Strasbourg, 27 September 2012

CDL(2012)067*
Engl. only

Opinion no. 691 / 2012

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE PRACTICE OF BLANKET RESIGNATION OF MINISTERS

IN THE FEDERATION OF BOSNIA AND HERZEGOVINA

On the basis of comments by

Ms Veronika BILKOVA (Member, Czech Republic)
Mr Jean-Claude SCHOLSEM (Substitute member, Belgium)
Mr Fredrik SEJERSTED (Substitute member, Norway)

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I. Introduction

1. On 5 September 2012, the Venice Commission received a request from the Minister of Justice of the Federation of Bosnia and Herzegovina (hereafter referred to as "FBiH"), Mr. Zoran Mikulić, asking the opinion of the Commission on the alleged political practice in some FBiH political parties of so-called pre-signed resignations. Under this practice, the candidates for the highest political positions have to sign blanket (or enveloped) resignations, which are used by their political party in case these candidates betray their loyalty to the party. The request to the Venice Commission is to get an opinion on whether this practice is in line with "the general principles of the rule of law, particularly the principles of legal security, respecting of human rights and prohibition of discrimination".

2. A working group of Rapporteurs was set up, composed of Ms Veronika BILKOVA and Messrs Jean-Claude Scholsem and Fredrik Sejersted.

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 … .

II. Preliminary remarks

A. Background information

4. The background to the request is the fact that, on 22 June 2012, the President of the FBiH, Mr. Živko Budimir, received a letter of resignation that was apparently signed by the Minister of Spatial Planning, Mr. Radivojevic. The President rendered a decision on the same day, accepting the resignation with immediate effect.

5. The removal has been contested by the Prime Minister of the FBiH, Mr. Nermin Niksić – who urged the President to review the decision, stating that to accept it would be abuse of authority, as well as by Mr. Radivojević himself, stating that he had not sent the letter and did not want to resign. It appears that the conflict is due to the fact that Mr. Radivojević left his party, the Party of Democratic Action (SDA), one of the parties in the government coalition.

6. The case is currently pending before the Constitutional Court of the FBIH which should render its decision in the nearest future.[1]

7. The case raises questions of FBiH constitutional law and of facts, which are pending before the Constitutional Court, and which it is not for the Venice Commission to assess. The constitutional issue is, *inter alia*, on the interpretation and relationship between Article IV.B.5 (2) of the Constitution of FBiH[2] on the appointment and removal of the Cabinet and Article 59[3] of the Law on Organization of the Administration Organs in the FBiH, which regulates ministerial resignations. On the factual side there appears to have been disagreement between the parties as to whether Mr. Radivojević had really signed an "enveloped resignation", and if so, whether the letter of resignation sent to the President on 22 June was the same document as the one he had pre-signed. It is not for the Venice Commission to pronounce on either of these two issues.

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[1] See Vijesti, *Ustavni sud FBiH danas odlučuje o slučaju Desnica Radivojević,* 10 September 2012

[2] "*The Cabinet may be removed either by the President with the concurrence of the Vice-President, or by a vote of no confidence adopted by a majority in each House of the Legislature. The President shall remove Ministers and Deputy Ministers upon the proposal of the Prime Minister*", The Constitution of the FBiH, http://www.unhcr.org/refworld/docid/3ae6b56e4.html

[3] "*If the Minister considers that he/she is not able to successfully perform the powers and duties vested, or that he/she can not undertake responsibility for their execution, he/she has the right to submit his/her resignation, which is to be submitted in writing. Federal Minister submits resignation to the President of the Federation of Bosnia and Herzegovina, and Cantonal Minister submits resignation to the Prime Minister of Canton. Minister, who submitted resignation, remains on a position he held until the day when the organ from the paragraph 2 of this article accepts the resignation*." (unofficial translation)

8. The present Opinion does not address the concrete case at hand. It only deals with the general question of whether a practice under which political parties demand that their government ministers, upon taking office, pre-sign a blanket letter of resignation, to be held by the party, and used upon the party's discretion to force a resignation, is in conflict with European standards for democracy and the rule of law. The aim is also to analyse the main implications that such a practice can have from the perspective of the respect for human rights, democracy, and the rule of law.

B. Applicable standards

9. There are no European binding legal rules (in the European Convention on Human Rights or other sources of law) that prohibit such a practice in a political party. Neither are there any Council of Europe recommendations or other soft law guidelines that explicitly address the issue.

10. The Venice Commission already had the opportunity to express its views on some aspects related to the practice of pre-signed resignations in its *Report on the Imperative Mandate and Similar Practices,* adopted at its 79th Plenary Session in June 2009.[4]

11. In this report, the Commission addressed various practices, to be found in some political systems, under which the mandate of elected parliamentarians (MPs) are tied up in advance, inter alia restricting their possibility to change political party ("cross the floor") during their period in parliament. Referring to earlier opinions in country-specific cases (see below), the Venice Commission stated that it had "*consistently argued that losing the condition of representative because of crossing the floor or switching party is contrary to the principle of a free and independent mandate*" (§ 39). The Report comes to the conclusion that the institution of imperative mandate is *"generally awkward in Western democracies"* (§ 11). It is important to stress that the Report primarily focuses on imperative mandate in general, and not on pre-signed resignation as a specific form of such mandate. Moreover, it is concerned with parliamentarians (MPs), and does not cover the situation of government members and their specific relations with their political parties. Therefore its conclusions may or may not be applicable to the question at hand, which has to do with the representatives of the executive power.

12. The Commission has also addressed the theory of the free mandate of representatives and issues related to the internal rules of political parties in its Guidelines on political party regulation, jointly adopted in 2010 with the OSCE/ODIHR.[5] In is paragraph 139, the Report states: "*Some states have legislation which terminates the mandate of an elected office holder due to a change in party affiliation. Such regulation is overly restrictive and potentially subject to abuse by political party leaders. Elected officials are elected by votes cast by citizens. Political party legislation should not transfer control of the voter bestowed mandate to a political party".* The same caveats as in the case of the 2009 Report apply here.

13. In addition to the criticism contained in the abovementioned general reports, the Venice Commission took the opportunity to emphasize the problematic nature of the imperative mandate in dealing with the legislation submitted to it for analysis by two countries: Ukraine and the Republic of Serbia.

14. In the context of the assessment[6] of a Ukrainian law providing for the dismissal ("recall") of parliament members by a certain number of voters or the concerned political parties, the Commission has pointed out that such a formula, not only was in opposition to the doctrine of representative mandate, but was also threatening to "*severely cut the relations between civil*

[4] CDL-AD(2009)027.
[5] See CDL-AD(2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission - Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15-16 October 2010), §115 and § 139
[6] CDL-AD(2007)018 Opinion on the Law on Amendments to the Legislation concerning the Status of Deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea and of Local Councils in Ukraine adopted by the Venice Commission at its 71st Plenary Session, (Venice, 1-2 June 2007)

society and Parliament"[7]. Furthermore, in its 2003 Opinion on draft legislation proposing amendments to the Constitution of Ukraine[8], the Venice Commission concluded that such revocation arrangements would even "*have the effect of weakening the Verkhovna Rada itself*" (§19).

15. The Commission took a similar stand when it criticized Article 102, paragraph 2 of the Constitution of the Republic of Serbia, stating that *"[u]nder the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at the disposal [of] a political party upon which proposal he or she has been elected a deputy*". According to the Venice Commission, "*It seems that its intent is to tie the deputy to the party position on all matters at all times. This is a serious violation of the freedom of a deputy to express his/her view on the merits of a proposal or action. It concentrates excessive power in the hands of the party leaderships*[9]. The Commission strongly reiterated this criticism in a more recent opinion concerning the electoral legislation of the Serbia[10].

16. In both countries mentioned, the dismissal arrangements under the doctrine of the imperative mandate were based on legal texts, often of a constitutional nature. This also applies to the American states practicing the "popular recall" formula[11].

17. Under specific circumstances, the imperative mandate (and the possibility of revocation that it implies) might be justified. This is the case of the German Bundesrat, made of "*members of the Land governments, which appoint and recall them*."[12]

III. Analysis

A. The blanket resignation as a form of the imperative mandate *largo sensu*

Imperative mandate and elected representatives

18. The technique of blanket resignation is an extension of the theory of the imperative mandate, according to which holders of a political position need to follow their party directives in implementing their mandate. If they fail to do so, they may be sanctioned and, in the last resort, recalled from their position.

19. Traditionally, the institution has been applied in the relationship between elected representatives and the electorate ("imperative mandate *stricto sensu*" or "imperative mandate" in the Venice Commission above-mentioned 2009 Report[13]). In practice, in recent times, it has mainly been an issue in the relationship between representatives and political parties ("imperative mandate *largo sensu*" or "party administered mandate" under the 2009 Report).

20. The imperative mandate, in either of its two forms, is not totally unknown from the practice of states, both in Europe and outside it. The imperative mandate was the official theory of representation in the various communist countries, often called "popular" democracies, since

[7] CDL-AD (2007) 018, § 22.
[8] CDL-AD(2003)019 Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003).
[9] CDL-AD(2007)004 Opinion on the Constitution of Serbia adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007) (in Serbian), § 53.
[10] CDL-AD(2011)005 Joint Opinion on the Draft Law on "altering and amending the Law on election of Members of Parliament" of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR -Adopted by the Council for Democratic Elections at its 36th meeting (Venice, 24 March 2011) and by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), §35
[11] See CDL-AD (2009) 027, § 14.
[12] Article 51 (1) of the Basic Law of the Federal Republic of Germany.
[13] See CDL-AD(2009)027

they seemed to give more power to the people. With the disappearance of these regimes, its use has become extremely rare[14].

21. In addition to several communist states (China, Cuba, North Korea), imperative mandate *stricto sensu* (the recall practice) may be found in the USA or Switzerland.

22. Moreover, over the past two decades, states have shown a tendency to introduce elements of imperative mandate *largo sensu*. This has occurred mainly as a reaction to large-scale floor-crossing, marking the political practice in an increasing manner. Imperative mandate *largo sensu* is accepted - albeit only under specific conditions - in several non-European countries (Bangladesh, India, Malawi, Nepal, Nigeria, Fidji, South Africa). In Europe, however, it is considered problematic and has been repeatedly criticized both by domestic constitutional courts (Croatia 2001) and by international institutions, including the Council of Europe Parliamentary Assembly[15] and the Venice Commission as previously indicated.

23. The main *rationale* behind the criticism of the Venice Commission against imperative mandate and similar practices lies in that under liberal democratic tradition, in a representative democracy, the elected MPs constitute a deliberative assembly in which they should in principle be able to discuss freely, change opinion if need be, and take positions without being tied up in advance or by outside institutions (such as their political parties). They are supposed to represent the whole constituency, not just particular segments thereof or particular political parties and should therefore exercise their mandate freely, in accordance only with their conscience, and seeking to accomplish what they believe is in the best interest of the country as a whole. Outside restrictions on their political freedom are therefore contrary to the very idea of how a parliament in principle should be able to operate. The Venice Commission has held that this is so, even if in representative electoral systems, the MPs are in effect elected also as representatives of their political parties, and not only as individual delegates.

24. Obviously, nothing can prevent that, without any constitutional or statutory authorization, candidates and parties have recourse to the practice of early blanket resignations. One would designate this scenario under the term *simulation*, consisting of hiding a real legal situation by an "apparent" act. The candidate pretends to accept a position or assignment while he knows very well, having signed an undated resignation letter, that another person or another structure (the party) will hold it at some stage. Trust is betrayed and constitutional structures are no more than appearances.

25. A few examples of blanket resignations may be found in the Western democracies' constitutional history, although the phenomenon is most probably more widespread than it seems. Maurice Duverger emphasizes the spectacular aspect of these few known cases, while at the same time denouncing the very awkward nature of the method: in many cases, as soon as the manoeuvre is revealed, its victim (even after having knowingly consented to it) will complain of pressure and try to turn against the party that has forced the manoeuvre[16].

26. The theory of the representative mandate comprises a considerable amount of fiction, which a more realistic analysis should duly take into account. Politicians are very sensitive to parties' influence and pressure and this can hardly be disputed. It is of key importance, however, that such influence and pressure be confined to their classical field of action, the political field[17]. Should these be allowed in the sphere of law, any institutional construction would be jeopardized and any procedures for appointing and dismissing ministers would become pointless.

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[14] Marc VAN DER HULST, *The parliamentary mandate: a global comparative study*, Inter-Parliamentary Union, Geneva, 2000, p. 10.

[15] See, for instance, Resolution 1747 (2010) in which the Assembly urges "the Parliaments of the Russian Federation, Serbia and Ukraine to abrogate constitutional and legislative provisions providing for the recall of peoples' representatives by the political parties (the so-called "imperative mandate") and legislative provisions in Serbia and Montenegro that allow for the reordering of candidates on the party lists after the elections have taken place" (19.1.12).

[16] Maurice DUVERGER, *Political Parties: their organization and activities in modern State*, second English edition, revised 1959, pp. 198-199.

[17] Pierre AVRIL, *Essai sur les partis politiques*, Petite Bibliothèque Payot, 1990, p. 123 et suiv.

Imperative mandate and Government members

27. The problem of blanket resignations is most often found with regard to members of parliament (MPs). There are strong reasons to give great weight to freedom of speech and opinion of MPs, who are directly elected by the people. In addition, more numerous and generally far from the political parties' decision centres, they are the ones who are the most prone to being "disciplined". As a rule, ministers are closer to their party leadership and the need for "discipline" appears less marked, unless the party's structure is itself very weak.

28. It is clear however that the practice of pre-signed (enveloped) resignations of ministers also constitute a form of imperative mandate *largo sensu*. Candidates for the highest positions in government oblige themselves in advance, in a general manner, to follow the directives given to them by their political party. At the same time, they "agree" that in case, they fail to follow these directives, engage in cross flooring, or, in fact, in any other situation, their party can remove them by presenting their pre-signed resignations. Thus, these resignations operate as blank checks which can be used in any case deemed appropriate by the relevant political party, or as swords of Damocles, hanging permanently over the heads of those having signed the resignations. As no one is truly free and independent under the blade of a sword, no one is free and independent once s/he signs a blanket resignation.

Government members' relations with their political parties

29. To some extent, considerations similar to those relating to the parliament may arguably apply to a government. A cabinet of ministers should also, in principle, be able to function as a collegiate body, and to discuss freely and form new opinions, without being tied up in advance or otherwise restricted by outside institutions or interests. The consequences of an imperative mandate vested secretly to their party are to some extent the same.

30. The question is whether ministers should be entitled to the same freedom of opinion and action as MPs. It can be argued that while pre-signed resignations, as a form of imperative mandate *largo sensu*, would be inacceptable in case of elected members of the parliaments (legislative power), the situation is different in case of non-elected members of the government (executive power). The requirement of free and independent mandate under liberal democratic tradition is applied primarily to the legislative power. While elected parliamentary deputies should be free to follow what they believe is in the best interest of the electorate, ministers in a government are supposed to implement the political programme of the government and its constituting political parties.

31. From this perspective, there are clear differences between a parliament and a cabinet. A cabinet is an executive organ, normally under the leadership of the Prime Minister, and not a deliberative institution, like a parliament. Furthermore, the individual ministers are not representatives elected by the people with a certain mandate. They are appointed, normally by the head of state upon nomination by the Prime Minister, and in some countries subject to a collective vote of approval (investiture) by parliament, and they can be dismissed according to different procedures. In most parliamentary democracies the ministers are in effect chosen by their political parties. In coalition governments, it is normal and legitimate for the parties first to agree on the number of ministerial positions given to each party, and then for the parties concerned to nominate their ministers.

32. In most democratic systems a minister who resigns from his party would be expected to resign or else be removed, and it would be highly unusual in a coalition government for the person concerned to expect to stay on as minister. It is legitimate and understandable for the party to want to have their former member leave the cabinet, in order to be replaced by a new party representative. In a well-established democracy, these procedures are sorted out by the political system itself, through political discussions and negotiations between the parties concerned.

33. The difference between the representatives of the two powers is further reflected in that, while parliamentary deputies cannot be under normal circumstances recalled either by the electorate or by the political party, government members remain prone to the recall. This possibility is clearly reflected in the Constitution of the FBiH, which states that "*the Cabinet may be removed either by the President with the concurrence of the Vice-President, or by a vote of no confidence adopted by a majority in each House of the Legislature. The President shall remove Ministers and Deputy Ministers upon the proposal of the Prime Minister*" (Article IV.B.5(2)). Such a clause is present in virtually all constitutions in Europe and outside it.

34. To be a government minister is a political position, which in modern parliamentary democracies is normally closely tied to a political party. It is not an elected position and it is not an ordinary job. A minister cannot expect to enjoy the same kind of employment rights and protection as other employees of the state. It is normal that a minister can be removed on purely political grounds, either by parliament in a vote of no confidence, by the head of state, by the Prime Minister, or according to other procedures laid down in national constitutional law.

35. As a private person, a minister of course enjoys the same fundamental rights of expression, free will, freedom to join political parties etc. as any other citizen, both under the ECHR and other treaties. Yet, these rights cannot extend as far as to give any kind of protection with regard to the position *a*s minister. On the contrary, government ministers are usually appointed to the government as representatives of certain political forces, are expected to follow the directives of these forces, and may be removed by them in case they fail to do so. It is a common practice in European democracies, and one may not easily argue that it goes against democratic principles.

B. The practice of pre-signed ministers' resignations in the light of the rule of law and democracy requirements

36. The specificities of the executive power as outlined above, when compared with the legislative one, imply that criticism directed towards imperative mandate, applicable in case of the parliamentary deputies, does not necessarily apply in the case of government members. Imperative mandate *largo sensu*, which is problematic in the context of the legislative power, could be acceptable in the context of the executive power.

37. Yet, this is only true, if certain key requirements, such as lawfulness, openness and transparency are met when it comes to the practical implementation of the imperative mandate in respect of government members.

38. First, pre-signed resignations in most cases circumvent the national legislative and/or even constitutional provisions, which provide specific stakeholders (usually the prime minister and the president) with the initiative to remove ministers, such as Under Article IV.B.5(2) of the Constitution of the FBiH[18]. The practice of pre-signed resignations deprives these stakeholders at least partially of this right, making it possible for those in possession of the pre-signed resignations to perform a *de facto* removal of a minister. Moreover, pre-signed resignations also circumvent legislative provisions which as a rule foresee *ex post* resignations submitted in concrete situations based on the decision of a concrete minister, and not *ex ante* resignations made available in advance to be used in any situation regardless of the will of a concrete minister[19].

39. In the Venice Commission's view, the actual effect of such a letter - and its ultimate aim - is to give the party the competence to remove a minister at will. One thing is for the party to have such a power in political terms, to be used according to political processes, which would normally include talks and perhaps negotiations within the party, with the minister concerned, and with the

[18] See footnote 2

[19] In this connection, Article 59 of the 2005 Law on the Organization of the Administration Organs in the FBiH, stipulates: "*if the Minister considers that he/she is not able to successfully perform the powers and duties vested, or that he/she can not undertake responsibility for their execution, he/she has the right to submit his/her resignation, which is to be submitted in writing*". (Law No. 35/05 Coll., Official Gazette of the Federation of Bosnia and Herzegovina, July 4, 2005).

coalition partners and the Prime Minister. Quite another is for the party leadership to hold a blanket letter giving it in effect a formal competence to remove ministers at will.

40. Furthermore, the existence of pre-signed resignation letters may also give the party leadership a stronger and different kind of power over its ministers than it would otherwise have, which may be harmful to the well-functioning and effectiveness of a government cabinet as a political institution. One thing is for a party to have influence over its government ministers. Another is for the party leadership to be able to continuously control the ministers and deny their independent agency[20] through the threat of forced resignation. Used in the wrong way, such a practice may serve to move everyday executive power away from the government to the headquarters of the political parties to a greater extent than what is democratically sound.

41. Even more disturbing, the use of a pre-signed letter (unless exposed) sends the message that the minister goes freely and of his/her own initiative. If the underlying reality is that the minister is being forced out by the party, then this should be an open fact, as part of ordinary democratic transparency. To pretend that the minister is handing in a letter of resignation based on present circumstances, when in fact it is a blanket letter written years earlier, and handed in by the party for completely different reasons, is simply dishonest, and means that the public (the electorate) is misinformed.

IV. Conclusions

42. Under the practice of pre-signed resignations, candidates for certain political positions are required to sign blanket resignations which can be used by their political party at any moment. In the Venice Commission's view, the practice of pre-signed resignations of Government members is problematic for several reasons.

43. First, it constitutes a form of imperative mandate *largo sensu*. Such mandate in itself, as well as similar practices, has attracted extensive criticism in Europe based on the principle of the free and independent political mandate under the liberal democratic tradition. According to this principle, in a representative democracy, elected representatives are supposed to represent the whole constituency, and not just particular segments thereof or particular political parties; they should therefore exercise their mandate freely and seeking to accomplish what they believe is in the best interest of the country as a whole, without being tied up in advance or by outside actors (such as their political parties).

44. Second, although the criticism directed towards the imperative mandate of elected representatives does not necessarily apply in the case of government members, the ministers' removal needs to happen in the way foreseen by the law and the relevant procedures, and not by a fictional decision of the minister himself.

45. The Venice Commission finds that a practice, bypassing the law, under which ministers pre-sign blanket letters of resignation, to be held by their party and used at the party's discretion, is a fictional and dishonest procedure, contrary to the European principles and best practices of democracy and rule of law, with negative consequences for the functioning of the political system. In its view, such practices should be avoided in European democracies.

46. Although such a practice may not be in breach of any legally binding rule at the European level, it is in the opinion of the Venice Commission not consistent with the democratic standards that should be expected of a well-functioning democracy. The main reason is that the whole arrangement is fictional, dishonest and non-transparent.

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

[20] See J.-E. Lane, *Comparative Politics: The Principal-Agent Perspective,* Routledge, 2007.