

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 – Revised Text (*Official Gazette of Bosnia and Herzegovina* no. 94/14 ), 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 25/14**, 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 Article 22(3)(a) and Article 24(2) of the Competition Act (*Official Gazette of Bosnia and Herzegovina*, nos. 48/05, 76/07 and 80/09) is hereby dismissed.

It is established that Article 22(3)(a) and Article 24(2) of the Competition Act (*Official Gazette of Bosnia and Herzegovina*, nos. 48/05, 76/07 and 80/09) are compatible 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.

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 the constitutionality of Article 22(3)(a) and Article 24(2) of the Competition Act (*the Official Gazette of BiH*, nos. 48/50, 76/07 and 80/09).

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

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

3. The Constitutional-Legal Committee of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ("the Constitutional-Legal Committee") submitted its reply to the request on 5 March 2015.

## **III. Request**

### **a) Allegations from the request**

4. The applicant alleges that the provisions of Article 22(3)(a) and 24(2) of the Competition Act are not compatible 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 Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 2, 25 ad 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention.

5. In introductory part, the applicant cited the relevant provisions of the Constitution of Bosnia and Herzegovina, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights as well as the relevant provisions of the European Convention. The applicant noted that the Constitution of Bosnia and Herzegovina distinguishes between the "constituent peoples" (the persons who declare themselves as Bosniacs, Croats and Serbs) and "Others" (the members of ethnic minorities and persons who do not declare themselves as members of any group due to mixed marriages, mixed marriages of their parents or for other reasons). Giving preference to the representatives of the "constituent peoples" constitutes a violation of the Constitution of Bosnia and Herzegovina and of the European Convention and is contrary to the Decision of

the European Court of Human Rights (see, ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, judgment 22 December 2009), since it prevents “Others” from participating on an equal footing in holding public offices. In this connection, the applicant pointed out that the State of Bosnia and Herzegovina signed and ratified the Stabilization and Accession Agreement with the European Union in 2008 and thus undertook the obligation to fulfill the priorities from the European Partnership, namely the elimination of discrimination to ensure full compliance with the European Convention and the Council of Europe post-accession commitments (see Annex to the Council Decision 2008/211/EZ of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with BiH and repealing Decision 2006/55/EZ, Official Journal of the European Union L80/21(2008)).

6. In addition, the applicant pointed to the case-law of the European Court, according to which an act or regulation is discriminatory if it treats differently a person or group of persons in the same situation, where it is of no relevance whether discrimination is the consequence of a different legal treatment or the application of the law itself (see, ECtHR, *Ireland v. The United Kingdom*, judgment of 18 January 1978, Series A no. 25, paragraph 226). The applicant pointed out that the challenged legal solutions rather clearly define discriminatory activity of the State against individuals insofar as the guarantees are concerned implying that every person is entitled, without any discrimination, to access to public services and equal valuation in the decision-making in the public institutions.

7. Article 22(3) of the Competition Act, as further alleged by the applicant, stipulates that the appointment of three members of the Competition Council that are appointed by the Council of Ministers of Bosnia and Herzegovina (“the Council”) shall be carried out so that three members of the Competition Council shall be appointed by the Council, *with one member from amongst each of the three constituent peoples*. The State of Bosnia and Herzegovina, as further alleged by the applicant, through the Council and in accordance with the challenged provisions, is forced to remove the persons who do not belong to the constituent peoples from the list of the persons who applied for a position advertised and to prevent them from having access to the given position. In other words, as the applicant pointed out, *all those who are not the members of the constituent peoples shall not have any legal right to be selected during the competition for the advertised position on the basis of their professional qualifications and work experience*.

8. As to the challenged provision of Article 24 of the Competition Act, the applicant pointed out that the challenged Article stipulates discriminatory limitations with regards to the decision-making. Namely, the provision of Article 24(1) stipulates a high quorum to take a decision, namely five out of a total of six members of the Competition Council, and that, according to paragraph 2, decisions shall be taken by the majority vote provided that at least one member from among each constituent people must vote for each decision, which constitutes discrimination in the decision-making process, as it places the members of the Competition Council from among the constituent peoples in more favorable position. The applicant further alleges that there is a theoretical possibility for the Government of the Federation of Bosnia and Herzegovina and the Government of the Republika Srpska to appoint members of the Competition Council from among “Others”. However, in that case, there is a possibility that a decision of the four members of the Competition Council, one of whom is from among the constituent peoples, is not valid although it is taken by the majority. This would happen if one or two members of the Competition Council from among constituent peoples were against a decision or if they did not form part of the quorum for decision-making. The applicant noted that such a situation constitutes a greater value of the vote of the members of the Competition Council from amongst the constituent peoples solely on the ground of ethnic affiliation, which is not relevant to the application of the competition law. Also, the applicant pointed out that the last sentence of Article 24(2) stressed that *a member of the Competition Council cannot abstain from voting ...* which further renders senseless the decision-making on the basis of ethnic principle, because the potential members of the Competition Council that could be appointed by the Entities from among “Others” *are forced to vote on decisions while their vote is of no value whatsoever even when it makes that majority, if that majority does not contain the vote of the members of the Competition Council from among all three constituent peoples.*

9. The applicant further pointed out that the arguments in favor of adopting such a legal solution are the particularity of Bosnia and Herzegovina and its ethnic composition, disregarding, however, at the same time the existence of those citizens who do not belong to any of the constituent peoples, who were prevented thus from becoming experts in the competition law. There is no objective and reasonable justification, by means of which the Council could deny the citizens of Bosnia and Herzegovina not coming from among the constituent peoples the possibility to participate on an equal footing in the decision-making procedure and in the implementation of regulations protecting the competition on the market

of Bosnia and Herzegovina and in the implementation of the demands of the European Union in the matters of the competition policy and law defined in Articles 87-89 of the Lisbon Treaty, namely Articles 101-109 according to the new numeration under the Lisbon Treaty, and the Council Regulation EC 1/2003. The aforementioned Articles of the Lisbon Treaty and the Council Regulation EC 1/2003, according to the *acquis communautaire*, have a direct effect in the Member States thereby surpassing the concept of national and ethnic.

10. Article 36(2) of the Interim Agreement on Trade and Trade-Related Matters between the European Community and Bosnia and Herzegovina, which entered into force in 2008, *Competition and Other Economic Provisions*, stipulates as follows: “2. Any practices contrary to 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 (hereinafter referred to as “the EC Treaty”) and interpretative instruments adopted by the Community institutions.” In this respect, as the applicant alleged, it would be irrational to make the validity of the implementation of the regulations on the market competition conditional upon ethnic origin of the members of the body taking decisions by applying the Competition Act and the Competition Rules of the EU.

11. The challenged provisions of the Competition Act disregard a group of citizens who refuse to declare their ethnic affiliation or declare their ethnic affiliation other than the constituent peoples. The existence of the challenged legal provisions, as further alleged by the applicant, is incompatible with the constitutional principles under Article II of the Constitution of Bosnia and Herzegovina, the European Convention and the judgment of the European Court of Human Rights in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. It follows from the aforementioned that there is no single objective and reasonable justification whatsoever for the lack of possibility for the members of “Others” and the citizens of Bosnia and Herzegovina to apply under equal conditions in the competition procedure for the mentioned positions in the public institutions. Such solutions, as further pointed out by the applicant, deprive *de facto* and *de iure* this group of citizens of Bosnia and Herzegovina of the guarantee for equal participation in managing public affairs at all levels and of the right to have access, on general terms of equality, to public services. Furthermore, there is no reasonable and objective justification for the validation of the vote of a member of the Competition Council from among the constituent peoples when taking decisions in the Competition Council. The challenged provisions essentially relate to the identical situation as

that in the mentioned judgment of the European Court, and the reasons given in the aforementioned judgment can therefore be applied analogously to the mentioned situation, i.e. the impossibility of having access to public offices, because the practical effects on the persons who are not the members of the constituent peoples are identical.

12. Finally, the applicant quotes the constitutional guarantees under Article II(1) and II(2) of the Constitution of Bosnia and Herzegovina and outlines that Bosnia and Herzegovina and both Entities, through such treatment, discriminate against its citizens, which is inconsistent with Article 1 of Protocol No. 12 to the European Convention and Article II(4) of the Constitution of BiH in conjunction with Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination and Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention.

**b) Reply to the request**

13. The Constitutional-Legal Committee alleged in its reply to the request that it had considered the request at the session held on 4 March 2015 and concluded unanimously after discussion to “inform the Constitutional Court of the aforementioned facts which would decide, in accordance with its responsibilities, on the compatibility of the respective law with the Constitution of Bosnia and Herzegovina”.

**IV. Relevant Laws**

14. The **Competition Act** (*Official Gazette of BiH*, nos. 48/05, 76/07 and 80/09), in its relevant part, reads as follows:

*Article 1*

*(Subject-matter)*

*This Act regulates the rules, measures and methods of protection of market competition, the jurisdiction and the way of operation of the Competition Council on protection and promotion of market competition in Bosnia and Herzegovina.*

*Article 20*

*(Competition Council)*

*(1) Body for implementation of protection of market competition in terms of this Act is the Competition Council.*

*(2) The composition of the Competition Council includes the offices for competition in the Federation of Bosnia and Herzegovina and in Republika Srpska, as organizational units outside the seat of the Competition Council.*

#### *Article 21*

##### *(Status of the Competition Council)*

*(1) The Competition Council is an independent body which shall ensure consistent implementation of this Act on the whole territory of Bosnia and Herzegovina and has the exclusive competence in making decisions on the presence of prohibited competition practices in the market.*

*(2) The Competition Council has a legal person status and its seat is in Sarajevo.*

*(3) Funds for the implementation of the competencies and conducting the activities of the Competition Council shall be provided from the Budget of the Institutions of Bosnia and Herzegovina.*

#### *Article 22*

##### *(The composition of the Competition Council)*

*(1) The Competition Council consists of six members who are appointed for a term of six years with the possibility of another re-election. The mandate of the members of the Competition Council can not be terminated before the expiry of the prescribed period, except in cases specified in Article 23 of this Act.*

*(2) The Members of the Competition Council shall be elected from among recognized experts in the relevant field, with administrative status equal to that of the judges which is incompatible with the performance of any direct or indirect, permanent or temporary functions, with the exception of academic activities and work in professional and scientific bodies.*

*(3) Appointment of the Competition Council is carried out in the following way:*



*a) three members of the Competition Council shall be appointed by the Council of Ministers of Bosnia and Herzegovina, with one member per each of the three constituent peoples;*

*b) two members shall be appointed by the Government of the Federation of Bosnia and Herzegovina;*

*c) one member shall be appointed by the Government of the Republika Srpska.*

#### *Article 24*

##### *(Modus operandi and decision-making of the Competition Council)*

*(1) The Competition Council may make valid decisions if the session is attended by at least five members of the Competition Council.*

*(2) Decisions of the Competition Council shall be made by majority vote of members present, provided that at least one member from among the constituent peoples must vote for each decision. A member of the Competition Council can not abstain from voting.*

## **V. Admissibility**

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

16. 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.*

17. As the request for the review of constitutionality of the state law was lodged by the Chairman of the Presidency of Bosnia and Herzegovina, the Constitutional Court notes that the present request was filed by an authorized person under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

18. In addition, the Constitutional Court observes that the subject-matter of the request is the review of constitutionality of a law enacted by the Parliamentary Assembly of BiH. In this connection, the Constitutional Court emphasizes that it adopted a position in its hitherto case-law that the provision of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not prescribe the explicit jurisdiction of the Constitutional Court to review the constitutionality of laws or of the provisions of the laws of Bosnia and Herzegovina. However, the substantial notion of the jurisdiction as specified by the very Constitution of Bosnia and Herzegovina contains in itself the title for the Constitutional Court to have such jurisdiction, in particular when one takes into account the role of the Constitutional Court as the body upholding the Constitution of Bosnia and Herzegovina (see the Constitutional Court, Decision *no. U 2/11* of 16 November 2010, paragraph 44, available on the website of the Constitutional Court: [www.ustavnisud.ba](http://www.ustavnisud.ba)).

19. Bearing in mind the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Constitutional Court's Rules, the Constitutional Court establishes that the present request is admissible, as it was filed by an authorized entity, and that there is not a single formal reason under Article 19 of the Constitutional Court's Rules rendering this request inadmissible.

## **VI. Merits**

20. The applicant claims that Article 22(3)(a) and Article 24(2) of the Competition Act are not compatible with Article 1 of Protocol No. 12 to the European Convention and Article II(4) of the Constitution of BiH in conjunction with Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention.

***General remarks***

21. The Constitutional Court, first and foremost, recalls that the creation of a single economic space is the necessary requirement on the path of Bosnia and Herzegovina towards the European integration. The Competition Act enacted in 2001 regulates for the first time the competition policy in Bosnia and Herzegovina. However, on 27 July 2005 a “new” Competition Act entered into force, which constitutes a legal framework for the protection of the market competition in Bosnia and Herzegovina and which is the basic and general regulation regulating this area in Bosnia and Herzegovina. This law regulates the rules, measures and procedures for the protection of the market competition, and the Competition Council is established as an independent body with the status of a legal person in accordance with the provisions of Articles 20 and 21 of the Competition Act. The Competition Council has the exclusive competence to take decisions on the existence of prohibited competition practices on the market of Bosnia and Herzegovina, including the prevention of prohibited market practices of business entities which is reflected in the entry into prohibited contracts/agreement (cartel arrangements), concerted practices, the implementation of measures to prevent the abuse of dominant position of business entities and other practices, the aim or the cause of which are the prevention, restriction or distortion of the market competition, for which purpose the Competition Act is being consistently applied. The Competition Council, by implementing the Competition Act, ensures the promotion of the principle of free market competition and prevents, by means of the established measures, certain business entities from being placed unjustly in a more favorable position over others.

***As to Article 22(3)(a) and Article 24(2) of the Competition Act***

22. The applicant holds that, due to the challenged provision of Article 22(3)(a) of the Competition Act, the persons who are not the members of the constituent peoples do not have any legal right to be selected for the position of member of the Competition Council on the

basis of their professional qualifications and work experience. Giving preference to the representatives of the “constituent peoples” constitutes a violation of the Constitution of Bosnia and Herzegovina and of the European Convention and it is contrary to the Decision of the European Court in the case of *Sejdić and Finci*, since “Others” as a group of citizens refusing to declare their ethnic affiliation or declaring to belong to an ethnic group other than the constituent peoples are prevented from participating on an equal footing in holding public offices.

23. In addition to the aforesaid, the applicant claims that the provision of the challenged Article 24(2) of the Competition Act determines “discriminatory limitations in taking decisions”, as it determines a high quorum to take a decision (five out of a total of six members) provided that at least one member from among each constituent people must vote for each decision, thereby “constituting a greater value of the vote of a member of the Competition Council coming from among the constituent peoples solely on the ground of ethnic affiliation which is not relevant to the application of the competition law. According to the allegations of the applicant, the aforesaid is inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention.

24. **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.*

25. **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, color, 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.*

26. Having examined the allegations of the applicant, the Constitutional Court emphasizes that Article 1 of Protocol No. 12 to the European Convention provides for the general principle of prohibition of discrimination and guarantees the enjoyment of all rights set forth by the law 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. Furthermore, the provision of Article of Protocol No. 12 to the European Convention stipulates that no one shall be discriminated against by any public authority on any ground. Thus, the basic principle of non-discrimination encompasses not only the rights guaranteed by the European Convention but also the national laws, as stipulated by Article 14 of the European Convention.

27. Furthermore, the Constitutional Court indicates that in respect of the interpretation of the term of discrimination within the meaning of Article 1 of Protocol No. 12, the European Court, in its decision *Sejdić and Finci* (see ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06 of 22 December 2009, paragraph 55), indicated as follows: “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 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, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel Publishers, 2005, pp. 597-634)”.

28. Turning to the instant case, the applicant claims that the challenged provisions of the Competition Act are discriminatory, because the members of Others are prevented from being appointed as members of the Competition Council on an equal footing as members of the constituent peoples, and because they are prevented from voting under the same conditions on the decisions of the Competition Council.

29. The Constitutional Court indicates that in decision *no. U-8/04* (see, the Constitutional Court, Decision no. *U-8/04* of 25 June 2004, published in *the Official Gazette of BiH*, no. 40/04) it stated as follows: “Finally, the issue of the interpretation of the notion of “effective participation of the constituent peoples in state authorities”, which was already mentioned in this decision, by applying it beyond the constitutional provisions quoted above, should be applied functionally and in line with the provision of Article IX(3) of the Constitution of Bosnia and Herzegovina, under which “officials appointed to offices in the institutions of Bosnia and Herzegovina, as a rule, shall be representative of the makeup of the peoples of Bosnia and Herzegovina”. On the one hand, this means that the state authorities 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 the constituent peoples in the authorities”, 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 (*op. cit.*, *U 8/04*, paragraph 33). To that end, the Constitutional Court reasoned that “no single provision whatsoever of the Constitution allows for a 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, 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 of the Constitution of Bosnia and Herzegovina under Article II(4) of the Constitution of Bosnia and Herzegovina, or the constitutional principle of equality of the constituent peoples” (*op. cit.*, *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 the affiliation with one constituent people and a citizen’s option” (*op. cit.* *U 8/04*, paragraph 33).

30. Also in the decision *no. U 4/05*, the Constitutional Court noted that the constitutional principle of the constituent status of peoples throughout the whole territory of Bosnia and Herzegovina was violated in the events where the participation in a representative body was not guaranteed to one constituent people, which was guaranteed to the two other constituent peoples (see, the Decision of the Constitutional Court *no. U 4/05* of 22 April 2005, published in the *Official Gazette of Bosnia and Herzegovina*, no. 32/05). The Constitutional Court referred on that occasion to its view taken in the Decision on the Constituent Status of Peoples *no. U 5/98* of 1 July 2000 (*ibid*, paragraph 115), reading as follows: “However, if a system of government is established which reserves all public offices only to the members of certain ethnic groups, the ‘right to participate in elections, to take part in government as well as in the exercise 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 those ethnic groups, insofar as they are denied the right to stand as candidates for such governmental or public offices”.

31. Turning to the present case, the Constitutional Court is to answer the question whether the provision of Article 22(3)(a) of the Competition Act discriminates against “Others” as well as citizens when compared to the members of the constituent peoples, because, as the applicant alleges, they are prevented from participating on an equal footing in holding public offices, in particular from being appointed as members of the Competition Council. The Constitutional Court observes that Article 22(1) of the Competition Act stipulates that the Competition Council is composed of six members, and paragraph 3 of the same Article prescribes the manner of appointing the members of the Competition Council, it prescribes that *three members of the Competition Council shall be appointed by the Council of Ministers, one member from among each of the three constituent peoples* (item (a)). Items (b) and (c) prescribe that *two members of the Competition Council shall be appointed by the Government of the Federation of Bosnia and Herzegovina and one member shall be appointed by the Government of the Republika Srpska*. Thus, the Constitutional Court observes that it follows from the aforementioned legal provision that three members of the Competition Council appointed by the Governments of the Entities may be (also) from among “Others” and/or citizens. In addition, the Constitutional Court observes that the Law on Ministerial, Government and Other Appointments of the Federation of BiH (*Official Gazette of the Federation of BiH*, nos. 12/03 and 34/03) and the Law on Ministerial, Government and Other Appointments of the Republika Srpska (*Official Gazette of the Republika Srpska*, nos.

25/03, 41/03 and 104/06) provide for the general and specific requirements to be fulfilled by the candidates for appointment to the regulated bodies such as the Competition Council, and the provision of Article 22(2) of the Competition Act provides for equal requirements (profession, independence, incompatibility with the performance of any other function which could amount to the conflict of interests) to be fulfilled both by the members of the constituent peoples and Others and/or citizens in order to be appointed as members of the Competition Council.

32. Furthermore, the applicant claims that the provision of Article 24(2) of the Competition Act determines discriminatory limitations in decision-making, because decisions shall be taken by majority vote provided that at least one member from among each constituent people must vote for each decision, which creates discrimination in the decision-making process as it places the members of the Competition Council from among the constituent peoples in a more favorable position. The Constitutional Court observes that Article 24 of the Competition Act prescribes the *modus operandi* and the method of decision-making of the Competition Council. Accordingly, paragraph 1 thereof prescribes that the Competition Council may make valid decisions if the session is attended by a minimum of five members of the Competition Council, whereas paragraph 2, which the applicant challenged, prescribes that Decisions of the Competition Council shall be made by majority vote of the members present, provided that at least one member from among the constituent peoples must vote for each decision, and that a member of the Competition Council cannot abstain from voting. Thus, a decision of the Competition Council will not be valid if five members of the Competition Council have not voted for it (as “the Competition Council may take valid decisions if the session is attended by a minimum of five members”) provided that the three votes out of five must come from among the constituent peoples. Given that the Constitutional Court has established in the foregoing paragraphs of this Decision that the Competition Council’ composition may also include three members from among Others and/or citizens, it follows that a decision will not be valid if two out of three possible members from among Others and/or citizens have not voted for it as well. It follows that the provisions of Article 24(2) of the Competition Act do not give greater value to the votes of the members from among the constituent peoples.

33. Taking into account the aforesaid, it follows that the members of “Others” and/or citizens are not prevented from being appointed as members of the Competition Council on an equal footing as members of the constituent peoples, nor are they prevented from voting on



the decisions of the Competition Council on an equal footing as the members of the constituent peoples. In the present case, the established guarantees in favor of the constituent peoples (three members of the Competition Council must be from among the constituent peoples and the validity of the decisions is conditional upon the votes of the constituent peoples, whereby three members of the Competition Council may also come from among “Others” and/or citizens, in which case they are not prevented from voting on decisions on an equal footing) are in keeping with the principle referred to in Article IX(3) of the Constitution of Bosnia and Herzegovina, namely that the State authorities should be a representative reflection of the advanced coexistence of all the peoples in Bosnia and Herzegovina, including national minorities and Others and/or citizens.

34. The Constitutional Court considers as unfounded the applicant's allegations holding that the contested provisions of the Competition Act “are essentially identical to a situation as that in the judgment of the European Court in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. In particular, in the aforementioned case of the European Court, the two applicants complained about discrimination on the ground of their Roma and Jewish origin respectively, which made them ineligible to stand for election to the Presidency of BiH or to the House of Peoples of the Parliamentary Assembly of BiH. The European Court, in the *Sejdić and Finci* decision (see ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06 of 22 December 2009) did not deny the fact that the disputable constitutional rule of excluding Others at the time when it was adopted made it possible for the establishment of peace and dialogue, which constitutes one of the aims of the European Convention. However, taking into account the positive development of Bosnia and Herzegovina since the signing of the Dayton Peace Agreement, the European Court concluded that the constitutional provisions which have rendered the applicants ineligible for election to the House of Peoples and the Presidency of BiH for a long term for not declaring their affiliation with a “constituent people” has no objective and acceptable justification, and they (constitutional provisions) constitute a discriminatory differential treatment in breach of Article 14 in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the European Convention.

35. Thus, in the case of the European Court, the reasoning of which is invoked by the applicant, despite the fact that they are citizens of Bosnia and Herzegovina the applicants have been deprived of the right to be elected, i.e. they were deprived of the right to stand for elections to the House of Peoples and the Presidency of Bosnia and Herzegovina on the

ground of their racial/ethnic origin. However, in the present case, as reasoned in the foregoing paragraphs of this Decision, the members from among Others and/or citizens are neither limited nor prevented from having access to public services under equal conditions as members of the constituent peoples, or to be appointed as members of the Competition Council, nor are they prevented from voting on the decisions of the Competition Council under equal conditions as the members of the constituent peoples.

36. In view of the aforementioned, the Constitutional Court concludes that the provisions of Article 22(3)(a) and (24)(2) of the Competition Act are compatible with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 to the European Convention, as the members of Others and/or citizens are not prevented from being appointed as members of the Competition Council under equal conditions as the members of the constituent peoples, nor are they prevented from voting on the decisions of the Competition Council under equal conditions as members of the Competition Council.

37. With regards to the applicant's allegations that a high quorum for decision-making was determined, namely five out of a total of six, and that decisions shall be taken by the majority vote, which constitutes discrimination according to the applicant, the Constitutional Court recalls that the regulation of the issue whether a decision shall be taken by a majority vote or qualified majority falls within the scope of a free margin of appreciation of the legislator and is considered justified and permissible for as long as it does not raise an issue of violation of the rights safeguarded by the Constitution. In the proceedings relating to the abstract control of constitutionality, the Constitutional Court does not have the task to review whether certain legal solution is good or bad, but exclusively to review certain legal provisions or the law as a whole in comparison to the constitutional arrangements, specifically whether the mentioned provisions adopted by the legislator amounted to discrimination. The Constitutional Court has already established that the legislator did not impose discrimination.

38. Given the conclusion relating to 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 it is not necessary to separately examine the applicant's allegations on the violation of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights.

### **VIII. Conclusion**

39. The Constitutional Court concludes that the provisions of Articles 22(3)(a) and 24(2) of the Competition Act are not inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina and Article 1 Protocol No. 12 to the European Convention, as the members of Others and/or citizens are neither limited nor prevented from being appointed as members of the Competition Council under equal conditions as members of the constituent peoples, and they are neither limited nor prevented from voting on decisions of the Competition Council under equal conditions as members of the constituent peoples.

40. Having regard to Article 57(2)(b) and Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

41. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Dissenting Opinion of the Vice-President Margarita Tsatsa-Nikolovska and the Judge Constance Grewe shall make an annex of this Decision.

42. 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

**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 Article 22(3)(a) and Article 24(2) of the Act on Competition (*Official Gazette of Bosnia and Herzegovina* nos. 48/05, 76/07 and 80/09) compatible 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.

**II - The scope of dissent**

I agree with the majority on the admissibility of the request (§§ 15 to 19). But I respectfully dissent on the constitutional conformity of Articles 22(3)(a) and 24(2) of the Act on Competition (§§ 22 to 38). In my opinion the Court should have granted the request and stated the discrimination against the Others and/or citizens.

**II – The incompatibility of Articles 22(3)(a) and 24(2) of the Act on Competition with Article II.4 of the Constitution of Bosnia and Herzegovina and with Article 1 of Protocol 12 to the ECHR**

1. Like in case U 26/14, the majority relies on the assumption that, beside the three members of the Competition Council coming from the constituent peoples, three Others and/or citizens would be appointed although this is not prescribed by the Act on Competition. Only the constituent peoples have such a guarantee or such a privilege. The majority infers from this premise that the Others and/or citizens can accede to the Competition Council under equal conditions as the members of the constituent peoples which is obviously wrong.

2. Likewise the decision making in the Competition Council is valid only when five members out of six are present, vote in favor and when each constituent people gives at least one favorable vote. If three Others and/or citizens are appointed, it is clear that in order to reach the required majority, two at least must consent. But again: this is not prescribed by the Competition Act; there is no condition relating to the votes of the Others whereas the support of the constituent peoples is mandatory. Therefore in the decision making neither, the Others

and/or citizens are not treated under equal conditions as the members of the constituent peoples.

In this regard, the majority invokes the margin of appreciation of the legislator when it comes to determine the necessary majority (simple or qualified). It holds this decision to be “justified and permissible for as long as it does not raise an issue of violation of the rights safeguarded by the Constitution”(§ 37). This is precisely the risk in the case at hand depending on the effective appointments.

3. Given the aforesaid, the question arises whether the unequal treatment of the Others and/or citizens amounts to discrimination. Neither the legislator nor the majority give any reasonable and objective justification although the European Court of Human Rights considers the monopoly of the constituent peoples in the power sharing - but not the power sharing as such - to be discriminatory against the Others.

In conclusion, the fact that the Others and/or citizens are not guaranteed to be appointed in the Competition Council and that therefore their consent to the adopted decisions is not necessary leads to the conclusion that the legislator has disregarded the requirements of Article IX(3) of the Constitution of Bosnia and Herzegovina.

For all these reasons I hold that in this case the Court should have granted the request as to Articles 22(3)(a) and 24(2) of the challenged Act on Competition.