



Strasbourg, 22 March 2021

CDL-AD(2021)012

Opinion 1025 / 2021

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MONTENEGRO

OPINION

**ON THE DRAFT AMENDMENTS TO THE LAW
ON THE STATE PROSECUTION SERVICE**

**AND THE DRAFT LAW ON THE PROSECUTOR'S OFFICE
FOR ORGANISED CRIME AND CORRUPTION**

**Adopted by the Venice Commission
at its 126th plenary session
(online, 19-20 March 2021)**

on the basis of comments by

Mr António Henriques GASPAR (member, Portugal)

Mr James HAMILTON (former member, Ireland)

Mr Myron Michael NICOLATOS (member, Cyprus)

I. Introduction

1. By letter of 16 February 2021, the Minister of Justice, Human and Minority Rights of Montenegro, Mr Vladimir Leposavić, requested an opinion of the Venice Commission on the draft law on amendments to the Law on the State Prosecutor's Service and the draft Law on the Prosecutor's Office for organised crime and corruption (amending the currently existing Law on the Special State Prosecutor's Office) (CDL-REF(2021)028).

2. Mr A. H. Gaspar (member, Portugal), Mr M. M. Nicolatos (member, Cyprus) and Mr James Hamilton (former member, Ireland) acted as rapporteurs for this opinion. On 1 and 2 March 2021 a delegation of the Commission composed of the rapporteurs and accompanied by Mr Dikov from the Secretariat held online meetings with the Ministry of Justice of Montenegro, the Supreme State Prosecutor's Office, the Special State Prosecutor's Office, the Prosecutorial Council, the Ombudsman, with the staff of the Supreme Court, members of Parliament from different political factions, and representatives of the civil society. The Venice Commission is grateful to the Ministry of Justice for the organisation of these meetings.

3. This opinion was prepared in reliance on the English translation of the draft laws and laws currently in force. The translation may not accurately reflect the original version on all points. The Government of Montenegro provided comments on the draft opinion.

4. This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings with the interlocutors in Montenegro. Following an exchange of views with representatives of the authorities, it was adopted by the Venice Commission at its 126th plenary session (online, 19-20 March 2021).

II. Background

5. In February 2021, a group of MPs from the ruling coalition introduced two draft laws proposing a reform of the prosecution service. The first draft law amends the 2015 law on the State Prosecution Service (hereinafter "the law on the SPS").¹ The second draft law ("On the Prosecutor's Office for organised crime and corruption") is in essence nearly identical to the 2015 Law of the Special State Prosecutor's Office (hereinafter "the law on the SSPO" – for more details see below). To those two draft laws the Government introduced their amendments, which were also tabled before Parliament.

6. The adoption of the two draft laws had been originally planned for 18 February 2021. The two draft laws were put on the agenda in an expedited procedure. Neither the Prosecutorial Council, nor the prosecutors have been consulted in the process of preparation of those proposals. According to the civil society, the proposals contained in the two draft laws were not submitted to any meaningful public discussion either.

7. Parliament has decided nevertheless to adjourn the examination of the two draft laws until the opinion the Venice Commission is obtained. This adjournment is welcome: legislative reforms should not be adopted in a rushed manner in the absence of genuine reasons of urgency.² The Venice Commission invites the authorities to use this adjournment in order to obtain meaningful input from the prosecutors, judges and lawyers, from the civil society, and from the general public.

¹ The translation of the relevant legislation provided by the authorities uses a different terminology – the State Prosecution Service or the State Prosecution Office. The present opinion will use the term "State Prosecution Service" for the general law, and the "Special State Prosecutor's Office" for the law regulating the activities of the Special State Prosecutor.

² See [CDL-AD\(2020\)036](#), Albania – Joint Opinion of the Venice Commission and the OSCE/ODIHR on the amendments to the Constitution of 30 July 2020 and to the Electoral Code of 5 October 2020, para. 32; see also [CDL-AD\(2018\)021](#), Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code, para. 35.

The Venice Commission is ready to assist the authorities and provide legal analysis of the proposed draft laws, but it recalls that key political decisions should be taken at the national level and should be preceded by a transparent and thorough public debate involving main stakeholder and experts.³ In their written submissions the Government informed the Venice Commission that a special working body was created which would collect and analyse comments from the experts and the general public to the draft legislation at issue.

A. Legal framework

8. The central body of governance of the prosecution service in Montenegro is the Prosecutorial Council. Under Article 136 Constitution, the Prosecutorial Council “shall ensure the autonomy of the state prosecution”.⁴ The Prosecutorial Council proposes a candidate to the position of the Supreme State Prosecutor (hereinafter referred to as “the Prosecutor General”, or “PG”), appoints and dismisses lower prosecutors, proposes the budget of the prosecution service and has other functions defined by law (Article 136 of the Constitution).

9. The composition of the Prosecutorial Council is not defined in the Constitution but is regulated by the 2015 Law on the SPS. Under Article 18 of this Law, the Prosecutorial Council has 11 members: the President (the PG *ex officio*), five prosecutorial members (prosecutors elected by their peers according to the quotas of representation of different levels and types of prosecution offices), four lay members (called in the Law “eminent lawyers”) elected by Parliament by a simple majority of votes and, finally, one member delegated by the Ministry of Justice. Thus, prosecutors represent 6 out of 11 members of the Prosecutorial Council, but only 5 of them are “elected by their peers”, because the PG receives his/her mandate from Parliament.

10. The prosecution service is headed by the PG. The status of the PG is regulated partly by the Constitution and partly by the Law on the SPS. Under the Constitution, the PG is elected by Parliament at the proposal of the Prosecutorial Council, by 2/3 majority of votes, for a five-years’ term. If the 2/3 majority cannot be reached on the candidate proposed by the Prosecutorial Council, Parliament may elect any candidate of appropriate qualifications by a 3/5 majority (Article 91). The Constitution is silent on what happens if this majority is not reached.

11. Another law adopted in 2015 created the Special State Prosecutor’s office, the SSPO. The SSPO deals with high-level corruption, organised crime, terrorism, and several other categories of serious crimes. The SSPO is a part of the general prosecution service but enjoys a certain autonomy. The Special State Prosecutor (the SSP) is elected by the Prosecutorial Council, at the proposal of the PG, for a five-years’ term.

B. Political context

12. Following the adoption of the two laws in 2015 and the creation of the SSPO, Montenegro achieved some progress in the fight against organised crime and corruption. The number of investigations and prosecutions for serious and organised crimes has increased. Several prominent politicians have been prosecuted for corruption-related offences; some of them belonged to the then ruling majority of the DPS (the Democratic Party of Socialists). However, the overall progress in this field has recently been assessed by the EU as “limited”.⁵ The rapporteurs were informed by some interlocutors that top prosecutors are closely related to the ruling class. They, reportedly, abused the plea bargain tool and committed procedural mistakes

³ See [CDL-AD\(2019\)015](#), Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, paras. 74 – 77.

⁴ Cf. the constitutional provisions on the judicial council which “secures autonomy and independence of the courts and the judges” (Article 126 of the Constitution).

⁵ See the EU Montenegro report of October 2020, https://ec.europa.eu/commission/presscorner/detail/en/country_20_1796.

CDL-AD(2021)012

which allowed high-time criminals to avoid liability or obtain lenient sentences. The Prosecutorial Council was allegedly subservient to the interests of the PG who is an *ex officio* President of the Council, and it rarely, if ever, voted against the will of the PG. MPs belonging to the ruling coalition complained that the prosecutorial system, and the Prosecutorial Council in particular, was “captured” by then then governing majority.

13. By contrast, MPs from the DPS party (in power until 2020, now in the opposition) claimed that the 2013 - 2015 reforms achieved the creation of an independent and professional prosecution service which showed good results and did not distinguish between criminals of different political colours. The prosecutors and judges met by the rapporteurs also asserted that the prosecution service achieved a good deal of independence following the adoption of the 2015 laws. They argued that transferring cases from the SSPO to other prosecutors – one of the proposals of the reform – would create administrative chaos and lead to delays in criminal proceedings, loss of evidence, etc.

14. The outgoing PG, Mr Ivica Stankovic, was appointed by a qualified majority in Parliament in October 2014. His mandate expired in October 2019. However, as the previous Parliament failed to secure the qualified majority to elect a new PG, the Prosecutorial Council appointed Mr Stankovic as acting PG. The SSP, Mr Milivoje Katnic, was appointed by the Prosecutorial Council in July 2015 and his first mandate expired in July 2020, when the Prosecutorial Council confirmed Mr Katnic unanimously for a second mandate. Five prosecutorial members of the Prosecutorial Council were elected in January 2018, while the lay members were appointed in April 2018. Thus, the mandate of the Prosecutorial Council expires in the first half of the 2022.

15. One of the most prominent cases on the SSP’s docket was the investigation into an alleged plot to carry out a *coup d’état* with the help of Russian secret agents. Several leaders of the Democratic Front (DF) were sentenced to a five-years’ prison term by a first instance court in relation to this *coup* attempt. In February 2021 the judgment in the *coup d’état* case was overturned on appeal and returned for retrial. The leaders of the DF, now in the ruling coalition in Parliament, were amongst the staunchest proponents of the reform of the prosecution service in general and the SSPO in particular.

16. The parliamentary election of 30 August 2020 was won by the opposition parties. The DPS, which had been ruling the country for almost 30 years, has lost control of Parliament, and a new Government was formed with the support of a heterogenous political coalition (having only a slight majority). It appears that following the elections, Mr Katnic has entered into an open confrontation with some of the members of the new ruling coalition who, in turn, called for his resignation. The Government referred to certain decisions of Mr Katnic which, in their opinion, amounted to an abuse of office or at least revealed a conflict of interests.

C. The proposed reform

17. In the short time available, the Venice Commission will focus on the most essential elements of the proposed reform.

1. Draft Law on the Prosecutor’s Office for organised crime and corruption

18. Under draft Law on the Prosecutor’s Office for organised crime and corruption the name of the SSPO would become “Prosecutor’s Office for organised crime and corruption” (POOCC), with the SSP becoming the head of the POOCC. The procedure of election of the head of the POOCC would also be changed: while currently the SPP is elected by the Prosecutorial Council at the proposal of the PG, under the amended law the proposal of the PG would not be required anymore to elect the head of the POOCC. Otherwise the structure of the office, its functions, status of the prosecutors, etc., remain the same as under the current law.

19. The draft law on the POOCC contains transitional provisions which provide that at the moment of the adoption of this law, the SSP and all prosecutors working in the SSP office would “have the status of unassigned prosecutors” (Article 48). The current SSP would lose his post and a new officeholder (with a new title – the head of the POOCC) would be elected by the Prosecutorial Council, for a new five-year term (under Article 20 and 21 of the draft law). After the adoption of the draft amendments, the Prosecutorial Council would have 90 days to decide how many prosecutors would work in the newly created POOCC (Article 45); after that, it would have 15 days to advertise the position of head of the POOCC and, after that, 60 more days to adopt the act on the internal organisation of the POOCC. Within 6 months, the Prosecutorial Council would re-assign the prosecutors previously working in SSPO. Pending the election of the head of the POOCC, the cases pending before the SSPO which cannot be adjourned would be dealt with by the PG’s office (Article 48 of the draft law, second paragraph).

20. The Government’s amendments to the draft law (see Article 42 of the Government’s amendments) also provide for a transfer of cases from the SSPO to the POOCC, but specify that, pending the election of the head of POOCC, all those cases would be dealt with by the prosecutors working in the office of the PG and in the High Prosecutor’s Office in Podgorica.⁶

2. Draft amendments to the Law on the State Prosecution Service

21. The Law on the SPS would undergo more substantial revision. First of all, the composition of the Prosecutorial Council would be changed. Instead of the current composition (with prosecutors having five seats and lay members four), under the draft amendments the Prosecutorial Council would be composed of five lay members and four prosecutors. The prosecutors would represent different levels of the prosecution system, but the SSPO/POOCC would not have a representative anymore (under the current law, one of the prosecutorial members should represent the SSPO – see Article 24).

22. Another major change concerns Article 48 of the Law of the SPS, which currently establishes that the Prosecutorial Council may appoint an acting PG after the termination of the mandate of the outgoing PG (apparently until the appointment of a new PG, under the rules set out in Article 91 of the Constitution – see above). The draft amendments provide that the acting PG would not necessarily be from the number of prosecutors of the PG office and only needs to satisfy the eligibility criteria;⁷ this means that an acting PG can be a person external to the prosecution service. Under the draft amendments, the acting PG’s mandate is 6 months, and can be renewed only once.⁸

23. The draft amendments further introduce a new disciplinary offence for a prosecutor or a head of the prosecution office, namely acts “contrary to legally prescribed competences” as well as the failure to “fulfil legally prescribed obligations”. This new provision adds to a long list of disciplinary offences contained in Article 108 and Article 125.⁹

⁶ Or, in the alternative, only those cases which may involve pre-trial detention, secret surveillance or where statute of limitation may expire.

⁷ 15 years’ of professional experience as a prosecutor or a judge, or 20 years of other legal experience, have necessary professional and moral quality, etc.

⁸ The Government’s alternative proposal amends the requirement of the minimal professional experience for the candidates to the position of the PG (or acting PG) by reducing it to 10 years of judicial or prosecutorial experience or, alternatively, 15 years of experience in another legal field. Acting PG should be selected by the Prosecutorial Council from the ranks of the state prosecutors (i.e. cannot be a person totally alien to the prosecutorial system, as per the MPs proposal).

⁹ The Government’s amendments contain a different formula for this disciplinary offence which is defined as an act of taking or not taking action in a specific case where such action is “clearly contrary to the law” and would seriously violate the rights of others.

24. Under transitional Article 21 of the draft amendments, on the date of their adoption the mandate of the members of the Prosecutorial Council would end. New members should be elected within 45 days for the prosecutorial members and within 8 days for the lay members.

III. Analysis

25. The Venice Commission understands that the proposed reform enjoys support amongst the political parties of the governing coalition. Furthermore, many civil society organisations are dissatisfied with the performance of the prosecutors and are concerned by their strong ties to the previous majority. The Venice Commission takes note that a reform of the prosecution service may be advisable. However, many interlocutors expressed fears that the reform, as it is designed now, would only lead to the replacement of top prosecutors but would not bring about any profound change. As a result, in the opinion of those interlocutors, the prosecution system would be dominated by the new majority in the same way as it was dominated by the previous one. The Government strongly disputed this view.

A. Renaming of the office dealing with corruption and organised crime and removal of the Special State Prosecutor

26. The Venice Commission recalls that the prosecution service should enjoy autonomy.¹⁰ One of the elements of this autonomy is that the prosecutors must have a security of tenure.¹¹ This guarantee may not be as strong as the security of tenure of judges.¹² However, as a minimum, a public prosecutor should be protected against arbitrary removal, even by law, which means that the law should specify grounds for early termination of his/her mandate.¹³

27. This safeguard is contained in the Constitution of Montenegro which stipulates, in Article 135, that “the function of the state prosecutor is permanent” (i.e. until retirement) and that “the term of office of the head of the state prosecution office and the state prosecutor shall cease or the same shall be released from duty in the cases and according to the procedure as defined by the law”. Thus, the Constitution requires that the law must define specific situations in which a prosecutor may be removed before the retirement age, to ensure stability and exclude arbitrariness.

28. The law should define the situations in which a prosecutor may be dismissed.¹⁴ However, in the case at hand it is the draft law itself which *directly* provides for the removal of the SSP from his position. In this part the draft law is a non-normative, *ad hominem* piece of legislation. The Venice Commission is concerned with such abuse of the legislative powers: it undermines legal certainty (because normally the removal of a prosecutor should be based on the grounds provided by a law in advance) and is contrary to the nature of the legislative activity, which is to

¹⁰ The Venice Commission prefers the term “autonomy” in the context of the prosecution service, in order not to confuse with a more elaborate and strict standard of judicial independence. The CCPE in its documents (see, for example, the [Rome Charter](#)) uses the word “independence” which must be guaranteed “in a manner similar to that of judges” (Explanatory Note, p. 33). To avoid any confusion, the Venice Commission recalls that in CDL-AD(2010)040 (Report on the European Standards as regards the independence of the judicial system: Part II – the Prosecution Service, para. 28) it explained that “the independence or autonomy of the prosecutor’s office is not as categorical in nature as that of the court”.

¹¹ CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, para. 118.

¹² Thus, the CM Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system only requires that public prosecutors must have “reasonable conditions of service such as [...] tenure”. The Explanatory Memorandum to the recommendation further specifies that “unlike judges, public prosecutors must not be guaranteed tenure in a particular position or post”.

¹³ For example, for a disciplinary breach, on health grounds, following election to a political office etc.). As stressed by the CCPE, “the independence of prosecutors is their protection from arbitrary or politically motivated dismissal. This is particularly relevant with reference to the Prosecutors General and the law should clearly define the conditions of their pre-term dismissal” (the [Rome Charter](#) Explanatory Note, p. 73).

¹⁴ Principle XII of the CCEP Rome Charter provides that the prosecutor’s “dismissal [...] should be regulated by law”.

define general rules of behaviour, not to take executive action in respect of specific individuals or situations.

29. In certain exceptional situations, a law may have a direct effect on the mandate of an officeholder. For example, it is conceivable that if the whole institution is terminated, the security of tenure of its head cannot be guaranteed. However, minor changes to an institution do not justify the replacement of its head. In addition, institutional reforms should not be launched with the sole purpose of replacing individuals in key positions.

30. It is legitimate to replace ministers or other holders of *political* offices following elections. But if in the domestic system an institution enjoys some sort of autonomy or, *a fortiori*, is defined as “independent”, replacing key office holders in such an institution on account of the change in the political majority and under the pretext of a legislative reform appears to run counter to the Constitution and the Rule of Law. If every new parliamentary majority in Parliament were entitled to do this, that would be contrary to the very idea of the “tenure” and to the stability of mandate of the officeholders, and the “independent” – i.e. apolitical – nature of those bodies. It would also frustrate provisions on the disciplinary liability. Disciplinary liability is imposed for specific misbehaviour by a disciplinary body, which, in the case of judicial and prosecutorial councils, enjoys independence or at least a high degree of autonomy. Since the parliamentary majority does not have control of those procedures, it may be tempted to use legislative amendment in order to circumvent the disciplinary liability provisions.

31. If the ruling coalition, as transpires from the meetings with the rapporteurs, is disappointed by the allegedly unprofessional or politically biased actions of the SSP, then he must be checked for disciplinary liability for specific misbehaviour, and not removed under the pretext of the change of his title, and/or of the name of the institution he runs. The Government, however, argued that this is not an efficient mechanism in practice, since very few prosecutors have previously been brought to the disciplinary liability by the Prosecutorial Council.

32. Finally, the Venice Commission is concerned about the arrangements for the transition from the SSPO to the new POOCC. A decision would be taken as to how many prosecutors would be needed in the new POOCC. Pending such decision, all the prosecutors currently working at the SSPO would be given the status of “non-assigned” prosecutors. Urgent casefiles (under the MPs’ proposal) or all casefiles (under the Government’s proposal) would be taken from them and given to the ordinary prosecutors, before being transferred to the POOCC. The Venice Commission is not convinced that the renaming of the office calls for such redistribution of cases. It would cause a delay in the prosecution of all cases pending before the SSPO. In addition, no criteria are indicated as to how the urgent cases will be identified, how they will be assigned to ordinary prosecutors and what are the criteria for assigning former SSPO prosecutors to the new POOCC or re-deploying them in other branches of the prosecution service. In the absence of such criteria, there is a risk that these choices will be, or appear to be, arbitrary and/or politically motivated.

33. As noted by the CCPE, “the assignment and the re-assignment of cases should meet requirements of impartiality”.¹⁵ Similarly, the reorganisation of the inner structure of the prosecution service resulting in the re-dispatching of prosecutors to other divisions, units or branches of the service should not be used to undermine their independence.¹⁶ As follows from the time-limits set out in the draft Law (see paragraph 19 above), the process of reorganisation would take months to complete. The most probable result of this reorganisation will be an

¹⁵ Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors, Explanatory Note, para. 43.

¹⁶ See, *mutatis mutandis*, CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, para. 149.

administrative chaos which would lead to unjustified delays in both prosecution offices for many months.¹⁷ Pending reorganisation, the work should continue.

B. New composition of the Prosecutorial Council

34. The proposed reform of the Prosecutorial Council is more extensive: the number of lay members (“eminent lawyers”) elected by Parliament would be increased to five, and the number of prosecutorial members elected by their peers reduced to four. This would give the lay members an upper hand in the Council if the vote of the representative of the Ministry of Justice is counted.

35. This proposal, as such, is not contrary to the European standards. The Venice Commission has previously expressed the view that a “significant part” of the Prosecutorial Council should be prosecutors elected by their peers.¹⁸ The Commission has never insisted that prosecutors should necessarily be in a majority, while the CCPE has advocated that the prosecutors should be in a slight majority. The current composition (with a slight majority of the prosecutors) is therefore in compliance with European standards¹⁹ – but the new composition is not clearly contrary to those standards either.²⁰ However, if the lay members continue to be elected by Parliament with a simple majority this change would certainly increase the dependence of the Prosecutorial Council, hence of the prosecutors, on the political power, compared with the currently existing model.

36. What is important is that the Prosecutorial Council escapes two dangers: corporatism and politicisation. Now the lay members are in a minority, which may lead to the dominance of the prosecutors and thus to the corporatist governance.²¹ This danger is stronger in the prosecutorial councils than in the judicial councils due to the hierarchical organisation of the prosecutorial systems and the culture of subordination which results in prosecutorial members of such councils voting as a block together with the PG.²² On the other hand, the increase in the quota of lay members may lead to the politicisation and lack of independence, given that all of the lay members are elected at the same time (therefore by the same Parliament), and by a simple majority.

37. There are several possible ways to avert or at least reduce the risk of politicisation. In a previous opinion on Montenegro the Venice Commission advocated the requirement of a qualified majority to elect the lay members of the Prosecutorial Council.²³ In theory, the qualified majority requirement should help to elect a candidate who enjoys the trust of different political forces and is therefore politically neutral. However, the qualified majority solution may present disadvantages. First of all, it may lead to political *quid pro quo*, when the votes given by the opposition in support of a majority candidate can be exchanged against some other concessions. If this is so, the qualified majority requirement will not necessarily reach its objective to ensure the election of a politically neutral figure. In addition, as the experience of Montenegro shows, it

¹⁷ See a similar reasoning in CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, para. 39.

¹⁸ See CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, para. 45.

¹⁹ CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, para. 38.

²⁰ See CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 41. Cf, however, with the position of the CCPE which advocates for the prosecutorial councils having a (slight) majority of the prosecutors - see [Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the High Prosecutorial Council and the way prosecutors work \(March 2019\)](#).

²¹ See CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor’s Office of Bolivia, paras. 42-430.

²² See CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, paras. 33 et seq.

²³ CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, para. 23.

may be practically difficult to reach a political agreement. Thus, a qualified majority requirement should be associated with an effective anti-deadlock mechanism.²⁴

38. The Venice Commission has previously examined several such mechanisms.²⁵ The Commission has expressed preference for a system where if no political agreement on a neutral figure can be reached (possibly in more than one round of voting), the right to appoint a candidate should pass to a neutral body outside Parliament.²⁶ The Venice Commission recalls its recommendation in the two previous opinions on Montenegro that in the absence of a consensual figure elected by Parliament with a qualified majority, the right to appoint a member (or several members) of the Prosecutorial Council may pass to “university faculties and lawyers’ representatives” (or, rather, to their representative bodies).²⁷ The main problem with this solution is to find such an independent outside body, especially in a small country like Montenegro.

39. For collegiate bodies the risk of politicisation may be reduced, for example, by the introduction of a proportionate representation of different political parties,²⁸ through the system of a single transferrable vote or otherwise, for example by allocating to the parliamentary opposition a certain number of seats. One of the possible models would be that each side nominates a fixed number of candidates greater than the number to be elected and all the MPs vote for both components, which would in principle lead to the choice of more neutral candidates, acceptable to both parties.²⁹

40. Another possible solution is to provide for the *nomination* of candidates to those positions by the civil society and/or the legal community, the Supreme Court, or the Judicial Council.³⁰ If Parliament has to choose amongst candidates who have the support of some non-governmental or independent institutions, that may somewhat reduce the risk of politicisation (albeit not remove it completely, since there is always a risk of manipulation of the nomination process, and there is a risk that NGOs participating in this process are not entirely politically neutral or not sufficiently representative of the civil society as a whole and thus not legitimate to play this role).

41. External bodies may not only be given the power to *nominate* candidate for the positions of lay member for their future election by Parliament,³¹ but even the power to *appoint* a certain

²⁴ See CDL-AD(2018)015, Opinion on the draft law on amendments to the Law on the Judicial Council and Judges of Montenegro, paras. 11-15. See also para. 34 where the Venice Commission recommended as follows: “In principle, as the appointment requires a qualified majority of 2/3 or 3/5, the votes of at least part of the opposition are at any rate necessary; as a consequence, proposing all four candidates together would appear to offer more chances of agreement within the parliamentary committee, to the extent that the opposition may obtain to choose one or two candidates in exchange for its support for the candidates proposed by the majority. In this respect, it would even seem that a vote “as a single unit” on the four candidates might render the agreement easier.”

²⁵ See CDL-PI(2018)003rev, Compilation of the Venice Commission opinions and reports relating to qualified majorities and anti-deadlock mechanisms.

²⁶ See CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 162, CDL-AD(2015)024, Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, para. 21.

²⁷ CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, para. 49; see also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, para. 23.

²⁸ This solution was recommended in CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, paras. 17 and 19.

²⁹ See in this respect CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 17 and in particular footnote 4.

³⁰ See CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor’s Office of Georgia, §§45-52.

³¹ See CDL-AD(2020)015, Republic of Moldova – Urgent Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending the law No. 947/1996 on Superior Council of Magistracy, para. 27.

CDL-AD(2021)012

number of lay members directly, in order to make the composition of the Prosecutorial Council more pluralistic.³²

42. As previously stressed by the Venice Commission, in respect of the anti-deadlock mechanisms, “each state has to devise its own formula”³³ which should lead to the creation of a pluralistic Prosecutorial Council where politically affiliated members have no clear majority.

43. The Constitution of Montenegro does not define the composition of the Prosecutorial Council and the method of election of its members but leaves these questions to an ordinary law. The Venice Commission has previously recommended that the composition and core competences of the Prosecutorial Council be entrenched in the Constitution.³⁴ Unfortunately, this recommendation has not been followed in Montenegro. In the 2015 Opinion the Venice Commission also suggested that the requirement to have a qualified majority for the election of lay members may be introduced in the law,³⁵ and this recommendation remains valid. The Montenegrin legislator should consider introducing one of the alternative ways of ensuring de-politicisation, such as those mentioned above. However, any legal mechanism will only function if it is coupled with political will. A future Parliament, dominated by a different majority, may be tempted to try to gain control over the lay members, and, through them, over the Prosecutorial Council. Consequently, it is highly recommendable to find a more sustainable solution and describe the composition of the Prosecutorial Council and the method of election of its members in the Constitution itself – as it is done in respect of the Judicial Council.

44. Finally, it is positive that in the new composition of the Prosecutorial Council, all levels of the prosecution service would be proportionally represented in the “prosecutorial component”. However, it is unclear why the future POOCC would not have a representative there, as it is the case now for the SSPO.

C. Replacement of the members of the Prosecutorial Council

45. The draft amendments to the Law on the SPS provide that, after their adoption, the members of the Prosecutorial Council will have to be re-elected, according to the new rules.

46. The above analysis on the replacement of the SSP is also applicable to the replacement of the members of the Prosecutorial Council. The Prosecutorial Council continues to exist, and the slight alteration in its composition neither extinguishes the organ nor modifies drastically its competences, nature, or functions. Furthermore, the mandate of the current members of the Prosecutorial Council expires within less than a year. The Venice Commission does not see the need for replacing the existing members of the Prosecutorial Council, not least for the sake of respecting their security of tenure.

47. The Venice Commission refers to a previous opinion concerning the renewal of the composition of a judicial council following a legislative reform. The functions of the judicial council and of the prosecutorial council in the system of checks and balances are very similar,³⁶ so the Commission’s findings are applicable to the case at hand as well:

³² That was one of the proposals made by the Venice Commission in respect of the high judicial council in CDL-AD(2018)011, Serbia - Opinion on the draft amendments to the constitutional provisions on the judiciary, para. 62: “another option would be to give to outside bodies, not under government control, such as the Bar or the law faculties the possibility to appoint members”.

³³ CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paragraphs 5-8.

³⁴ CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, para. 47.

³⁵ CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, para. 27; see also CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, para. 48.

³⁶ Despite evident difference in the status of judges and prosecutors in many legal orders.

“The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council.

*Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. [...]*³⁷

48. One may argue that the political goal of the reform – to change the balance between lay members and prosecutorial members in the future Council – would not be achieved if the current members are allowed to serve until the end of their original mandate. This goal, however, may be achieved without the immediate re-election of all lay members. To achieve this new balance it would be sufficient to elect one additional lay member, and remove one prosecutorial member (for example, by drawing lots, or by removing a member representing the SSPO), or to add two lay members and not remove prosecutorial members at all, as a transitional solution. If, for whatever reason, it is difficult to designate one prosecutorial member to be removed, it should be possible re-elect all of them, eventually, under the new rules. In this scenario the prosecutorial and lay members would end their mandate at different times. The majority of the lay members, elected by the previous Parliament and until the end of their mandate, would not be perceived as political appointees of the current majority, and the risk of total politicisation of the Council (due to the arrival of the new members appointed by the current majority) would be at least temporarily diminished.³⁸ In any event, the Venice Commission does not recommend the immediate removal of the lay and prosecutorial members and considers that they should be allowed to finish their mandate.

D. Appointment of the new Prosecutor General

49. The Venice Commission has previously recommended a qualified majority for the election of the PG, as a mechanism to achieve consensus on such appointments, and also recommended for the introduction of an anti-deadlock mechanism.³⁹ Unfortunately, a political consensus about the next PG has not been achieved, and the Constitution of Montenegro does not provide for an anti-deadlock mechanism, so the outgoing PG has been performing this function *ad interim*, on the basis of the decision of the Prosecutorial Council, since 2019.

50. The first question is whether this situation is compatible with the Constitution. Admittedly, even if the Constitution is silent on this point, the law may provide for some transitional arrangements which permit the SPS to function normally pending the election of a new PG – as the current Article 48 does.⁴⁰ Extending the mandate of the outgoing PG as an acting one is the most evident solution in such cases, on the basis of the law of necessity and since the outgoing PG has at least some residual legitimacy (because he or she has been originally appointed by

³⁷ CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§71-72.

³⁸ The situation in Montenegro should be distinguished from the situation with the appointment of the lay members of the Supreme Council of Magistracy of the Republic of Moldova where the Venice Commission recommended that upon the entry into force of the constitutional amendments requiring a 3/5 qualified majority in parliament for their election, the mandate of the recently appointed lay members of the SCM be confirmed with this new qualified majority – see CDL-AD(2020)007, Republic of Moldova - Joint Opinion on the revised draft provisions on amending and supplementing the Constitution, with respect to the Superior Council of Magistracy, para. 46.

³⁹ See CDL-AD(2011)010, 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, para. 54.

⁴⁰ See, in respect of judges, CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 25.

CDL-AD(2021)012

Parliament following a constitutionally prescribed procedure). However, such temporary arrangement should not be prolonged *ad infinitum* – otherwise the constitutional provisions giving the power to elect the PG to Parliament and fixing a limited term of the PG’s mandate would be deprived of any meaning. And, sooner or later, the acting PG will reach a retirement age, or decide to resign, and Parliament will have to assume its constitutional role and appoint a new one.

51. It follows that it is unacceptable that a non-elected prosecutor should perform interim functions indefinitely. In the absence of an appropriate anti-deadlock mechanism provided for in the Constitution, the interim functions should be carried out by the outgoing PG until the election of a new one. This solution is also likely to motivate Parliament to find a compromise as to the choice of the new PG.

52. Once an effective anti-deadlock mechanism is provided, an *ad interim* PG could be nominated. However, the duration of such interim appointment would have to be necessarily limited to the operation of the anti-deadlock mechanism. Two consecutive six-months’ terms, as currently foreseen in the draft law, is definitely too long, and would amount to circumventing the qualified majority requirement of the Constitution, which is unacceptable.

53. In conclusion: pending the introduction in the Constitution of an appropriate anti-deadlock mechanism for the appointment of the PG, the law should be amended to provide that the outgoing PG will continue to exercise his functions *ad interim*. Once the anti-deadlock mechanism is introduced, the law may provide that an interim prosecutor be appointed, with the duration of his/her interim functions limited to the operation of the anti-deadlock mechanism.

E. New ground for disciplinary liability

54. The draft amendments to the Law on the SPS propose to define, as the most severe disciplinary offence (punishable with the dismissal), actions which are “contrary to legally prescribed competences” as well as the failure to “fulfil legally prescribed obligations”. This is an overly broad formula. First of all, it is unclear whether it covers acts or omissions in the professional context, or *any* act or omission. Second, it overlooks the fact that every prosecutor enjoys discretion in taking procedural actions. Clear and knowing abuse of legal powers should be a criminal offence. However, *bona fide* mistakes or contestable procedural moves should normally be corrected by way of an appeal to a higher prosecutor or to a court. The Law must be clear that, as a matter of principle, a prosecutor cannot be held disciplinary liable for a decision invalidated by a higher prosecutor or a court, and that a disciplinary sanction may only be imposed for a “gross and inexcusable misbehaviour and not to the incorrect application of the law”.⁴¹

IV. Conclusion

55. At the request of the Minister of Justice, Human and Minority Rights of Montenegro, the Venice Commission has examined two draft laws introduced before parliament by certain MPs in February 2021: one amending the Law on the State Prosecution Service (the Law on the SPS) and another (draft Law “On the Prosecutor’s Office for organised crime and corruption”) amending the Law on the Special State Prosecutor’s Office (the Law on the SSPO).

56. The adoption of these two draft laws by Parliament has been adjourned pending their examination by the Venice Commission, which is welcome. The Venice Commission is grateful for the opportunity to assist the authorities of Montenegro and comment on these two draft laws,

⁴¹ See, *mutatis mutandis*, CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, para. 60.

but it also encourages the authorities to submit them to a meaningful public discussion, involving all major stakeholders and experts.

57. The Venice Commission understands that there is a strong demand in Montenegro for a comprehensive reform of the prosecution service. However, such reform should be carefully designed and not result in the simple replacement of top prosecutors with new ones, and with the substitution of the new majority for the old one in a potentially dangerous exercise of political control over the prosecution service.

58. The Venice Commission expresses concerns about the proposed replacement of the Special State Prosecutor (the SSP) following the change in the name of the SSPO, which will henceforth be called “the Prosecution Office for organised crime and corruption”, and a change in the manner of his/her election. The security of tenure of the current officeholder should be respected. If the current SSP is guilty of any misbehaviour, he should face disciplinary or criminal liability, and not be replaced under the pretext of a legislative reform.

59. The envisaged new composition of the Prosecutorial Council (which would have a slight majority of lay members) is not as such directly contrary to the European standards and could be explained by the need to avoid corporatism. However, in the current setting – where all lay members are elected at the same time by a simple majority of votes in Parliament – this reform may lead to the increased politicisation of the Prosecutorial Council. To avoid it, the authorities have a choice of options. For example, lay members may be elected by a qualified majority. But in this case an effective anti-deadlock mechanism should be in place. Another option would be to elect the lay members on the basis of a proportional system (so that they represent different political forces) or to provide for their nomination or even direct appointment by external non-governmental actors (such as universities, the Bar, the Judiciary etc.). Ideally, the composition and the method of election of lay members should be entrenched in the Constitution.

60. The immediate replacement of all currently sitting members of the Prosecutorial Council has no justification and infringes their security of tenure. The role of the Prosecutorial Council is to ensure the autonomy or independence of the prosecution system. To achieve the desired balance between prosecutorial and lay members it would be sufficient to elect one additional lay member and remove one prosecutorial member, for example by drawing the lots (or, possibly, to re-elect all prosecutorial members), and wait until the mandate of the remaining members expires (which is shortly).

61. As regards the current stalemate regarding the election of the new Prosecutor General, the Venice Commission regrets that the Constitution of Montenegro does not provide for an anti-deadlock mechanism, despite the Venice Commission’s earlier recommendation to this effect. Pending the introduction in the Constitution of an appropriate anti-deadlock mechanism for the appointment of the Prosecutor General, the law should be amended to provide that the outgoing Prosecutor General will continue to exercise its functions *ad interim*. This solution is likely to motivate the current majority to find a compromise with the opposition to elect a new Prosecutor General. The current proposals as concerns an interim prosecutor who may be appointed twice for a six-month term should be abandoned. Once the anti-deadlock mechanism is introduced, the law may be changed to provide that an interim prosecutor be appointed with the duration of his/her interim functions limited to the operation of the anti-deadlock mechanism.

62. Finally, the Venice Commission recommends reviewing the new provisions on disciplinary liability of prosecutors in order to specify that such liability may only be imposed for gross misbehaviour and not simply for an incorrect application of the law.

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