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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

**CONCLUSIONS OF THE MEETING  
ON THE ANNEX OF THE FINAL AWARD  
IN THE ARBITRATION  
FOR THE BRČKO AREA**

Following a request from the Office of the High Representative (OHR), the Working Group on Bosnia and Herzegovina of the Sub-Commission on the Federal and Regional State met in Paris on 19 April 1999 to examine whether any amendments should be proposed to the Annex to the Final Award of 5 March 1999 in the arbitration for the Brčko area. According to the decision of the tribunal, the text of this Annex is not yet final and the Award itself may undergo further changes. Messrs Scholsem (Chairman), Matscher and Tuori participated in the meeting as well as Mr van Lamoën, Deputy High Representative for Legal Affairs, and Mr Nicholas from OHR.

The Working Group did not consider the Final Award as such. With respect to the text of the Annex to the Final Award it came to the following conclusions:

### **General observations**

The provisions of the Annex, and later the Statute, have to reflect the text of the Final Award. The Final Award is based on a general delegation of powers from the Entities to the District. Such delegation may be construed in two ways: either directly, the Entities having delegated their powers to the District), or indirectly, the Entities having delegated their powers to the District as an institution of Bosnia and Herzegovina. The second alternative is preferable. As pointed out in section 60 of the Award, this approach allows integrating the legal consequences of the Award into the constitutional order of BH, on the basis of Article III.5.(a) of the Constitution. This would mean that the various institutions of the District are established under the sovereignty of BH.

In general, the working group was of the opinion that the democratic character of government in the District should be emphasised and international supervision limited to what is required to ensure a correct application of the Award. This implies in particular that the degree of supervision should decrease over time.

It would seem advisable to introduce into the Annex a new section 1, "Statute", indicating that the basic rules of self-government will be laid down in the Statute, which will also contain provisions on possible amendments to its text as well as on what happens at the end of supervision, in particular on what will replace the powers of the Supervisor. The District as such should come into existence only once the Statute enters into force. Throughout the text wordings such as "the Supervisor may include in the Statute" should be replaced by wordings such as "the Statute may provide".

The relationship between the Supervisor and the High Representative should also be clarified. The Supervisor is appointed as a Deputy to the High Representative and his authority is thus derived from and subordinate to that of the High Representative.

The attention of the BH and Entity authorities should be drawn to the fact that the setting-up of the District will require a review of existing legislation.

### **Ad 1. Status of District Residents**

- a) According to the laws of Bosnia and Herzegovina, citizenship of BH is linked to citizenship of one or the other Entity. The present wording "shall have the right to elect to be also a citizen" gives the impression that BH citizens resident in Brčko may choose not to be citizens of any Entity. There seems to be no compelling reason for such an

exception from the generally applicable legislation and it is suggested to replace the present wording by e.g. “shall opt for the citizenship of one or the other Entity (but not both)”.

- b) A number of practical problems will have to be addressed which are due to the fact that the inhabitants of the District will be citizens of the two Entities. These concern areas such as social security, pension rights and passports.
- c) It would be an important privilege for Brčko residents not to be subject to military service. In order not to unduly favour them, the introduction of a compulsory alternative service should be envisaged to replace the military service.
- d) The issue of taxation is not an issue of status and should be dealt with in section 9. The present wording is too wide: there is no reason to exempt Brčko residents from Entity taxes on real property situated in the respective Entity or on transactions taking place there. The proper approach would be that Entity tax legislation is not applicable within the District but is replaced by the tax system of the District.
- e) There seems no justification for special privileges of former Brčko residents once they have left the District (apart possibly from providing an incentive for the return of refugees). The third sentence should therefore be deleted.
- f) The last sentence is problematic. An approach based on the equality of citizens would be preferable.

## **Ad 2. The District Assembly**

Legislation containing parameters for all elections within BH is currently being drafted at the BH level. A reference that the District electoral rules have to respect this legislation should be added.

## **Ad 3. The Executive Board**

A more positive formulation describing the responsibilities of the Executive Board would seem appropriate, clearly vesting the executive responsibilities within the District in the Executive Board. The establishment, composition and powers of the Board would have to be further defined in the Statute. The reference to the orders of the Supervisor should be qualified (“where appropriate”) to avoid the impression that the Board is generally under the authority of the Supervisor.

## **Ad 4. District Manager**

- a) In the first sentence the word “Supervisor’s” should be deleted before the word “Statute”.
- b) The rules on the appointment and possible revocation of the District Manager, e.g. by the District Assembly upon the proposal of the Executive Board, will be of particular importance.

- c) The reference to “political sources” in the third sentence is unfortunate. It gives the impression that parallel salaries may be paid by political parties or other groups. Compensation should be on an equal (not equitable) basis.

#### **Ad 5. Judicial and Penal System**

- a) Pending the setting up of a State Court at the BH level the suggested two-tier court system seems the only possible solution. The appeals court could also exercise the functions of a supreme court within the District. The possibility to refer cases to the Constitutional Court of BH under Article VI.3.(c) of the BH Constitution or to the Human Rights Chamber under Annex VI of the General Framework Agreement provides additional protection. Appeals to the Supreme Courts of the Entities would run counter to the general delegation of all powers from the Entities to the District and entail a risk of diverging case law.
- b) If the delegation of powers to the District is construed, as advocated above, as a delegation by the Entities to a BH institution, it seems justified to set forth in the Annex that this delegation also enables BH not only to provide for appeals to appropriate BH courts against decisions of the courts of the District but also to take appropriate measures to provide for co-operation between the courts of the District and the Entities as well as with foreign courts.
- c) In the last sentence of the first paragraph a reference to the independence of judges should be added.
- d) It should be specified that the jurisdiction of the District courts is general, comprising all types of cases including administrative ones.

#### **Ad 6. Law Revision Commission**

A harmonisation of all applicable laws would require disproportionate resources. An easier way to proceed would be to decide area by area the legislation of which Entity will be applicable at the outset. Large areas should be chosen to minimise possible contradictions. The further work of the Commission would then be limited to eliminate contradictions arising from this distribution of areas and to adapt in particular administrative rules to the structures of the District. It would also seem useful to give to the Commission the possibility to propose the introduction of new laws as well as the revision of existing laws.

#### **Ad 7. Law Enforcement**

Rules on hot pursuit will be important. Inspiration could be drawn in this respect from the relevant chapter of the Rambouillet agreement. The enforcement of judgments of the District courts also has to be regulated. This task could be entrusted to the courts acting with the assistance of the police.

### **Ad 9. Taxation and Financial Matters**

- a) The working group understood the first sentence as applying only to the general rules of the tax system, in particular to its co-ordination with the tax system of BH and the Entities. Otherwise tax legislation should be the responsibility of the District Assembly.
- b) The provisions on “short-fall” provide an incentive for irresponsible fiscal behaviour and appear difficult to accept for the Entities which do not have any control over spending and revenue collection of the District. The District seems economically in a (by BH standards) fairly favourable position (cf. sections 46 and 47 of the initial Award of 1997) and should be able to cover expenses by its revenue or from borrowing. If a ‘guarantor of last resort’ is deemed necessary, it would more appropriately be BH since according to the Award the district is “under the exclusive sovereignty of BH”.
- c) The introduction of an independent audit authority for the District (to be appointed by the District Assembly) should be envisaged.

### **Ad 10. Voting**

- a) A reference to the BH law on elections currently being prepared should be added (see above). This law presumably will ensure an adequate supervision of future elections and OSCE supervision should be limited to an initial stage.
- b) The words “(if any)” should be deleted since all BH citizens resident in the District have to be citizens of one or the other Entity.
- c) The participation of District residents in Entity elections is not justified since the Entities have delegated all governmental functions within the District to the District. For District residents the elections to the District Assembly should therefore replace (and not supplement) participation in Entity elections. It is true that this creates a problem insofar as the House of Peoples of BH is concerned. The House of Peoples is indirectly elected by the parliaments of the two Entities. This circumstance alone seems however not sufficient to justify granting to Brčko residents the right to vote also in Entity elections. It should also be noted that there are even more serious problems of representation with respect to the House of Peoples. Only Serbs from the RS and Bosniacs and Croats from the FBH are represented within it.

### **Ad 11. Symbols**

- a) The question of languages should be dealt with in a separate paragraph.
- b) The issue of an identity card should also be dealt with separately. The identity card issued by the District authorities should correspond to the identity card issued elsewhere in BH.

### **Ad 12. Educational Curriculum**

It should be noted that this is the only section where express provision is made for the period after the end of supervision.

**Ad 13. Public Properties**

- a) There is a considerable risk that each seizure of an Entity asset may lead to political agitation. To avoid this, it might be preferable to provide that the Supervisor will, upon entry into force of the Statute, hold all present Entity assets within the District in trust, with a view to transfer these assets, as necessary, to the District authorities.
- b) In principle regulations for the operation of public utilities and enterprises should be within the responsibility of the District Assembly. The power of the Supervisor in (b) should therefore be qualified “pending the adoption of appropriate rules by the District Assembly”.