



Strasbourg, 20 July 2004

Opinion no. 264 / 2003

Restricted
CDL(2004)063
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT LAW

**ON AMENDMENTS TO THE LAW
ON OMBUDSMAN FOR HUMAN RIGHTS**

IN BOSNIA AND HERZEGOVINA

Pursuant to article IV.4.a) and in connection with article II 1. of the Constitution of Bosnia and Herzegovina, at _____ session of the House of Representatives and at _____ session of the House of Peoples, the Parliamentary Assembly of BiH carried the following

**LAW ON AMENDMENTS TO
LAW ON OMBUDSMAN FOR HUMAN RIGHTS IN BIH**

Article 1

Article 1(2) item (d) of the Law on Ombudsman for Human Rights in Bosnia and Herzegovina (BiH OG 19/02) shall be so amended that it reads:

“(d) “BiH authorities” indicates all institutions, bodies, agencies and all other public institutions in Bosnia and Herzegovina (state, entity, Brcko District, cantonal and municipal authorities as well as private institutions performing public functions). Item (e) shall be deleted.”

Article 2

Article 5 shall be deleted.

Article 3

Article 8(1) shall be so amended that it reads:

- “1. The Institution of the Ombudsman shall be composed of the Ombudsman and two Deputies.
2. A separate, ad hoc commission for nomination of the Ombudsman and two Deputies shall be appointed by the House of Representatives of Parliamentary Assembly of BiH. The commission shall publish an open competition for the posts and, after having carried on the public proceedings, shall make a list of applicants qualified under this Law.
3. The list shall be submitted to the House of Representatives of Parliamentary Assembly of BiH for consideration. The list shall include more nominees for the both positions. The House of Representatives of Parliamentary Assembly of BiH may ask of the nominees to present their concepts of work in the Ombudsman Institution.
4. The Ombudsman and two Deputies shall be appointed and dismissed by the House of Representatives and the House of Peoples of Parliamentary Assembly of BiH by a two-thirds majority in each House.
5. The Ombudsman and two Deputies shall be appointed from the three different constituent peoples (Bosniak, Serb and Croat nationality) for a 6-year term with the possibility of reappointment and they shall rotate in the position of Ombudsman every two years.
6. Before entering upon their term of office the Ombudsman and two Deputies shall take an oath before the House of Representatives of Parliamentary Assembly of BiH. The competent body of the House of Representatives of Parliamentary Assembly of BiH shall specify the text of the oath.
7. In the event of Ombudsman’s longer absence, incapability or illness one of his Deputies shall replace him according to a schedule he makes.”

Article 4

Paragraph 1 of article 9 shall be deleted.

Paragraph 2 shall become paragraph 1 after having been amended to read as follows:

“The election and appointment of Ombudsman and Deputy Ombudsmen shall be carried on within one month after the proposal was sent to the House of Representatives of Parliamentary Assembly of BiH or, at the latest, three months after the post became vacant or after the Ombudsman or his Deputy ceased performing functions for reasons under this Law.”

Article 5

Article 10 shall be so amended that it reads:

- “1. Any Ombudsman who is appointed after a resignation of Ombudsman or after the Ombudsman ceased performing functions for reasons under this law shall only serve for that part of the six-year term of office remaining and may be re-appointed.
2. The salary of the Ombudsman shall be equal to the salary of a BiH Constitutional Court judge.
3. The salary of the Deputies shall be equal to the Ombudsman’s salary reduced by 10%.
4. Salaries of advisors and other employees shall be in line with salaries of BiH Constitutional Court staff and salaries of the rest of staff shall be in line with salaries of civil servants employed in the Joint Institutions of Bosnia and Herzegovina.
5. The Ombudsman shall enact a by-law on harmonization of salaries and other perquisites of advisors, deputies and other staff in accordance with this Law.”

Article 6

Article 11 shall be so amended that it reads:

“Any citizen of Bosnia and Herzegovina, who is a lawyer, who has passed the Bar examination, who has at least ten (10) years of experience and distinguished career in the legal profession, who has a demonstrated experience in the field of human rights and is of recognised high moral stature, may be appointed as an Ombudsman or Deputy Ombudsman.”

Article 7

Paragraphs 3 and 5 of article 12 shall be so amended that they read:

- “3. Once a post of Ombudsman or Deputy Ombudsman is vacant, the procedure for appointing a new Ombudsman or Deputy Ombudsman shall be started within one month.
4. Where a post of Ombudsman or Deputy Ombudsman becomes vacant for a reason other than the expiration of his/her term of office, the remaining Ombudsman or a Deputy Ombudsman shall provisionally perform his/her duties until the appointment of a new Ombudsman or Deputy Ombudsman has been completed.”

Article 8

A new article 12.a and 12.b shall be added after article 12 as follows:

12.a

- “1. The Ombudsman or Deputy Ombudsmen shall co-operate in the exercise of their functions.

2. In carrying out their activities, they shall follow the principle of personal contacts, they shall investigate individually and consult each other when making recommendations but distribution of tasks among them shall not be grounded on any criterion such as race, ethnic, religious, social or political origin, sex, age or any other affiliation of the applicant.

3. The Ombudsman shall make his/her recommendations, decisions and reports independently but he/she shall take into consideration written opinions by his/her deputies, who shall submit them within 8 days on receipt of a request for opinion.”

12.b

“The Institution of Ombudsman may establish additional field offices if interests of work require so, but within budgetary constraints.”

Article 9

Chapter “IV – COOPERATION WITH ENTITY INSTITUTIONS OF OMBUDSMAN” and articles 13 and 14 shall be deleted.”Chapter V shall become Chapter IV, Chapter VI shall become Chapter V, Chapter VII shall become Chapter VI, Chapter VIII shall become Chapter VII, Chapter IX shall become Chapter VIII, Chapter X shall become Chapter IX, Chapter XI shall become Chapter X, Chapter XII shall become Chapter XI, Chapter XIII shall become Chapter XII, Chapter XIV shall become Chapter XIII, Chapter XV shall become Chapter XIV.

Article 10

Article 15 shall be so amended that it reads:

“1. The Ombudsman and Deputy Ombudsmen shall perform duties independently and self-reliantly. They shall be under no specific orders nor shall they be given instructions by any authority. The Ombudsman and Deputy Ombudsmen shall work within the framework of constitutional and legal provisions and international human rights instruments signed by Bosnia and Herzegovina.

2. The Ombudsman and Deputy Ombudsmen shall comply with principles of justice and ethics in their work.”

Article 11

Article 36 shall be so amended that it reads:

“1. The Institution of Ombudsman shall enact by-laws that will determine, in pursuance of this law, rules of procedure for treating cases and applicants, rules on structure and job descriptions, rules on salaries, rules on labour relations and disciplinary responsibility and other by-laws as required. The Ombudsman shall enact Rules on Structure and Job Descriptions within one month after the appointment.

2. Rules on Structure and Job Descriptions and Rules on Salaries under paragraph 1 above are subject to approval of the House of Representatives of Parliamentary Assembly of BiH.”

Article 12

The title of Chapter "XIV – STAFF AND EQUIPMENT" 15 shall be so amended that it reads "XIV – STAFF, EQUIPMENT AND FUNDING OF THE INSTITUTION OF OMBUDSMAN".

Article 13

Article 37 shall be so amended that it reads:

"The selection of staff of the Institution of Ombudsman shall be carried on in an open competition or by publishing vacancies in accordance with the Law on Labour Relations in Institutions of Bosnia and Herzegovina and in pursuance of the Rules on Structure and Job Descriptions."

Article 14

Paragraph 1 of article 38 shall be deleted.

Paragraph 2 shall become paragraph 1 after replacing words "members of the staff" by word "staff".

Article 15

Article 39 shall be so amended that it reads:

"1. Financial resources for the operation of the Institution of Ombudsman shall be provided in the Budget of Joint Institutions of BiH.

2. Every year the Institution of Ombudsman shall submit to the Minister of Finance and Treasury a proposal for its budget that will be the basis for approval of resources in the Budget of Joint Institutions of BiH.

3. While determining the amount of financial resources needed for the operation of the Institution of Ombudsman, the need to secure full, independent and effective discharge of responsibilities, the nature and extent of the functions and other requirements provided for in specific laws shall be taken as the starting point."

Article 16

Article 41 shall be so amended that it reads:

"1. The already appointed BiH and entity Ombudsmen shall have the status of Interim Ombudsmen and Deputy Ombudsmen.

2. The status of Interim Ombudsmen and Deputy Ombudsmen shall last for two years at the longest, counting from the effective date of this Law.

3. During the period of time under paragraph 2 above, a transfer of Ombudsman responsibilities shall be carried on in the following manner:

a) The position of Interim Ombudsman of BiH shall be held by an Ombudsman belonging to one of the constituent peoples and the position of Deputy Ombudsmen shall be held by appointed entity Ombudsmen belonging to the other two constituent peoples.

b) The position of Interim Ombudsman of RS shall be held by the appointed Ombudsman belonging to one of the constituent peoples and the position of Deputy Ombudsmen shall be held by the appointed Ombudsmen belonging to the other two constituent peoples.

c) The position of Interim Ombudsman of the Federation shall be held by the appointed Ombudsman belonging to one of the constituent peoples and the position of Deputy Ombudsmen shall be held by the appointed Ombudsmen belonging to the other two constituent peoples.”

4. The House of Representatives of Parliamentary Assembly of BiH and entity Parliaments shall issue a decision on the criteria and the schedule of rotation of the Interim Ombudsman and Deputy Ombudsmen within 30 days after the effective date of this Law.

5. The House of Representatives of Parliamentary Assembly of BiH and entity parliaments while issuing decision from the previous paragraphs shall take care that the ombudsman of Bosnia and Herzegovina and entities' ombudsman should not belong to the same people.

Article 17

Article 42 shall be so amended that it reads:

“1. The appointment of Ombudsman and two Deputy Ombudsmen shall be carried out within the deadline set out in article 16(2) of this Law.

2. Exceptionally, the first Ombudsman and two Deputy Ombudsmen may be appointed among the Interim Ombudsmen and Deputy Ombudsmen in pursuance of this Law.”

Article 18

Article 43 shall be so amended that it reads:

“1. In the transitional period the current number of staff and field offices in the BiH and entity Institutions of Ombudsman shall be gradually reduced by at least 30 % and 50% respectively.

2. Ombudsmen, deputy ombudsmen, advisors and other members of staff, who will not be reappointed after the establishment of the new structure and the reappointment procedure, are entitled to work in the Institution for another month, after which their employment shall be terminated.”

Article 19

Article 44 shall be so amended that it reads:

“1. Financial resources for the operation of the Institution of Ombudsman in the transitional period shall be provided in the Budget of Joint Institutions of BiH until the restructuring under this Law has been completed.

2. The Ombudsman of BiH and entity Ombudsmen shall cooperate on a regular basis as long as the latter exist and the cooperation shall include preparation of coordinated plans of action, exchanging the experience, bringing the practice in line and drafting the initial framework of future operation of the Institution of Ombudsman of BiH.

3. Entity authorities shall amend the valid Laws on Ombudsmen in pursuance of this Law within 90 days.

4. Within the deadline set out in article 16(2) of this Law, entity authorities shall enact relevant laws governing the cessation of operation of entity Institutions of Ombudsman and the transfer of their responsibilities to the Institution of Ombudsman for Human Rights of BiH.

5. Members of staff of entity Institutions of Ombudsman, who will not be reappointed after the establishment of the Institution of Ombudsman for Human Rights of BiH in pursuance of this Law and the enactment of the Rules on Structure and Job Descriptions, are entitled to work in the Institution for another month, after which their employment shall be terminated.”

Article 20

“Words “agency and bodies of BiH government” shall be replaced by words “authorities of BiH” in appropriate case throughout the body of the law.”

Article 21

This Law shall come into force on the eighth day from the date of its publishing in the “Official Gazette of Bosnia and Herzegovina”.

PA BiH number: /04

May 2004

Sarajevo,

Speaker
of the House of Representatives
of the Parliamentary Assembly of BiH
Martin Raguz

Speaker
of the House of Peoples
of the Parliamentary Assembly of BiH
Goran Milojevic

R a t i o n a l e

I - CONSTITUTIONAL GROUNDS

Constitutional grounds for enacting the Law are contained in article IV.4.a) of the Constitution of Bosnia and Herzegovina:

“The Parliamentary Assembly shall have responsibility for: a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.”

Pursuant to article XIV of GFPA Annex 6, on 1 January 2004 the responsibilities for the continued operation of the Institution of Ombudsman for Human Rights of BiH was transferred to the institutions of Bosnia and Herzegovina and three Ombudsmen BiH nationals were appointed.

Article III.5.a) of the Constitution of Bosnia and Herzegovina reads:

“Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.”

II- REASONS FOR ENACTING THE LAW

In order to meet an obligation set out as a condition for the accession to European Union and other Euro-Atlantic integrations, Bosnia and Herzegovina had defined its activities on the restructuring of existing Institutions of Ombudsman in Bosnia and Herzegovina, including the necessary amendments to the legislation governing this matter.

To this end, at its 41st session held on 19 February 2004, the Council of Ministers of BiH adopted the Information of Actual State of Affairs in the Institutions of Ombudsman for Human Rights in Bosnia and Herzegovina and the need to regulate further the matter prepared by the Ministry of Human Rights and Refugees of BiH. On the basis of conclusions and recommendations passed then by the Council of Ministers of BiH, the Ministry of Human Rights and Refugees of BiH established a inter-ministerial expert Working Group (consisting of all BiH and entity ombudsmen, the entity Ministry of Justice, the BiH Ministry of Justice, the Ministry of Human Rights and Refugees of BiH and international organizations in BiH: OHR, OSCE, Council of Europe and European Commission) whose task was to analyse the situation and possibilities of restructuring the Institutions of Ombudsman, to make a plan of activities and measures to be taken by competent institutions and authorities and to put together a report about all the issues and submit it to the Council of Ministers of BiH for consideration and adoption.

In the meantime, other national (RS National Assembly, Government of the FBiH, Direction for European Integrations) and international bodies and institutions initiated restructuring the Institutions of Ombudsman in Bosnia and Herzegovina, including the merge of all institutions

in one institution at the level of the state of Bosnia and Herzegovina. In order to coordinate all activities the Council of Europe facilitated a meeting of a few members of the Council of Ministers Working Group with the European Commission for Democracy Through Law (Venice Commission) in Strasbourg on 19 April 2004, where certain positions about activities on the restructuring the Institutions of Ombudsman were taken. Here are some agreed principles: the level of protection of human rights in Bosnia and Herzegovina must not be jeopardized, on the contrary, it has to be increased: the number of ombudsmen has to be reduced gradually from 9 to 3 so that in the period of transition the Institutions of Ombudsman would have one Ombudsman and two Deputies; the final merge of the Institutions of Ombudsman will be a process and will be done during a period of transition (which should last two years at the longest) when the three Institutions will co-exist; the number of staff and field offices has to be reduced significantly in all Institutions; and other principles and a detailed plan of activities should be made to include them all.

However, the group could not reach agreement on the scope of amendments to the valid legislation, to the Law on Ombudsman for Human Rights of BiH in particular. Therefore, having in mind all relevant discussions and obligations of Bosnia and Herzegovina, the Ministry of Human Rights and Refugees of BiH decided to propose this version of amendments to Law on Ombudsman for Human Rights of BiH. More to the point, since the entities started independently the procedure of amending the legislation respecting the Institution of Ombudsman, Government of FBiH initiated amending the Constitution of FBiH in the part respecting the Ombudsman and the RS National Assembly has recently passed amendments to the Law on Ombudsmen of RS.

V PRINCIPLES ON WHICH THIS LAW HAS BEEN GROUNDED

This Law ensures the principles of economical, cost-effective, efficient and continued functioning of the Institution and protection of human rights of citizens of BiH.

IV EXPLANATIONS OF PROPOSED LEGAL SOLUTIONS

Article 1 so amends article 1(2) that point e) will be deleted and new point d) shall be added to give more precise definition of term “BiH authorities”.

Article 2 replaces words “agency and bodies of BiH government” by words “authorities of BiH” in appropriate case throughout the body of the law, because the term indicates any municipal, cantonal, Brcko District, entity or BiH authorities.

Article 3 deletes article 5 that provides for an exclusive jurisdiction of the Institution of Ombudsman and has to be deleted in pursuance of the plan for restructuring the Institutions of Ombudsman in BiH.

Articles 4, 5 and 6 amend articles 8, 9 and 10 and the new text specifies the number of Ombudsman and Deputies (one Ombudsman and two Deputy Ombudsmen). A novelty is the introduction of open competition for the posts and Ombudsman and Deputy Ombudsmen’s taking an oath before entering upon the term of office.

This chapter determines in details the appointment procedure, requirements for the position of Ombudsman and Deputy Ombudsmen, the term of office, salaries, resignation, termination of

employment, taking an oath and all other issues relevant to the posts of Ombudsman and Deputy Ombudsmen.

Article 7 so amends article 11 that it specifies qualifications required for the posts of Ombudsman and Deputy Ombudsmen in BiH.

Article 8 so amends article 12, paragraphs 3 and 5 that they determine in details the appointment procedure when the posts of Ombudsman and Deputy Ombudsmen are vacant or when the posts of Ombudsman and Deputy Ombudsmen are not filled for other reasons.

Articles 8 and 9 provide for new articles 12.a and 12.b that clarify the manner of cooperation among the Ombudsman and Deputy Ombudsmen that will be based on the principle of personal contacts with applicants during investigations and distribution of tasks among them shall not be grounded on any criterion such as race, ethnic, religious, social or political origin, sex, age or any other affiliation of the applicant.

The principle of independent work of Ombudsmen will be pursued through mandatory consideration of written opinions which shall be submitted by Deputy Ombudsmen within the set deadline, which also proves the principle of cost-effectiveness of the Institution of Ombudsman applied fully.

A new article 12.b provides for the establishment of field offices.

With a view to implementing the plan of restructuring, chapter “IV – COOPERATION WITH ENTITY INSTITUTIONS OF OMBUDSMAN” and articles 13 and 14 are deleted.

Article 12 so amends article 15 that it clarifies independence and self-reliance of the Ombudsman and Deputy Ombudsmen and how they shall work within the framework of constitutional and legal provisions and international human rights instruments signed by Bosnia and Herzegovina.

Article 13 so amends article 36 that it specifies which bylaws the Institution of Ombudsman shall enact and which bylaws are subject to approval of the House of Representatives of Parliamentary Assembly of BiH.

The reason for this provision is that some Institutions of Ombudsman in BiH have not enacted the bylaws nor have they regulated the matters in any other way in all these years.

The title of Chapter “XIV – STAFF AND EQUIPMENT” is so amended that it also covers funding of the Institution of Ombudsman.

Chapter “XIV – STAFF, EQUIPMENT AND FUNDING OF THE INSTITUTION OF OMBUDSMAN” and articles 37, 38 and 39 are amended and articles 16 and 17 give details about the recruitment of staff and funding of the Institution and provides for an obligation of the Institution to submit a proposal for its budget that will be the basis for approval of resources in the Budget of Joint Institutions of BiH, which is a normal procedure of all budgetary beneficiaries, which will not affect independence and self-reliance of the Institution of Ombudsman .

FINAL AND TRANSITIONAL PROVISIONS

Article 18 so amends article 41 that it provides for the positions of Interim Ombudsmen and Deputy Ombudsmen with a view to restructuring the Institution of Ombudsman.

The status of Interim Ombudsman and Deputy Ombudsman will last two years at the longest, counting from the affective date of this law.

The transfer of responsibilities of Ombudsmen will be done within the deadline in a way that the positions of Interim Ombudsman of BiH, the Federation and RS will be held by Ombudsmen belonging to one of the constituent peoples and the position of Deputy Ombudsmen shall be held by appointed Ombudsmen belonging to the other two constituent peoples, who are now being appointed to the position of Ombudsman in one of the three institutions of Ombudsman in BiH. The House of Representatives of Parliamentary Assembly of BiH and entity Parliaments shall issue a decision on the criteria and the schedule of rotation of the Interim Ombudsman and Deputy Ombudsmen within the set time limit. It is provided for an obligation of the House of Representatives of Parliamentary Assembly of BiH and entity Parliaments in making the decision under the preceding paragraph to ensure that Ombudsman of BiH and Entity Ombudsmen to be appointed are not from the same constituent peoples.

Article 18 so amends article 42 that it stipulates that the appointment of Ombudsman and two Deputy Ombudsmen shall be carried out within the deadline set out in article 18(1) of this Law.

The amended article also provides for an exception in the appointment of the first Ombudsman and two Deputy Ombudsmen in pursuance of this Law.

Article 20 so amends article 43 that it determines a reduction of the current number of staff and field offices in the BiH and entity Institutions of Ombudsman and the termination of employment of Ombudsmen, deputy ombudsmen, advisors and other members of staff after the establishment of the new structure and the reappointment procedure, which will implement the principle of streamlining and cost-effectiveness.

Article 21 so amends article 44 that it clarifies funding of the three Institutions of Ombudsman in the transitional period. The manner of regular co-operation of the Ombudsman of BiH and entity Ombudsmen is defined and so is the obligation to prepare joint documents and implement the joint initial framework of future operation of the Institution of Ombudsman of BiH.

The deadline is set for entity authorities to bring the relevant legislation in line with this Law and to enact relevant laws governing the cessation of operation of entity Institutions of Ombudsman and the transfer of their responsibilities to the Institution of Ombudsman for Human Rights of BiH.

The manner of deployment of members of staff of entity Institutions of Ombudsman after the establishment of the Institution of Ombudsman for Human Rights of BiH is determined here.

FINANCIAL RESOURCES

No additional financial resources from the 2004 Budget of Bosnia and Herzegovina are required for the implementation of this Law but Bosnia and Herzegovina has committed itself to a fully financially independent Institution of Ombudsman for Human Rights of BiH as of 1 January 2004, which also includes a provision of premises.