

JOSEP BORRELL FONTELLES

HIGH REPRESENTATIVE  
VICE PRESIDENT OF THE EUROPEAN COMMISSION

Brussels, 30/10/2020  
*A(2020)5278451-6788457*

Mr Syed Riaz Haider  
Acting Head of Court Management Unit  
Kosovo Specialist Chambers  
The Hague

Dear Mr Haider,

Thank you for having accepted our request for an extension of the time limit for filing written submissions in response to the Notification of the Referral and Request for Information from the Specialist Chambers of the Constitutional Court, transmitted on 5 October. I hereby file my written submission on the admissibility of the Referral.

Please accept the assurance of my highest consideration.

Yours sincerely,



Josep Borrell Fontelles

Brussels, 30 October 2020

In the proceedings of the Specialist Chamber of the Constitutional Court

**Written Submission by the High Representative of the Union for Foreign Affairs  
and Security Policy on the admissibility of the Referral**

Subject: File KSC-CC-2020-11: Referral on a proposed amendment to the Constitution of Kosovo (\*)

References: 1) Decision KSC-CC-2020-11/F00004 of 5 October 2020 on Notification of the Referral and Request for Information;  
2) Decision KSC-CC-2020-11/F00012 of 20 October 2020 on the Requests for Extension of the Time Limit for Filing Written Submissions.

**BACKGROUND**

1. On 14 April 2014, the President of Kosovo and the High Representative of the Union for Foreign Affairs and Security Policy (the High Representative) exchanged letters with regard to the mandate of the European Union Rule of Law Mission in Kosovo (EULEX Kosovo), and the establishment and operation of a “specialist court” and a “specialist prosecutor’s office” for any proceedings arising from the investigations of the Specialist Investigative Task Force (SITF) (“the Exchange of Letters”).
2. On 23 April 2014, the Assembly of Kosovo, by Law n°04/L-274, ratified the Exchange of Letters as an international agreement between Kosovo and the European Union.
3. On 3 August 2015, the Assembly of Kosovo amended the Constitution adding a new Article 162 on the Specialist Chambers and the Specialist Prosecutor’s Office.

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(\*) This designation is without prejudice to positions on status, and is in line with UNSCR 1244 (1999) and the ICJ Opinion on the Kosovo declaration of independence.

## PROCEDURE

4. On 24 August 2020, the President of Kosovo proposed an amendment to Article 162 of the Constitution (“the Proposed Amendment”).
5. On 18 September 2020, the President of the Assembly of Kosovo conveyed the Proposed Amendment to the President of the Specialist Chambers pursuant to Articles 144(3) and 162(3) of the Constitution (“the Referral”), for a review by the Specialist Chamber of the Constitutional Court as to whether the Proposed Amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.
6. On 22 September 2020, The President of the Specialist Chambers assigned the Constitutional Court Panel to decide on the Referral.
7. On 5 October 2020, the Constitutional Court Panel decided to notify, among others, the High Representative with a possibility for him to file, by 19 October 2020, a written submission, should he wish to do so, on the admissibility and/or merits of the Referral.
8. On 19 October 2020, the High Representative requested the Panel to extend to 2 November 2020 the time limit for filing written submissions on the admissibility and/or merits of the Referral.
9. On 20 October 2020, the Constitutional Court Panel granted the request of the High Representative for extension of the time limit for filing written submissions on the admissibility and/or merits of the Referral, and extended this time limit for the High Representative to 2 November 2020.

## SUBMISSION ON ADMISSIBILITY

10. Article 162 (14) of the Constitution provides that ‘...the mandate of the Specialist Chambers and the Specialist Prosecutor’s Office shall continue until notification of completion is made in accordance with Law. No. 04/L-274 and in consultation with the Government.’
11. The Proposed Amendment foresees the deletion of current paragraphs 13 and 14 of Article 162 of the Constitution. It foresees the following new paragraph 13 to replace those provisions: ‘[t]he mandate of the Specialist Chamber and the Specialist Prosecutor’s Office shall continue until notification of completion is made by the Council of the European Union, in consultation with the Government of Kosovo.’
12. Since the Proposed Amendment aims at amending a constitutional provision ‘having an impact for the judicial proceedings arising from SITF investigations’, it falls under the corresponding category of amendments referred to in the Exchange of Letters.

13. The Exchange of Letters states: '[w]e will undertake, in accordance with the Constitution and applicable Kosovo law, with the EULEX KOSOVO Head of Mission and/or the EUSR (as applicable) any supplementary commitments and modalities necessary to facilitate the effective functioning of EULEX KOSOVO, including consultations in the process of amending laws having an impact on the discharge of EULEX KOSOVO mandate as well as for the judicial proceedings arising from the SITF investigation, and the EUSR in implementing their mandate. [...]'
  14. Since, in accordance with Article 16(1) thereof, the Constitution 'is the highest legal act of the Republic of Kosovo', the abovementioned legal obligation, enshrined in the Exchange of Letters ratified as an international agreement by the Assembly of Kosovo, applies in the case of the Proposed Amendment which, if adopted, would have an impact for the judicial proceedings arising from the SITF investigation, as this Proposed Amendment aims at removing from the Constitution a reference to Law. No. 04/L-274 on ratification of the Exchange of Letters.
  15. However, no consultations with the Head of Mission EULEX Kosovo took place before the President of Kosovo sent the Proposed Amendment to the Chairperson of the Assembly on 24 August 2020, contrary to the abovementioned legal obligation which should have been complied with, in accordance with Article 19(2) of the Constitution, which provides that "[r]atified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo".
  16. It is therefore submitted that, without entering into other considerations on admissibility, the Referral is in particular inadmissible for the reason that the consultations referred to in paragraphs 13 and 15 did not take place.
  17. In that respect, the Referral would allow the Constitutional Court Panel to review the constitutionality of the procedure followed in the process of issuing the Proposed Amendment, bearing in mind the importance of preserving the Specialist Chambers and the Specialist Prosecutor's Office as 'an independent and impartial tribunal established by law', as referred to in Chapter II, Article 31(2) of the Constitution, and the international obligations of Kosovo under the Exchange of Letters.
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