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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SERBIA

OPINION

ON TWO DRAFT LAWS IMPLEMENTING THE CONSTITUTIONAL AMENDMENTS ON THE PROSECUTION SERVICE

Adopted by the Venice Commission at its 133rd Plenary Session (Venice 16-17 December 2022)

On the basis of comments by

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I. Introduction

1. By letter of 12 September 2022, the Serbian Minister of Justice Ms Maja Popović requested an opinion of the Venice Commission on a legislative package composed of five draft Laws aimed at implementing the 2022 constitutional amendments. Earlier the Commission had issued two opinions (the 2021 Opinions) on the draft constitutional amendments on the judiciary and draft Constitutional Law for the implementation of the constitutional amendments.[1] The constitutional amendments were approved by a referendum held on 16 January 2022.

2. The three draft laws related to the implementation of the constitutional amendments related to the judiciary were examined by the Venice Commission in October 2022 (hereinafter the "October 2022 Opinion").[2] A revised version of these draft laws is the object of a follow-up Opinion (CDL-AD(2022)043), adopted at the 133rd Plenary in December 2022). The present Opinion deals with the two draft Laws implementing the constitutional amendments related to the prosecution service, namely the draft Law on the Public Prosecutor's Office (CDL-REF(2022)061), and the draft Law on the High Prosecutorial Council (CDL-REF(2022)060).

3. Mr Martin Kuijer (substitute member, the Netherlands), Mr Kaarlo Tuori (Honorary President), and Mr James Hamilton (expert, former member, Ireland) acted as rapporteurs for this Opinion. On 23, 24 and 35 November 2022, a delegation of the Commission composed of Mr Kuijer and Mr Hamilton, accompanied by Ms S. Granata-Menghini and Mr G. Dikov from the Secretariat travelled to Belgrade and had meetings with the Prime Minister, the High Prosecutorial Council, the Supreme Public Prosecutor and members of her office, with members of the National Assembly from the majority and the opposition, with the Minister of Justice, the Association of Prosecutors, as well as with representatives of civil society and of the international community. The Commission is grateful to the Ministry of Justice of Serbia for the excellent organisation of this visit.

4. This Opinion was prepared in reliance on the English translation of the two draft Laws. The translation may not accurately reflect the original version on all points.

5. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 23, 24 and 25 November 2022. The Ministry of Justice made written comments on the draft Opinion and also presented a revised version of the two draft laws (CDL-REF(2022)070 and CDL-REF(2022)071, hereinafter referred to as the "revised draft Law on the Public Prosecutor's Office" and the "revised draft Law on the High Prosecutorial Council"), prepared on the basis of the recommendations contained in the draft Opinion. The draft Opinion was examined at the meeting of the Sub-Commission on 15 December 2022. Following an exchange of views with Minister Popović it was adopted by the Venice Commission at its 133rd Plenary Session (Venice, 16-17 December 2022).

II. Background and the procedure for the adoption of the two draft laws

6. The context of the ongoing judicial reform in Serbia was described in detail in the October 2022 Opinion. In summary, the two draft Laws aim at implementing the January 2022 constitutional amendments which the Commission had previously assessed in 2021. In April 2022 a working group composed of civil servants, representatives of the judiciary, the public prosecution office, legal scholars, and representatives of civil society, was created within the

[1] Venice Commission, CDL-AD(2021)032, Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments of Serbia, and CDL-AD(2021)048, Urgent opinion on the revised draft constitutional amendments on the judiciary of Serbia.

[2] Venice Commission, CDL-AD(2022)030, Serbia - Opinion on three draft laws implementing the constitutional amendments on the judiciary

Ministry of Justice. In September 2022, the Ministry of Justice approved the draft Laws developed by the Working Group and published them for public consultations.

7. In the October 2022 Opinion, the Commission praised the Serbian Ministry of Justice for "the considerable effort they invested in the preparation of the legislative package implementing the constitutional amendments, and for the inclusiveness of the process of preparation of the legislative package" (para. 95). This fully applies also to the two draft Laws under examination. The composition of the Working Group ensured a sufficiently inclusive process, and the majority of the Commission's interlocutors confirmed to have been duly informed and consulted. The Venice Commission encourages the Serbian authorities to continue public consultations until the draft Laws are finalised and introduced before the Parliament.

III. Analysis

8. The two draft Laws are voluminous and cover a vast range of issues relating to the functioning of the prosecution service and to ensuring the independence of the prosecution service as well as prosecutorial autonomy. Due to the time constraints, the Venice Commission will limit itself to addressing some key issues. If the Opinion remains silent on other elements of the two draft Laws, this is not to say that the Venice Commission agrees with them nor that it will not comment on them at a later stage.

9. The Venice Commission also refers the Serbian authorities to the recommendations formulated in the October 2022 Opinion on the judiciary. and the follow-up opinion on the revised drafts laws on the judiciary (CDL-AD(2022)043). Some of these recommendations are relevant *mutatis mutandis* in the context of the two draft Laws on the prosecution service.

10. As a general preliminary remark, the Venice Commission reiterates that any legislative amendments "should be accompanied by a change in the legal culture".[3] This was said in the context of the judicial reform, but the same approach is also applicable to the reform of the prosecution service. Even the most sophisticated mechanisms of judicial or prosecutorial governance can be instrumentalised for ulterior purposes. Therefore, the process of reform of the prosecution service will not be achieved with the adoption of the two Laws under consideration.

11. Finally, the Venice Commission expresses gratitude to the Serbian Ministry of Justice for the very detailed explanations proposed in their written comments, as well as for the revised version of the two draft Laws presented to the Venice Commission on 9 December 2022. In the following sections the Venice Commission would comment on some of the solutions proposed in the revised draft laws or in the Ministry's comments, but it should be stressed that, given the extremely tight timeframe, those comments are preliminary and certainly not exhaustive. In the overall, the revised text of the two draft Laws contains many improvements and clarifications which address the concerns formulated in the draft Opinion.

A. The law on the High Prosecutorial Council

1. Composition

12. There is no international standard as to the need to set up a Prosecutorial Council (see the Committee of Ministers' recommendation Rec(2000)19). The Venice Commission has, however, acknowledged that if the prosecutorial councils are "composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for

[3] Venice Commission, CDL-AD(2022)030, cited above, para. 16

the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors".[4]

13. There are various reasons for creating such councils: they dilute the power of the chief prosecutor and senior staff, give the prosecutors a say in the processes which affect their careers, free up the chief prosecutor to deal with the complex legal issues, etc. The Venice Commission agrees with the Consultative Council of European Prosecutors that "properly composed councils enhance the autonomy of the prosecutorial system vis-à-vis other branches of power as well the internal autonomy of the individual prosecutors. It need hardly be emphasised that the independence of prosecutorial councils and their individual members should not be a prerogative or privilege conferred in their interest, but a guarantee in the interest of a fair, impartial and effective functioning of the prosecution system".[5]

14. The Committee of Ministers in its Recommendation on the role of the public prosecutors in the criminal justice system (Rec(2000)19) makes no reference to prosecutorial councils, and, consequently, has not set any standard as the requirement to establish such councils or with respect to their functions, powers, duties, or the composition. There is an ongoing discussion among expert bodies and constitutional experts on whether prosecutorial councils should contain a majority of prosecutors elected by their peers. Unlike the judiciary, prosecution services are often organised in a hierarchical manner regarding their management as well as their professional functions, which carries the risk that the prosecutorial component of the prosecutorial council may be under the influence of the Prosecutor General. This can create tensions or even conflict between councils and senior prosecutors who are given management responsibilities, and in some circumstances could even prevent the prosecutorial council from duly exercising its supervisory and disciplinary functions and may weaken the necessary accountability of the prosecution service. It is important to design any prosecutorial council (composition, representation, methods of elections, powers) considering both the constitutional and the legal situation of the prosecution service in the country concerned, as well as the actual situation and practice concerning the exercise of prosecutorial functions as well as the management of the service.

15. The Consultative Council of European Prosecutors has advocated that prosecutorial councils should be composed of a majority of prosecutors but has acknowledged that there is no general agreement on this point.[6] The Venice Commission has recommended that "a substantial element or a majority of the members" of a prosecutorial council be prosecutors elected by their peers.[7]

16. Article 7 of the draft Law on the High Prosecutorial Council (HPC or the Council) of Serbia stipulates, following Article 163 of the Constitution, that the Council will have 11 members: five members elected by the prosecutors themselves, four "prominent lawyers" elected by the National Assembly, and two *ex officio* members: the Supreme Public Prosecutor (hereinafter referred to as the PG, the Prosecutor General), and the Minister of Justice.

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[4] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 65

[5] Opinion No. 16 of the Consultative Council of European Prosecutors on the "Implications of the decisions of international courts and treaty bodies as regards the practical independence of prosecutors" states that "the independence of prosecutors is not a prerogative or privilege conferred in their interest, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned."

[6] That has been acknowledged by the CCPE Bureau in 2020: "there may not be, as yet, a generally accepted requirement for a majority of prosecutor-members in Prosecutorial Councils" (CCPE-BU(2020)2, Opinion of the CCPE Bureau following a request by the Superior Council of Prosecutors of the Republic of Moldova concerning the independence of prosecutors in the context of legislative changes as regards the prosecution service", para. 37)

[7] Venice Commission, CDL-AD(2022)018, Republic of Moldova - Opinion on draft amendments to Law No 3/2016 on the Public Prosecution Service, para. 11

17. In the 2021 Opinions on the constitutional amendments in Serbia, the Venice Commission expressed concern that the number of prosecutors elected by their peers would be lower than before. Even if the Serbian model still meets the standard of a "substantial element", it raises concern because "a majority in the HPC will act under the hierarchical control of the [PG], who will also sit on the HPC. Equally, six out of 11 members of the HPC will be political appointees: four would be elected by the National Assembly, the [PG] is elected by the National Assembly by qualified majority, and the Minister of Justice is a political figure. Removing the *ex officio* members would address this concern".[8] As the composition of the HPC is fixed in the Constitution, and the PG will be elected by a qualified majority only in the future, it is extremely important that the rules on the election of the prosecutorial council, its powers as well as the nature of the hierarchical relations within the prosecution service are such as to allow to counter the risk of subordination to the prosecutorial component of the HPC to the PG. It is also important to guard against the risk of prosecutorial corporatism becoming dominant, which is not necessarily the same as the excessive domination by the PG.

18. In Serbia the composition of the HPC differs from the composition of the High Judicial Council (the HJC). The Venice Commission has previously accepted that some differences between the composition of the bodies of governance of the judiciary and the prosecution service may be both necessary and desirable.[9] What is important is that in each case the final composition is such as to exclude the control of this institution by the political majority of the day, while, at the same time, ensuring the accountability and the effectiveness of the prosecution service.

a. Ex officio *members*

19. With regard to the *ex officio* membership of the Minister of Justice (the MoJ or the Minister), following the recommendation of the Venice Commission the amended Constitution and the draft Law on the Public Prosecutor's Office provide that the Minister cannot vote in disciplinary proceedings (Article 121 para. 2 of the draft Law). This is positive.

20. As for the *ex officio* membership of the PG, the Venice Commission has previously explained that there is a risk of the PG becoming an overly powerful figure both within the Council and within the prosecution system in general.[10] This may lead to the lack of accountability of the PG.[11] In the Serbian context this problem may arise as well, since five prosecutorial members in the HPC will have hierarchical links to the PG. It is therefore not illusory that these members would align their voting behaviour to that of the PG.

21. In the Commission's view, it is necessary to limit the powers of the MoJ and the PG in other areas, in particular as regards decisions about arresting and detaining members of the Council (see Article 11 para. 2 of the draft Law on the HPC stipulating that Council members cannot be deprived of their liberty without the approval of the Council). Some of such adjustments are discussed below, in the section on the decision-making procedure and working methods of the Council. It must be stressed that the influence of the PG within the Council may be even more dangerous for the proper functioning of this body, because of his or her position vis-à-vis the prosecutorial members, than the influence of the Minister of Justice vis-à-vis the lay members. This issue is discussed below, in the Section analysing the draft Law on the Public Prosecutor's Office.

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[8] Venice Commission, CDL-AD(2021)048, cited above, paras. 27, 28
[9] Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, para. 40
[10] Venice Commission, CDL-AD(2022)032, Bulgaria - Opinion on the draft amendments to the Criminal Procedure Code and the Judicial System Act, with reference to the earlier opinion on the Judicial System Act, which examine the question of accountability of the prosecutor general in a system where the prosecutor general is a hierarchical superior of a significant number of members of the council.
[11] Venice Commission, CDL-AD(2017)018, cited above, para. 32

b. *Prosecutorial members*

22. The election procedure for the five prosecutorial members of the HPC is described in detail in Articles 25 et seq. of the draft Law. Article 26 stipulates that the prosecutorial members of the HPC are elected from various layers within the prosecution service: one from the office of the PG; one from the appellate public prosecutor's offices, the Public Prosecutor's Office for Organised Crime, and the Public Prosecutor's Office for War Crimes; one from the higher public prosecutor's offices; and two from the basic public prosecutor's offices. The Commission recalls that Article 163 of the Serbian Constitution enshrines the principle of the "broadest representation of the prosecutors" which is reflected in the composition of the HPC proposed by the draft Law.

23. Article 27 provides that any candidate should be nominated by the collegium (i.e. the chief public prosecutor and the public prosecutors of that public prosecutor's office, Article 123 of the draft Law on the public prosecutor) of one or more public prosecutor offices. One collegium may only nominate one candidate (Article 27 para. 3), and, in addition, each candidate should be supported by at least 15 prosecutors of the relevant level (see Article 27 para. 5). It is understood that a candidate who gets the support of less than 15 of his or her peers cannot run for the elections. However, it is unclear how this rule would apply to the top level of the system as the collegium of the PG office only consists of the PG and 12 prosecutors. This should be clarified in the Law.

24. Article 28 para. 3 provides that at the elections each prosecutor "votes for only one candidate from the list of candidates of the type, i.e. the level of the public prosecutor's office in which he or she performs the public prosecutor's function". The elections take place "on the basis of free, general, equal and direct electoral rights, by secret ballot". The elections will be based on the principle of "one man, one vote". A question of equal weight of the votes in the election of the members of the HPC was raised by several interlocutors during the country visit. Article 28 para. 3 means that one member of the HPC will be elected by the PG and 12 top-level prosecutors, while, by comparison, several hundred public prosecutors working in the basic offices will elect only two members. This is a great difference in electoral weight.

25. Further, if the basic level prosecutors are to vote for any candidate from the general list, it is very likely that the candidates supported by the largest collegium (for example, from Belgrade) would have a greater chance of being elected, compared to candidates from a smaller collegium. This is thought by some interlocutors to compromise a genuine territorial representation.

26. The Venice Commission is of the view that this model, even if it is in principle in line with the Commission's previous recommendations, might not sufficiently shield the system against a potential risk of excessive influence of the PG over the prosecutorial component of the HPC. This should be taken into consideration in deciding the method of election of the members of the HPC. Consideration could therefore be given to letting each prosecutor vote for each of the four levels. An alternative could also be, as suggested by one interlocutor, to provide that the prosecutors from the PG's office, from the appellate public prosecutor's offices, the Office for Organised Crime and the Office for War Crimes vote for two representatives. It is ultimately for the Serbian authorities to choose the appropriate solution, but the Commission reiterates the need to increase the public trust in the prosecution service.

27. In their written comments the Ministry of Justice argued that the current system of the election of the prosecutorial members – with each level of the prosecutorial system voting for "their" candidates – is the only model which satisfies the constitutional principle of broadest representation of public prosecutor's offices in the prosecutorial component of the HPC. The Venice Commission is not necessarily persuaded that the Constitution would prohibit the election of the prosecutors from relevant categories by all prosecutors (and not only by the prosecutors of the same category). However, it reiterates that in the overall it belongs to the national legislator

to find an appropriate solution, compatible both with the constitutional framework and with the national legal traditions.

c. *Lay members*

28. The election of the lay members of the Council is regulated in Articles 43 et seq. The draft Law – in line with the constitutional amendments – contains certain key features: (1) a public call for candidates (Article 46), (2) shortlisting of the candidates by the Committee on the judiciary (the JC), (3) qualified majority voting in the National Assembly in order to reinforce the depoliticisation (Article 50), and (4) having in place an anti-deadlock mechanism to avoid stalemates (Article 51).

29. It is welcome that Article 44 stipulates that the members elected by the National Assembly should not have any present hierarchical (or *de facto*) subordination links to the PG and should represent other legal professions. However, the question of political affiliation of those members may arise, if all four lay members have the same political colour as the Minister of Justice sitting in the HPC *ex officio*.

30. Article 43 stipulates that a candidate must be a "prominent lawyer" with at least ten years of experience in the legal profession. The meaning of the "prominent lawyer" is developed further in this provision. Along with the formal criteria (which are relatively easy to apply), the draft Law mentions some more subjective criteria and, amongst them, "worthiness" for performing the function of a Council member. As the concept of "worthiness" is rather vague, it will be up to the parliamentary Committee on the judiciary to select eight candidates who are "worthy" to be presented to the National Assembly for the selection of four lay members. The revised draft Law provides that the National Assembly votes for each candidate individually, and four candidates who have received the highest number of votes are elected. If more proposed candidates have received the same, and at the same time the lowest, number of votes sufficient for election, election among those candidates is subject to repeated voting.

31. As noted in the October 2022 Opinion on the judiciary, since the Committee on the judiciary is dominated by the ruling coalition parties, there is a risk that all eight candidates will be selected along party lines. Article 51 provides that the decision on selection should be "reasoned", but this does not exclude that the decision will be taken on non-objective or partisan grounds. In any event, according to the same article, this decision is taken by secret vote, which is hardly compatible with the requirement of having a "reasoned" decision. The vote necessarily precedes the "reasons". It is of the essence of a secret ballot that every voter's actions and reasons remain secret.

32. For the Venice Commission it is crucially important to ensure the political neutrality of those eight candidates, or at least ensure political pluralism within the lay component.

33. One solution to this problem would be to formulate the (in)eligibility criteria in such a manner as to reinforce the political neutrality of the candidates, in particular the requirement of not having been active in politics for some period before running for a position of lay member. In the context of the October 2002 Opinion on the judiciary, the Ministry of Justice argued that such a "cooling off" period could be potentially unconstitutional (see para. 80 of the October 2022 Opinion), which may explain why this path has not been explored in the context of the HPC as well.

34. As an alternative, the Ministry of Justice proposed to expand the notion of "worthiness" of the candidates, which is one of the criteria for shortlisting them, by specifying that the "worthiness" of the candidate implies "absence of a strong political influence". This is a welcome addition, which can be developed even further. Thus, the draft Law might specify

that candidates who were elected officials or members of the Government or members of political parties with leading roles cannot be seen as "worthy" and should therefore not be eligible for the HPC.[12] The draft Law could equally stipulate that those candidates whose close relatives, spouses and partners were active in politics are ineligible. In the opinion of the Commission, such a strengthening of the (in)eligibility requirements may alleviate the risk of politicisation of the lay component of the HPC and help to create a "safety distance" between the lay members and party politics.

35. In the October 2022 Opinion on the judiciary the Venice Commission said that the main concern of avoiding a politically homogeneous lay component could be addressed in various ways. *Inter alia*, the Venice Commission suggested that the eight candidates could be elected through some form of a proportional voting. This suggestion could be an option also for the election of the lay component of the HPC, but other modalities exist as well.

36. The Ministry of Justice proposed to modify the voting procedure in the JC. Thus, according to revised Article 49 new para. 2, each member of the JC will propose one candidate. The revised draft Law will make some further improvements as regards the transparency of the procedure before the National Assembly and in the procedure before the five-member Commission (which serves as an anti-deadlock mechanism if the National Assembly fails to elect the four members). The Ministry states that these additions are intended to give the opposition more say in the election of the lay members of the HPC. This is positive.

37. Most importantly, in the discussion with the rapporteurs the Ministry proposed providing that the JC should decide on the short-list of eight candidates with a majority of two thirds of votes of the JC members, so as to ensure the broadest political support of the candidates. If this majority is not reached in the first round, a second round will be held in which the list of eight candidates will have to be approved by a simple majority of votes.

38. The Venice Commission gives a cautious welcome to this initiative of the Serbian authorities. The JC is composed on a proportional basis of representatives of different political parties. Therefore, the requirement of a qualified majority will normally ensure that the candidates will have a significant cross-party support. This reduces the risk of a politically homogeneous lay component, which was the main concern for the Venice Commission in respect of both the HPC and the HJC.

39. As to the antideadlock mechanism proposed by the Ministry of Justice, the Venice Commission reiterates that it is "aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms, for which there is no single model. One option is to provide for different, decreasing majorities in subsequent rounds of voting, but this has the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Other, perhaps preferable, solutions include the use of proportional methods of voting, having recourse to the involvement of different institutional actors or establishing new relations between state institutions. Each state has to devise its own formula."[13]

40. In sum, the Venice Commission welcomes the proposal by the Serbian authorities to (i) require a qualified majority in the JC, and to (ii) strengthen the (in)eligibility criteria, provided

[12] Venice Commission, CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, para. 28.
[13] Venice Commission, 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, para. 8.

they are further elaborated in the Law as recommended by the Commission. This would address the concern about the dangers related to a politically homogenous lay component.

d. *Overall assessment of the composition of the High Prosecutorial Council*

41. For the Venice Commission, the institutional design of the HPC should be such as to avoid two dangers: corporatism and politicisation. Heightened majorities in the decision-making of the Council ensure that neither prosecutors nor lay members can govern alone. However, the same heightened majorities carry with them the risk of the inability of the Council to take any decision, if lay members always vote together, as a block, and the prosecutorial members do always the same, and the two components disagree amongst themselves. Therefore, it is necessary to increase pluralism within both components. Certain steps, described above, may help achieving this result and therefore avoid blockages. In particular, the legislator should increase the independence of prosecutorial members from the PG and ensure that the lay members represent different political currents.

2. Status of the members of the High Prosecutorial Council

42. Article 11 of the draft Law deals with the immunity of the members of the HPC. It provides for a complete immunity of the members for their opinions given in connection with their duties or for voting. Given the range of powers and duties proposed to be conferred on the Council the possibility that opinions will be given, and votes will be cast corruptly is not merely theoretical. In such an eventuality to exclude the possibility of criminal investigation and corruption cannot be justified. Furthermore, it is hard to see how the commission of any criminal offence could be justified in the proper performance of duty as a member of the Council. Therefore, the draft Law must state clearly that the functional immunity for the opinions expressed, and votes cast does not exclude possible criminal prosecution if there is serious evidence of corruption, abuse of office for personal gain, and other similar crimes.[14]

43. The same article provides for immunity from imprisonment for criminal offences committed as members of the Council without the approval of the Council. The Venice Commission understands that this provision does not speak of the imprisonment as a punishment but rather about the pre-trial detention. The duty of the prosecution bodies to obtain an approval of the Council for detaining a member of the Council is seen in some legal orders as a measure protecting individual members from the potential harassment by the law-enforcement bodies for ulterior reasons; however, this procedural guarantee should by no means prevent criminal investigations directed against the members.

44. Article 12 deals with the removal of a Council member. Apart from detention, the grounds for the removal are not specified. It is understood that “removal” in this context means a temporary suspension of the mandate, and the “detention” means pre-trial detention, and not an imprisonment to serve a sentence (in the latter case the return of the member to his or her position after serving the sentence would not seem appropriate).

45. Article 13 deals with the employment rights of the elected members of the HPC. According to para. 1 they are to be exercised in accordance with the regulations governing public prosecutors’ rights, while those rights which existed prior to the appointment “are inactive”. The Ministry explained that all elected members of the Council enjoy the same labour rights and the same social coverage as the prosecutors, and that this provision does not mean that they are subject to the same obligations as the prosecutors while performing their functions within the Council.

[14] The “immunity” provision is even more objectionable given that Article 17 (26) gives the Council – the body largely composed of the prosecutors – the power to decide on issues of immunity of prosecutors.

46. As transpires from Article 15, prosecutorial members of the Council work full-time, whereas lay members may have other occupations. In theory, it might be better if all members (except for the *ex officio* members, indeed) had the same status, but the size and the budget of the judiciary are factors to be considered in this context.

47. Article 16 fixes a five-year mandate which is not renewable. It should be clarified whether this provision applies only to the election at the expiry of the term of office, or also to subsequent elections (following a "pause").

48. The list of incompatibilities for lay members is so extensive that in essence the only parallel activity they could exercise is teaching, research, or an artistic activity. Thus, practising lawyers cannot be lay members of the Council. As noted in the October 2022 Opinion, this may reduce the pool of qualified candidates; on the other hand, including practising lawyers in the HPC may create conflicts of interests. It would certainly be inappropriate that a lawyer might engage in criminal defence work in Serbia while being a lay member. Indeed, the Venice Commission recognises that the national authorities have a significant margin of discretion when defining the list of incompatible occupations.

49. It belongs to the Ethics Committee of the Council to define the list of incompatible occupations. This function might be combined with an advisory function helping lay members to understand whether they can take up a parallel occupation or giving other guidance to prosecutors on ethical questions. In any event, the legislator should consider whether the list of incompatible functions is not overly restrictive.[15]

50. As explained by the Ministry, provisions relating to the removal of Council members from their post do not apply to the *ex officio* members (only the National Assembly is competent to decide whether a person continues to act as a Minister / PG and hence as a Council member), whose mandates as members are terminated only in case their primary function is terminated.

51. According to Article 44 para. 1 (7), those who have exerted undue influence on prosecutorial service, or the judiciary are not eligible to become members of the HPC. It remains unclear whether the application of this condition presupposes a decision of the HPC or the HJC on "undue influence". Normally, such "undue influence" may be qualified as a disciplinary or even a criminal offence, depending on the gravity of the situation, and in both cases a decision is required by a competent body to assert that the person was guilty of such a behaviour. As follows from the explanations of the Ministry of Justice, the body selecting candidates (the Judiciary Committee of the National Assembly) may decide that a candidate has previously "exerted undue influence" and is therefore ineligible on this ground, without any previous decision of another body. This should be explained in the draft Law since, under Article 17 para. 1 (20) the power to decide on the "undue influence" belongs to the HPC.

52. Articles 54 and 56 of the draft Law describe the reasons for the termination of office. Article 56 states in particular that the term of office of an elective member of the Council may be terminated before the expiry of the mandate, *inter alia*, if he/she becomes "unworthy" to perform the function of a Council member.

53. In respect of lay members, the reference to "unworthiness" may be considered as a logical corollary of the eligibility requirements listed in Article 44 although the Commission would argue that "unworthiness" relates much more to the behaviour of a Council member and not so much to incompatible functions or private interests.

54. In any event, the "worthiness" of a member is established at the moment of his or her election; the termination of the mandate should be justified by some *specific behaviour*, described in the

[15] Venice Commission, CDL-AD(2022)030, paras. 42 et seq.

law with sufficient precision. The same observation applies to the possibility to terminate the mandate if a member "does not perform the function of a Council member in accordance with the Constitution and the law". This is too vague to be used as a ground for dismissal. The Venice Commission reiterates that early removal of a member of the HPC should be justified in the case of a *specific disciplinary offence* (or, in extreme cases, commission of a crime), and not because of his or her positions taken in performing the function of a member (even if some other members might see these positions as undignified or unconstitutional).[16]

55. The revised draft Law in Articles 54 and 56 indicates explicitly that a member of the Council may be stripped of his or her mandate if he or she fails to participate in the work of the Council without "justified reason". This is a useful addition; the legislator may consider qualifying this rule by adding that only a "repeated" failure to participate without a serious and objective reason (like serious illness etc.) can lead to the termination of the mandate. Given the high quorum required for the HPC decision-making in certain matters, the risk of a Council member seeking to thwart the operations of the HPC by a deliberate refusal to carry out the duties of a member needs to be guarded against. It is also welcome that in the revised draft Article 54 will not anymore include such vaguely formulated ground for the termination of the mandate as "not performing the function in accordance with the Constitution and the law".

56. Finally, the Venice Commission recommends providing that any criminal conviction involving imprisonment (and not only exceeding six months' imprisonment as per Article 54) should automatically terminate the mandate of the member of the Council. The Venice Commission is aware that this rule is based on the constitutional norm (Article 164 para. 4), which mentions the six months' imprisonment as a ground for an *automatic* termination of the member's functions. If the Constitution is interpreted as allowing for a dismissal of a HPC member for "undignified" performance of the function (see above), the commission of any crime may be considered by the HPC as such, and lead to the dismissal. The Ministry confirmed such reading of this provision, which means that, most likely, this provision will not lead to a seemingly abnormal situation that a member may retain his or her mandate while serving a prison sentence, even a short one.

3. The mandate of the Council and its decision-making procedure

a. *The mandate of the Council*

57. Pursuant to Article 162 of the Constitution, the Council "shall guarantee the autonomy of the public prosecutor's offices, the [PG], Chief Public Prosecutors and public prosecutors" and "shall propose to the National Assembly the election and dismissal of the [PG], elect acting [PG], Chief Public Prosecutors and public prosecutors and decide on the cessation of their term of office and on other issues concerning the status of the [PG], Chief Public Prosecutors, and public prosecutors, and performs other duties within its remit of jurisdiction defined by the Constitution and law".

58. Article 17 of the draft Law gives the Council *inter alia* the powers to decide on the permanent relocation and temporary assignments of public prosecutors and on objections to mandatory instructions. In the revised draft Law, the power to decide on objections to mandatory instructions by the PG or a chief public prosecutor in a specific case and objections to "devolution" (withdrawal of the case by a higher prosecutor) was transferred to a special commission, which is an acceptable solution (on this see more below).

59. Some of the powers of the HPC are formulated in an overly broad manner: thus, for example, the HPC is entitled to decide on "other issues pertaining to the position of the [PG], chief public

[16] The Venice Commission is aware that Article 164 of the Constitution does not provide explicitly for the removal of a member of the HPC for a disciplinary offence, but Article 163 para. 8 of the Constitution may be interpreted as allowing for the removal of a member for "dishonourable" behaviour

prosecutors and public prosecutors". This wording is overly broad, which may put the PG in a clearly subordinate position vis-à-vis the HPC, or result in the HPC assuming *de facto* the functions of the PG.

60. In some areas (in particular, those related to the appointment and dismissal of public prosecutors) criteria for taking decisions by the HPC are described in sufficient detail (see the draft Law on the Public Prosecutor's Office). However, as regards the power of the HPC to review decisions of the prosecutorial hierarchy (on transfers, withdrawal of cases, etc.), such criteria are missing. The draft Law should at least clarify in which cases the HPC is required to make a *de novo* assessment of the impugned decisions, and in which cases it is required to assess whether the impugned decision was taken on reasonable grounds. This commentary also relates to the work of the new Commission on objections to mandatory instructions (see Article 19 of the revised draft Law) – it is necessary to define the scope of review exercised by this commission in respect of the decisions which are normally in the discretion of the prosecutorial hierarchy.

61. There are a number of difficulties with the provisions concerning decisions on mandatory instructions in relation to prosecutorial decisions on the conduct of cases. Firstly, the criteria for objecting to such instructions read that the instruction is illegal or unfounded. The question whether an instruction is illegal is a question of law and should be subject to a legal appeal if necessary. It is not clear what does "unfounded" mean in this context, and what criteria determine whether the decision is deemed unfounded. The decision on withdrawal of cases ought to be a professional prosecutorial decision. It is questionable whether such decisions should be taken by a body containing persons who are not prosecutors, may not be legally qualified and may be open to political influence.[17] Having said that, it is important to ensure so far as may be possible that a decision to withdraw a case cannot be made for improper reasons.

62. The Venice Commission recommends that the distribution of responsibilities between the Council and the PG be decided carefully so that the influence of the PG over the prosecutors does not unduly limit their autonomy, while ensuring the effectiveness of the prosecution service. The draft Law on the HPC and the draft law on the Public Prosecutor's office will need to explain clearly and in detail the respective roles of the prosecutorial hierarchy and of the HPC. In exercising reviewing powers, the HPC and its bodies should respect the discretion of prosecutors and the prosecutorial hierarchy in taking managerial decisions or decisions related to the conduct of the proceedings.

b. *Decision-making procedures and majorities*

63. The Council adopts its Rules of Procedure which "regulate the method of work and decision-making of the Council". The Serbian legislator should consider describing the decision-making procedures in more detail in the law itself (for example, explaining better what information should be made public (Article 21), what are the basic criteria for meeting in closed session (Article 18), etc.). Certainly, the Rules of Procedure may develop those rules further, but should remain within the framework of the law which should set out the basic principles.

64. The Council will be presided over by one of the elective prosecutorial members; the vice president is a lay member, and both are appointed by the whole Council. This seems an appropriate model. It is welcome that these tasks are not entrusted to one of the *ex officio* members, although it may prove challenging for an elective prosecutorial member to preside the Council in the presence of his/her hierarchically superior PG.

65. Article 10 provides that the Council may obtain information, documents and other material related to the performance of its tasks from any legal body or person in Serbia. There is no

[17] On this see below, Section B (2) b) of the present Opinion, analysing the mechanism of appeals against mandatory instruction to a commission of the HPC on mandatory instructions.

provision as to how this is to be enforced in the case of a refusal or who is to resolve any dispute about the provision's application. Prosecutors are "under the obligation to act on the decision of the Council" without any limitation, qualification, or provision to resolve disputes. This power of the HPC should be circumscribed. It is permissible for the HPC to obtain access to such documents and information which are in possession of other State bodies, provided that it is connected with the performance of the HPC's mandate. However, there are natural limits to this power, which are defined *inter alia* by the rights to privacy and by the public interest as well. Private persons cannot be obliged to provide the Council with the information, documents, and materials they possess, and some privileged or secret information in the hands of the State bodies may also be excluded. When there is a disagreement about the power of the HPC to request some documents or information, there should be a provision for judicial determination of such disputes. The Ministry of Justice in their written comments explained that such power will only be used for the purposes of performing functions of the HPC described in Article 17 of the draft Law. However, Article 17 contains a list of 32 more specific or more general functions of the HPC (including some vaguely formulated functions, such as "deciding on the existence of undue influence" on public prosecutors). Therefore, despite this clarification, this provision still can be interpreted as empowering the HPC to seek and obtain from private persons any document and in any circumstances. This provision should be reformulated to exclude such a possibility; or, at least, it could be clarified in the explanatory memorandum to the bill.

66. Decisions by the Council are ordinarily adopted "by a majority of eight votes" (Article 20, para 1). It is understood that this Article speaks of the majority, and not of the quorum. Such a heightened majority guarantees that decisions may only be adopted with support from both prosecutorial members as well as lay members. This ensures that neither of the two big groups can single-handedly control the Council. However, it also raises the risk of blockages in the work of the HPC, either because some members fail to attend the meeting of the Council or because the necessary majority for taking decisions is too high.

67. A way to combat absenteeism is to amend Article 54: the repeated absence of a member in the Council meetings without valid reasons should be a ground for the termination of his or her mandate, and this should be decided by a simple majority of members of the HPC. Indeed, the member who repeatedly failed to participate in the work of the Council should be given a reasonable opportunity to explain the reasons for his or her absence and this decision should be taken with all necessary procedural safeguards.

68. Even if all the members participate in the decision-making, another risk remains. While five prosecutorial members, together with the PG, will not be able to take the decisions alone, no decision can be taken without the vote of at least some of them. If these members were to always act as a block, they could obstruct the work of the Council. That is not to say that there will not be occasions where it is appropriate and understandable for them to act together, but they should do so from conviction rather than coercion. It is therefore necessary to ensure that all members, including the prosecutorial ones, exercise their mandate independently.

69. The legislator should design appropriate rules and procedures which reduce the potential abuse of influence of any individual on other members, thus reducing the likelihood that all prosecutors act as a block. For example, the legislator might provide that following the expiry of the mandate of prosecutorial members, they may decide not to return to their previous positions in the prosecution system but to become a judge at the corresponding level. However, as explained to the rapporteurs in Belgrade, this solution may not fit to the Serbian model where the prosecution service and the judiciary are clearly separate professions and where there might be constitutional barriers for such a transfer of a prosecutor to the judiciary without a proper competition and an appointment decision. The Venice Commission reiterates its recommendations concerning the method of election of the prosecutorial members, which may indirectly reduce the influence of the prosecutorial hierarchy within the Council.

70. Under Article 20 para. 1 a majority of eight is necessary for the HPC to take decisions. However, under para. 2 certain decisions may be taken by a majority of seven votes. As explained by the Ministry of Justice in their written comments, these decisions concern matters of greater gravity, such as disciplinary liability and the removal or termination of the term of office of elective Council members and the lower majority here is explained by the fact that the Minister of Justice does not have the right to vote on the questions of disciplinary liability/dismissal, and, when the termination of the mandate of a member of the judicial council is at issue, the member concerned will also not participate in the voting, so in both cases the overall number of members eligible to vote would be ten, and not eleven.

71. Under the draft Law the HPC has the power to decide in disciplinary cases and examine appeals against disciplinary sanctions (Article 17 (15)). Under Article 108 of the draft Law on the Public Prosecutor's Office, an appeal against the dismissal may be filed with the Constitutional Court. Under Article 121 para. 4 of the draft Law on the Public Prosecutor's Office the decision of the HPC on imposing a disciplinary sanction (falling short of the dismissal) is final. If follows that an appeal to the Constitutional Court is provided only in the case of the most serious sanction – the dismissal, while for lesser sanctions the appeal is directed to the HPC itself.

72. The Venice Commission has often recommended providing for an appeal in matters related to discipline.[18] An appeal to the HPC may be an acceptable solution only if the HPC, given its institutional characteristics, may be characterised as a "court", and if it provides all basic guarantees of a fair trial.

4. Budgetary autonomy of the High Prosecutorial Council

73. The Venice Commission has previously recommended "to include the budgetary autonomy of the […] HPC at the constitutional level". This recommendation was not followed when adopting the constitutional amendments. Articles 3 and 4 of the draft Law do contain a regulation on the Council's budget. The HPC itself prepares a proposal for the budget which it then submits to the Minister of Finance, followed by negotiations in the event of disagreement. If the negotiations fail, the Ministry of Finance shall retain the final say but shall need to give reasons for not accepting the proposal of the HPC. The budget is then discussed and adopted by the National Assembly. This is a welcome step towards greater budgetary autonomy of the Council. This greater autonomy should go hand in hand with ensuring adequate expertise on budgetary matters within (the secretariat of) the Council. It should be made clear in the draft Law that while the decision on the budget belongs to the National Assembly, the decisions on how the budget is used belong to the prosecution service exclusively.

B. The law on the Public Prosecutor's Office

1. Functions and powers of the public prosecution service in Serbia

74. Article 155 para. 1 of the Constitution provides that "the Public Prosecutor Office shall be unitary and an autonomous state body which shall prosecute the perpetrators of crime and perform other tasks to protect public interest as prescribed by law". Under Article 2 of the draft Law on the Public Prosecutor's Office[19] the public prosecution service is responsible for criminal prosecutions. This is the most common function of all prosecution services in Europe.

75. By contrast, the task to "exercise other authorities that protect the public interest determined by law" seems to give to the prosecution service the power to represent the State in other fields

[18] See, for example, Venice Commission, CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, para. 75

[19] In this section and until the Conclusions the "draft Law" will refer to the draft Law on the Public Prosecutor's Office, unless specified otherwise.

going beyond the prosecution of crimes. With this broadly defined function come equally broadly defined powers. Article 9 of the draft Law requires that all State bodies, and even "legal and natural persons" are "obliged to submit to the public prosecutor's office, at their request, the files, and notifications necessary for taking actions for which they are competent". Article 9 provides for the obligation for "everyone" to "immediately provide the public prosecutor's office, upon the request, with the explanations and data they need to take actions they are authorised to do by law".

76. These provisions give rise to serious concerns. Indeed, when prosecuting criminal cases prosecutors may request and obtain information and documents, within the limits and in the procedure set by the Code of Criminal Procedure. This is the essence of the prosecutorial activity in the criminal law context.

77. However, there should be no general and unfettered obligation of "everyone", especially private persons, to provide the prosecution service with "files", "explanations", or "data". This clause is particularly dangerous because the law itself does not define for what purpose the prosecution may seek such materials and information. The Venice Commission insists that the prosecution should not be entitled to get access to the proprietary information, information about private life, privileged materials, etc. simply because the Constitution and the law give it a general mandate to "protect public interests" is some undefined areas. The power to prevent implementation of administrative – and even judicial decisions – is also dangerously broad. The reference to the general function of the prosecution to defend the "public interest" is insufficient to justify such power. Similar vague provisions broadly defining the role and the corresponding powers of the prosecution have been criticized by the Venice Commission in previous opinions.[20]

78. This is not to say that the prosecution cannot have some powers outside of the criminal law field. Thus, it is possible for the sectoral legislation to give to the prosecution authorities (when there are no specialised State bodies dealing with the relevant questions) the power to act in the public interest. But the scope of the mandate and of the accompanying powers should be described with sufficient precision, and the most important powers – in particular the coercive powers which have a potential of interfering with the right of privacy or with the property rights – should be accompanied by the judicial supervision and by other procedural safeguards.

79. At the meetings in Belgrade the Ministry of Justice explained that the functions of the prosecution outside of the criminal law field are fairly limited in the Serbian legal order. The Minister gave an example of the provisions of family law allowing the prosecution to step in the civil proceedings in the interests of vulnerable persons. Taken in isolation, this function does not appear problematic, but the Venice Commission is concerned with the risk of uncontrolled expansion of the functions of the prosecution which may be explained by the reference to the provisions of the draft Law. More generally, the Venice Commission considers that concentration of too many heterogenous functions and powers (especially coercive powers) in the hands of one institution is dangerous for the system of checks and balances.

80. In their written comments the Ministry confirmed that those powers can be used "only as prescribed by the special law, in order to conduct activities for which the public prosecutor's office is specifically authorized in order to conduct the procedure. The procedural [powers] of the public prosecutor's office are prescribed in other laws such as: Criminal Procedure Code, Law on Civil Procedure, Law on Administrative Disputes, etc." In the revised draft Law it is proposed to supplement Articles 9 and 10 by specifying that the power of the prosecution service to receive and obtain documents, information etc. from the State authorities and private persons should be exercised "in accordance with the law".

[20] Venice Commission, CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, para. 63

81. The Venice Commission welcomes this addition. In the light of the explanation given by the Ministry the Venice Commission understands that the power to request information etc. must be specifically established by the relevant procedural legislation, and, without it, the prosecution will not be able to refer to the law on the Public Prosecutor's Office as a sole ground for exercising such powers. However, in order to avoid any overbroad interpretation of the provisions on the prosecutor's powers in this respect it would be preferable to reflect this in the text of the draft Law, (or at least in the explanatory memorandum to the law), by stating it clearly that the prosecution service may only perform other specific tasks if there is a specific legal basis for performing such a task. In the exchanges with the rapporteurs the Minister of Justice confirmed that this could be done at the legislative level.

82. A similar remark is called vis-à-vis the power of the PG "to request a postponement or suspension of the execution of the decision when [the PG] considers that there are reasons to challenge a decision made in a court"; such requests are addressed to "the authority that allows the execution of the decision" (Articles 27 and 28). This provision seems to authorise the PG to seek suspension of any administrative (and other?) decision issued by any other authority (admittedly excluding private persons and entities), on any ground. Again, this general mandate gives the PG the power to enter *any* legal proceedings in *any* possible situation, without the law specifically empowering him or her to do so. This should be reconsidered. The Ministry explained in their written comments that a request for a postponement or suspension of the execution of decisions (both administrative and judicial) does not lead automatically to such postponement or suspension, that such matters are decided by the competent courts, and that the prosecutor's powers are regulated by the respective procedural codes. This explanation is satisfactory, but the draft Law would benefit from adding there a provision clarifying that the prosecution may exercise this power within the boundaries set by other procedural codes.

83. Article 11 enumerates the "principles of performing the public prosecutor's function" (professionalism, impartiality, fairness etc.) Respect for human rights was added to the principles listed in this article in the revised draft Law, which is positive.

2. Autonomy of the public prosecution service

a. *Autonomy vis-à-vis the executive and the legislative branches*

84. Sufficient autonomy must be ensured to shield the prosecution service from undue (political) influence. It is therefore welcome that the autonomy of the individual prosecutor and the prosecutorial authorities as such is laid down in Articles 2, 5 and 49 of the draft Law, in pursuance of Article 155 of the Constitution. It is particularly welcome that – in line with a previous recommendation of the Commission[21] – it is impermissible (for anyone outside of the prosecutorial hierarchy) to give instructions to a public prosecutor in an individual case.

85. Article 5 includes the prohibition of "undue influence" on the prosecutors which includes undue influence by the executive and legislative authorities (see Article 5 para. 2). The provisions of Article 5 are complemented by provisions in the draft Law on the HPC. While the idea of protecting against "undue influence" is commendable, it remains unclear how the HPC can react to instances of undue influence, because some of them may fall within the jurisdiction of the ordinary courts (for example, threats to a prosecutor would constitute a criminal offence).

86. New Article 6 of the revised draft Law makes a useful addition to the notion of "undue influence": thus, the use of the lawful rights of participants in a procedure, reporting on the work of the prosecution "in line with the regulations governing public information", and expert analysis of actions of the prosecution in a "finally ended" procedure, are not considered as "undue

[21] Venice Commission, CDL-AD(2021)032, Opinion on the draft Constitutional Amendments on the Judiciary and draft Implementation of the Constitutional Amendments, paragraph 79.

influence". This addition is welcome; however, the law should permit commenting on the ongoing procedures, as well as on the procedures which are terminated. It is recommended to amend Article 6 accordingly to make it clear that a public criticism of the decisions and behaviour of the prosecution service in a pending or terminated case does not as such amount to "undue influence" (while virulent and baseless attacks on the integrity and professionalism of the prosecutors may indeed be prohibited).

87. The draft Law assigns to the Ministry of Justice certain tasks which are not usually a function of the Minister. The Venice Commission notes that under Articles 42 and 43 the Ministry (alone of jointly with the HPC) is empowered to supervise some aspects of the work of the prosecution offices, and almost all the matters referred to in Article 42 appear to be prosecutorial rather than administrative – including relations with the public, handling of cases and documents, data protection, handling of complaints and "other issues". The Venice Commission considers that such tasks should be entrusted *solely* to the HPC or to the HPC together with the PG, which would avoid any (appearance of) interference by the executive into the substantive work of the prosecutors. This is particularly important given the fact that field supervision is conducted by direct inspection of public prosecutor's cases, registers, documents, etc. (Article 45 para. 1) and given the fact that the person performing the supervision is granted "unhindered access to the automatic case management system" (Article 45 para 5). These powers should not be exercised by the Ministry in respect of the more substantive work of the prosecutors in individual cases.

88. According to Article 48, the Ministry would also be entrusted with various tasks of the administration of the prosecution service.[22] This may be acceptable in respect of purely administrative functions, provided it does not undermine the autonomy of the prosecution service in which prosecutors may be answerable to hierarchically superior prosecutors in respect of prosecutorial functions, but not to the Minister. The hierarchical model does not justify the subordination of the prosecutors to the Ministry in respect of the prosecutorial functions (as distinct from purely administrative functions). Furthermore, such a system would necessitate prosecutors working alongside Ministry officials which would inevitably compromise any independent exercise of prosecutorial functions.

89. Article 128 of the draft Law stipulates that the MoJ needs to consent to the number of staff in the public prosecutor's office and that the criteria for determining the number of staff shall be determined by the Minister. It is only natural that the ultimate decision on the allocation of (limited) budgetary resources to the prosecution service rests with the Parliament (adopting the consolidated State budget on the proposal of the Government). As to the use of those resources (i.e. whether there is a need to have more prosecutors or more supporting staff, more IT, etc.), however, this could in principle be left to the prosecution service itself. It is understood that the Government envisages a change of the status of the staff working for the prosecution service, who will not be governed by the ordinary rules on the civil service but will be a special category under the jurisdiction of the hierarchy of the prosecution service. This is welcome since it allows the prosecution service to have greater control on the organisation of work of the "non-prosecutorial" personnel. In their written comments the Ministry of Justice reconfirmed that a special law that would regulate the position of civil servants working in judicial/prosecutorial bodies, which is envisaged by the Strategy of Human Resources in the Judiciary, would soon be adopted and replace the provisions of the draft Law on the management of the staff of the prosecution offices. It will also be explicitly prescribed in the draft Law that the Government cannot suspend, delay, or limit the execution of funds allocated for the work of the public prosecution without the consent of the HPC. This is positive.

[22] Which are for some reason called "tasks of judicial administration" and include, under Article 47, *inter alia* "the performance of work in the public prosecutor's offices, especially the provision of material, financial, spatial and other conditions […] giving consent to the act on the internal organisation and systematisation of the public prosecutor's office and other tasks".

90. The Venice Commission notes that in the revised draft Law the tasks of administration performed by the HPC and those performed by the Ministry has been re-formulated and separated from each other (see the new Article 42 and Article 47 which is removed). Moreover, a very important general principle was added specifying that the Ministry should not, in performing those tasks, "encroach [on] the autonomy of [prosecutors] and the public prosecutor's office, nor the performance of tasks of administration in the public prosecutor's office under jurisdiction of the chief public prosecutor". The Venice Commission welcomes this addition. As to the specific tasks of the Ministry and the HPC, some of them are still formulated too broadly, but this may be a conscious choice of the drafters, in order not to omit some important functions and not be overly casuistic. It remains to be seen whether the newly formulated "division of labour" is sufficiently clear and precise, and to what extent the proclamation of the general principle of non-interference with the autonomy of individual prosecutors or the prosecutorial hierarchy would in practice exclude such interference. A reasonable interpretation of those provisions should normally ensure a healthy working relationship between the Ministry, the HPC, and the prosecutorial hierarchy.

91. Following a recommendation by the Venice Commission, Article 158 of the Constitution provides that the PG is responsible to the National Assembly for the work of the public prosecution, and his/her own work, but not "for acting in individual cases". The draft Law consequently stipulates that the PG does not report to the National Assembly regarding proceedings in individual cases (Article 22 paragraphs 2 and 3), which is positive.

b. *Mandatory instructions, devolution, and transfer of cases and prosecutors*

92. The draft Law has adopted a hierarchical model of the prosecutorial system (see Article 4 para. 4). The system is organised vertically, by functional and geographical principle (basic public prosecutor's offices at the lower level, higher public prosecutors' offices, and, above them, the appellate public prosecutors' offices), as well as horizontally, on the basis of the specialisation (with two specialised offices – on organised crime and on war crimes). The office of the PG is at the top of the system (see Articles 5, 12 and 13).

93. The main feature of the prosecutorial hierarchy is the duty to report to a higher prosecutor, and the power of the higher prosecutors to give instructions to the lower ones. Article 14 provides for an obligation of the chief prosecutors to report "directly to the high chief public prosecutor" but also to the PG "in accordance with the law". Article 16 allows for general instructions, and also for mandatory instructions in a specific case "if there is doubt about the efficiency or legality" of the action of a subordinate prosecutor. In the proposed model, the PG may receive reports from and give instructions to any head of the prosecution office, and not only those which are immediately under the PG.

94. There is no common European standard on whether the prosecution service should be organised according to a hierarchical principle, or according to the principle of individual independence, or regulating the extent to which the hierarchical principle should apply. It is therefore not uncommon to find a hierarchical model, as proposed by the draft Law. A hierarchical system has its benefits: it aims to unify proceedings, nationally and regionally, and to bring about legal certainty. In such a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. It is important to make a distinction between general instructions (see Article 15 of the draft Law) and case-by-case instructions (see Article 16): in a purely hierarchical system, not only general instructions but even case-by-case instructions may be allowed.

95. While a hierarchical model is fully acceptable, the power of the higher prosecutors to issue instructions in *specific cases* must be treated with particular caution.[23] This power may easily be abused, so certain procedural safeguards must be put in place. The Committee of Ministers' Recommendation Rec(2000)19, cited above, contains detailed provisions in this regard.

96. Article 157 of the Constitution on "mandatory instructions for the Actions of Chief Public Prosecutors and Public Prosecutors" provides that "the [PG] shall issue general mandatory instructions for the conduct of all Chief public prosecutors in order to achieve legality, efficiency and uniformity of content". This article further provides for the hierarchical possibility to issue "obligatory instructions" on "how to act in a specific case, if there is a doubt in the efficiency and legality of his actions". The Constitution also provides for the duty of the chief public prosecutor and the prosecutor dealing with the case to act in accordance with these instructions. Article 157 further provides that "a lower Chief Public Prosecutor or a public prosecutor who considers that the mandatory instructions are illegal or unfounded shall be entitled to file an objection in accordance with the law".

97. Article 16 of the draft Law implements Article 157 of the Constitution as concerns the conditions for the mandatory instructions and introduces an additional important safeguard: "the mandatory instruction shall be issued in written form and must contain the reasons and explanation of its issuance". This guarantee could be strengthened even more. The requirement that the written instructions should be reasoned should mean that the doubts about the "efficiency or legality" of the action of a subordinate prosecutor should be substantiated; the reasoned instructions should be appended to the casefile and accessible to the parties. This is very positive that under the revised draft Law the parties to the proceedings can get access to the mandatory instructions and the objections thereto, as well as to the decision of the Commission on those objections; however, it is unclear why this right of access can be exercised only when the proceedings are terminated and, hence, the parties cannot use these materials in their interest. This limitation should be reconsidered, and the parties should be given access to those instructions and decisions if not necessarily immediately after they have been issued (which can be prejudicial to the interests of the prosecution) but at some moment in the proceedings when it can still be useful for the parties. At the meeting with the rapporteurs, the Minister of Justice confirmed that the draft Law may be amended to this end, which is welcome.

98. Article 17 of the draft Law deals with the "objection" to the allegedly "illegal and unfounded" mandatory instruction. On the one hand, having such a mechanism in the system increases the autonomy of the lower prosecutors.[24] The Venice Commission itself has previously recommended introducing a right of appeal against the illegal instructions to a court or to an independent body like a prosecutorial council.[25] On the other hand, if the instructions are challenged and set aside too often, or if the examination of such appeals is too slow, that may undermine the efficiency of the whole system.

99. Recommendation Rec(2000)19 in p.10 provides that "where [a subordinated prosecutor] believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement". This represents a minimal standard which allows the lower prosecutor to manifest his or her disagreement but does not necessarily lead to the invalidation of the instruction. Most importantly, this recommendation speaks of the "internal" procedure. The procedure before the HPC cannot

[23] See Rec(2000)19, where the Committee of Ministers characterises the power to give instructions a "particularly sensitive question" – see p. 10 of the commentaries to the individual recommendations contained in the Explanatory Memorandum to the recommendation.
[24] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, paras. 92 and 95
[25] Venice Commission, CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, para 69.

be considered “internal”, even though under the proposed draft Law the appeal will be decided only by the prosecutorial members of the HPC (see Article 17). Therefore, it would not be against the standards if another procedure, not necessarily involving the HPC, is designed. However, this does not need to be done now, but only if the practical implementation of the proposed mechanism of appeals proves to be too cumbersome.

100. The original text of Article 17 of the draft Law entrusted the decision on mandatory instructions to the prosecutorial members of the HPC, excluding all lay members. In the revised version of the draft Law the power to decide on such instructions is given to a commission which is a subordinate body of the HPC, and whose members are selected by the HPC from amongst the ranks of the prosecutors. This an acceptable model. It is advisable to specify the scope of review exercised by this commission in respect of the decisions of the prosecutorial hierarchy: only manifestly unreasonable or unlawful decisions should be reviewed, while the commission should respect the operational discretion of the hierarchically superior prosecutors.

101. The draft Law describes the procedure for dealing with complaints of subordinate prosecutors against devolution (i.e., a higher prosecutor stepping in and removing a lower prosecutor from a case) or substitution (i.e., a higher prosecutor transferring the case from one lower prosecutor to another lower prosecutor: see Articles 19 – 20 of the draft Law). The possibility of both devolution and substitution is in line with the hierarchical model. Under the draft Law, the substitution is possible when “the competent public prosecutor’s office is prevented from legal or factual reasons to act in the case”. There may be a need of more precise conditions for this decision, and for the decision on devolution or substitution to be accompanied by due reasons.

102. The draft Law should also clarify the relationship between provisions on substitution and provisions on the transfer of jurisdiction (Article 35). Article 37 provides for the adoption of “the Annual Schedule of work in the public prosecutor’s office”. This power belongs to the PG, together with the relevant chiefs of the prosecution offices. It is understood that the Annual Schedule defines the distribution of the workload and specific fields of work within each prosecution office. Individual prosecutors are entitled to challenge this Annual Schedule to the HPC, but the draft Law does not indicate on which grounds. For the Venice Commission, the distribution of work should be the primary responsibility of the heads of the respective prosecution offices, under the supervision of the PG. The HPC may intervene only in cases of impropriety or some other reasonable cause, while the primary responsibility for such managerial decisions should be with the prosecutorial hierarchy. This should be made clear in the draft Law. The Ministry of Justice in their written comments explained the meaning of those procedures in the Serbian legal order. The transfer of jurisdiction is a temporary exceptional measure adopted by the PG in case of the impossibility of one prosecution office to perform its functions due to some “extraordinary circumstances”, while the annual plan of work of the public prosecutor office is a regular measure adopted by each head of the prosecution office (or the PG for the whole system). Such explanations are useful and may be reproduced in the explanatory memorandum to the bill.

103. Article 68 of the draft Law provides for the possibility of “temporary assignment”: “the public prosecutors may, with their written consent, be temporarily assigned to another public prosecutor’s office of the same or lower level for a maximum of one year, without the possibility of re-assignment to the same public prosecutor’s office”. This provision was singled out and discussed by practically all the interlocutors in Belgrade. These secondments are indeed considered to be a powerful tool to reward or sanction public prosecutors. While under the current system, decisions on secondment are taken by the PG, the draft Law allocates this power to the HPC. It is unclear if such decisions may be appealed to the Constitutional Court pursuant to Article 165 of the Constitution.

104. Several interlocutors argued that temporary assignments, like transfers, amount to decisions as to the status of a prosecutor. According to the Constitution these decisions would

be reserved to the HPC. Other interlocutors argued that such decisions do not relate to the status of prosecutors but are managerial decisions.

105. As far as the Commission is concerned, the categorisation of these decisions is not the main issue. Instead, the Commission will focus on the practical application of the temporary assignments. In doing so, it will distinguish between two situations.

106. The first situation entails a sudden and/or unforeseen personnel problem in a specific area of the organisation of the prosecution service. Such a problem calls for a swift managerial response to "fill a gap". In such a situation, the possibility of a temporary assignment is a necessary managerial tool for any organisation. It appears unproblematic to entrust such a decision to the prosecutorial hierarchy itself (i.e. the PG office) which possesses a more direct knowledge of the needs of the prosecution offices in the country and the possible candidates to meet those needs. The Commission recommends that these decisions be issued in writing, be duly motivated and made available to the prosecutor concerned. An appeal against these decisions should be possible.

107. There is however a second situation. The rapporteurs were informed that temporary assignments are not solely used as a temporary solution. Its use is of a more structural nature to address certain systematic shortcomings in the organisation. In the Commission's view, temporary assignments are not the proper way to solve such structural issues. The repeated and structural use of the temporary assignments creates unnecessary insecurity for the prosecutors concerned and a potential risk of arbitrary application of such assignments. Structural issues should be solved by regular appointments and filling vacancies which is a task entrusted to the HPC. The Commission was informed that, at the moment, several vacancies are not being filled by the HPC, with the result that temporary assignments are repeatedly made on these vacancies. The Council's task in respect of filling these vacancies is therefore crucial. It is for that reason the Commission makes certain recommendations to avoid a blockage of the Council's work. The legislator could consider introducing additional mechanisms which would encourage the HPC to fill in the vacancies which are occupied by the seconded personnel on a temporary basis.

108. The Venice Commission notes that the revised draft Law extended the period of the temporary assignment to three years. This solution may be seen in a positive light because a three-year non-extendable transfer makes the prosecutor concerned less dependent on the discretion of the prosecutorial hierarchy, compared to the situation where such transfers are to be extended every year. On the other hand, such long transfers become a long-term solution, while normally transfers are supposed to be of a very limited duration. The Venice Commission will therefore abstain from making any recommendations on the duration of the transfer. Furthermore, the power to order such transfers is given in the revised draft Law to the PG, and not to the HPC (as in the original draft). This solution further increases the power of the PG in the prosecutorial system, so the original solution – with the HPC deciding on those issues – may be maintained.

3. The Prosecutor General

a. *Election of the Prosecutor General*

109. When assessing different models of appointment of chief prosecutors, the Venice Commission has always been concerned with finding an appropriate balance between the requirement of the democratic legitimacy of the process, on the one hand, and the requirement of depoliticisation, on the other.

110. Under the draft Law, following a public competition, the candidates for the election of the PG are selected by the HPC (see Article 93). The HPC proposes to the National Assembly one candidate, which is in line with a previous recommendation by the Venice Commission (see

Article 93, para. 6). The PG is then elected by the National Assembly to a six-year term of office by majority vote of three fifths of all deputies (see Article 158 of the Constitution and Articles 79, paragraph 1, and 94 of the draft Law). If the National Assembly fails to elect the proposed candidate, the PG shall be chosen from among all the candidates who meet the conditions for election, by a committee consisting of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the PG, and the Ombudsman, by a majority vote (see Article 94, para. 3 and Article 158 of the Constitution). It is understood that this committee will select from the list of candidates who satisfied the formal criteria of eligibility and who were retained by the HPC as corresponding to three criteria indicated in Article 93 para. 1 ("worthiness", sufficient expertise, and competence), but who were not finally selected by the HPC for the proposal to the National Assembly.

b. *Dismissal of the Prosecutor General*

111. As with the appointment of the PG, the decision to dismiss the PG must be taken on objective grounds; political considerations in such a decision must be excluded or minimised. In the Serbian context this is achieved by stipulating specific grounds for the dismissal and by the involvement of the HPC in the process.

112. The mandate of the PG is to be terminated early: (i) when the PG reaches 67 years of age, (ii) if he/she is sentenced to a criminal offence to at least six months' imprisonment, and (iii) for a serious disciplinary offence which seriously damages the reputation of the prosecution and the public trust therein.[26]

113. As concerns the dismissal following a criminal conviction, the Venice Commission finds it unusual that if the PG is sentenced to, for example, 5 months' imprisonment, s/he would still remain in the office. However, the six months' threshold is set by the Constitution (see Article 158 para. 7), so the draft Law only repeats the constitutional provision. And, in any event, any criminal conviction, even not involving a prison sentence, is likely to give rise to a disciplinary case against the PG and would therefore lead to the dismissal of the PG.

114. The third reason for dismissal (a serious disciplinary offence) deserves attention. According to Article 106 of the draft Law, the HPC determines the reasons for dismissal of the PG and submits a proposal for dismissal to the National Assembly. In these proceedings the HPC acts as a legal body: it should follow a certain procedure and should give a reasoned decision (Article 104).

115. Article 105 para 3 of the Constitution provides that the National Assembly elects the PG and decides on the termination of his office by a three-fifths majority. There is a possibility that the National Assembly, for political reasons, decides not to approve the proposal of the HPC to dismiss the PG. Such decision of the National Assembly is a political act, which means that the role of the Constitutional Court in reviewing it should be fairly limited (see Article 108 of the draft Law which provides to the PG a right to appeal before the Constitutional Court about the dismissal). Indeed, the Constitutional Court may still assess the procedural propriety of the decisions taken by the HPC and the National Assembly. However, it is questionable to what extent it may go into the substance of the case. If the National Assembly exercises its constitutional prerogative and votes for the removal of the PG, as a rule, the substantive reasons for this vote should not be reviewed by the Constitutional Court.

116. The risk of politicisation of the process of the early removal of the PG from office, discussed in the previous paragraphs, is not the only consideration in designing the system. Another is the

[26] See Article 102 of the draft Law; the grounds for the termination of the mandate are indicated in this Article in a different order. This order is reversed in the present Opinion to follow the structure of the ensuing analysis.

risk of corporatist attitude of the prosecutorial component of the HPC, which effectively shields the PG from any accountability.[27] The Venice Commission also notes that the PG by virtue of Article 27 of the draft Law may request the suspension of any administrative (and probably judicial) decision, which may be another way of shielding the PG from the liability or obstructing the proceedings.

117. The HPC's proposal to dismiss the PG is made by a majority of seven votes (see Article 20, para. 2 of the draft Law on HPC). If such a vote is called for, the PG is excluded from the decision-making process (Article 56 para. 5 of the draft law on HPC). This means that the PG would not be dismissed unless all lay members, and at least three or more elective prosecutorial members of the HPC vote for it.[28]

118. Experience in other countries has shown that it is not illusory for prosecutorial members to align their voting behaviour to that of the PG. The likelihood that they will in future become subordinated to the PG at the least gives rise to a concern that they may not be fully independent on such issues. A possible solution, as recommended above, is that to design appropriate rules and procedures which would reduce the potential abuse of influence of any one individual on other members, thus reducing the likelihood that all prosecutors act as a block.

119. One possible solution would be to reduce the decision-making majority in some situations. The Venice Commission recalls that under Article 163 of the Constitution, para. 2, the Minister of Justice should not vote in a procedure for determining disciplinary responsibility of a public prosecutor. This also arguably applies to the voting on the proposal to remove the PG on disciplinary grounds. The PG should also be excluded from voting on those matters, due to an evident conflict of interest. This leaves nine members of the HPC, which could then take a decision on bringing the PG to liability by a simple majority of five votes out of nine.

120. The Venice Commission is aware that none of those proposals can guarantee an absolutely objective and impartial decision-making process; however, some fine-tuning of the proposed system may help reducing both risks – that of politicisation and that of the corporatism. As shown above, the risks associated with a higher decision-making majority may be partly mitigated by making the two components of the Council less homogenous and more independent from the two *ex officio* members – the PG and the Minister of Justice.

4. Mandate of individual prosecutors

a. *Appointments*

121. Section IV of the draft Law (Articles 79 et seq.) deals with the appointment of prosecutors and defines the eligibility criteria for becoming a prosecutor. European and international standards demand that appointments be based on objective, transparent and non-discriminatory selection criteria, which can relate to formal requirements (nationality, age, qualifications, professional experience, etc.), and to professional and human skills, which are more difficult to define exhaustively.

122. Overall, the draft Law meets those standards. Some of the terms used by the draft Law – such as "worthiness" (Article 80) – may appear quite broad. However, the legislator tried to elaborate upon this notion in Article 82, and "worthiness" is a common notion in the Serbian law. In such circumstance, the use of this criterion may be tolerated, provided that the body which decides on the appointment is sufficiently independent, impartial, and its members have sufficient

[27] See ECtHR, *Kolevi v. Bulgaria,* 5 November 2009, no. 1108/02, §§ 195-215.
[28] Under Article 163 of Constitution, "the Minister of Justice may not vote in a procedure for determining disciplinary responsibility of a public prosecutor" which arguably excludes the Minister from participating in deciding on the dismissal of the PG.

professional and personal experience to assess the "worthiness" of a candidate. The appointing body in respect of prosecutors is the HPC, which, in the overall, can be trusted in assessing the "worthiness" of candidates.

123. Certain rules regarding the appointment procedure deserve praise. Thus, Article 84 contains a welcome provision that when selecting prosecutors account must be taken of "the national composition of the population, the appropriate representation of members of national minorities and knowledge of professional legal terminology in the language of the national minority that is in official use in the court". Gender should be added to the list of possible grounds of affirmative action.

124. It is also welcome that an appeal before the Constitutional Court lies against a decision by the HPC on the election of a public prosecutor and a chief public prosecutor (Article 92; also see Article 158 of the Constitution). In exercising its review, the Constitutional Court should act with deference to the HPC,[29] and primarily check whether the appointment procedure has been followed, formal eligibility criteria respected, etc. As to more subjective elements (like, again, the "worthiness" of the candidate), the Constitutional Court should respect the discretion of the HPC to which the Constitution explicitly entrusted the power to select prosecutors.

b. *Disciplinary liability and dismissal of prosecutors*

125. Article 158 of the Constitution and Article 98 of the draft Law provide that the function of the chief public prosecutor ends if the public prosecutor's office is abolished. This provision is acceptable only if the decision to restructure the prosecution service, resulting in the abolishment of certain offices, is taken by the HPC. Otherwise, it would be easy to remove chief prosecutors under the guise of restructuring of the offices. Previously, the Venice Commission criticised such *ad hominem* institutional reforms.[30]

126. Article 114 uses some vague formulas to define disciplinary breaches. To a certain degree it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility. This was previously recognised by the Venice Commission.[31] Relevant in this regard is the fact that the task of interpreting and applying these notions will be assigned to the HPC, which enjoys sufficient institutional autonomy and expertise.

127. The draft Law under examination, as the draft Law on Judges examined in the October 2022 Opinion, introduced in Article 114 a concept of a "repeated disciplinary offence", which is considered as a severe breach and may entail dismissal. The gravity of the disciplinary offences listed in Article 114 varies greatly. It would not necessarily be proportionate to dismiss a prosecutor if he/she has been disciplined twice for minor offences, or if these two less serious offences have been committed with a long interval. Furthermore, a mere negligence in a single case should not be enough for imposing a disciplinary sanction.

128. There are two safety valves in the draft Law: (i) the principle of proportionality is explicitly guaranteed in Article 115 para. 2, and (ii) if the HPC believes that the behaviour of the prosecutor

[29] Venice Commission, CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, para. 151, and, before that, Venice Commission 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. 92. In the Armenian opinion this was said in the context of disciplinary proceedings against judges, but a similar approach is applicable here.
[30] Venice Commission, CDL-AD(2021)012, 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, para. 28
[31] See, for example, Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, para. 108.

"seriously damages the reputation of the public prosecutor's office or the trust of the public in the public prosecutor's office" it may (and not "must") trigger the dismissal proceedings (Article 114).

129. So, even a repeated offence may not necessarily lead to the dismissal unless the HPC establishes that it has caused "serious damage". The Venice Commission also notes that the draft Law provides for an appropriate scale of sanctions for disciplinary offences (see Article 115), which is an additional guarantee against a disproportionate use of the provisions on the disciplinary liability. These qualifications contained in the draft Law may be sufficient. It is positive that the revised draft Law now defines more narrowly the list of offences which may be seen as "serious" and explains the notion of "repeated" offence (which should be limited by a period of three years). It is also important that new Article 114 of the revised draft Law excludes disciplinary liability in the situations resulting from the structural deficiencies in the prosecutorial system, and not from the prosecutor's own fault.

130. Article 114 also provides that a significant violation of the Code of Ethics constitutes a disciplinary offence. As follows from Article 17 of the draft Law on the HPC, the Code of Ethics is adopted by the HPC. The original draft Laws were silent on the content of such a Code, which basically entitles the HPC to regulate in this Code any aspect of the prosecutor's life and behaviour. In the revised draft Law on the Public Prosecutors' Office, new Article 52 describes some basic principles of ethical behaviour, which is positive (although the questions of expertise are more relevant to the performance evaluations than compliance with the ethical rules).

131. The draft Law provides for essential fair trial guarantees in the context of the dismissal proceedings: the right to be informed immediately about initiating the dismissal procedure, the right to become familiarised with the case and the accompanying documentation, the right to provide explanations and give evidence in person or through a proxy, time-limits for conducting the proceedings, and the right to appeal against a decision (see Articles 104 to 108 on the dismissal proceedings, and Articles 117 to 121 as regards the disciplinary proceedings). This is positive.

132. However, as in the draft Law on judges, the interrelation between disciplinary proceedings and dismissal proceedings is not entirely clear.[32] A finding of a serious disciplinary breach in the disciplinary proceedings may lead to the dismissal of a prosecutor (see Article 102). Disciplinary proceedings may end with the imposition of a disciplinary sanction imposed by the Disciplinary Commission, which may be appealed to the HPC. The decision of the HPC is final (Article 121 para. 3). However, the same HPC may be the initiator of the dismissal proceedings, if it finds that the prosecutor is guilty of a particularly serious breach of discipline (Article 103). It is unclear how the "appellate" function of the HPC within the disciplinary proceedings is compatible with the role of the HPC in the dismissal proceedings.

133. The revised draft Law attempts to describe this interrelation between two proceedings in more detail, and in particular to harmonize the procedural guarantees in disciplinary proceedings and dismissal proceedings. This is worth praise.

134. The Venice Commission observes in particular that the revised draft Law reviewed the procedural guarantees in the dismissal proceedings in order to align them with those offered in the disciplinary proceedings (Article 105). Decision of the HPC on the dismissal must henceforth be reasoned (Article 105, last paragraph). Under Article 106 para. 3 the dismissal proceedings before the HPC may be public, similarly to the disciplinary proceedings. Moreover, new Article 106 of the revised draft Law is more detailed as regards the procedural rules for the dismissal proceedings, with reference to some general principles, and rights of the prosecutors concerned. It would be useful to supplement those provisions of the draft Law by more detailed procedural

[32] Venice Commission, CDL-AD(2022)030, cited above, para. 65.

regulations adopted at the sub-legislative level by the HPC itself, but the Law should then specifically empower the HPC to adopt such regulations.

135. The revised draft Law also specifies that a violation of the Code of Ethics – which is a disciplinary breach – should be established by the Ethics Committee of the HPC, but the composition of this body is not defined. The Venice Commission recommends describing the composition and the principles functioning of its body if its decisions have a formal bearing in the disciplinary proceedings.

136. Article 121, paragraph 2, rightly stipulates that the Minister of Justice is not entitled to vote in the appeal stage of disciplinary proceedings. This should also be made explicit with regard to the dismissal proceedings as well, since one (and probably the main) ground for the dismissal is a serious disciplinary breach.

c. *Prohibited activities and incompatibilities*

137. Article 52 may be interpreted as prohibiting the prosecutors from joining any associations except professional associations of prosecutors. As explained by the Ministry of Justice in their written comments, this provision should not be interpreted as prohibiting prosecutors from joining other associations, even not of a purely professional character. In general, as with the parallel occupations as in Article 70 of the draft Law, it is important that in the case of doubt the prosecutor might seek advice of the Ethics Commission, as recommended in the October 2022 Opinion.[33]

138. Article 53 prevents prosecutors from being members of political parties, from publicly expressing political views or participating in public debates of a political nature. This provision aims to ensure the political neutrality of the prosecution service. The provision does not prohibit all political activities of prosecutors and appears to be more proportionate than a comparable provision in the draft law on judges. However, the duty "to refrain from participating in political activities" may be interpreted in the overly broad manner. Some interlocutors argued that the definition of political activity of political entity in Article 52 is given in the law on the financing of political parties. The Venice Commission recommends using the language of the international instruments concerning the right to freedom of expression and the permitted limitations thereto, in particular stressing that only such participation in the political activities which raises serious doubts in the impartiality of the prosecutor may be prohibited.

IV. Conclusions

139. On 12 September 2022, the Serbian Minister of Justice, Ms Maja Popović, requested an opinion of the Venice Commission on five draft Laws aimed at implementing the recent constitutional amendments concerning the organisation of the judiciary and the prosecution service. The present Opinion assesses the two draft Laws related to the prosecution service: the draft Law on the High Prosecutorial Council, and the draft Law on the Public Prosecutor's Office. This Opinion should be read together with the previous Opinions issued by the Venice Commission in respect of the judicial reform in Serbia, and in particular the October 2022 Opinion on the three draft laws implementing the constitutional amendments on the judiciary.

140. The Venice Commission reiterates, once again, that the recent constitutional amendments have the potential to bring about significant positive change in the Serbian judiciary and the prosecution service. The Venice Commission praises the Serbian Minister of Justice for the considerable effort her Ministry invested in the preparation of the legislative package and encourages the Serbian authorities to continue conducting public consultations in the same spirit of inclusiveness and transparency. However, the Commission emphasises that a truly successful reform of the prosecution service requires non-legislative measures to be taken following the

[33] Venice Commission, CDL-AD(2022)030, cited above, para. 45

adoption of these legislative amendments. In that sense, the adoption of these legislative amendments marks an essential but not the last step in the process.

141. On the substance, the Venice Commission observes that the Serbian prosecutorial system was and will remain hierarchically organised, which is a legitimate choice. The central body of governance of the prosecution system – the High Prosecutorial Council (the Council) – has sufficient powers to ensure a high degree of autonomy of individual prosecutors and of the prosecution system as a whole. More specific recommendations to the Serbian legislator in respect of the two draft Laws under examination are described below. Before addressing them, the Venice Commission would like to emphasise that the revised draft Laws, prepared by the Ministry on the basis of the draft Opinion, and their further written observations introduced important clarifications and improvements to the text, and address many of the concerns of the Venice Commission.

A. The draft Law on the High Prosecutorial Council

142. The Venice Commission remains concerned by the presence of the two *ex officio* members in the Council – the Prosecutor General and the Minister of Justice, and in particular by the effect it may have on the balance of power between the prosecutorial and lay components of the Council, and the effective functioning of the Council. The current composition of the Council is now set in the Constitution, so appropriate solutions must be found at the legislative level to reduce the influence of the two *ex officio* members within the Council.

143. In this context the Venice Commission considers it very important to ensure the broadest representation amongst lay members so to avoid a politically homogenous lay component affiliated to the political majority. The Venice Commission welcomes the proposal by the Serbian authorities to (i) require a qualified majority in the Commission on the Judiciary of the National Assembly and (i) strengthen the ineligibility criteria, provided that these criteria are further elaborated in the Law as recommended by the Venice Commission. This would address the concern expressed by the Venice Commission about dangers related to a politically homogenous lay component.

144. The Venice Commission also recalls that heightened majority for taking some important decisions may lead to blockages, but the risk of blockages is less if the legislator increases the independence of prosecutorial members from the Prosecutor General and ensures that the lay members represent different political currents or are not politically affiliated to the ruling majority.

B. The draft Law on the Public Prosecutor's Office

145. On the draft Law on the Public Prosecutor's Office the Venice Commission makes the following key recommendations:

- The mechanism of appeal against unfounded or illegal instructions of a higher prosecutors is necessary, but it is necessary to describe the scope of the power of the commission of the HPC on mandatory instructions in reviewing substantive decisions made by the higher prosecutors;
- Temporary assignments as a managerial decision to fill temporary vacancies created by a sudden and/or unforeseen personnel problem in a specific area of the organisation of the prosecution service may be entrusted to the prosecutorial hierarchy itself (i.e. the Prosecutor General's office) which possesses a more direct knowledge of the needs of the prosecution offices in the country and the possible candidates to meet those needs. These decisions should be issued in writing and be duly motivated and made available to the prosecutor concerned. An appeal against these decisions should be possible. On the other hand, the structural use of temporary assignments to other prosecution offices creates insecurity for the prosecutors and a risk of arbitrariness. The legislator should consider introducing

additional mechanisms which would encourage the High Prosecutorial Council to fill in the vacancies which are occupied by the seconded personnel;

- The draft Law should explain better the interrelation between disciplinary proceedings and dismissal proceedings; it is necessary to avoid confusion as to the role played by the High Prosecutorial Council in those proceedings. More detailed procedural rules can be specified in the regulations adopted by the High Prosecutorial Council.

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