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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON
THE DRAFT AMENDMENTS TO THE
LAW ON THE STATE PROSECUTORIAL COUNCIL
OF
SERBIA

on the basis of comments 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*

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I. INTRODUCTION

1. The Venice Commission received a request for an opinion on the draft Law on the State Prosecutorial Council (and on the High Judicial Council) of Serbia by letter of 26 June 2014 from Mr Nikola Selaković, Minister of Justice of Serbia.

2. The Venice Commission invited Mr Nicolae Esanu, Mr Jørgen Steen Sørensen and Mr Andras Varga to act as rapporteurs for this opinion.

3. This opinion is a part of a series of opinions that were adopted by the Venice Commission on the judicial reform in Serbia, notably the Opinion on the Constitution of Serbia (CDL-AD(2007)004), the 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), the 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) and the Opinion on the draft amendments to the Law on the Public Prosecution of Serbia (CDL-AD(2013)006). It also takes into account the standards referred to by the Venice Commission in its opinions on judicial councils established in other countries, for instance in Armenia¹, Bosnia and Herzegovina,² Montenegro³ and Turkey⁴.

4. On 28-29 August 2014, the rapporteurs met with the Serbian authorities in Belgrade to discuss the draft amendments to the laws on the High Judicial Council and on the State Prosecutorial Council. The Venice Commission's delegation met with the President of the Supreme Court of Cassation and the High Judicial Council; the President of the State Prosecutorial Council; representatives of the OSCE and diplomatic representations; the Judges Association of Serbia; the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia; the State Secretary and Assistant Minister of the Ministry of Justice of Serbia; the President of the National Commission for the implementation of the Strategy for the reform of justice and representatives of the Working Group responsible for the draft amendments to the laws on the High Judicial Council and the State Prosecutorial Council of Serbia.

5. This opinion is based on the translation from Serbian into English of the draft amendments to the Law on the State Prosecutorial Council of Serbia (CDL-REF(2014)028 hereinafter, the "draft Law"). The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

6. *The present opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

¹ Joint Opinion on the draft Law amending and supplementing the Judicial Code (evaluation system for judges) of Armenia (CDL-AD(2014)007).

² Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (CDL-AD(2014)008).

³ Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro (CDL-AD(2013)028).

⁴ Interim Opinion on the draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey (CDL-AD(2010)042).

II. GENERAL REMARKS

A. Independence of prosecutors

7. While the independence of judges and the judiciary in general have their origin in the fundamental right for persons to a fair trial – i.e. fair and public hearing within a reasonable time by an **independent** and impartial tribunal established by law⁵, without unjustified interference, is an important part of the common European heritage – the independence of prosecutors and the prosecution system does not have such a common standard.

8. The Venice Commission has found in its Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service (hereinafter, the “Report”), that the major reference texts allow for systems where the prosecution service is not independent from the executive. But for such systems, guarantees need to be provided at the level of the individual case to ensure that there is transparency concerning instructions that may be given.⁶

9. The Report further states that there are a variety of prosecution systems that exist in Europe today, which have developed as a result of the various criminal justice systems and that there is, therefore, no uniform model for all states to follow. Nevertheless, virtually all modern criminal justice systems in Europe have common values: for instance, states generally regard criminal prosecution as a core function of the state and most systems provide for a monopoly on criminal prosecutions by the state or an organ of the state.⁷

10. Recommendation Rec(2000)19 of the Committee of Ministers (of the Council of Europe) to member states on the Role of public prosecution in the criminal justice system states that:

“Legal Europe is divided on this key issue between the systems under which the public prosecutor enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action.

Inasmuch as this is an institutional question - ...the very notion of European harmonisation around a single concept seemed premature.”⁸

11. As the prosecutor acts on behalf of society as a whole and because of the serious consequences of criminal conviction, the prosecutor must act fairly, impartially and to a high standard. Even in systems where the prosecutor is not part of the judiciary, the prosecutor is expected to act in a judicial manner.⁹

12. It is therefore important that the qualities required for prosecutors be similar to those of a judge and that suitable procedures for appointment and promotion are in place. Prosecutors, like judges, will take unpopular decisions on occasion and these are likely to be criticised in the media and become the subject of political controversy. Proper tenure and appropriate arrangements for promotion, discipline and dismissal, which will ensure that the prosecutor cannot be victimised on account of having taken an unpopular decision, must be in place and secured.¹⁰

⁵ Article 6, European Convention on Human Rights.

⁶ Paragraph 23, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service (CDL-AD(2010)040).

⁷ Ibid, paragraphs 10-12.

⁸ P. 11, Explanatory Memorandum to Recommendation Rec(2000)19 of the Committee of Ministers to member states on the Role of public prosecution in the criminal justice system

⁹ Ibid, paragraph 15.

¹⁰ Ibid, paragraph 18.

B. Prosecutorial councils

13. While a number of countries have established prosecutorial councils, there is no uniform standard binding on all European states for such councils.¹¹

14. The Venice Commission believes that these councils, where they exist, are an appropriate structure to ensure the transparency and protection of lower-ranked prosecutors, by providing valuable input in the appointment and disciplinary processes.¹²

III. DRAFT LAW ON THE STATE PROSECUTORIAL COUNCIL

A. Background

15. Within the context of the National Judicial Reform Strategy of Serbia, that was introduced in 2006 in order to reform the Serbian justice system “*widely perceived by the Serbian public as being corrupt*”,¹³ the Serbian authorities decided to introduce a reappointment process of all existing prosecutors (and judges) in Serbia, in 2009.

16. This procedure ended in December 2009 and the newly appointed prosecutors (and judges) took office in January 2010. The Venice Commission and the European Commission stated, at the time, that the decisions by the State Prosecutorial Council (hereinafter, the “SPC”) not to reappoint all prosecutors (and the High Judicial Council not to reappoint all judges) without providing reasoned decisions were tantamount to dismissals.

17. In Belgrade in August 2014, the Venice Commission’s delegation was informed that a general distrust remained by the Serbian prosecutors of the institution that is supposed to represent them, i.e. the SPC. The reason for this being that the current composition was involved in the decision to confirm the dismissals of the prosecutors under the reappointment process.

18. However, the Venice Commission’s delegation was told by professional associations that the situation for the prosecutors was not as acute as that for the judges and their lack of confidence in the High Judicial Council. This was due to the fact that the decisions to confirm dismissals under the reappointment process were much lower in number than those for judges. The delegation was told that the distrust of the SPC was linked to the election of the members of the SPC in 2011, which they claim was carried out without the participation of a substantial body of prosecutors and is therefore perceived as lacking legitimacy and credibility.

B. Constitutional provisions and the current Law on the State Prosecutorial Council

19. The Constitution of the Republic of Serbia adopted by the National Assembly on 30 September 2006, established the SPC under Articles 164-165, bringing this institution to the constitutional level. The Law on the SPC of 2008 (revised in 2010) then effectively introduced the SPC in Serbia.

¹¹ See paragraphs 64 and 68, CDL-AD(2010)040, “*While there are specialised prosecutorial councils for example in Bosnia and Herzegovina, Moldova (CDL(2008)055), Montenegro (CDL(2008)023), Serbia (CDL(2009)103) and “the Former Yugoslav Republic of Macedonia” (CDL(2007)023), France, Italy and Turkey (CDL(2010)125) have judicial councils, which are also competent for prosecutors (however, with a separate chamber for prosecutors in France; ...)*”.

¹² Ibid, paragraphs 41 and 65

¹³ See Opinion on the draft laws on judges and on the organisation of courts of the Republic of Serbia (CDL-AD(2008)007), paragraph 5.

20. Article 164 of the Constitution defines the SPC as an autonomous body, which is to provide for and guarantee the autonomy of Public Prosecutors and Deputy Public Prosecutors in accordance with the law.

21. This provision also determines the SPC's composition – eleven members consisting of three *ex officio* members (the Republic Public Prosecutor, the Minister of Justice and the President of the authorised committee of the National Assembly); eight electoral members elected by the National Assembly (six of whom are public prosecutors or deputy public prosecutors with permanent tenure, one of whom shall be from the territory of autonomous provinces and two respected and prominent lawyers with at least 15 years' experience, one of whom shall be a solicitor and the other a law professor).

22. Article 164 of the Constitution also determines the term of office of the SPC's members, which is of five years, except for the members appointed *ex officio*.

23. The SPC's jurisdiction is set out in Article 165 of the Constitution as follows: "*The State Prosecutors Council shall propose to the National Assembly the candidates for the first election of a Deputy Public Prosecutor, elect Deputy Public Prosecutors to permanently perform that function, elect Deputy Public Prosecutors holding permanent posts as Deputy Public Prosecutors in other Public Prosecutor's Office, decide in the proceedings of termination of Deputy Public Prosecutors' tenure of office in the manner stipulated by the Constitution and the Law, and perform other duties specified in the Law.*"

24. The current Law on the SPC addressed the issue of the excessive involvement of the National Assembly in the appointment of the members of the SPC by providing a procedure whereby the National Assembly would only be presented with the name of the person elected by the authorised nominators in respect of each vacancy. However, the National Assembly is still entitled to reject the candidate, in which case another election would take place.

25. In the light of the Venice Commission's earlier criticism of the Constitution's provisions, the delegation welcomed the information that it received in Belgrade about a Commission on revising the Constitution having been set up to deal with the amendments to the Constitution.

C. Comments on the draft Law – Article by Article

26. The Constitution of Serbia stipulates, in its Article 156, that the "*Public Prosecutor's Office shall be an independent state body which shall prosecute the perpetrators of criminal offenses and other punishable actions, and take measures in order to protect constitutionality and legality. Public Prosecutor's Office shall perform its function on the grounds of the Constitution, Law, ratified international treaty and regulation passed on the grounds of the Law*", and provides that the Republican Public Prosecutor's Office is the supreme prosecutorial office in Serbia (Article 157). Yet, the Law on SPC only grants autonomy to the SPC (Article 2 of the Law) and guarantees autonomy only to public prosecutors and deputy public prosecutors, who are (as well as the Republican Public Prosecutor and members of the SPC) elected by the National Assembly. It seems that the concept for the prosecution service of Serbia is still not very clear.¹⁴ The approach in the draft Law should be harmonised with that of the Constitution.

¹⁴ See paragraph 12, Opinion on the draft amendments to the Law on the Public Prosecution of Serbia (CDL-AD(2013)006).

27. Furthermore, elected members of the SPC may be dismissed by the National Assembly (even if on proposal by the SPC in the case of public prosecutors or deputy public prosecutors, by the Bar Association for lawyers, by deans of faculties of law for professors). This role of the National Assembly could easily lead to the politicisation of the work of the SPC as its decisions are not strictly based on objective grounds. The danger of politicisation in this situation is clear when compared to a system of an independent Prosecution Service, but it is even more pronounced than in the case of a Prosecution Service that comes under the Executive (where the decisions on dismissal made by a minister – or other state official – and the political accountability of the minister are, in principle, separate from each other).

28. There is an additional factor that increases the danger of politicisation: the proposed vote of confidence in the dismissal procedure. A vote of confidence has its place in the political sphere and is a tool that should only apply in the political decision-making process (see comments on Chapter V, below).

Article 6 – President and Deputy President of the Council

29. Under current Article 6, the Republican Public Prosecutor (hereinafter, the “RPP”) is, by virtue of office, President of the SPC, while the Deputy is elected among the prosecutors and deputy prosecutors, who are members of the SPC (current Article 7). This will no longer be the case under new Article 6 that requires the President (and Deputy President) to be elected from among public prosecutors of “*the elective members of the Council*”.

30. Also, since the RPP is not an elected member, s/he will apparently not qualify for the election as President of the SPC. This means that in the future, the President of the SPC will be a prosecutor below the rank of the RPP within the hierarchy of the prosecution service.

31. Articles 164-165 of the Constitution on the SPC do not set out who the President of the SPC should be. Although there are no common European standards on who should preside a prosecutorial council¹⁵, in principle, ensuring the stability of the SPC would require that a new rule be applied only to the next appointments and should not affect the current ones.

32. However, the introduction of an election-based system may be seen as a step towards improving the autonomy (guaranteed by Article 164 of the Constitution) and the legitimacy of the SPC (see also comments under Article 17 of the draft “*Independent Articles*” under the transitional provisions, below).

Article 9 - Immunity

33. This Article only applies to offences committed “*in discharge of duties*” of the SPC. The purpose of the provision is supposedly to protect members (the heading of the provision is “Immunity”) reflecting Article 51 paragraph two of the Law on Public Prosecution¹⁶ as regards prosecutors in general and Article 162 of the Constitution¹⁷.

¹⁵ The Report on the prosecution service (CDL-AD(2010)040) does not mention the presidency of prosecutorial councils nor does the Report on judges (CDL-AD(2010)004) refer to the presidency of judicial councils.

¹⁶ “A public prosecutor and/or deputy public prosecutor may not be deprived of freedom in proceedings instituted for a criminal offence committed in the performance of prosecutorial office and/or service, without a permission of the relevant Committee of the National Assembly.”

¹⁷ “A Public Prosecutor and Deputy Public Prosecutor may not be held responsible for the expressed opinion while performing the function of prosecutors, except in cases when a Public Prosecutor or Deputy Public Prosecutor commits a criminal offence by violating the law.

A Public Prosecutor or a Deputy Public Prosecutor may not be detained or arrested in the legal proceedings instituted due to a criminal offence committed in performing the prosecutor’s function or service without the approval of the authorised committee of the National Assembly.”

34. This means that prosecutors have functional immunity, which is in line with Venice Commission recommendations.¹⁸

Articles 9a and 9b - Removal from office and Decision on suspension

35. The terminology is unclear because these provisions (and headings) refer to both “removal” (understood to be permanent) and “suspension” (understood to be temporary, pending a decision on dismissal). It seems that these provisions refer (and should refer) to suspension only. If this is correct, the terminology should be changed.

36. The new element introduced by the draft amendment is the rule that prescribes suspension from office following a no-confidence vote. Whilst there are no common European standards on the issue of suspension of prosecutors, it is a general principle that suspension is a mechanism that should be used in case of suspicion of reasonably serious deficiencies etc. in the discharge of duties, making immediate removal necessary. The rule on suspension is logical when it is based on a final court decision, as it serves as a temporary restraint from the prosecutor’s activity and should be automatic.

37. The reference to the no-confidence vote raises concern because it involves a subjective assessment and its appropriateness in the context of a dismissal process is in itself questionable (see below). The Venice Commission has raised this issue in previous opinions, notably on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, where it stated: “...it seems to mean that a person can be removed from the HJPC for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.”¹⁹

39. A vote of confidence should be seen as specific to political institutions and is not suited for institutions such as the SPC. The members of the SPC are elected for a fixed term and their mandates should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons (see comments under Chapter V below). The Venice Commission therefore strongly recommends that the amendment to Article 9a on the suspension of office due to a vote of confidence not be kept.

Article 14 – Manner of operation

38. This Article sets out that the sessions of the SPC are open to the public, if the SPC does not decide to work in closed session, in accordance with its rules of procedure. The former rule was the reverse: “*The State Council may decide to operate in a public session, in accordance with the Rules of Procedure*”.

39. This amendment should be welcomed and will contribute to the transparency of the SPC’s activity. However, the majority of the SPC’s procedures are of a personal nature (election, dismissal) and the persons involved (candidates to positions of prosecutors or prosecutors in office) are not political actors, they are therefore not expected to reveal their personal data to the public. On the contrary, security or other reasons related to the protection of personal data might also require closed sessions.

¹⁸ See paragraph 61, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service (CDL-AD(2010)040).

¹⁹ Paragraph 51, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (CDL-AD(2014)008).

Articles 15- 16 – Permanent working bodies - and Ad hoc working bodies

40. These Articles establish permanent working bodies in specific areas within the SPC's jurisdiction and *ad hoc* working bodies to consider specific issues within its competence and to make proposals, give opinions and provide expert opinions.

41. It is, however, not clear what the substantive difference is between the permanent and *ad hoc* bodies, although the latter appear to be subsidiary bodies set up for a specific or punctual purpose. The draft Law neither defines the powers of these bodies nor the procedure of selection of the members of these bodies. It merely makes reference to the rules of procedure and to subsequent special acts for their composition, establishment and operation (see Article 15 second paragraph and 16, second paragraph).

Chapter III (Articles 20-38) - Procedure for election of the State Council Members

42. It is a significant characteristic of the SPC that its elected members are not (at least not directly) elected by their peers, but by the National Assembly. There is no European standard to the effect that members of a prosecutorial council cannot be elected by parliament. In the Venice Commission's Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service,²⁰ it indirectly accepts such a system. However, the Commission then goes on to say that in such situations, election should preferably be by qualified majority (to reduce the risk of politicizing elections).

43. This position has not prevented the Venice Commission from subsequently questioning legislation providing parliament with very significant powers as to electing members of a prosecutorial council. For instance, in its Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, the Venice Commission recommended: *“that BiH consider limiting the involvement of the legislative power to the election process of non-judicial/prosecutorial members of the HJPC, whereas a majority of the HJPC members should be elected by their peers.”*²¹

44. The Serbian authorities have attempted to curb the National Assembly's involvement in the appointment of SPC members and this can be seen under current Article 35 of the Law on the SPC, where the SPC only proposes *“one candidate who won the largest number of votes”* from the profession to the National Assembly. However, the latter is still entitled to reject the candidate, in which case another election would take place.²² If this role is maintained, it is recommended, in order to increase the SPC's democratic legitimacy, that a qualified-majority requirement be introduced.

45. It will therefore be important for the amendments to the Constitution to reduce the excessive role of the National Assembly in judicial appointments.

Chapter V (Articles 41-46v) – Dismissal of elected members

46. Chapter V of the draft Law is dedicated to the dismissal of elected members only. There seems to be no provisions for the dismissal of *ex officio* member – and this should be clarified. The current Law only provides for early termination of their office due to the expiry of the term of their original function.

²⁰ See paragraph 66, CDL-AD(2010)040.

²¹ Paragraph 46, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (CDL-AD(2014)008).

²² CDL-AD(2008)006, paragraph 11.

47. Article 41 sets out three reasons for which an SPC member can be dismissed before the end of his or her elected term: (1) if s/he failed to perform the duty of an SPC member in compliance with the Constitution and law; (2) if s/he was convicted with a final court decision to unconditional imprisonment for a criminal offence and (3) if s/he is convicted with a final court decision for an offence which renders him or her dishonourable for exercising the office of an SPC member.

48. Reasons (2) and (3) are covered by Article 42, imposing as an obligation that the proposal for dismissal of the elected SPC member be submitted to the National Assembly.

49. For reason (1), the dismissal procedure follows the steps below:

Step 1: there are two ways of starting the procedure. The first way is through Article 43, which sets out that “*each member of the council or authorized nominators*” may initiate the dismissal of an elected SPC member. The second way is through Article 45, which provides for a motion (proposal) for dismissal by at least 20% of the total numbers of public prosecutors and deputy public prosecutors who are entitled to vote on the election of elected members of the SPC; at least 20 % of the total number of lawyers registered in registry of lawyers in the Bar Association; at least 20 % of all law faculty deans.

Step 2: following the acceptance of the initiative by the SPC or after the motion/proposal (this should be harmonised) for dismissal has been submitted to the SPC, the procedure before the SPC begins (Article 46). It will be conducted in line with the principle of a fair trial. The SPC will render a reasoned decision on the admissibility of the initiative or a reasoned opinion on the proposal for dismissal, and this decision or opinion will be published on the webpage of the SPC (Article 46a).

Step 3: a vote of confidence will be casted by secret ballot either by the public prosecutors and deputy public prosecutors that are entitled to elect the elected members of the SPC or by the authorised nominators of the members from the ranks of lawyers and law professors (Article 46b).

Step 4: in case of a vote of no confidence, the SPC or the authorised nominators shall propose to the National Assembly the removal of the SPC member. The decision on dismissal, based on the proposals shall be enacted by the National Assembly (Article 46v). If the voting did not result in a no-confidence vote, Article 46v provides that “*The council shall suspend the procedure of dismissal of an elected member of the council, within eight days of the voting ...*”.

50. The general impression of this new procedure is that it is ambiguous and seems to confuse two different kinds of procedures: a procedure on the preservation of confidence and a disciplinary procedure.

51. A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the SPC, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

52. A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of “lack of confidence”. Article 41 clearly defines the reasons that can lead to a dismissal of the SPC members. The disciplinary procedure must therefore only focus on the question whether the SPC member failed to perform his or her duties “*in compliance with the constitution and law*”. This question must not be confused with the question whether said

member still enjoys the confidence of the public prosecutors and deputy public prosecutors who participated in his or her election. The disciplinary procedure has to guarantee the SPC member a fair trial. While a reference to a fair trial is made under Article 46a, details on related guarantees should be provided.

53. In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, for instance, an “impeachment” of a member is allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. In fact, the draft Law lacks specific provisions on disciplinary issues in respect of SPC members and merely focuses on dismissal. An appeal to a court of law should also be provided.

54. In particular, the introduction of the involvement of the profession at two stages of the dismissal procedure: (a) the motion for dismissal under Article 45 and (b) the vote of confidence under Article 46b – remains difficult to understand. This includes both its underlying philosophy and its technical aspects.

55. While existing concerns with respect to the composition of the SPC and its legitimacy may be understandable, a cautious approach should be adopted when addressing the matter. It should be underlined, for instance, that a vote of confidence regarding members of a prosecutorial council is highly unusual. Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced.

56. If reasons for the termination of office of an elected SPC member are objective, the dismissal should be an *ex lege* consequence of a court decision. In addition, a vote of confidence is difficult to reconcile with the disciplinary functions of a council such as the SPC.²³

Transitional provisions

57. Under Article 17 of the transitional provisions, a new President and Deputy President should be elected within 30 days from the day of entry into force of the Law. This effectively means that the RPP will have to resign immediately from his or her position as President of the SPC (and cannot be elected President again as s/he does not qualify, see above). It is effectively a dismissal of the President (who cannot even in principle be elected) and probably also a *de facto* dismissal of the Vice President.

58. These types of changes can endanger the stability of institutions such as the SPC and therefore should be avoided. This applies especially where such changes affect the term of office of persons elected²⁴ under previous provisions – and in particular where their term of office is set by the Constitution (Article 164 of the Constitution).

²³ See paragraph 194, Opinion on the draft Law on the review of the Constitution of Romania (CDL-AD(2014)010), it is noted that provisions in the Romanian law allowing revocation of magistrates members of the judicial council by general assemblies of judges/prosecutors have been found unconstitutional by the Romanian Constitutional Court.

²⁴ See Opinion on the draft Law on introducing amendments and addenda to the Judicial Code of Armenia (term of office of court presidents) (CDL-AD(2014)021).

59. In the particular case of the SPC of Serbia, this only applies to the Deputy President, who was elected, and hence his or her term is set by the Constitution. The position of the President of the SPC is different: s/he is an *ex officio* member (i.e. not an elected member of the SPC) whose term of office is not set by the Constitution, but expires when the six-year term as RPP ends.

60. Therefore, in this case, the Deputy President of the SPC should be kept in his or her position.²⁵

IV. CONCLUSIONS

61. On the whole, the draft amendments to the Law on the SPC are a positive step by the Serbian authorities and aim to improve, among others, the appointment system and general status of the SPC. There are, however, concerns regarding a number of the draft amendments which cannot be addressed currently due to the fact that their change is limited by the problematic provisions on the SPC in the current Constitution.

62. In particular, it will be important that the amendments to the Constitution reduce the excessive role of the National Assembly in the appointments of SPC members. At the moment, the National Assembly elects (directly or indirectly) all the SPC members.

63. The Venice Commission strongly recommends that the dismissal procedure be reconsidered in the light of the concerns raised in this Opinion. In particular, the Venice Commission recommends that the motion for dismissal and the vote of confidence – both involving the professions represented in the SPC in the dismissal process of elected SPC members – should be removed. This kind of involvement is not suitable for institutions such as the SPC, where members are elected for a fixed term.

64. Since the Law on the SPC will need to be amended again once the Commission on revising the Constitution has completed its work, it might be useful to wait with the amendments to the Law on the SPC until the Constitution has been amended.

65. The Venice Commission remains at the disposal of the Serbian authorities for any further assistance they may need.

²⁵ The text of paragraphs 60 and 61 will be further discussed at the meeting of the sub-commission on 10 October 2014.