



Number: 05-1-02-2-1218-4/21

Sarajevo, September 21, 2021

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SUBJECT: Initiative for adoption of the Law amending the BiH Election Law

Dear Sir/Madam

The European Commission had in 2019 adopted the Opinion on Bosnia and Herzegovina's application for membership in the European Union.

The opinion is crucial in the relations between the European Union and Bosnia and Herzegovina, a confirmation that the EU is committed to providing guidance and support to the country in implementing the necessary reforms on its path to the European integration.

The opinion identifies 14 key priorities that the country needs to meet in order to receive a recommendation to open accession negotiations with the European Union; provides comprehensive guidelines for gradual reforms. Key priorities include areas of democracy/functionality; rule of law; fundamental rights; and public administration reforms - the basics of the EU accession process. One of the key priorities related to political criteria relates to the improvement of the electoral process.

In this regard, the Central Election Commission of BiH has, using its legal powers set forth in Article 2.9 paragraph (1) item 16 of the Election Law of BiH "Official Gazette of BiH", No. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14, 31/16 and 41/20), adopted a Conclusion approving the Draft Initiative for the Adoption of the Law amending the Election Law of BiH at its 50th session, held on June 8, 2021.

This initiative was prepared in order to improve the electoral process in Bosnia and Herzegovina, and in its preparation this institution was guided by the technical aspects of the BiH Election Law without considering political solutions and the need to implement judgments of the European Court of Human Rights and the Constitutional Court of Bosnia and Herzegovina, which is the task of the Parliamentary Assembly of Bosnia and Herzegovina, as stated by the OSCE Office for Democratic Institutions and Human Rights OSCE/ODIHR in its "Informal Comments on the Draft Proposal of Amendments to the BiH Election Law".

The draft is based on the recommendations of the OSCE Office for Democratic Institutions and Human Rights OSCE/ODIHR from their final reports on the implementation of the 2014 and 2018 General Elections, GRECO recommendations from their evaluation reports and the experience gained by this institution during the preparation of elections, conduct of elections, implementation

of election results and recommendations submitted by this institution to the Parliamentary Assembly of Bosnia and Herzegovina through its reports on the conduct of elections and reports on implementation of the laws under competence of the Central Election Commission of BiH.

Following the adoption of the Conclusion, all election actors were invited to submit their proposals, comments and suggestions on the proposed draft, and a total of 9 election commissions of basic constituencies, the NGO "Pod lupom", one municipal assembly, one citizens' association and 6 voters responded to the BiH CEC's invitation. Also, the Draft was sent to the Council of Europe requesting the Venice Commission and GRECO to provide an opinion on the proposed draft. The same request was forwarded to the OSCE/ODIHR through the OSCE Mission to Bosnia and Herzegovina. The Council of Europe replied that the Venice Commission and GRECO could not give their opinion at this stage of the preparation of the Law.

The OSCE Office for Democratic Institutions and Human Rights on had on August 16, 2021 submitted to the BiH Central Election Commission "Informal Comments on the Draft Proposal for Amendments to the BiH Election Law" which include proposals for amendments to the BiH Election Law submitted by the BiH Central Election Commission to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) for review.

Informal comments are based on the unofficial translation of the Draft and the consolidated version of the 2018 Election Law - Summary and Conclusions.

In the OSCE/ODIHR's opinion the proposed amendments do not address significant long-standing ODIHR recommendations, such as removing ethnic and residence-based restrictions on voting rights and candidacy, which were not included in the amendments proposed by the BiH Central Election Commission.

In the opinion of the OSCE Office for Democratic Institutions and Human Rights proposed amendments to the BiH Election Law prepared by the BiH Central Election Commission *"are broad and exhibit important progress in reviewing some of the recommendations formulated by previous ODIHR EOMs. Proposed changes address, inter alia, issues related to constituency delimitation, the method of formation of Polling Station Committees (PSC), the abuse of public resources for campaign purposes, the training of the election officials, electoral participation of women, and the timely publication of CEC and courts' decisions on election-related complaints. If adopted, the amendments would reinforce the integrity of the electoral process."*

Other proposals include postponing elections in case of extraordinary circumstances, voter registration, nomination of candidates, media regulations, early voting agreements and election violations.

Numerous amendments address technical issues, clarifying previous ambiguities and aligning certain provisions with the BiH Constitution and other laws. All these improvements have been duly noted in the ODIHR's "Informal Comments", which are attached hereto.

The proposed amendments do not address the ODIHR's recommendations regarding the audit of financial statements on campaign, the publication of audit results, and the extension of the deadline for filing complaints. Furthermore, the draft does not revise the data exchange mechanism to improve the accuracy of the voter list, nor does it provide for the possibility of revising the voter lists.

In the ODIHR's opinion *"It is still possible to implement outstanding recommendations if the proposed amendments are passed into law. Priority should be given to addressing the*

recommendations related to universal suffrage rights, the accuracy of the voter register, the appointment mechanism of PSCs, training of the PSCs with a focus on counting and results protocols, and the abuse of state resources for campaign purposes."

ODIHR welcomed the readiness of the BiH authorities to follow-up on electoral recommendations and to assist the authorities of the BiH to further improve the electoral process.

Considering the "Informal Comments on the Draft Text of Amendments to the BiH Election Law" submitted by the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) the Central Election Commission had made some minimal corrections in the text in relation to the Draft Law on Amendments to the Law on Amendments and amendments to the Election Law of BiH adopted at the 50th session held on June 8, 2021, which is available to the public through the website of the Central Election Commission of BiH www.izbori.ba. Furthermore, certain corrections were made in Chapter 16 based on the opinion submitted by the Communications Regulatory Agency.

Based on the above, the Central Election Commission of BiH had at its 64th session held on September 15, 2021 adopted a Conclusion on the adoption of the Initiative for the adoption of the Law on Changes and Amendments to the Election Law of BiH, which we hereby submit.

The most significant proposals for the Parliamentary Assembly of BiH that we would like underline relate to a number of new definitions that have not been covered by the BiH Election Law so far, such as the definition of hate speech, abuse of public funds and resources, social media, early elections, extraordinary circumstances and electoral technologies as well as introduction of "regular elections" as one of the basic principles of the electoral process, ensuring the necessary financial independence so that the electoral process would not be jeopardized, introduction of the institute of early voting and early elections, strengthening the integrity of the Central Voters' Register, establishment of electronic application for certification of political entities to participate in the elections, electronic registration of out-of-country voters, separation of invalid and blank ballots, ban on conducting premature election campaign, etc...

The Central Election Commission of BiH has also prepared two possible solutions related to the appointment of members of polling station committees in order to strengthen the independence and integrity of the election administration. According to both of these proposed solutions, presidents of the polling station committees and their deputies would be selected based on a public call. According to the first proposal members of polling station committees and their alternates would also be selected through a public call, and according to the second proposal, members would be selected based on nominations by political entities.

This proposal significantly improved the BiH Election Law in the part related to the financing of election campaigns, and also tightened the penal policy because it has been shown that the current practice does deter repeating the manipulations.

As mentioned earlier, the BiH Central Election Commission was guided by the technical aspects of the BiH Election Law during the preparation of the Initiative, however, we would like to draw attention to the need to consider a number of issues that need to be regulated by the BiH Election Law. These are as follows:

- To implement the judgments of the International Court of Human Rights in Strasbourg, namely the judgments Sejdić and Finci v. Bosnia and Herzegovina dated December 22, 2009; Zornić v. Bosnia and Herzegovina dated July 15, 2014; Šlaku v. Bosnia and Herzegovina Dated May 26, 2016; Pilav v. Bosnia and Herzegovina dated June 90, 2016; and Pudarić v. Bosnia and Herzegovina dated December 8, 2020;

To implement the Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina No. 14/12 on appeal at the time of submission of the request by the member of the Presidency of Bosnia and Herzegovina Željko Komšić, assessing that the provisions of Articles 9.13, 9.14, 9.16 and 12.3 are in conflict with Article II/4 of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention.

We note that the Constitutional Court of Bosnia and Herzegovina also reviewed the provisions of Articles 9.15, 12.1 and 12.2 and concluded that these provisions are in accordance with Article II/4 of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention;

- To implement the Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina No. 23/14 on appeal at the time of submission of the request by the Speaker of the House of Representatives of the BiH Parliamentary Assembly Božo Ljubić, ascertaining that the provisions of Subchapter B of Article 10.12, paragraph 2 in the part: "Each constituent people shall be given one seat in each canton" and the provisions of Chapter 20 - Transitional and final provisions of Article 20.16.A, paragraph 2, item a-j. of the Election Law of Bosnia and Herzegovina are not in accordance with Article I/2 of the Constitution of Bosnia and Herzegovina, which is why they were deleted from the Election Law of BiH.

We note that the Constitutional Court of Bosnia and Herzegovina had, by the same decision, determined that the provisions of Subchapter B, Art. 10.10., 10.12. in the remaining part, 10.15. and 10.16. of the Election Law of Bosnia and Herzegovina in accordance with Article I/2 of the Constitution of Bosnia and Herzegovina.

- The Central Election Commission of BiH considers it necessary to introduce technologies in the election process in Bosnia and Herzegovina. The Strategy and Action Plan for Improving the Integrity, Transparency and Efficiency of the Electoral Process in Bosnia and Herzegovina were submitted to the Parliamentary Assembly of BiH on November 12, 2020 in document number 04-2-50-4-1192-9/20. The submitted documents were prepared within the project "EU Support to the Development of the Strategy and Action Plan for Improving the Integrity, Transparency and Efficiency of the Electoral Process in Bosnia and Herzegovina" funded by the Delegation of the European Union through the Instrument for Pre-Accession Assistance (IPA) and implemented by Indra Soluciones Tecnológicas de Información SL (Minsait-Indra Group), a Spanish company with 40 years of experience in providing technological solutions and professional services for managing election processes in 40 different countries.

These documents contain a roadmap for improving the electoral process, overcoming the identified shortcomings and introducing technologies into the electoral process. The decision on the technologies that will be used in the electoral process is up to the BiH Parliamentary Assembly, and only after this decision is made will it be possible to prepare the necessary interventions in the BiH Election Law.

- To consider the possibility of introducing the institute of "freezing mandates" for persons who have won mandates and subsequently been appointed to executive positions. In this case, interventions in Article 1.8 of the BiH Election Law would be needed. The mandate would be temporarily assigned to the next qualified candidate from the list of the political entity from which the person, whose mandate would be frozen, is coming, and the Central Election Commission of BiH would be authorized to regulate this procedure by a bylaw;
- Recommendation No. 2 of the OSCE/ODIHR Final Report on the Conduct of the 2014 General Elections as well as Recommendation No. 8 of the OSCE/ODIHR Final Report on the Conduct of the 2018 General Elections stipulate that the constituency and the number of seats for national and entity parliaments should be reviewed periodically in order to ensure the principle of equality of vote. Furthermore, it was stated that this review should be carried

out in accordance with international obligations and good practices and that a legal provision could be introduced prescribing the actions that the BiH Central Election Commission should take if the competent parliaments do not fulfill their legal obligation.

The BiH Central Election Commission has prepared a proposal for certain interventions in Articles 9.11, 10.9 and 11.9 of the Election Law of BiH, and we note that the Parliamentary Assembly of BiH should proceed with the aforementioned review.

- Article 20.13, paragraph (2) stipulates that until the entities form multi-member constituencies, 6 multi-member constituencies shall be valid for the National Assembly of Republika Srpska, from which 62 members of the National Assembly of Republika Srpska shall be elected. Considering that the Election Law of Republika Srpska determines 9 multi-member constituencies for this entity from which 63 members are elected, it is necessary to harmonize the provisions of the Election Law of BiH with the Election Law of Republika Srpska.
- Article 9.12c paragraph (2) stipulates that each list for the election of Croat or Bosniak delegates to the House of Peoples of the Parliamentary Assembly of BiH may contain more names than the number of delegates elected to the House of Peoples. We propose to have this paragraph supplemented by a binding norm that this list must have at least 5 candidates more than the number of delegates to be elected as to avoid the situation where there are not enough qualified candidates on the list who could take office in case seats are allocated to the next qualified candidates.
- We draw attention to the need to harmonize provision 9.15 of the Election Law of BiH with Chapter IV Structure of FBiH Government, Subchapter B. Executive Power of the Federation, specifically Article 2, paragraph (4) of this subchapter, which refers to the election of the President and Vice President of the Federation of BiH. Namely, this paragraph stipulates that *"If one of the Houses rejects the joint slate in the repeated procedure, it will be considered that the candidates were elected by the slate being accepted only House"*, while Article 9.15 of the BiH Election Law stipulates that *"if the joint slate presented by the House of Representatives of the FBiH Parliament does not receive the necessary majority in the House of Peoples of the FBiH Parliament, this procedure will be repeated. If in the repeated procedure the joint slate which receives majority of votes in the House of Representatives of the FBiH Parliament is rejected again in the House of Peoples of the FBiH Parliament that joint slate shall be considered to be elected."*
Given that the above provisions are in obvious conflict, it is necessary to harmonize the provisions of the Election Law of BiH with the Constitution of the Federation of BiH.
- Provision 9.7a of the BiH Election Law stipulates that a political party that has no more candidates on the list of candidates for compensatory mandates and has won more seats to be distributed may submit a supplementary list to the BiH Central Election Commission within 48 hours.
This decision is not in line with the provisions of Article 4.24 paragraph (2), 10.6 paragraph (3) and 11.6 paragraph (3) which prescribe other solutions where these mandates are allocated to the party or coalition that won the most votes and has qualified candidates on their lists.
We propose that the provision of Article 9.7a be aligned with the provisions of Article 4.24 paragraph (2), 10.6 paragraph (3), and 11.6 paragraph (3) in order to establish a symmetrical solution.
- Article 10.7 paragraph (3) stipulates that if a political party or coalition does not have enough candidates on the list to fill the seats allocated to it, the mandates shall be transferred to the candidates' lists of that political party or coalition in another constituency, in accordance with Article 9.7 of this Law.

We draw attention to fact that reference is made to the wrong provision as Article 9.7 does not address this situation as it only prescribes the procedure for allocating seats within the list of the party or coalition that won the seats.

- Early elections for the President of Republika Srpska were announced and held during 2007, considering that the then President of Republika Srpska had passed away. Following the receipt of the notice on the death of the President of Republika Srpska there were certain dilemmas as to whether the mandate of the Vice Presidents would end with the termination of the mandate of the President of Republika Srpska. When making the decision, the Central Election Commission of BiH took the position that it is necessary to call elections only for the President of Republika Srpska, which the Court of Bosnia and Herzegovina confirmed by its decision number IŽ-49/07 of December 26, 2017.
Taking into account that this situation relating to the President and Vice Presidents of Republika Srpska is not prescribed in Chapter 12 of the Election Law of BiH we propose that the Parliamentary Assembly of BiH regulates this situation as well.
- Article 83 of the Constitution of Republika Srpska stipulates that the same person may be elected President and Vice-Presidents of Republika Srpska no more than two consecutive times. In order to harmonize the provisions of the Election Law of BiH with the Constitution of Republika Srpska, it is necessary to incorporate this restriction in Chapter 12 of the Election Law of BiH.
- We draw attention to the need to delete Article 13.13 of the BiH Election Law because this provision prescribes the obligation of taking into account the composition of the population of a municipality, canton or city when appointing officials who manage these administrative bodies, which is not relevant to the BiH Election Law.
- We point out the problem of difficulties in determining the exact number of members of national minorities in municipalities/cities because there are neither exact data nor the Central Election Commission of BiH has a mechanism to control the provision of guaranteed seats for national minorities in the councils or city/municipal assemblies. In the processes of organizing local elections, the Central Election Commission of BiH notices a tendency where the number of cities/municipalities that provide guaranteed seats for national minorities is decreasing. We note that Sarajevo Canton had amended the Constitution of the Canton, which guarantees at least one mandate to members of national minorities, however, due to the lack of implementing regulations, this provision of the Constitution of Sarajevo Canton cannot be implemented.

We provide this information in order to acquaint the EU member states with the activities undertaken by this institution in order to meet one of the key criteria.

Sincerely,



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