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Dear Giuliana,

We would like to draw your kind attention again to the question of the validity of the Rules of the Assembly of EULEX Judges and all subsequent decisions concerning this issue. The problems we see arise from the following facts:

According to the "Minutes Report" of the Assembly held on 23 October 2008 in Prizren "It was mentioned that the role of the Assembly of EULEX Judges, both before and after appointment of Judges, had been discussed with colleagues from the European Council ("EC") during their visit to Kosovo within the past few weeks. It was clarified that the decision of the Assembly are of interim nature and have to be taken formally once the official appointment of EULEX Judges takes place. The question of calling another Assembly after the appointment was also raised". EULEX Judges have been appointed by HoM on the basis of the delegation of power received from SRSG as from December 2008. During the last Assembly in Peja various amendments to the "Rules of the Assembly of EULEX Judges" were decided upon by the Assembly and an explicit clarifying decision of the Assembly whether the decision on the amendments constitutes a tacit confirmation of the "Rules of the Assembly of EULEX Judges" as a whole was, although a respective motion had been lodged, not taken.

In these circumstances we see a need for clarification by way of a formal decision of the Assembly confirming all decisions taken by the Assembly prior to the first appointments of its members in December 2008 because of the following reasons:

According to Article 1 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Official Gazette of the Republic of Kosovo No. 27, 3 June 2008) "EULEX judge" means a judge, belonging to the EULEX Kosovo, who has been selected and appointed by the competent authority to work in Kosovo in this specific position." Hence, according to the wording of the law the Assembly of EULEX Judges, as referred to in particular in Articles 2.6 and 4.10 of Law No. 03/L-053, is constituent and able to take (valid) decisions only after appointment of its members as EULEX judges. The reason for this legal requirement is obvious: According to Articles 2.6 and 4.10 of Law No. 03/L-053 the Assembly of EULEX Judges takes important decisions which – like the decision on the "modalities on case selection and allocation" (see

Articles 3.2 and 5.1 of Law No. 03/L-053) – affect the mandate and the independence of EULEX Judges. The decisions must therefore be made by judges with judicial independence as granted by their appointment. Apart from that the “Rules of the Assembly of the EULEX Judges”, on which all of the decisions of the Assembly are based, were adopted on 10 July 2008 by 12 judges only where as presently there are more than 30 EULEX Judges.

The Assembly did not take any decision on the “Rules of the Assembly of EULEX Judges” in their entirety when adopting the amendments thereto during the session held on 2 March 2009. Even a tacit confirmation of the existing Rules by adopting the proposed amendments seems to be doubtful. Such a tacit confirmation would at least require the consciousness of the assembled judges that there was a need for such a confirmation. The presence of such consciousness can, taking into account the different opinions that were outspoken during the last Assembly, not be presumed.

Taking these uncertainties into account, we also disagree with the wording of the document attached to the minutes of the Peja Assembly named “Rules of the Assembly\_amended” as regards the last sentence “These Rules are adopted by the Assembly of the EULEX Judges on 2 March 2009 in Pejë/Pec”.

For the above mentioned reasons we hereby bring forward the following

**motion:**

The next Assembly of EULEX Judges, to be convened for the 22<sup>nd</sup> of April 2009, should additionally deal with the following agenda points:

- 1) Formal decision confirming all decisions taken by the Assembly of Judges on 10 July 2008 in Pristina, 23 October 2008 in Prizren and 5 November 2008 in Pristina.
- 2) Decision on the following proposals amending the Rules of the Assembly of EULEX Judges (proposals in italics):

**Article 6**

**Meetings of the Assembly**

The Assembly is convened at least once every three months *by the President of the Assembly as laid down in Article 2 and 5. Upon motion of six members of the Assembly the President of the Assembly shall convene the Assembly within eighteen days of receipt of the motion.* The Assembly shall take place in each District Court area on a rotational base. The members of the Assembly shall receive the convocation and agenda of the Assembly at least ten days before the date fixed for the session. *The first point on each agenda shall be the decision of the Assembly on the minutes taken of the previous session. ...*

Reasons for the proposed amendments:

The insertion “*by the President of the Assembly as laid down in Article 2 and 5*” is proposed as a clarification necessitated by the proposal that “*Upon motion of six members of the*

*Assembly the President of the Assembly shall convene the Assembly within eighteen days of receipt of the motion.*” The latter proposal reflects a common provision in the rules of democratically established self-governing bodies that a certain number of its members has the right to a session to be convened. The quorum suggested (6 members) is in compliance with the amendment to Article 11, “Modification of these rules”, as adopted on 2 March 2009. The time limit (18 days) takes into consideration that - according to the amendments made to Article 6, “Meetings of the Assembly” on 2 March 2009 – the request to adopt an item on the agenda must not be submitted later than 15 days prior to a session.

The proposal that “*The first point on each agenda shall be the decision of the Assembly on the minutes taken of the previous session*” is also common practice in sessions held by democratically established self-governing bodies. In addition, it takes up the decision taken by the Assembly of Judges on 23 October 2008 according to its “Minutes Report” and incorporates it into the “Rules of the Assembly of EULEX Judges” for the purpose of easy reference.

At the end, please allow us to clearly point out that our motion is based only on the assumption that the Law on Jurisdiction is applicable to the inner structure of the Assembly of EULEX Judges and thus is without any prejudice to the question of the applicability of those laws which have not been promulgated by the SRSG.

Best regards,

Anna Bednarek

Gabriele Gaube

Eija-Liisa Helin

Harri Katara

Torsten Koschinka

Andreas Anton Schuler

Richard Winkelhofer

Addendum by Gabriele Gaube, Richard Winkelhofer:

In the discussions of the Presidency Board meeting of 26 March 2009, another option was brought up: To incorporate the rules applied in the past (sending draft minutes around only to be commented within a certain period of time) into the Rules of the Assembly.