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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SERBIA

DRAFT OPINION

ON

TWO DRAFT LAWS IMPLEMENTING THE CONSTITUTIONAL AMENDMENTS ON THE PROSECUTION SERVICE

On the basis of comments by

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Mr James HAMILTON (Expert, Former Member, Ireland)
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I. Introduction

1. By letter of 12 September 2022, the Serbian Minister of Justice Ms Maja Popović requested an opinion of the Venice Commission on a legislative package composed of five draft Laws aimed at implementing the 2022 constitutional amendments. The Commission has issued two opinions (the 2021 Opinions) on the draft constitutional amendments on the judiciary and draft Constitutional Law for the implementation of the constitutional amendments.[1] The constitutional amendments were approved by a referendum held on 16 January 2022.

2. The three draft laws related to the implementation of the constitutional amendments related to the judiciary were examined by the Venice Commission in October 2022 (hereinafter the "October 2022 Opinion").[2] A revised version of these draft laws is the object of a Follow-up Opinion (CDL(2022)050, to be adopted in December 2022). The present Opinion deals with the two draft Laws implementing the constitutional amendments related to the prosecution service, namely the draft Law on the Public Prosecutor's Office (CDL-REF(2022)061) and the draft Law on the High Prosecutorial Council (CDL-REF(2022)060).

3. Mr Martin Kuijer (Substitute Member, the Netherlands), Mr Kaarlo Tuori (Honorary President), and Mr James Hamilton (Expert, Former Member, Ireland) acted as rapporteurs for this opinion. On 23, 24 and 35 November 2022, a delegation of the Commission composed of Mr Kuijer and Mr Hamilton, accompanied by Ms S. Granata-Menghini and Mr G. Dikov from the Secretariat travelled to Belgrade and had meetings with the Prime Minister, the High Prosecutorial Council, the Supreme Public Prosecutor and members of her office, with several members of the National Assembly from the majority and the opposition, with the Minister of Justice, the Association of Prosecutors, as well as with representatives of civil society and of the international community. The Commission is grateful to the Ministry of Justice for the excellent organisation of this visit.

4. This Opinion was prepared in reliance on the English translation of the two draft Laws. The translation may not accurately reflect the original version on all points.

5. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 23 and 24 November 2022. The draft opinion was examined at the meeting of the *Sub-Commission on *** on *** 2022. [Following an exchange of views with ***,] it was adopted by the Venice Commission at its *** Plenary Session (Venice, *** 2022)*.

II. Background and the procedure for the adoption of the two draft laws

6. The context of the ongoing judicial reform in Serbia was described in detail in the October 2022 Opinion. In summary, the two draft Laws aim at implementing the January 2022 constitutional amendments which the Commission had previously assessed in 2021. In April 2022 a working group composed of civil servants, representatives of the judiciary, the public prosecution office, legal scholars, and representatives of civil society, was created within the Ministry of Justice. In September 2022, the Ministry of Justice approved the draft Laws developed by the Working Group and published them for public consultations.

7. In the October 2022 Opinion, the Commission praised the Serbian Ministry of Justice for "the considerable effort they invested in the preparation of the legislative package implementing the constitutional amendments, and for the inclusiveness of the process of preparation of the

[1] Venice Commission, CDL-AD(2021)032, Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments of Serbia, and CDL-AD(2021)048, Urgent opinion on the revised draft constitutional amendments on the judiciary of Serbia.

[2] Venice Commission, CDL-AD(2022)030, Serbia - Opinion on three draft laws implementing the constitutional amendments on the judiciary

legislative package" (para. 95). This fully applies also to the two draft Laws under examination. The composition of the Working Group ensured a sufficiently inclusive process, and the majority of the Commission's interlocutors confirmed to have been duly informed and consulted. The Venice Commission encourages the Serbian authorities to continue public consultations until the draft Laws are finalised and introduced before the Parliament.

III. Analysis

8. The two draft Laws are voluminous and cover a vast range of issues relating to the functioning of the prosecution service and to ensuring the independence of the prosecution service as well as prosecutorial autonomy. Due to the time constraints, the Venice Commission will limit itself to addressing some key issues. If the Opinion remains silent on other elements of the two draft Laws, this is not to say that the Venice Commission agrees with them nor that it will not comment on them at a later stage.

9. The Venice Commission also refers the Serbian authorities to the recommendations formulated in the October 2022 Opinion on the judiciary: some of these recommendations are relevant *mutatis mutandis* in the context of the two draft Laws on the prosecution service.

10. As a general preliminary remark, the Venice Commission reiterates that any legislative amendments "should be accompanied by a change in the legal culture".[3] This was said in the context of the judicial reform, but the same approach is also applicable to the reform of the prosecution service. Even the most sophisticated mechanisms of judicial or prosecutorial governance can be instrumentalised for ulterior purposes. Therefore, the process of reform of the prosecution service will not be achieved with the adoption of the two Laws under consideration.

A. The law on the High Prosecutorial Council

1. Composition

11. There is no international standard as to the need to set up a Prosecutorial Council (see the Committee of Ministers' recommendation Rec(2000)19). The Venice Commission has, however, acknowledged that if the prosecutorial councils are "composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors".[4]

12. There are various reasons for creating such councils: they dilute the power of the chief prosecutor and senior staff, give the prosecutors a say in the processes which affect their careers, free up the chief prosecutor to deal with the complex legal issues, etc. The Venice Commission agrees with the Consultative Council of European Prosecutors that "properly composed councils enhance the autonomy of the prosecutorial system vis-à-vis other branches of power as well the internal autonomy of the individual prosecutors. It need hardly be emphasised that the independence of prosecutorial councils and their individual members should not be a prerogative or privilege conferred in their interest, but a guarantee in the interest of a fair, impartial and effective functioning of the prosecution system".[5]

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[3] Venice Commission, CDL-AD(2022)030, cited above, para. 16

[4] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 65

[5] Opinion No. 16 of the Consultative Council of European Prosecutors on the "Implications of the decisions of international courts and treaty bodies as regards the practical independence of

13. The Committee of Ministers in its Recommendation on the role of the public prosecutors in the criminal justice system (Rec(2000)19) makes no reference to prosecutorial councils, and, consequently, has not set any standard as the requirement to establish such councils or with respect to their functions, powers, duties, or the composition. There is an ongoing discussion among expert bodies and constitutional experts on whether prosecutorial councils should contain a majority of prosecutors elected by their peers. Unlike the judiciary, prosecution services are often organised in a hierarchical manner regarding their management as well as their professional functions, which carries the risk that the prosecutorial component of the prosecutorial council may be under the influence of the Prosecutor General. This can create tensions or even conflict between councils and senior prosecutors who are given management responsibilities, and in some circumstances could even prevent the prosecutorial council from duly exercising its supervisory and disciplinary functions and may weaken the necessary accountability of the prosecution service. It is important to design any prosecutorial council (composition, representation, methods of elections, powers) considering both the constitutional and the legal situation of the prosecution service in the country concerned, as well as the actual situation and practice concerning the exercise of prosecutorial functions as well as the management of the service.

14. The Consultative Council of European Prosecutors has advocated that prosecutorial councils should be composed of a majority of prosecutors but has acknowledged that there is no general agreement on this point.[6] The Venice Commission has recommended that "a substantial element or a majority of the members" of a prosecutorial council be prosecutors elected by their peers.[7]

15. Article 7 of the draft Law on the High Prosecutorial Council (HPC or the Council) of Serbia stipulates, following Article 163 of the Constitution, that the Council will have 11 members: five members elected by the prosecutors themselves, four "prominent lawyers" elected by the National Assembly, and two *ex officio* members: the Supreme Public Prosecutor (hereinafter referred to as the PG, the Prosecutor General), and the Minister of Justice.

16. In the 2021 Opinions on the constitutional amendments in Serbia, the Venice Commission expressed concern that the number of prosecutors elected by their peers would be lower than before. Even if the Serbian model still meets the standard of a "substantial element", it raises concern because "a majority in the HPC will act under the hierarchical control of the [PG], who will also sit on the HPC. Equally, six out of 11 members of the HPC will be political appointees: four would be elected by the National Assembly, the [PG] is elected by the National Assembly by qualified majority, and the Minister of Justice is a political figure. Removing the *ex officio* members would address this concern".[8] As the composition of the HPC is fixed in the Constitution, and the PG will be elected by a qualified majority only in the future, it is extremely important that the rules on the election of the prosecutorial council, its powers as well as the nature of the hierarchical relations within the prosecution service are such as to allow to counter the risk of subordination to the prosecutorial component of the HPC to the PG. It is also important to guard against the risk of prosecutorial corporatism becoming dominant, which is not necessarily the same as the excessive domination by the PG.

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prosecutors" states that "the independence of prosecutors is not a prerogative or privilege conferred in their interest, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned."

[6] That has been acknowledged by the CCPE Bureau in 2020: "there may not be, as yet, a generally accepted requirement for a majority of prosecutor-members in Prosecutorial Councils" (CCPE-BU(2020)2, Opinion of the CCPE Bureau following a request by the Superior Council of Prosecutors of the Republic of Moldova concerning the independence of prosecutors in the context of legislative changes as regards the prosecution service", para. 37)

[7] Venice Commission, CDL-AD(2022)018, Republic of Moldova - Opinion on draft amendments to Law No 3/2016 on the Public Prosecution Service, para. 11

[8] Venice Commission, CDL-AD(2021)048, cited above, paras. 27, 28

17. In Serbia the composition of the HPC differs from the composition of the High Judicial Council (the HJC). The Venice Commission has previously accepted that some differences between the composition of the bodies of governance of the judiciary and the prosecution service may be both necessary and desirable.[9] What is important is that in each case the final composition is such as to exclude the control of this institution by the political majority of the day, while, at the same time, ensuring the accountability and the effectiveness of the prosecution service.

a. Ex officio *members*

18. With regard to the *ex officio* membership of the Minister of Justice (the MoJ or the Minister), following the recommendation of the Venice Commission the amended Constitution and the draft Law on the Public Prosecutor's Office provide that the Minister cannot vote in disciplinary proceedings (see Article 121 para. 2 of the draft Law). This is positive.

19. As for the *ex officio* membership of the PG, the Venice Commission has previously explained that there is a risk of the PG becoming an overly powerful figure both within the Council and within the prosecution system in general.[10] This may lead to the lack of accountability of the PG.[11] In the Serbian context this problem may arise as well, since five prosecutorial members in the HPC will have hierarchical links to the PG. It is therefore not illusory that these members would align their voting behaviour to that of the PG.

20. In the Commission's view, it is necessary to limit the powers of the MoJ and the PG in other areas, in particular as regards decisions about arresting and detaining members of the Council (see Article 11 para. 2 of the draft Law on the HPC stipulating that Council members cannot be deprived of their liberty without the approval of the Council). Some of such adjustments are discussed below, in the section on the decision-making procedure and working methods of the Council. It must be stressed that the influence of the PG within the Council may be even more dangerous for the proper functioning of this body, because of his or her position vis-à-vis the prosecutorial members, than the influence of the Minister of Justice vis-à-vis the lay members. This issue is discussed below, in the Section analysing the draft Law on the Public Prosecutor's Office.

b. *Prosecutorial members*

21. The election procedure for the five prosecutorial members of the HPC is described in detail in Articles 25 et seq. of the draft Law. Article 26 stipulates that the prosecutorial members of the HPC are elected from various layers within the prosecution service: one from the office of the PG; one from the appellate public prosecutor's offices, the Public Prosecutor's Office for Organised Crime and the Public Prosecutor's Office for War Crimes; one from the higher public prosecutor's offices; and two from the basic public prosecutor's offices. The Commission recalls that Article 163 of the Serbian Constitution enshrines the principle of the "broadest representation of the prosecutors" which is reflected in the composition of the HPC proposed by the draft Law.

22. Article 27 provides that any candidate should be nominated by the collegium (i.e. the chief public prosecutor and the public prosecutors of that public prosecutor's office, Article 123 of the draft law on the public prosecutor) of one or more public prosecutor offices. One collegium may only nominate one candidate (Article 27 para. 3), and, in addition, should be supported by at least 15 prosecutors of the relevant level (see Article 27 para. 5). It is understood that a candidate who

[9] Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, para. 40
[10] Venice Commission, CDL-AD(2022)032, Bulgaria - Opinion on the draft amendments to the Criminal Procedure Code and the Judicial System Act, with reference to the earlier opinion on the Judicial System Act, which examine the question of accountability of the prosecutor general in a system where the prosecutor general is a hierarchical superior of a significant number of members of the council.
[11] Venice Commission, CDL-AD(2017)018, cited above, para. 32

gets the support of less than 15 of his peers cannot run for the elections. However, it is unclear how this rule would apply to the top level of the system as the collegium of the PG office only consists of the PG and 12 prosecutors. This should be clarified in the Law.

23. Article 28 para. 3 provides that at the elections each prosecutor "votes for only one candidate from the list of candidates of the type, i.e. the level of the public prosecutor's office in which he or she performs the public prosecutor's function". The elections take place "on the basis of free, general, equal and direct electoral rights, by secret ballot". The elections will be based on the principle of "one man, one vote". A question of equal weight of the votes in the election of the members of the HPC was raised by several interlocutors during the visit. Article 28 para. 3 means that one member of the HPC will be elected by the PG and 12 top-level prosecutors, while, by comparison, only two members will be elected by several hundred public prosecutors working in the basic offices. This is a great difference in electoral weight.

24. Further, if the basic level prosecutors are to vote for any candidate from the general list, it is very likely that the candidates supported by the largest collegia (for example, from Belgrade) would have a greater chance of being elected, compared to candidates from smaller collegia. This is thought by some interlocutors to compromise a genuine territorial representation.

25. The Venice Commission is of the view that this model, even if it is in principle in line with the Commission's previous recommendations, might not sufficiently shield the system against a potential risk of excessive influence of the PG over the prosecutorial component of the HPC. This should be taken into consideration in deciding the method of election of the members of the HPC. Consideration could therefore be given to letting each prosecutor vote for each of the four levels. An alternative could also be, as suggested by one interlocutor, to provide that the prosecutors from the PG's office, from the appellate public prosecutor's offices, the Office for Organised Crime and the Office for War Crimes vote for two representatives. It is ultimately for the Serbian authorities to choose the appropriate solution, but the Commission reiterates the need to increase the public trust in the prosecution service.

c. *Lay members*

26. The election of lay members of the Council is regulated in Articles 43 et seq. The draft Law – in line with the constitutional amendments – contains certain key features: (1) a public call for candidates (Article 46), (2) shortlisting of the candidates by the Committee on the judiciary, (3) qualified majority voting in the National Assembly in order to reinforce the depoliticisation (Article 50), and (4) having in place an adequate anti-deadlock mechanism to avoid stalemates (Article 51).

27. It is welcome that Article 44 stipulates that the members elected by the National Assembly should not have any present hierarchical (or *de facto*) subordination links to the PG and should represent other legal professions. However, the question of political affiliation of those members may arise, if all four lay members have the same political colour as the Minister of Justice sitting in the HPC *ex officio*.

28. Article 43 stipulates that a candidate must be a "prominent lawyer" with at least ten years of experience in the legal profession. The meaning of the "prominent lawyer" is developed further in this provision. Along with the formal criteria (which are relatively easy to apply), the draft Law mentions some more subjective criteria and, amongst them, "worthiness" for performing the function of a Council member. As the concept of "worthiness" is rather vague, it will be up to the parliamentary Committee on the judiciary to select eight candidates who are "worthy" to be presented to the National Assembly for the selection of four lay members.

29. As noted in the October 2022 Opinion, since the Committee on the judiciary is dominated by the ruling coalition parties, there is a risk that all eight candidates will be selected along party

lines. Article 51 provides that the decision on selection should be "reasoned", but this does not exclude that the decision will be taken on non-objective or partisan grounds. In any event, according to the same article, this decision is taken by secret vote, which is hardly compatible with the requirement of having a "reasoned" decision. The vote necessarily precedes the "reasons". It is of the essence of a secret ballot that every voter's actions and reasons remain secret.

30. For the Venice Commission it is crucially important to ensure political neutrality of those eight candidates, or at least ensure political pluralism within the lay component. The Venice Commission invites the authorities to consider the solutions outlined in the October 2022 opinion in relation to the process of pre-selection of lay members, namely:

- to re-formulate the (in)eligibility rules for the candidates in order to increase their political detachment.
- to exclude candidates who have been State officials or held leading positions in political parties during some period prior to their participation in the elections.
- to provide for the nomination of a certain number of lay members by civil society, or
- to provide for some form of proportional voting which ensures that some of the lay members are elected with the votes of the opposition.

31. The Venice Commission is aware that some of those mechanisms have downsides or may not be entirely efficient (see the October 2022 Opinion, paras. 79 et seq.). It belongs to the Serbian legislator to select the most appropriate method while ensuring that the model of pre-selecting candidates for the positions of the lay members fits to the constitutional framework. However, the imperative of ensuring politically neutral (or at least politically heterogenous) lay component is even stronger in the context of the HPC, compared to the election of the lay members to the HJC, due to a somewhat different balance of powers within the HPC, which is defined by the presence there of the two *ex officio* members.

d. *Overall assessment of the composition of the High Prosecutorial Council*

32. For the Venice Commission, the institutional design of the HPC should be such as to avoid two dangers: corporatism and politicisation. Heightened majorities in the decision-making of the Council ensure that neither prosecutors nor lay members can govern alone. However, the same heightened majorities carry with them the risk of the inability of the Council to take any decision, if lay members always vote together, as a block, and the prosecutorial members do always the same, and the two components disagree amongst themselves. Therefore, it is necessary to increase pluralism within both components. Certain steps, described above, may help achieving this result and therefore avoid blockages. In particular, the legislator should increase the independence of prosecutorial members from the PG and ensure that the lay members represent different political currents.

2. Status of the members of the High Prosecutorial Council

33. Article 11 of the draft Law deals with the immunity of the members of the HPC. It provides for a complete immunity of the members for their opinions given in connection with their duties or for voting. Given the range of powers and duties proposed to be conferred on the Council the possibility that opinions will be given, and votes will be cast corruptly is not merely theoretical. In such an eventuality to exclude the possibility of criminal investigation and corruption cannot be justified. Furthermore, it is hard to see how the commission of any criminal offence could be justified in the proper performance of duty as a member of the Council. Therefore, the draft Law must state clearly that the functional immunity for the opinions expressed, and votes cast does

not exclude possible criminal prosecution if there is serious evidence of corruption, abuse of office for personal gain, and other similar crimes.[12]

34. The same article provides for immunity from imprisonment for criminal offences committed as members of the Council without the approval of the Council. The Venice Commission understands that this provision does not speak of the imprisonment as a punishment but rather about the pre-trial detention. The duty of the prosecution bodies to obtain an approval of the Council for detaining a member of the Council is seen in some legal orders as a measure protecting individual members from the potential harassment by the law-enforcement bodies for ulterior reasons; however, this procedural guarantee should by no means prevent criminal investigations directed against the members.

35. Article 12 deals with the removal of a Council member. Apart from detention, the grounds for the removal are not specified. It is understood that "removal" in this context means a temporary suspension of the mandate, and the "detention" means pre-trial detention, and not an imprisonment to serve a sentence (in the latter case the return of the member to his or her position after serving the sentence would not seem appropriate).

36. Article 13 deals with the employment rights of the elected members of the HPC. According to para. 1 they are to be exercised in accordance with the regulations governing public prosecutors' rights, while those rights which existed prior to the appointment "are inactive". The meaning of this Article needs to be clarified: it is understood that all elected members of the Council enjoy the same labour rights and the same social coverage as the prosecutors, but that should not mean that they are subject to the same obligations as the prosecutors while performing their functions within the Council.

37. As transpires from Article 15, prosecutorial members of the Council work full-time, whereas lay members may have other occupations. In theory, it might be better if all members (except for the *ex officio* members, indeed) had the same status, but the size and the budget of the judiciary are factors to be considered in this context.

38. Article 16 fixes a five-year mandate which is not renewable. It should be clarified whether this provision applies only to the election at the expiry of the term of office, or also to subsequent elections (following a "pause").

39. The list of incompatibilities for lay members is so extensive that in essence the only parallel activity they could exercise is teaching, research, or an artistic activity. Thus, practising lawyers cannot be lay members of the Council. As noted in the October 2022 Opinion, this may reduce the pool of qualified candidates; on the other hand, including practising lawyers in the HPC may create conflicts of interests. It would certainly be inappropriate that a lawyer might engage in criminal defence work in Serbia while being a lay member.

40. It belongs to the Ethics Committee of the Council to define the list of incompatible occupations. This function might be combined with an advisory function helping lay members to understand whether they can take up a parallel occupation or giving other guidance to prosecutors on ethical questions. In any event, the legislator should consider whether the list of incompatible functions is not overly restrictive.[13]

41. The draft Law should clarify that provisions relating to the removal of Council members from their post do not apply to the *ex officio* members (only the National Assembly is competent to decide whether a person continues to act as a Minister / PG and hence as a Council member).

[12] The "immunity" provision is even more objectionable given that Article 17 (26) gives the Council – the body largely composed of the prosecutors – the power to decide on issues of immunity of prosecutors.
[13] Venice Commission, CDL-AD(2022)030, paras. 42 et seq.

42. According to Art. 44 para. 1 (7), those who have exerted undue influence on prosecutorial service or the judiciary are not eligible to become members of the HPC. It remains unclear whether the application of this condition presupposes a decision of the HPC or the HJC on "undue influence". Normally, such "undue influence" may be qualified as a disciplinary or even a criminal offence, depending on the gravity of the situation, and in both cases a decision is required by the competent body to assert that the person was guilty of such a behaviour.

43. Articles 54 and 56 of the draft Law describe the reasons for the termination of office. Article 54 para. 3 includes two vague grounds for the dismissal of an elective member of the HPC: becoming "undignified to performing the function" and not performing the function in accordance with the Constitution and the law. Article 56 states that the term of office of an elective member of the Council may be terminated before the expiry of the mandate, *inter alia*, if he/she becomes "unworthy" to perform the function of a Council member.

44. In respect of lay members, the reference to "unworthiness" may be considered as a logical corollary of the eligibility requirements listed in Article 44 although the Commission would argue that "unworthiness" relates much more to the behaviour of a Council member and not so much to incompatible functions or private interests.

45. In any event, the "worthiness" of a member is established at the moment of his or her election; the termination of the mandate should be justified by some *specific behaviour*, described in the law with sufficient precision. The same observation applies to the possibility to terminate the mandate if a member "does not perform the function of a Council member in accordance with the Constitution and the law". This is too vague to be used as a ground for dismissal. The Venice Commission reiterates that early removal of a member of the HPC should be justified in the case of a *specific disciplinary offence* (or, in extreme cases, commission of a crime), and not because of his or her positions taken in performing the function of a member (even if some other members might see these positions as undignified or unconstitutional).[14]

46. The Venice Commission also recommends indicating explicitly that a member of the Council may be stripped of his or her mandate if he or she fails repeatedly to participate in the work of the Council without serious and objective reason (like serious illness etc.). Given the high quorum required for the HPC decision-making in certain matters, the risk of a Council member seeking to thwart the operations of the HPC by a deliberate refusal to carry out the duties of a member needs to be guarded against.

47. Finally, the Venice Commission recommends providing that any criminal conviction involving imprisonment (and not only exceeding six months' imprisonment as per Article 54) should automatically terminate the mandate of the member of the Council. The Venice Commission is aware that this rule is based on the constitutional norm (Article 164 para. 4), which mentions the six months' imprisonment as a ground for an *automatic* termination of the member's functions. If the Constitution is interpreted as allowing dismissal of the HPC for "undignified" performance of the function (see above), the commission of any crime may be considered by the HPC as such and lead to the dismissal.

3. The mandate of the Council and its decision-making procedure

a. *The mandate of the Council*

48. Pursuant to Article 162 of the Constitution, the Council "shall guarantee the autonomy of the public prosecutor's offices, the [PG], Chief Public Prosecutors and public prosecutors" and "shall

[14] The Venice Commission is aware that Article 164 of the Constitution does not provide explicitly for the removal of a member of the HPC for a disciplinary offence, but Article 163 para. 8 of the Constitution may be interpreted as allowing for the removal of a member for "dishonourable" behaviour

propose to the National Assembly the election and dismissal of the [PG], elect acting [PG], Chief Public Prosecutors and public prosecutors and decide on the cessation of their term of office and on other issues concerning the status of the [PG], Chief Public Prosecutors, and public prosecutors, and performs other duties within its remit of jurisdiction defined by the Constitution and law".

49. Article 17 of the draft Law gives the Council *inter alia* the powers to decide on the permanent relocation and temporary assignments of public prosecutors, to decide on objections to mandatory instructions by the PG or a chief public prosecutor in a specific case, etc.

50. Some of the powers of the HPC are formulated in an overly broad manner: thus, for example, the HPC is entitled to decide on "other issues pertaining to the position of the [PG], chief public prosecutors and public prosecutors". The HPC is also entitled to examine "objections to mandatory instructions of the [PG] and chief public prosecutor […] the objection to the decision on devolution and on the objection to the decision on substitution". This wording is overly broad, which may put the PG in a clearly subordinate position vis-à-vis the HPC, or result in the HPC assuming *de facto* the functions of the PG.

51. In some areas (in particular, those related to the appointment and dismissal of public prosecutors) criteria for taking decisions by the HPC are described in sufficient detail (see the draft Law on the Public Prosecutor's Office). However, as regards the power of the HPC to review decisions of the prosecutorial hierarchy (on transfers, withdrawal of cases, mandatory instructions etc.), such criteria are missing. The draft Law should at least clarify in which cases the HPC is required to make a *de novo* assessment of the impugned decisions, and in which cases it is required to assess whether the impugned decision was taken on reasonable grounds.

52. There are a number of difficulties with the provisions concerning decisions on mandatory instructions in relation to prosecutorial decisions on the conduct of cases. Firstly, the criteria for objecting to such instructions read that the instruction is illegal or unfounded. The question whether an instruction is illegal is a question of law and should be subject to a legal appeal if necessary. It is not clear what does "unfounded" mean in this context, and what criteria determine whether the decision is made or deemed unfounded. The decision on withdrawal of cases ought to be a professional prosecutorial decision. It is questionable whether such decisions should be taken by a body containing persons who are not prosecutors, may not be legally qualified and may be open to political influence. Having said that, it is important to ensure so far as may be possible that a decision to withdraw a case cannot be made for improper reasons.

53. The Venice Commission recommends that the distribution of responsibilities between the Council and the PG be decided carefully so that the influence of the PG over the prosecutors does not unduly limit their autonomy, while ensuring the effectiveness of the prosecution service. The draft Law and the draft law on the Public Prosecutor's office will need to explain clearly and in detail the respective roles of the prosecutorial hierarchy and of the HPC. In exercising reviewing powers, the HPC should respect the discretion of prosecutors and the prosecutorial hierarchy in taking managerial decisions or decisions related to the conduct of the proceedings.

b. *Decision-making procedures and majorities*

54. The Council adopts its Rules of Procedure which "regulate the method of work and decision-making of the Council". The Serbian legislator should consider describing the decision-making procedures in more detail in the Law itself (for example, explaining better what information should be made public (Article 21), what are the basic criteria for meeting in closed session (Article 18), etc.). Certainly, the Rules of Procedure may develop those rules further, but should remain within the framework of the Law which should set out the basic principles.

55. The Council will be presided over by one of the elective prosecutorial members; the vice president is a lay member, and both are appointed by the whole Council. This seems an appropriate provision. It is welcome that these tasks are not entrusted to one of the *ex officio* members, although it may prove challenging for an elective prosecutorial member to preside the Council in the presence of his/her hierarchically superior PG.

56. Article 10 provides that the Council may obtain information, documents and other material related to the performance of its tasks from any legal body or person in Serbia. There is no provision as to how this is to be enforced in the case of a refusal or who is to resolve any dispute about the provision's application. Prosecutors are "under the obligation to act on the decision of the Council" without any limitation, qualification, or provision to resolve disputes. This power of the HPC should be circumscribed. It is permissible for the HPC to obtain access to such documents and information which are in possession of other State bodies, provided that it is connected with the performance of the HPC's mandate. However, there are natural limits to this power, which are defined *inter alia* by the rights to privacy and by the public interest as well. Private persons cannot be obliged to provide the Council with the information, documents and materials they possess, and some privileged or secret information in the hands of the State bodies may also be excluded. When there is a disagreement about the power of the HPC to request some documents or information, there should be a provision for judicial determination of such disputes.

57. Decisions by the Council are ordinarily adopted "by a majority of eight votes" (Article 20, para 1). It is understood that this Article speaks of the majority, and not of the quorum. Such a heightened majority guarantees that decisions may only be adopted with support from both prosecutorial members as well as lay members. This ensures that neither of the two big groups can single-handedly control the Council. However, it also raises the risk of blockages in the work of the HPC, either because some members fail to attend the meeting of the Council or because the necessary majority for taking decisions is too high.

58. A way to combat absenteeism is to amend Article 54: the repeated absence of a member in the Council meetings without valid reasons should be a ground for the termination of his or her mandate, and this should be decided by a simple majority of members of the HPC. Indeed, the member who repeatedly failed to participate in the work of the Council should be given a reasonable opportunity to explain the reasons for his or her absence and this decision should be taken with all necessary procedural safeguards.

59. Even if all the members participate in the decision-making, another risk remains. While five prosecutorial members, together with the PG, will not be able to take the decisions alone, no decision can be taken without the vote of at least some of them. If these members were to always act as a block, they could obstruct the work of the Council. That is not to say that there will not be occasions where it is appropriate and understandable for them to act together but they should do so from conviction rather than coercion. It is therefore necessary to ensure that all members, including the prosecutorial ones, exercise their mandate independently.

60. The legislator should design appropriate rules and procedures which reduce the potential abuse of influence of any individual on other members, thus reducing the likelihood that all prosecutors act as a block. For example, the legislator might provide that following the expiry of the mandate of prosecutorial members, they may decide not to return to their previous positions in the prosecution system but to become a judge at the corresponding level. However, as explained to the rapporteurs in Belgrade, this solution may not fit to the Serbian model where the prosecution service and the judiciary are clearly separate professions and where there might be constitutional barriers for such a transfer of a prosecutor to the judiciary without a proper competition and an appointment decision. The Venice Commission reiterates its recommendations concerning the method of election of the prosecutorial members, which may indirectly reduce the influence of the prosecutorial hierarchy within the Council.

61. Under Article 20 para. 1 a majority of eight is necessary for the HPC to take decisions. However, under para. 2 certain decisions may be taken by a majority of seven votes. Surprisingly, these decisions concern matters of greater gravity, such as disciplinary liability and the removal or termination of the term of office of elective Council members. Such a lower majority for substantively more severe decisions is at odds with the approach taken in the HJC, where a higher majority is required for the dismissal of a judge and should be reconsidered.

62. Under the draft Law the HPC has the power to decide in disciplinary cases and examine appeals against disciplinary sanctions (Article 17 (15)). Under Article 108 of the draft Law on the Public Prosecutor's Office, an appeal against the dismissal may be filed with the Constitutional Court. Under Article 121 para. 4 of the draft Law on the Public Prosecutor's Office the decision of the HPC on imposing a disciplinary sanction (falling short of the dismissal) is final. If follows that an appeal to the Constitutional Court is provided only in the case of the most serious sanctions – dismissal, while for lesser sanctions the appeal is directed to the HPC itself.

63. The Venice Commission has often recommended providing for an appeal in matters related to discipline.[15] An appeal to the HPC may be an acceptable solution only if the HPC, given its institutional characteristics, may be characterised as a "court", and if it provides all basic guarantees of a fair trial.

4. Budgetary autonomy of the High Prosecutorial Council

64. The Venice Commission has previously recommended "to include the budgetary autonomy of the […] HPC at the constitutional level". This recommendation was not followed when adopting the constitutional amendments. Articles 3 and 4 of the draft Law do contain a regulation on the Council's budget. The HPC itself prepares a proposal for the budget which it then submits to the Minister of Finance, followed by negotiations in the event of disagreement. If the negotiations fail, the Ministry of Finance shall retain the final say but shall need to give reasons for not accepting the proposal of the HPC. The budget is then discussed and adopted by the National Assembly. This is a welcome step towards greater budgetary autonomy of the Council. This greater autonomy should go hand in hand with ensuring adequate expertise on budgetary matters within (the secretariat of) the Council. It should be made clear in the draft Law that while the decision on the budget belongs to the National Assembly, the decisions on how the budget is used belong to the Prosecution service exclusively.

B. The law on the Public Prosecutor's Office

1. Functions and powers of the public prosecution service in Serbia

65. Article 155 para. 1 of the Constitution provides that "the Public Prosecutor Office shall be unitary and an autonomous state body which shall prosecute the perpetrators of crime and perform other tasks to protect public interest as prescribed by law". Under Article 2 of the draft Law on the Public Prosecutor's Office[16] the public prosecution service is responsible for criminal prosecutions. This is the most common function of all prosecution services in Europe.

66. By contrast, the task to "exercise other authorities that protect the public interest determined by law" seems to give to the prosecution service the power to represent the State in other fields going beyond the prosecution of crimes. With this broadly defined function come equally broadly defined powers. Article 9 of the draft Law requires that all State bodies, and even "legal and

[15] See, for example, Venice Commission, CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, para. 75

[16] In this section and until the Conclusions the "draft Law" will refer to the draft Law on the Public Prosecution Office, unless specified otherwise.

natural persons" are "obliged to submit to the public prosecutor's office, at their request, the files, and notifications necessary for taking actions for which they are competent". Article 9 provides for the obligation for "everyone" to "immediately provide the public prosecutor's office, upon the request, with the explanations and data they need to take actions they are authorised to do by law".

67. These provisions give rise to serious concerns. Indeed, when prosecuting criminal cases prosecutors may request and obtain information and documents, within the limits and in the procedure set by the Code of Criminal Procedure. This is the essence of the prosecutorial activity in the criminal law context.

68. However, there should be no general and unfettered obligation of "everyone", especially private persons, to provide the prosecution service with "files", "explanations", or "data". This clause is particularly dangerous because the law itself does not define for what purpose the prosecution may seek such materials and information. The Venice Commission insists that the prosecution should not be entitled to get access to the proprietary information, information about private life, privileged materials, etc. simply because the Constitution and the law give it a general mandate to "protect public interests" is some undefined areas. The power to prevent implementation of administrative – and even judicial decisions – is also dangerously broad. The reference to the general function of the prosecution to defend the "public interest" is insufficient to justify such power. Similar vague provisions broadly defining the role and the corresponding powers of the prosecution have been criticized by the Venice Commission in previous opinions.[17]

69. This is not to say that the prosecution cannot have some powers outside of the criminal law field. Thus, it is possible for the sectoral legislation to give to the prosecution authorities (when there are no specialised State bodies dealing with the relevant questions) the power to act in the public interest. But the scope of the mandate and of the accompanying powers should be described with sufficient precision, and the most important powers – in particular the coercive powers which have a potential of interfering with the right of privacy or with the property rights – should be accompanied by the judicial supervision and by other procedural safeguards.

70. At the meetings in Belgrade the Ministry of Justice explained that the functions of the prosecution outside of the criminal law field are fairly limited in the Serbian legal order. The Minister gave an example of the provisions of family law allowing the prosecution to step in the civil proceedings in the interests of vulnerable persons. Taken in isolation, this function does not appear problematic, but the Venice Commission is concerned with the risk of uncontrolled expansion of the functions of the prosecution which may be explained by the reference to the provisions of the draft Law. More generally, the Venice Commission considers that concentration of too many heterogenous functions and powers (especially coercive powers) in the hands of one institution is dangerous for the system of checks and balances.

71. The Venice Commission therefore recommends removing the reference to those powers from the draft Law or reformulating it to make it clear that Articles 8 and 9 *as such* do not give the prosecution authorities the power to obtain information, explanations, materials etc., and that a special legal basis is necessary to enable the prosecution to seek and obtain them, in the procedure and for the narrow purposes defined in such a law. It is therefore necessary to reformulate Article 2 and make it clear that the prosecution service may only perform other specific tasks if there is a specific legal basis for performing such a task.

72. A similar remark is called vis-à-vis the power of the PG "to request a postponement or suspension of the execution of the decision when [the PG] considers that there are reasons to challenge a decision made in a court"; such requests are addressed to "the authority that allows

[17] Venice Commission, CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, para. 63

the execution of the decision" (Articles 27 and 28). This provision seems to authorise the PG to seek suspension of any administrative (and other?) decision issued by any other authority (admittedly excluding private persons and entities), on any ground. Again, this general mandate gives the PG the power to enter any legal proceedings in any possible situation, without the State specifically empowering him or her to do so and should be reconsidered.

73. Article 11 enumerates the "principles of performing the public prosecutor's function" (professionalism, impartiality, fairness etc.) Respect for human rights should be added to the principles listed in this article.

2. Autonomy of the public prosecution service

a. *Autonomy vis-à-vis the executive and the legislative branches*

74. Sufficient autonomy must be ensured to shield the prosecution service from undue (political) influence. It is therefore welcome that the autonomy of the individual prosecutor and the prosecutorial authorities as such is laid down in Articles 2, 5 and 49 of the draft Law, in pursuance of Article 155 of the Constitution. The draft law, in line with the Constitution, stipulates that the PG does not report to the National Assembly regarding proceedings in individual cases (Article 22 paras. 2 and 3). It is particularly welcome that – in line with a previous recommendation of the Commission[18] – it is impermissible (for anyone outside of the prosecutorial hierarchy) to give instructions to a public prosecutor in an individual case.

75. Article 5 includes the prohibition of "undue influence" on the prosecutors which includes undue influence by the executive and legislative authorities (see Article 5 para. 2). The provisions of Article 5 are complemented by provisions in the draft law on the HPC. While the idea of protecting against "undue influence" is commendable, it remains unclear how the HPC can react to instances of undue influence, because some of them may fall within the jurisdiction of the ordinary courts (for example, threats to a prosecutor would constitute a criminal offence).

76. The draft Law assigns to the Ministry of Justice certain tasks which are not usually a function of the Minister. The Venice Commission notes that under Articles 42 and 43 the Ministry (alone of jointly with the HPC) is empowered to supervise some aspects of the work of the prosecution offices, and almost all the matters referred to in Article 42 appear to be prosecutorial rather than administrative – including relations with the public, handling of cases and documents, data protection, handling of complaints and "other issues". The Venice Commission considers that such tasks should be entrusted *solely* to the HPC or to the HPC together with the PG, which would avoid any (appearance of) interference by the executive into the substantive work of the prosecutors. This is particularly important given the fact that field supervision is conducted by direct inspection of public prosecutor's cases, registers, documents, etc. (Article 45 para. 1) and given the fact that the person performing the supervision is granted "unhindered access to the automatic case management system" (Article 45 para 5). These powers should not be exercised by the Ministry in respect of the more substantive work of the prosecutors in individual cases.

77. According to Article 48, the Ministry would also be entrusted with various tasks of the administration of the prosecution service.[19] This may be acceptable in respect of purely administrative functions provided it does not undermine the autonomy of the prosecution service in which prosecutors may be answerable to hierarchically superior prosecutors within the

[18] Venice Commission, CDL-AD(2021)032, Opinion on the draft Constitutional Amendments on the Judiciary and draft Implementation of the Constitutional Amendments, paragraph 79.

[19] Which are for some reason called "tasks of judicial administration" and include, under Article 47, *inter alia* "the performance of work in the public prosecutor's offices, especially the provision of material, financial, spatial and other conditions […] giving consent to the act on the internal organisation and systematisation of the public prosecutor's office and other tasks".

prosecution service in respect of prosecutorial functions, but not to the Minister. The hierarchical model does not justify the subordination of the prosecutors to the Ministry in respect of the prosecutorial functions (as distinct from purely administrative functions). Furthermore, such a system would necessitate prosecutors working alongside Ministry officials which would inevitably compromise any independent exercise of prosecutorial functions.

78. Article 128 of the draft Law stipulates that the MoJ needs to consent to the number of staff in the public prosecutor's office and that the criteria for determining the number of staff shall be determined by the Minister. It is only natural that the ultimate decision on the allocation of (limited) budgetary resources to the prosecution service rests with the Parliament (adopting the consolidated State budget on the proposal of the Government). As to the use of those resources (i.e. whether there is a need to have more prosecutors or more supporting staff, more IT, etc.), however, this could in principle be left to the prosecution service itself. The Venice Commission therefore invites the drafters to review these provisions in order to enhance the budgetary autonomy of the prosecution service. It is understood that the Government envisages a change of the status of the staff working for the prosecution service, who will not be governed by the ordinary rules on the civil service but will be a special category under the jurisdiction of the hierarchy of the prosecution service. This is welcome since it allows the prosecution service to have greater control on the organisation of work of the "non-prosecutorial" personnel.

79. Following a recommendation by the Venice Commission, Article 158 of the Constitution provides that the PG is responsible to the National Assembly for the work of the public prosecution, and his/her own work, but not "for acting in individual cases". The draft Law consequently stipulates that the PG does not report to the National Assembly regarding proceedings in individual cases (Article 22 paragraphs 2 and 3), which is positive.

b. *Mandatory instructions, devolution, and transfer of cases and prosecutors*

80. The draft Law has adopted a hierarchical model of the prosecutorial system (see Article 4 para. 4). The system is organised vertically, by functional and geographical principle (basic public prosecutor's offices at the lower level, higher public prosecutors' offices, and, above them, the appellate public prosecutors' offices), as well as horizontally, on the basis of the specialisation (with two specialised offices – on organised crime and on war crimes). The office of the Prosecutor General is at the top of the system (see Articles 5, 12 and 13).

81. The main feature of the prosecutorial hierarchy is the duty to report to the higher prosecutor, and the power of the higher prosecutors to give instructions to the lower ones. Article 14 provides for an obligation of the chief prosecutors to report "directly to the high chief public prosecutor" but also to the PG "in accordance with the law". Article 16 allows for general instructions, and also for mandatory instructions in a specific case "if there is doubt about the efficiency or legality" of the action of a subordinate prosecutor. In the proposed model, the PG may receive reports from and give instructions to any head of the prosecution office, and not only those which are immediately under the PG.

82. There is no common European standard on whether the prosecution service should be organised according to a hierarchical principle, or according to the principle of individual independence, or regulating the extent to which the hierarchical principle should apply. It is therefore not uncommon to find a hierarchical model, as proposed by the draft Law. A hierarchical system has its benefits: it aims to unify proceedings, nationally and regionally, and to bring about legal certainty. In such a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. It is important to make a distinction between general instructions (see Article 15 of the draft Law) and case-by-case instructions (see Article 16): in a purely hierarchical system, not only general instructions but even case-by-case instructions may be allowed.

83. While a hierarchical model is fully acceptable, the power of the higher prosecutors to issue instructions in *specific cases* must be treated with particular caution.[20] This power may easily be abused, so certain procedural safeguards must be put in place. The Committee of Ministers' Recommendation Rec(2000)19, cited above, contains detailed provisions in this regard.

84. Article 157 of the Constitution on "mandatory instructions for the Actions of Chief Public Prosecutors and Public Prosecutors" provides that "the [PG] shall issue general mandatory instructions for the conduct of all Chief public prosecutors in order to achieve legality, efficiency and uniformity of content". This article further provides for the hierarchical possibility to issue "obligatory instructions" on "how to act in a specific case, if there is a doubt in the efficiency and legality of his actions". The Constitution also provides for the duty of the chief public prosecutor and the prosecutor dealing with the case to act in accordance with these instructions. Article 157 further provides that "a lower Chief Public Prosecutor or a public prosecutor who considers that the mandatory instructions are illegal or unfounded shall be entitled to file an objection in accordance with the law".

85. Article 16 of the draft Law implements Article 157 as concerns the conditions for the mandatory instructions and introduces an additional important safeguard: "the mandatory instruction shall be issued in written form and must contain the reasons and explanation of its issuance". This guarantee could be strengthened even more. The requirement that the written instructions should be reasoned should mean that the doubts about the "efficiency or legality" of the action of a subordinate prosecutor should be substantiated; the reasoned instructions should be appended to the casefile and accessible to the parties.

86. Article 17 of the draft Law deals with the "objection" to the allegedly "illegal and unfounded" mandatory instruction. On the one hand, having such a mechanism in the system increases the autonomy of the lower prosecutors.[21] The Venice Commission itself has previously recommended introducing a right of appealing against the illegal instructions to a court or to an independent body like a prosecutorial council.[22] On the other hand, if the instructions are challenged and set aside too often, or if the examination of such appeals is too slow, that may undermine the efficiency of the whole system.

87. Recommendation Rec(2000)19 in p.10 provides that "where [a subordinated prosecutor] believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement". This represents a minimal standard which allows the lower prosecutor to manifest his or her disagreement but does not necessarily lead to the invalidation of the instruction. Most importantly, this recommendation speaks of the "internal" procedure. The procedure before the HPC cannot be considered "internal", even though under the proposed draft Law the appeal will be decided only by the prosecutorial members of the HPC (see Article 17). Therefore, it would not be against the standards if another procedure, not necessarily involving the HPC, is designed. However, this does not need to be done now, but only if the practical implementation of the proposed mechanism of appeals proves to be too cumbersome.

88. Article 17 of the draft Law entrusts the decision to the prosecutorial members of the HPC, excluding all lay members. The PG explained that as Article 155 para. 3 of the Constitution provides that "no one outside the public prosecutor's office can influence the public prosecutor's

[20] See Rec(2000)19, where the Committee of Ministers characterises the power to give instructions a "particularly sensitive question" – see p. 10 of the commentaries to the individual recommendations contained in the Explanatory Memorandum to the recommendation.
[21] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, paras. 92 and 95
[22] Venice Commission, CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, para 69.

office and the holders of the public prosecutor's function in conducting and deciding in a particular case", the review of a mandatory instruction in a specific case may not be given to a lay member who is not part of the public prosecutor's office, because it would necessitate access to the casefile. The Venice Commission is of the view that the concept of "influence" in Article 155 refers to undue influence, and not to the exercise of an appellate review by a constitutional body such as the HPC. In addition, excluding lay members from the appeal may also be problematic from the point of view of the constitutional design of the HPC, which includes both prosecutorial and lay members.

89. That being said, the Venice Commission itself is not in favour of giving the power to review instructions to non-professionals. An alternative model, not directly involving the HPC (or any part of it) as a decision-making body, is constitutionally possible. Neither Article 157, nor Article 162 of the Constitution give the HPC an *exclusive* power to decide on the mandatory instructions. Therefore, the law might entrust the power to examine such appeal to a subordinate body of the HPC whose members are selected by the HPC from amongst the ranks of the prosecutors.

90. The draft Law describes the procedure for dealing with complaints of the subordinate prosecutors against devolution (i.e., a higher prosecutor stepping in and removing a lower prosecutor from a case) or substitution (i.e., a higher prosecutor transferring the case from one lower prosecutor to another lower prosecutor: see Articles 19 – 20 of the draft Law). The possibility of both devolution and substitution is in line with the hierarchical model. Under the draft Law, the substitution is possible when "the competent public prosecutor's office is prevented from legal or factual reasons to act in the case". There may be a need of more precise conditions for this decision, and for the decision on devolution or substitution to be accompanied by due reasons.

91. The draft Law should also clarify the relationship between provisions on substitution and provisions on the transfer of jurisdiction (Article 35). Article 37 provides for the adoption of "the Annual Schedule of work in the public prosecutor's office". This power belongs to the PG, together with the relevant chiefs of the prosecution offices. It is understood that the Annual Schedule defines the distribution of the workload and specific fields of work within each prosecution office. Individual prosecutors are entitled to challenge this Annual Schedule to the HPC, but the draft Law does not indicate on which grounds. For the Venice Commission, the distribution of work should be the primary responsibility of the heads of the respective prosecution offices, under the supervision of the PG. The HPC may intervene only in cases of impropriety or some other reasonable cause, while the primary responsibility for such managerial decisions should be with the prosecutorial hierarchy. This should be made clear in the draft Law.

92. Article 68 of the draft Law provides for the possibility of "temporary assignment": "the public prosecutors may, with their written consent, be temporarily assigned to another public prosecutor's office of the same or lower level for a maximum of one year, without the possibility of re-assignment to the same public prosecutor's office". This provision was singled out and discussed by practically all the interlocutors in Belgrade. These secondments are indeed considered to be a powerful tool to reward or sanction public prosecutors. While under the current system, decisions on secondment are taken by the PG, the draft Law allocates this power to the High Prosecutorial Council. It is unclear if such decisions may be appealed to the Constitutional Court pursuant to Article 165 of the Constitution.

93. Several interlocutors argued that temporary assignments, like transfers, amount to decisions as to the status of a prosecutor. These decisions would according to the Constitution be reserved to the HPC. Other interlocutors argued that such decisions do not relate to the status of prosecutors but are managerial decisions.

94. As far as the Commission is concerned, the categorisation of these decisions is not the main issue. Instead, the Commission will focus on the practical application of temporary assignments. In doing so, it will distinguish between two situations.

95. The first situation entails a sudden and/or unforeseen personnel problem in a specific area of the organisation of the prosecution service. Such a problem calls for a swift managerial response to "fill a gap". In such a situation, the possibility of a temporary assignment is a necessary managerial tool for any organisation. It appears unproblematic to entrust such a decision to the prosecutorial hierarchy itself (i.e. the PG office) which possesses a more direct knowledge of the needs of the prosecution offices in the country and the possible candidates to meet those needs. The Commission recommends that these decisions be issued in writing, be duly motivated and made available to the prosecutor concerned. An appeal against these decisions should be possible.

96. There is however a second situation. The rapporteurs were informed that temporary assignments are not solely used as a temporary solution. Its use is of a more structural nature to address certain systematic shortcomings in the organisation. In the Commission's view, temporary assignments are not the proper way to solve such structural issues. The repeated and structural use of the temporary assignments creates unnecessary insecurity for the prosecutors concerned and a potential risk of arbitrary application of such assignments. Structural issues should be solved by regular appointments and filling vacancies which is a task entrusted to the HPC. The Commission was informed that, at the moment, several vacancies are not being filled by the HPC, with the result that temporary assignments are repeatedly made on these vacancies. The Council's task in respect of filling these vacancies is therefore crucial. It is for that reason the Commission makes certain recommendations to avoid a blockage of the Council's work.

97. The legislator could consider introducing additional mechanisms which would encourage the HPC to fill in the vacancies which are occupied by the seconded personnel on a temporary basis.

3. The Prosecutor General

a. *Election of the Prosecutor General*

98. When assessing different models of appointment of chief prosecutors, the Venice Commission has always been concerned with finding an appropriate balance between the requirement of the democratic legitimacy of the process, on the one hand, and the requirement of depoliticisation, on the other.

99. Under the draft Law, following a public competition, the candidates for the election of the PG are selected by the HPC (see Article 93). The HPC proposes to the National Assembly one candidate, which is in line with a previous recommendation by the Venice Commission (see Article 93, para. 6). The PG is then elected by the National Assembly to a six-year term of office by majority vote of three fifths of all deputies (see Article 158 of the Constitution and Articles 79, paragraph 1, and 94 of the draft Law). If the National Assembly fails to elect the proposed candidate, the PG shall be chosen from among all the candidates who meet the conditions for election, by a committee consisting of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the PG and the Ombudsman, by majority vote (see Article 94, para. 3 and Article 158 of the Constitution). It is understood that this committee will select from that list of candidates who satisfied the formal criteria of eligibility and who were retained by the HPC as corresponding to the basis of the three criteria indicated in Article 93 para. 1 ("worthiness", sufficient expertise and competence), but who were not finally selected by the HPC for proposal to the National Assembly.

b. *Dismissal of the Prosecutor General*

100. As with the appointment of the PG, the decision to dismiss a PG must be taken on objective grounds; political considerations in such a decision must be excluded or minimised. In the Serbian context, this is achieved by stipulating specific grounds for the dismissal and by the involvement of the HPC in the process.

101. The mandate of the PG is to be terminated early: (i) when the PG reaches the 67 years of age, (ii) if he/she is sentenced to a criminal offence to at least six months' imprisonment, and (iii) for a serious disciplinary offence which seriously damages the reputation of the prosecution and the public trust therein.[23]

102. As concerns the dismissal following a criminal conviction, the Venice Commission finds it unusual that if the PG is sentenced to, for example, 5 months' imprisonment, s/he would still remain in the office. However, the six months' threshold is set by the Constitution (see Article 158 para. 7), so the draft Law only repeats the constitutional provision. And, in any event, any criminal conviction, even not involving a prison sentence, is likely to give rise to a disciplinary case against the PG and would therefore lead to the dismissal of the PG.

103. The third reason for dismissal (a serious disciplinary offence) deserves attention. According to Article 106 of the draft Law, the HPC determines the reasons for dismissal of the PG and submits a proposal for dismissal to the National Assembly. In these proceedings the HPC acts as a legal body: it should follow a certain procedure and should give a reasoned decision (Article 104).

104. Article 105 para 3 of the Constitution provides that the National Assembly elects the PG and decides on the termination of his office by a three-fifths majority. There is a possibility that the National Assembly, for political reasons, decides not to approve the proposal of the HPC to dismiss the PG. Such decision of the National Assembly is a political act, which means that the role of the Constitutional Court in reviewing it should be fairly limited (see Article 108 of the draft law which provides to the PG a right to appeal before the Constitutional Court about the dismissal). Indeed, the Constitutional Court may still assess the procedural propriety of the decisions taken by the HPC and the National Assembly. However, it is questionable to what extent it may go into the substance of the case. If the National Assembly exercises its constitutional prerogative and votes for the removal of the PG, as a rule, the substantive reasons for this vote should not be reviewed by the Constitutional Court.

105. The risk of politicisation of the process of the early removal of the PG from office, discussed in the previous paragraphs, is not the only consideration in designing the system. Another is the risk of corporatist attitude of the prosecutorial component of the HPC, which effectively shields the PG from any accountability.[24] The Venice Commission also notes that the PG by virtue of Article 27 of the draft Law may request the suspension of any administrative (and probably judicial) decision, which may be another way of shielding the PG from the liability or obstructing the proceedings.

106. The HPC's proposal to dismiss the PG is made by a majority of seven votes (see Article 20, para. 2 of the draft Law on HPC). If such a vote is called for, the PG is excluded from the decision-making process (Article 56 para. 5 of the draft law on HPC). This means that the PG would not

[23] See Article 102 of the draft Law; the grounds for the termination of the mandate are indicated in this Article in a different order. This order is reversed in the present Opinion to follow the structure of the ensuing analysis.
[24] See ECtHR, *Kolevi v. Bulgaria,* 5 November 2009, no. 1108/02, §§ 195-215.

be dismissed unless all lay members, and at least three or more elective prosecutorial members of the HPC vote for it.[25]

107. Experience in other countries has shown that it is not illusory for prosecutorial members to align their voting behaviour to that of the PG. The likelihood that they will in future be subordinates of the PG at the least gives rise to a concern that they may not be fully independent on such issues. A possible solution, as recommended above, is that to design appropriate rules and procedures which would reduce the potential abuse of influence of any one individual on other members, thus reducing the likelihood that all prosecutors act as a block.

108. One possible solution would be to reduce the decision-making majority in some situations. The Venice Commission recalls that under Article 163 of the Constitution, para. 2, the Minister of Justice should not vote in a procedure for determining disciplinary responsibility of a public prosecutor. This also arguably applies to voting on the proposal to remove the PG on disciplinary grounds. The PG should also be excluded from voting on those matters due to an evident conflict of interest. This leaves nine members of the HPC, which could then take a decision on bringing the PG to liability by a simple majority of five votes out of nine.

109. The Venice Commission is aware that none of those proposals can guarantee an absolutely objective and impartial decision-making process; however, some fine-tuning of the proposed system may help reducing both risks – that of politicisation and that of the corporatism. As shown above, the risks associated with a higher decision-making majority may be partly mitigated by making the two components of the Council less homogenous and more independent from the two *ex officio* members – the Prosecutor General and the Minister of Justice.

4. Mandate of individual prosecutors

a. *Appointments*

110. Section IV of the draft Law (Articles 79 et seq.) deals with the appointment of prosecutors and defines the eligibility criteria for becoming a prosecutor. European and international standards demand that appointments be based on objective, transparent and non-discriminatory selection criteria, which can relate to formal requirements (nationality, age, qualifications, professional experience, et cetera), and to professional and human skills, which are more difficult to define exhaustively.

111. Overall, the draft Law meets those standards. Some of the terms used by the draft Law – such as “worthiness” (Article 80) – may appear quite broad. However, the legislator tried to elaborate upon this notion in Article 82, and “worthiness” is a common notion in the Serbian law. In such circumstance, the use of this criterion may be tolerated, provided that the body which decides on the appointment is sufficiently independent, impartial and its members have sufficient professional and personal experience to assess the “worthiness” of a candidate. The appointing body in respect of prosecutors is the HPC, which, in the overall, can be trusted in assessing the “worthiness” of candidates.

112. Certain rules regarding the appointment procedure deserve praise. Thus, Article 84 contains a welcome provision that when selecting prosecutors account must be taken of “the national composition of the population, the appropriate representation of members of national minorities and knowledge of professional legal terminology in the language of the national minority that is in official use in the court”. Gender should be added to the list of possible grounds of affirmative action.

[25] Under Article 163 of Constitution, “the Minister of Justice may not vote in a procedure for determining disciplinary responsibility of a public prosecutor” which arguably excludes the Minister from participating in deciding on the dismissal of the PG.

113. It is also welcome that an appeal before the Constitutional Court lies against a decision by the HPC on the election of a public prosecutor and a chief public prosecutor (Article 92; also Article 158 of the Constitution). In exercising its review, the Constitutional Court should act with deference to the HPC,[26] and primarily check whether the appointment procedure has been followed, formal eligibility criteria respected, etc. As to more subjective elements (like, again, the "worthiness" of the candidate), the Constitutional Court should respect the discretion of the HPC to which the Constitution explicitly entrusted the power to select prosecutors.

b. *Disciplinary liability and dismissal of prosecutors*

114. Article 158 of the Constitution and Article 98 of the draft law provide that the function of the chief public prosecutor ends if the public prosecutor's office is abolished. This provision is acceptable only if the decision to restructure the prosecution service, resulting in the abolishment of certain offices, is taken by the HPC. Otherwise, it would be easy to remove chief prosecutors under the guise of restructuring of the offices. Previously, the Venice Commission criticised such *ad hominem* institutional reforms.[27]

115. Article 114 of the draft Law lists various grounds for disciplinary liability. As in the draft Law on judges, analysed in the October 2022 Opinion,[28] in the draft Law under examination there appears to be a disproportionate focus on disciplining the prosecutors for various procedural delays. The Venice Commission reiterates the prosecutors should not be held responsible for the structural problems of the system which might have caused such delays.

116. Article 114 uses some vague formulas to define disciplinary breaches. To a certain degree it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility. This was previously recognised by the Venice Commission.[29] Relevant in this regard is the fact that the task of interpreting and applying these notions will be assigned to the HPC, which enjoys sufficient institutional autonomy and expertise.

117. The draft Law under examination, as the draft Law on Judges examined in the October 2022 Opinion, introduced in Article 114 a concept of a "repeated disciplinary offence", which is considered as a severe breach and may entail dismissal. The concepts of "severe" and "repeated" offences should be developed further. The gravity of the disciplinary offences listed in Article 114 varies greatly. It would not necessarily be proportionate to dismiss a prosecutor if he/she has been disciplined twice for minor offences, or if these two less serious offences have been committed with a long interval. Furthermore, a mere negligence in a single case should not be enough and could create a basis for abuse.

118. There are two safety valves in the draft Law: (i) the principle of proportionality is explicitly guaranteed in Article 115 para. 2, and (ii) if the HPC believes that the behaviour of the prosecutor "seriously damages the reputation of the public prosecutor's office or the trust of the public in the public prosecutor's office" it may (and not "must") trigger the dismissal proceedings (Article 114).

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[26] Venice Commission, CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, para. 151, and, before that, Venice Commission CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 92. In the Armenian opinion this was said in the context of disciplinary proceedings against judges, but a similar approach is applicable here.

[27] Venice Commission, CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, para. 28

[28] Venice Commission, CDL-AD(2022)030, cited above, para. 50

[29] See, for example, Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, para. 108.

119. So, even a repeated offence may not necessarily lead to the dismissal unless the HPC establishes that it has caused "serious damage". The Venice Commission also notes that the draft Law provides for an appropriate scale of sanctions for disciplinary offences (see Article 115), which is an additional guarantee against a disproportionate use of the provisions on the disciplinary liability. These qualifications contained in the draft Law may be sufficient.

120. Article 114 provides that a significant violation of the Code of Ethics constitutes a disciplinary offence. As follows from Article 17 of the draft Law on the HPC, the Code of Ethics is adopted by the HPC. However, the draft Laws are silent on the content of such a Code, which basically entitles the HPC to regulate in this Code any aspect of the prosecutor's life and behaviour. In the opinion of the Venice Commission, if the Code of Ethics is to be used as a legal authority for imposing a disciplinary liability, some basic principles of ethical behaviour should be described in the Law itself, while the Code of Ethics may develop them in more detail.

121. The draft Law provides for essential fair trial guarantees in the context of the dismissal proceedings: the right to be informed immediately about initiating the dismissal procedure, the right to become familiarised with the case and the accompanying documentation, the right to provide explanations and give evidence in person or through a proxy, time-limits for conducting the proceedings, and the right to appeal against a decision (see Articles 104 to 108 on the dismissal proceedings, and Articles 117 to 121 as regards the disciplinary proceedings). This is positive.

122. However, as in the draft Law on judges, the interrelation between disciplinary proceedings and dismissal proceedings is not entirely clear.[30] A finding of a serious disciplinary breach in the disciplinary proceedings may lead to the dismissal of a prosecutor (see Article 102). Disciplinary proceedings may end with the imposition of a disciplinary sanction imposed by the Disciplinary Commission, which may be appealed to the HPC. The decision of the HPC is final (Article 121 para. 3). However, the same HPC may be the initiator of the dismissal proceedings, if it finds that the prosecutor is guilty of a particularly serious breach of discipline (Article 103). It is unclear how the "appellate" function of the HPC within the disciplinary proceedings is compatible with the role of the HPC in the dismissal proceedings.

123. It is therefore recommended to describe this interrelation between two proceedings in more detail in the draft Law, and in particular to harmonize the procedural guarantees in disciplinary proceedings and dismissal proceedings. For example: the right to a reasoned decision is laid down in Article 104 (dismissal proceedings) but not in Article 120 (disciplinary proceedings). Disciplinary proceedings are closed to the public, unless the (chief) prosecutor requests for the proceedings to be public (Article 117). The latter exception is not foreseen in dismissal proceedings (Article 104). Article 117 stipulates a time-limit for initiating disciplinary proceedings, such a time-limit is lacking in respect of dismissal proceedings.

124. Article 121, paragraph 2, rightly stipulates that the Minister of Justice is not entitled to vote in the appeal stage of disciplinary proceedings. This should also be made explicit with regard to dismissal proceedings, since one (and probably the main) ground for dismissal is a serious disciplinary breach.

c. *Prohibited activities and incompatibilities*

125. Article 52 may be interpreted as prohibiting the prosecutors from joining any associations except professional associations of prosecutors. Such a rule would be too strict; the Venice Commission does not consider that membership in a sporting association or a book-reading club, for example, is incompatible with the prosecutorial function. In general, as with the parallel

[30] Venice Commission, CDL-AD(2022)030, cited above, para. 65.

occupations as in Article 70 of the draft Law, it is important that in the case of doubt the prosecutor might seek advice of the Ethics Commission, as recommended in the October 2022 Opinion.[31]

126. Article 53 prevents prosecutors from being members of political parties, from publicly expressing political views or participating in public debates of a political nature. This provision aims to ensure the political neutrality of the prosecution service. The provision does not prohibit all political activities of prosecutors and appears to be more proportionate than a comparable provision in the draft law on judges. However, the duty "to refrain from participating in political activities" may be interpreted in the overly broad manner. Some interlocutors argued that the definition of political activity of political entity in Article 52 is given in the law on the financing of political parties. The Venice Commission recommends using the language of the international instruments concerning the right to freedom of expression and the permitted limitations thereto, in particular stressing that only such participation in the political activities which raises serious doubts in the impartiality of the prosecutor may be prohibited.

IV. Conclusions

127. On 12 September 2022, the Serbian Minister of Justice, Ms Maja Popović, requested an opinion of the Venice Commission on five draft Laws aimed at implementing the recent constitutional amendments concerning the organisation of the judiciary and the prosecution service. The present Opinion assesses the two draft Laws related to the prosecution service: the draft Law on the High Prosecutorial Council, and the draft law on the Public Prosecutor's Office. This Opinion should be read together with the previous Opinions issued by the Venice Commission in respect of the judicial reform in Serbia, and in particular the October 2022 Opinion on the three draft laws implementing the constitutional amendments on the judiciary.

128. The Venice Commission reiterates, once again, that the recent constitutional amendments have the potential to bring about significant positive change in the Serbian judiciary and the prosecution service. The Venice Commission praises the Serbian Minister of Justice for the considerable effort her Ministry invested in the preparation of the legislative package and encourages the Serbian authorities to continue conducting public consultations in the same spirit of inclusiveness and transparency. However, the Commission emphasises that a truly successful reform of the prosecution service requires non-legislative measures to be taken following the adoption of these legislative amendments. In that sense, the adoption of these legislative amendments marks an essential but not the last step in the process.

129. On the substance, the Venice Commission observes that the Serbian prosecutorial system was and will remain hierarchically organised, which is a legitimate choice. The central body of governance of the prosecution system – the High Prosecutorial Council (the Council) – has sufficient powers to ensure a high degree of autonomy of individual prosecutors and of the prosecution system as a whole. More specific recommendations to the Serbian legislator in respect of the two draft Laws under examination are as follows.

The draft Law on the High Prosecutorial Council

130. The Venice Commission remains concerned by the presence of the two *ex officio* members in the Council – the Prosecutor General and the Minister of Justice, and in particular by the effect it may have on the balance of power between the prosecutorial and lay components of the Council, and the effective functioning of the Council. The current composition of the Council is now set in the Constitution, so appropriate solutions must be found at the legislative level to reduce the influence of the two *ex officio* members within the Council. Several measures could be recommended to this end:

[31] Venice Commission, CDL-AD(2022)030, cited above, para. 45

- as to the lay members, the draft Law should ensure the broadest representation amongst lay members so to avoid a politically homogenous lay component; that can be achieved for example by revising the process of nomination of candidates or the rules on voting for them in the parliamentary Committee for the judiciary;
- as to the prosecutorial members, the legislator may reconsider the proposed system of their election;
- the heightened majority for taking some important decisions may lead to blockages, but the risk of blockages is less if the legislator increases the independence of prosecutorial members from the Prosecutor General and ensures that the lay members represent different political currents or are not politically affiliated to the Minister of Justice;
- the draft Law could provide explicitly that the repeated absence of a member in the Council meetings without valid reasons should be a ground for the termination of his or her mandate, and this should be decided by a simple majority of members of the HPC.

The draft Law on the Public Prosecutor's Office

131. On the draft Law on the Public Prosecutor's Office the Venice Commission makes the following key recommendations:

- Competencies of the prosecution service outside the criminal law field, and the corresponding powers should be precisely defined in the sectoral legislation, cannot be derived solely from the general function of the prosecution to defend "public interest", and should not give the prosecution the unfettered power to obtain materials and information, especially from private persons;
- the Ministry should not exercise supervisory powers in respect of the prosecutorial function, but it may exercise functions related to the administrative support of the activities of the prosecution offices. The list of the Minister's powers in this area should be reviewed accordingly;
- The mechanism of appeal against unfounded or illegal instructions of a higher prosecutors is necessary, but the current proposal (involving the prosecutorial members of the HPC) is problematic from the constitutional perspective and may prove to be inefficient. The legislator could consider replacing it with another legal tool (for example a special panel composed of prosecutors selected by the High Prosecutorial Council). In any event, it is necessary to describe the scope of the power of the High Prosecutorial Council in reviewing substantive decisions made by the higher prosecutors;
- Temporary assignments as a managerial decision to fill temporary vacancies created by a sudden and/or unforeseen personnel problem in a specific area of the organisation of the prosecution service may be entrusted to the prosecutorial hierarchy itself (i.e. the PG office) which possesses a more direct knowledge of the needs of the prosecution offices in the country and the possible candidates to meet those needs. These decisions should be issued in writing, and be duly motivated and made available to the prosecutor concerned. An appeal against these decisions should be possible. On the other hand, the structural use of temporary assignments to other prosecution offices creates insecurity for the prosecutors and a risk of arbitrariness. The legislator should consider introducing additional mechanisms which would encourage the High Prosecutorial Council to fill in the vacancies which are occupied by the seconded personnel;
- Basic principles of ethical behaviour of the prosecutors should be described in the law itself, while the Code of Ethics may develop them in more detail; the draft Law should explicitly say that individual prosecutors should not be held responsible for structural deficiencies within the prosecution service; the concepts of "severe" and "repeated"

offences should be developed further, especially in order to exclude dismissal in cases of repeated minor offences;

- The draft Law should explain better the interrelation between disciplinary proceedings and dismissal proceedings; it is necessary to avoid confusion as to the role played by the High Prosecutorial Council in those proceedings, and the prosecutor should enjoy comparable procedural guarantees in both types of proceedings.

132. The Venice Commission remains at the disposal of the Serbian authorities for further assistance in this matter.