



DECISION ON FURTHER REMEDIES
(delivered on 7 March 2003)

Case nos.

CH/00/5134, CH/00/5136, CH/00/5138 and CH/01/7668

**Muhamed ŠKRGIC, Raska ĆERIMOVIĆ, Fikret MURTIĆ and the ASSOCIATION FOR THE
PROTECTION OF UNEMPLOYED SHAREHOLDERS OF AGROKOMERC**

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 5 March 2003 with the following members present:

Mr. Mato TADIĆ, President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Giovanni GRASSO
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, Deputy Registrar

Having considered the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Article XI of the Agreement and Rule 59 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. On 8 March 2002, the Chamber delivered a decision on admissibility and merits in the case nos. CH/00/5134 *et al.*, *Škrgić and others* ("decision of 8 March 2002"). These cases concern the applicants' failed attempts to have their status and rights recognised as shareholders of the Agrokomerc joint stock company ("Agrokomerc") located in Velika Kladuša, the Federation of BiH.

2. The applicants Muhamed Škrgić, Raska Čerimović and Fikret Murtić and the members of the Association for the Protection of Unemployed Shareholders of Agrokomerc ("applicant association") were employed by Agrokomerc. All of them claim to own private shares in Agrokomerc that they allegedly acquired during the period of 1991 through 1994 under the so-called "Marković scheme" for privatisation. Primarily the applicants allege that they acquired such shares as partial payments for salaries, although they also allege to have acquired shares by other means.

3. The applicants complained that they were denied their rights to take part in the decision-making process of Agrokomerc and to exercise other shareholder rights from 1994 until the present day.

4. On 22 June 2000, the Chamber issued an order for provisional measures ordering the Federation of BiH to desist from taking any steps aimed at changing the present status of Agrokomerc pending the outcome of the proceedings before the domestic courts in respect of the decision of the Assembly of the Una-Sana Canton of 17 July 1997; in particular, to postpone the registration of a company, Perutnina – Agrokomerc d.o.o, which was to be formed as a joint venture of Agrokomerc and a Slovenian company, previously scheduled for 23 June 2000 with the Cantonal Court in Bihać.

5. On 12 March 2001, the Chamber issued another order for provisional measures ordering the Federation of BiH to suspend the adaptation and realisation of the so-called process of small scale privatisation of objects of Agrokomerc to buyers and to prevent any other steps aimed at changing the ownership of any and all business premises or real or movable property other than articles produced during an industrial, biological, chemical or manufacturing process with a view to their sale for commercial profit.

6. In the decision of 8 March 2002, the Chamber found a violation of Article 6 paragraph 1 of the European Convention on Human Rights ("European Convention") and Article 1 of Protocol No. 1 to the European Convention. The Chamber ordered the Federation of BiH, *inter alia*, to take all necessary steps to recognise the applicants as holders of internal shares in relation to the amount of their paid internal shares in Agrokomerc and to enable the applicants to exercise the management rights connected to these shares, in accordance with the decision of 8 March 2002; to employ, at its own expense, internationally recognised auditors to undertake a forensic audit to determine the complete present ownership structure of Agrokomerc, in accordance with the decision of 8 March 2002 and in compliance with International Accounting Standards and International Auditing Standards; to take all necessary action to ensure that the results of the audit are properly and speedily implemented, including causing the new ownership structure of Agrokomerc to be properly registered, causing individual share certificates to be issued to each applicant in accordance with the Law on Securities of the Federation, and causing a general meeting of the assembly of shareholders to be convened in accordance with the law and at the latest within three months from the delivery of the results of the forensic audit; to recognise, as an interim measure until the forensic audit ordered in the decision of 8 March 2002 is complete, the capital structure of Agrokomerc registered by the Court of Bihać on 31 October 1991, that is, 53% share capital and 47% state capital; and, to appoint, as an interim measure until the forensic audit ordered in the Chamber's decision is complete and at the latest by 8 April 2002, 3 (three) members to a newly constituted supervisory board of Agrokomerc, and to allow the applicants, through the applicant association, to appoint 4 (four) members to this interim supervisory board, which shall be composed of 7 (seven) members total, each of whom shall perform his or her duties in full compliance with the decision of 8 March 2002 and with the applicable law. The Chamber also reserved its right to issue a decision on possible further remedies.

7. The relevant orders in the conclusions of the decision of 8 March 2002 read as follows:

Conclusion no. 6:

“unanimously, to order the Federation of Bosnia and Herzegovina, at its own expense, to employ internationally recognised auditors, in strict compliance with best practice procurement rules for international tenders, to undertake a forensic audit to determine the complete present ownership structure of Agrokomerc, in accordance with the Chamber’s decision and in compliance with International Accounting Standards and International Auditing Standards;”

Conclusion no. 9:

“unanimously, to order the Federation of Bosnia and Herzegovina, as an interim measure until the forensic audit ordered in conclusion no. 6 above is complete, to recognise the capital structure of Agrokomerc registered by the Court of Bihać on 31 October 1991, that is, 53% share capital and 47% state capital;”

Conclusion no. 10:

“by 6 votes to 1, to order the Federation of Bosnia and Herzegovina, as an interim measure until the forensic audit ordered in conclusion no. 6 above is complete, and at the latest by 8 April 2002, to appoint 3 (three) members to a newly constituted supervisory board of Agrokomerc, and to allow the applicants, through the Shareholders Association, to appoint 4 (four) members to this interim supervisory board, which shall be composed of 7 (seven) members total, each of whom shall perform his or her duties in full compliance with this decision, in particular paragraphs 315, 317 and 318 above, and with the applicable law;”

Conclusion no. 11:

“by 6 votes to 1, to order the Federation of Bosnia and Herzegovina, as an interim measure until the forensic audit ordered in conclusion no. 6 above is complete, and at the latest by 29 April 2002, to cause the members it has appointed to the interim supervisory board in accordance with conclusion no. 10 above, to convene a session of the newly constituted supervisory board, after providing proper notice of such session to the members appointed by the Shareholders Association, as required by Article 267 of the Law on Business Companies of 1999;”

Conclusion no. 12:

“by 6 votes to 1, that the Chamber’s previous orders for provisional measures in these cases shall remain in effect until the Chamber receives a fully executed and signed copy of the minutes from the first session of the newly constituted interim supervisory board ordered in conclusion no. 11, together with any resolutions and decisions decided at that session;”

Conclusion no. 13:

“by 6 votes to 1, that the interim measures ordered in conclusions nos. 9, 10, and 11 shall remain in effect until the Chamber receives a fully executed and signed copy of the minutes from the first meeting of the newly constituted assembly of shareholders ordered in conclusion no. 8, together with any resolutions and decisions decided at that meeting;

Conclusion no. 15:

“unanimously, to reserve the right to make additional orders for further remedies, as it deems necessary in the future, to protect the human rights of the applicants and remedy violations thereof, including, in particular, additional orders based upon the results of the forensic audit ordered in conclusion no. 6.”

II. PROCEEDINGS BEFORE THE CHAMBER AND DEVELOPMENTS SUBSEQUENT TO THE DECISION ON ADMISSIBILITY AND MERITS

8. On 8 April 2002, the applicants informed the Chamber that they appointed four members to the interim supervisory board of Agrokomerc as ordered by the Chamber.

9. On 15 April 2002, the applicants alleged that the management of Agrokomerc leased certain business premises in Velika Kladuša to Mr. Ferid Babić. The applicants further allege that the management planned to reorganise Agrokomerc into sixteen companies. The applicants did not submit any evidence in support of these allegations, explaining that they did not have access to the company's files.

10. On 17 April 2002, the Federation of BiH informed the Chamber that it appointed three members to the interim supervisory board of Agrokomerc as ordered by the Chamber.

11. On 3 May 2002, the Federation of BiH replied to the allegations of the applicants of 15 April 2002. The Federation of BiH confirmed that Agrokomerc leased a department store to another company from Velika Kladuša (BF Komerc d.o.o). The contract on lease included a clause that the lessee could not acquire the priority right to purchase the department store in the process of privatisation of Agrokomerc, regardless of any investments of the lessee in the department store. The Federation of BiH stated that the contract on lease at issue is in accordance with the decision of 8 March 2002 and the Chamber's orders for provisional measures issued in the present cases. Furthermore, the Federation of BiH asserted that the management is entitled to conclude such a contract without prior consent of the interim supervisory board in accordance with Article 275 of the Law on Business Companies (Zakon o privrednim društvima) (Official Gazette of the Federation of BiH – "OG FBiH" – nos. 23/99, 45/00, 2/02 and 6/02). The Federation of BiH also informed the Chamber that Agrokomerc needs prior consent of the Federal Ministry of Energy, Mining and Industry (Federalno ministarstvo energije, rudarstva i industrije) in the case of any changes affecting the status of Agrokomerc in accordance with Article 7 of the Decree on Performing Powers and Obligations of the Bodies of the Federation of BiH in Business Companies on the Basis of State Capital (Uredba o vršenju ovlašćenja i obaveza organa Federacije Bosne i Hercegovine u privrednim društvima po osnovu državnog kapitala) (OG FBiH nos. 8/00, 40/00, 43/00, 4/01, 5/01, 26/01, 35/01, 13/02, 14/02 and 68/02). No such consent was requested from the Federal Ministry of Energy, Mining and Industry as of 30 April 2002.

12. On 20 May 2002, the applicants informed the Chamber that the interim supervisory board of Agrokomerc held its first session on 14 May 2002. The applicants requested the Chamber not to withdraw its orders for provisional measures because the interim supervisory board did not adopt any decisions.

13. On 4 June 2002, the Federation of BiH informed the Chamber that the interim supervisory board of Agrokomerc held its first session on 14 May 2002. The Federation of BiH requested the Chamber to withdraw its orders for provisional measures because the interim supervisory board was constituted.

14. On 17 June 2002, the Federation of BiH submitted its first report on implementation of the decision of 8 March 2002. The Federation of BiH reported that the Federal Ministry of Finance (Federalno ministarstvo finansija) issued a tender for the audit of Agrokomerc on 29 April 2002. The tender was subsequently quashed on request of the World Bank. The World Bank offered its assistance to the Federation of BiH in preparing another tender.

15. On 20 August 2002, the Federation of BiH submitted its second report on implementation of the decision of 8 March 2002. The Federation of BiH reported that the new tender was to be issued the following week. The Federation of BiH further reported that the interim supervisory board of Agrokomerc held its second session and that the third session was scheduled for 22 August 2002.

16. On 10 September 2002, the applicants informed the Chamber that the interim supervisory board of Agrokomerc held its second session on 22 August 2002 (not the third session as the

Federation of BiH reported). It is clear from the record (zabilješka) of the session that the interim supervisory board could not reach any decision.

17. On 10 September 2002, the applicants also requested the Chamber to interpret conclusion no. 12 of the decision of 8 March 2002 stating that the Chamber's orders for provisional measures shall remain in effect "until the Chamber receives a fully executed and signed copy of the minutes from the first session of the newly constituted interim supervisory board ordered in conclusion no. 11, together with any resolutions and decisions decided at that session". Finally, the applicants alleged that the management of Agrokomerc had sold an affiliate company (poslovna jedinica) with its entire equipment, certain business premises and certain other equipment, without the consent of the interim supervisory board.

18. On 30 October 2002, the applicants informed the Chamber that Agrokomerc in Vienna (a subsidiary of Agrokomerc in Velika Kladuša) held 100% of the quotas¹ of Agrokomerc in Karlovac (17,900 Croatian Kunas or, approximately, 5,000 Convertible Marks (*Konvertibilnih Maraka*, "KM")). According to the applicants, Mr. Šemsudin Husić, the director of Agrokomerc in Velika Kladuša, transferred the ownership over Karlovac Agrokomerc from Vienna Agrokomerc to Velika Kladuša Agrokomerc. Mr. Šemsudin Husić further moved the head office of Karlovac Agrokomerc from Karlovac to Rijeka and amended the act of incorporation (osnivački akt) of Karlovac Agrokomerc. Mr. Šemsudin Husić also dismissed Messrs. Fikret Abdić and Muhamed Abdić and appointed Mr. Enes Demirović to the management of Karlovac Agrokomerc. The agreement (ugovor) on transfer of the ownership over Karlovac Agrokomerc from Vienna Agrokomerc to Velika Kladuša Agrokomerc was authorised by the public notary office (javni bilježnik) in Rijeka, Croatia, on 30 September 2002. The amendments to the act of incorporation of Karlovac Agrokomerc were also authorised by the public notary office in Rijeka, Croatia, on 30 September 2002. Mr. Enes Demirović, the newly appointed member of the management of Karlovac Agrokomerc, applied to the Commercial Court in Rijeka (Trgovački sud u Rijeci) to register the above mentioned changes. It appears that this application is still pending. No changes were registered at the Commercial Court in Vienna either. The applicants asserted that these steps taken by the director of Velika Kladuša Agrokomerc are in violation of Article 246 paragraph 1 points 7, 8 and 9 of the Law on Business Companies, Article 269 of the Law on Business Companies and the decision of 8 March 2002. The applicants finally submitted that the steps taken by the director of Velika Kladuša Agrokomerc constitute an offence under Article 275 of the Criminal Code (robbery) (*razbojnička krađa*).

19. On 9 November 2002, the Chamber issued the third order for provisional measures replacing the previous two orders. The Chamber ordered the Federation of BiH to:

(a) to continue to suspend the adaptation and realisation of the so-called process of small privatisation of objects of Agrokomerc to buyers and to prevent any other steps aimed at changing the ownership of any and all business premises or real or moveable property other than articles produced during an industrial, biological, chemical or manufacturing process with a view to their sale for commercial profit; and,

(b) to apply the above mentioned order to all subsidiaries of Agrokomerc, located in Bosnia and Herzegovina and abroad, and specifically to prevent any change of management, change of seat, and any other changes effecting the status or organisational structure of the subsidiaries.

20. On 13 November 2002, the Chamber asked the Federation of BiH to answer certain questions. On 29 November 2002, in reply to the Chamber's questions, the Federation of BiH informed the Chamber that Agrokomerc had both the management board envisaged in the old Law on Enterprises (*Zakon o preduzećima*) (OG FBiH nos. 2/95 and 8/96) and management envisaged in the new Law on Business Companies (*Zakon o privrednim društvima*) (OG FBiH nos. 23/99, 45/00, 2/02 and 6/02) (and, of course, the interim supervisory board with legal competencies of the

¹ The Chamber uses the term "quota" (*udio*) with a meaning similar to the term "share" (*dionica*), with the difference that registered capital of joint stock companies (such as Velika Kladuša Agrokomerc) is divided into shares while registered capital of limited liability companies (such as Karlovac Agrokomerc) is divided into quotas.

assembly of shareholders and supervisory board as ordered by the Chamber). The Federation of BiH further informed the Chamber that Agrokomerc has one subsidiary company, Agrokomerc in Vienna. The Federation of BiH submitted excerpts from the court registry books at the Commercial Court in Karlovac (Trgovački sud u Karlovcu) and the Commercial Court in Vienna (Handelsgericht Wien) of 21 November 2002 and 4 April 2002, respectively. According to the excerpt from Karlovac, Karlovac Agrokomerc was incorporated (osnovan) on 11 January 1993. It has registered capital in the amount of approximately 5,000 Convertible Marks ("KM") divided into quotas. Vienna Agrokomerc holds 100% of the quotas of Karlovac Agrokomerc. Messrs. Fikret Abdić and Muhamed Abdić are the members of the management of Karlovac Agrokomerc. The head office is in Karlovac. According to the excerpt from Vienna, Vienna Agrokomerc was incorporated (osnovan) on 27 January 1992. It has registered capital in the amount of approximately KM 71,500 divided into quotas. 95% of its capital is held by Velika Kladuša Agrokomerc, 3% of its capital is held by Mr. Fikret Abdić and 2% of its capital is held by Ms. Habiba Zukić. Mr. Šemsudin Husić has been the director of Vienna Agrokomerc since 12 December 1996.

21. On 29 November 2002, the applicants informed the Chamber that Agrokomerc had a management board whose members were appointed by the Federal Ministry of Energy, Mining and Industry (Federalno ministarstvo energije, rudarstva i industrije) on 7 August 2001 in accordance with Article 7 of the Decree on Performing Powers and Obligations of the Bodies of the Federation of BiH in Business Companies on the Basis of State Capital. The applicants further informed the Chamber that the management board appointed members of the management of Agrokomerc. The applicants asserted that Agrokomerc has six subsidiary companies, all of them abroad:

- Agrokomerc Handelsgesellschaft m.b.H. Wien, Austria (a limited liability company with 95% of its quotas owned by Velika Kladuša Agrokomerc, 3% owned by Mr. Fikret Abdić and 2% owned by Ms. Habiba Zukić);
- Agrokomerc d.o.o. Karlovac, Croatia (a limited liability company with 100% of its quotas owned by Vienna Agrokomerc; the director is Mr. Fikret Abdić);
- Agrokomerc d.o.o. Zagreb, Croatia (a limited liability company with 100% of its quotas owned by Velika Kladuša Agrokomerc; the director is Mr. Šaćir Agić);
- Agrokomerc d.o.o. Ljubljana, Slovenia (a limited liability company with 100% of its quotas owned by Vienna Agrokomerc; the company has been inactive since 1995);
- Agrokomerc Belgrade, FR Yugoslavia (a socially owned company; initially incorporated by Velika Kladuša Agrokomerc);
- Agrokomerc Herceg Novi, FR Yugoslavia (a socially owned company; initially incorporated by Velika Kladuša Agrokomerc).

The applicants also informed the Chamber that they filed criminal charges against Messrs. Šemsudin Husić and Enes Demirović in relation to the above mentioned changes within Karlovac Agrokomerc. The applicants referred to the following Articles of the Criminal Code: Article 256 (business mismanagement) (nesavjesno poslovanje u privredi); Article 259 (abuse of position of power in business matters) (zloupotreba ovlasti u privredi); Article 260 (concluding a prejudicial contract) (zaključenje štetnog ugovora); Article 282 (fraud) (prijevара); Article 289 (interference with the property right of others) (oštećenje tuđih prava); Article 359 (embezzlement) (pronevјera).

22. In the light of the non-sufficient information in the previous letter of the Federation of BiH, the Chamber requested the Federation of BiH to submit urgently the names of the members of the management board and management of Agrokomerc and the list of all subsidiary companies of Agrokomerc. On 3 December 2002, the Federation of BiH informed the Chamber that the Federal Ministry of Energy, Mining and Industry (Federalno ministarstvo energije, rudarstva i industrije) had appointed the management board of Agrokomerc on 2 August 2001. The members of the management board are:

- Mr. Rusmir Sendić (the president of the board);
- Mr. Enes Demirović (the vice-president of the board);
- Mr. Vojislav Bajić;
- Mr. Adem Ibrahimpašić;
- Mr. Josip Sočo;

- Mr. Ekrem Pašić;
- Mr. Ljubomir Rukavina was the member of the management board until he died in July 2002.

The management board appointed the members of the management. The members of the management are:

- Mr. Šemsudin Husić (the director, appointed on 13 December 2001);
- Mr. Salko Kuduz (the executive director, appointed on 25 January 2002);
- Mr. Muhamed Đogić (the executive director, appointed on 25 January 2002);
- Mr. Nihad Ugarak (the executive director, appointed on 25 January 2002);
- Mr. Munir Termiz (the executive director, appointed on 25 January 2002);
- Mr. Ibrahim Alagić (the executive director, appointed on 25 January 2002);
- Mr. Mirsad Mašić (the executive director, appointed on 25 January 2002);
- Mr. Enver Pašić (the executive director, appointed on 25 January 2002, withdrew on 1 October 2002).

The Federation of BiH also informed the Chamber that Agrokomerc has six subsidiary companies:

- Agrokomerc Handelsgesellschaft m.b.H. Wien, Austria (a limited liability company);
- Agrokomerc d.o.o. Karlovac, Croatia (a limited liability company);
- Agrokomerc d.o.o. Zagreb, Croatia (a limited liability company);
- Agrokomerc d.o.o. Ljubljana, Slovenia (a limited liability company);
- Agrokomerc Belgrade, FR Yugoslavia (a socially owned company; initially incorporated by Velika Kladuša Agrokomerc);
- Bosna Pečuh, Hungary.

The Federation of BiH added that only two of the six subsidiary companies were active at the moment, Agrokomerc d.o.o. Karlovac and Agrokomerc Belgrade.

The Federation of BiH also alleged that the head office of Karlovac Agrokomerc was moved from Rijeka to Karlovac by Mr. Fikret Abdić, with no consent of Vienna Agrokomerc (which holds 100% of the quotas of Karlovac Agrokomerc) nor Velika Kladuša Agrokomerc (which holds 95% of the quotas of Vienna Agrokomerc). Finally, the Federation of BiH complained of the fact that none of the subsidiary companies of Velika Kladuša Agrokomerc have been brought under its effective control because of the Chamber's orders for provisional measures.

23. In a letter dated 13 January 2003, the applicants informed the Chamber that the four members of the interim supervisory board, who were appointed by the applicants, held a meeting on 28 December 2002. These four members stated that the management board and management, who were appointed by the Federal Ministry of Energy, Mining and Industry, continued to manage Agrokomerc, that the interim supervisory board existed only on paper, without any real power, and that the management board and management did not provide even minimal conditions for the work of the interim supervisory board (the interim supervisory board has no offices and no access to documents and premises of Agrokomerc). The applicants requested the Chamber to order further remedies, which would enable the interim supervisory board to function in accordance with the applicable law.

24. On 6 February 2003, the Federation of BiH pointed out to the Chamber that according to Article 383 of the Law on Business Companies, a company that is in the process of privatisation is to adjust its structure and by-laws to the Law on Business Companies not later than 60 days after the completion of the process of privatisation. Since the process of privatisation of Agrokomerc has not been completed yet, Agrokomerc did not go through those structural adjustments. That is why organs, such as the management board, envisaged by the old Law on Enterprises (Zakon o preduzećima) (OGFBiH nos. 2/95 and 8/96) and not by the new Law on Business Companies, are still operative. The Federation of BiH then referred to Article 386 of the Law on Business Companies, which expressly repealed the Law on Enterprises. The Federation of BiH explained that the organs of Agrokomerc must act on the basis of the new Law on Business Companies, though they may keep

the old names (*i.e.* the names envisaged in the old Law on Enterprises). Accordingly, the so-called “management board” actually functions as the “supervisory board” in the sense of the new Law on Business Companies. The director and executive directors of Agrokomerc function as the “management” in the sense of the new Law on Business Companies. The Federation of BiH did not comment on what would then be the competence of the interim supervisory board ordered by the decision of 8 March 2002.

25. On 7 February 2003, the Chamber ordered additional provisional measures, namely that the Federation of BiH ensure immediately that each of the members of the interim supervisory board has access to all the documentation and premises of Agrokomerc.

III. RELEVANT LEGAL PROVISIONS

A. Decree on Performing Powers and Obligations of the Bodies of the Federation of BiH in Business Companies on the Basis of State Capital (Uredba o vršenju ovlašćenja i obaveza organa Federacije Bosne i Hercegovine u privrednim društvima po osnovu državnog kapitala) (OG FBiH nos. 8/00, 40/00, 43/00, 4/01, 5/01, 26/01 and 35/01)

26. Article 7, as amended, reads:

“Until the completion of the privatisation process and the issuance of the procedural decision referred to in Article 38 of the Law on Privatisation of Enterprises (OG FBiH nos. 27/97, 8/99, 32/00, 45/00, 54/00, 60/01, 27/02 and 33/02), the body of the Federation of BiH established in the list referred to in Article 2 of this Decree shall, in proportion to the participation of the state capital in the entire capital of the enterprise: (1) appoint and dismiss the members of the assembly of shareholders, as well as the members of the management/supervisory boards; (2) give prior consent for the appointment of the director of the company; (3) give prior consent for the articles of incorporation of the company; (4) give prior consent for any changes of the status of the company.”

B. Law on Enterprises (Zakon o preduzećima) (OG FBiH nos. 2/95 and 8/96)

27. According to Articles 32 and 46-48, the joint stock company shall have an assembly of shareholders, a management board, a supervisory board and a director.

28. According to Article 37, the assembly of shareholders shall appoint and dismiss the members of both the management board and supervisory board.

29. According to Article 40, the management board shall appoint and dismiss the director.

30. According to Article 45, the supervisory board shall supervise work of the management board.

31. The Law on Enterprises does not regulate the decision-making process within the joint stock company but leaves it to the by-laws of the company to regulate it.

C. Law on Business Companies (Zakon o privrednim društvima) (OG FBiH nos. 23/99, 45/00, 2/02 and 6/02)

32. The Law on Business Companies replaced the Law on Enterprises.

33. According to Article 239, the joint stock company shall have the assembly of shareholders, supervisory board and management.

34. According to Article 246, the assembly of shareholders shall, *inter alia*, appoint and dismiss the members of the supervisory board.

35. According to Article 248, the assembly of shareholders shall make decisions pertaining to division, termination or transformation of the company and amendments of the by-laws of the company by two thirds majority of represented shares with voting rights. The assembly of shareholders shall make all other decisions by simple majority of represented shares with voting rights.

36. According to Article 268, the supervisory board shall make decisions by simple majority of members present, under the condition that at least two thirds of all members of the supervisory board are present.

37. According to Article 269, the supervisory board shall, *inter alia*, appoint the management (the director and executive directors).

38. According to Article 274, the members of the supervisory board shall be entitled to request all the data on business operation of the company.

39. According to Article 275, the management shall consist of the director and executive directors.

40. According to Article 277, the supervisory board shall appoint and dismiss the executive directors upon the suggestion of the director.

41. According to Article 382, the company shall be obliged to adjust its structure and by-laws to the Law on Business Companies not later than six months after this Law has become applicable, *i.e.* by 28 February 2000.

42. According to Article 383, the company that is under the process of privatisation shall be obliged to adjust its structure and by-laws to this Law not later than 60 days after the completion of the process of privatisation.

43. According to Article 385, the registration court shall *ex officio* issue and publish in the Official Gazette of the Federation of BiH a decision to terminate a company that has not adjusted its structure and by-laws to this Law in accordance with either Article 382 or Article 383 of this Law.

IV. OPINION ON FURTHER REMEDIES

44. The Chamber recalls that under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the respondent Parties to remedy the established breaches of the Agreement. In the decision of 8 March 2002 the respondent Party was ordered, as an interim measure until the forensic audit is completed, to recognise the capital structure of Agrokomerc registered by the competent court in Bihać on 31 October 1991, that is, 53% share capital and 47% state capital. The Federation was further ordered to appoint three members to a newly constituted interim supervisory board of Agrokomerc, to allow the applicants to appoint four members to this interim supervisory board and to ensure that each of the seven members of the interim supervisory board perform duties in full compliance with the decision of 8 March 2002 and with the applicable law. The decision of 8 March 2002 further provides in paragraph 315:

“The interim supervisory board shall be competent to decide upon all issues within the general competence of the assembly of shareholders, as that competence is defined in the decision on issuance of internal shares and the currently applicable laws (in particular Article 246 of the Law on Business Companies of 1999, with the exception of item 12 of Article 246). In the event that the interim supervisory board decides upon any issue within the general competence of the assembly of shareholders, then such a decision must be taken on the basis of a two-thirds majority vote of all members of the interim supervisory board (*i.e.*, 5 (five) members in agreement). Similarly, if the interim supervisory board decides to change any or all of the members of the management board of Agrokomerc during the interim period, then this vote must also be taken on the basis of a two-thirds majority vote of all members of the interim supervisory board (*i.e.*, 5 (five) members in agreement).”

45. This arrangement was intended to provide for a balance in the governance of Agrokomerc during the interim period between the delivery of the Chamber's decision and the completion of the audit. The management appointed by the respondent Party would have continued to manage the company under the supervision of the supervisory board, on which the applicants, who according to the register kept at the competent court in Bihać hold the majority of the company's shares, would have enjoyed the majority. All decisions within the competence of the assembly of shareholders and any decision to change the management, however, would have required the agreement of not only the members of the supervisory board appointed by the applicants (*i.e.* would have required 5 members in agreement).

46. However, the Chamber observes that the interim period until the ownership structure is established, its results registered and the general meeting of the assembly of shareholders convened is lasting significantly longer than envisaged in the decision of 8 March 2002. As of the date of the present decision on further remedies, one year later, the auditors have not begun the audit of Agrokomerc in accordance with the Chamber's decision. The Chamber is of the opinion that this delay is to be imputed, at least in part, to the respondent Party. On 29 April 2002 the Federal Ministry of Finance (Federalno ministarstvo finansija) issued a tender for the audit of Agrokomerc, which was not deemed to be "in strict compliance with best practice procurement rules for international tenders" as required in paragraph 307 of the decision of 8 March 2002. The tender was therefore subsequently quashed on request of the World Bank, and a corresponding delay occurred.

47. Moreover, the interim arrangement required "that the applicants should be allowed immediately to participate in the management of the company" (paragraph 313 of the decision of 8 March 2002). In order for the applicants' participation in the management to be meaningful and workable, the Chamber established that "the newly constituted interim supervisory board shall commence the performance of its legal duties and responsibilities to manage Agrokomerc in accordance with the law, in particular the Law on Business Companies of 1999. Unless otherwise explicitly stated in this decision, the interim supervisory board shall fully comply with the applicable law as it conducts its business and performs its legal duties." (paragraph 318 of the decision of 8 March 2002).

48. The Chamber observes that, as evidenced by the minutes of the meetings of the interim supervisory board, this organ has since its formation been unable to take any decisions and thus unable to perform "its legal duties and responsibilities to manage Agrokomerc in accordance with the law". Moreover, according to the statements of the applicants, which have remained unchallenged by the respondent Party, the members of the supervisory board appointed by the applicants have been prevented from performing their duties by the management, which has denied them access to the business records of Agrokomerc and to the premises of the company. Finally, the lack of clarity as to whether Agrokomerc is currently governed under the 1995 Law on Enterprises or the 1999 Law on Business Companies appears to have given the management board and management appointed by the Federation of BiH additional grounds to obstruct any meaningful participation in the management of the company by the members of the interim supervisory board appointed by the applicants.

49. For these reasons, and considering that the interim period preceding the general meeting of the assembly of shareholders cannot be expected to last less than another four months, the Chamber sees it fit to order further remedies aimed at securing "that the applicants ... be allowed immediately to participate in the management of the company" (paragraph 313 of the decision of 8 March 2002).

A. As to the management board of Agrokomerc

50. On 6 February 2003, the Federation of BiH asserted that the organs of Agrokomerc must act on the basis of the new Law on Business Companies, though they may keep the old names (*i.e.* the names envisaged in the old Law on Enterprises). Accordingly, the so-called "management board", appointed by the Federal Ministry of Energy, Mining and Industry, functions as the "supervisory board" in the sense of the new Law on Business Companies. The director and executive directors of Agrokomerc, appointed by the management board, function as the "management" in the sense of the new Law on Business Companies.

51. The Chamber is of the opinion that this situation, as described by the respondent Party, is incompatible with the performance by the interim supervisory board of its legal duties and responsibilities to manage Agrokomerc in accordance with the law, in particular the Law on Business Companies of 1999. It results in Agrokomerc having in fact two supervisory boards, the practically inoperative interim supervisory board on which the applicants are represented and the “management board” appointed by the Federation Ministry of Energy, Mining and Industry on 7 August 2001, which is, according to the Federation’s own statement, carrying out the functions of the supervisory board. Therefore, the Chamber, so as to permit the interim supervisory board to carry out its intended functions, will order that the respondent Party take all necessary steps to ensure that the “management board” of Agrokomerc appointed by the Federation Ministry of Energy, Mining and Industry on 7 August 2001 cease functioning. The “management board” shall cease to function as soon as possible and in any case no later than 15 April 2003.

B. As to the management of Agrokomerc

52. The Chamber recalls that the Federation of BiH originally appointed the management board of Agrokomerc. On 13 December 2001 the management board appointed the director of Agrokomerc and, on 25 January 2002, the executive directors of Agrokomerc. The Federation of BiH thus acted again as if it was the sole owner of Agrokomerc.

53. The Chamber has previously ordered that the interim supervisory board shall be entitled to dismiss the director and executive directors of Agrokomerc by a two-thirds majority vote (*i.e.* 5 members in agreement). The Chamber recalls that this arrangement derogates from Articles 268 and 269 of the Law on Business Companies, pursuant to which the supervisory board shall make decisions, including the appointment and dismissal of the management, by simple majority of members present, under the condition that at least two thirds of all members of the supervisory board are present. As explained above, this order was intended to secure a balance between the management rights of the applicants and the respondent Party in the period of uncertainty as to who owns the majority of the Agrokomerc shares.

54. The Chamber considers, on the one hand, in the light of the obstructive conduct of the Agrokomerc management over the last year, that in order to allow the applicants to meaningfully participate in the management of the company during the interim period, the presence of their representatives on the interim supervisory board is not sufficient. On the other hand, the super majority requirement appears to have created a deadlock in the interim supervisory board, which makes it unrealistic to expect that the interim supervisory board can agree by the majority established in the Chamber’s decision, on the appointment of any executive director proposed by the applicants.

55. Therefore, the Chamber decides to partly lift the super majority requirement in so far as it applies to the appointment and dismissal of the executive directors, as explained in the following sentences. Currently, Agrokomerc has one director and six executive directors. The interim supervisory board shall be entitled to replace three of the current six executive directors and to appoint one executive director replacing Mr. Pašić who withdrew on 1 October 2002 by a simple majority vote (*i.e.* 4 members in agreement). The Chamber further decides that, exclusively for the purpose of the appointment of these four executive directors, the presence quorum requirement in Article 268 of the Law on Business Companies shall not apply to the interim supervisory board. Furthermore, the interim supervisory board shall not be obliged under Article 277 of the Law on Business Companies to obtain the proposals from the director as to candidates for the position of executive directors, nor shall it be obliged to acquire the prior consent of the Federation of BiH when appointing executive directors in the sense of Article 7 of the Decree on Performing Powers and Obligations of the Bodies of the Federation of BiH in Business Companies on the Basis of State Capital. In the same manner, by a simple majority of four, the interim supervisory board shall decide who of the executive directors shall be the deputy director within the meaning of Article 278 of the Law on Business Companies. Furthermore, the Chamber clarifies that the interim supervisory board shall select which present executive directors they wish to replace, while not changing the current functional competencies. As to the director and the three remaining executive directors, the interim supervisory board shall remain entitled to replace them by a two-thirds majority vote (*i.e.* 5 members

in agreement). This provision replaces the last sentence of paragraph 315 in the decision of 8 March 2002.

C. Further orders

56. Article XI(1) of the Agreement states that “the Chamber shall promptly issue a decision, which shall address: ... (b) what steps shall be taken by the Party to remedy such breach, including ... provisional measures.” The Chamber finds it appropriate to exercise its powers granted under Article XI(1)(b) of the Agreement to order the respondent Party to take the actions decided on in paragraphs 51 and 55 above without further delay, regardless of whether either party files a request for review of the present decision under Article X(2) of the Agreement.

57. The Chamber reserves the right to issue any further orders it deems necessary to remedy the human rights violations found in the decision of 8 March 2002.

D. Reporting requirement

58. The respondent Party shall report to the Chamber on the implementation of all orders set out above no later than 15 April 2003.

V. CONCLUSIONS

59. For the above reasons the Chamber decides:

1. by 6 votes to 1, to issue the present decision on further remedies;
2. by 5 votes to 2, to order the Federation of Bosnia and Herzegovina to take all necessary steps to ensure that the management board of Agrokomerc cease functioning no later than 15 April 2003;
3. by 5 votes to 2, to entitle the interim supervisory board to replace three of the current six executive directors of Agrokomerc and to appoint one executive director replacing Mr. Pašić who withdrew on 1 October 2002 by a simple majority vote (*i.e.* at least 4 members present and in agreement) and thus in derogation of the last sentence of paragraph 315 of the decision of 8 March 2002 and of Article 268 of the Law on Business Companies; in so doing the interim supervisory board shall select which present executive directors they wish to replace, while not changing the current functional competencies, and who among the four appointed executive directors shall serve as the deputy director;
4. by 5 votes to 2, that in making the appointments under conclusion no. 3 above, the interim supervisory board shall not be obliged under Article 277 of the Law on Business Companies to obtain the proposals from the director as to candidates for the position of executive directors, nor shall it be obliged to acquire the prior consent of the Federation of BiH when appointing executive directors in the sense of Article 7 of the Decree on Performing Powers and Obligations of the Bodies of the Federation of BiH in Business Companies on the Basis of State Capital;
5. by 5 votes to 2, that the orders in conclusion nos. 2, 3 and 4 above shall take effect immediately, regardless of whether either party files a request for review of the present decision under Article X(2) of the Agreement
6. by 6 votes to 1, to reserve the Chamber’s right to issue additional decisions on further remedies;
7. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Chamber by 15 April 2003 on the steps taken to implement all orders set out above.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Mato TADIĆ
President of the Second Panel

Annex Dissenting opinion of Mr. Vitomir Popović

ANNEX

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Vitomir Popović.

DISSENTING OPINION OF MR. VITOMIR POPOVIĆ

In the decision on admissibility and merits delivered on 8 March 2002, the Chamber found a violation of the applicants' rights under Article 6 paragraph 1 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the European Convention. As stated in paragraph 6 of the present decision, the Chamber ordered the respondent Party, *inter alia*, as follows: "to recognise, as an interim measure until the forensic audit ordered in the decision of 8 March 2002 is complete, the capital structure of Agrokomerc registered by the Court of Bihać on 31 October 1991, that is, 53% share capital and 47% state capital...".

In conclusions nos. 3 and 4 of the present decision, the Chamber decided "to entitle the interim supervisory board to replace three of the current six executive directors of Agrokomerc and to appoint one executive director replacing Mr. Pašić who withdrew on 1 October 2002 by a simple majority vote (*i.e.* at least 4 members present and in agreement) and thus in derogation of the last sentence of paragraph 315 of the decision of 8 March 2002 and of Article 268 of the Law on Business Companies..." and that "the interim supervisory board shall not be obliged under Article 277 of the Law on Business Companies to obtain the proposals from the director as to candidates for the position of executive directors, nor shall it be obliged to acquire the prior consent of the Federation of BiH when appointing executive directors in the sense of Article 7 of the Decree on Performing Powers and Obligations of the Bodies of the Federation of BiH in Business Companies on the Basis of State Capital".

Acting in this manner, the Chamber exceeded the limits of its competence under Article 1 of the Human Rights Agreement, which, *inter alia*, states: "The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms...". Thus, after having established the existence of the above-mentioned violations in the Chamber's previous decision of 8 March 2002, the Chamber could, with the view to remedying these violations, only order a consistent application of the currently applicable Law on Business Companies, which unambiguously established the competence of the assembly of shareholders, the supervisory board, and the directors. However, in making such an order, the Chamber should not have excluded certain other provisions of the applicable law. Acting in this manner, by ordering the replacement of a certain number of executive directors, including Mr. Pašić, who withdrew on 1 October 2002, the Chamber started addressing and governing the business and personnel policy of Agrokomerc; however, in doing so, it failed to address the potential consequences of such decision. Even if the entire management, including the executive directors, is competent to run Agrokomerc, under the Chamber's decision, four of seven of the executive directors still must be replaced. This is so, even if the shareholders agree with the representatives of the state capital that the majority of the existing members of the executive board should not be replaced. I specifically highlight that the transformation of state property into private property made during this period of transition for Bosnia and Herzegovina was primarily intended to promote the general efficiency of businesses by reducing the excessive influence of the State on the economy and by increasing the efficiency of leadership and management structures. In other words, if, contrary to the provisions of the law, the Chamber now excludes the director's right to propose executive directors, who are his closest associates, then the Chamber introduces duality of governing management on the business subject. In this manner, the Chamber will create a whole set of problems in the functioning of not only the management structure, but also the company as a whole, to the detriment of the company and its employees, as well as the wider community.

For these reasons, I respectfully dissent.

(signed)
Vitomir Popović