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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION ON
THE DRAFT AMENDMENTS TO
THE LAW ON THE PUBLIC PROSECUTION
OF SERBIA

on the basis of comments by

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I. Introduction

1. On 3 January 2013, the Venice Commission received a request for an opinion by Mr Nikola Selakovic, Minister for Justice and Public Administration of Serbia, on the draft amendments to the Law on judges, to the Law on the organisation of courts and to the Law on the public prosecution. This opinion is solely on the draft amendments to the Law on the public prosecution.
2. The Venice Commission has invited Mr Nicolae Esanu and Mr James Hamilton to act as rapporteurs for this opinion.
3. On 31 January - 1 February 2013, Mr Johan Hirschfeldt¹ and Mr Nicolae Esanu, accompanied by Mr Thomas Markert, Ms Tanja Gerwien from the Secretariat of the Venice Commission and Ms Nadia Cuk from the Council of Europe's office in Belgrade, visited Belgrade for meetings with the relevant stakeholders. They met with representatives of the Ministry of Justice and Public Administration, the working groups on the draft amendments to the Law on judges, on the draft amendments to the Law on the organisation of courts and on the draft amendments to the Law on the public prosecution, the Judges' Association of Serbia, the Prosecutors' Association of Serbia, the Committee on the Judiciary, Public Administration and Local Self-Government and a representative of the Committee on European Integration of the National Assembly of the Republic of Serbia.
4. The present opinion is based on the translation into English of the draft amendments to the Law on the public prosecution (CDL-REF(2013)004). A number of modifications to this text were made by the Secretariat of the Venice Commission following the above-mentioned visit to Belgrade on the basis of information received from the working group on the draft amendments to this Law. The modifications in the text of the draft amendments have footnotes, for easy reference.
5. *The present opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. General remarks

6. In 2008, within the context of the National Judicial Reform Strategy of Serbia that was adopted by the Serbian National Assembly in 2006, the Law on the public prosecution was part of a package of laws that included the laws on judges and on the organisation of courts and was adopted in December 2008. Although the Law on judges and the Law on the organisation of courts were both subject to an opinion by the Venice Commission², the Law on Public Prosecution itself never was.³
7. When the Serbian authorities introduced a reappointment procedure in 2009 for all existing judges, the same applied to all the prosecutors in the country. This procedure ended in December 2009 with the newly appointed judges and prosecutors taking office in January 2010.
8. This reappointment procedure raised concern with, *inter alia*, the Venice Commission and the European Commission (EC), stating that the decisions by the High Judicial Council to lay off

¹ See the *draft Opinion on draft Amendments to laws on the judiciary of Serbia*, CDL(2013)010.

² Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia, CDL-AD(2008)007.

³ See paragraph 5, Opinion on Rules of procedure on criteria and standards for the evaluation of the qualification, competence and worthiness of candidates for bearers of Public Prosecutor's function of Serbia, CDL-AD(2009)022.

all judges (and the State Prosecutorial Council to lay off all prosecutors) without providing reasoned decisions were tantamount to dismissals.⁴

9. The decisions to lay off all the prosecutors (and all the judges) were appealable to the Constitutional Court of Serbia. The judgments rendered on the cases brought before this Court pointed to the shortcomings in the procedure, which led to the need of reinstating all the prosecutors (and of all judges) that had been laid off in the country. In the meantime, new prosecutors (and judges) had been appointed and took office in January 2013, along with those who were reinstated.

10. In Belgrade, the Ministry of Justice informed the Venice Commission's delegation that it considered the now overall number of prosecutors and judges (newly appointed and those reinstated) to correspond to the general need for these professions in the country.

11. The draft amendments to the Law on the public prosecution of Serbia that the Venice Commission received on 3 January 2013 and that it was invited to comment on are technical in nature and do not seem to deal with the important aspects that need to be addressed with respect to the prosecution service in Serbia at the moment.

12. In this context, with the sudden and unforeseen reinstatement of all prosecutors (and all judges) into the system, it would be important for the Ministry of Justice of Serbia to take stock of the situation in the country. The Venice Commission would like to encourage the Ministry of Justice to take an active role in developing a clear concept for the prosecution service of Serbia, as this would be a difficult task for the State Prosecutorial Council to carry out due to the problems resulting from the unsuccessful reappointment process.

13. It is important that the reallocation/reintegration of prosecutors be well prepared and implemented so that the reform process proceeds smoothly and in a fair manner. It is therefore important that the reform process be measured and not implemented hastily at the expense of the quality that is required to make this reform process a successful one.

III. Draft amendments to the Law on the public prosecution

A. General

14. This opinion relates solely to the unofficial translation of the draft amendments to the Law on the public prosecution of 25 December 2012 (CDL-REF(2013)004). It does not attempt to examine the Law on the public prosecution as a whole.

15. The proposed amendments are rather limited in scope and address mainly technical issues.

B. The amendments

Article 5 – Independence in work

16. In this Article, which deals with the prosecutor's independence, there is a new provision obliging the public prosecutor and deputy public prosecutor to reject any action that represents an influence on the independence of the prosecutor's work. This provision should be welcomed as strengthening the prosecutor's independence concerning individual cases.

⁴ See paragraph 9, Interim Opinion on the draft decisions of the High Judicial Council and of the State Prosecutorial Council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia, CDL-AD(2011)015.

Article 10a - Principles in discharge of public prosecutor's function

17. This Article contains a new provision requiring prosecutors to perform their functions in a professional, honourable, impartial and just manner without unnecessary delay, especially taking care to protect victims and prevent discrimination on any ground.

18. The list of principles provided by the draft is unobjectionable. It should only be added that the draft might be reassessed in order to consider including the independence of prosecutors in its list of principles. However, in general, this provision should be welcomed.

19. The Venice Commission stated in its Report on the European Standards as regards the Independence of the Judicial System: Part II: Prosecution Service that "The 'independence' of prosecutors is not of the same nature as the independence of judges. While there is a general tendency to provide for more independence of the prosecution system, there is no common standard that would call for it [...]".⁵ Nonetheless, the interests of an independent judicial system require certain guarantees of non-interference as concerns the Prosecutor General, individual prosecutors and on a structural basis.

20. There are no international standards that require the independence of the prosecution service. But, at the same time, it is clear that there is a general tendency towards introducing the independence of the prosecution service. The fact that the Constitution does not expressly provide for this type of independence does not mean that it cannot be included in the law. In any case, it will be difficult to argue that the Constitution contains norms that exclude the independence of the prosecution service. At the same time it is important to avoid that the prosecutors' independence becomes a threat to the judges' independence.⁶

Article 18 – Mandatory instructions of a higher-ranking public prosecutor to a lower-ranking public prosecutor and Article 24 - Mandatory instructions of the Republican Public Prosecutor

21. There are two provisions that deal with mandatory instructions, the first is Article 18, which deals with mandatory instructions of the higher-ranking public prosecutor to a lower-ranking public prosecutor and the second is Article 24, which deals with mandatory instructions of the Republican Public Prosecutor.

22. Both Articles provide that the public prosecutor who received the mandatory instruction may submit an objection if s/he considers the instructions to be "unlawful and unwarranted" and the time limit to do so is eight days. The Venice Commission's delegation was told that the raising of an objection does not suspend the implementation of the instruction.

23. The amendments and the Law do not cover the situation of a prosecutor dealing with an instruction that runs counter to his/her conscience and therefore are not sufficient to be in line with European standards. Recommendation CM/Rec(2000)19 provides that the prosecutor should have a right to object not only to illegal instructions, but also in cases where s/he believes that an instruction runs counter to his/her conscience⁷. In its Report on the Independence of the Judiciary, Part II, the Venice Commission recommended that in case of an allegedly illegal instruction, a replacement of the prosecutor is not sufficient and "any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation

⁵ Paragraph 86, Report on the European Standards as regards the Independence of the Judicial System: Part II: Prosecution Service, CDL-AD(2010)040
http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf

⁶ Ibid., Section I.

⁷ See paragraph 10, Recommendation Rec(2000)19, <https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM>

that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.”⁸

Article 29 – Competence of the Republican Public Prosecutor

24. Article 29 amends the provisions concerning the Republican Public Prosecutor’s competence to submit regular annual reports about the work of the office to the National Assembly. However, at the same time the amendment provides that the Republican Public Prosecutor must submit to the National Assembly “other reports”.

25. This is a reasonable provision provided that it means to refer to the competence of the prosecutor rather than to impose an obligation on him/her. However, if there is any doubt in the wording in Serbian, it should be made clear that the prosecutor should not have an obligation to report to the National Assembly on the details of individual cases.

Article 47 – Code of Ethics

26. The amendments to Article 47 do not provide an obligation for the State Prosecutorial Council to seek the opinion of professional associations of public prosecutors and deputy public prosecutors at the drafting or adopting stage of a code of ethics, but only at the stage of enactment. Even if, as mentioned by the members of the working group during the meeting in Belgrade, the draft provides for an obligation to seek the opinion at the “adoption” stage (and not at the enactment stage), this should not be considered as sufficient.

27. The right of the prosecutor would be better protected if professional associations were involved in the process at an earlier stage. Consultation of this sort should be arranged.

Article 53 - Right to association

28. This Article has been amended to permit meetings of professional associations of prosecutors to take place during work time, provided they do not “disturb the process of work”. This appears to be a reasonable provision.

Article 75 – Fundamental rules for the election of deputy public prosecutor

29. Article 75 deals with the appointment of deputy public prosecutors. The State Prosecutorial Council is obliged, according to the text, when proposing candidates, to propose a candidate who has completed the initial training in the Judicial Academy.

30. According to the clarifications provided at the meeting in Belgrade, this does not exclude people without that background, just states that those at the Academy have an advantage. That, however, is not what the English text says and if the clarification is correct presumably there is a mistranslation.

Article 82 – Nomination and election

31. This Article, which regulates the nomination and election of candidates for public prosecutor’s office, is rephrased and seems not to have introduced any major changes, except for the introduction of the obligation to publish the list of candidates on the Internet site of the State Prosecutorial Council. The obligation to publish the list of candidates is to be welcomed.

⁸ Paragraph 59, Report on the European Standards as regards the Independence of the Judicial System: Part II: Prosecution Service, CDL-AD(2010)040
http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf

32. However, the provision then goes on to say that in making the list, “care shall be taken of the national composition of the population, adequate representation of members of national minorities, as well as knowledge of professional legal terminology in national minority languages using court”. It is unclear what this means in practice. What happens if the original list based on professional competence, etc., does not contain anyone from a particular national minority or with the necessary language skills? Is the list to be supplemented? Presumably, if it can be supplemented with persons who did not have the necessary professional skills to make it on to the original list, they must at least reach some acceptable minimum standard. Is a quota to be fixed? These matters need to be clarified in the text of the Law, as the practical implications of the current provision are very vague. The same problem arises in relation to trainees in Article 122.

33. In addition, some differences in the text give rise to concern. For example, the deletion of the provision that stated that in the nomination and proposition of candidates for a public prosecutor’s office, discrimination on any grounds shall be prohibited, is unclear. However, its deletion surely does not mean that discrimination will now be permitted? It is also not clear why it was necessary to provide that the State Prosecutorial Council shall explain the proposal and decision on the election of candidates instead of simply providing that every proposal and/or decision must be reasoned.

34. In any case and in accordance with best practices, account will need to be taken of the fact that it is mandatory to ensure that appointments of prosecutors and deputy prosecutors are made on the basis of objective criteria. These criteria in turn must be established in advance by law or in conformity with the procedure provided by law, on the basis of a transparent procedure and that decisions must be reasoned.

Article 95 – Procedure before the State Prosecutorial Council

35. This Article provides for open hearings of the State Prosecutorial Council except upon the request of a prosecutor against whom the proceedings are conducted. This appears reasonable.

Article 102a – Extraordinary evaluation of performance

36. A new Article 102a provides for extraordinary evaluation of prosecutors six months after the date when they are evaluated and obtain the appraisal “does not satisfy”. Again, it is unclear how this provision fits into the existing scheme of things. What happens after the initial finding that the prosecutor is unsatisfactory? Is s/he suspended, or does s/he simply continue at work until the six-monthly inspection takes place? This needs to be clarified.

37. While there is a lot to be said for a second inspection carried out by three persons, where the prosecutor is found unsatisfactory, it does not seem a good idea to permit continuance in office for six months until a second inspection can be carried out. If the purpose is to have a second check of the position, why not carry it out as soon as practicable after the first?

Article 111 – Decisions of the State Prosecutorial Council

38. This Article provides for the right of the prosecutor, subject to disciplinary sanction, to appeal to the Administrative Court. However, the basis for the exercise of this right is not clear. Is it a right to a rehearing – which is preferable - or is it purely procedural review?

IV. Conclusions

39. The Venice Commission's delegation was informed during its visit to Belgrade that the draft amendments to the Law on Public Prosecution only dealt with the most pressing changes that needed to be made to the Law and that it, by no means, was a complete revision of the Law.

40. According to the information received by the Venice Commission's delegation, further reforms will be necessary and the Venice Commission would like to invite the Serbian authorities to make such a change as soon as practicable. It would notably be important for the Ministry of Justice of Serbia to take stock of the situation in the country and to take an active role in developing a clear concept for the prosecution service of Serbia, as this would be a difficult task for the State Prosecutorial Council to carry out due to the problems resulting from the unsuccessful reappointment process.

41. The draft amendments to the Law on public prosecution of Serbia are, on the whole, positive. However, there are a number of unclear provisions in the texts that should be revisited and clarified, some of them may also be due to the translation.

42. The following elements were raised, *inter alia*:

- Article 18 on the mandatory instructions of a higher-ranking public prosecutor to a lower-ranking public prosecutor - should be revisited in order to cover the situation of a prosecutor dealing with an instruction that runs counter to his/her conscience; an appeal to an independent prosecutorial body against alleged illegal instructions should be introduced;
- Article 47 on a Code of Ethics - do not provide an obligation for the State Prosecutorial Council to ask the opinion of professional associations of public prosecutors and deputy public prosecutors at the stage of drafting and adopting of a code of ethics, but only at the stage of enactment. Consideration should be given to involve these associations at an earlier stage;
- Article 82 on nomination and election – raises concern with respect to the composition of the list of candidates, which should be clarified;
- Article 102a on extraordinary evaluation of performance, provides for extraordinary evaluation of prosecutors six months after the date when they are evaluated and obtain the appraisal “does not satisfy”. It is unclear how this provision fits into the existing scheme of things – and this should be clarified;
- Article 111 on decisions of the State Prosecutorial Council – the basis for the right of the prosecutor subject to disciplinary sanction to appeal to the Administrative Court should be clarified.

43. The Venice Commission is ready to assist in further reforms in the legislation on the prosecution service, should the Serbian authorities make a request for such assistance.