

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, no. 94/14 – Revised text), in Plenary and composed of the following Judges:

Mr. Mirsad Ćeman, President

Mr. Mato Tadić, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Margarita Tsatsa-Nikolovska, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the request of **Mr. Željko Komšić, the Member of the Presidency of Bosnia and Herzegovina at the time of filing the request**, in case no. **U 26/14**, at its session held on 9 July 2015, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

The request lodged by Mr. **Željko Komšić**, the Member of the Presidency of Bosnia and Herzegovina at the time of filing the request, for the review of constitutionality of Articles 7(2), 9(3) and 11(4) of the Law on the System of State Aid in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, no. 10/12) is hereby dismissed.

It is hereby established that Articles 7(2) and 11(4) of the Law on the System of State Aid in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, no. 10/12) are in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It is hereby established that Article 9(3) of the Law on the System of State Aid in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, no. 10/12) is in conformity with Article III(1)(e) of the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

## **REASONING**

### **I. Introduction**

1. On 30 October 2014, Mr. Željko Komšić, the Member of the Presidency of Bosnia and Herzegovina at the time of filing the request ("the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for the review of constitutionality of Articles 7(2), 9(3) and 11(4) of the Law on the System of State Aid in Bosnia and Herzegovina (*Official Gazette of BiH*, no. 10/12; "the Law").

### **II. Procedure before the Constitutional Court**

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples were requested on 10 October 2014 to submit their respective replies to the request.

3. The House of Peoples, Constitutional-Legal Committee, submitted a reply to the request on 5 March 2015.

4. The House of Representatives failed to submit a reply to the request.

### **III. Request**

#### **a) Allegations from the Request**

5. The applicant stated that Articles 7(2) and 11(4) of the Law are not in conformity with Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), Article II(4) of the Constitution of Bosnia and Herzegovina in connection with the International Convention on the Elimination of All Forms of Racial Discrimination and Article 5 thereof, as well as with the International Covenant on Civil and Political Rights and Articles 2, 25 and 26 thereof, and Article 14 of the European Convention. In addition, the applicant stated that Article 9(3) of the Law is not in conformity with Article III(1) (e) of the Constitution of Bosnia and Herzegovina.

#### **a) 1. As to Articles 7(2) and 11(4) of the Law**

6. The applicant indicated, first and foremost, that the Constitution of Bosnia and Herzegovina distinguishes between the constituent peoples (persons who declare themselves as Bosniacs, Croats and Serbs) and Others (members of ethnic minorities and persons who do not declare themselves as members of any group due to their mixed marriages, mixed marriages of parents or for other reasons). Privileging the representatives of constituent peoples in itself constitutes a violation of the Constitution of Bosnia and Herzegovina and of the European Convention, and is also contrary to the Decision of the European Court of Human Rights in the case of *Sejdić and Finci* (see, ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, judgment of 22 December 2009), since it makes it impossible for Others to participate on an equal footing in the exercise of these public offices. In that respect, the applicant indicated that the State of Bosnia and Herzegovina signed and ratified the Stabilization and Association Agreement between the European Communities and its Member States and Bosnia and Herzegovina and committed itself to the obligation of establishing an independent body to control state aids as stipulated in Article 71 of the Stabilization and Association Agreement between the European Communities and their Member States and Bosnia and Herzegovina, that is to say in Article 36 of the Interim Agreement on Trade and Trade-Related Matters between the European Community and Bosnia and Herzegovina. One of the top priorities for Bosnia and Herzegovina is the elimination of discrimination in order to ensure full harmonization with the European Convention and the post-accession obligations to the Council of Europe (see Annex to Council Decision 2008/211/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with BiH and repealing Decision 2006/55/EC, Official Journal of the European Union L80/21(2008)).

7. As to Article 7(2) of the Law the applicant stated that this article defines the discriminatory activities of the state against individuals when it comes to guarantees for any person to have access to public services, without discrimination. Namely, the mentioned article eliminates a person from the list of qualified candidates who applied for a vacancy who does not belong to the constituent peoples, that is to say it determines that the candidates coming from among Others are less worthy due to their ethnic affiliation, irrespective of their professional qualifications. The aforementioned implies ethnic affiliation as a crucial element of selection, and not professionalism, vocation and experience, i.e. everything that an independent operational body needs. By prescribing this unreasonable concept the State introduces “positive discrimination” in favor of the constituent peoples who represent demographic majority, while completely marginalizing possible professional personnel from among the minorities or Others. Therefore, this makes it more difficult for

minorities and Others to access, under equal conditions, public positions in independent operational bodies and thus violates their right to work.

8. As to Article 11(4) of the Law the applicant stated that this article sets a high quorum for decision-making, namely a minimum of seven out of the total of eight members of the State Aid Council (“the Council”), whereby the next level may only be a consensus of all eight members. Thus, decisions are made by a qualified majority that equals quorum, with a minimum of one member from among each of the constituent peoples having to vote for each decision. That constitutes the third ethnic quorum, and creates discrimination in the process of decision-making, as it puts the members of the Council from among the constituent peoples in a more favorable position. The applicant indicated that, instead of having a legal validity of a decision be made conditional upon a majority vote, five out of eight, the mentioned article prescribes a legal validity of a decision only in the event of a qualified majority, seven out of eight members, so that it is in the service of discrimination by way of a greater value of the votes of the members of the Council coming from among the constituent peoples. If the ethnic quota in the composition of the Council was eliminated, it could happen that a decision of seven members of the Council was not legally valid only because it was not voted for by a member of the Council coming from among one of the constituent peoples.

9. The applicant further stated that arguments in favor of the adoption of such legal solutions come down to the peculiarities of Bosnia and Herzegovina and its ethnic composition, which neglects, however, the existence of the citizens who do not belong to either of the constituent peoples. There is no objective and reasonable justification for the Council of Ministers of Bosnia and Herzegovina, the Government of Republika Srpska, the Government of the Federation of Bosnia and Herzegovina, or the Government of the Brčko District, to deny to the citizens of Bosnia and Herzegovina, who are not coming from among the constituent peoples, the possibility to participate on an equal footing in the decision-making and in the implementation of regulations protecting the market competition in the market of Bosnia and Herzegovina in terms of permissibility of state incentives to private and public business entities, that is to say those implementing the requirements of the European Union in the field of competition policy and law and aids granted by states as defined in Articles 87 – 89 of the EC Treaty, namely Articles 107 – 109 of the Treaty on the Functioning of the European Institutions, better known as the Treaty of Lisbon, which succeeded and sublimated the preceding treaties. Article 36 paragraph 2 of the Interim Agreement on Trade and Trade-Related Matters between the European Community and

Bosnia and Herzegovina, which went into force in 2008: Competition and other Economic Provisions, reads as follows: “2. Any practices inconsistent with this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community (“the EC Treaty”) and interpretative instruments adopted by the Community institutions.” The applicant stated that, in accordance with the aforementioned, it is irrational to make the validity of the implementation of regulations on the impact of aids granted by states on the market competition conditional upon the ethnic origin of the members of the bodies making decisions, by applying the Law and the EU Rules on Aids Granted by States, i.e. of the Council. The EU regulations on state aids have a direct effect in the legal system of Bosnia and Herzegovina, which was made possible through the entry into force of the Interim Agreement from 2008. Due to the aforementioned, the ethnic quota in the composition of the Council, namely the provision of mandatory participation of the constituent peoples for the purpose of “protecting national interests” is contrary to decrees, directives, guidelines or communiques of the European Commission or of other EU institutions, including the judgments of the European Court. On the basis of the aforementioned it follows that there is no reasonable and objective justification for the discriminatory treatment of the members of Others and of citizens of Bosnia and Herzegovina so that they cannot be selected, under equal conditions in a competition procedure for the advertised positions in public institutions, based exclusively on their professional qualifications. The successfulness of the candidates who apply is currently being only correlated to the filling in of an ethnic quota, i.e. which institution (the Council of Ministers of BiH, the Republika Srpska Government, the Government of the Federation of BiH or the Brčko District Government) would appoint, at what instant, a Serb, a Croat or a Bosniac, in order to bring their number to a minimum of two or more. Therefore, these solutions *de facto* and *de iure* deny the guarantee for participation on an equal footing in managing public affairs, at all levels, and the right of access, under equal conditions, to public offices for this group of citizens of Bosnia and Herzegovina.

**a) 2. As to Article 9(3) of the Law**

10. As to Article 9(3) of the Law, the applicant stated that it is unconstitutional as it is inconsistent with Article III(1)(e) of the Constitution of Bosnia and Herzegovina. Namely, it is indisputable that the Council is a new institution at the state level, so that the funding should be made from the Budget of the institutions and the international obligations of BiH, and not with 1/3 provided by each the Council of Ministers of BiH, Republika Srpska and the Federation of BiH.

The funding model for “the Fiscal Council”, which served as the reasoning for the funding method for the Council, is not applicable, because the Fiscal Council features as its members the Chair of the Council of Ministers, Prime Ministers of the Entities and the Mayor of the Brčko District as the elected officials. These elected officials do not make up the “operational independent body” that applies the European standards, but the institutionalized mechanism of harmonizing different political wills of the state authority and of the lower levels of authority in the process of the distribution of money going to the budgets of the institutions that they represent. All the aforesaid in order to secure finances for the realization of political programs on the basis of which they won the trust of people in the elections. By further elaborating on the mentioned standpoint, the applicant indicated that the funding whereby 1/3 share is provided by each the Council of Ministers of BiH, the Federation of BiH and Republika Srpska, creates financial dependence of this state institution on the will of the Entities, which are the greatest grantors of state aid, unlike the State of Bosnia and Herzegovina which only has at its disposal the Budget of the institutions and the international obligations of BiH, without a possibility to grant state aid, which puts it in the best position to fund completely an independent operational body as is the Council. Due to the aforementioned legal solution, the Entities are in a position to deny the funding of the Council in the event it adopts decisions that are in conformity with the European standards, but that are contrary to the intentions of the authorities in the Entities. In that way the Entities’ authorities have a direct opportunity to influence the independence of the Council in the decision-making process.

11. The applicant concluded that the funding system, as defined in Article 9(3) of the Law, in addition to being inconsistent with Article III(1)(e) of the Constitution of Bosnia and Herzegovina, failed to provide the independence in the work of the Council, and the operational independence and the very operability have been reduced by the manner of decision-making as defined in Article 7(2) and Article 11(4) of the Law.

**b) Reply to request**

12. The Constitutional-Legal Committee of the House of Peoples indicated that it considered at the session held on 4 March 2015 the request of the Constitutional Court for opinion on the respective request, and that it unanimously decided to inform the Constitutional Court of this consideration, which will, in accordance with its responsibilities, decide on the conformity of the Law with the Constitution of Bosnia and Herzegovina.

#### **IV. Relevant Law**

13. The **Law on the System of State Aid in Bosnia and Herzegovina** (*Official Gazette of BiH*, no. 10/12) reads in its relevant part as follows:

*Article 1*

*(Subject)*

*(1) This Law shall set forth general conditions for the allocation, the control of allocation and use, the approval and recovery of state aid that has been unlawfully granted, the inventory of state aid and the reporting on state aid, with the aim of establishing and ensuring competitive market conditions and of fulfilling the obligations committed to under the international agreements, which were entered into, containing provisions on state aid.*

*(2) This Law shall also establish the competent bodies for the application and implementation of the provisions thereof in accordance with the rules of the European Union on state aid, particularly the State Aid Council of Bosnia and Herzegovina (hereinafter: the Council).*

*Article 4, paragraph 3*

*(3) Authorities with the competence to apply and implement this law shall be as follows:*

*(a) the Council,*

*b) Authorities in charge of the implementation are as follows: the Council of Ministers of BiH, the Government of the Federation of BiH, the Government of Republika Srpska and the Government of the Brcko District of BiH, through their respective competent bodies.*

*Article 7, paragraphs 1, 2 and 5*

*(Composition of the Council)*

*(1) The Council shall be a public institution, which shall independently exercise its function, with a duty to ensure a consistent application of this law throughout the entire territory of Bosnia and Herzegovina. The Council shall consist of eight members:*

*a) three representatives appointed by the Council of Ministers of BiH,*

*b) two representatives appointed by the Government of Republika Srpska,*

*c) two representatives appointed by the Government of the Federation of BiH,*

*d) one representative appointed by the Government of the Brcko District of BiH.*

*(2) The constituent peoples of Bosnia and Herzegovina must have a minimum of two representatives each in the Council.*

*(5) The members of the Council shall be selected from among recognized experts in the area of economy or law. The status of the members of the Council shall be incompatible with any direct or indirect, permanent or temporary duty or office that may expose their independence to a risk or create a possible conflict of interest.*

*Article 9, paragraph 3*

*(Budget of the Council)*

*(3) The funds for funding the work of the Council shall be provided by the Council of Ministers of BiH, Republika Srpska and the Federation of BiH in equal proportion (one third each), and the execution of the Budget of the Council shall be effected through the Ministry of Finance and Treasury of BiH.*

*Article 11, paragraphs 3 and 4*

*(Modus Operandi and Decision-Making)*

*(3) The presence of a minimum of seven members of the Council shall be required to hold sessions of the Council.*

*(4) In order for the decisions to be legally valid, it is necessary that a minimum of seven members of the Council vote for them, which should imply a vote of a minimum of one member from among each constituent people in Bosnia and Herzegovina.*

## **V. Admissibility**

14. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

15. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

*The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:*

*- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.*

*- Whether any provision of an Entity's Constitution or law is consistent with this Constitution.*

*Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.*

16. The Constitutional Court observes that the subject-matter of the request has been the review of constitutionality of the provision of the law enacted by the Parliamentary Assembly of BiH. In that respect, the Constitutional Court emphasizes that it has adopted a stance in its hitherto case-law that the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not prescribe an explicit competence of the Constitutional Court to review the constitutionality of a law or a provision of a law of Bosnia and Herzegovina, however, the substantial term of responsibility determined by the very Constitution of Bosnia and Herzegovina contains a title for such a competence of the Constitutional Court, especially when one takes into

account the role of the Constitutional Court as a body upholding the Constitution of Bosnia and Herzegovina (see the Constitutional Court, Decision no. *U 2/II* of 16 November 2010, paragraph 44, available at the website of the Constitutional Court: [www.ustavisud.ba](http://www.ustavisud.ba)).

17. Bearing in mind the aforementioned, in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court established that the respective request is admissible, as it was filed by an authorized entity, and that there is not a single formal reason whatsoever under Article 19 of the Rules of the Constitutional Court rendering this request inadmissible.

## **VI. Merits**

18. The applicant claims that Articles 7(2) and 11(4) of the Law are not in conformity with Article 1 of Protocol No. 12 to the European Convention, Article II(4) of the Constitution of Bosnia and Herzegovina in connection with the International Convention on the Elimination of All Forms of Racial Discrimination and Article 5 thereof, as well as with the International Covenant on Civil and Political Rights and Articles 2, 25 and 26 thereof, and Article 14 of the European Convention. In addition, the applicant stated that Article 9(3) of the Law is not in conformity with Article III(1) (e) of the Constitution of Bosnia and Herzegovina.

### ***General remarks***

19. The Constitutional Court recalls, first and foremost, that the establishment of a single economic space is a necessary condition on the path of Bosnia and Herzegovina towards the European integration where the competition policy occupies one of the most significant places. The Constitutional Court further recalls that the Presidency of Bosnia and Herzegovina adopted a Decision accepting the Stabilization and Accession Agreement between the European Communities and their Member States and Bosnia and Herzegovina and the Interim Agreement on Trade and Trade-Related Matters between the European Community and Bosnia and Herzegovina (*Official Gazette of BiH*, no. 5/08 – paragraph III of the Decision reads, *inter alia*, as follows “the Interim Agreement shall enter into force on 1 July 2008”). Article 71 of the Stabilization and Accession Agreement between the European Communities and their Member States and Bosnia and Herzegovina, namely Article 36 of the Interim Agreement on Trade and Trade-Related Matters between the European Community and Bosnia and Herzegovina, among other things, prescribes the following: “The following are incompatible with the proper functioning of this Agreement, insofar

as they may affect trade between the Community and Bosnia and Herzegovina: 1. (a) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; (b) abuse by one or more undertakings of a dominant position in the territories of the Community or of Bosnia and Herzegovina as a whole or in a substantial part thereof; (c) any State aid which distorts or threatens to distort competition by favoring certain undertakings or certain products. ... 4. Bosnia and Herzegovina shall establish an operationally independent public authority, which is entrusted with the powers necessary for the full application of paragraph 1(c) within two years from the date of entry into force of this Agreement. This authority shall have, *inter alia*, the powers to authorize State aid schemes and individual aid grants in conformity with paragraph 2 of this article, as well as the powers to order the recovery of State aid that has been unlawfully granted.“ The Parliamentary Assembly of BiH enacted the Law governing general conditions for the allocation, the control of allocation and use, the approval and recovery of state aid that has been unlawfully granted, the inventory of state aid and the reporting on state aid, with the aim of establishing and ensuring competitive market conditions and of fulfilling the obligations committed to under the international agreements that were entered into containing provisions on state aid. The enactment of the mentioned law, among other things, introduced in Bosnia and Herzegovina the competition policy as one of the prerequisites for joining the European Union. The law established the competent bodies for the application and implementation of the provisions thereof in accordance with the rules of the European Union on state aid, the Council in particular.

***a) As to Articles 7(2) and 11(4) of the Law***

20. The applicant claims that Article 7, paragraph 2 of the Law is discriminatory, because it makes it impossible for the members of Others to be appointed as members of the Council under equal conditions as members of the constituent peoples.

21. In addition, the applicant claims that Article 11, paragraph 4 of the Law is also discriminatory, because it makes it impossible for the members of Others to vote for the decisions of the Council under equal conditions as members of the constituent peoples (greater value of the vote of the members coming from among the constituent peoples when compared to the value of the vote of the members of Others). In this part the applicant also objects to the qualified majority (seven out of eight), which is prescribed for decision-making, which is also in the service of discrimination.

22. According to the applicant's allegations, the aforesaid is inconsistent with Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

23. **Article II(4) of the Constitution of BiH** reads as follows:

*Article II(4)*

*The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

24. **Article 1 of Protocol No. 12** to the European Convention reads as follows:

Article 1

General prohibition of discrimination

*1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

*2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

25. The Constitutional Court indicates that with respect to the interpretation of the notion of discrimination in terms of Article 1 of Protocol No. 12, in the Decision *Sejdić and Finci* the European Court of Human Rights pointed out the following (paragraph 55): "The notion of discrimination has been interpreted consistently in the Court's jurisprudence concerning Article 14 of the Convention. In particular, this jurisprudence has made it clear that "discrimination" means treating differently, without an objective and reasonable justification, persons in similar situations (see paragraphs 42-44 above and the authorities cited therein). The authors used the same term, "discrimination", in Article 1 of Protocol No. 12. Notwithstanding the difference in scope between these provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The

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Court does not therefore see any reason to depart from the settled interpretation of “discrimination”, noted above, in applying the same term under Article 1 of Protocol No. 12 (as regards the case-law of the United Nations Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights, a provision similar – although not identical – to Article 1 of Protocol No. 12 to the Convention, see Nowak, *CCPR Commentary*, N.P. Engel Publishers, 2005, pp. 597-634).”

26. The Constitutional Court finds that Article 7(2) of the Law prescribes that “The constituent peoples of Bosnia and Herzegovina must have a minimum of two representatives each in the Council”, and that Article 11(4) of the Law prescribes that “In order for the decisions to be legally valid, it is necessary that a minimum of seven members of the Council vote for them, which should imply a vote of a minimum of one member from among each constituent people in Bosnia and Herzegovina”. The applicant finds these legal solutions to be discriminatory, because they make it impossible for the members of Others to be appointed as members of the Council under equal conditions as the members of the constituent peoples and because they make it impossible for them to vote for the members of the Council under equal conditions.

27. The Constitutional Court indicates, first and foremost, that in the Decision no. *U-8/04* (see the Constitutional Court, Decision no. *U-8/04* of 25 June 2004, *Official Gazette of BiH*, no. 40/04), the Constitutional Court indicated that “Finally, the issue of the interpretation of the notion of “effective participation of the constituent peoples in the state authority”, which has already been mentioned in this decision, by applying it beyond the constitutional provisions cited above, should be applied functionally and in line with the provision of Article IX(3) of the Constitution of Bosnia and Herzegovina, according to which “officials appointed to positions in the institutions of Bosnia and Herzegovina, as a rule, shall be representative of the composition of the peoples of Bosnia and Herzegovina”. On the one hand, this means that the state authority should, in principle, be a representative reflection of an advanced co-existence of all peoples in Bosnia and Herzegovina, including national minorities and Others. On the other hand, “effective participation of constituent peoples in the authority”, if it exceeds the constitutional framework, must never be carried out or imposed to the detriment of effective functioning of the state and its authorities (*ibid*, *U 8/04*, paragraph 33). To that end, the Constitutional Court reasoned that “no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH may be applied also for other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, [...] they are legitimized solely by their constitutional rank and,

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therefore, have to be narrowly construed. In particular, it cannot be concluded that the Constitution of Bosnia and Herzegovina provides for a general institutional model which could be transferred to the Entity level or that similar, ethnically-defined institutional structures on an Entity level need not meet the overall binding standard of non-discrimination under the Constitution of Bosnia and Herzegovina according to Article II(4) of the Constitution of Bosnia and Herzegovina, or the constitutional principle of equality of constituent peoples” (*ibid*, *U 5/98 III*, paragraph 68). Accordingly, a correct conclusion to be inferred from this is that this is the only way to establish a compromising relationship between affiliation with one constituent people and a citizen’s option” (*ibid*, *U 8/04*, paragraph 33).

28. Furthermore, in its Decision no. *U 4/05*, the Constitutional Court established that Serbs were discriminated against when compared to Bosniacs and Croats, because the Statute of the City of Sarajevo contained an explicit provision which guaranteed only Bosniacs and Croats and members of Others a minimum number of seats in the City Council of Sarajevo irrespective of the election results. The Constitutional Court referred to its stance in the Decision no. *U 5/98* on the constituent status of peoples dated 1 July 2000 (*ibid*, paragraph 115), which reads as follows: “However, if a system of government is established which reserves all public offices only to members of certain ethnic groups, ‘the right to participate in elections, to take part in government as well as in the conduct of public affairs at any level and to have equal access to public services’ is seriously infringed upon for all those persons or citizens who do not belong to these ethnic groups insofar as they are denied the right to stand as candidates for such governmental or other public offices”.

29. In the case at hand the Constitutional Court finds that Article 7(1) of the Law, among other things, prescribes that the Council shall consist of eight members (three representatives are appointed by the Council of Ministers of BiH, two representatives are appointed by each of the Governments of the Entities and one representative is appointed by the Government of the Brčko District of BiH). The Constitutional Court further finds that Article 7(2) of the Law prescribes that six members of the Council (two out of eight must come from among each of the constituent peoples) must be from among the constituent peoples. It follows that two members of the Council may be (also) from among Others and/or citizens. In addition, Article 7(5) of the Law undisputedly prescribes equal conditions (profession, independence, prohibition of exercising any other office that may bring about the conflict of interest) that must be met by the members of the constituent peoples and members of Others and/or citizens in order to be eligible for appointment as members of the Council.

30. The Constitutional Court observes that Article 11(4) of the Law prescribes that in order for decisions to be legally valid, it is necessary that a minimum of seven members of the Council vote for them, which implies a vote of a minimum of one member coming from among each constituent people in Bosnia and Herzegovina. The Constitutional Court finds that it follows, first and foremost, from the mentioned article that a decision will not be legally valid if not voted for by seven members of the Council, whereby three votes out of the said seven votes must come from among the constituent peoples. As the Constitutional Court previously analyzed that the composition of the Council may include two members who may come from among Others and/or citizens, it follows that a decision will not be legally valid if not voted for by one of the two possible members coming from among Others and/or citizens. Thus, a decision may not be adopted without the votes of the members of the constituent peoples and without the votes of the members of Others and/or citizens. It follows that Article 11(4) of the Law does not give a greater value to the votes of the members of the Council from among the constituent peoples. Anyhow, Article 11(3) of the Law prescribes that the presence of a minimum of seven members, out of eight, of the Council shall be required to hold sessions of the Council. That means that conditions do not exist for holding a session of the Council without the members of the constituent peoples or without the members of Others and/or citizens.

31. On the basis of the aforementioned, it follows that the members of Others and/or citizens were prevented neither from being appointed as members of the Council under equal conditions as members of the constituent peoples, nor were they prevented from voting for the decisions of the Council under equal conditions as members of the constituent peoples. In the opinion of the Constitutional Court, by prescribing a mandatory participation of the constituent peoples in the Council and, in connection thereto, an indisputable obligation of having votes of the members of the constituent peoples for decision-making, without thereby preventing the members of Others and/or citizens from being, under equal conditions, members of the Council, or preventing them from voting, under equal conditions, for the decisions of the Council, the legislator precisely observed the principle referred to in Article IX(3) of the Constitution of Bosnia and Herzegovina, i.e. that the state authority ought to be, in principle, a representative reflection of an advanced co-existence of all peoples in Bosnia and Herzegovina, including national minorities and Others and/or citizens. It follows that the legislator complied with the mentioned principle and the principle of non-discrimination.

32. The Constitutional Court concludes that Articles 7(2) and 11(4) of the Law are not inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, because the members of Others and/or citizens were neither prevented from being appointed as members of the Council under equal conditions as members of the constituent peoples, nor were they prevented from voting for the decisions of the Council under equal conditions as members of the constituent peoples.

33. As to the applicant's allegations referring to the case of *Sejdić and Finci*, the Constitutional Court refers to the following. In the case of *Sejdić and Finci*, the European Court concluded "that the applicants' continued ineligibility to stand for election to the House of Peoples of the Parliamentary Assembly of BiH lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1". Besides, the European Court indicated that "The lack of a declaration of affiliation by the present applicants with a "constituent people" also rendered them ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 as regards the House of Peoples (see paragraph 50 above). Moreover, the principles relating to discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner (see the preceding paragraph). It follows that the constitutional provisions which render the applicants ineligible to stand for election to the Presidency must also be considered discriminatory and as such they constitute a violation of Article 1 of Protocol No. 12, and the Court does not hold that there is any relevant distinction to be drawn in this regard between the House of Peoples and the Presidency of BiH. Accordingly, and for the reasons outlined in detail in paragraphs 47-49 above in the context of Article 14, the Court finds that the impugned precondition relating to eligibility to stand for election to the Presidency constitutes a violation of Article 1 of Protocol No. 12".

34. On the basis of the aforementioned it follows that the applicant unfoundedly referred to the mentioned judgment, for the reason that in that case the applicants were rendered ineligible and prevented from standing for election to the House of Peoples of the Parliamentary Assembly and the Presidency of Bosnia and Herzegovina, because they do not come from among the constituent peoples. In the present case, the members of Others and/or citizens were neither prevented from being appointed as members of the Council under equal conditions as members of the constituent peoples, nor were they prevented from voting for the decisions of the Council under equal conditions as members of the constituent peoples.

35. As regards objections to the qualified majority (seven out of eight), which is prescribed for decision-making, which, according to the applicant's allegations, serves discrimination, the Constitutional Court finds that it is the exclusive competence of a legislator to prescribe whether the adoption of decisions requires majority or qualified majority. Namely, in the procedure of abstract jurisdiction of the Constitutional Court, the Constitutional Court is not called upon to appraise whether a legal solution is good or bad, but exclusively to review individual legal provisions or an entire law in comparison to the constitutional solutions, in particular whether a legislator imposed discrimination by way of the mentioned provisions. The Constitutional Court concluded beforehand that a legislator did not impose discrimination.

36. Considering the conclusion in connection with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, the Constitutional Court holds that there is no need to examine separately the allegations of the applicant as to the violation of Article II(4) of the Constitution of Bosnia and Herzegovina in connection with the International Convention on the Elimination of All Forms of Racial Discrimination and Article 5 thereof, as well as with the International Covenant on Civil and Political Rights and Articles 2, 25 and 26 thereof and Article 14 of the European Convention.

***b) As to Article 9, paragraph 3 of the Law***

37. The applicant claims that Article 9(3) of the Law is in contravention of the provision of Article III(1)(e) of the Constitution of Bosnia and Herzegovina, because the Council is a new institution at the state level, so that the funding should be effected from the Budget of the institutions and the international obligations of BiH, and not through one third coming from the Council of Ministers, Republika Srpska and the Federation of BiH each.

38. **Article III(1) of the Constitution of Bosnia and Herzegovina** reads as follows:

***Article III:***

***Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities***

**1. Responsibilities of the Institutions of Bosnia and Herzegovina**

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

- a) Foreign policy.*
- b) Foreign trade policy.*
- c) Customs policy.*
- d) Monetary policy as provided in Article VII.*
- e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.*
- f) Immigration, refugee, and asylum policy and regulation.*
- g) International and inter-Entity criminal law enforcement, including relations with Interpol.*
- h) Establishment and operation of common and international communications facilities.*
- i) Regulation of inter-Entity transportation.*
- j) Air traffic control.*

39. The Constitutional Court finds, first and foremost, that Article 1(2) of the Law establishes the competent bodies for the application and implementation of the Law in accordance with the rules of the European Union on state aid, particularly the Council, to which Article 7(1) of the Law attributed a determinant of a public institution, which shall independently exercise its activity, with an obligation to ensure a consistent application of this Law throughout the entire territory of Bosnia and Herzegovina. The Constitutional Court further finds that Article 4 of the Law, among other things, establishes authorities with the competence to apply and implement this Law, as follows: a) the Council, b) authorities in charge of the implementation: the Council of Ministers of BiH, the Government of the Federation of BiH, the Government of Republika Srpska and the Government of the Brčko District of BiH, through their respective competent bodies. Furthermore, Article 9(3) of the Law prescribes that the funds for funding the work of the Council shall be provided by the Council of Ministers of BiH, Republika Srpska and the Federation of BiH in equal proportion (one third each), and that the execution of the Budget of the Council shall be effected through the Ministry of Finance and Treasury of BiH.

40. The Constitutional Court will refer to certain laws by means of which the Parliamentary Assembly of BiH established the institutions at the state level and by means of which, among other things, it regulated the method of funding thereof. For instance the Competition Act established the Competition Council of Bosnia and Herzegovina. The same act prescribes that the funds for the performance of responsibilities and the exercise of affairs of the Competition Council shall be secured from the Budget of the institutions of Bosnia and Herzegovina. Furthermore, the Food Law established the Food Safety Agency of Bosnia and Herzegovina. The same law prescribes that the funds for the work of the Agency shall be secured from the State Budget of Bosnia and Herzegovina. On the other hand, the Law on the Fiscal Council of Bosnia and Herzegovina established the Fiscal Council of Bosnia and Herzegovina. The same law prescribes that the funding of the work of the Fiscal Council shall be provided by the Council of Ministers of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska in equal proportions (one third each). Further, the Law on Refugees from BiH and Displaced Persons in BiH established the Return Fund of Bosnia and Herzegovina. The same law prescribes that the primary sources of funding for the Return Fund include the funds of the State Budget, the Federation of BiH, Republika Srpska and the Brčko District of BiH, which are intended for the return and reconstruction. The Constitutional Court observes that the Parliamentary Assembly of BiH regulated differently the funding method (exclusively from the Budget of the institutions of BiH or combined with a portion provided by the State and a portion by the Entities, and the Brčko District) of these institutions established at the state level by the mentioned laws.

41. In that respect the Constitutional Court refers to a portion of the text of Article IV(4) 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”. The Constitutional Court finds that the cited constitutional provision grants the power to the Parliamentary Assembly of BiH to enact laws necessary for the implementation of the decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution, by means of which it governs independently relations regulated by the said laws. In that sense the Parliamentary Assembly of BiH has the power to regulate new and abolish the existing legal regulations of such relations, amend them, i.e. regulate them in different ways, depending on different circumstances. However, when regulating such relations, the Parliamentary Assembly of BiH shall be obliged to observe all constitutional provisions.

42. In the present case, the applicant claims that, although it established by Law the Council as an institution at the state level, the Parliamentary Assembly of BiH prescribed the funding of the Council both by the State and by the Entities, so that it acted inconsistent with Article III(1)(e) of the Constitution of Bosnia and Herzegovina. The Constitutional Court recalls the text of Article III(1)(e) of the Constitution of Bosnia and Herzegovina (Responsibilities of the Institutions of Bosnia and Herzegovina) “The following matters are the responsibility of the institutions of Bosnia and Herzegovina: ... e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina”, as well as the text of Article IV(4)(b) of the Constitution of Bosnia and Herzegovina: “The Parliamentary Assembly shall have responsibility for: ... Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.” The Constitutional Court finds that the cited provisions of the Constitution of Bosnia and Herzegovina clearly prescribe an obligation and responsibility of Bosnia and Herzegovina to fund the institutions of Bosnia and Herzegovina, within the meaning of Article III(1)(e) of the Constitution of Bosnia and Herzegovina, and, under Article IV(4)(b) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of BiH shall have responsibility for deciding upon the sources and amounts of funds for the operation of the institutions of Bosnia and Herzegovina. Thus the power of the Parliamentary Assembly of BiH to decide on the model of the funding of the institutions of Bosnia and Herzegovina is indisputable. However, the obligation and responsibility of Bosnia and Herzegovina to fund the institutions of Bosnia and Herzegovina is also indisputable. In the present case, the Parliamentary Assembly of BiH decided that one third of the funds for the operation of the Council be provided by the Council of Ministers of BiH, as an institution at the state level. Considering the aforementioned, and in accordance with the constitutional authority, the Parliamentary Assembly of BiH, by prescribing a combined funding model for the Council (State and Entities), did not act inconsistent with the provision of Article III(1)(e) of the Constitution of Bosnia and Herzegovina. In view of the aforementioned, the Constitutional Court cannot agree with the premise of the applicant reading that the Council being a new institution at the state level and as such should be funded exclusively and completely from the Budget of the institutions and international obligations of BiH, because Article III(1)(e) of the Constitution of Bosnia and Herzegovina does not prescribe strictly that new institutions at the state level must be exclusively (in full) funded from the Budget of the institutions and international obligations of BiH.

43. The Constitutional Court concludes that Article 9(3) of the Law is in conformity with Article III(1)(e) of the Constitution of Bosnia and Herzegovina.

### **VIII. Conclusion**

44. The Constitutional Court concludes that Articles 7(2) and 11(4) of the Law are not inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, because the members of Others and/or citizens were neither thwarted in getting appointed as members of the Council under equal conditions as members of the constituent peoples, nor were they thwarted in voting for the decisions of the Council under equal conditions as members of the constituent peoples.

45. The Constitutional Court concludes that the Parliamentary Assembly of BiH, by prescribing a combined funding model for the Council (State and Entities), did not act inconsistent with the provision of Article III(1)(e) of the Constitution of Bosnia and Herzegovina.

46. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as set out in the enacting clause of this decision.

47. Under Article 43 of the Rules of the Constitutional Court, annex of this decision shall make Separate Dissenting Opinion of Vice-President Margarita Tsatsa-Nikolovska and Judge Constance Grewe.

48. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mirsad Ćeman  
President  
Constitutional Court of Bosnia and Herzegovina

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**SEPARATE DISSENTING OPINION OF JUDGE CONSTANCE GREWE JOINED BY  
VICE-PRESIDENT MARGARITA TSATSA-NIKOLOVSKA**

**I - In the present case the Constitutional Court of Bosnia and Herzegovina has decided:**

- to dismiss the request of Mr. Zeljko Komsic,
- to declare Articles 7(2) and 11(4) of the Law on the System of State Aid in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, no. 10/12) to be in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- to declare Article 9(3) of the Law on the System of State Aid in Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, no. 10/12), compatible with Article III(1)(e) of the Constitution of Bosnia and Herzegovina.

**II – The scope of dissent**

I agree with the majority on the admissibility of the request (§§ 14 to 17) as well as on the conformity of Article 9(3) of the Law on the System of State Aid in Bosnia and Herzegovina with Article III(1)(e) of the Constitution of Bosnia and Herzegovina (§§ 37 to 43 of the reasoning). But I respectfully dissent on the constitutional conformity of Articles 7(2) and 11(4) of the Law on the System of State Aid in Bosnia and Herzegovina (§§ 20 to 36).

**III - The incompatibility of Articles 7(2) and 11(4) of the Law on the System of State Aid in Bosnia and Herzegovina with Article II(4) of the Constitution of Bosnia and Herzegovina and with Article 1 of Protocol 12 to the ECHR**

The facts of the case at hand are located between those relating to the equality between constituent peoples and those implying a complete exclusion of the Others and/or citizens. The questions are raised whether and to what extent 1- the Others are prevented from being appointed as members of the Council **under equal conditions** as members of the constituent peoples 2- they are prevented from voting for the decisions of the Council **under equal conditions** as members of the constituent peoples.

1. In order to conclude in favor of the constitutional conformity, the majority relies on the assumption that one or two Others and/or citizens would be designated a member of the Council.

But the law does not provide positions reserved for Others and/or citizens, unlike the constituent peoples. Therefore the majority neglected that there is no legal obligation to appoint an Other and/or citizen to the Council whereas the appointment of six members of constituent peoples is mandatory. This is obviously an unequal treatment.

Likewise, a vote of Others and/or citizens is not necessary in order to reach a valid decision in the Council, whereas such a decision may not be reached without the votes of the constituent peoples. Admittedly, if two Others and/or citizens are designated, a valid decision can be reached only with the participation of at least one Other. But again, this membership is not necessary because it is not prescribed. If there is no Other and/or citizen or only one, a valid decision can be reached without the participation of any Other. Therefore the participation of the Others and/or citizens in the decision making has not the same value than the participation of the constituent peoples.

2. Does this unequal treatment amount to discrimination? In other words, are there some objective and reasonable justifications for such a differential treatment? The majority tries to justify its reasoning by referring to the constitutional case law, especially *U 5/98*, *U 8/04* and the differences with regard to the *Sejdic and Finci* case.

Yet in *U 5/98*, it is clearly stated that the power sharing only by the constituent peoples represents a risk of discrimination and that therefore it has to be construed “narrowly”: “Besides, no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH may be applied as well for other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, as it shall be shown below, they are legitimised solely by their constitutional rank and therefore, have to be narrowly construed” (§ 68).

As to *U 8/04*, the facts of this case are quite different since it deals with a veto, i.e. a violation of the vital interest of one of the constituent peoples and not at all with the relationship between these peoples and the Others and/or citizens. However, a reconciliation between the principle of constituent peoples and Article IX(3) of the Constitution of Bosnia and Herzegovina is highlighted in *U 8/04*. Pursuant to this provision, “Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina”. In his respect, the Court mentions “an advanced co-existence of all peoples in Bosnia and Herzegovina, including national minorities and Others” (§ 27). According to its starting point,

the assumption of the appointment of at least one Other, the majority holds the regulations relating to the Council on State Aids compatible with Article IX(3). I cannot agree with this conclusion and I find no further justification of this unequal treatment neither in the reasoning of the majority nor in the legislator's reply to the request.

3. Moreover, the legislator is not free to prescribe a qualified majority for decision-making when, in so doing, it violates the non-discrimination principle. Namely, it is indisputable that, when combining the provisions of Articles 7(1) and 11(4) of the Law, the requirement of a qualified majority favors the constituent peoples in the decision-making process.

4. As to the differences between this case and the facts of the *Sejdic and Finci* application, they are obvious since in the latter case there is a complete exclusion from the right to stand for elections. But what the European Court of Human Rights considers generally to be discriminatory, independently from the concrete case, is not the power sharing as such but the monopoly of the constituent peoples. In the *Azra Zornic v. Bosnia and Herzegovina* (no. 3681/06, judgment of 15 July 2014) application the European Court noted the following: "In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing" (see *ibid.*, § 45). The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace (*ibid.*). However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions."

Therefore the majority should have at least examined the question of reasonable and objective justifications for this discrimination.

For all these reasons I hold that in this case the Court should have granted the request as to Articles 7(2) and 11 (4) of the challenged law.