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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**DRAFT OPINION ON THE SCOPE OF THE
RESPONSIBILITIES OF BOSNIA AND HERZEGOVINA
IN THE FIELD OF IMMIGRATION AND ASYLUM
WITH PARTICULAR REGARD TO POSSIBLE
INVOLVEMENT OF THE ENTITIES**

I. Introduction

1. At the 36th Plenary Meeting of the Commission on 16-17 October 1998 the representative of the Office of the High Representative (OHR) asked the Commission to provide an opinion on the legal aspects of the delegation of powers from Bosnia and Herzegovina (BH) to the Entities. In a memorandum dated 3 December 1998 the OHR further explained this request. In fact, the Commission is not invited to adopt a general opinion dealing with all possible cases of delegation of powers, but to provide an opinion on the compatibility of the proposed *Draft Bosnia and Herzegovina Law on Immigration and Asylum* with the constitutional distribution of responsibilities between BH and the Entities, it being understood that similar principles may apply in other fields.
2. Within the framework of the Sub-Commission on the Federal and Regional State a Working Group with Mr Scholsem in the Chair and Messrs Bartole, Matscher and Tuori as members was entrusted with preparing the opinion. The Working Group met in Paris on 29 January 1998 together with representatives of the OHR. *<Following the approval of the opinion prepared by the Working Group by the Sub-Commission on 20 March 1999, the present Opinion was adopted at the 38th Plenary Meeting of the Commission on 22 to 23 March 1999.>*
3. The Commission underlines that the authoritative interpretation of the Constitution of BH is the prerogative of the Constitutional Court of BH as the sole body able to give a binding interpretation of the provisions of the Constitution. Nevertheless, in view of the request by the OHR and taking into account the need to ensure from the outset that the approach chosen for the drafting of legislation in BH is compatible with the Constitution, it is of the opinion that a non-binding opinion of outside legal experts may be of value for the BH authorities.

II. General considerations

4. Under the terms of Article III.1 of the Constitution of Bosnia and Herzegovina:

"The following matters are the responsibility of the institutions of Bosnia and Herzegovina: ...

(f) Immigration, refugee and asylum policy and regulation."

5. The *Draft Law on Immigration and Asylum* regulates in detail questions of immigration and asylum, including in particular the administrative procedures to be followed. It enables the Ministry of Civil Affairs and Communication of BH to specify further rules by way of regulations. No regulatory power is granted to the Entities. However, in many cases the competent authority of an Entity takes the first administrative decision, for example on issuing a residence permit. In these cases an administrative appeal may then be lodged to the Ministry of Civil Affairs and Communication of BH. The question of further appeals to the courts against the final administrative decision is not addressed in the text of the draft law.

6. The OHR memorandum raises in particular the question whether, and if so under which conditions, it is possible for BH to delegate responsibilities or functions to the Entities in areas within the exclusive constitutional competence of BH. Applied to the present draft law, is it lawful that in many cases an Entity authority takes the first administrative decision?

III. Legislative and Regulatory Powers

7. The Commission first of all notes that the draft law is a BH law and that all regulatory powers are reserved to BH institutions. In addition, the draft law clearly tries to give to the administrative authorities a maximum of guidance for the treatment of individual cases. The Commission sees no reason to doubt that this approach is fully in line with the BH Constitution, in particular its Article III.1.(f), which clearly reserves all normative powers in this field to the BH institutions.

IV. Administrative functions

8. The Constitution of BH is a very short and concise document and it provides extremely few indications with respect to State administration. Some provisions clearly provide that BH is responsible for the day-to-day running of certain institutions, e.g. Article III.1.(h) which makes BH responsible for the “operation” of certain facilities. Article III.1.(f) is less clear by explicitly mentioning only a responsibility for “policy and regulation”. This may however, in the Commission’s view, not be interpreted as limiting the responsibilities of BH to the normative aspects. The Commission already rejected a similar approach in its “*Opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina*” with respect to customs policy.¹
9. The lack of provisions on administration in the Constitution can only be explained by the fact that the Constitution is based on a general parallelism between legislative and executive functions. Unless there is a contrary indication in a specific provision of the text of the Constitution, the basic assumption is that BH is responsible for both legislation and execution. This follows from the general wording of Article III.1 which does not distinguish legislative and administrative powers but assigns responsibility for certain subject matters. This interpretation is confirmed by Article V.4.(a) which gives to the Council of Ministers the task to carry out the decisions of BH, inter alia in the fields referred to in Article III.1.

¹ The Commission stated that: “The Working Party was reticent to accept this distinction between customs policy and implementation. At B.H. level it may of course be decided in the future to entrust implementation of the customs policy to the Entities. In the absence of such a decision, the Entities should refrain from claiming responsibilities in this field. It is essential that customs rules are uniformly applied throughout B.H. since merchandise can then freely circulate within B.H. The lack of other resources of B.H. (see above) is also an argument in favour of B.H. collecting the customs duties on its own behalf”.

10. An administrative responsibility of BH seems also indispensable in the field of immigration and asylum (as well as in other fields) to ensure the necessary uniformity of administrative practice. Article I.4 of the Constitution provides for the free movement of persons within BH. Any decision by one Entity on the admission of a person to its territory therefore necessarily has repercussions on the other Entity and a uniform practice throughout BH has to be ensured.
11. As a point of departure, the Commission therefore notes that BH is responsible also for the carrying out of immigration and asylum policy.
12. This does however not mean that it may not be justified in some cases to entrust the Entities with certain administrative functions. It only means that the decision on whether to do so is reserved to BH. BH may, in the exercise of its legislative power, provide that certain functions should be carried out by the Entities. Practical considerations make such an approach advisable. The Commission has noted before that BH is an unusually weak federation with only limited responsibilities. The administrative capacity of BH is therefore also limited. If BH is unable to carry out certain functions due to the lack of a sufficiently developed State administration or if it is much more feasible to take certain decisions on the spot, BH may exercise its responsibility partly by asking the Entities to carry out certain administrative functions. This partial devolution of powers may however in no case jeopardise the requirement of a uniform application of the law throughout BH. There is also no reason why such devolution could not be revoked in the future. Legally nothing prevents BH from amending the law and entrusting BH administrative bodies with the respective decisions if the work of the Entity bodies does not give satisfaction.
13. Applied to the Law on Immigration and Asylum, these considerations confirm the legality of the approach chosen by the draft. As far as is practically possible, the draft ensures a uniform application of the law. It not only provides fairly detailed guidance to the authorities already in its text, to be supplemented by additional regulations to be adopted by a BH ministry, but also ensures full information of the authorities of BH by the requirement to send copies of decisions by Entity authorities to the competent BH Ministry and in particular by providing for an administrative appeal against all decisions taken by authorities of the entities to the Ministry of Civil affairs and Communication of BH. The Ministry will have full power to review these decisions and not be limited to a control of legality.
14. The Commission therefore fully supports the approach taken in the draft law with respect to administrative functions. A problem could only arise if the Entities object to be given additional tasks from BH without the necessary funding to carry them out. While such objections would appear plausible in other federal States, in BH, where the federal state is dependent financially upon the Entities and not the other way round, they seem unlikely to be made. Nevertheless this aspect points to the need to install consultation mechanisms between BH and the Entities on such issues.

V. Judicial Protection

15. The draft law does not contain any rules on judicial protection. This omission is understandable, taking into account that the BH Constitution does not expressly provide for any BH court apart from the Constitutional Court. It was therefore difficult for the drafters to provide an appropriate solution. To provide for an appeal to the Entity courts would have been contrary to their efforts to ensure uniform application of the law throughout BH.
16. The Commission in this respect refers to its *Opinion on the Need for a Judicial Institution at the Level of the State of Bosnia and Herzegovina*. In this opinion it found that BH is empowered, and even obliged, to set up a State level court with respect to administrative disputes.²
17. The present draft law provides a perfect illustration of a case in which such a BH court is indispensable. The field of immigration and asylum is a particularly sensitive one with respect to human rights and a constitution as human rights friendly as the BH Constitution clearly requires the possibility of judicial protection against adverse administrative decisions in this field. All final decisions subject to appeal will be taken by a Ministry of BH or even the Council of Ministers of BH and an Entity court has no jurisdiction to annul decisions by a BH Ministry. The possibility for appeals to a BH court still to be established therefore has to be provided and the draft law should be supplemented in this respect or this should be set out in an additional law.

VI. Conclusion

18. The Commission fully supports the approach of the *draft Law on Immigration and Asylum* with respect to the distribution of responsibilities between BH and the Entities. The draft strikes a constitutionally sound balance between constitutional requirements, in particular for an equal application of the law throughout Bosnia in this sensitive area, and practical problems due to the weakness of the BH administration. The draft would only have to be supplemented by additional

² The Commission stated: "There is absolutely no doubt that decisions taken by the BH administrative authorities pursuant to the powers vested in them by the Constitution (for instance, in matters of foreign policy, customs policy, immigration policy, regulation of transportation and air traffic control) may have a decisive effect on the exercise of individuals' civil rights or obligations or may be regarded as penalties imposed following a criminal charge, within the meaning of Article 6, paragraph 1 of the ECHR. That article, which is binding on BH by virtue of its Constitution and the peace agreements, requires that such administrative decisions be subject to judicial review.

The state of BH is therefore bound by its Constitution to afford its subjects access to a tribunal which will determine any dispute arising from an act or omission of the administrative authorities, in so far as that act or omission can be regarded as a criminal penalty or immediately affects an individual's personal or economic rights. Since the courts of the entities have no jurisdiction to rule on the lawfulness of decisions taken by the BH administrative authorities, or to set aside such decisions, the state of BH is obliged to set up a judicial institution at state level, which is competent to deal with all aspects of a case (that is to say has jurisdiction to hear the case on the merits and is empowered to overturn an administrative act)".

provisions, providing individuals with the possibility to appeal administrative decisions taken by the BH authorities to a BH (administrative) court.