

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)(e) and Article 64(1) and (4) of the Rules of the Constitutional Court – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Mirsad Ćeman, Vice-President

Mr. Zlatko M. Knežević, Vice-President

Ms. Helen Keller, Vice-President

Ms. Seada Palavrić,

Ms. Angelika Nussberger, and

Mr. Ledi Bianku

Having deliberated on the request of **Mr. Denis Bećirović, a Member of the Presidency of Bosnia and Herzegovina** and on requests of **other applicants**, for adoption of an interim measure in the case no. *U-5/23*, at its session held on 2 March 2023, adopted the following

DECISION ON INTERIM MEASURE

The requests for an interim measure filed by **Mr. Denis Bećirović**, a Member of the Presidency of Bosnia and Herzegovina, **Željko Komšić**, a Member of the Presidency of Bosnia and Herzegovina, 11 delegates of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and five delegates of the House of Peoples of Bosnia and Herzegovina are hereby granted.

The Law on Immovable Property Used for Functioning of Public Authority (*Official Gazette of the Republika Srpska*, 16/23) is temporarily rendered ineffective.

This decision shall be effective immediately and shall be legally binding pending a final decision of the Constitutional Court of Bosnia and Herzegovina with regards to the submitted requests.

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 22 February 2023, Mr. Denis Bećirović, a Member of the Presidency of Bosnia and Herzegovina (“the applicant”), lodged a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for review of constitutionality of the Law on Immovable Property Used for Functioning of Public Authority (“the contested Law”) (*Official Gazette of the Republika Srpska*, 16/23). In addition, on 28 February 2023, the day when the contested Law entered into force, the applicant made a submission. In it, he stated that „by way of caution, and with the aim of securing the admissibility of the request“, he is informing the Constitutional Court that he remains fully supportive of the submitted request and proposal for interim measure.

2. In addition, on 28 February 2023, the Constitutional Court has received three more requests for review of constitutionality of the same law including the requests for interim measure. The requests were filed by Mr. Željko Komšić, a Member of the Presidency of BiH (registered under no. *U-6/23*), 11 delegates of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (registered under no. *U-7/23*) and five delegates of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (registered under no. *U-8/23*; hereinafter: the applicants).

3. Pursuant to Article 64 of the Rules of the Constitutional Court, the applicants also filed a request for an interim measure by which the Constitutional Court would temporarily render the contested Law ineffective pending a final decision of the Constitutional Court.

Joining of requests

4. Considering these requests are based on the same or similar claims of unconstitutionality of the contested Law and request adoption of the same interim measure, the Constitutional Court adopted, in accordance with Article 31(1) of the Rules of the Constitutional Court, the decision on joining the requests in respect of which it will conduct one proceeding and adopt one decision registered under no. *U-5/23*.

Relevant facts

5. At the fifth special session held on 28 December 2022, the National Assembly of the Republika Srpska passed the disputed Law.

6. The Committee for the Protection of Vital National Interests within the Constitutional Court of the Republika Srpska adopted Ruling no. UV-1/23 of 9 February 2023. It determined that the Request of the Bosniac People Caucus in the Council of Peoples of the Republika Srpska to determine that the contested law violated the vital national interests of the Bosniac people, is inadmissible. The aforementioned ruling was published in the *Official Gazette of the Republika Srpska*, 14/23 of 15 February 2023.

7. On 16 February 2023, the President of the Republika Srpska issued Decree no. 01-020-832/23 on the promulgation of the disputed Law. That Decree was published on 20 February 2023 in the *Official Gazette of the Republika Srpska*, 16/23.

Allegations in the Request

8. The applicants contend that the disputed Law is inconsistent with the provisions of Articles I(2), III(3)(b), IV(4)(a) and (e) and VI(5) of the Constitution of Bosnia and Herzegovina and Article 2 of Annex II to the Constitution of Bosnia and Herzegovina. It is pointed out that the contested Law is identical in form and content to the earlier Law on Immovable Property Used for Functioning of Public Authority (*Official Gazette of RS*, 29/22). The Constitutional Court declared it unconstitutional by its Decision on Admissibility and Merits no. *U-10/ 22* of 22 September 2022. In this regard, the applicants allege, *inter alia*, that the Republika Srpska lacks constitutional competence to regulate legal matters that are subject matter of the contested Law and that it represents the continuation of unconstitutional act of disposal of the State property in the territory of that Entity. The applicants also contend that the disputed Law "legalizes" the previous illegal activity carried out by the mentioned Entity concerning the State property. However, the applicants do not dispute the fact that the Entities own the property necessary for the functioning of their own institutions and that these issues can be regulated exclusively within the framework of their competence, without "taking over certain legal matters" that fall within the exclusive competence of the State of Bosnia and Herzegovina.

9. The applicants demand that the Constitutional Court grant the request and establish that the contested Law is not in accordance with the aforementioned provisions of the Constitution of Bosnia and Herzegovina and that the Republika Srpska does not have the constitutional authority to regulate the legal matter that is the subject of the contested Law. It was further requested from the

Constitutional Court, pursuant to Article 61(2) and (3) of the Rules of the Constitutional Court, to render the contested Law ineffective and to determine that it will cease to be applicable on the following day from the date of publication of the Constitutional Court's decision in the *Official Gazette of Bosnia and Herzegovina*.

Allegations in the request for adoption of an interim measure

10. Pursuant to Article 57 (2)(e) and Article 64 (1) of the Rules of the Constitutional Court, the applicants request the Constitutional Court to adopt an interim measure that would temporarily render the contested Law ineffective pending a decision by the Constitutional Court on the request for constitutional review. The applicants list the following reasons for adoption of an interim measure: the legal nature of the dispute arising under the Constitution; the continuous violation of relevant provisions of the Constitution of Bosnia and Herzegovina; the blatant violation of the Agreement on Succession Issues between Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia (which was ratified by the decision of the Presidency of Bosnia and Herzegovina on 28 November 2001; *Official Gazette of BiH - International Agreements*, 10/2001), and the Law on the Temporary Prohibition of the Disposal of State Property of Bosnia and Herzegovina and other legal regulations relevant to the legal regulation of state property; repeated failures to enforce final and binding decisions of the Constitutional Court, and non-compliance with Bosnia and Herzegovina's competence to regulate the legal matter that is the subject of the disputed Law. Due to the aforementioned reasons, the applicants contend that the application of the disputed Law could cause irreparable damage to the immovable State property. In view of the above, the applicants demand that the request for adoption of an interim measure be granted, and that the disputed Law be temporarily rendered ineffective. In addition, the applicants demand that the decision of the Constitutional Court be rendered effective immediately and be legally binding pending a final decision by the Constitutional Court of Bosnia and Herzegovina on the submitted request, as well as that the decision of the Constitutional Court be published in the official gazettes.

Relevant Law

11. The **Law on Immovable Property Used for the Functioning of the Public Authority of the Republika Srpska** (*Official Gazette of Republika Srpska*, 16/23) reads:

Article 1

This Law shall regulate the ownership of immovable property, which serves as a means of exercising and carrying out public authority, which is used by the subjects exercising that authority since the signing of the General Framework Agreement for Peace in Bosnia and Hercegovina and is entered in public records on immovable property, the management and maintenance of which is within the responsibility of the Republic Administration for Geodetic and Property Legal Affairs ("the Administration") as the property of those subjects.

Article 2

This law does not apply to ownership over immovable property, the management and maintenance of which is within the responsibility of the Administration, which was registered in the public records on immovable property until 31 December 1991 as property with the right of disposal or management by the former Socialist Republic of Bosnia and Herzegovina.

Article 3

The subjects of public authority are the Republika Srpska, local self-government units, public companies, public institutions and other public services, founded by the Republika Srpska, or by the local self-government units ("the subjects of public authority").

Article 4

Immovable property entered in the public records of immovable property, the management and maintenance of which is within the responsibility of the Administration, as the property of the subjects of public authority from Article 3 of this law, which these subjects use for their activities and functioning, shall be the property of these subjects by operation of law.

Article 5

Immovable property, referred to in Article 4 of this Law, as well as management and disposal of the said property by the subjects of public authority, shall be established in accordance with a special law.

Article 6

(1) Entries of immovable property referred to in Article 2 of this law in the public records of immovable property, the management and maintenance of which is the

responsibility of the Administration, shall not be changed until the adoption of a law regulating ownership of that immovable property.

(2) The immovable property referred to in paragraph 1 of this article is managed by the Republika Srpska or another subject of public authority determined by the Government of the Republika Srpska.

Article 7

This law shall enter into force on the eighth day from the day of its publication in the Official Gazette of the Republika Srpska.

12. The **Law on Immovable Property Used for the Functioning of the Public Authority of the Republika Srpska** (*Official Gazette of Republika Srpska*, 29/22) which was declared unconstitutional by the Decision on Admissibility and Merits no. *U-10/22* of 22 September 2022 (available at www.ustavnisud.ba).reads:

Article 1

This Law shall regulate the ownership of immovable property, which serves as a means of exercising and carrying out public authority, which is used by the subjects exercising that authority since the signing of the Dayton Peace Agreement.

Article 2

The subjects of public authority are the Republika Srpska, local self-government units, public companies, public institutions and other public services, founded by the Republika Srpska, or by the local self-government units (“the subjects of public authority”).

Article 3

Immovable property, which is considered ownership of the subjects of public authority referred to in Article 2 of this Law, which is used by the said subjects to execute their activities and the functioning thereof, shall be ex lege the ownership of the said subjects.

Article 4

Immovable property, referred to in Article 3 of this Law, as well as management and disposal of the said property by the subjects of public authority, shall be established in accordance with a special law.

Article 5

This Law shall enter into force eight days upon the publication thereof in the Official Gazette of the Republika Srpska.

Admissibility and grounds for the request for an interim measure

13. In examining the request for an interim measure, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 64(1) and (4) of the Rules of the Constitutional Court.

14. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall uphold this Constitution.

a) 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 neighbouring 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.

15. Article 64 (1) and (4) of the Rules of the Constitutional Court reads as follows:

(1) The Constitutional Court may, of its own motion or at the request of an applicant or appellant, adopt any interim measure it deems necessary in the interest of the parties or the proper conduct of the proceedings before the Constitutional Court.

(4) The proceedings concerning the adoption of an interim measure shall be expedited and a decision granting a request for the adoption of an interim measure shall be binding until the Constitutional Court takes a final decision. (...)

16. The Constitutional Court recalls that Article 64 of the Rules of the Constitutional Court is applicable in cases where the Constitutional Court assesses that, pursuant to the reasons and evidence on justification attached to the request for an interim measure, adoption of the measure is in the interest of the parties or the proper conduct of the proceedings, notably if they create irreparable harm.

17. It is obvious to the Constitutional Court that the circumstances of this case raise very serious and complex issues regarding the constitutionality of the contested Law. In particular, the Constitutional Court observes that the name of the disputed Law is identical to the name of the Law which the Constitutional Court has already rendered ineffective by the Decision on Admissibility and Merits, no. *U-10/22* of 22 September 2022. Furthermore, the Constitutional Court notes that the contested Law contains certain provisions that were contained in the previous law, albeit also containing provisions that were not contained in the previous law.

18. The Constitutional Court recalls that pursuant to Article 64 (1) of the Rules, the Constitutional Court may, of its own motion or at the request of an applicant or appellant, adopt any interim measure it deems necessary in the interest of the parties or the proper conduct of the proceedings, especially where irreparable damage could occur. In this regard, in its case law the Constitutional Court recalls that Article 64(1) of the Rules of the Constitutional Court, through the use of the expressions “may, of its own motion or at the request of an applicant or appellant, adopt any interim measure it deems necessary” confirms that the Constitutional Court has a broad discretion when faced with a request. This discretion, both follows from and is curtailed by the Court’s constitutional duty to “uphold the Constitution” under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. When faced with a request for an interim measure, before deliberating on what kind of interim measure it may order, the Constitutional Court must find that the circumstances for the adoption of an interim measures have been met. That is, the Court must be able to conclude, “pursuant to the reasons and evidence on justification attached to the request for

an interim measure that it is in the interest of the parties or the proper conduct of the proceedings, notably that they create irreparable harm” (see, Constitutional Court, Decision on Interim Measure no. *U-10/16* of 17 September 2017, published in the *Official Gazette of BiH*, 74/16, paragraph 25).

19. The requests raise serious and complex issues related to the possible harmful consequences of the application of the disputed Law before the final decision on the request is adopted. In this regard, the Constitutional Court particularly observes that Article 6 of the contested Law stipulates that new laws will be passed, based on which the registrations of real properties that are the subject of this Law will be changed. If the legislator of the Republika Srpska continues to act in this direction before the final decision of the Constitutional Court on the disputed Law is adopted and despite all other decisions adopted so far regarding the issue of the State property, and if the Constitutional Court declares the contested Law unconstitutional, in the opinion of the Constitutional Court, the harmful consequences following the same would be more serious than the consequences of temporarily suspending the application of the contested Law. Moreover, the Constitutional Court concludes that there is a danger that irreparable damage would occur because the application of the disputed Law could seriously undermine the rule of law and the conduct of the judicial proceedings before the Constitutional Court. Therefore, although the implementation of the contested Law has not commenced yet, the Constitutional Court considers that the adoption of an interim measure would prevent potential adverse consequences that could arise as a result of its application. Without prejudicing the final decision on the request, the Constitutional Court considers that the adoption of the interim measure is necessary in the interest of legal security, especially bearing in mind that the measure only temporarily suspends the application of the disputed Law.

20. Taking into account all of the above, the Constitutional Court is persuaded that the adoption of an interim measure, within the meaning of Article 64, paragraph (1) of the Rules of the Constitutional Court, is in the interest of all parties and of the judicial proceedings before the Constitutional Court, as stated in the enacting clause of this decision. The Constitutional Court has reached the above conclusion notwithstanding that on 27 February 2023, the High Representative issued a decisions suspending the application of the disputed Law (see full text [here](#)), since that decision states that such suspension will last *until a final decision of the Constitutional Court of Bosnia and Herzegovina enters into force or until the Constitutional Court of Bosnia and Herzegovina decides on interim measures in respect to the said Law*.

21. Pursuant to Article 64(4) of the Rules of the Constitutional Court, a decision granting a request for the adoption of an interim measure shall be binding until the Constitutional Court takes a final decision.
22. In view of the above, it was decided as in the enacting clause of this decision.
23. The Constitutional Court reiterates that the decision on an interim measure shall in no way prejudice a decision on admissibility/merits of the requests concerned.
24. Under Article 43 of the Rules of the Constitutional Court, Vice-President Zlatko M. Knežević gave a statement of dissent informing the Constitutional Court of its reasons.
25. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.