Strasbourg, 25 November 2014

CDL(2014)056*
Or. Engl.

Opinion no. 790 / 2014

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)**

DRAFT OPINION

ON

THE DRAFT LAW
ON SPECIAL STATE PROSECUTOR'S OFFICE

OF MONTENEGRO

on the basis of comments by

Mr Michael FRENDO (Member, Malta)
Mr Guido NEPPI MODONA (Substitute Member, Italy)
Mr Jørgen Steen SØRENSEN (Member, Denmark)
Mr Tudorel TOADER (Member, Romania)
Mr James HAMILTON (Expert, Former Member, Ireland)

CONTENTS

I. INTRODUCTION

1. On 10 October 2014, the Minister of Justice of Montenegro requested the opinion of the Venice Commission on the Draft Law on Special State Prosecutor's Office of Montenegro (CDL-REF(2014)042). The opinion of the Venice Commission was required on three other draft laws having been prepared in the context of the on-going reform of the judiciary in Montenegro: the Draft Law on State Prosecution Service, the Draft law on Courts and the Draft Law on the Rights and Duties of Judges and on Judicial Council of Montenegro.

2. Mr Michael Frendo, Mr James Hamilton, Mr Guido Neppi Modona, Mr Jørgen Steen Sørensen and Mr Tudorel Toader acted as rapporteurs on behalf of the Venice Commission.

3. On 27-28 October 2014, a delegation of the Venice Commission visited Podgorica and held meetings with representatives of the authorities (the Ministry of Justice, the Parliament, the Supreme Court and lower level courts, the State Prosecutor's Office, the Judicial Council and Prosecutorial Council) as well as professional associations of judges and prosecutors and civil society. The Venice Commission is grateful to the Montenegrin authorities and to other stakeholders met for the excellent co-operation during the visit.

4. This Opinion is based on the English translation of the draft law provided by the Montenegrin authorities. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. *This Opinion was adopted by the Venice Commission at its …th Plenary Session (…)*

II. GENERAL REMARKS

A. Background

6. The Parliamentary Assembly of the Council of Europe, in its June 2012 Resolution 1890 (2012) on "The Honouring of obligations and commitments by Montenegro", pointed out, in the area of the rule of law, in addition to the judicial reform, which remained a priority for Montenegro, the importance of the combat against corruption and organised crime.

7. The Assembly welcomed "the steps taken to combat corruption and organised crime, in particular the amendments to the Penal Code in April 2010, the adoption of a new Criminal Procedure Code in July 2010 and the revision of the Law on Prevention of Money Laundering and Terrorist Financing in February 2012". It underlined the importance of this new legislation and stressed its expectations that these laws, together with other legislative improvements (the enactment of the Law on Financing of Political Parties and the Law on Public Procurement, as well as the amendments to the Law on the Conflict of Interests in July 2011 and the Law on Lobbying adopted in November 2011) would "contribute to reducing opportunities for corruption and increasing transparency in this field".

8. Following the constitutional reforms of July 2013, new legislation on the judiciary has been elaborated - currently under examination by the Venice Commission. The opening, in December 2013, of Chapter 23 on *Judiciary and fundamental rights* in the negotiation process for EU accession, based on a detailed Action Plan prepared by the Montenegrin authorities, gave an additional impetus to the efforts made in this area. A new judicial reform strategy for 2014-2018, adopted in April 2014, articulates and complements further the key reform priorities listed in the Action Plan.

9. Strengthening the legal and institutional framework for the operation of the prosecution service, including in the area of the fight against corruption and organized crime is a major component of this wider process. The European Commission stressed in its communication 'Enlargement Strategy and Main Challenges 2014-15"[1], upon publication of its most recent

[1]COM(2014)700 final of 8.10.2014

2014 Progress Report on Montenegro on 8 October 2014, that, despite some positive recent steps, "[t]he institutional and operational capacity of prosecutors, judges and police to fight corruption remains insufficient" and delays have been noted in the implementation of related legislative reforms. In the assessment of the European Commission, "fighting organised crime and corruption is fundamental to countering criminal infiltration of the political, legal and economic systems."

10. The elaboration of a draft law aiming at establishing, within the State Prosecution Service, a separate[2] and autonomous body for fighting organised crime and corruption, is intended *inter alia* to confirm the authorities' commitment to put in place all legislative and institutional conditions likely to contribute to more efficiently combating corruption and organised crime. As indicated in the Explanatory Note accompanying the draft law, "*the need to adopt the Law on Special State Prosecutor's Office was defined in the Action Plan for Chapter 23 and the Action Plan for Chapter 24, as the most important strategic documents in the area of fight against corruption and organized crime, which define concrete objectives and measures to be implemented in the EU accession process. In these action plans, one of the measures aimed at establishing independent, effective and specialized authorities for the fight against corruption and organized crime is the adoption of the Law on Special State Prosecutor's Office and establishment of the Special State Prosecutor's Office (AP 23, measure 2.2.1.4 and AP 24 measure 6,2,8).*"

11. It is important to note also that, as part of the alignment of the legislation with the 2013 amendments to the Constitution, a Draft Law amending the current Law on the State Prosecution Service of Montenegro (the 2008 Law, as amended in 2013) has been prepared and submitted to the Venice Commission for assessment. In its article 10 dealing with the structure of the State prosecution Service, this draft provides for the establishment, under the State Prosecution Service, alongside the Supreme State Prosecution Office, high state prosecution offices and basic state prosecution offices, of a *Special State Prosecution Office*, (hereinafter the "Special Office")." The Draft Law on Special State Prosecutor's Office therefore needs to be assessed in close relation with the more comprehensive state draft law regulating the whole system of state prosecution in Montenegro.

12. This opinion will ascertain whether the Draft Law on Special State Prosecutor's Office (hereinafter, "the draft law") is in line with the Montenegrin Constitution (and in particular the new constitutional rules dealing with the prosecution service), the applicable European standards and best practices as well as relevant recommendations contained in the previous opinions of the Venice Commission[3], and should be read together with the findings and recommendations contained in the opinion on the draft law on the State Prosecution Service (see CDL(2014)055).

13. It is not the purpose of this opinion to provide a detailed and exhaustive review of the draft law. It will therefore focus on the provisions raising more critical issues.

B. Standards

14. The Venice Commission has examined the draft law in the light of the international standards for addressing corruption, as well as of existing good practices in the field.

[2] A specialised unit for fighting corruption already exists within the State Prosecution Service.

[3] *Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro*, CDL-AD(2013)028;
Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, CDL-AD(2012)024;
Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro, CDL-AD(2011)010;
Opinion on the draft amendment to the law on the State Prosecutor of Montenegro, CDL-AD(2008)005;
Opinion on the Constitution of Montenegro, CDL-AD(2007)047.

15. Special attention was paid, in preparing the present opinion, to the key principles guiding the establishment of specialised institutions for the detection, investigation, prosecution and adjudication of corruption offences, as autonomous bodies with adequate powers, resources and training, and effectively protected from improper political influence, as in particular reflected in:

- the **Council of Europe 1998 Criminal Law Convention on Corruption**[4], stipulating in its article 20 on "Specialised authorities" that:
"*Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks"*;

- the **Council of Europe Twenty guiding principles for the fight against corruption**[5] inviting States
"to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations" (Principle 3);

- the **United Nations Convention against Corruption (UNCAC)**[6], which article 36 requires States to ensure, in accordance with the fundamental principles of their legal systems, "*the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks*."

16. Other international instruments containing provisions relating to specialised institutions for combatting corruption include: the African Union Convention on Preventing and Combatting Corruption (article 20), the Southern African Development (SADC) Protocol against corruption (article 4), the Inter-American Convention against Corruption (article III).

17. It is important to emphasize that, although not proposing or advocating in favour of a unique or universal model of anti-corruption agency, the above instruments clearly define an international obligation for states to ensure institutional specialisation in the sphere of corruption, i.e to establish specialised bodies, departments or persons (within existing institutions) in charge of fighting corruption through law enforcement.

18. Key requirements for a proper and effective exercise of such bodies' functions, as they result from the above instruments, include:

- independence/autonomy (an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence);
- accountability and transparency;
- specialised and trained personnel;
- adequate resources and powers.

[4] CETS No. 173, adopted on 4 November 1998; entered into force on 1 July 2002; entered into force for Montenegro on 6/6/2006; see also Additional Protocol to the Criminal Law Convention on Corruption CETS No.: 191, entered into force for Montenegro on 1/7/2008
[5] Resolution (97) 24, adopted by the committee of Ministers of the Council of Europe on 9 November 1997
[6] Adopted on 31 October 2003, ratified by Montenegro on 23 October 2006

19. An adequate level of inter-agency co-operation and coordination and exchange of information among the various state law enforcement bodies and control institutions, openness to the co-operation with civil society and the private sector are also fundamental for the effective fight against corruption.

20. In addition to these specific elements, general standards for prosecutors are relevant also for specialised anti-corruption prosecutors, for instance, the Venice Commission *Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service*,[7] which provides further references.

III. THE DRAFT LAW ON THE SPECIAL STATE PROSECUTION SERVICE

A. Constitutional and legal framework

21. As indicated in its **Article 1**, the purpose of the draft law is to regulate the organisation and jurisdiction of the *Special State Prosecutor's Office*, the requirements and procedure for appointment of the Chief Special Prosecutor and special prosecutors and the relationship with other state authorities and state administration authorities.

22. **Article 9** establishes that the Special State Prosecutor's Office will "officiate" before the "Special Department of the Higher Court in Podgorica", with the jurisdiction to prosecute:

- organised crime, irrespective of the potential sanction;
- offences with elements of corruption, irrespective of the potential sanction, committed by public officials, as follows: abuse of office, fraud at work, illicit influence, inciting illicit influence, and active and passive bribery;
- offences with elements of corruption within the private sector where the gain exceeds €4000, as follows: abuse of position in business undertakings, and abuse of authority in economy;
- and money-laundering.

23. The use of special prosecutors in such cases has been successfully employed in many countries. The offences in question are specialised and can better be investigated and prosecuted by specialised staff. In addition, the investigation of such offences very often requires persons with special expertise in very particular areas. Provided that the special prosecutor is subject to appropriate judicial control, there are many benefits to and no general objections to such a system. The decision whether such a system would be useful and appropriate in the current circumstances of Montenegro is essentially a policy choice for the relevant authorities in that country.

24. In establishing such an institution, the authorities in Montenegro face a choice. They could establish the Special Office as a distinct institution or an independent officer outside the existing prosecution framework. To do so would nonetheless require a constitutional amendment: the **Constitution of Montenegro** provides that *"[t]he State Prosecution shall be a unique and independent state authority that performs the affairs of prosecution...*" (Article 134), where "*[t]he affairs of the State Prosecution shall be performed by the State Prosecutor*" (Article 135), a system of criminal prosecution for which the Supreme State Prosecutor bears responsibility and which is subject to his/her control.

25. Instead, the Montenegrin authorities have decided to establish the new Office within the constitutional framework regulating the State Prosecution Service. As indicated in the Explanatory Note to the draft law, the constitutional basis for the adoption of this law is to be found in Article 16, paragraph 1, Item 3 of the Constitution, which stipulates that "*[i]n accordance with the Constitution, the law shall regulate: […] 3) the manner of establishment,*

[7] Adopted by the Venice Commission - at its 85th plenary session (Venice, 17-18 December 2010 - CDL-AD(2010)040),.

organization and competences of the authorities and the procedure before those authorities, if so required for their operation". In more concrete terms, this means that the new institution will remain an integral part of the existing prosecution service, although this decision is not always fully reflected in the draft law.

26. The approach chosen is confirmed by the Draft Law on the State Prosecution Service, which provides, as previously indicated, for the establishment of the Special Office, as part of the State Prosecution Service, alongside the Supreme State Prosecution Office, high state prosecution offices and basic state prosecution offices (**Article 10**). Further provisions of that draft set out a number of key principles and norms which should also apply to the operation of the future Special Office.

27. There are advantages and disadvantages to either solution. This essentially amounts to a policy choice, which is undoubtedly the output of political negotiations and takes into account the country's specific context and needs, as well as its legal tradition and culture. It is crucial however that, in the framework of the selected model, all necessary conditions and safeguards be in place to ensure the effective functioning of the new institution, in accordance with existing standards and best practices in the field.

28. The option that appears to have been adopted has certain consequences, one of which is that the Chief Special Prosecutor cannot be independent of the Supreme State Prosecutor. Essentially the reform will amount to an upgrading of the existing unit in the Prosecutor's Office dealing amongst other matters with organised crime and corruption. The intention appears to be to confer as much autonomy as is legally possible within the existing constitutional framework to the new Office and to improve, the focus on such crimes being prosecuted within its jurisdiction; however, in practice, this will be constrained by the fact that the Supreme State Prosecutor will continue to bear an ultimate responsibility for these prosecutions which he cannot abdicate. This would therefore mean that, within the Prosecution system and under the supervision of the Supreme State Prosecutor's Office, the Chief Special Prosecutor would merely be distinguished by being specialised in this particular sector.

29. The Draft Law has regrettably been formulated in a way which tends to fudge this issue. There is no clear indication, in the first Chapter (**Article 1 to 4**, General Provisions), that the Office described is/remains an integral part of the State Prosecution Service. This is only suggested in Article 4, stating that "*[p]rovisions of the Law on State Prosecutor's Office apply accordingly to all the issues that are not regulated by this law*."

30. Likewise, **Article 11**, dealing with the Special Office management, specifies that the Chief Special Prosecutor, "is responsible to" the Supreme State Prosecutor, who in turn "supervises" the work; but even this is expressed obliquely. Furthermore, the text of the Draft Law on State Prosecution Service does not treat the Special State Prosecution Office in the same manner as other component parts of the State Prosecution Service. Hence, the draft seems presented in such a way as if it were to create a new independent office but without taking the constitutional steps that would be necessary to achieve this goal.

31. While such an approach might be understandable from a purely political standpoint, from the legal and practical point of view it could be highly problematic. Experience in other countries shows that defendants in high corruption cases are frequently well-resourced and "lawyered-up" and prone to take any legal objection open to them, as they are entitled to do. Unless the law is framed in such a way as to leave no doubt that it is drafted within the constitutional framework of Montenegro, it is likely to be challenged on the constitutional level.

32. In the light of the above comments, and assuming that there is to be no change in the Constitution, it is recommended, in order to ensure that that the constitutional framework is respected, that it be clearly indicated in the draft law that the new institution will be placed, in accordance with the Constitution, within the State Prosecution Service and under the authority of the Supreme State Prosecutor.

B. Specific comments

1. General Provisions

33. **Chapter I. General Provisions** contains four articles: **Article 1** and **Article 4** previously mentioned relate to the regulatory object of the law and to its relationship with other laws, whilst **Article 2** and **Article 3** concern the seat of the new structure[8] and, under the concept of criminal prosecution, its activity and the meaning of the concept of "high-level corruption".

34. As already indicated, it is recommended to clearly spell out, possibly in **Article 1**, the institutional position of the new structure, i.e. that, in the structure which the law opts for, the Special State Prosecutor's Office is a constituent part of the State Prosecution Service and that the Supreme State Prosecutor retains his responsibility and powers in respect of that Office. For the sake of consistency, **Article 129 of the Draft Law on the State Prosecution Service** needs to be amended. The first and third paragraphs are confusing. The former permits the Supreme State Prosecutor to exercise all the authorities and actions that the Head of the Special Office can perform (essentially the management of the Office) while the latter permits him to take over the cases of the Office only if there are grounds for suspicion of a criminal offence or there are reasons for a recusal (essentially meaning a conflict of interest). Furthermore, the powers of mandatory instruction set out in **Article 127** would need to be applicable in the Special Office.

35. To ensure the unity of the regulation, the position of **Article 9 (1)** of the draft law dealing with the jurisdiction of the Special Office and **Article 11** specifying the relation between the Head of the Special Office (the Chief Prosecutor) and the Supreme State Prosecutor could be reconsidered. Their inclusion in Chapter I would enable completion of General Provisions and a clear circumstantiation of the position, authority relationship and object of activity of the new body.

36. Harmonisation and a clearer relation between **Article 3** providing the definition of "high level corruption"[9] and of the offences listed under **Article 9** are also needed. If the concept of "high level corruption" as defined by Article 3 seems to correspond to the two categories of offences mentioned under Article 9.2 and 9.3, the draft law does not state this explicitly, nor does it explain why Article 3, dealing with the scope of the law, refers only to high level corruption, while Article 9.2 lists, under the jurisdiction of the Special Office, four categories of criminal offences. Hence, in order to clearly establish the object of activity of the Special Office and the exact circumstantiation of the offences under its jurisdiction, it would be useful to rename and reformulate the text of Article 3, possibly by merging it with the provisions of article 9.2.

37. More generally, it is important to stress that a sufficiently clear determination of the offences under the jurisdiction of the new body is essential both in terms of legal certainty and its effectiveness. Hence, increased attention should be paid to the criteria to be taken into consideration in establishing the offences: the nature of the offence, the value of the damage, the capacity of the person. Besides appropriate criteria, it is obvious that the future

[8] "Special State Prosecutor's Office shall be the state prosecutor's office established for the overall territory of Montenegro and with the seat in Podgorica".

[9] "High level corruption, under this Law, shall mean the criminal offences of the abuse of office, fraud at work, illicit influence, inciting illicit influence, active and passive bribery committed by public officials, as well as the criminal offences of the abuse of position in business undertakings and abuse of authority in economy resulting in obtaining of the pecuniary gain exceeding the amount of four thousand euros."

office needs to be equipped with the capacity - specialised, competent staff and all the resources necessary - to determine and address the offences within its jurisdiction.

38. From this perspective it is worth examining whether the value of damage set forth in the draft law as a criterion for establishing jurisdiction for offences of corruption in the private sector (over 4000 Euros, as specified by Article 9.3) is appropriate given the nature and purpose of the institution. At the proposed threshold level, one should consider whether this constitutes a risk of it being overloaded with cases that are not related to high-level corruption within the meaning of Article 3 of the law. More generally, it would be important to limit the mandate of the Special Office to particularly complex files, involving elements of serious and high level crimes. Cases that do not fit to the definition of high-level corruption should be under the mandate of regular prosecution offices.

39. As far as the capacity of the person is concerned, the term "public official" used in the draft law is insufficiently determined, which may lead to differences of interpretation in legal practice. It is recommended that a definition of "public official" be provided, as well as a list of positions which are determined as being positions held by a public official (which will therefore fall under the scope of this law)[10].

40. Also, given the steps for accession to the European Union and the objectives proposed in that regard in the statement of reasons, we consider that it would be necessary to introduce, as in Romanian legislation, jurisdiction over the offences against the financial interests of the European Union.

41. The Commission's delegation has learned about views according to which the mandate of the Special Office should also include war crimes and terrorism. It is noted that Articles 18 and 19 regulating the formation and operation of "*special investigative teams*" include, among persons seconded to the Special Office by other state agencies "for the purpose of investigating particularly complex cases and providing expert assistance", employees of the administration for the prevention of money laundering and financing terrorism. However, In view of the purpose of the institution and the need of its specialisation, it should not be overburdened with too many different tasks.

42. In addition, for a complete determination of the new institution and its systems of operation, the draft law should include a set of procedural provisions identifying the persons / authorities entitled to notify it, the conditions under which the new structure can be notified and, unless reference is made to relevant regulations in another law, related procedure and deadlines.

43. It is suggested that this Chapter be renamed and its contents rethought in the light of the above comments.

[10] For example, the Romanian regulation specifically stipulates that it refers to offences committed by: deputies; senators; the Romanian members of the European Parliament; the member appointed by Romania within the European Commission; Government's members; state secretaries; under state secretaries and the persons assimilated to them; counsellors of the ministers; the judges of the High Court of Cassation and Justice and of the Constitutional Court; the other judges and prosecutors; the members of the Superior Council of Magistracy; the president of the Legislative Council and the person who replaces him/her; the Ombudsman and his/her deputies; the presidential and state counsellors within the Presidential Administration; the state counsellors of the Prime Minister; the external public members and auditors from the Court of Accounts of Romania and of the County Chambers of Accounts; the Governor and the First Deputy Governor and the Deputy Governor of the National Bank of Romania; the president and the vice-president of the Council of Competition; officers, admirals, generals and marshals; police officers; the presidents and the vice-presidents of county councils; the general mayor and the deputy mayors of the Bucharest municipality; the mayors and the deputy mayors of the sectors of Bucharest; the mayors and the deputy mayors of municipalities; county counsellors; prefects and sub-prefects; the leaders of the central and local public institutions and authorities and the persons filling control position therein, except for the leaders of the public institutions and authorities at the level of towns and communes and of the persons with control positions within them; lawyers; commissioners of the Financial Guard; customs employees; persons with leading positions, higher than and including that of a director within the autonomous administrators of national interest, of the national companies and firms, of the banks and trading companies where the state is a main shareholder, of the public institutions having tasks in the privatization process, and of the central financial – banking units; persons provided by articles 293 and 294 of the Criminal Code.

2. Appointment of the Special State Prosecutor

44. As a general observation concerning Chapter II, it is noted that its position in the text is not in line with **Article 1** of the draft law, which establishes a different order of the legal issues it regulates, mentioning first the organisation and powers, and only after the requirements and procedure for appointment of special prosecutors and the relationship with other public authorities. For the symmetry of the regulation, it is suggested either changing Article 1 in the sense that it should mention the actual order of the chapters of the law or rearranging the chapters in the sense of Article 1.

45. The procedures for the appointment of the Special State Prosecutor are somewhat complex and in some respects unclear. The Chief Special Prosecutor is to be appointed[11] by the Prosecutors' Council, upon the proposal of the Supreme State Prosecutor, made following prior opinion of the assembly of state prosecutors from the Supreme State Prosecutor's Office (**Article 5**). However, no guidance is given as to what happens if these three actors do not agree. What happens if the Supreme State Prosecutor does not agree with the opinion of the assembly? Can he/she just ignore it? What happens if the Council disagrees with his/her proposal? Can they reject the nominee or is their intervention only advisory? (**Article 5**).

3. Termination of duty and mandate of the Chief Special Prosecutor and special prosecutors

46. Similar questions may be raised regarding the special situation of the Chief Special Prosecutor and special prosecutors who are not reappointed (**Article 8**). They are to be offered an alternative position (as state prosecutor in the Supreme State Prosecutor's Office or, respectively, in the state prosecutor's office where he/she worked prior to the appointment). A rejection of such an offer by the person concerned will lead to his/her termination of duty. However, this offer is to be confirmed by the Prosecutors' Council. Do they have a choice? If not, what is the purpose of their involvement at all? If so, then what happens? In the view of the Venice Commission, it is fundamental that the criteria, conditions and - transparent - procedures for appointment and termination of mandate of the Chief Special State Prosecutor and special prosecutors be clearly specified by the law. These are important guarantees for the functional autonomy and security of tenure of the prosecutors and for the efficiency of the institution.

47. In addition, there are strong arguments for opening the eligibility for this office to candidates from outside the Prosecutor's Office. Even though the Special State Prosecutor will not be independent of the Supreme State Prosecutor, it will be desirable to appoint a person with an independent frame of mind. During the exchanges held with the Venice Commission delegation, the Supreme State Prosecutor of Montenegro indicated his support for opening up this function, as well as other positions, to outside competition. That said, even if the function were legally open to outside candidates, the method of election, as currently proposed, would strongly favour an inside candidate.

4. Supervision

48. **Article 11** states that the Head of the Special Office will be responsible to the Supreme State Prosecutor "for the work of the Special Prosecutor's Office" and that "*[t]he Supreme State Prosecutor's Office shall supervise the work of the Special State Prosecutor's Office in accordance with the law*." It is recommended that the supervision powers of the Supreme State Prosecutor's Office be clearly specified; this is all the more important that the relevant provisions of the Draft Law on the State Prosecutors Office (see **Article 129**), which should

[11] Article 5: "*Chief Special Prosecutor shall be appointed from amongst the heads of the state prosecutor's office or state prosecutors with a permanent mandate, who meet the requirements for the supreme state prosecutor's appointment*"

be applicable to the supervision of the Special Office, are neither clear nor consistent. Cross-references between the respective provisions would bring increased clarity.

49. Supervision of the Special Office by the Supreme State Prosecutor's Office amounts, within the prosecution service in Montenegro, to an internal control, supplemented by the Supreme State Prosecutor's power (under specific conditions[12]) to take over individual cases from the jurisdiction of the Special Office (see **Article 129** of the draft law on State Prosecution's Office). In the framework of models similar to that chosen by Montenegro, internal control is indeed one of the factors contributing, along with a clear legal basis and mandate, appropriate human resources management, transparent procedures for appointment and removal of the head of office, to ensuring effectiveness, but also the autonomy of the specialised body[13]. However, supervision also carries the danger of abuse. In high level corruption cases, there could be political pressure to give instructions, which would benefit the persons being investigated. Therefore, the law should explicitly exclude instructions to the Head of the Special Office and special Prosecutors in individual cases. Any general instructions should be made public.

50. To be in line with the requirements of the rule of law, these internal guarantees should be coupled with accountability guarantees, including judicial review of prosecutorial measures, accessibility and transparency.

51. It is also recommended to insert an obligation on the new Office to develop an annual activity report, submit it to the Prosecutors Council and subsequently to the attention of Parliament, to enable it to adapt criminal law / criminal policy measures.

5. Police department

52. **Chapter IV** on the relationship between the Special State Prosecutor's Office and the Police Administration (**Articles 16 to 17**) regulates one of the core areas of the Special Office work, i.e. detecting and investigating organised crime, high level corruption and money laundering. Police officers employed by a "special organisational unit" of the Police Directorate for work with the Special Office will be entrusted with such tasks.

53. It is regrettable that, apart from the provisions in Article 17 allowing initiation of disciplinary proceedings against the police officer - by motion of the Chief Special Prosecutor, for failure to act as instructed by the special prosecutor in the case assigned to him, no information is provided on the specific position of the police officer while conducting investigation activities for the special Office, nor on the relationship between the two bodies. As far as the disciplinary procedure is concerned, aside from the communication of the final decision to the Chief Special Prosecutor, no further involvement of the Office is foreseen in this procedure.

54. No details are given either on the internal organisation of the "special organisational unit", its composition, hierarchical structure or management. Similarly, no information is provided on the criteria and the manner in which officers are assigned to particular cases and prosecutors within the Special Office, on how and by whom they should be supervised, and the relations between the respective managements. This is a source of concern.

55. As underlined by the OECD Report on Specialised Anti-Corruption Institutions[14], "*the question of independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. Police and other investigative bodies are in most countries highly centralised, hierarchical*

[12] Supreme State Prosecutor can take over the case from within the jurisdiction of the Special Prosecution Office if there are grounds of suspicion that the head of the Special State Prosecution Office or a state prosecutor in the Special State Prosecution Office committed a criminal offence that falls within the jurisdiction of the Special State Prosecution Office, or if there are reasons for recusal. (Article 129 of the Draft Law on State Prosecution Service)
[13] *Specialised anti-corruption institutions*. Review of Models, OECD, 2008, p. 10
[14] *Specialised anti-corruption institutions*. Review of Models, OECD, 2008, p. 25

structures reporting at the final level to the Minister of Interior or Justice." Also, "*the risk of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case*". To address such risks, the Report suggests that special anti-corruption departments or units within the police or the prosecution service could be subject to separate hierarchical rules and appointment procedures or that police officers dealing with corruption cases, although institutionally placed within the police, report in individual cases only and directly to the competent prosecutor.

56. In any event, to avoid overlapping or conflicting instructions on police officers, undue interferences and delays, as well as potential issues of data secrecy, clarity should be provided by the draft law on these important aspects in their work. One option, likely to improve the efficiency of the investigation activities and to offer increased autonomy guarantees would be for police officers to be seconded to the new Office and, in this framework, to carry out their activities, as a judicial police, under the exclusive authority of the Chief Special Prosecutor. Individual police officers would then carry out their activity under the direct leading, supervision and control of a special prosecutor.

6. Special investigative teams

57. **Article 18** provides for the general rules and conditions for the formation of special investigative teams to address particularly complex files, while **Article 19** for the composition and operation of such a team in a concrete case.

58. Under these provisions, investigative teams are provided, through secondment of experts from various specialised agencies, with special expertise in areas such as tax administration, customs, money-laundering, terrorism, etc. Key aspects and safeguards for the selection of members of special investigative teams and the teams operation are regulated therein, including working methods and hierarchy, accountability rules and confidentiality requirements. It is however is difficult to see the utility of two separate though largely similar provisions.

59. This being said, further important elements are missing: what are and who decides on the criteria/job description for the selection of seconded experts, the areas of expertise required and the experts' number; what is the role of the Chief Special Prosecutor in the selection of the person(s) to be seconded; what is the time-framework of the secondment; other available modalities (such as direct application) for joining such teams. It is recommended that the above aspects be clearly specified by the draft law or reference be made to other acts regulating these aspects.

7. Powers of special prosecutors

60. A number of the provisions in the draft law confer very extensive powers on special prosecutors:

- to require various state authorities, including the authorities responsible for taxes, customs and the prevention of money laundering, to control the operation of a legal or physical entity, to obtain certain documentation and data and to take other actions within their mandate **(Article 20);**
- to be informed within three days, with relevant data, by the authorities responsible for the prevention of money-laundering and terrorism when they have suspicions that money or property have been obtained through the criminal offences under the jurisdiction of the Special Office (**Article 21**);
- to require banks to provide data about individuals' accounts and to suspend withdrawals from those accounts for up to one year where there is suspicion of an offence within the Special Office's jurisdiction (**Article 22**)

61. Even though the draft imposes that such requests contain a detailed description of the measures required, the facts or acts concerned and the legal qualification of suspected offences, these powers are so far-reaching that they should not be exercised without the authority of a judge. In view of the possible security implications in some cases, it might be reasonable to provide for *ex parte* applications to be heard in private, provided that, unless there are compelling reasons to the contrary, the person affected has an opportunity to challenge them as soon as possible. Even the powers of special prosecutors need to be balanced with the rights of the individual under enquiry and, in view of their wide scope, there needs to be checks and balances which protect against abuse.

62. **Article 23** contains a provision allowing a judge to issue a decision on the application of a special prosecutor obliging a bank to monitor payment operations and to report them to the special prosecutor. It is recommended that clear criteria for the grant of an order to this effect be set out in the law, especially considering that sanctions are provided for the cases of failure to execute the decision, amounting from €5,000 for initial failure to 2 months imprisonment for the responsible person in the bank. However, the penalty for an initial failure to comply with such an order is surprisingly weak consisting merely of a fine. In fact, a fine of even €50,000 (for the bank) might not be an effective deterrent for a bank in a fraud involving very large sums of money.

63. It is welcomed that an appeal is provided against such decisions (**Article 23.5**), in accordance with applicable provisions of the Criminal Code (Article 24 §7 of the Criminal Code).

64. As a more general comment, it is noted that no indication is provided of existing obligations of banks in terms of co-operating with state authorities, notably in the sphere of prevention and protection against corruption.

8. Data protection

65. There are provisions in the draft law relating to intelligence data. Their collection, keeping and communication by the police administration to the Special Office, in relation the initiation and implementation of criminal proceedings under its jurisdiction, is regulated by **Article 24**.

66. In a specific chapter dealing with data protection (**Chapter VII. Articles 28 to 31**), reference is made, for acts, documents and minutes concerning investigative actions taken under the jurisdiction of the Special Office, to the data secrecy law. Similarly, a confidentiality obligation is imposed, with reference to this law, on special prosecutors, employees and seconded persons of the Office in relation to facts, data or contents of acts that are subject to investigative actions and data on personal and family, as well as property aspects of physical persons, or legal entities. It is positive that police officers carrying out tasks for the Special Office are explicitly under the “duty to protect confidential data”. It is recommended that the issue of confidentiality be also addressed from the perspective of their hierarchical subordination to/within the Police Directorate.

67. It would be important to include a provision to the effect that data containing relevant information helpful to an accused person cannot be withheld from that person in the event of a prosecution being brought.

9. Staff

68. As a general observation, it is noted that the draft law delegates to an act on internal organisation and systematisation of the Office the function of establishing the necessary number of staff members for it. It would be useful to set out in the law at least criteria for establishing the minimum number of positions that guarantee the effectiveness of the Office and how this number can be changed.

69. Also, too general terms are used to designate the categories of staff members: advisors (**Article 26**), other officers (called "professional assistants" in **Article 27**) and employees (**Article 25**). If with respect to the first two categories there are provisions that set the recruitment criteria, there is no such regulation concerning the "employees", and it is not clear to what this category refers. Lack of clear circumstantiation of the categories to which they belong, and the failure to indicate the maximum number of positions can create difficulties in terms of staff members' recruitment and remuneration.

70. It would also be useful to identify, in the law, categories of advisors / employees with specific areas of responsibility, corresponding to those targeted by corruption offences[15].

71. Finally and most importantly, in view of its potential impact on the capacity, efficiency and quality of work of the Office, and its autonomy, the recruitment procedure applicable to the above categories should also be adequately regulated by the law. The absence, in the current draft, of any such information - whether recruitment may be organised through competition or other modalities - is a source of concern.

10. Funds

72. As stated by **Article 32** of the draft law, financial resources for the Special Office are to be provided from the general budget of the State Prosecutor's Office. Additional indications on the criteria or indicators taken as a basis for the budget proposal, its author (by the Chief Special Prosecutor?) and the deciding authority (is it the Parliament, upon adoption of the general budget or by subsequent decision of the Supreme Prosecutor?) would be recommended.

11. Transitional and final provisions

73. In view of the complex and sometimes highly sensitive cases generally investigated by anti-corruption offices, it is recommended that transitional provisions be introduced to regulate the situation of pending cases regarding offences that fall under the jurisdiction of the Office, i.e. cases which are in the phase of criminal investigation at the entry into force of this law and cases pending before courts, sent to the criminal prosecution bodies, in the sense that the newly established structure should be able to take them over one by one when it is ready to do so.

IV. CONCLUSIONS

74. The Venice Commission welcomes the efforts made by Montenegro to establish a legal and institutional framework, within the State Prosecution Service, for a specialised Office for fighting organised crime and high-level corruption.

75. The drafters remained within the existing constitutional framework, without proposing a constitutional amendment, which would have allowed endowing the new institution with full independence. The draft therefore places the Special Prosecution Service within the framework of the general prosecution service. As a consequence, the Special Prosecution Service is under the supervision of the Prosecutor General. This has important consequences which the law has to take into account.

76. Key aspects of the establishment and the operation of the future Office are regulated by the draft, in accordance with the constitutional principles and the proposed legal framework for the state prosecution service.

[15]For example, the Romanian law provides that "The National Anticorruption Directorate functions with prosecutors, judicial police officers and agents, specialists in the economic, financial, banking, customs, IT field and also in other fields, specialized auxiliary personnel, as well as economic and administrative personnel, to the extent of the number of positions provided in the list of positions, approved according to the law". (Article 6 of GEO 43/2002)

77. Nonetheless, to ensure that the future law will provide a sound, clear and consistent legal basis for the operation of the future institution, in compliance with the applicable standards and taking into account the best practices in the field, a number of important issues should be further examined and relevant provisions improved, notably:

- the degree of autonomy of the future Office and its institutional position within the State Prosecution Office should be clearly specified: its supervision by the Supreme State Prosecutor should be associated with adequate functional autonomy guarantees; accountability guarantees, including judicial review, as well as reporting to Parliament, should be introduced;

- to ensure full respect of the principle of legal certainty, increased clarity should be provided with regard to the mandate of the future Office (clear and consistent definition of offences under its jurisdiction, clearer determination of the public functions or positions which will fall under its scope);

- the procedure for the appointment of the Special State Prosecutor should be made clearer and profoundly simplified and consideration should be given to whether candidates from outside the State Prosecution Service should be eligible to be appointed to the office of Special Prosecutor;

- more detailed regulations should be provided concerning the criteria and procedure for the recruitment of special prosecutors and other staff, including police officers, their supervision and operational subordination, disciplinary procedures, safeguards against undue interference; inter-institutional relations, including with the police department, and the powers of special prosecutors in relations to other institutions should be clearly delimitated.

78. More generally, it is important to emphasise, in view of the complex and challenging tasks of the Special Office, that ensuring the greatest degree of clarity and precision in the determination of its areas of action, powers and mode of operation, in line with the principle of legal certainty and coupled with adequate safeguards against any undue interference, is crucial for its autonomous and successful operation. Increased clarity should also be provided on the human, financial and other resources allocated to the Office, including indicators, criteria and arrangements for the decision-making on these matters, which are also essential for the autonomous and effective functioning of the new office.

79. The Venice Commission remains at the disposal of the authorities of Montenegro for any further assistance they may need.