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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MONTENEGRO

URGENT OPINION

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

**Issued pursuant to Article 14a
of the Venice Commission's Rules of Procedure**

on the basis of comments by

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I. Introduction

1. By letter of 26 April 2021, the Deputy Prime Minister of Montenegro, Mr Dritan Abazović, requested an urgent opinion of the Venice Commission on the revised draft amendments to the Law on the State Prosecution Service (see CDL-REF(2021)040, hereinafter the “revised draft”; see also the Law on the State Prosecution Service currently in force, CDL-REF(2021)028).
2. On 27 April 2021 the Bureau of the Venice Commission authorised the preparation of an urgent opinion on this matter, taking into account that the Montenegrin parliament had stayed the examination of the amendments and awaited the Commission’s March 2021 opinion, that revised amendments have been prepared in the light of the Commission’s opinion but the procedure in parliament would be resumed in May.
3. Mr A. H. Gaspar (member, Portugal), Mr M. M. Nicolatos (member, Cyprus) and Mr J. Hamilton (former member, Ireland) acted as rapporteurs for this urgent opinion. Due to the time constraint, this opinion was prepared without a visit, with regard to the information obtained by the rapporteurs within the preparation of an earlier opinion relating to a previous version of the draft amendments to the Law on the State Prosecutor’s Service¹ and on the basis of written information received by several stakeholders and by civil society. The Montenegrin authorities submitted written comments on the draft urgent opinion. The present opinion relies on the English translation of the revised draft. The translation may not accurately reflect the original version on all points.
4. This urgent joint opinion was drafted on the basis of comments by the rapporteurs. It was issued on 10 May 2021 pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions (CDL-AD(2018)019) and will be presented to the Venice Commission for endorsement at its 127th Plenary Session on 2-3 July 2021.

II. Background

A. The two draft laws of February 2021

5. At its 126th plenary session the Venice Commission examined two draft laws introduced before the Parliament of Montenegro by a group of MPs from the ruling coalition. The first draft law contained amendments to the 2015 law on the State Prosecution Service. The second (draft law “On the Prosecutor’s Office for organised crime and corruption”, the law on the POOCC) was aimed to replace the 2015 Law of the Special State Prosecutor’s Office.
6. The political background to this reform is described in detail in the opinion of March 2021 (hereinafter – the March opinion). In a nutshell, the ruling coalition, dissatisfied with the performance of the prosecution service and its alleged ties to the political majority which had ruled the country for nearly 30 years, made radical changes to the top of the prosecution service one of its political priorities.
7. First, it was proposed to replace the Special State Prosecutor’s Office with another body - the Prosecutor’s Office for organised crime and corruption (the POOCC), which would have essentially the same jurisdiction and structure; the currently serving the Special Prosecutor would subsequently be replaced with a new office holder.
8. Second, the composition of the Prosecutorial Council (PC) would be changed: the number of lay members (elected by the Parliament by a simple majority) would be increased from four to five, and the number of prosecutorial members (elected by their peers) would be reduced from five to

¹ Venice Commission, 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, CDL-AD(2021)012, hereinafter “the March 2021 Opinion”.

four. The mandate of all the currently sitting members of the PC would be terminated, and new members would be re-elected under the new rules.

9. Third, the renewed PC would elect an interim Prosecutor General (PG), pending the - long overdue - election of the new PG by Parliament by a qualified majority, and elect the new head of the POOCC. It was proposed that such interim prosecutor could be appointed twice for a six-month term.

10. Fourth, two new grounds for disciplinary liability (acting “contrary to legally prescribed competences” as well as the failure to “fulfil legally prescribed obligations”) would be added to the law.

B. Main recommendations of the opinion of March 2021

11. In its March opinion, the Venice Commission acknowledged that there was a strong demand in Montenegro for a comprehensive reform of the prosecution service. However, it warned against such reform resulting in the simple replacement of the top prosecutors with new ones, more loyal to the new majority.² The Commission made several recommendations in order to avoid this risk.

12. The first main recommendation concerned the intended replacement of the Special State Prosecutor. Such a reform, in the opinion of the Venice Commission, was not of a structural or substantive nature and as such it did not warrant the replacement of the head of the office. If the current Special State Prosecutor was guilty of any misbehaviour (as alleged by the proponents of the reform), he should face disciplinary or criminal liability. Similarly, the Venice Commission was concerned by the proposed withdrawal of files from the prosecutors working in the Special State Prosecutor’s Office, with further redistribution of those files to other prosecutors, without objective and verifiable criteria.

13. The second main recommendation was about the envisaged new composition of the PC, with the lay members elected by parliament by simple majority outnumbering the prosecutors elected by their peers (5 to 4). The majority of lay members over prosecutors was not as such contrary to the European standards and could be justified in order to avoid corporatism. However, since all lay members would be elected by parliament by a simple majority at the same time, hence by the same political majority, the serious risk existed that the PC would be politicised even further. To avoid such risk, the Venice Commission proposed several alternatives:

- election of the lay members by parliament by a qualified majority (with an effective anti-deadlock mechanism);
- election of the lay members by parliament on the basis of a proportional system (so that lay members represent different political forces);
- nomination or even direct appointment by external nongovernmental actors (such as universities, the Bar, the judiciary, etc.).

14. The Venice Commission also stressed that the immediate replacement of all currently sitting members of the PC was not justified, the extent of the reform not being a sufficient justification. Such total replacement infringed the security of tenure of the Prosecutorial Council members. The desired new balance between prosecutorial and lay members could be achieved for example by electing one additional lay member and removing one prosecutorial member.

15. The Venice Commission also examined the situation of the continuation in office of the outgoing PG, after the expiry of his mandate, in the event of parliament being unable to reach a 2/3 majority. The problem was caused by the absence of an anti-deadlock mechanism. The Commission found the proposal to nominate an interim Prosecutor General chosen by the Prosecutorial Council to be inappropriate, as a non-elected prosecutor would have no legitimacy

² Ibidem, para. 57.

and could not remain *ad libitum*. The Commission recommended that the outgoing PG should continue to exercise his functions *ad interim* but parliament needed to appoint a new one as a matter of priority and introduce an anti-deadlock mechanism.

16. Finally, the Venice Commission recommended reviewing the proposed provisions on disciplinary liability in order to specify that such liability may be imposed on a prosecutor only for gross misbehaviour and not simply for an incorrect application of the law.

17. The Commission also criticised that the two draft laws had been put on the Parliament's agenda in an expedited procedure. The prosecutors had not been consulted, nor had any meaningful public discussion taken place. The Commission encouraged the authorities to submit the legislative proposals to a meaningful public discussion, involving all major stakeholders and experts.

III. Analysis

18. The Venice Commission wishes to welcome at the outset the constructive approach of the authorities of Montenegro and their readiness for dialogue.

19. Due to the time constraints, the present opinion will only address those main elements of the revised draft which are related to the key recommendations of the March opinion.

20. The revised draft maintains the general direction of the reform. However, some of the controversial proposals of the original draft laws have been abandoned, and several key recommendations of the Venice Commission have been taken into account. Thus, the revised draft represents a significant progress compared to the two draft laws examined in March, but still presents some shortcomings which will be addressed in detail below.

A. Recommendations fully addressed

21. The proposals to replace the Special State Prosecutor's Office with the new "Prosecutor's Office for organised crime and corruption (the POOCC)" (and the subsequent reassignment of prosecutors and redistribution of files) and to remove the Special State Prosecutor have been abandoned. The Venice Commission welcomes that its key recommendations on these points have been fully accepted by the authorities.

22. Furthermore, the formerly proposed disciplinary offences (punishable with dismissal) of "actions which are contrary to legally prescribed competences" and "failure to fulfil legally prescribed obligations" have been abandoned. The new draft introduces a new kind of "unprofessional or unconscientious performance of the prosecutorial function" leading to dismissal:³ "committing a serious disciplinary offence which caused significant damage to the reputation of the State Prosecutor's Office".⁴ The concept of "significant damage to the reputation" is rather broad, which is however difficult to avoid;⁵ it will have to be interpreted by the PC⁶ and, eventually, by a judicial body.⁷ It is important when creating criminal offences to ensure that they are clearly defined; in the case of disciplinary offences a greater latitude may be acceptable.

³ See article 108 of the Law on the State Prosecutor.

⁴ New Article 108, para. 6 (5)

⁵ See the discussion about the limits to precision in norms defining professional behaviour of judges in CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, para. 67.

⁶ Which only can order a dismissal – see Article 114 para. 5 of the current Law.

⁷ See Article 118 part two of the current Law.

23. It is important to note, however, and to commend that the revised draft does not attempt at removing the legal guarantee that a prosecutor (including the Special State Prosecutor) may be dismissed only for a disciplinary offence described in the law.⁸ In the disciplinary proceedings, the prosecutor will enjoy the right to a fair trial.⁹ If the PC decides for the dismissal, the prosecutor, including the Special State Prosecutor, has the possibility to appeal against this decision before a panel of three judges of the Supreme Court.¹⁰ These guarantees reduce the risk of arbitrary removal of a prosecutor for political or other ulterior motives. The Venice Commission therefore welcomes that its key recommendations in this regard have been fully taken into account.

B. Recommendations partly addressed

1. Process of the reform

24. The Venice Commission notes with satisfaction that this time the Government engaged in a dialogue with the major stakeholders and the civil society. Preliminary drafts have been circulated and discussed at roundtables involving NGOs and prosecutors, including the PG. Some of the suggestions made during those consultations have been incorporated in the text.

25. Some NGOs complained that more time could have been dedicated to the public debate, that the consultations with the civil society were informal, and that the Government did not address all the points raised during those consultations. There is certainly room for improvement, but, in general, the procedure followed by the Government this time was in stark contrast with the original, rushed approach. This change of attitude to the law-making procedure is commendable: it increases the quality of the legislative policies and strengthens the public confidence in democratic institutions.

2. Method of election of the lay members

26. One of the central concerns of the Venice Commission in the March opinion was the risk of politicisation of the future PC, which would be dominated by political appointees of the ruling coalition.¹¹ The Commission identified the origin of the problem in the election of all the lay members by parliament by simple majority at the same time; the problem was exacerbated by the change in the balance of the composition of the PC, with the lay members outnumbering the prosecutors (5 to 4). The Venice Commission suggested several possible solutions to tackle this problem (see paragraph 13 above).

27. The revised draft maintains that the number of lay members is increased to 5 and that their election is done by simple majority. However, it contains two proposals aiming at mitigating the risk of politicisation.

a. New ineligibility criteria

28. The first proposal is to introduce new ineligibility criteria for the lay members: not to have been elected officials or members of the Government in the past five years; not to have been members of political parties with leading roles; excluding close relatives, spouses, and partners of politicians;

⁸ The law distinguishes between the grounds for dismissal from the position of a prosecutor (for which an addition relating to the “damage to the reputation” of the prosecution service has been made in the revised draft) and dismissal from the position of a head of the prosecution service (see Article 125). However, the procedural rules on disciplinary proceedings are applied in both cases.

⁹ See Article 115, 116, 120 etc.

¹⁰ See Article 118 para. 2

¹¹ Directly or indirectly, insofar as the member appointed by the Minister of Justice is concerned.

not to have been former prosecutors.¹² Ineligibility criteria are proposed also for prosecutorial members of the PC (see new paragraph 3 of Article 18 of the Law on the State Prosecution Service).

29. In the opinion of the Venice Commission, the new ineligibility criteria create some “safety distance” between lay members and party politics, which could make the PC more politically neutral and avoid conflict of interest, even though it may be difficult to completely insulate lay members from any political influence. The criterion of not having been a prosecutor aims at avoiding additional, though indirect, corporatism. It does so, however, at the expense of excluding persons who might have highly relevant expertise, but this may be a necessary price to pay to reduce the risk of corporatism. The Venice Commission therefore welcomes the introduction of ineligibility criteria (for both lay members and prosecutor members) in the law on the State Prosecution Service of Montenegro.

30. The ineligibility criteria should continue to apply throughout the mandate; as some of them may materialise after the election (marriage to an MP for example). The law should provide for a continuing procedure of revisiting verification during the mandate, possibly leading to its loss.

31. The Venice Commission is of the view that it is necessary to increase the detachment of the lay members not only from politics but also from big business interests. Prosecutorial Council members are considered as civil servants and as such they need to submit their asset declaration to the Anti-corruption Agency; these asset declarations are made public. The Commission thinks that false declarations could be a separate ground for their removal from the PC. Article 120 of the Law on the State Prosecution Service could be amended to the effect of allowing external requests of recusal of a member of the PC on the ground of conflict of interest revealed by the publication of the asset declaration, in response to which an official, reasoned decision would have to be made.

b. Nomination of one lay member by the civil society

32. Under the revised draft, one of the lay members would be nominated by some selected NGOs. This solution echoes the recommendation of the Venice Commission to give the nomination power to external non-governmental actors, such as NGOs, universities, the Bar, the Judiciary, etc.¹³

33. From the text of the revised draft it is not entirely clear whether or not the Parliament can reject the candidate nominated by these NGOs. Under Article 26c paras. 1 and 2, the competent parliamentary committee should draft “a list of appropriate candidates”. On the other hand, the committee communicates to the Parliament the name of *one single candidate* who was, “as a rule, proposed by the largest number of eligible NGOs” (see part 3 of this Article).

34. The Venice Commission understands that under the revised draft the Parliament would simply *endorse* the candidate who obtained the maximum number of nominations. If this understanding is correct, the qualifier “as a rule” in Article 26 para. 3 should be removed. It is unclear, however, whether this candidate would be put on the list of 5 candidates which parliament should vote “as a single unit”. This would not be appropriate. The candidate proposed by civil society should not be part of the vote on the candidate lay members. Parliament should separately decide to endorse such candidate and should be permitted to decline to do so only for a stated reason. The draft should be clarified on these points.

35. The Venice Commission finds that while the proposal to have one lay member chosen by civil society is a step forward, there are several questions that remain to be addressed. Most importantly, it is unclear whether this candidate would be really representative of civil society. Legal

¹² See Article 26 new paragraph 2 of the Law on the State Prosecution Service.

¹³ See paras. 40 and 59 of the March opinion.

professionals are represented by the Bar, academics may be represented by their universities, but who may claim to represent the non-governmental organisations?¹⁴

36. The authors of the revised draft have devised a system which attempts to address this difficulty. Thus, to be eligible to submit a nomination, a non-governmental organisation must have existed for more than three years, work in the field of the rule of law, and implement projects in this area with a budget of more than EUR 20,000 per year.¹⁵ Those criteria aim at excluding NGOs which may have been created specifically for the purpose of participating in the nomination process. In the Commission's view, it is positive that the revised draft introduces some objective criteria and thresholds, but it is difficult to say whether these are realistic and whether they may ensure the representative character of the process in the medium and long term.

37. In addition, all NGOs are put on an equal footing, and every NGO may nominate one candidate. This means that well-known NGOs having many years of experience and numerous successful projects in their portfolio would have the same weight as much junior, smaller and less experienced NGOs. In this context, the result would be more representative if there was no formal equality amongst all the NGOs satisfying the minimal criteria. The selection of the candidate to be endorsed by parliament should therefore not be based simply on the nomination by the "largest number" of NGOs: qualitative criteria should be developed to identify the NGOs whose nomination carries more weight.

38. Finally, it is unclear what would happen if no candidate receives more nominations than the others. As the decision as to who is the candidate of the NGOs should stay with the NGOs, the selection mechanism should be developed; the decision should not be left to the discretion of parliament. In developing the selection mechanism, the legislator should take care not to infringe the necessary independence of NGOs.

39. The Venice Commission does not discourage the authorities of Montenegro from exploring this model further, but it considers that in order for it to genuinely ensure political pluralism amongst lay members, other procedural safeguards are needed to reinforce it.

40. In conclusion, as concerns the method of election of the lay members, the Venice Commission reiterates that it is necessary to ensure that the Prosecutorial Council should not be politicised. The Commission does not consider that election by parliament by simple majority is conducive to political neutrality or at least pluralism. While qualified majority or proportional voting systems do not appear as an acceptable final solution, as a transitional solution simple majority may be accepted only if it is coupled with additional solid guarantees.

41. The proposals contained in the revised draft go in the right direction. Appropriate ineligibility criteria, which should remain applicable throughout the duration of the mandate, will contribute to depoliticisation.

42. The appointment of one lay member by civil society is an additional step forward, but the proposal would need to be further developed.

¹⁴ For a discussion about the legitimacy of international experts participating in the anti-corruption bodies of Ukraine, see CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences, para. 51.

¹⁵ See Article 26b para. 1. The Commission has been informed that similar procedures exist for the nomination by NGOs of some members of the Council of the Anti-corruption Agency, the Council of the Public Broadcaster RTCG and some other independent institutions and bodies, but it has not examined such procedures.

43. In addition, the Commission finds that, besides one member appointed by the NGOs, one or more lay members may additionally be appointed by the legal community (represented by the Bar) and by the academic community (represented by the conference of university deans).¹⁶

44. It would be worth considering that Parliament choose *all five candidates* from a list composed on the basis of nominations made by the NGOs. But in this case, as recommended by the Venice Commission in an opinion on Georgia, (a) "it might be useful to establish a parliamentary committee composed of an equal number of representatives of all parties represented in Parliament" to compose such list, and (b) the election in Parliament should be done with a qualified majority of votes or on the basis of a proportional system.

45. The Venice Commission welcomes the efforts of the Montenegrin authorities to find a solution in line with European Standards. It encourages them to pursue the reflection. It reiterates that only when solid additional guarantees and safeguards are provided may a system of election by simple majority be acceptable, at least as a transitional solution.

C. Recommendations which remain to be addressed

1. Immediate replacement of all members of the Prosecutorial Council

46. The revised draft maintains the provision for the immediate replacement of all currently sitting members of the PC upon the entry into force of the law, that is before the end of their mandate (which expires on 22 January 2022).¹⁷ In the March opinion, the Venice Commission expressed the view that the members of the current PC should be allowed to terminate their mandate.¹⁸ The Commission has previously stated in respect of judicial councils that as one of their important functions is to shield judges from political influence, "it would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections." [...] While using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council [and the independence of the Judiciary (judges and prosecutors)]. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council, which amounts to an infringement of its independence.¹⁹ The Venice Commission found on the other hand that the renewal of the members could be justified on condition that the manner of appointment changed from simple to qualified majority as this it would lessen the risk of politicisation of the Council.²⁰

¹⁶ See CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, and CDL-AD(2018)011, Serbia - Opinion on the draft amendments to the constitutional provisions on the judiciary.

See CDL-AD(2020)022, Ukraine – Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Law 'on the Judiciary and the Status of Judges' and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no. 3711), para. 40.

¹⁷ See Article 184b.

¹⁸ See para. 48

¹⁹ Venice Commission, Joint Interim Opinion on the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office of Moldova, CDL-AD(2019)020, paras 69 and ff.

²⁰ Venice Commission, Joint Opinion on the revised draft provisions on amending and supplementing the Constitution, with respect to the Superior Council of Magistracy in the Republic of Moldova, CDL-AD(2020)007, § 39.

47. The question which arises in the present context is therefore whether the proposed amendments may be considered as a sufficiently deep reform towards depoliticization of the PC so as to justify the renewal of its whole composition concurrently, in derogation of the principle of stability of tenure of its members.

48. The Venice Commission is not convinced that the extent of the reform is sufficient in this regard, even if it contains several positive features which have the potential to mitigate the risk of politicisation brought about by election by simple majority. As a consequence, the Commission does not consider that the termination of mandate of all the current members of the Prosecutorial Council would be justified.

49. However, the Commission considers that the ineligibility criteria introduced by the draft are an adequate means to create the conditions to strengthen independence in an environment which presents risks of improper political influence. The relevant general interest in setting such standards can be considered as proportionate and justify their immediate application on a case-by-case basis, to the current members of the PC, without affecting the principle of trust in the integrity of the mandates. A procedure could therefore be devised for assessing the possible ineligibility of the current members of the PC in the light of these criteria. Should this exercise lead to loss of mandates, the balance of lay members and prosecutor members may be reassessed to see if adjustments are necessary prior to the regular expiry of the mandate on 22 January 2022. In general, in the Commission's view, as long as the election is carried out by simple majority it would be preferable if lay members were elected at different moments (possibly by different parliaments).

2. Election of an interim Prosecutor General

50. Under the Constitution of Montenegro, the PG is elected by a qualified majority in Parliament, on the proposal of the PC. In 2019, when the term of mandate of the outgoing PG came to an end, the Parliament failed to elect a new one. The Constitution of Montenegro does not provide for an anti-deadlock mechanism for such cases. As a result, the outgoing PG has been performing his functions *ad interim*, on the basis of a decision of the PC, since 2019.

51. The original draft amendments provided that the PC would elect an interim PG for a period of six months, extendable for one more period of six months. The interim PG would not need to be a prosecutor but would need to satisfy some ineligibility criteria. The revised draft repeats those provisions.²¹

52. In the March opinion, the Venice Commission noted that while the very idea of an interim PG is not directly contrary to the Constitution, such a temporary solution should not last too long, "otherwise the constitutional provisions giving the power to elect the PG to Parliament and fixing a limited term of the PG's mandate would be deprived of any meaning."²² The Venice Commission however observed that an outgoing PG has at least some "residual legitimacy", so the interim functions should be carried out by him until the election of a new, permanent PG.

53. It was reported that in May 2021 the outgoing (interim) PG would reach the retirement age and would have to vacate his position definitely. If no political agreement on the election of the new PG (or on a constitutional amendment introducing an anti-deadlock mechanism or another method of appointment of the PG), is reached by this time, the prosecution service will remain without leadership. This is a constitutional impasse, and while any solution to this problem proposed in a law adopted by a simple majority would be constitutionally questionable, a constitutionally compatible solution needs to be found, even if it is based on the Law of Necessity.

²¹ See Articles 43 and 48 of the Law

²² Para. 50.

54. Since under the Constitution the Parliament elects the PG on the proposal of the PC, it is reasonable to assume that the PC should appoint an interim PG once the outgoing PG retires. There is a strong argument for selecting an interim PG from the ranks of existing top prosecutors, and not to put an outsider in this position, as might be the case under the revised draft.²³ The appointment of an existing prosecutor might better ensure the continuity and legitimacy of the office and, in addition, it might create an incentive for the ruling majority to seek a compromise with the opposition about the election of the (permanent) PG (or a possible amendment of the Constitution). As against this, the appointment of an appropriately qualified outsider might be seen as signaling a fresh start and reducing the risk of corporatism.

55. The Commission wishes to stress that these transitional arrangements do not represent a solution to the serious issue of the need to find a broad political agreement on the next Prosecutor General. It is a sign of maturity and responsibility on the part of the political class, both in government and in opposition, to be able to find consensus or agreements, including and in particular as to appointments of independent institutions and top political appointees. Broad political agreements are necessary in order for the state institutions to function in a democratic manner. The Venice Commission reiterates that the Constitution should contain an anti-deadlock mechanism which would motivate parliament to reach the qualified majority for the appointment of the Prosecutor General.

D. An important additional point regarding the reporting obligations to Parliament of the Prosecutor General and of the Special Prosecutor

56. Article 147 of the revised draft provides that the PG and the Special State Prosecutor, in addition to the annual reports, have to provide the Parliament with “special” reports. The PG and the Special State Prosecutor also have to participate in the sessions of the Parliament and of the appropriate committees, including inquiry committees. The “manner” and “deadlines” for such special reports are to be established by the “competent working bodies of the Parliament on the issue of judiciary, corruption, security and immunity”. If the PG or the SPP fail to submit a report in the manner and within the deadlines decided by parliament or by the “competent working bodies”, the latter may submit “opinions, assessments, suggestions and recommendations” to the PC and the Minister of Justice.

57. The Venice Commission notes with approval that the previous proposal that parliament could adopt, by simple majority, a motion for dismissal of the PG or the SSP after the presentation of their reports has been abandoned, as recommended in its March 2021 opinion. Now the dismissal of the PG or the SSP may only be decided by the PC on the basis of the grounds exhaustively provided by law, and with a procedure which ensures due process, and with the right to appeal to the Supreme Court. The Commission commends the Montenegrin Authorities for following this key recommendation.

58. The new provisions should not be considered as problematic if they do not aim at obliging the PG or the Special State Prosecutor to report on specific cases. Sound considerations may justify that the PG or the SSP refuse to disclose information on pending and even terminated cases. The law should therefore make it clear that the reports of the PG and SSP to parliament should not relate to individual – pending or terminated - cases. Further, the law should provide for the possibility to give a reasonable justification to parliament for failure to report or to appear before it.

²³ See Article 48 para. 4

IV. Conclusion

59. At the request of the Deputy Prime Minister of Montenegro, the Venice Commission has examined the revised draft amendments to the Law on the State Prosecution Service. The present opinion has been prepared following the urgent procedure, as requested by the Deputy Prime Minister, upon authorisation of the Bureau.

60. The revised draft amendments have been prepared taking into account the previous opinion of the Venice Commission on this matter, adopted in March 2021.

61. The Venice Commission wishes to welcome at the outset the constructive approach of the authorities of Montenegro and their readiness for dialogue.

62. The Commission further welcomes that the preparation of these revised amendments has been accompanied by consultations with the main stakeholders and of civil society, even if this process could have been broader and longer. The Commission encourages the Montenegrin government and parliament to pursue an open and transparent process of public consultation.

63. The revised draft represents a significant progress compared to the two draft laws examined in March. Several of the key recommendations contained in the March 2021 opinion have been fully addressed and others partly.

64. The proposals to replace the Special State Prosecutor's Office with the new "Prosecutor's Office for organised crime and corruption (the POOCC)" (and the subsequent reassignment of prosecutors and redistribution of files) and to remove the Special State Prosecutor have been abandoned. Furthermore, the formerly proposed disciplinary offences (punishable with dismissal) of "actions which are contrary to legally prescribed competences" and "failure to fulfil legally prescribed obligations" have been abandoned. The revised draft does not attempt anymore at removing the essential legal guarantee that a prosecutor (including the Special State Prosecutor) may be dismissed only for a disciplinary offence provided by the law, with due process and with a right to appeal. The Venice Commission welcomes that its key recommendations in this regard have been fully taken into account.

65. As concerns the method of election of the lay members, the Venice Commission reiterates that it is necessary to ensure that the Prosecutorial Council should not be politicised. The Commission does not consider that election by parliament by simple majority is conducive to political neutrality or at least pluralism. When qualified majority or proportional voting systems do not appear as an acceptable solution, as a transitional solution simple majority may be accepted only if it is coupled with additional solid guarantees and safeguards.

66. As concerns the lay members, the revised draft maintains that their number is increased to 5 and that their election is done by simple majority. However, it contains two proposals aiming at mitigating the risk of politicisation and conflicts of interest. In the first place, new ineligibility criteria will be introduced for the lay members - and also for the prosecutor members - of the Prosecutorial Council. These new criteria create a "safety distance" between lay members and party politics, which will make the PC more politically neutral. They are therefore welcome; a procedure should be devised in order to verify that these criteria continue to be fulfilled throughout the mandate.

67. Secondly, under the revised draft, one of the lay members would be nominated by selected NGOs and would be endorsed by parliament. The candidate proposed by these NGOs should not be part of the vote on the other candidate lay members. Parliament should separately decide to endorse such candidate. The authors of the revised draft have devised a system which attempts to address the difficulty of ensuring that this candidate represents "civil society". Several criteria have been introduced to select the NGOs who are entitled to submit candidates: to have existed for more than three years, to have worked in the field of the rule of law, and to have implemented

projects in this area with a budget of more than EUR 20,000 per year. The Commission finds it positive that the revised draft introduces some objective criteria, safeguards and thresholds, even if it is difficult to say whether these are realistic and whether they may effectively ensure the representative character of the process in the medium and long term. Representativeness would be increased if the criterion of formal equality of all NGOs were abandoned and the most experienced and senior NGOs were entitled to present more than one candidate. At any rate, the law should contain a mechanism for selecting a candidate, should it happen that none receives more nominations than the others. The choice should remain with the NGOs, it should not be left to the discretion of parliament.

68. In the Commission's opinion, the two proposals contained in the revised draft go in the right direction to reduce politicisation, but in all they are not yet sufficient to eliminate completely the risks of politicisation which are inherent in election by simple majority. The Commission encourages the Montenegrin authorities to pursue the reflection and improve their model.

69. The revised draft maintains the provision for the immediate replacement of all currently sitting members of the PC upon the entry into force of the law, that is before the end of their mandate (which expires on 22 January 2022). The Commission has previously stated in respect of judicial councils that as one of their important functions is to shield judges from political influence, "it would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections. The Venice Commission found on the other hand that the renewal of the members could be justified only when the manner of appointment changed from simple to qualified majority, as this would pose a lesser risk to the politicisation of the Council.

70. The Venice Commission is not convinced that the extent of the reform is sufficient in this regard, even if it contains several positive features which have the potential to mitigate the risk of politicisation brought about by election by simple majority. As a consequence, the Commission does not consider that the termination of mandate of all the current members of the Prosecutorial Council would be justified. It would amount to a serious infringement of its independence.

71. However, the Commission considers that the ineligibility criteria introduced by the draft should become immediately applicable to all members of the PC. A procedure should be devised for assessing their possible ineligibility in the light of these criteria, and the balance between lay members and prosecutor members should be reassessed after this exercise, making the necessary arrangements, if need be.

72. As concerns the nomination of an interim prosecutor by the PC, while the Commission is not in favour of it, it seems that the expected retirement of the Prosecutor General will lead to a constitutional impasse, so that this transitional arrangement might be necessary. There is a strong case for selecting an interim PG from the ranks of existing top prosecutors. The Commission stresses nonetheless that these transitional arrangements do not represent a solution to the serious issue of the need to find a broad political consensus on the next Prosecutor General.

73. Finally, the law should indicate explicitly that the obligation of the two top prosecutors to present regular and special reports before the Parliament and its committees does not include individual cases, pending or completed, and/or that it should be possible to give reasonable justification for failing or refusing to do so.

74. In his comments on the draft urgent opinion, the Deputy Prime Minister expressed satisfaction at the Commission's recognition that the revised amendments represent an improvement compared to the previous version; he acknowledged that the process of consultation may be improved. As concerns the Commission's recommendations, he stated that they would be considered by the authorities, although he maintained his position as to the need to replace all the members of the PC (but offered monetary compensation) and as to the opportunity of choosing the interim PG from non-prosecutors. The Deputy Prime Ministers also expressed the authorities'

commitment to political dialogue in order to elect a new PG. He finally expressed openness to the Commission's recommendation to exclude individual cases from reporting obligations of top prosecutors.

75. The Venice Commission welcomes the efforts of the Montenegrin authorities to find a solution in line with European standards, encourages them to pursue such efforts and remains at their disposal for further assistance in this matter.