

Reference: 2020-COS-0317

Fidelma Donlon
Registrar
Kosovo Specialist Chambers
The Hague
Netherlands

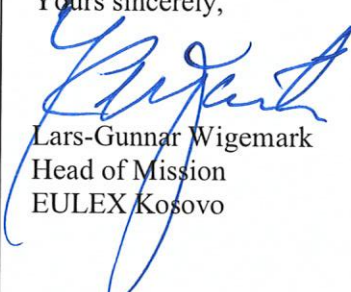
Pristina, 30 October 2020

Subject: Written Submission by the Head of the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) on the Admissibility of Referral KSC-CC-2020-11 on a Proposed Amendment to the Constitution of Kosovo by the President of the Assembly of Kosovo

Dear Ms. Donlon,

Following the decision of the Panel granting an extension of time to file a submission on this matter, please find attached the relevant submission for transmission to the Panel.

Yours sincerely,



Lars-Gunnar Wigemark
Head of Mission
EULEX Kosovo

Enclosed: Written Submission by the Head of the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) on the Admissibility of Referral KSC-CC-2020-11 on a Proposed Amendment to the Constitution of Kosovo by the President of the Assembly of Kosovo

Reference: 2020-COS-0317

Judge Vidar Stensland
Presiding Judge
Specialist Chamber of the Constitutional Court of Kosovo
The Hague
The Netherlands

Pristina, 2 November 2020

Subject: Written Submission by the Head of the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) on the Admissibility of Referral KSC-CC-2020-11 on a Proposed Amendment to the Constitution of Kosovo by the President of the Assembly of Kosovo

References: Decision KSC-CC-2020-11/F00004 of 5 October 2020 on Notification of the Referral and Request for Information

Introduction

1. On 5 October 2020, the Registrar of the Specialist Chambers conveyed to the Head of the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) a notification concerning the registration of a Referral KSC-CC-2020-11/F00004 filed with the Specialist Chamber of the Constitutional Court ("the Court") and of an invitation from the Panel of the Court assigned to deal with the referral, to make submissions, should he wish to do so on the admissibility and or merits of the referral by 19 October 2020.

2. After being granted an extension of time until 2 November 2020, the Head of Mission is filing the following submission in response to the above mentioned request.

Subject Matter

3. The Head of Mission notes that the subject matter of the Referral is the assessment of the proposed amendment and whether or not it diminishes any of the rights and freedoms guaranteed by Chapter II of the Constitution of Kosovo.

4. Article 162 (13) and (14) currently reads:

“13- The mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall be for a period of five (5) years, unless notification of completion of the mandate in accordance with Law No. 04/L-274 occurs earlier.

14- In the absence of notification of completion of the mandate under paragraph 13, 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.”

5. The proposed amendment reads:

“Paragraph 13 of the Article 162 [The Specialist Chambers and the Specialist Prosecutor's Office], shall be deleted and reformulated with the text:

13. The mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall continue until notification of completion is made and in consultation with the Government of the Republic of Kosovo.”

Paragraph 14 of Article 162 [The Specialist Chambers and the Specialist Prosecutor's Office], shall be deleted.”

6. Consequently, the Head of Mission notes that, if the proposed amendment were to be ultimately approved by the Assembly, the result would be that any and all reference to Law No. 04/L-274 as currently contained in Article 162 of the Constitution would be expunged.

Law 04/L-274

7. The Head of Mission recalls that on 14 April 2014 the High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission and the President of Kosovo entered into an Exchange of Letters.

8. Under this 2014 Exchange of Letters, the President of Kosovo committed in writing and undertook to consult with the EU institutions in Kosovo, in particular with EULEX Kosovo, on any proposed amendments that could have an impact on the discharge of the EULEX mandate as well as judicial proceedings stemming from the Special Investigative Task Force (SITF) investigations.

Page 4 of the 2014 Exchange of Letters reads:

“... undertake, in accordance with the Constitution and applicable Kosovo law, with the EULEX Head of Mission and/or the EUSR (as applicable) any supplementary commitments and modalities necessary to

facilitate the effective functioning of EULEX, including consultations in the process of amending laws having an impact on the discharge of EULEX mandate as well as for the judicial proceedings arising from the SITF investigation, and the EUSR in implementing their mandate. [...]”.

9. On 23 April 2014, the Assembly of Kosovo ratified the 2014 Exchange of Letters between the President of the Republic of Kosovo and the EU High Representative through the Law No. 04/L-274, thereby confirming the consent of Kosovo to be bound by the Exchange of Letters in all its contents, including, in particular, the undertaking and commitment to consult EULEX Kosovo in the circumstances described in paragraph 8 above.

10. On 7 May 2014, the President of Kosovo, by Decree No. DL022-2014, promulgated the aforementioned Law No. 04/L-274 and following publication in the Official Gazette of Kosovo the Law entered into force 15 (fifteen) days after.

11. Law No. 04/L-274 remains in force and has never been repealed.

12. On 3 August 2015, the Assembly of Kosovo amended the Constitution through the introduction of Article 162, which makes direct reference to Law No. 04/L-274.

Admissibility of the Referral

13. In order to be able to adjudicate the Referral, the Court must first examine whether the admissibility requirements established in the Constitution and further specified in the Law on the Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053, as well as in the Rules of Procedure and Evidence of the Specialist Chambers of the Constitutional Court have been met.

14. The Head of Mission notes that, apart from preliminary issues of admissibility as to whether or not the applicant is an authorized person or whether the Court has jurisdiction on the subject matter of referral, criteria which all appear to be met, the Rules of Procedure and Evidence of the Specialist Chambers of the Constitutional Court at Page 114, Rule 14 set out additional specific admissibility criteria for any referral submitted pursuant to Article 49 of the Law No. 05/L-053. In particular, Rule 14 (f) provides that such a referral shall be inadmissible and summarily dismissed if:

“... upon a prima facie review, the Panel considers that the referral constitutes an abuse of process and/or that nothing in the referral gives rise to the appearance of an incompatibility with the Constitution or a violation of a Constitutional right”.

15. The Head of Mission understands that the right to declare a Referral inadmissible and to dismiss it stems from the Court's overriding duty to promote justice and prevent injustice.

16. The Head of Mission recalls once again the 2014 Exchange of Letters as well as the Law 04/L-274, through which the 2014 Exchange of Letters was ratified.

17. The Head of Mission wishes to underline that, despite a legal obligation to do so, at no point did the President of Kosovo consult with EULEX Kosovo prior to submitting the Proposed Amendment to the President of the Assembly for referral, nor has the President ever consulted with EULEX Kosovo concerning the matter of proposed amendments to the Constitution of this nature.

18. The Head of Mission notes that that the Constitution of Kosovo is Kosovo's highest law and thus the obligations contained in the 2014 Exchange of Letters would apply equally to any amendments to the Constitution.