



PRESS RELEASE

**WILL ANYONE TAKE RESPONSIBILITY FOR THE LEGAL UNCERTAINTY AND CONSEQUENCES DUE TO THE FAILURE TO FULFIL THE DECISION OF THE CONSTITUTIONAL COURT OF BIH?**

Sarajevo, 20<sup>th</sup> December 2017

Dear sir or madam,

On the 27th of June 2016, the then second Deputy Speaker of the House of Representatives of the Parliamentary Assembly of BiH (PA BiH), Mrs Borjana Kristo, submitted a request to the Constitutional Court of BiH, considering the review of the constitutionality of the provisions of Article 84, paragraphs 2, 3, 4 and 5; 109 paragraphs 1 and 2; 117. (d); 118 paragraph 3; 119 paragraph 1; 216 paragraph 2; 225 paragraph 2 and 226 paragraph 1; of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), and on the 7th of December 2016, the request for review of the constitutionality of the provisions of Article 78, paragraphs 3, 4 and 5 of the Law on the Intelligence and Security Agency of Bosnia and Herzegovina (Law on ISA BiH). As an explanation of her demands, Mrs. Kristo referred to the inconsistency of these Articles with provisions of the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

After the response from the House of Representatives and the House of Peoples of the PA BiH, as the lawmakers of the mentioned Laws, and the delivery to the Constitutional Court of BiH, judges at the Plenary Session of the Constitutional Court of Bosnia and Herzegovina, on the session on the 1st of June 2017, made a partial decision on the admissibility and a merit which partially adopts the request of Mrs Kristo concerning the constitutionality of several Articles of the CPC BiH as well as the Decision on Admissibility and Merits adopting the request considering Article 78, paragraph 3, 4, and 5 of the Law on ISA BiH.

These Decisions require that the PA BiH, in accordance with Article 61, paragraph 4 of the Rules of the Constitutional Court of BiH, within six months of the date of delivery of the decision, harmonizes the mentioned Articles of the Law on ISA BiH with the Constitution of BiH and the ECHR and informs the Constitutional Court of BiH on the measures taken to implement this Decision. Regarding the changes of some Articles of the CPC BiH, for which the Constitutional Court of BiH found that they are not in accordance with the Constitution of BiH and the ECHR, in relation to the request (Article 84, paragraphs 2, 3 and 4; 117 d; 118, paragraph 3; 225, paragraph 2 and 226 paragraph 1), the Constitutional Court of BiH, probably considering the complexity and extent of the harmonization of these Articles, left out the part about harmonization, and ordered the PA BiH to notify the Constitutional Court within six months after the delivery of the decision with the taken measures in order to enforce this decision.

The Constitutional Court of BiH delivered both decision to PA BiH on the 29th of June, by which the deadline for the harmonization of the Articles of the mentioned laws started. In accordance with the Article 61, paragraph 5 of the Rules of the Constitutional Court of BiH, if the identified non-



compliance is not removed within the foreseen deadline, the Constitutional Court will make a decision about the invalidity of the non-complied Articles, which becomes effective the day following its publication in the Official Gazette BiH.

The deadline is expiring on the 29th of December 2017, which brings the Constitutional Court of BiH in the position that it has to make a decision about the invalidity of the nonharmonized provisions of the Law on ISA BiH and the CPC BiH. Such decisions create preconditions for unimaginable consequences related to security interests and the criminal legal processes for most serious crimes of organized crime and corruption whose investigations are ongoing. We are pointing out that the decisions of the Constitutional Court are final and binding.

After receiving the Constitutional Court's decision, the PA BiH instructed the Council of Ministers of BiH to undertake measures in accordance with its competencies on implementing the decisions, apropos, to propose legal solutions to align the Articles of the CPC BiH and the Law on ISA BiH in question. To this cause, activities for the harmonization of the provisions of the Law on ISA BiH have been entrusted to the Ministry of Security BiH (MS BiH) and, the harmonization of the provisions of CPC BiH to the Ministry of Justice BiH (MJ BiH). The way in which working groups are set up to implement these activities and in which phase their work is, are not known for now. It is worrying that no representative of the Court of BiH or the Prosecutor's Office of BiH has been included in the MJ BiH working group. Probably due to this information regarding the composition of the working group responsible for changes of the CPC BiH, the US administration has decided to establish an informal group of referential experts from the field of criminal procedural law. They made a proposal for possible solutions in relation to the Constitutional Court of BiH decision to amend the criminal law regulations and informed the relevant institutions about it. According to the information, the working group of the MS BiH, in charge of amending the Law on ISA BiH, submitted its proposal to the competent bodies of the Council of Ministers of BiH, probably to the Legislative Office, the Internal Security Committee and the General Secretariat.

Without the intention to comment on the efficiency, expertise and responsibility of the executive authorities, in this case the competent ministries of the Council of Ministers of BiH, the fact that the agenda of today's session (December 21st 2017) of the House of Representatives of the PA BiH, did not include even a proposal of amendments to the mentioned Articles of the Law on ISA BiH and the CPC BiH, nor any information regarding the binding and final decisions of the Constitutional Court, is greatly concerning. Again, the deadline for its implementation expires on December 29th this year. Following the provisions of the Rule of Constitutional Court of BiH, it is to be expected that judges at the next 108th plenary session, which is not yet scheduled, but is expected to be held in January next year, make a new decision by which non-complied Articles of the two mentioned laws will not be valid anymore.

What amount of legal uncertainty and consequences would such decision of the Constitutional Court BiH bring to the existing legal criminal procedures and the rule of law and the protection of human rights, is inconspicuous in this moment. The deprivation of the security and protection of the constitutional order may be a consequence of the abolition of provisions of the Law on ISA BiH. This would open the possibility to proclaim as unconstitutional all activities of the Agency related to the collection of secret data for periods longer than 60 days. Also, it could open the ability to initiate damage claims by persons who were the subject of these actions from ISA BiH, and, therefore, would cause significant financial damage to the state budget.



The failure to comply with the Constitutional Court's decision related to the Articles of the CPC BiH would be even more dramatic for BiH's constitutional and legal, and in particular, criminal justice system. These decisions would consequently, except at the state level, simultaneously affect the criminal procedure codes at the entity level and at the level of the Brcko District of BiH. Investigations by law enforcement agencies, carried out using intrusive measures, would be questioned and certainly would not be considered credible and lawfully collected evidence in criminal proceedings. The questioning of the list of criminal offenses that may be brought by prosecutors during the investigation and seeking approval by judicial authorities to enforce these measures related to secret surveillance, interception of telecommunications and so on, would lead to a large number of investigative actions which are currently considered as an area of illegal activities. Also, the duration of these measures after 30 days would probably also become unlawful and unenforceable in the process of proving the criminal offense, as well as testimonies of witnesses who were granted immunity from prosecutors, or procedural actions when filing indictments or terminating the investigations.

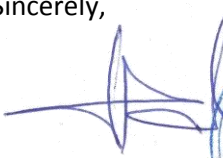
Considering the above mentioned, I appeal primarily to the representatives and delegates of the House of Representatives and the House of Peoples of the Parliamentary Assembly of BiH, as well as all interested parties in the executive, legislative and judicial authorities, to urgently address this situation and initiate processes and procedures from their competencies to avoid the possibility of endangering the rule of law in BiH, but also the security, sovereignty, territorial integrity and constitutional order of Bosnia and Herzegovina.

One of the possible solutions, which will hopefully be considered by the judges of the Constitutional Court of BiH, is the extension of the deadline of 6 months, which was given to the PA BiH to take the necessary measures. Of course, the prerequisite for considering such a decision is the respect of the procedure that the representatives of the Parliamentary Assembly of BiH officially direct one act to the Constitutional Court of BiH with a request for extending the deadline.

We can find similar cases that the Constitutional Court of BiH can rely on, in the eventual decision-making and explanation of the decision related to the request of PA BiH for extending the deadline, in international judicial practice. The Republic of Slovenia had almost the same situation regarding the provisions of their Internal Affairs Act that dealt with this issue. Through its Decision U-I-158/95, adopted on the 14th of October 1998, considering the complexity and scope of the necessary measures for the implementation of the harmonization of the legal provisions, the Constitutional Court of the Republic of Slovenia has decided to extend the deadline for an additional 6 months to harmonize the disputed provisions of the law.

I hope that everyone in this country will recognize the severity of this situation in which citizens and institutions in Bosnia and Herzegovina can come, and urgently and responsibly approach the taking of concrete and necessary measures in accordance with time constraints.

Sincerely,

  
Denis Hadžović, Ph.D.  
Director

