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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON

**THE REVISED DRAFT LAW
ON SPECIAL PUBLIC PROSECUTOR'S OFFICE**

OF MONTENEGRO

on the basis of comments by

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)

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I. INTRODUCTION

1. On 24 December 2014, the Speaker of the Parliament of Montenegro requested the opinion of the Venice Commission on the revised Draft Law on the Special Public Prosecutor's Office of Montenegro (hereinafter, "the Draft Law") (CDL-REF(2015)0), version dated 4 December 2014.

2. At its 101st Plenary Session (Venice, 12-13 December 2014), the Venice Commission had already adopted, at the request of the Ministry of Justice of Montenegro (dated 2 September 2014), an Interim Opinion¹ on an earlier Draft Law on the Special Public Prosecutor's Office of Montenegro. The opinion of the Venice Commission had been 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 the Public Prosecution Service, the Draft law on Courts and the Draft Law on the Rights and Duties of Judges and on Judicial Council of Montenegro.

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

4. At its 101st Plenary Session, having been informed that the Montenegrin authorities had in the meantime amended the earlier Draft Law taking into account the Commission's assessment and that they would intend to seek the Commission's opinion on the revised Draft Law, authorised the rapporteurs, in the light of the urgency of the domestic proceedings, to send the forthcoming draft opinion to the Parliament of Montenegro prior to its 102nd Plenary Session.

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

II. GENERAL/PRELIMINARY REMARKS

A. Background

6. The background to the request to the Venice Commission for legal assessment of the Draft Law on the Special Public Prosecutor's Office of Montenegro (including the current – revised – version of the draft) is related to the judicial reforms which are ongoing in Montenegro following the amendment of the Constitution in 2013 and to the country's efforts towards its EU integration. Since this background is set out in the Commission's Interim Opinion, the present document will not elaborate further on this matter.

7. In its Interim Opinion, the Venice Commission welcomed the efforts made by Montenegro to establish a legal and institutional framework for a specialised Office for fighting organised crime and high-level corruption and notes the drafters' choice to set up the new body within the general prosecution service, thus within the existing constitutional framework. Another option, not retained and involving a constitutional amendment, would have allowed endowing the new institution with full independence. As a consequence, the Special Prosecution Office (hereinafter the "Office") will come under the supervision of the Prosecutor General.

8. The Interim Opinion noted that the main aspects of the organisation and functioning of the future Office had been regulated in accordance with the constitutional principles and the proposed legal framework for the public prosecution service. It stressed at the same time that, to 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 needed to be further examined and

¹ See CDL-AD(2014)041, *Interim Opinion on the Draft Law on the Special Public Prosecutor's Office of Montenegro*, adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014).

relevant provisions of the draft law to be improved, in particular:

- *“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 delimited.”*

9. The Interim Opinion furthermore emphasised, 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, was crucial for its autonomous and successful operation. Increased clarity was also recommended concerning the human, financial and other resources allocated to the Office, including indicators, criteria and arrangements for the decision-making on these matters, essential pre-requirements for the autonomous and effective functioning of the new office.

10. The present Opinion will deal with the most relevant improvements introduced by the new version of the Draft Law and the provisions which could be further improved by the Parliament in accordance with the recommendations of the Venice Commission.

11. This Opinion is based on the English translation of the Draft Law provided by the Montenegrin authorities. Although the new draft contains many provisions which appear to be identical to those in the earlier Draft Law, the entire text has been re-translated in the meantime, as a result of which many provisions which appear not to have been changed in the original language now read quite differently in English. Since the translation may not always accurately reflect the original version on all points, certain issues raised may be due to problems of translation.

III. THE REVISED DRAFT LAW

A. General comments. The institutional position of the Special Office

12. One of the concerns expressed in the Interim Opinion which has been addressed was that the earlier Draft Law did not make it sufficiently clear that the new Office was not a completely independent special public prosecutor but rather that the special prosecutor was being established within the existing public prosecution service².

² See *Interim Opinion*, paragraph 15.

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13. It is important to emphasise that the choices whether to establish such an office in the first place, and if establishing such an office whether it should be sited within the existing public prosecution service or as an independent office, are essentially policy choices. There are arguments to be made for either choice. There is no international norm which gives guidance as to how such a question should be answered. While there are a number of important international instruments which recommend specialisation, in particular concerning the prosecution of corruption offences, and which speak of specialised anti-corruption prosecutors having the necessary independence or autonomy to carry out their functions, they fall short of prescribing that such a body should be completely separate from the prosecution service as a whole.³

14. In the case of Montenegro, the fact that the **Constitution** prescribes, in its **Article 134**, that there is a “unique” State Prosecution Service inevitably tended to favour the choice which has been made to establish the special public prosecutor within the framework of the existing prosecution service. Otherwise, the authorities would have been compelled to embark on the difficult process of attempting to amend the Constitution. At the same time, if a special public prosecutor’s office is to serve a useful purpose, a degree of autonomy within the framework of the existing prosecution service is necessary. The draft legislation seeks to achieve such a balance.

15. The difficulty in a law which did not make it clear that the special prosecutor operates within the framework of the existing “unique” Prosecution Service was that such a law could have been vulnerable to constitutional challenge. A weakness in the earlier draft was that the law failed to state clearly and expressly that this was the case, although a careful reading of the text together with the Draft Law on the Prosecution Service would probably have made that clear.

16. From this perspective, it is a welcome improvement that the new Draft Law states unambiguously in **Article 2** that the Special Public Prosecutor’s office is established “*within the Public Prosecution Service which is a unique and autonomous authority*”, whereas, by Article 11 paragraph 3 of the Draft Law on the Public Prosecution Office, the Special Public Prosecutor’s Office is formally included in the structure of the Public Prosecution Office. The English text should perhaps say “unitary” or “single” rather than “unique”; however, the English text of the Draft Law follows the wording of the English translation of the Constitution. It would be important to ensure that, in their original version, the wording of the two texts is harmonised. **Article 7** of the revised Draft Law provides further clarification by stipulating that “[p]rovisions of the Law on Public Prosecution Service shall apply accordingly to the matters that are not regulated under this law”.

17. At the same time, it should be pointed out that the Venice Commission, in its Interim Opinion⁴, recommended unifying in the same law the Public Prosecution Office and the new Special Office, *inter alia* in order to avoid the risk of inconsistency with Article 134 of the Constitution. The choice of the Montenegrin authorities to provide a special law for the Special Prosecutor could have as a positive effect that of providing a framework for increased autonomy of the new Office and for ensuring its effectiveness against organized crime and corruption.

³ See *Interim Opinion*, paragraph 15.

⁴ See *Interim Opinion*, paragraphs 32 and 78.

B. Specific comments

1. Guarantees for the autonomy of the Special Office within the Public Prosecution Service

18. In addition to the abovementioned general statement clarifying the institutional position of the new Office, a number of more specific provisions regulate the operation of the future body within the existing prosecution system, a number of which guarantee a certain degree of autonomy to the new body.

19. **Article 4** unambiguously provides that the Chief Special Prosecutor is to be accountable to the Supreme Public Prosecutor (for his/her work and the work of the Office) and **Article 5** provides for the “institutional supervision” by the Supreme Public Prosecutor’s Office.

20. However, a number of provisions guarantee a degree of autonomy of the Special Public Prosecutor’s Office. According to **Article 6** its funds are to be allocated in a separate budget item of the Public Prosecution Service. The Special Prosecutor can hire expert staff and has a special relationship with the police assigned to his office and with other public offices including tax, customs and the money-laundering and anti-terrorist organisations (see **Articles 26 - 30**).

21. Furthermore, the method of appointment of the Chief Special Prosecutor and the other special prosecutors excludes any political input and the role of the Supreme Public Prosecutor is under the revised Draft Law merely that of a member of the Prosecutorial Council and he/she does not have a veto over the appointment (**Article 14**). Appointments are open to judges and lawyers as well as prosecutors (see **Articles 12 and 13**).

22. The Chief Special Prosecutor has a tenure for five years (renewable for one further term of five years) and other special prosecutors have life tenure once they have served an initial probationary period of four years which may be served as a prosecutor or judge prior to appointment as a special prosecutor (**Article 22**). The law does not contain any provisions relating to the dismissal of the Chief Special Prosecutor and it would seem that there is no power to dismiss him or her as a result of any disagreement with decisions which he or she may make. It is understood however that, as it results from **Article 7** of the revised Draft Law, the provisions on disciplinary responsibility and related procedures contained in the future Law on the Public Prosecution Office shall apply *mutatis mutandis* to the special prosecutors including the Chief Special Prosecutor.

23. However, the text of **Article 131** of the revised draft Law on Public Prosecution Office still provides the Supreme Prosecutor the authority to give mandatory instruction of general nature, but also in an individual case, to the Chief Special Prosecutor. The Chief Special prosecutor may, in turn, issue instructions to be followed in an individual case for special prosecutors. It is recommended to ensure that all general instructions and policy guidelines issued to special prosecutors should be published.

24. Instructions given in an individual case are subject to the safeguards set out in **Article 132**, which are in compliance with the provisions of *Recommendation REC(2000)19 of the Committee of Ministers of the Council of Europe*⁵. As an added safeguard, in case an instruction is alleged illegal a court or an independent body like the Prosecutorial Council should decide on the legality of the instruction; hence, the right to complain to such a body should be made available⁶. Furthermore, it would have been desirable to have strengthened the possibilities for judicial review of prosecutorial decisions in line with the

⁵ See *Recommendation (2000)19 of the Committee of Ministers of the Council of Europe to member states on the role of public prosecution in the criminal justice system (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers’ Deputies)*.

⁶ See *Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine*, CDL-AD(2013)025, paragraph 60. See also CDL-AD(2010)040, paragraph 59.

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recommendations of paragraph 50 of the Interim Opinion⁷, where the Commission was recommending that, “[t]o 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”. To do so would provide a further safeguard against potential political interference with the decisions of special prosecutors. Additional guarantees likely to increase the autonomy and the efficiency of the Special Office may include, for instance, establishing the Chief Special Prosecutor’s capacity as budget administrator.

2. Jurisdiction of the Special Office

25. The Interim Opinion was critical of some aspects of the provisions of the law relating to jurisdiction which, as recommended in the Interim Opinion⁸, have been moved to the **Chapter I (Basic Provisions)** and, for the sake of unity of the regulation, merged with the provisions of the **former Article 3**.

26. The **new Article 3** specifying the jurisdiction of the Special Office has addressed some of these concerns. The term “public official” is now defined. However, the term “organised crime” is not defined although it may well be that it is defined elsewhere in the legislation of Montenegro. The Commission emphasised in its Interim Opinion (paragraph 37) that a clear determination of the offences under the jurisdiction of the new Office is essential both in terms of legal certainty and for the effectiveness of the Office. Care needs to be exercised to ensure that any definition of organised crime is not so wide as to catch every premeditated offence involving a number of persons no matter how minor, as has been the case in some other jurisdictions. The threshold for inclusion of corruption offences in the private sector has been increased from €4000 to €40,000. An increase in this threshold is in line, although even €14,000 would seem too high, with the Commission’s recommendations in its Interim Opinion (see paragraph 38).

27. In this context, the Commission wishes to point out, in addition to its comments made in the Interim Opinion, that – in the revised as in the earlier version of the Draft Law - the jurisdiction of the Special Prosecutor to deal with offences of inciting illicit influence and active bribery within the public sector are confined to offences committed by public officials (**Article 3**). Typically, however, these two particular offences are more likely to be committed by persons from outside the public service who bribe an official whereas the public official is more likely to commit the offences of abuse of office, fraud, trading in influence or passive bribery. It does not seem logical to give the special prosecutor power to prosecute the person who receives the bribe but not the person who gives it when the moral culpability of one is not necessarily less than that of the other. It also makes no sense that one prosecutor’s office would deal with one offender while a different office would deal with another in respect of the same single corrupt transaction in the course of which both offences had been committed.

28. The new draft has restored the jurisdiction to deal with terrorism and war crimes to the special prosecutor. While there is an argument for not overburdening the special prosecutor with too large a variety of different offences⁹, the risk of political interference with war crimes prosecutions remains a problem in much of former Yugoslavia. To remove this jurisdiction from the Special Prosecutor in Montenegro could have been seen both as sending a wrong signal and as increasing the risk of political interference with any such cases that may arise in the future. The alternative to including these cases in the remit of the Special Prosecutor

⁷ See *Interim Opinion*, paragraph 50.

⁸ In its *Interim Opinion*, paragraph 35, the Venice Commission was of the view that “[t]o 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.” The Commission further recommended harmonisation and a clearer relation between **former Article 3** providing the definition of “high level corruption” and of the offences listed under **former Article 9**.

⁹ See *Interim Opinion*, paragraph 41.

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would probably be to establish a second special prosecutor's office, but given the size of Montenegro and the small number of cases potentially involved it would be hard to justify such a step. From this perspective, the restoration of war crimes and terrorism to the Special Prosecutor's jurisdiction may be seen as an appropriate choice.

29. Finally, the Commission reiterates in relation to the Basic Provisions of the Draft Law that, *"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"*.¹⁰

3. Activity report

30. **Article 11** of the revised Draft Law introduces an obligation, for the new Office, to prepare a regular (six-month) activity report, to be submitted to the Supreme Public Prosecutor, as part of the institutional supervision of the latter over the Special Office. It is welcomed that, as recommended by the Venice Commission¹¹, the Office shall also submit an annual activity report to the Prosecutorial Council and make it available to the public by publishing it on its website. Additional ad-hoc reports may be prepared at the request of the Supreme Public Prosecutor or of the Prosecutorial Council. While such reporting tasks should not lead to undue overburdening of the Special Prosecutor Office (one way could be to limit the frequency of the reports to one per year), the information of the public and, possibly, of the Parliament on its activity and trends requiring specific criminal law / criminal policy measures constitute an important dimension likely to contribute to the efficiency - but also to the transparency and accountability - of the Office.

4. Appointment/election of special prosecutors (Chief Special Prosecutor)

31. The new Draft Law as amended simplifies the procedures for the appointment of special prosecutors, which are no longer open to prosecutors only. Apart from the changes already referred to above (see paragraph 21 before), the procedures have been considerably improved.

32. It is a welcome improvement that, as stipulated by **Article 14** of the revised Draft Law, both the Chief Special Prosecutor and special prosecutors shall be elected by the Prosecutorial Council on the basis of a public advertisement and the assessment of their expert knowledge and competence to discharge the prosecutorial function, taking into account specific criteria detailed by the law (see **Articles 12 to 21** of the revised Draft Law).

33. It is recalled that, according to the earlier draft¹², the names of candidates to the position of special prosecutor were to emerge from the proposal of the Chief Special Prosecutor, submitted to the opinion of the Supreme Prosecutor. Similarly, under the previous draft, the Chief Special Prosecutor was to be elected, among prosecutors only, by the Prosecutorial Council at the proposal the Supreme Public Prosecutor (and after obtaining the opinion of Assembly of Public Prosecutors from the Supreme Public prosecutor's Office¹³).

34. It is to be welcomed that, as stipulated by the revised draft, the Prosecutorial Council will elect the Chief Special prosecutor from among those having applied to the public advertisement and based on the evaluation of their expert knowledge and competence to discharge the function of Chief Special Prosecutor, including by the way of interviews conducted by the Prosecutorial Council with the candidates meeting the requirements set out by the draft law (see **Articles 18 to 20**).

¹⁰ See *Interim Opinion*, paragraph 42.

¹¹ See *Interim Opinion*, paragraph 51.

¹² See earlier Draft Law, article 6.

¹³ See earlier Draft Law, article 5.

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35. In this connection, the inclusion, in the new Article 37 of the revised Draft law on the Public Prosecution Office dealing with the responsibilities of the Prosecutorial Council, of a specific provision stipulating the election, by the Council, of the Chief Special Prosecutor and special prosecutors¹⁴, could contribute to better harmonizing the two laws.

36. It is also to be welcomed that the conditions for the election of the Chief Special Prosecutor and special prosecutors have been broadened - as for public prosecutors under the revised Draft Law on the Public Prosecutor's Office - to enable the access not only of prosecutors, but also of persons having at least 12 years (for the Chief Special Prosecutor) or 10 years (for special prosecutors) of work experience as a judge or attorney, to such positions. In addition, persons "*whose previous work shows that he/she has special knowledge and competences to work on the cases falling under the jurisdiction of the Special Public Prosecutor's Office*" will be eligible for such positions (see **Articles 12 and 13** of the revised Draft Law). This should reduce the risk of the Special Prosecutor's Office being too inward looking and may help to foster a more independent outlook. Despite the position of the special prosecutors as part of the prosecution service as a whole it is necessary to foster an independent outlook among special prosecutors and any widening of the potential pool for appointments to the office is likely to assist that process.

37. The exclusion of the role of the Supreme Public Prosecutor and of the Assembly of Public Prosecutors¹⁵ from the actual process of appointment is to be welcomed as this removes a potential source of deadlock and confusion.

5. Term of office

38. The fact that, as stipulated by **Article 22** of the revised Draft Law, the special prosecutor shall be elected to serve life tenure¹⁶ is a welcome development (it is recalled that the Commission has expressed concern regarding the situation of the Chief Special Prosecutor and special prosecutors who are not reappointed). Clarification is also provided that the Chief Special Prosecutor will continue to work as special prosecutor of the Special Public Prosecutor's Office upon expiry of his/term of office (**Article 23**).

6. Relationship with the police administration

39. The concerns expressed in the Interim Opinion in relation to the organisation of police investigators attached to the special prosecutor have not been addressed, despite a number of new provisions detailing the pre-requirements for being employed in the "special organisational unit" of the Police in charge of police work with the Special Office or for heading this unit (see **Article 26** of the revised Draft Law).

40. While there are certain safeguards to protect the right of the prosecutor to control these investigations, notably by requiring the investigator to take the actions instructed by the special prosecutor (**Article 27**), the fact that disciplinary proceedings, in case of failure to execute the order given by the special prosecutor, remain in the hands of the police chief rather than the prosecutor (under **Article 27**, the special prosecutor may only initiate a disciplinary procedure) leaves a question mark over the effectiveness of these procedures. In addition, the statute of the police unit and its interrelation with the Special Office remains unclear. The Commission reiterates its related recommendations in paragraphs 55 and 56 of the Interim Opinion.

¹⁴ According to Article 136.3.3 of the Constitution, as amended in 2013, the Prosecutorial Council shall "*elect and release from the duty the Heads of the state prosecution offices and state prosecutors*".

¹⁵ See **former articles 5 and 6** of the earlier Draft Law.

¹⁶ For special prosecutors who have not worked as public prosecutors or judges for at least four years, the term of office shall be a period of four years, after which they may be elected to serve life tenure according to the provisions of the Law on Public Prosecution Service governing election of public prosecutors to serve life tenure.

7. Investigators

41. The inclusion in the revised Draft Law (**Article 28 and Article 29**) of more detailed provisions specifying the modalities for selecting civil servants with specialized expertise to accomplish specific tasks for the Special Office is a positive development. It is welcome in particular that the Chief Special Prosecutor is now involved in the selection of the seconded experts and may conduct interviews with them before making a proposal to the Supreme Public Prosecutor (**Article 28**). Authorizing the Chief Special prosecutor to make these appointments directly would be a further improvement, more in line with recommendations contained in the Interim Opinion (see paragraphs 58 and 59).

8. Powers of special prosecutors

42. The Interim Opinion also raised some concerns¹⁷ about the powers of special prosecutors, and in particular their power to make certain orders and requirements to certain administrative authorities and sometimes from banks (see **Articles 31 to 33** of the revised Draft Law) without apparently needing to seek approval from a court of law. Apart from the deletion of the power of the prosecutor to suspend withdrawals from bank accounts (see **Article 33**) these concerns have not been addressed. The Commission reiterates that *“[e]ven 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”* (paragraph 61 of the Interim Opinion).

9. Data protection

43. Paragraphs 65 to 67 of the Interim Opinion raised some concerns about data protection. These do not appear to have been addressed. In addition, it is not clear for which reasons the provisions regulating the duty to protect confidential data concerning investigative actions taken under the jurisdiction of the Special Office (**former Articles 28 to 31**), have been deleted.

44. The confidentiality obligation which was imposed on special prosecutors, employees and seconded persons of the Office in relation to facts, data or contents of acts being subject to investigative actions and data on personal and family and property circumstances of physical persons or legal entities, is also absent from the new draft. The reference to the law governing data secrecy, which was made in the earlier draft in relation to the above aspects, now appears only in connection with the submission, by state authorities and state administrative authorities, of classified data of relevance for the work of the Special Office (see Article 35 of the revised Draft Law). It is recommended to re-examine the relevant provisions of the Draft Law with a view to ensuring that all required guarantees for the protection of data are provided, in line with the relevant Montenegrin legislation and the applicable European standards¹⁸.

¹⁷ See paragraphs 60 to 64 of the Interim Opinion.

¹⁸ See the Council Of Europe *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* of 28 January 1981 [ETS No. 108], in force in Montenegro since 6 June 2006; *Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* allowing the European Communities to accede of 15 June 1999; *Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, Recommendation No.R(87) 15 of the Committee of Ministers regulating the use of personal data in the police sector* (17 September 1987); See also *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*;

10. Transitional Provisions

45. In the revised Draft Law, there are now provisions dealing with the taking over of existing cases and functions and these are to be welcomed. **Article 42** provides that cases falling within the jurisdiction of the special prosecutors which were within the jurisdiction of other prosecutors are to be concluded by the entry into force of the new law. The draft does not provide any solution for the cases currently falling within the jurisdiction of other public prosecutor's offices which will not be concluded by the time the new law on the future Special Prosecutor's Office enters into force. It is recommended that this issue be also addressed. The solution may be similar to that proposed in **Article 43** of the Revised Draft law for cases currently falling within jurisdiction of the Division for Suppressing Organised Crime, Corruption, Terrorism and War Crimes of the Supreme Public Prosecutor's Office.

46. The reference to need to adopt a separate law, to govern the internal organisation including the job descriptions of the Special Prosecutor's Office, is a welcome development.

IV. CONCLUSION

47. The Venice Commission welcomes the fact that the Montenegrin Government took into account some significant criticisms contained in the Interim Opinion adopted at its 101st Plenary Session on the earlier version of the Draft Law on the Special Public Prosecutor's Office. The revised Draft Law constitutes an improvement to the earlier draft and represents, on the whole, a workable framework for an effective Special Public Prosecutor's Office, although a project of this type is particularly complex and, in the light of experience, the proposed scheme will probably need to be reviewed at some future point.

48. However, the revised Draft Law does not address or only partly addresses a number of important concerns raised by the Commission, in particular:

- the need for increased accountability guarantees, including judicial review of prosecutorial measures, but also reporting to Parliament, as a way to minimize the risks of abuse and/or political pressure; in particular, the concerns relating to the power of the special prosecutors to issue certain instructions and take certain steps in relation to other institutions without judicial approval or control need to be adequately addressed;
- the relationship between the special prosecutor and the police, which remains essentially unchanged from the earlier draft;
- the need for increased and efficient data protection guarantees;
- the situation of pending cases regarding offences that fall under the jurisdiction of the Office which are not concluded by other prosecution offices at the date of the entry into force of the Law on the Special Public Prosecutor's Office.

49. In addition, as suggested in the Interim Opinion, the authorities of Montenegro may wish to consider whether it would not be suitable to unify the two draft laws under examination - on the Public Prosecution Office and on the Special Prosecutor's Office - into a single law, to better reflect that, as stated by Article 134 of the Constitution, the state Prosecution is a "unique and independent authority".

50. Taking into account the improvements already introduced to the earlier Draft Law, the Venice Commission trusts that the Parliament will be able to insert further improvements, as specified above. The Venice Commission remains at the disposal of the Montenegrin authorities for any further assistance.