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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.*

1. Introduction

This note contains my preliminary comments/questions on the draft law amending the Law on State Prosecutors Office of Montenegro.

The present Act was passed in 2003. It deals extensively with numerous issues concerning the Prosecution Service in Montenegro, and the present draft amending Act – although it contains a large number of provisions in itself – touches upon only a limited number of subjects dealt with in the entire present Act.

At this point, the task for the Venice Commission will not be to deal with the present Act as such, but only with the amendments now proposed. Thus, my comments below refer, as a general rule, only to the amendments. Also, as a general, rule I do not comment on issues that appear to be strictly technical.

It is difficult to assess the full content and implications of the present draft amendments without detailed knowledge of the political background and motivations that lie behind them. For that reason, some of the comments below may be due to misunderstandings, and some of the amendments to which I have no comments, may, on the other hand, in fact appear to be very relevant and call for further discussion. These issues will need to be investigated in connection with the upcoming meeting in Montenegro (which I am unfortunately unable to attend) and with the further work that lies ahead after the meeting.

2. Preliminary comments/questions on the draft amendments

Article 1

This provision appears to mean simply a change of name: from “State Prosecutor” to “State Prosecutor’s Office”. Perhaps, the provision is to be seen in context with Article 3 stating that the State Prosecutor’s Office is a “single” state authority.

If this is indeed the only implication of the provision, I have no comments.

In the following, I use the notion SPO to mean the State Prosecutor’s Office.

Article 2

It is not quite clear what the implication of this amendment is. On the face of it, it gives rise to some concern that the word “independent” is now struck from Article 2. However, the present Article 3 of the Act – stating that nobody shall influence the work of the SPO – remains unchanged.

The intentions of this amendment should be investigated.

Article 3

This amendment appears to be a simple consequence of the new constitution.

I have no comments.

Article 4 and 5

The implication of these amendments is to relieve the SPO of its task to represent the state in property law matters.

Relieving the prosecution service of taking care of other business than dealing with prosecution of criminal offences is generally in line with CoE standards, cf. CDL-AD(2005)014, Opinion on Federal Law on the Prokuratura of the Russian Federation, para 75.

I see no other implication if this amendment. If this is correct, it should be welcomed.

Under Article 17 of the present Act, it remains a task for the SPO to “apply legal remedies for the purpose of protection of constitutionality and legality”. It is unclear what this means in practice. The amendment concerning property law matters might therefore be an opportunity to briefly investigate this issue in order to assess whether this is an appropriate task for the SPO.

Article 6

This amendment implies a difference in the requirements for work experience as regards the Basic State Prosecutor and his/her Deputy.

The amendment as such does not appear to be of great significance. However, it appears slightly odd that a differentiation is only made on the Basic State Prosecutor level and not at Chief State and High State Prosecutor level.

Furthermore: although, as said above, the present task is to deal only with the amendments, it may be pointed out that the advantages of provisions such as Article 25 is questionable especially where there is, as it appears to be the case here, no possibility to defer from the requirements. For example, it does not seem appropriate that a person who otherwise appears as the best candidate for the position of Chief State Prosecutor cannot be appointed simply because he/she only has 14 (and not 15) years of work experience. Generally, such mechanisms are not well suited to ensure that the best candidates are appointed.

It might be worth raising this issue although, as I say, it goes beyond the proposed amendment as such.

Article 7

This is one of a number of provisions of the draft Act dealing with the position of the Deputy State Prosecutor (DPS) vis a vis the State Prosecutor (SP). The consequence of the amendment provided for in this provision is that the DPS may be appointed and removed by the Prosecutors Council directly whereas the competence to appoint and remove the SP will remain with the Assembly (at the proposal of the Prosecutors Council).

In the opinion of the Venice Commission on the constitution of Montenegro (adopted in December 2007), the commission deals with the very significant political influence on the appointment and removal of prosecutors that is a consequence of the constitution. In this context, it should be noted that the Prosecutors Council, although consisting mainly of prosecutors and experts, is appointed by the Assembly, cf. Article 86 of the present Act.

I believe the concerns expressed in the opinion should indeed continue to be the view of the Commission.

However, it is now a fact that the constitution requires this influence.

Under these circumstances, the ambition would seem to be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutors Council rather than the Assembly since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters.

Seen in this context, I believe the amendment as such should be welcomed.

If the view expressed above is correct, it would seem appropriate if even the SP (and not only the DSP) would be appointed directly by the Prosecutors Council. While this may be unrealistic in a political context, it would still be the natural point of view of the Venice Commission.

In any event, these issues should be discussed at the meeting.

Article 8

Under the present Article 28, both the SP and the DSP are appointed for the office for a term of 5 years with the possibility of reappointment. The amendment means that whilst the SP will continue to be appointed under this regime, the DSP will now be permanently appointed (except in case of the first appointment of the Deputy Basic Prosecutor).

I am not aware whether the Venice Commission has previously expressed its opinion on the issue of reappointment of prosecutors.

Bearing in mind this reservation, I believe such arrangements should be carefully and critically scrutinized. Since it is obvious that prosecutors (as is also the case under the Montenegro system) may of course be removed under disciplinary proceedings, the arrangement of fixed term appointments in combination with a possibility of reappointment is designed to cast doubt on the independence of the prosecution service. This is, of course, emphasized in systems such as that in Montenegro where there is considerable political influence on appointment decisions.

Under these circumstances, I believe the amendment as such should be welcomed since it implies a further safeguard on the independence of the DSP.

In line, however, with what is said in the comments to Article 7 above, I believe there is very good reason to raise the question of the SP also in this connection. In this context, it should be noted that the fact that it is now (almost) only the SP who is appointed under a fixed term/reappointment regime appears to intensify the focus on the issue of the independence of the SP.

Article 9

This provision simply erases the present provision on the functional immunity of the SPO.

There may be a good explanation for this. On the face of it, however, the amendment gives rise to concern.

The issue should be further investigated.

Article 10

Under the present Article 32(4), the decision of the Prosecutors Council on a complaint is final and cannot be challenged in court.

The amendment appears to mean that some sort of legal challenge against the Council's decision is now introduced.

On the face of it, this amendment does not appear to be critical. As I am not sure of the implications, however, the issue should be further investigated.

Article 11

I have no comments.

Article 12

This amendment means that the Act will lay down specific criteria concerning professional knowledge etc. for the appointment of SP and DSP. It appears from the amendment that more detailed criteria shall be laid down by the Prosecutors Council.

While the practical use of such provisions may in general sometimes appear to be questionable, there may be an adequate point in this one given the intense political influence on appointments of prosecutors in Montenegro (see comments above to Article 7). Thus, the amendment underlines that the criteria must be linked strictly to professional knowledge and qualifications.

Furthermore, the wording of the criteria appears to be sufficiently broad in order not to preclude any relevant criteria.

Seen in this context, I believe the amendment should be welcomed.

Article 13

No comments. Regardless of the amendment, the Prosecutors Council will always be entitled to conduct an interview if it deems it appropriate to do so.

Article 14

No comments.

Article 15

See comments on Article 7. Otherwise no comments.

Article 16

See comments on Article 7 and 10 above.

Otherwise no comments. The proposed Article 36b appears to be a reflection of the present Article 34.

Article 17

No comments.

Article 18

This amendment should be seen in context with the words "without justified reason" in the present Article 41.

Otherwise no comments.

Article 19

See comments on Article 10.

Article 20 – 24

No comments.

Article 25

This appears to be only a technical consequence of Article 21 and does not appear to change the right of the SP or DSP to engage a defence attorney.

If this reading is correct, I have no comments.

Article 26

This appears to be technical consequence of Article 7. See comments on that provision.

Article 27

No comments.

Article 28

See comments on Article 10. Otherwise no comments.

Article 29

See comments on Article 7. Otherwise no comments.

Article 30

No comments.

Article 31

It is difficult to assess the full implications of this amendment.

On the one hand, secondment of prosecutors without their prior consent should always be considered critically as it may impede their independence. On the other hand, the decision to second is laid in the hands of the Chief State Prosecutor and the secondment in question is to another office within SPO. Furthermore, the amendment is probably meant merely to solve a practical problem.

The provision should be discussed, but it is likely that there are no grounds for concern.

Article 32

No comments.

Article 33

On the face of it, this amendment seems to further underline the political influence on the composition of the Prosecutors Council.

The provision might therefore give rise to concern and should be further investigated.

Article 34

The implication of this amendment as such appears uncertain. See also comments on Article 7 and 33.

The matter should be further investigated.

Article 35-37

No comments.

Article 37

This provision is difficult to assess since the word “appointed” does not appear in my version of the present Article 89(1).

Article 38

It is difficult to understand why this provision should be erased.

The issue should be investigated further.

Article 39

No comments.

Article 40

On the face of it, this amendment appears difficult to understand. Perhaps it should be seen in context with the amendments proposed in Article 39.

The issue should be investigated further.

Article 41

The implications of this amendment, substituting “shall” with “may” appears unclear.

The issue should be investigated further.

Article 42

This amendment means there is no time limit to the secondment of the DSP.

See comments on Article 31.

Article 43

See comments on Article 31 and 42.

Article 44

No comments.

Article 45

No comments. This appears to be a technical consequence of Article 4 and 5.

Article 46-48

No comments.

Article 49

The implications of this amendment, substituting “official secret” with “confidential information”, are not clear. It may be only a technical amendment.

The issue should be investigated further.

Article 50

No comments.

Articles 51-55

No comments.