



Strasbourg, 6 March 2008

Opinion 467/2008

CDL(2008)028*
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON DRAFT AMENDMENTS
TO THE LAW ON THE STATE PROSECUTOR
OF MONTENEGRO**

On the basis of comments by

Mr Paul W. M. BROEKHOVEN
**(Netherlands, Expert for the Directorate of Co-operation of the
Directorate General for Human Rights and Legal Affairs)**

Mr Harry GSTÖHL
(Member, Liechtenstein)

Mr Jorgen Steen SÖRENSEN
(Member, Denmark)

**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.*

Table of contents

1. General remarks	3
2. The Venice Commission's opinion on the Constitution of Montenegro.....	3
3. Comments, article by article	4
4. Conclusion	10

1. *By message of 8 February 2008, the Deputy Minister of Justice of Montenegro, Ms Lakocevic, requested an opinion on draft amendments to the Law on State Prosecutors of Montenegro (CDL(2008)024).*
2. *The Venice Commission requested Messrs Gstöhl and Sörensen to act as rapporteurs. Their comments can be found in documents CDL(2008)026 and 027 respectively.*
3. *The present opinion is prepared jointly with the Directorate of Co-operation of the Directorate General for Human Rights and Legal Affairs of the Council of Europe. The Directorate appointed Mr. Broekhoven, as rapporteur (see document CDL (2008)025).*
4. *On 28 February 2008, Messrs Broekhoven and Mr. Gstöhl, accompanied by Mr. Dürr from the Secretariat, made a visit to Podgorica, where they met the drafting group chaired by the Minister of Justice. This visit allowed settling a number of issues raised by the rapporteurs in their comments.*
5. *The present opinion has been adopted by the Venice Commission at its ... Plenary Session on ...*

1. General remarks

6. The Law, which is currently in force, was passed in 2003 (CDL(2008)023). It deals extensively with numerous issues concerning the Prosecution Service in Montenegro, and the present draft amending Law (CDL(2008)024) – although it contains a large number of provisions in itself – touches upon only a limited number of subjects dealt with in the entire present Law. The present opinion refers, as a general rule, only to the amendments.
7. Since the translation of the draft amendments the Drafting Group had continued its work and changed a few articles of the draft amending law. These changes were presented orally and discussed at the meeting in Podgorica. These points did however not raise special comments by the members of the Delegation.
8. Without an explanatory memorandum it remains difficult to assess the full content and implications of the present draft amendments. For that reason, some of the comments below may be due to misunderstandings even after the meeting in Podgorica.

2. The Venice Commission's opinion on the Constitution of Montenegro

9. The draft amendments to the Law on State Prosecutor's Office have been rendered necessary in order to bring the existing Law in accordance with the later Constitution of 2007 CDL(2007)105.
10. At its Plenary Session in December 2007, the Venice Commission had given an opinion on the Constitution of Montenegro (CDL-AD(2007)047 in which it recalled *inter alia* also the commitments of Montenegro upon accession to the Council of Europe relating to the judiciary and prosecution, namely:

„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.“

11. While the principle of independence of the state prosecutorial service and the state prosecutors is ensured in Article 134 of the Constitution, several points had been criticised by the Commission in its opinion:

12. The Commission was very critical that Article 135 of the Constitution provides that prosecutors are appointed and dismissed by Parliament and that no qualified majority is required (CDL-AD(2007)047, para. 60 and 107-109).

13. Another critical point was the absence of the requirement of a qualified majority in Parliament for the election the members of the Prosecutorial Council (CDL-AD(2007)047, para. 111)

14. In line with its Opinion on the Constitution of Montenegro, the Venice Commission remains convinced that these elements seriously endanger the independence of the prosecutor's office because they could lead to a politisation of the appointment process and, probably even more dangerously, to the politisation of dismissals.

15. For the purpose of the present opinion on the draft amendments to the Law on the State Prosecutor's Office, the Constitution has to be seen as a given fact, however. Other elements of the Venice Commission's opinion can be addressed also by these amendments:

16. The Venice Commission had also deplored the fact that the Human Rights Protector had not be reinforced in the Constitution as recommended by the Commission (CDL-AD(2007)047, para. 55). Unfortunately, the proposed draft amendments contain a further weakening of this important democratic institution. In fact, while 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 (see also remarks relating to [article 33](#) below).

17. On the other hand, the Venice Commission had also recommended that one of the tasks of the Prosecutorial Council should be to oversee that prosecutorial activity be performed according to the principle of legality (CDL-AD(2007)047, para. 110). The present draft amendments do not contain such a provision either.

18. The Venice Commission remarks very positively that the competence of the State Prosecutor in property law matters have been dropped and were not implemented in the new Constitution; the present draft of law had to amend the existing law consequently.

3. Comments, article by article

Article 1

19. This provision appears to mean simply a change of name from “State Prosecutor” to “State Prosecutor's Office”. The provision is to be seen in context with Article 153 of the Constitution stating that the State Prosecutor's Office is a “unique” (or in other translation “single”) state authority.

20. At the meeting in Podgorica, the Montenegrin authorities raised the issue whether the use of the term “single” in the Constitution excluded the structuring of the prosecution in three tiers as the State Prosecutor's Office, the Higher Prosecutors Office (2 prosecutors) and the Basic Prosecutor's Office (13 prosecutors). The issue was not about whether there would be a

hierarchical subordination between these levels but whether the term “office” could be used at the various levels.

21. The Delegation pointed out that it was important to focus on the functions of the various levels rather than specific terms used to describe them. The legislator should have certain margin on how to name the various parts of the Prosecutor’s Office.

22. Nonetheless, the amending Law should use clear terminology. The changes are made in articles 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 obvious in articles 14, 15 and 16; in fact, in those articles the terms to be replaced are used in composed expressions (Chief State Prosecutor, High State Prosecutor and Basic State Prosecutor). It can be assumed that they also cover those terms. In Article 4, however, the understanding is quite difficult and a rewording would help for clarification. According to the English translation available, the amended Article 4 would read “The Chief Prosecutor’s Office, High State Prosecutor’s Office and Basic State Prosecutor’s Office (hereinafter referred to as: the State Prosecutor’s Office) shall exercise the State Prosecutor’s Office.”

23. Another issue raised in this context at the meeting by the Montenegrin authorities was whether there should be special departments for organised crime, war crimes, corruption and terrorism. The delegation pointed out that the intention by the Montenegrin authorities to group organised crime and war crimes as well as war corruption and terrorism respectively together was not unreasonable, especially as special sections were to be set up for these functions on the level of the high courts.

Article 2

24. The deletion of the term “independent” describing the prosecution from Article 2 of the Law, turned out to be a mistranslation. On the contrary, the intention of the amendment is to align the terminology used in the Law with that used in Article 134 of the Constitution.

Articles 4 and 5

25. These amendments relieve the State Prosecutor’s Office of its task to represent the state in property law matters and should be welcomed.

26. Under Article 17 of the present Law, it remains a task for the State Prosecutor’s Office to “apply legal remedies for the purpose of protection of constitutionality and legality”. The Delegation was informed that this task is similar to the institute of cassation in the interest of law, which exists also in other countries. It is available only in the field of criminal and administrative law and results in a request for re-opening of a final case by the Chief State Prosecutor to the Supreme Court for the benefit of human rights protection. In these circumstances there is no objection to such a possibility, which is quite distinct from the general supervisory powers over courts, which the prosecutor enjoyed, for example, in the Soviet Union (see also CDL-AD(2005)014, para. 75).

Article 6

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

28. At the meeting, the Montenegrin authorities explained that this differentiation was necessary because they had opted to make the deputy prosecutors permanent officials, which should however be subject to a three year trial period at the beginning of their career. Therefore, the amendment concerned only the deputy prosecutors at the basic level.

Article 7

29. This is one of a number of provisions of the draft Act dealing with the position of the Deputy State Prosecutor *vis a vis* the State Prosecutor. The consequence of the amendment provided for in this provision is that the Deputies are appointed and removed by the Prosecutorial Council directly whereas the competence to appoint and remove the Prosecutors remains with Parliament (at the proposal of the Prosecutorial Council). This seems to indicate a distinction between the deputies, seen as civil servants, and prosecutors who would have some kind of political mandate. Such a logic might be appropriate for the Chief State Prosecutor but not for the high state prosecutors and even less so for basic state prosecutors.

30. For the criticism of the appointment of the prosecutors by Parliament, see above, section 2. A constitutional amendment would seem necessary to entrust the Prosecutorial Council also with the task to appoint the prosecutors and not only their deputies.

31. While it is positive that the deputy prosecutors are to be appointed by the Prosecutorial Council, the latter itself, although consisting mainly of prosecutors and experts, is appointed by Parliament without a qualified majority.

32. Nonetheless, the ambition should be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutorial Council rather than the Parliament since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters. Consequently, in the light of the constitutional context, this amendment should be welcomed.

Article 8

33. Under the Article 28 of the present Law, both the prosecutors and their deputies are appointed for office for a term of 5 years with the possibility of reappointment. The amendment means that whilst the prosecutors will continue to be appointed under this regime, the deputies will now be permanently appointed (except in case of the first appointment of the deputy basic prosecutors for a probationary period).

34. This arrangement should be carefully scrutinized. Since it is obvious that prosecutors (as is also the case in Montenegro) may of course be removed under disciplinary proceedings, fixed term appointments in combination with a possibility of reappointment cast doubt on the independence of the prosecution service. This is, of course, emphasised in systems such as that in Montenegro where there is considerable political influence on appointment decisions.

35. Under these circumstances, the amendment as such should be welcomed because it implies a safeguard for the independence at least for the deputies. Permanent appointment of the prosecutors would require an amendment of Article 135 of the Constitution.

Article 9

36. This amendment erases the present provision in the Law on the functional immunity of the prosecutors. At the Podgorica meeting, the Delegation was informed that the intention of this deletion is to avoid a repetition of Article 137 of the Constitution, which provides for functional immunity directly on the level of the Constitution.

Article 10

37. Under the present Article 32(4), the decision of the Prosecutorial Council on a complaint is final and cannot be challenged in court. The amendment introduces an appeal to an

administrative court against a decision of the Prosecutorial Council. This is an improvement, which is in line with the practice in many European countries.

Article 12

38. This amendment introduces specific criteria concerning professional knowledge etc. for the appointment of prosecutors and their deputies. Even more detailed criteria shall be laid down by the Prosecutorial Council.

39. The amendment should be welcomed especially in the light of the strong political influence on appointments of prosecutors (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 appears to be sufficiently broad in order not to preclude any relevant criteria.

Article 16

40. The new article 36b takes over elements of the present article 34 and provides that a candidate shall be entitled to have an insight into documentation of *other candidates*, the results of written tests, assessments of the *other candidates* and opinions on *other candidates* and to deliver a written statement thereon. Apart from the fact that there seems to be a duplication between Article 34 and 36b, this provision can open the door to nasty business and false allegations between candidates. Such a provision can bring much unnecessary and undeserved damage to the candidates. The question is also, if this provision is not conflicting with the right on privacy. In general one has to be very careful with the outcome of assessments, because the objective and impartial quality of that outcome can be controversial.

41. At the meeting, the Montenegrin authorities insisted on the necessity of such a provision to guarantee transparency and to allow for the usefulness of an appeal against a decision of the Prosecutorial Council to an administrative court. As concerns the protection of private data, the Prosecutorial Council would be bound to directly apply the relevant provisions of the Constitution.

Article 25

42. The apparent removal of the right to counsel is only a technical consequence of Article 21 of the amendments, which refers to this right in Article 54 of the Law.

Article 28

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

Article 31

44. This article allows seconding a (deputy) prosecutor to another post exceptionally also against his or her will. Reasons for such cases are the need for a prosecutor in another office because of disqualification of the prosecutor in that office (recusal or challenging of the prosecutor) or his or her absence as well as "other justified reasons".

45. The issue of secondment always bears in it on the one side the necessity to overcome functional problems by allocating human resources efficiently – sometimes against the will of the concerned persons – in order to insure the fulfilment of the tasks required by Constitution and Law and, on the other side, the legitimate interest of the persons involved and the avoidance of potential abuse. While the amendment is probably meant merely to solve a

practical problem, forced secondment is something to be looked at with care, because it can endanger the independence of the office holder.

46. Secondment of a prosecutor without his or her consent could be abused as an instrument to manoeuvre the handling of files, i.e. removing a Prosecutor from a certain file in order to influence the prosecution in this case.

47. In order to distinguish the general rule from the exception, the current second paragraph should remain in place and the new paragraph with the exception should be added as the third paragraph.

48. In introducing secondment against the will of a prosecutor, the potential risks should be balanced by safeguards. While a full appeal with suspensive effect against a secondment order might lead to an inability to deal with urgent situations of staff shortages, the prosecutor who is being seconded could be allowed to file a protest to the Prosecutorial Council, which would at least allow for an *ex post* review of the contended secondment. This would also allow some scrutiny of the rather vague term "other justified reasons".

Article 33

49. This article changes the composition of the members of the Prosecutorial Council. The Council is to be composed by the Chairman, i.e. the Chief Prosecutor *ex officio*, and ten Members, whereof 6 are nominated from amongst the State Prosecutors and their Deputies, one professor and, according to the proposed draft, two lawyers at the proposal of the President; the 10th member being a representative of the Ministry of Justice as in the existing Law.

50. Formerly one member of the prosecutorial was to be proposed by the Protector of Human Rights and Freedoms (ombudsman). Taking this right away from the Protector of Human Rights and Freedom results in a further weakening of this important institution (see also the opinion of the Constitution of Montenegro, CDL-AD(2007)046, paras. 55-56).

51. The consequences of the absence of the requirement of a qualified majority for the election of the members of the Prosecutorial Council have been pointed out above. The amendment even reinforces this political influence by giving the right to nomination to the President of Montenegro who is a political figure, even in a parliamentary system.

52. At the meeting in Podgorica, the Montenegrin authorities pointed out that the amendment served to raise the qualification of the respective members of the Council ("renowned lawyers"). In addition, the President would be a neutral figure.

53. The delegation replied, in addition to weaken the Protector institutionally, specific human rights knowledge might lack in the Council. Consequently, the right to appoint a member of the Council should remain with the Protector of Human Rights or at least the President of Montenegro should be obliged to consult with the Protector before making his or her proposal. As for qualifications, relevant human rights experience should be a criterion.

Article 38

54. The Montenegrin authorities explained the deletion of the article on professional skills development with the fact that it should no longer be the chief prosecutor but the Prosecutorial Council, who are in charge of training. This had been stipulated in the legislation on judicial training.

Article 40

55. The deletion of Article 104 on special reports to be provided upon the request by Parliament and by Government is to be welcomed because it removes a possibility to exert political pressure on the Chief State Prosecutor in individual cases.

56. While the proposed amendment was still part of the draft, at the Podgorica meeting some argued for keeping the possibility of special reports because they allowed Government and Parliament to obtain useful information.

57. If such a provision were to be re-introduced, it should be formulated in a way to exclude requests concerning individual cases.

Article 41

58. The Delegation was informed that the exclusion from information of not only of the media (existing Law) but of public at large (draft amendments), widens the scope of this article.

Article 42 and 43

59. Article 42 amends Article 106 on the secondment and drops the time limits of 6 months maximum (with consent) and 3 month (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. See the comments on Article 31 above.

Article 49

60. There is quite a difference between official secret and confidential information. The Montenegrin authorities explained that a draft law on official secrets is currently being prepared. The present article should be aligned with that law.

Article 50

61. This article refers to the Heading of Chapter X of the new law, where the word "prosecutor" is to be replaced 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 meeting.

Article 51

62. 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 of indirect control of the Prosecutor's Office.

63. The delegation was however 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. Since the translation of the draft this provision had further evolved and that there should be separate parts of the budget for the Council and the prosecutors' office.

4. Conclusion

64. Within the given framework of the Constitution, the draft amendments are well prepared and provide a good basis for the work of the State Prosecutor's Office in Montenegro.

65. Problems for the independence of the prosecution result rather from the Constitution itself, which provides that both the prosecutors and the members of the Prosecutorial Council are elected by Parliament without the requirement of a qualified majority. The Venice Commission hopes that it will be possible to address these issues in a future constitutional amendment.

66. While the amendments are well drafted, there are also some issues in the present draft which should be addressed:

1. A prosecutor who is being seconded against his or her will should be allowed to file a non suspensive protest to the Prosecutorial Council.
2. The right to appoint one member of the Council should remain with the Protector of Human Rights, or at least the President of Montenegro should be obliged to consult with the Protector before making his or her proposal for a person with relevant human rights experience.
3. The deletion of the provision on special reports to be provided upon the request by parliament and by government is to be welcomed. If such a provision were to be re-introduced it should be formulated in a way to exclude requests concerning individual cases.

67. The Venice Commission remains at the disposal of the authorities of Montenegro for any further assistance.