



Strasbourg, 4 March 2022

CDL(2022)003*

Opinion N° 1080 / 2022

Or. Engl.
(GID/ba)

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

KOSOVO

DRAFT OPINION

**ON THE REVISED DRAFT AMENDMENTS
TO THE LAW
ON THE PROSECUTORIAL COUNCIL**

On the basis of comments by

**Mr António Henriques GASPARG (Member, Portugal)
Mr Myron Michael NICOLATOS (Member, Cyprus)
Mr James HAMILTON (former Member for Ireland, expert)**

Opinion co-funded
by the European Union



**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. In October 2021 the Minister of Justice of Kosovo, Ms Albulena Haxhiu, requested an opinion of the Venice Commission on the draft amendments to the law on the Kosovo Prosecutorial Council (see [CDL-REF\(2021\)083](#), hereinafter the “original draft amendments”). At the 129th Plenary Session (Venice and online, 10-11 December 2021), the Venice Commission adopted opinion [CDL-AD\(2021\)051](#) (hereinafter – the December opinion).

2. Following the December opinion, and informal consultations with the Secretariat, the Ministry of Justice revised the draft amendments (see [CDL-REF\(2022\)009](#), hereinafter “the revised draft”). By letter of 25 February 2022, the Minister of Justice of Kosovo requested an opinion of the Venice Commission on whether the revised draft amendments implemented key recommendations of the December opinion.

3. Mr Gaspar, Mr Hamilton, and Mr Nicolatos acted as rapporteurs for this opinion. Given the urgency of the request, this opinion was prepared without a country visit, and on the basis of the information already received during the visit to Kosovo of 18 and 19 November 2021 and in reliance on the English translation of the revised draft. The translation may not accurately reflect the original version on all points.

4. *This opinion was drafted on the basis of comments by the rapporteurs. Following an exchange of views with ..., it was adopted by the Venice Commission at its ... Plenary Session (Venice and online, 18 and 19 March 2022).*

II. Background

5. As follows from the exchanges with the Ministry of Justice, the submission of the revised draft to the Assembly is imminent. The authorities asked the Venice Commission to focus on key issues which had been identified in the December opinion, and to prepare a follow-up opinion very quickly. Given the tight timeframe, this opinion will not deal with all matters related to the revised draft. It will focus essentially on the new institutional design of the Kosovo Prosecutorial Council (the KPC), and on the transitional provisions.

6. As in December 2021, the authorities departed from an assumption that by changing the institutional structure of the KPC they may solve the endemic problems affecting the prosecution system of Kosovo: the lack of efficiency and professionalism, corruption, cronyism, etc. In absence of an in-depth analysis of the flaws in the current system is difficult to see whether the Government's assumption is well-founded, i.e. whether the proposed reform is be capable of fixing those problems. However, the Venice Commission reiterates that the Government is better placed to evaluate local needs and conditions and identify priorities.

III. Analysis

A. New composition of the KPC

7. In the current composition the KPC has 13 members: 10 of them represent the prosecution system (including the PG who is a member *ex officio*), and three are the lay members.

8. Under the original draft amendments, it was proposed to reduce the composition of the KPC to 7 members: three of them would be prosecutors elected by their peers, three would be lay members elected by the Assembly by a simple majority of votes of the MPs, and one would be a prosecutor elected by the Assembly, also by a simple majority.

9. In the December opinion, the Commission acknowledged that the balance between lay members (elected by the Assembly) and prosecutorial members (elected by their peers) may be changed. It is not against European standards to have a majority of lay members in a prosecutorial council. However, it is important that the increased presence of lay members does not lead to the politicisation of KPC. The Commission also stressed that the prosecutors elected by their peers should still represent a substantial part of its members. The December opinion also recommended keeping the Prosecutor General (PG) in the renewed composition of the KPC as an *ex officio* member, given a possible overlap of functions between the KPC and the PG.

10. The revised draft proposes the following composition of the KPC: out of its 7 members three will be prosecutors elected by their peers (two from the lower prosecution offices and one from the Appellate and the Special Prosecution Offices), three will be lay members (one appointed by the Ombudsman and two elected by Assembly by a simple majority of votes), and the PG will be a member *ex officio*. Thus, in the future KPC prosecutors will regain a (slight) majority, together with the PG, which is not against standards.

11. The next point of criticism in the December opinion was the method of election of lay members (by a simple majority in the Assembly). In particular, the Commission recommended “to elect lay members on the basis of a proportional system, or to provide for the appointment of a certain number of lay member by independent bodies, in order to achieve a pluralistic composition of the KPC”.¹ The revised draft returns to a model where the KPC is dominated by the prosecutors. In addition, the revised draft provides that one of the lay members is to be appointed directly by the Ombudsman. The Venice Commission assumes that the institution of the Ombudsman can be seen as an independent body in the Kosovo legal order. It is important that the Ombudsman’s involvement does not compromise his or her ability to make independent determinations concerning matters involving the KPC. Otherwise, in this set-up, the fact that the remaining two lay members are elected by a simple majority in the Assembly reduces the risk of politicisation of the KPC.

12. Another key recommendation of the December opinion was to “consider keeping the PG as an *ex officio* member” and “delineate more clearly the spheres of competency of the PG and the KPC”. Under the revised draft, the PG remains in the composition of the KPC. The overlap in functions between the PG and the KPC is organisationally unsound and a source of conflict and confusion; however, legislation on the KPC is probably not the right place to address this problem. The fact that the PG remains in the KPC as an *ex officio* member may arguably solve the problem of partly overlapping spheres of competency of the PG and the KPC² – even if the respective competencies are not so clearly defined. So, these key recommendations can be seen as addressed in essence.

13. That being said, the Venice Commission acknowledged the risk of the PG becoming an overly powerful figure in a KPC dominated by the prosecutors.³ The December opinion proposed to counter this risk by providing that the PG has no voting rights in certain areas, such as discipline.⁴ Under Article 12 of the revised draft disciplinary decisions have to be adopted by a qualified majority of 5 members, including two votes of lay members. That is a useful addition which reduces the influence of the PG in the disciplinary sphere. If the PG has a role in a disciplinary matter in the exercise of his or her functions as PG he/she should not be involved in the deliberations of the KPC on disciplinary matters at all. The ordinary principles concerning conflicts of interest should apply. Moreover, to reduce the excessive influence of the PG in other areas the law might provide that the prosecutorial members of the KPC sit in this body in their individual capacity and that they

¹ See paragraph 49 of the December opinion.

² See paragraph 72 of the December opinion.

³ See paragraph 38 of the December opinion.

⁴ In this case one of the members – for example, the Chairperson of the KPC – may have the casting vote in case of a tie, if the KPC is to decide in a 6-members’ composition.

are not subordinated to the PG insofar as their work in the KPC is concerned, and that the PG cannot use his/her hierarchical powers to influence their voting, both directly and indirectly.

14. Finally, the Venice Commission notes that in the new KPC prosecutors elected by their peers would constitute a substantial part of its members (3 out of 7). The new model would ensure fair representation of different levels of the prosecution system. It follows that the model of the KPC proposed by the revised draft would not contradict the European standards and recommendations of the Venice Commission.

B. Election of the prosecutorial members

15. The December opinion expressed concerns about the process of pre-selection of the prosecutorial members by the Electoral Commission (the EC). Thus, under the original draft, the EC would be dominated by non-prosecutors and would be capable of rejecting candidates with reference to their “moral integrity” and “managerial skills”. That would affect the representative character of the process of election of prosecutorial members by their peers.

16. Both these concerns are addressed in the revised draft. Thus, the EC will retain the power to exclude candidates, but only with reference to the formal criteria of eligibility (such as citizenship, diploma, work experience etc.). As stipulated in Article 10B (8), the EC will not be able to reject candidates with reference to their “integrity, vision and managerial skills”. It is understood that it would be for the prosecutorial community electing their delegates to the KPC to assess those qualities of the candidates. Furthermore, the composition of the EC will be changed: it will have at least two prosecutors out of three members.

17. It follows that, insofar as the EC is concerned, the revised draft addressed the recommendation of the December opinion.

18. The only element of the procedure which still needs to be addressed is the fact that in the election process each prosecutor would cast one vote (see Article 10B (11) and (12)). Since the prosecutors have three candidates to elect from their ranks, and since they may have quite a large number of candidates to those positions, it is unclear how this “one prosecutor – one vote” principle would work. If the prosecutors are to vote for any candidate from the general list, that may lead to a situation where all votes would be concentrated in one very popular candidate, and the second and even more so the third candidate would have much less support amongst his/her colleagues. If each candidate on the list is to be voted separately by the prosecutorial community, that may result in more candidates than needed. Thus, the voting provision should be clarified. A possible solution would be to invite the prosecutors to mark three names on the general list of the candidates (or less, if less than 3 vacancies are to be filled). Details of the voting process may be regulated by the KPC itself.

C. Election of the lay members

19. As regards lay members, the revised draft abandons the idea of creating a special Commission of the Assembly tasked with the short-listing of the candidates. The December opinion criticised this model stressing, in particular, that the exact composition – and hence a political tendency of this Commission – is unclear.

20. Now the short-listing will be entrusted to the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency (hereinafter: the Committee). The Venice Commission understands that the parliamentary opposition has a fair representation in this Committee. This solution is simpler and thus addresses some of the criticism of the December opinion.⁵

⁵ See paragraphs 43 – 45

21. One outstanding consideration remains, however. Contrary to the Electoral Commission, the Committee of the Assembly would also have the power to assess the candidates' "integrity, vision and managerial skills" and, following an interview, shortlist two candidates for each position of a lay member.

22. The Venice Commission is not against the idea of some form of shortlisting of candidates to the positions of lay members. However, the candidates should not be rejected because of their "vision" – i.e. ideas, because that may politicise the pre-selection process. This criterion should be excluded. As to other criteria used by the Committee (managerial experience, competency, and integrity), the interview process should be as objective as possible. Thus, it would be useful if the Committee would rely on the opinion of acknowledged experts in this field, that the interviews are open and the decision of the ranking of candidates are reasoned. Indeed, the final say in the matter of appointment of those two members will belong to the Assembly.

23. It will also be necessary to describe the decision-making process within the Committee more clearly. Article 10 (8) provides that each Committee member would attribute a certain number of points to the candidates in relation to each criterion of assessment, but it is unclear how these points would be reflected in the final score of the two remaining candidates. The authors of the revised draft claimed that such procedure is known in the Kosovo legal order, but for the Venice Commission it is difficult to understand, on the basis of the text of the revised draft alone, how the "points system" would function. This should be clarified. It would also be useful not to limit the pool of candidates to only two, but to give the Assembly more names to choose from (rejecting only those candidates who do not obtain some minimal support of the Committee members).

24. Another option would be to consider alternative voting procedures in the Committee, for example a preferential system, with a single ballot paper where candidates are numbered in order of preference by the each member of the Committee, with successive counts in each of which the lowest candidate is eliminated and the vote transferred to the next-highest preference until one candidate has a majority or with successive rounds of voting where the bottom candidate is excluded each time until a result is reached.

25. In sum, the Commission invites the Kosovo authorities to exclude "vision" from the list of criteria used by the Committee, to add procedural safeguards making the process more objective, and to ensure that, as a result of the shortlisting, the Assembly can choose from a sufficiently large pool of candidates, ranked by the Committee according to a chosen decision-making process.

D. Transitional provisions

26. The last major source of concern for the Venice Commission in the December opinion was the transitional mode of functioning of the KPC. The original draft provided for an early termination of mandates of *all* the current members of the KPC, and also allowed for the renewed KPC to function only with the lay members in its composition (the "reduced KPC"). The Venice Commission stressed that "the new KPC may start functioning only when all members are elected" and that "currently sitting members – or at least some of them - should be allowed to continue serving their mandates", unless there is "a major improvement in the current system (in particular, its depoliticisation)" which might justify the total renewal of the composition of the KPC.

27. In the revised draft the idea of the automatic termination of mandates of all members of the current KPC is abandoned. The revised draft proposes to retain three currently sitting prosecutorial members by selecting them by lot, which follows the suggestion made in the December opinion.⁶ The revised draft also abandons the idea of a "reduced KPC" operating only or essentially with the newly elected lay members. Article 18 of the revised draft – amending Article 36 of the Law –

⁶ See paragraph 62 of the December opinion.

provides for the following procedure of the renewal of the Council: first the new lay members are to be elected by the Assembly/appointed by the Ombudsman; next, a drawing by lot is organized, which would define three members who would remain until the end of their mandates, and, finally, once they are selected, “the Council shall begin its work with the new composition in accordance with this Law” (see Article 36 (8)).

28. Even though, as a rule, the Venice Commission is not in favour of an automatic early termination of mandates of members of a prosecutorial council due to an institutional reform,⁷ the new transitional provisions are more respectful of the security of tenure of the members of the existing KPC than the previous model. Furthermore, the risk of a “reduced KPC” dominated by the newly appointed lay members and having the same power as the full KPC is removed, which is a major improvement and addresses the main objection expressed by the Venice Commission in the December opinion.

IV. Conclusion

29. In December 2021, the Venice Commission, at the request of the Minister of Justice of Kosovo, Ms Albulena Haxhiu, adopted opinion CDL-AD(2021)051 on the draft amendments to the law on the Kosovo Prosecutorial Council (the KPC). Following the December opinion, the Ministry of Justice revised the draft amendments and, by letter of 25 February 2022, asked the Venice Commission whether the revised draft amendments implemented key recommendations of the December opinion. This opinion does not analyse all elements of the revised draft but focuses essentially on the new institutional design of the KPC, and on the transitional provisions proposed by the revised draft.

30. The new composition the KPC (where prosecutors elected by their peers represent three out seven members, two lay members are elected by the Assembly, one lay member is appointed by the Ombudsman, and the Prosecutor General is a member *ex officio*) does not infringe the international standards. The powers of the Prosecutor General in the disciplinary field are counter-balanced by the qualified majority requirement for the decision-making in disciplinary matters within the KPC, which is a useful addition.

31. It is positive that the pre-selection process for the prosecutorial members is based on formal criteria only. The pre-selection process for the lay members has been simplified, which is also an improvement.

32. Most importantly, the revised draft addresses the key concern of the December Opinion related to the transitional provisions, which originally provided for the replacement of all currently sitting members and for the possibility for a “reduced KPC” (composed of lay members only) to have the powers of the full KPC. The revised draft allows three out of the 9 current prosecutorial members to keep their seats, which is much better than a complete renewal of its composition, and it also abandons the idea of a “reduced KPC”.

33. These changes represent a clear and significant progress compared to the original draft amendments, analysed in the December opinion. That being said, the revised draft could be improved further. Most importantly the following recommendations are made:

- in order to exclude possible undue influence of the PG on other prosecutorial members in the KPC the law should make it clear that the prosecutorial members sit in the KPC in their personal capacity and that the PG cannot not use his/her powers of their hierarchical superior, directly or indirectly, to influence their work in this body;
- “vision” should not be in the list of criteria used by the Committee tasked with the pre-selection of the lay members;

⁷ See paragraph 59 of the December opinion, with further references.

- the law could provide for procedural safeguards making the process of pre-selection of lay members more objective: participation of experts, reasoning.
- the law should describe more clearly the process of election of prosecutorial members by the prosecutorial community (probably by introducing some form of a preferential voting);
- the procedure of pre-selection of lay members should also be clarified; in particular, while the Committee may filter out some candidates not enjoying sufficient support, it should provide the Assembly with a sufficiently long list of acceptable candidates to choose from.

34. The above recommendations do not affect the general conclusion that the key issues identified by the Commission in the opinion of December 2021 have been addressed. The implementation of those more specific recommendations contained in this opinion and in the December opinion should be left to the discretion of the Ministry and the Assembly, in dialogue with the national stakeholders, experts, and the international partners of Kosovo.

35. The Venice Commission remains at the disposal of the authorities of Kosovo for further assistance in this matter.

Draft-restricted