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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW AMENDING THE LAW ON
THE STATE PROSECUTOR'S OFFICE OF MONTENEGRO**

by

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

INTRODUCTION

The present draft amendments to the Law on State Prosecutor's Office have been rendered necessary in order to bring the existing law [no. 69/2003 – Law on State Prosecutor] in accordance with the later Constitution of 2007.¹

The draft amendment to the existing law is not self-understanding; the existing law is needed to understand the proposed amendments. The fact that the existing law is prior to the constitution creates a series of inconsistencies which have not all been cleared by the proposed draft of ?? amendments and need further clarification.

PRELIMINARY AND GENERAL COMMENTS

1. The constitutional² basis of the draft of amendment of the prosecutor's office is established in chapter 8 on the State Prosecution and more specifically in the articles 134 to 138 of the Constitution of Montenegro.
2. At this point it is recalled that the Commission rendered an opinion on the CONSTITUTION OF MONTENEGRO³, where, amongst other the commitments of Montenegro upon accession to the Council of Europe had been recalled that

„B. the Constitution must provide for the independence of the judiciary and recognise the imperative of avoiding any decisive role of political institutions in the procedure of appointment and dismissal of judges and prosecutors;

C. in order to avoid conflict of interests, the role and tasks of the Public Prosecutor should not include, both the application of legal remedies for the protection of constitutionality and legality and the representation of the Republic in property and legal matters.“

The principle of **independence** of the state prosecutorial service and the state prosecutors is fixed in Article 134 of the Constitution.

3. Several concrete points had been pointed out and criticised by the VENICE COMMISSION during the analysis of the **Constitutions**; some of these points have been accepted, others are now in the Constitution and are of course the basis of the present draft law. Some points are retaken and reassumed:

APPOINTEMENT AND DISMISSAL OF PROSECUTORS

4. It had been criticised by the Commission [CDL-AD(2007)047, p. 12, art. 80] that the Public Prosecutors are appointed and dismissed (even before the end of the term) by the Parliament and that no qualified majority is requested.⁴

¹ See CDL(2007)105 – The Constitution of The Republic of Montenegro and The Constitutional Law for the Implementation of the Constitution of the Republic of Montenegro, adopted on 19 October 2007

² The working basis is the document CDL(2007)105, english non official translation the Constitutional Law for the Implementation of the Constitution of the Republic of Montenegro, adopted on 19 October 2007

³ CDL-AD(2007)047 – Opinion no. 392 / 2006, Adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007)

⁴ CDL-AD(2007)047, p. 10, par. 60

PROTECTOR OF HUMAN RIGHTS

5. While the Venice Commission⁵ had deplored the fact that – in spite of the suggestions made by the Venice Commission with a view to reinforcing the independence of the Protector of Human Rights and Liberties, the proposed draft amendment contains another weakening of this important democratic figure. In fact, whilst the present law granted the Protector of Human Rights the right to name one member of the Prosecutorial Council, the draft amendment has shifted that right to the President of the Republic.

PROSECUTORIAL COUNCIL

6. It had been also criticised by the Venice Commission⁶ that the Prosecutorial Council should have also as function to oversee that prosecutorial activity be performed according to the principle of legality. It seems that this terminology has not found entry into the new draft. Besides, the absence of a qualified majority for the election by Parliament is something which gives very much power to Parliament, even if other groups [although of minor importance] have the right to nominate a candidate. It needs to be repeated that the prosecutorial system of Montenegro remains very much exposed to political influence or pressure and therefore makes it vulnerable.
7. It has been positively remarked that the critics of the Venice Commission on the competence of the State Prosecutor on Property Law have been dropped and were not implemented in the new Constitution; as a consequence, the present draft law had to amend the existing law.

THE DRAFT AMENDMENT

Some of the points criticised in the Constitution have not been eliminated when implementing the Constitution and are taken over partially by the draft law. It is of course understandable for the Commission that these points in the draft have to follow the Constitution but the criticism made at that time are to be repeated.

8. Article 1.

The draft amendment uses a wider terminology in the sense that the term “State Prosecutor” in the existing law is to be changed to the term “State Prosecutor’s Office”. Art. 1 of the draft amendment is applying this to article 1, 2, 3, 4, 8, 10, 13, 14, 15, 16, 17 and 18 of the existing law. Whilst the proposed changes are understandable in the other articles, the simple replacement of words is not so clear in articles 14, 15 and 16; in fact, in these articles the terms to be replaced are used in composed expressions and it would be clearer to widen the application also to those terms if that is the intention. In Article 4 the understanding is even more difficult and a rewording would help clarification.

9. Article 2.

Whilst Article 134 of the Constitution states that the State Prosecution shall be a unique and independent state authority and the Prosecutorial Council shall ensure

⁵ CDL-AD(2007)047, p.9, par. 55

⁶ CDL-AD(2007)047, p. 16, par. 110 and 111

the independence of the prosecutorial services and the state prosecutors [Art. 136 of the Constitution], Article 2 of the proposed amendment to the existing law expressly omits the term “independent” in article 2 of the existing law. We have been told during the working meeting, that the original version of the draft continues to use the term “independent” and that it is an error of translation.

10. Article 3

These amendments are of a formal nature.

11. Articles 4 and 5

The competence of the Prosecutor in matters of property law having been cancelled, a series of changes in relation to that former competence had to be made and some articles had to be cancelled as a logical consequence. NOTE that the cancellation of the competence on property law follows the criticism of the Venice Commission⁷

CONDITIONS AND PROCEDURE FOR APPOINTMENTS OF THE STATE PROSECUTOR AND THE DEPUTY

12. Article 6

The general and specific conditions for the appointment as State Prosecutor or Deputy are set out in Chapter III of the existing law where the power to nominate and dismiss the State Prosecutor remains with the Assembly. In the new draft, the nomination and dismissal of the Deputy State Prosecutor, is now shifted from the Assembly to the Prosecutor's Council.

REMARKS

The criticisms⁸ [i.e. on political influence] made by the Commission on the procedure of nomination of the Prosecutors (even if now the Deputies are excluded) remains **valid**; the solution is **problematic** in the light of European standards.

13. Article 8

The term of office for the State Prosecutor is fixed at 5 years and the re-elegibility is explicitly admitted. An exception is made for the deputy to the Basic Prosecutor, whose term of office shall be permanent (like for the other deputies), except for the first term. We have been told that the reason for this is to allow a kind of trial period for the deputies.

14. Article 9 FUNCTIONAL IMMUNITY

This article of the draft [art. 29 of the existing law] takes away the functional immunity and the freedom of expressed opinion or decisions rendered during the term of office. Nevertheless, Article 137 of the Constitution of Montenegro has established exactly what is proposed to be taken out of the existing law and this fact, as we have been told, was the reason for the proposed amendment.

⁷ CDL-AD(2007)047, p. 15, par. 105

⁸ CDL-AD(2007)047, par. 80

15. As for the protection of the Prosecutors itself one recalls : ⁹.

“While some protection of prosecutors from arbitrary or abusive process emanating from another organ such as the police might be desirable, it would be preferable if any limitation on the power to commence a criminal process was subject to judicial control.”

NOMINATION (APPOINTMENT)

16. Article 10

In Art. 32 (4) the possibility of an administrative procedure against decisions of the Prosecutorial Council in relation to the Application Procedure for the nomination is introduced. This is a positive element.

17. Article 11 and 12

These articles are insertions (32a and 33a) into the existing law and regard the nomination procedure. Especially the new article 33a proposes a series of criterias which are detailed and refer to objective preparation as well as to moral criteria. The already vast catalogue shall be even expanded by Rules of Procedure of the Prosecutorial Council. This is to be seen as a positive attempt to improve the nomination procedure.

18. Article 13

The former Article 35 is widened and specific indications and exceptions to the compulsory interview and rules on the exact procedure to be followed by the Prosecutorial Council are given.

19. Article 14

This article inserts article 35a into the draft and imposes on the Prosecutorial Council the drafting of a list of candidates having achieved satisfactory results.¹⁰

20. Articles 15 and 16

Whilst article 15 is only a logical adaptation, article 16 inserts the new articles 36a, 36b and 36c, where the Procedure of the appointment of the Deputy State Prosecutors is regulated. It is noted that the candidates have a right to inspect their own documentation [Art. 36b] and an appeal is open against the decisions of the Prosecutorial Council in this matter [Art. 36c]. All these amendments are positive steps.

⁹ CDL-AD(2004)038 “Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor”, adopted by the Commission at its 60th Plenary session (Venice, 8-9 October 2004), paragraph 27.

¹⁰ The Prosecutorial Council only submits propositions to the Assembly for the nomination of the State Prosecutor; Deputies are appointed directly by the Council.

DISCIPLINARY RESPONSIBILITY and CESSATION OF OFFICE AND REMOVAL

21. Chapter IV on Disciplinary Responsibility and V on Cessation of Office and Removal are not changed in a significant way, except for the insertion of an Article 58a. In this provision at least a hearing of the session of prosecutors of the Chief State Prosecutor's Office has to be requested by the Prosecutors Council prior to a removal proposal; as for the removal of state prosecutors and Deputies, an analogue opinion has to be provided by the "competent authority".

22. Article 25

Article 61 of the existing law which gave a defence counsel to the State prosecutor or Deputy whose removal is sought during the procedure before the Prosecutorial Council is cancelled. In fact this provision has now been inserted into article 21 of the draft.

23. Article 27

This article introduces the possibility of temporary suspension during the procedure for removal.

24. Article 28

The insertion of articles 64a and 64b are precisions to the procedure of suspension and art. 64b specifically allows instituting an administrative dispute which is a positive move.

SECONDMENT

The problem of secondment always bears with it, on the one hand, the necessity to overcome functional problems by allocating human resources – sometimes against the will of the concerned persons – in order to ensure the fulfilment of the tasks required by the constitution and the law and, on the other hand, the legitimate interest of the persons involved and the avoidance of potential abuses.

25. Article 31 [Amending Art. 77, par. 2 of the existing law]

The possibility to second the State Prosecutor under certain conditions with his or her consent is extended (although an exception) to cases where the consent of the concerned person is **not** given. Reasons for such cases are disqualification or absence in another prosecutorial office.

It is self-understanding that the secondment, i.e. the transfer of a prosecutor without his consent can (potentially) represent also an instrument to manoeuvre the handling of files, i.e. taking away a Prosecutor from a particular file without his consent. By taking away limitations in time for the secondment against the wishes of a person, the potential risks should be equilibrated balanced by other means.

Chapter VII: PROSECUTORIAL COUNCIL

26. Article 32

This is an extension of the competences of the Prosecutorial Council.

27. Article 33

In this article the composition and the choice [article 84 of the existing law] of the members of the Council are changed in the sense that the Council is composed of the Chairman, i.e. the Chief Prosecutor ex officio and ten Members, whereby 6 are nominated from amongst the State Prosecutors and their Deputies, one professor and, according to the proposed draft, 2 lawyers on the proposal of the President; the 10th member being a representative of the Ministry of Justice as in the existing law.

REMARK:

Formerly one member of the prosecutorial was to be proposed by the Protector of Human Rights and Freedoms. The fact of having shifted this right from the Protector of Human Rights and Freedom is a further weakening of this important figure. The consequences of the absence of the requirement of a qualified majority for the election of the members had already been pointed out.¹¹ Secondly the composition and the right of nomination gives the impression that the choice of the Council is widely politically influenced which might present a vulnerability.

28. Articles 34, 35 and 36

Are small corrections.

29. Article 37

This article refers to a change in Article 89 of the present law; however, the word "appointed" which is to be replaced by the word "elected" does not exist in this article. It seems that this is an error which needs to be corrected. We have been told that the original version does not contain this error.

30. Article 38

This article eliminates article 99 of the existing law, which does not call for any particular attention.

31. Articles 39 and 40

The provision of article 39 concerns the annual report to be submitted by the Chief Prosecutor for the attention of the Assembly, whereas article 40 drops article 104 of the existing law on Special Reports which concerned not directly the work but the criminal activities and general or specific problems encountered during the work of the Prosecutor. The filing of a general report on the general administration of the State Prosecutor's Office is generally admitted and is conform to the standards set out by the commission:

*"The independent status of the general prosecutor and the public prosecution service does not necessarily preclude the possibility of an annual report to Parliament describing in general terms his work but without commenting on individual cases."*¹²

¹¹ See specifically CDL-AD(2007)047, p. 16, par. 111

¹² CDL(1995)073. Opinion on the regulatory concept of the Constitution of the Hungarian Republic, adopted at the Commission's 25th Plenary Meeting, Venice, 24-25 November 1995

32. Article 41

This article consists of a very slight change in the sense that the existing law foresees that “information that could affect the conducting of the proceedings shall **not be disclosed to the media**” whilst the proposed amendment rules that such information “may **not be made available to the public.**”

Insofar as the possible interdiction has been extended from the media to the public.

33. Articles 42 and 43

Article 42 amends Article 106 on the secondment and drops the time limits of 6 months maximum (with consent) and 3 months (without consent) of the interested person.

Article 43 inserts a new article 106a on the Secondment to another Prosecutor's Office of the State Prosecutor and his/her Deputy without their consent. In this article the hypothesis is the lack of prosecutors in a State Prosecutor's office. Reference is made to what has been stated regarding Article 31 of the proposed amendments.

34. Articles 44 and 45

Whilst article 44 replaces the word “Prosecutor” by the words “Prosecutor's Office”, article 45 erases article 113 of the present law being related to property law, which is not any more a competence of the Prosecutor's Office and logically had to be dropped. It had already been stated that the fact of taking away from the Prosecutor's Office competences in property law matter had been a suggestion from the Venice Commission and is an appreciated improvement.

35. Articles 46 and 47

No comments.

36. Articles 48 and 49

There is no specific comment.

37. Article 50

This article refers to the Heading of Chapter X of the new law, where the word “PROSECUTOR” is to be changed by the words “PROSECUTOR'S OFFICE”. The existing law does however already contain in the Heading of Chapter X the Wording: “PROSECUTOR'S OFFICE”. Therefore the proposed change is not understandable and might be an error which has been confirmed during the working meeting.

BUDGET

38. Article 51

This amendment concerns the budget. Whilst the existing article 128 allocated a special budget to the Prosecutor's Office, the proposed amendment allocates this budget to the Prosecutorial Council for the work of the Prosecutor's Council. The fact that the budget for the Prosecutor's Office has been cancelled (although the Constitution foresees the independence of the Prosecutor's Office), could be seen as an attempt at indirect control of the Prosecutor's Office.

We have been told that the idea behind this amendment was the fact that the President of the Prosecutorial Council was *ex officio* the Supreme State Prosecutor and that it was appropriate to let him integrate the Budget of the Prosecutorial Office in that of the Prosecutorial Council, so that the Budget for the State Prosecutor is integrated in the Budget of the Prosecutorial Council.

39. Articles 52 to 55

These are the transitional and final provisions which do not call for special remarks.