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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

INTER-ENTITY JUDICIAL CO-OPERATION IN BOSNIA AND HERZEGOVINA

Opinion on the basis of contributions by

Mr Jean-Claude Scholsem (Belgium)
Mr Jan Helgesen (Norway) and
Mr Helmut Steinberger (Germany)

adopted by the Commission
at its 35th Plenary meeting
(Venice, 12-13 June 1998)

Introduction

1. When speaking before the Venice Commission at the 34th Plenary meeting in Venice on 6 March 1998, the High Representative to Bosnia and Herzegovina, Mr Carlos Westendorp, asked the Commission to provide an expertise on the issue of inter-entity judicial co-operation against the background of the complex federal structure of Bosnia and Herzegovina (BH).

2. By letter of 7 May 1998, the Office of the High Representative provided some background material of interest to this question, in particular the text of a draft agreement on the regulation of legal assistance between institutions of the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS) and an opinion of the Ministry of Civil Affairs and Communication of BH of 16 February on the constitutionality of this draft agreement. The Office of the High Representative asked the Commission to provide an opinion, in particular on the following two questions:

a) is inter-entity judicial co-operation within the competence of BH?

b) are the Entities entitled to conclude an agreement on inter-entity judicial co-operation?

3. It is recalled that the Commission has already given an opinion on the competence of the FBH in criminal law matters (document CDL-INF (98) 5).

The competence of BH in the field of inter-entity judicial co-operation

4. The question of the competence of the State of BH in the field of criminal law and criminal procedure has already been addressed in the abovementioned opinion on the competence of the FBH in criminal law matters, although mainly from the point of view of substantive criminal law. The Commission came to the following conclusions:

> *5. "The fundamental rule for interpreting the constitutions of BH (Appendix IV of the Dayton Agreements), the FBH and the RS is that the two Entities enjoy residual powers. The Constitution of BH assigns only certain specific areas of competence to the State, while the remainder lie with the federated Entities (article III-3-a of the Constitution of BH). The Entities' competence in principle for criminal law and criminal procedure is beyond all doubt. It is simply limited by the competences of the State of BH in this area, as provided for in the Constitution of BH.*
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> *6. Of the areas of competence assigned to BH, only one directly concerns criminal law matters in the broad sense of the term: this is article III-1-g, which gives BH responsibility for "international and inter-entity criminal law enforcement, including relations with Interpol". This provision undoubtedly confers a degree of competence upon BH in the area of criminal law and criminal procedure. Our task is to establish the scope of that competence as accurately as possible.*

7. The wording of article III-1-g of the Constitution of BH seems to show that the competence it grants is a competence in the field of implementation ("enforcement") and co-ordination. It seems to be more a matter of crime policy concerning crime on an international scale or extending beyond the borders of the Entities than competence for criminal law or criminal procedure in the full sense of the term. Article III-1-g of the Constitution of BH, which expressly refers to relations with Interpol, is indicative in this respect".

These considerations remain valid. They have however to be further refined with respect to the specific topic of this opinion, judicial co-operation, which was a topic not really envisaged in the previous opinion.

8. The reference in Article III-1-g to "enforcement" makes it clear that, as stated in the previous opinion, Article III-1-g in no way intends to give BH wide-ranging powers in the field of the adoption of substantive criminal law rules. With respect to criminal procedure, this is less obvious since criminal procedure is aimed at enforcement of the criminal law rules.

9. The term "law enforcement" in the English language is usually associated with the police and might therefore be understood in this context as referring mainly to police co-operation. A further indication in this respect is the reference to Interpol. Nevertheless, it does not seem possible to draw a very clear line between co-operation at the police and at the court and prosecution level. Law enforcement may also refer to the tasks of the Public Prosecutor's office and of the criminal courts and in many countries the police acts in the field of criminal law under the instructions of the prosecutor or an investigating judge. A very clear-cut distinction therefore cannot be made and it seems not possible to exclude any competence of BH at the level of co-operation between prosecutors and courts.

10. On the other hand, it seems also not possible to provide for an exclusive competence of BH for all matters concerning judicial co-operation in the criminal law field. The simple fact that all criminal law courts are courts of the Entities requires an active rule of the Entities in this field. The State of BH, which does not itself have the instruments to enforce criminal law, cannot claim to have a monopoly on regulating such matters. It would moreover be surprising if judicial co-operation in the criminal law field were an exclusive prerogative of BH, while judicial co-operation in the field of civil law undoubtedly is within the powers of the Entities.

11. Having regard to the situation that practical implementation is a task of the two Entities, the only possible interpretation seems to be that Article III-1-g intends to give to BH in the field of criminal procedure powers to coordinate, to harmonise and to initiate co-operation with respect to all cases involving the two Entities or other countries. The precise extent of these powers will have to be assessed on a case basis.

Power of the Entities to enter into an agreement on inter-entity judicial co-operation

12. The above-mentioned opinion of the Ministry of Civil Affairs and Communications of 16 February 1998 considers that the two Entities do not have the right to conclude agreements among themselves on inter-entity judicial co-operation. This position, and in particular some of the arguments used, is in contradiction with the modern theory of federalism which more and more emphasises the need for co-operative federalism.

13. The simple fact that the Constitution of BH does not explicitly provide for such agreements seems not relevant, provided that these agreements respect the basic principles on the division of powers.

14. It is also not true to say that such agreements would be similar to international agreements and would give to the Entities the attributes of sovereign States. In a large number of federal States (Belgium, Canada, Germany, United States) agreements and conventions between federated Entities (or between some or all the federated Entities and the federal State) are quite usual and nobody pretends that such agreements would give to the federated Entities the attributes of a sovereign State. In Belgium, certain co-operation agreements between Entities or between Entities and the federal State are even explicitly required by the laws on institutional reform.

15. The specific situation of BH and its Entities where the central State only has very few powers makes this "co-operative" approach to federalism particularly necessary, especially in the judicial field. In effect, even if one arrived at a different conclusion from the one set out above concerning the possible powers of BH in the criminal law field, judicial co-operation in the civil law field is entirely within the powers of the federated Entities and may therefore only be implemented by way of voluntary agreements.

16. The BH constitution is therefore no obstacle to such agreements. On the contrary, several of its provisions seem to invite (or even impose) the conclusion of agreements between the Entities. The following provisions may be cited:

a) Article III-2-c requires that the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, inter alia, "by taking such other measures as appropriate". The conclusion of mutual agreements is one of the possible "other measures".

b) Article III-2-d enables the Entities to enter, under certain conditions, into agreements with foreign States. This power is fairly rare in comparative law (it exists, for example, in Belgium). It would seem paradoxical that the Entities may conclude international agreements and may not conclude mutual agreements although this last possibility is very frequent in most federal States.

c) By virtue of Article III-4, the BH Presidency may decide to facilitate inter-entity co-ordination on matters not within its responsibility (and which therefore are within the responsibility of the Entities). One way of achieving such co-ordination may be to conclude agreements between federated Entities on the exercise of their respective powers.

d) Article III-5-a of the BH constitution provides that the State of BH may assume responsibility for such other measures as are agreed by the Entities. This provision therefore envisages the possibility of transfers in the exercise of powers resulting from an agreement between federated Entities. It would seem difficult to conceive that the constitution provides for this kind of

> agreement and does not permit the federated Entities to agree on the way of exercising their proper powers as is the case in the agreement to be concluded on judicial co-operation.

17. There seems therefore no doubt that the Entities may enter into an agreement on judicial co-operation.