

Explanatory Note on the High Representative's Decision from October 19th



EXPLANATORY NOTE

This Explanatory note provides additional background information^[1] in relation to:

- 1) [The High Representative's Decision Enacting the Law on Changes to the Law on the Council of Ministers of Bosnia and Herzegovina of 19 October 2007](#) (hereinafter "Decision");
- 2) [Proposed Changes and Amendments to the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina sent to the Parliamentary Assembly for adoption on 19 October 2007](#) ;
- 3) [Proposed Changes and Amendments to the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina sent to the Parliamentary Assembly for adoption on 19 October 2007;](#)

Considering that the amendments under items 2 and 3 enjoy substantial similarities, they will be treated jointly in this Note.

I. The High Representative's Decision Enacting the Law on Changes to the Law on the Council of Ministers of Bosnia and Herzegovina of 19 October 2007:

The aim of the Decision is to facilitate the operation of the Council of Ministers (hereinafter "CoM").

The measures enacted by the Decision are in accordance with the Constitution of Bosnia and Herzegovina (hereinafter "Constitution") and in particular with Article V.4 of the said Constitution.

These measures apply equally to all members of the CoM without any distinction.

The measures enacted by the Decision do not touch upon the overall composition of the CoM, and in particular the equal representation of the constituent peoples of Bosnia and Herzegovina (see Art. 6 of the Law on the Council of Ministers of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina" 38/02, 30/03, 42/03, 81/06, 76/07) (hereinafter "Law on Council of Ministers") and Art.IX.3 of the Constitution).

The measures enacted by the Decision ensure that none of the members of the CoM can obstruct its work simply by not showing up to sessions and the need for the Council of Ministers to be able to take decisions at all times.

The measures amend and change a Law enacted by the High Representative on December 2, 2002. This Law introduced quorum and decision-making mechanisms to protect and promote the interests of each constituent people. However, these mechanisms have been regularly abused to counter the interests of the citizens of Bosnia and Herzegovina.

The Decision addresses the following issues in particular:

a) Replacement of a Minister by his Deputy in case of a Minister's permanent inability, resignation or dismissal:

The Decision amended Articles 14 and 15 of the Law on the Council of Ministers in order to ensure that, for the period between the day of resignation, dismissal or permanent inability of a Minister and the day upon which the successor of the Minister takes office, the Deputy Minister shall

temporarily perform the duties of the concerned Minister.

As far as the impact of a replacement by a Deputy Minister on decision-making in the Council of Ministers is concerned, the above mentioned amendments should be read in conjunction with the amendments brought to Article 18 of the Law on the Council of Ministers by the Decision. The Decision added a new Paragraph (4) to Article 18 and has thus ensured, *inter alia*, that the vote of a Deputy Minister cannot be counted as a vote of any member of a constituent people. New Paragraph (4) provides explicitly:

“(4) When a Deputy Minister replaces a Minister in accordance with this Law, the vote of the said Deputy Minister shall be counted for the purpose of calculating the majority prescribed in Paragraph (1) of this Article and for the purpose of determining the existence of the consensus prescribed in Paragraph (2) of this Article. When calculating the majority prescribed in Paragraph (3) of this Article, the vote of the said Deputy Minister shall be counted but **shall not be considered as a vote of any member of a constituent people.**”
(emphasis added)

b) Quorum for sessions to be held:

The Decision amended Article 18 (3) of the Law on the Council of Ministers in order to enable the CoM to hold a session if such a session is attended by more than one half of its members. This amendment reduces possibilities to block the Council of Ministers by the mere absenteeism of members of a constituent people. The rule applies equally to any such member without any distinction.

c) Obligation to hold session of the CoM:

The amendments to Article 16 Paragraph 2 of the Law on Council of Ministers brought by the Decision provide that the sessions of the Council of Ministers shall be held at least once per week. The amendment however allows exceptions to this rule in

justified cases and as determined by the Rules of Procedure of the CoM. In addition, the amendment provides that if the Chair fails to convene two consecutive sessions without falling within the scope of an exception provided for by the Rules of Procedures, the Deputy Chairs shall jointly convene the session.

As to whether or not a session may be called by surprise or in the absence of certain members, it must be recalled that the working schedule of the Council of Ministers will be transparent and known to all its members and that the new provision explicitly allows the rules of procedures to derogate from the principle of weekly sessions for justified reasons (e.g. holiday or seasonal recess). Furthermore, the convening of a session by the Deputy Chairs is subjected to certain conditions:

- (1) The Chair must have failed to convene two consecutive sessions of the CoM;
- (2) Such a failure must be in contravention to the provisions of the Law and Rules of Procedures of the Council of Ministers; and
- (3) The session needs to be jointly convened by the two Deputy Chairs.

By way of illustration, a session could not be convened by surprise by the Deputy Chairs on a day where the CoM should not, for a justified reason prescribed by the rules of procedures (e.g. holiday celebrated by certain members of the CoM), convene.

Article 16, Paragraph (2) enacted by the Decision provides explicitly:

“ As a rule, the sessions of the Council of Ministers shall be held at least once per week, **except in justified cases as determined by the Rules of Procedure of the Council of**

Ministers of Bosnia and Herzegovina. Should the Chair of the Council of Ministers fail, **in contravention to the provisions of this Law and the provisions of the said Rules of Procedure,** to convene **two consecutive sessions** of the Council of Ministers, the Deputy Chairs shall **jointly convene** a session.” (emphasis added)

d) Decision-making of the CoM:

The Decision maintains the distinction between (1) decisions taken by the CoM on issues that are finally decided by the Parliamentary Assembly (e.g. Laws) and (2) final decisions of the CoM (appointments, bylaws, etc)

– On issues that are finally decided by the Parliamentary Assembly: the amendments brought by the Decision do not change the majority decision-making requirement enshrined in Article 18 (1) of the Law on the Council of Ministers. However, the Decision provides that such a majority shall be calculated on those members who are present and voting. This provision must be read in accordance with Article 16 (1) of the Law on the Council of Ministers which explicitly provides that the members of the CoM are obliged to participate in the work of the Council of Ministers. The amendments brought by the Decision are fully in accordance with this obligation and ensure that the work of the Council of Ministers cannot be blocked by mere absenteeism. The old rule according to which the majority of the total number of members was needed to pass decisions that are finally decided by the Parliamentary Assembly in practice amounted to considering absent Ministers as voting against decisions considered by the Council of Ministers. The provision applies equally to any member of the Council of Ministers without any distinction. It must be recalled finally that these decisions are forwarded to the Parliamentary Assembly where the decision-making procedure prescribed by the Constitution in Article IV is applicable.

– On all other matters, including final decisions of the CoM: the amendments brought by the Decision do not change the decision-making requirement of consensus provided in Articles 18 (2) of the Law on the Council of Ministers. For the sake of clarity, the amendments provide that the consensus shall be calculated based on those members who are present and voting. This provision, just like the amendment to Article 18 (1), must be read in conjunction with Article 16 (1) of the Law on the Council of Ministers which explicitly provides that members of the CoM are obliged to participate in the work of the Council of Ministers. The amendments brought by the Decision are fully in accordance with this obligation and ensure that the work of the Council of Ministers cannot be blocked by mere absenteeism. The provision applies equally to any member of the Council of Ministers without any distinction.

The amendments brought by the Decision to Article 18 (3) of the Law on the Council of Ministers ensure a better functioning of the Council of Ministers by requiring that if a consensus is not reached, the prescribed majority shall include the vote of at least one (1) member of each constituent people. This provision applies equally to all members of the Council of Ministers without any distinction. It must be emphasised that the rule relates to constituent peoples and not Entities. In that respect, it is recalled that the previous provision did not refer to Entity representation either.

It is worth reiterating that the requirement that a final decision of the Council of Ministers be supported by one Minister of each constituent people is not affected by the absence of one or two other Ministers of said constituent people.

It must be recalled also that the procedure of nomination and approval of members of the CoM prescribed by the Constitution ensures that the Presidency nominates the Chair of the Council

of Ministers and that all members of the Council of Ministers must be approved by the Parliamentary Assembly. Entity interests regarding the composition of the Council of Ministers may be addressed through the Vital Entity Interest procedure prescribed in Article V (2) d) of the Constitution and through the decision making procedure of the Parliamentary Assembly prescribed in Article IV (3), d) of the Constitution (Entity voting).

II. Proposed Changes and Amendments to the Rules of Procedure of the Houses of the Parliamentary Assembly (PA) of Bosnia and Herzegovina

The proposed Changes and Amendments to the Rules of Procedure of the Houses of the Parliamentary Assembly (PA) of Bosnia and Herzegovina (hereinafter Rules of Procedures of the PA) would:

- ▶ Bring the Rules of the Procedure of the PA (in particular those that address the issues on quorum and on decision making) into compliance with the Constitution. There are currently substantial discrepancies between the Rules of Procedure of the PA and the BiH Constitution;
- ▶ Reduce the possibility for blockage by absenteeism in the work of the PA;
- ▶ Help prevent the obstruction of the work of bodies of the Houses of Parliament (such as committees, collegium and joint collegium) by one or by a minority of its members.

The proposed amendments and changes address the following main issues:

a) On quorum:

- ▶ House of Representatives: Article IV (2) b) of the Constitution explicitly provides that:

“A majority of all members elected to the House of Representatives shall comprise a quorum”

The current Rules of Procedures of the House of Representatives (HoR) require, in addition to the attendance of the majority of all members, the presence of 1/3 of the members of each Entity (see current Article 67 of the Rules of Procedures of the HoR). As such, it enables the representatives elected from one Entity to prevent the HoR from meeting simply by failing to show up at the session(s). As such, the HoR is thus prevented to convene in cases where it is constitutionally entitled to do so. The proposed amendments and changes bring the current Rules of Procedures of the HoR in line with the Constitution.

- ▶ House of Peoples: unlike for the HoR, the quorum for the House of Peoples is regulated in the same manner by the Constitution and the Rules of Procedure which provide for minimum representation of the constituent peoples at its session. The proposed changes and amendments do not change the current provision on quorum of the Rules of Procedures of the House of Peoples (HoP).

- ▶ Collegium, Joint Collegium and Joint Committees: With the aim of facilitating the better functioning of the Collegiums and the Joint Collegium, the amendments would address the issue of quorum in those bodies. For the Collegiums, it is proposed that “two members [out of three] of the Collegium shall comprise the quorum” (instead of three out of three) and in the Joint Collegium, the proposed amendments mean that “a majority of members [constitutes a quorum] provided that at least two Members of each House is present”. On Joint Committees, the requirement that the quorum includes at least one representative of each constituent people from the House of Peoples has been deleted to ensure that Joint Committees are not held hostage of one particular constituent people.

- ▶ As to the impact that such changes may have on the functioning of the Commission to be formed under Article IV (3) d) of the Constitution, we note that a clear distinction

must be drawn between the Collegiums established by the Rules of Procedures of the Houses, on the one hand, and the Commission foreseen by Article IV (3) d) of the Constitution on the other.

The said Commission is the forum through which the Chair and Deputy Chairs must exercise specific and *sui generis* responsibilities directly attributed to them in their individual capacities by the Constitution. The provisions of the Rules of Procedure of both Houses which regulate the work of the Collegiums do not apply to the Commission created under Article IV (3) d). As such, the said Commissions would thus not be subjected to the proposed amendments and changes pertaining, *inter alia*, to the quorum, convening or chairing of Collegium sessions or decision-making procedures of Collegiums.

b) On Decision-making and entity voting:

The proposed changes and amendments do not in any manner or form abolish the Entity voting mechanism prescribed by the Constitution. The objective of the amendments is to ensure that the relevant Members or Delegates of the Parliamentary Assembly attend sessions of the respective House for such mechanisms to be used.

A decision cannot, as such, be adopted by a mere majority of Members/Delegates of a House (22 out of 42 for the HoR/ 8 out of 15 for the HoP) if the Members/Delegates of such a House who are elected from the territory of each Entity are present and use the Entity voting mechanisms provided by Article IV (3) d) to block the adoption of such a decision.

The Constitution provides for a three step decision-making procedure in the Houses of the PA:

1. **First Step:** A first round of voting on the decision by majority of those present and voting, during which the Members or Delegates shall make their best efforts to see that

this majority includes at least 1/3 of the votes of Delegates or Members from the territory of each Entity;

2. **Second Step:** If this majority vote does not include one-third of the votes of the Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs of the relevant House shall meet as a commission and attempt to obtain approval of the decision within three days of the vote;

3. **Third Step:** If those efforts fail, a second round of voting on the decision takes place. In order to be adopted, a given decision needs to be supported by a majority of those present and voting, provided that the dissenting votes do not include 2/3 or more of the members/delegates elected from either Entity.

Step 1: The texts of the current Rules interpret the constitutional requirement that the majority includes at least 1/3 of the **votes** of members/delegates from the territory of each Entity as referring to **all** members/delegates elected from an Entity. The wording of the Constitution (and in particular the word “votes” used therein) however requires that rules of procedure refer to 1/3 of the Delegates/Members that are present and voting. The proposed changes interpret the 1/3 requirement as referring to only those Members/Delegates who are present and voting. As such, it requires the representatives of each Entity to attend a session if they want to vote against a decision. These changes and amendments do not, in any manner or form, abolish or eliminate the said 1/3 requirements.

Step 2: While the Constitution provides, under Article IV (3) d), that the role of the Chair and Deputy Chairs is one of attempting to obtain an approval of a decision which has already gone through the first step, the current Rules of procedure of the PA provide instead that the Collegium shall, after harmonization, inform the House which must then take a

new vote on the decision with an identical requirement to make best efforts to gather the 1/3 entity vote. This provision in fact introduces an additional blocking mechanism in the system and creates the possibility for *vicious circles to take place* as decisions could be passed indefinitely from the House to the Collegium and from the Collegium to the House. This has led to very concrete blockages of a significant number of decisions recently. The proposed amendments are fully consistent with the wording of the Constitution while introducing a number of clarifications.

Step 3: The wording of the last sentence of Article IV (3) d) of the Constitution refers to “two-thirds or more of the Delegates or Members **elected** from either Entity” as opposed to the “**votes**” of the said Delegates or Members (compare with the second and third sentences of Article IV (3) d) which explicitly use the word “votes”). The proposed amendments and changes therefore simply ensure that the 2/3 requirement is brought in line with the explicit wording of the Constitution. It merely clarifies that such requirement be calculated based on the total number of Members/Delegates elected from either Entity as opposed to the number of such Members/Delegates who are present and voting.

These changes and amendments apply to all Member/Delegates equally without any distinction.

c. On absences and conveying the sessions

Other parts of the proposed amendments provide for the necessity to reduce the capacity for any Parliamentary body to be held hostage of the desire of a minority of its members. In particular, they seek to enable certain bodies to carry out their function even when some of its members try to block its work by absenteeism.

2007

Miroslav Lajčák

High

Representative

[\[1\]](#) This Explanatory note does not, in any manner or form, either directly or indirectly seek to alter or modify the provisions of the texts referenced in items 1-3 above.