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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

INTERIM OPINION

ON

THE DRAFT LAW ON THE STATE PROSECUTION OFFICE

OF MONTENEGRO

Adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014)

on the basis of comments by

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I. INTRODUCTION

1. On 2 September 2014, the Minister of Justice of Montenegro requested the opinion of the Venice Commission on the Draft Law on the State Prosecution Service of Montenegro (hereinafter, "the draft law") (CDL-REF(2014)045). The opinion of the Venice Commission was required on three other draft laws having been prepared in the context of the on-going reform of the judiciary in Montenegro: the Draft Law on Special State Prosecution Service, the Draft law on Courts and the Draft Law on the Rights and Duties of Judges and on Judicial Council of Montenegro

2. Mr Guido Neppi Modona, Mr Jørgen Steen Sørensen and Mr James Hamilton acted as rapporteurs on behalf of the Venice Commission.

3. On 27-28 October 2014, a delegation of the Venice Commission visited Podgorica and held meetings with representatives of the authorities (the Ministry of Justice, the Parliament, the Supreme Court and lower level courts, the State Prosecutor's Office, the Judicial Council and Prosecutorial Council) as well as with professional associations of judges and prosecutors and civil society. The Venice Commission is grateful to the Montenegrin authorities and to other stakeholders met for the excellent co-operation during the visit.

4. This Opinion is based on the English translation of the draft law provided by the Montenegrin authorities. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

1. *5.* This Interim Opinion was adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014).

II. GENERAL REMARKS

A. Background

6. The Parliamentary Assembly of the Council of Europe, in its June 2012 Resolution 1890 (2012) on "*The Honouring of obligations and commitments by Montenegro*", pointed out the independence of the judiciary and the efficiency of the justice system of Montenegro as key issues. The adoption of constitutional amendments to de-politicise the judiciary was also a strong requirement from the European Commission to start the EU accession negotiations.

7. Montenegro has already taken steps aiming at ensuring, in line with European standards and best practices, the independence and efficiency of its judicial system. To achieve these goals, amendments to the Constitution were introduced in 2013. These amendments, among other improvements, have introduced limitations to the role of the Parliament in the sphere of the judiciary and provided a constitutional framework for the de-politicisation of the judiciary.

8. Following the changes to the constitutional framework, new legislation on the judiciary has been elaborated aimed at strengthening the independence of the judiciary and its efficiency. The Draft Law on the State Prosecution Service of Montenegro is an important step of a larger program aiming at implementing the 2013 constitutional amendments dealing with the Judiciary and the Judicial Council, the Prosecution Service, and the Constitutional Court, all of them addressed to meet European standards.

9. A number of amendments to the 2008 Law on the State Prosecutor's Office were adopted in September 2013, providing, *inter alia*, for the appointment of the Supreme Prosecutor, heads of prosecutors' offices and of state prosecutors within a fixed timeframe from the date of enactment of the new law. The new provisions also required suspension, before the entry

into force of the amended law, of ongoing procedures for the appointment of state prosecutors (under the 2008 law -"deputies") and heads of prosecution offices (under the 2008 law - "state prosecutors")[1].

10. In addition, although both the Constitution and the 2008 law provide that their appointment is permanent, the 2013 amended law introduced a requirement - for former "deputies" - to undergo selection to be reappointed as state prosecutors. In view of their potentially negative impact on the independence and impartiality of prosecutors, as well as of the related administrative difficulties, the new provisions raised concerns and strong criticism within the judiciary in Montenegro.

11. In February 2014, in the presence of representatives of the Venice Commission, the authorities of Montenegro and the European Commission during a meeting in Brussels concluded that the respect for the principles of legal continuity and life tenure in favour of current state prosecutors in relation to the implementation of the 2013 amendments to the Law on the State Prosecution Office were of crucial importance. In this context, it was agreed that previous heads of prosecution offices, elected for five years under the previous constitutional provision should be entitled to complete their mandate; furthermore, internal control/disciplinary and dismissal proceedings would be dissociated from the election procedure and would be carried out respecting all relevant procedural guarantees.

12. Since February 2014, in the framework of the amended constitutional and legislative provisions, key judicial and prosecutorial officials have been elected and appointed. In particular, the Prosecutorial Council completed the procedure for selecting the heads of state prosecutor's offices. Reportedly, all former heads of prosecution offices who re-applied for their position were confirmed. It is also welcome that, after several attempts, the Parliament finally appointed a new Supreme State Prosecutor in October 2014.

13. According to the information available to the Venice Commission, a decision of the Constitutional Court on the constitutionality of the (re)selection of prosecutors is pending. In its 2014 Progress Report on Montenegro[2], the European Commission recalled the conclusions agreed with the authorities of Montenegro in this regard in February 2014 and emphasised that "the appointment of state prosecutors (former deputy state prosecutors) needs to be carried out in line with European standards".

B. Prosecution service

14. The independence of judges and the judiciary in general have their origin in the fundamental right for persons to a fair trial. The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law[3], without unjustified interference is an important part of the common European heritage. The independence or autonomy of prosecutors and the prosecution system is not such a clearly defined common standard.

15. As indicated by the Venice Commission in its Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service[4] (hereinafter, the "Report on the Prosecution Service"), there exist a variety of prosecution systems in Europe today, which have developed as a result of the various criminal justice systems; there is, therefore, no uniform model for all states to follow. Nevertheless, virtually all modern criminal justice systems in Europe have common values: for instance, modern states universally

[1] See Section XI. Transitional and Final provisions of The Law on State Prosecution Service (Official Gazette of the Republic of Montenegro 69/03 and Official Gazette of Montenegro 40/08, 39/11 and 46/13).
[2] European Commission, Montenegro - 2014 Progress Report, issued on 8 October 2014
[3] Article 6, European Convention on Human Rights
[4] Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service (CDL-AD(2010)040)

regard criminal prosecution as a core function of the state and most systems provide for a monopoly on criminal prosecutions by the state or an organ of the state.[5]

16. The Report further states that the major reference texts allow for systems where the prosecution service is not independent from the executive. Nonetheless, where such systems are in place, guarantees must be provided at the level of the individual case to ensure that there is transparency concerning instructions that may be given.[6]

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

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

Inasmuch as this is an institutional question - …the very notion of European harmonisation around a single concept seemed premature."[7]

17. Since the prosecutor acts on behalf of society as a whole and because of the serious consequences of criminal conviction, the prosecutor must act fairly, impartially and to a high standard. Even in systems where the prosecutor is not part of the judiciary, the prosecutor is expected to act in a judicial manner.[8]

18. It is therefore important that the qualities required for prosecutors be similar to those of a judge and that suitable procedures for appointment and promotion are in place. Prosecutors, like judges, will take unpopular decisions on occasion and these are likely to be criticised in the media and become the subject of political controversy. Proper tenure and appropriate arrangements for promotion, discipline and dismissal, which will ensure that the prosecutor cannot be victimised on account of having taken an unpopular decision, must be in place and secured.[9]

19. Taking into account the new constitutional rules dealing with the prosecution service and their compliance with European standards, this opinion will ascertain above all whether the draft law is in line with the European standards as reflected in the above mentioned documents, and relevant recommendations contained in the previous opinions of the Venice Commission[10].

20. It is not the purpose of this opinion to provide a detailed and exhaustive review of the draft law. It will therefore focus on the provisions raising more critical issues.

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[5] See Report, §§ 10-12.
[6] See Report, § 23.
[7] P. 11, Explanatory Memorandum to Recommendation Rec(2000)19 of the Committee of Ministers to member states on the Role of public prosecution in the criminal justice system
[8] Ibid, § 15
[9] Ibid, § 18
[10] *Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro*, CDL-AD(2013)028;
Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, CDL-AD(2012)024;
Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro, CDL-AD(2011)010;
Opinion on the draft amendment to the law on the State Prosecutor of Montenegro, CDL-AD(2008)005;
Opinion on the Constitution of Montenegro, CDL-AD(2007)047.

III. THE DRAFT LAW ON THE STATE PROSECUTION SERVICE

A. Constitutional framework pertaining to the state prosecution service

21. According to Article 134 of the Constitution, un-amended, "*the State Prosecution shall be a unique and independent state authority that performs the affairs of prosecution of the perpetrators of criminal offenses and other punishable acts who are prosecuted ex officio*". Articles 82, 91, 135, 136, 137 and 138 of the Constitution have been modified following the numerous previous recommendations of the Venice Commission[11].

22. Article 91, paragraph 2 of the Constitution provides that the Supreme State Prosecutor is elected and released from duty by the Parliament with the qualified majority of two-thirds in the first voting and with the three-fifths majority in the second voting (the same qualified majorities are required for the judges of the Constitutional Court and for four members of the Judicial Council selected from among reputable lawyers). Paragraph 3 of Article 92 provides that in the first voting the Parliament elects the Supreme State Prosecutor on the proposal of the Prosecutorial Council; if the proposed candidate is not supported by the required majority, in the second [and subsequent] voting the Parliament shall elect the Supreme State Prosecutor from among all the candidates that meet the legal requirements.

23. As for the appointment procedure, Article 135 of the Constitution provides that the Supreme State Prosecutor shall be elected by the Parliament on the proposal of the Prosecutorial Council, upon a public call for the selection of candidates and after the hearing with the competent working body of the Parliament. The Supreme State Prosecutor and the heads of state prosecution offices are elected for a period of five years, while the function of the state prosecutors is permanent.

24. Article 136 dealing with the Prosecutorial Council provides that:
- the Council shall ensure the autonomy of the state prosecution; the reference to autonomy rather than independence is not contrary to European standards;
- the Council is presided over, except for disciplinary proceedings, by the Supreme State Prosecutor;
- the composition, election and organization of the Council is regulated by law. The last paragraph lists the competences of the Council, among them the power to make proposals to the Parliament for the election of the Supreme State Prosecutor, and for the appointment and dismissal of the heads of state prosecution offices and state prosecutors.

25. Article 137 grants functional immunity to the heads of the prosecution offices and the state prosecutors; moreover they are not responsible for the opinion expressed or the decision made in performing their duties, except for case of a criminal act.

26. Article 138 provides that the heads of state prosecution offices and state prosecutors may not be member of the Parliament and may not perform other public duty or be engaged in any other activity.

B. Comments on the draft law

1. Basic provisions

27. In defining the activity of the prosecution service **Article 2** of the draft law refers, as Article 134 of the Constitution does, to the prosecution of criminal offences and "*other punishable acts* according to the law". It would be desirable, in accordance with the principle

[11]See CDL-AD(2013)028; CDL-AD(2012)024; CDL-AD(2011)010; CDL-AD(2007)047; CDL-AD(2008)05, all including specific references to the State Prosecution Service of Montenegro.

of legality, to clarify what are the "other punishable acts" referred to. Also Article 15, para. 2, refers to "other acts punishable".

28. **Article 4**, provides that "*State prosecutors shall carry out their duties in public interest for the purpose of application of the law, whereby respect for and protection of human rights and freedom shall be ensured*". It is welcome that paragraph 2 provides, with implicit reference to Article 134 of the Constitution, that state prosecutors "*carry out their duties impartially and objectively*". At the same time, to an extent, paragraph 1 involves the critical issue of the powers of the prosecutor's office outside the criminal law field. In this regards, in its 2011 Report on the Prosecution Service[12], the Venice Commission wrote that a distinction "needs to be made between the interest of the holders of state power and the public interest" and that "ideally the exercise of public interest functions (including criminal prosecution) should not be combined or confused with the function of protecting the interests of the current Government". That being stated, the Venice Commission pointed out that in "many countries the function of asserting public interest, outside the field of criminal prosecution, would rest with an ombudsman", while in a number of democracies "the two functions of defending state interest and public interest are combined".

29. Taking into account that the Venice Commission has sometimes been critical of excessive powers of the prosecution service in individual countries where "the prosecutor's office was a powerful means to control the judiciary", it is recommended to avoid any doubt about non-criminal functions of the prosecutors and to limit the wording of Article 4 setting out that prosecutors should carry out their duties impartially and objectively, on the basis of principles of legality and equality before the law.

30. Article 5 states that 'operations of the state prosecution service shall be public unless this law stipulates otherwise'. The scope of this provision needs to be clarified, particularly in view of the fact that, according to Article 97 (6) it is a severe disciplinary offence to disclose information learnt while handling cases or in discharging duties of the prosecutorial office. It is recalled that, by definition, the prosecutor's preliminary investigations are, for evident criminal procedure reasons, secret.

31**. Article 6** provides that there is a right to and a duty of professional advancement. In case the aim of this provision was to refer to training[13], this should be made more explicit.

2. Organisation and competences of the State Prosecution offices

32. The general structure of the prosecution service follows a very hierarchical model with the individual components of the service attached to the different levels of court. The Supreme State Prosecution Office deals with the Supreme Court and Court of Appeal, as well as the administrative Court, and the high state prosecution offices are attached to the two High Courts, with 13 basic state prosecutors' offices attached to the Basic Courts.

33. As stated in **Article 16**, the State Prosecution Service is to be managed by the Supreme State Prosecutor; other state prosecution offices have their own heads. **[**However**]**, **In** accordance with the option made in Montenegro for a model of hierarchically organised prosecution service, **Article 129** effectively gives the Supreme State Prosecutor absolute control by authorising him or her directly to exercise all the authority and to undertake all the actions that the heads of other state prosecution offices are authorised to undertake (see comments under **Article 129**; see also **article 130** on supervision by the Supreme State Prosecution Office).

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[12] *Report on European Standards as regard the Independence of the Judicial System: Part II – The Prosecution Service*, CDL-AD(2010)040, §§ 71-73.

[13] According to the *Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System*, "training is both a duty and a right for all public prosecutors".

34. However, such direct exercise of powers by the Supreme State Prosecutor clearly goes too far because it would remove any control over illegal instructions. Prosecutors should be able to protest against illegal instructions from their superiors[14]. If the Supreme State Prosecutor can take all acts directly, even without giving an instruction to the prosecutor in charge of the case, any control of illegal instruction could easily be avoided by directly ordering such acts.

35. Article 15 gives the prosecutors power to impose and undertake the measures necessary to investigate crimes and "other acts punishable according to the law" (see comments under **Article 2** above).

3. Prosecutorial Council

Composition

36. Part III of the draft law (**Articles 17 to 41**) deals with the Prosecutorial Council. This body is intended to have 11 members, out of whom five are to be prosecutors elected and dismissed by the Prosecutorial Conference[15], four are to be eminent lawyers elected and dismissed by the Parliament, and one member appointed by the Minister of Justice from amongst his own staff. The Supreme State Prosecutor, elected by the Parliament, is to be the chairman (except in disciplinary proceedings) of the Prosecutorial Council, which is in line with previous recommendations of the Venice Commission.[16]

37. Very little work has been done to lay down international standards in relation to Prosecutorial Councils, unlike the situation with regard to Judicial Councils. While it is tempting to apply the standards relating to the latter to Prosecutorial Councils, there are some differences between the judiciary and the prosecution which are significant for the organisation of their respective councils.

38. Firstly, the hierarchical nature of the prosecution service and the obligation on the Supreme State Prosecutor to manage the prosecution service makes it appropriate that that person should also chair the Prosecutorial Council. The balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers also seems appropriate. It is also welcome that the power to appoint half of the members of the Prosecutorial Council be given to different bodies: it helps to avoid a corporatist management of the prosecution service and can provide a democratic legitimacy to it. Furthermore, it is wise that the Minister of Justice should not him- or herself be a member but it is reasonable that an official of that Ministry should participate. One may wonder however whether ten members, in addition to the president, are not too many, since there are reportedly only 140 state prosecutors in Montenegro.

39. According to **Article 17** of the draft law, the composition of the Prosecutorial Council shall be promulgated by the President of Montenegro. It would be important to clarify whether this also involves the President's right to reject the proposed composition of the Council or promulgation is only a matter of formality.

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[14] Point 10 of Recommendation CM/Rec 2000 (19); CDL-AD(2010)040, § 59.

[15] According to Article 19 of the draft law, the Prosecutorial Conference will be composed of all heads of state prosecution offices and all state prosecutors.

[16] See CDL-AD(2012)024, § 50.

Term of Office

40. It is envisaged in **Article 18** that there should be a four year term of office for the Council. This is a reasonable period. Members can be re-elected provided that at least four years have expired since their previous term of office (**Article 25**). This seems a reasonable provision as it would be undesirable for persons to remain on the Council for too long a period.

Elections of prosecutors' representatives

41. The members who are prosecutors are elected by the Prosecutorial Conference (**Article 19**). **Articles 23 and 24** provide the procedures for the proposal and the election of the five Prosecutorial Council members from among the state prosecutors. They seem too complicated.

42. Four of the prosecutors' representatives are to come from the Supreme State Prosecution Office, the Special State Prosecution Office and the two High State Prosecution Offices taken as a group. Proposals of candidates are to be made in the sessions of those offices, which are respectively to nominate three, two and three candidates. The election of the single representative from the basic state prosecution offices is also complex. Every prosecutor in these offices can nominate two candidates.

43. Based on these proposals, an Election Commission - the composition of which is described in **Article 22**[17] - is responsible for preparing lists of eight and four candidates respectively (**Article 23**).

44. The actual election is then made by all the members of the Prosecutorial Conference from the lists of candidates as determined by the Electoral Commission. It seems that all prosecutors will vote for all of the vacancies and successive rounds of voting take place until candidates receive the necessary majority. It is provided that the Conference can elect only one candidate from any one office (**Article 24**).

45. This system ensures that all levels of the prosecution system are represented**.** However, since out of the five state prosecutor members of the Prosecutorial Council four are elected from among the Supreme State Prosecution Office, Special State Prosecution Office and high state prosecution office, and only one from among basic state prosecution offices **(Article 17),** the system does not secure a proportional and fair representation of all levels of the prosecution service. In the opinion of the Venice Commission at least two, if not three members should be elected from among basic state prosecution offices, taking into account that the Supreme State Prosecutor is *ex officio* the President of the Prosecutorial Council.

46. Moreover, one may wonder whether such a degree of complexity of the system provided for in **Articles 22 to 24** for electing the five representatives for some 140 prosecutors is really needed. The election procedure (including that for establishing the proposals for candidates) should be simplified.

Election of the eminent lawyers as members of the Prosecutorial Council by the Parliament

47**. Article 26** deals with the election of the eminent lawyers by the Parliament. It is welcome that its provisions provide for a public call (by the relevant working body of the Parliament) and that the list of candidates shall be published. Yet, this provision seems

[17] "The Election Commission shall have a chairman and two members elected from among the heads of the state prosecution offices and state prosecutors by the extended session of the Supreme State Prosecution Office upon the proposal of the sessions of the state prosecutors of all state prosecution offices."

unclear in a number of respects. The public call is intended to attract applicants who are lawyers with at least 10 years' experience "*who [have] earned personal and professional reputation*". The "*relevant working body*" of the Parliament then submits a proposal to the Parliament. This proposal "*shall contain as many candidates as are to be elected members of the Council*". It seems, therefore, that the "*relevant working body*" effectively chooses the members but that this choice is subject to a veto by the plenary of the Parliament. It is not clear what is meant by "*the relevant working body"*. If this is a committee of Parliament, this should be spelled out. In addition, Article 26 does not specify the majority required for the election of the eminent lawyers, which would mean that a simple majority may be sufficient.

48. In the opinion of the Venice Commission, to avoid politicisation of the appointments, a qualified majority should be required for election of this parliamentary component of the Prosecutorial Council. The Venice Commission already suggested in its Report on the prosecution service[18] and in numerous opinions on the judicial and prosecutorial councils referred to in the Montenegrin Constitution[19] that, in order to avoid a politicisation of the body, the Parliament should elect the lawyers members with a qualified majority of two-thirds, as it is provided for the Judicial Council by Article 91 of the Constitution. Instead, the draft law remains unclear on the method of appointment. The same qualified majority should be applied to the Prosecutorial Council.

49. In addition, an anti-deadlock mechanism should be foreseen for the election of the eminent lawyers, e.g. a three-fifth majority for subsequent voting, as provided for in Article 91 of the Constitution for the election of the lay members of the Judicial Council, or the proposal of a higher number of candidates and the election with the absolute majority of the components of the Parliament, or the election by Parliament using a proportional system, or to transfer of the power to elect to university faculties and lawyers' representatives.

Subsidiary bodies

50. Besides the Prosecutorial Council, the draft law in its **Articles 19 to 22** and **Article 141 and 142** provides for a number of commissions and collegial bodies, such as the Commission for the Code of Prosecutorial Ethics (within which the Council will be represented) and the Election Commission; as well as for the Prosecutorial Conference, the Session and Extended Session of the Supreme State Prosecution Office and other State Prosecution Offices. Yet, the rationale for the existence of so many structures is not sufficiently clear.

51. For instance, the tasks of the Election Commission, provided for in **Article 22**, could be organised within the Prosecutorial Conference, without giving autonomy to a specific commission. The Commission for the Code of Prosecutorial Ethics could be a sub-commission of the Prosecutorial Council, consisting of a member who is not a state prosecutor and two members of the Prosecutorial Council who are state prosecutors. It is not clear, however, why this body has to be chaired by a person who is not a prosecutor, as provided for by Article 20

Termination of the term of office

52**. Article 27** deals with termination of the mandate of a member of the Prosecutorial Council. Among the cases of termination of the mandate, **Article 27.2** mentions the case of a member being elected as a state prosecutor or promoted to a higher rank or a management position in the prosecution service. It seems that the membership in the Council is a part-time position and prosecutors continue to exercise their office during membership. It is quite evident that, in view of the wide powers of members of the

[18] CDL-AD(2010)040, § 66
[19] See for instance CDL-AD(2012)024, §§ 44-50.

Prosecutorial Council, no member should be entitled, while serving on the Council, to be promoted within the service. A provision should therefore be added to the draft prohibiting any member of the Council from seeking or receiving such an appointment or promotion during the course of his or her mandate.

Dismissal

53**. Article 28** deals with dismissal from the Council. Members are to be dismissed if they discharge their duties "*unconscientiously and unprofessionally*" or are convicted of an offence making them "*unworthy of discharging the duties of a Prosecutorial Council member*". It is strongly recommended to define these dismissal grounds more closely. For example, it is not clear what sort of offence would make one 'unworthy' to be a member of the Council. Prosecutor members are also dismissed if a disciplinary sanction is imposed. However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure. In addition, the law should also provide for unjustified failure to perform duties as a ground for dismissal.

54. It is noted that, under article 28, the proposal for dismissal will be submitted by the Prosecutorial Council to the body that elected the member. The draft law does not say what happens if that body declines to dismiss the member. This is a source of concern as it may mean that the electing body would have the possibility to confirm a Prosecutor member even when there are grounds for his/her dismissal. The decision of the Prosecutorial Council should directly result in dismissal without the intervention of a political organ.

55. In addition, Article 28 should ensure a fair hearing for the person to be dismissed and that the decision can be appealed to a court. Dismissal should be decided upon by the other members of the Council, with a qualified majority, without the member concerned.

56. In view of the above comments, it is recommended that clearer dismissal grounds and mechanism be provided and that the provision on remission of the dismissal decision to the electing body be deleted from the draft law.

Emoluments

57. **Article 31** deals with emoluments. Members employed in state authorities are allowed to be absent for their office in order to serve on the Prosecutorial Council and their salaries and emoluments are to be secured, for the duration of their absence, based on their employment within the concerned authorities. Prosecutor members of the Council may work for the Prosecutorial Council up to 70% of their annual working hours and their prosecutorial activities should be proportionately reduced. There is no provision for the remuneration of Council members who are not prosecutors or employed by state authorities.

58. It is noted that the Prosecutorial Council is to fix the amount of its members' emoluments for their work on the Council. In the opinion of the Commission, it is not wise for a body of the State to set its own emoluments. Similarly, it is recommended to reconsider the provision in Article 34 enabling the Council to set up commissions, which would allow the Council to fix the remuneration for such work at up to 50% of the average salary in Montenegro.

Competences

59. The Prosecutorial Council is envisaged as a body with very wide competences, which will play a very hands-on role in such matters as appointments and termination of functions, promotions, performance evaluation and discipline. These competences are listed, in a non-exhaustive manner, in **Article 136 of the Constitution**, as amended in 2013.

60. The Venice Commission has already expressed its view that fixing in the Constitution the composition and key competences of the Prosecutorial Council is a welcome approach[20]. Among the competences listed in Article 136 of the Constitution, the task of ensuring the autonomy of the state prosecution service and that of establishing a proposal for the election of the Supreme State Prosecutor are of particular importance.

61. Besides the competencies set forth in the Constitution, **Article 35** of the draft law lists in a very detailed way (also in a non-exhaustive manner) other competences that, overall, give to this body effective power to govern and organise the prosecution service. It would be important to explicitly mention among the Council's function, in line with a previous recommendation of the Venice Commission, that of overseeing that prosecutorial activity be performed according to the principle of legality.[21]

62. One of the competences is to decide on the number of state prosecutors. However, reading this in conjunction with **Article 36** it seems that the real power lies with the Supreme State Prosecutor. While the Minister of Justice does not seem to have the power to object to the initiative of the Supreme State Prosecutors, the Council itself seems to have a veto. It is recommended that Article 36 be more clearly expressed.

63. The Council's powers also include the issuing of opinions on incompatibility of certain activities with the office of the prosecutor (**Article 35.8**). Any such opinion shall be subject to an appeal to a court of law. It may be reconsidered whether such a function is not more suitable for the Ethics Commission rather than the Council as a whole.

64. Another Commission shall be established, as part of the Council's tasks under the draft law, to evaluate the performance of prosecutors. In addition to the fact that this is likely to lead to a considerable concentration of power for the Council, one may wonder whether this would not be better handled by a specialised inspectorate rather than the Council.

65. More generally, it seems to be envisaged that, while not a full-time body, its members would devote about 70% of their time to its work. It is envisaged that in matters such as conducting examinations to determine appointments, or in dealing with the disciplinary matters, the Council would operate through small commissions consisting normally of three members. Such a model is open to a number of criticisms.

66. Firstly, the conferring of such important powers on a small body which will exercise them directly creates a very powerful body which may be susceptible to corruption. There is an argument that the powers in relation to appointments, promotions and discipline should not all be exercised by the same small group of people.

67. Secondly, the Council will not merely make decisions of principle but will be involved in the operational day-to-day work. In that case, one may wonder whether the electoral method of choosing a council, while appropriate for a body intended to be representative and to exercise a general supervisory role, is the best way to select persons who will have a very technical role. For example, one of the functions of a Commission composed of members of the Council dealing with examinations will be to set and correct examination questions (see **Article 57**). This is hardly a function one would normally confer on an elected body whose function should rather be to oversee and guarantee the integrity of the process rather than to be involved in its technical aspects. It is also envisaged that the Council will itself conduct interviews for positions in the prosecution service (**Article 58**).

[20] See CDL-AD(2012)024, § 47.
[21] See CDL-AD(2007)047, §110.

Decisions

68**. Article 38** provides in its first paragraph (in the English version of the draft law) that the decisions of the Prosecutorial Council are to be "final". If there is no drafting or translation mistake; this paragraph is self-contradictory, since it second parts stipulates that "administrative dispute may be initiated against them". Many of the decisions of the Prosecutorial Council are indeed of sufficient importance that an appeal to a court of law should be provided as well as the possibility of procedural review. One may wonder also for which reason the appeal against the Council's decisions is placed under "administrative dispute". It is recommended that Article 38 paragraph 1 be reworded to provide clarity on the availability of an appeal to a court of law in relation to the decisions of the Prosecutorial Council and related procedures.

4. Election of heads of state prosecutors offices and state prosecutors

The election of the Supreme State Prosecutor

69**. Articles 45 to 96** deal with the requirements to be elected, the procedure for election, the transfer of state prosecutors (with or without consent), their performance evaluation and termination of office, their immunity as well as issues of incompatibility. As stated by **Article 135 of the Constitution**, the Supreme State Prosecutor and the heads of state prosecution offices shall be elected for a period of five years.

70. In particular, **Articles 42-44** deal with the election of the Supreme State Prosecutor, stating that the Prosecutorial Council shall issue a public call and compose a list of eligible candidates, which will be submitted to the Parliament along with a reasoned proposal for the election of the Supreme State Prosecutor.

71**. Article 42** requires from candidates to the position of Supreme State Prosecutor to "*meet the general requirements for election to the position of the state prosecutor in the Supreme State Prosecution Office and […] be characterized by professional impartiality, high professional and moral qualities.*" In addition, the candidate shall have "*work experience of at least 15 years as a state prosecutor, or 20 years in other duties in the field of law"*.

72. With regard to the election procedure, it is welcomed that, as provided for in **Article 91, paragraph 2 and 3, of the Constitution**, in accordance with previous recommendations of the Venice Commission, the Supreme State Prosecutor shall be elected with a qualified majority of two-thirds of all member of Parliament in the first voting and three-fifths majority in the second voting if the proposed candidate has not been supported by the required majority. That being the case, it results from of **Articles 43 and 44** of the draft law in conjunction with **Article 91 of the Constitution** that in the subsequent voting the three-fifths majority is required not for the election of the proposed candidate but for the election of the Supreme State Prosecutor from among the list of all eligible candidates composed by the Prosecutorial Council. A further anti-deadlock mechanism would be needed which could/should state that, in case no candidate is supported with the qualified majority of three-fifth in the subsequent voting, the Prosecutorial Council proposes two candidates, for whom the absolute majority of the members of the Parliament should be sufficient.

73. The role of the Council in submitting a proposal to the Parliament for the election of the Supreme State Prosecutor is not entirely clear. On one reading they simply list the candidates who have the necessary length of service. However, the qualifications also require the candidate to be characterised by professional impartiality and high professional and moral qualities, and the Council seems to be required to form a judgement on this. **Article 44** would seem to indicate this wider role: its first paragraph mentions, in addition to the initial list of eligible candidates - to be established in close session as a basis for the

Council's proposal -, the opinion of the extended session of the Supreme Prosecution Office and the candidate interview; besides, the second paragraph mention the "reasoned" proposal of the Prosecutorial Council to be submitted to the Parliament for the election of the Supreme State Prosecutor. This needs to be further clarified and related procedures specified.

Heads of state prosecution offices

74. It is welcome that state prosecutors and heads of state prosecution offices will be appointed (for five years, as stipulated by the Constitution) by the Prosecutorial Council.

75. **Article 45** of the draft law requires the prosecutor to hold a law degree. Considering the degree of movement of population throughout former Yugoslavia and the similarity of legal systems between its successor states, the question whether the degree must be conferred in Montenegro only (or degrees conferred elsewhere are also accepted) could be an important one. The rapporteurs of the Venice Commission have been informed that no such limitation had been envisaged. It is recommended that Article 45 be made clearer on this issue.

76. The criteria for election to the position of head of state prosecution office in **Article 49**[22] and the following articles seem somewhat mechanistic. While the drafting of a programme of work may be very important, there are other criteria which might be required from a candidate. Additionally, more precise elements for the candidates' evaluation as well as for the assessment of the programme of work proposed by them would be helpful. It seems that **Article 49** envisages interviews for positions as the head of a state prosecution office being carried out by the whole Council. This seems a rather cumbersome and unnecessary procedure.

State prosecutors

77. According to **Article 135 of the Constitution**, the function of state prosecutor is permanent. Exceptionally, the person elected for the first time as state prosecutor shall be elected for a period of four years.

78. As mentioned in **Article 57,** the written examination to be conducted for persons applying for election as state prosecutors for the first time is to be set and corrected by a commission established within the Prosecutorial Council. It is questionable whether the use of elected representatives is appropriate for such a task. On the other hand, to guarantee impartiality and fairness in the procedure for electing state prosecutors, some outside input would be desirable.

79. Under **Article 58**, the Prosecutorial Council shall conduct interviews with the successful candidates in the written examination. As stipulated in **Article 41,** the Council may in this context benefit from the assistance of a psychologist. No indication is given on the need and purpose of such assistance or on the manner in which it should be provided. It is recommended, if recourse to the assistance of a psychologist is maintained, that clarification be provided about the conditions under which the Council should seek such assistance.

Reassignment and transfer of state prosecutors

80. A**rticles 69 to 73** deal with reassignment and transfer of prosecutors to other offices. It is not easy to see the relationship between **Articles 69 and 70**. The first requires consent to a transfer while the second seems to envisage a compulsory temporary transfer although consultation is required. The principle of irremovability applies to judges and not to

[22] These include evaluation of the programme of work proposed by the candidates, of their previous performance as prosecutors (heads of prosecutorial office), evaluation in the candidate interview.

prosecutors. Nonetheless, prosecutors should have a possibility to appeal against compulsory transfers.

81. It is noted in this connection that **Article 72** allows transfer without consent "*in the event of restructuring of the State Prosecution Service which leads to decreasing or dissolving the number of posts of the state prosecutors*". Since the decision is taken by the Prosecutorial Council, Article 38 allowing administrative dispute against it should be applicable. Yet, explicitly mentioning a right to appeal against transfer decisions and more detailed indications of the criteria to be taken into account when such a decision is adopted would be beneficial. It seems to be envisaged that a salary might be lower following a transfer; this seems unfair particularly in the case of a compulsory transfer. It is recommended that Articles 69, 70 and 72 be reviewed in the light of the above comments.

5. Performance evaluation

82. **Articles 74 to 88** deal with performance evaluation of state prosecutors. No such evaluation seems to be foreseen for the state prosecutors from the Supreme State Prosecution Office and the Special State Prosecution Office who, as indicated by article 74, are excluded from the related procedure. No indication is provided with regard to the reasons for such an exception. All prosecutors, with the possible exception of the Supreme State Prosecutor, should be evaluated.

83. As already indicated, a question may be raised on whether it is appropriate to entrust the Prosecutorial Council with the performance evaluation of prosecutors (see comments in § 65 above). If the Council is to have a role, it would be preferable that this role be confined to that of oversight with the actual evaluations being carried out by a technical body. Instead, what is proposed in **Article 75** is that evaluation should be conducted by an evaluation commission composed of all prosecutor members of the Council, in addition to the Supreme State Prosecutor. Yet, the commission will act based on an assessment by an evaluation panel consisting of the head of the office where the evaluated prosecutor works and four senior prosecutors. Since each office has a different head it seems that there will not be just one panel but the panel will meet in various different compositions. This, however, is not very clear in the text. Neither is the precise relationship between the panel and the commission. Despite the very detailed function envisaged for the panel (**Article 82**), the Commission also is given a very hands-on role in **Article 83** in what appears to be a system of appeals to the commission.

84. In the opinion of the Venice Commission, the evaluation commission should be much more independent of the Council than is proposed. It is difficult to justify why the eminent lawyers should excluded from this process. The Venice Commission believes, on the contrary, that the input of some "outsiders" would help to guarantee impartiality and independence. In addition, the possibility of an appeal against the decisions of the evaluation commission should be clearly provided. As it does for the decisions of the Prosecutorial Council in **Article 38**, the draft law allows for administrative dispute against decisions of the evaluation commission while stating that the decisions "shall be final" (**Article 85).**

Criteria for evaluation

85. The key criteria for evaluation of state prosecutors are provided by **Article 76** of the draft law: "expert knowledge" and "general competences for discharging the duties of prosecutorial office" and detailed by sub-criteria listed in **Article 77** and **Article 78**. **Article 79** provides further indicators ("sources") for performance evaluation.

86. Some of proposed sub-criteria, in particular the quantitative ones (see **Article 77**), would need careful consideration, to ensure that measuring quantity of work will not be done merely by counting cases without due regard to their weight. The number of 'convicting'

judgments should in no circumstances be a criterion. No prosecutor should have a personal interest in securing a conviction. Certainly, if a prosecutor has an unusually high number of acquittals it is reasonable to ask why this is the case; yet, it is not appropriate to measure this as a criterion either of quality or quantity of work without any further enquiry.

87. Similarly, success on appeal should not be a criterion. While it is reasonable to examine the track record of any prosecutor whose 'results' diverge more than 20% from the average, the evaluator must remain open to considering possible explanations likely to justify these figures.

88. As regards the practice of assessing the quality[23] of work by examining random cases, this seems a reasonable approach, as is the practice of inviting the person evaluated to put forward examples of good work he or she has done.

89. **Article 84** on the establishing (calculating) the grade following evaluation may be a source of diverging interpretation. A reference to articles 77 and 78, listing all sub-criteria, should be made in paragraph 1, to ensure that the right number of sub-criteria (six in Article 77 and four in Article 78) and related grades obtained by the evaluated prosecutor (excellent, good, satisfactory, unsatisfactory) are taken into account when the final grade is established.

90. According to **Article 86**, persons with a low grade (satisfactory or unsatisfactory) are required to undergo mandatory training. While it is reasonable to require additional training for low-level performance, it is obvious that all prosecutors should have to undergo training. As noted under Article 6, *"[s]tate prosecutors shall have the right and the duty of professional advancement*". In addition, **Article 78 and 79** list participation in training amongst the sub-criteria and indicators of the performance evaluation.

91. As stated by **Article 87,** heads of state prosecution offices will be evaluated - two years after their election to that function as well as after the expiry of the term of office of five years - "according to the procedure and the manner stipulated in this Law", i.e. the rules applicable to state prosecutors. It appears therefore that, despite their extended management roles, heads of prosecutions offices are still to be assessed on the basis of a full case-load as prosecutors. Concerns relating to this approach, which seems indeed questionable, were also expressed during the visit of the Venice Commission delegation to Podgorica. The way to address this specific situation seems to be left to the Prosecutorial Council, entrusted by **Article 88** of the draft law with the task of regulating in more details the criteria and indicators for evaluation of the heads of state prosecution office. It is recommended however that the provisions draft law be reviewed to clearly specify that the case-load of heads of prosecution offices as well as their evaluation criteria should adequately take into account their managerial tasks.

6. Incompatibility, immunity and termination of office

92. **Article 89** empowers the Prosecutorial Council to issue opinions about incompatibility of certain activities with the duties of a state prosecutor. It is suggested that the Commission for the Code of the Prosecutorial Ethics (Article 19) be consulted on such matters.

93. **Article 90** dealing with decisions on immunity requires a court, when considering a custodial sentence for a criminal offence committed by a prosecutor in discharging his/her duties of prosecutorial office, to request the opinion of the Council on whether it approves such a detention. According to Article 137 of the Constitution, prosecutors only enjoy functional immunity. Such immunity only relates to acts performed in the exercise of

[23] It is necessary to point out the difference between judges and prosecutors. Judges should not be evaluated on the basis of the quality of their judgements.

prosecutor's functions. Procedural immunity has to be lifted by the Prosecutorial Council unless there are strong indications that false accusations are levelled against the prosecutor in order to exert pressure.[24]

94. **Article 91** deals with the liability of the prosecutor for damage caused to an injured party "in the proceedings by the state prosecutor as a result of his/her performing of the duties of his/her prosecutorial office unlawfully, unprofessionally or unconscientiously." This article makes a reasonable distinction between wider liability of the State towards the victim (arg. "unlawfully, unprofessionally or unconscientiously") and more narrow liability of the prosecutor towards the State which already compensated the victim (arg. "deliberately"). This means that the victim has a wider claim against the State and the State can recover the compensation paid only when the prosecutor caused the damage deliberately.

7. Disciplinary liability and dismissal

Disciplinary offences and sanctions

95. It is welcome that disciplinary offences be analytically detailed by the draft law. **Article 97** sets out the various disciplinary offences for which a prosecutor may be held liable, ranking them as "minor", "severe" and "most severe" according to their seriousness. These also include a number of rather vague offences, which should be more specific, such as, listed under severe disciplinary offences, "behaving in a manner which is inappropriate to the prosecutorial office'. The concept of being "convicted of an offence which makes him/her unworthy of prosecutorial office" (under the most severe offences) is also unclear and should be made more precise (e.g. by reference to the penalty that can be imposed for such offences). The sanction of a 20% cut in salary for a period of three months for a minor disciplinary offence (**Article 98**) seems disproportionate.

8. Disciplinary procedure

96. As required in **Article 99**, the system of establishing disciplinary liability involves a *motion* filed by the head of the prosecution office concerned or the immediately higher office, the Supreme State Prosecutor, the Minister of Justice or the Commission for the Code of Prosecutorial Ethics. The motion for establishing disciplinary liability of the Supreme State Prosecutor may be filed by the session of the Supreme State Prosecution Office, the Minister of Justice and the Commission for the Code of Prosecutorial Ethics. It is welcome that the disciplinary procedure can be initiated by different bodies. Yet, since a complaint may be initiated by a person who is a member of the Council or represented on the Council, there should be a provision excluding such a person from participating in the ensuing proceedings.

97. As established by **Article 101**, a *disciplinary plaintiff*, appointed by the Prosecutorial Council outside the Council for two years, is entrusted with disciplinary investigations and the indictment of the accused. While this is in principle positive, it is difficult to understand the need for a disciplinary plaintiff in the case of a complaint made by the Ethics Commission based on an examination which they have already carried out.

98. Under the proposed scheme, the procedure for establishing and deciding disciplinary liability - upon the motion to indict issued by the disciplinary plaintiff - is, for minor and severe disciplinary offences, conducted by a *Disciplinary Panel* and, for the most severe offences, by the Prosecutorial Council (**Articles 105 and 106**). The Disciplinary Panel consists of three members of the Council, two of them prosecutors and one from among the eminent lawyers (**Article 103**).

[24] CDL-AD(2010)040, para. 61. On the distinction between substantive and procedural immunity and the lifting of immunity, see CDL-AD(2013)008, *Amicus curiae brief on the Immunity of Judges for the Constitutional Court of the Republic of Moldova,* (Venice, 8-9 March 2013), paras. 21 and seq.

99. Although the aim is to ensure that different authorities are in charge of the different steps, which is positive, there is still scope for improvement as regards the separation between some of the different actors in this mechanism. For example, since the disciplinary plaintiff is elected after obtaining the opinion of the session of the Supreme State Prosecution Office, among its prosecutors, one may wonder how objective the disciplinary plaintiff is likely to be where the complainant is the Supreme State Prosecutor. An alternative may be, to ensure complete autonomy and independence to the "disciplinary plaintiff", that she/he be not a state prosecutor of the Supreme State Prosecution Office and be not elected "after obtaining the opinion of the session of the Supreme State Prosecution Office".

100. More generally, to ensure the required separation between the authorities involved and that their members do not participate in prior/subsequent proceedings, it would be preferable that disciplinary decisions be made by a small body none of whose members is also on the Prosecutorial Council, and which would contain an element of independent outside participation. Should the proposed scheme be maintained, it would be advisable to specify, in line with **Article 136 of the Constitution** (stressing the autonomy of the state prosecution), that the Chair of the Prosecutorial Council entrusted with disciplinary decisions, as well as the Chair of the Disciplinary panel, must be lay members, not state prosecutor members; this would give increased credibility and democratic legitimation to the disciplinary procedure.

101**. Article 109** provides for recusal of members of the Disciplinary Panel/Prosecutorial Council without giving guidance to the grounds for refusal other than to refer to "circumstances that provoke suspicion into their impartiality". The decision on recusal is to be made by the Supreme State Prosecutor except when the recusal in question relates to him, in which case the Council makes the decision. This again is somewhat problematic since it implies that the Supreme State Prosecutor may be a member of a Disciplinary Panel, which would be clearly inappropriate.

102. Finally, it is welcome that, against the final decision on disciplinary offences by the Disciplinary Panel/Prosecutorial Council, accused and disciplinary plaintiff are entitled to file an appeal to a judicial and impartial body such as a panel of three Supreme Court Judges **(Article 107)**. It is further welcome that the criminal procedure code and its guarantees of the right of defence applies to disciplinary proceeding **(Article 110)** and that the procedure for the disciplinary proceeding of state prosecutors also applies to the dismissal of heads of the state prosecution offices for failures in accomplishing their tasks (see **Articles 113 to 115).**

9. Funds

103. **Article 118** provides for a separate annual allocation - in the national budget - for the State Prosecution Service including the Prosecutorial Council. The budget proposal is made by the Council to the government for each state prosecution office individually and for the operations of the Council itself. In addition, the Council is represented by its president when the budget is discussed by the Parliament. These provisions are important for the autonomy of the prosecution service, as guaranteed by **Article 136 of the Constitution**.

10. Organisation of work of the State Prosecution Service

Independence in the work of the state prosecutors

104. Under **Article 126, "***[s]tate prosecutor shall be responsible for the work in the case he/she is allocated and he/she shall be independent in his/her work and decision making, except in the cases stipulated in Article 127*"**.** This provision is in line with article 137 of the Constitution guaranteeing functional immunity of state prosecutors and heads of state prosecution offices.

105. **Article 127** provides for the issue of instructions of a general nature by the Supreme State Prosecutor and for the initiation of such instructions by the heads of prosecution offices when needed. It further provides for instructions for proceeding in individual cases (by the Supreme State Prosecutor and the heads of prosecution offices respectively). As required by **Article 128**, such instructions are to be issued in writing, apart from exceptional cases when circumstances do not allow, in which case they must be issued in writing subsequently. These provisions seem appropriate in a hierarchical system and the requirement for them to be in written form (and with explanation) is welcome.

106. Article 128 also provides for the release of a prosecutor from a case where he/she considers the instruction unlawful or ill founded. There may be some contradiction, which should be clarified, between the first and second paragraphs. According to the first paragraph, instructions in individual cases have to be in writing; therefore, it is not clear why the second paragraph gives the aggrieved prosecutor the right to request them in writing. This provision seems generally, however, to be in accordance with paragraph 10 of *Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system*.

107. In addition, a complaint against allegedly illegal instructions should be available. In its Report, the Venice Commission stated: *"Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction"*.[25]

108. **Article 129** allows the Supreme State Prosecutor to exercise the authorities and functions of the heads of all prosecution offices. He/she also has extensive powers of delegation. In effect the draft law gives him/her total hierarchical control over the whole prosecution system. In principle, hierarchical control is in line with the option made in Montenegro for a model of hierarchically organised prosecution service. However, direct exercise of authority by the Supreme State Prosecutor must not be used to circumvent guarantees against illegal instructions.

Supervision of the work of the state prosecutors

109. **Article 130** entrusts the Office of the Supreme State Prosecutor with the supervision of all state prosecution offices at all levels, including the Special State Prosecution Office, according to a supervision plan established by the Supreme State prosecution. Supervision measures, which also include an every two-year reporting system, will therefore involve a direct insight into the overall work and operations of every state prosecution office. This is in line with the hierarchical organisation of the system.

Allocation and withdrawal of cases

110. The provisions set forth in **Articles 136 and 137** provide that the allocation of cases must be done in such a way as to ensure impartiality, independence, and efficiency, and that the withdrawal of the allocated case is allowed only in specific situations due to failures of the state prosecutor: "*if it is established that he/she is unjustifiably not proceeding in the case, due to recusal or if he/she is prevented from discharging the duties of the office for longer than a month*". Withdrawal is allowed also for "*cases the urgent nature of which is stipulated in the law".* These *"can be withdrawn from the state prosecutor if due to his/her absence or because he/she is prevented from discharging the duties of his office he/she cannot proceed in such cases timely and within the time-limit defined in the law*". The state

[25] CDL-AD(2010)040, § 59

prosecutor is given the faculty to file a complaint against the decision of withdrawal; if the complaint is accepted, the case is given back to the state prosecutor. The provisions are welcome, since they guarantee in a satisfactory way an impartial organization of the prosecution offices and a good balance between the hierarchical organisation and the autonomy of the individual state prosecutor in accomplishing her/his tasks.

Session of the State Prosecution Office

111. The framework for the operation of the prosecution service at its different levels is provided in **Articles 139-142.** To discuss issues of common interest for the work and management of the state prosecution office (programme of work, rules of procedure, annual schedule of tasks), sessions of the offices of different levels shall be convened. These provisions are welcomed, since they ensure a form of collective decision and responsibility on the functioning of the prosecution offices and the programs of work.

11. Prosecutorial management

Supervision over Prosecutorial Management

112. As stated by **Article 155** of the draft law, the Ministry of Justice exercises supervision over the activities of the prosecutorial management, including that of the Special State Prosecutor Office. It is welcome that paragraph 2 of this article stipulates that this supervision should not involve any actions likely to have an impact on the prosecutors' decisions in individual cases. Its scope and modalities are regulated in detail by **Articles 157 to 160** dealing with the "inspection supervision" of the Ministry of Justice, described in **Article 158** as the supervision "over the tasks of prosecutorial management in state prosecution offices".

113**. Articles 157-160** provide for inspection supervision in state prosecution offices by the Ministry of Justice through the use of Judicial Inspectors. It is not clear how this can be in line with the independence of the prosecution service (as guaranteed by article 134 of the Constitution) or with other systems of control, for example by the Prosecutorial Council and by the Ethics Commission. At the very least there appears to be a high degree of duplication which is undesirable. In the opinion of the Venice Commission, the Ministry of Justice should not have a function of day-to-day control of the prosecution office although an input into overall general policy questions would be reasonable. If the Ministry is to have any power to give instructions it must be in accordance with the provisions of *Recommendation Rec(2000) of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System* (item 13, points c) to f)).

114. The supervision power of the Ministry of Justice also raises an issue of consistency with the right of the Supreme State Prosecutor to manage the prosecution service as provided for in Article 16. **Article 156** seems to indicate that the Ministry of Justice has an overall power of supervision, since "*[u]pon request of the Ministry of Justice, the Supreme State Prosecutor shall submit the data and information needed for* ***monitoring***[26] *of the organization and operations of the State Prosecution Service, application of the Rulebook on Internal Operations of the State Prosecution Service, proceeding upon applications and complaints of citizens and general data on prosecution of perpetrators of criminal offences and other acts punishable according to the law*."

115. In view of the above comments, it is recommended that the provisions dealing with the supervision to be carried out by the Ministry of Justice over the activities of the prosecutorial management be revised to provide, in a consistent manner, clarity on their scope as well as the safeguards needed to ensure full and effective respect of the principles of independence

[26] Emphasis added

of the State prosecution and functional immunity of individual state prosecutors. In the light of Article 134 of the Constitution, any supervision should relate only to policies and the activities of the prosecution system in general but not to individual cases.

12. Data protection

116. **Articles 162 - 163** deal with secret data. In particular, article 162 requires members of the prosecution service, including state prosecutors, civil servants and state employees, to "*preserve secret data according to the law governing the secrecy of data regardless of how they learnt of them*". No guidance is given on what should be the position where secret data is indicative of the innocence of an accused person or would tend to assist the defence. This issue needs to be addressed.

13. Transitional and Final Provisions

117. As previously indicated, the fact that the transitional and final provisions of the draft law repeal problematic amendments to the 2008 Law on the State Prosecution Service enabling early termination of mandates of prosecutors and heads of prosecution offices (the 2013 amendments), is a welcome development, in line with the position expressed by the Venice Commission in its *Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service*[27] and in previous opinions[28].

118. As it did in its 2008 Opinion on the draft amendment to the law on the State Prosecutor of Montenegro[29], the Venice Commission wishes to stress the importance of providing a permanent mandate for prosecutors. In its view, "*fixed term appointments in combination with a possibility of reappointment cast doubt on the independence of the prosecution service. This is, of course, emphasized in systems such as that in Montenegro where there is considerable political influence on appointment decisions*".

119. Similarly, full respect for the principle of stability and security of their function should protect heads of prosecution offices from undue removal from office (for political reasons, legislative changes or other reasons) and contribute to the autonomy, stability and efficiency of the prosecution service, as guaranteed by the Constitution. It is of the utmost importance that these requirements be adequately taken into account in the forthcoming legislative steps and in the implementation of the future law.

120. The draft law proposes, for its transitional and final provisions, two alternative ways of dealing with the necessary transitional steps in the implementation of the proposed amendments. Under both versions, the implementation of the provisions dealing with the election of state prosecutors and heads of prosecution offices (articles 42 to 68) and on performance evaluation (articles 74 to 88) is to start on 1 January 2016. Relevant provisions of the current law, as amended in 2013, would remain in force. However, the problematic amendments introduced in 2013 in the Chapter XI on transitional and final provisions, will be repealed on the day of entering into force of the current draft law. In the Venice Commission's opinion, it belongs to the authorities of Montenegro to assess which are the most suitable ways and time-frame for the implementation of the draft law, once adopted. What is essential is to ensure the effective implementation of the improvements introduced to the existing legal framework, with due respect for the principles of autonomy, efficiency, legal continuity and institutional stability of the Prosecution service as well as the functional immunity of the state prosecutors.

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[27] Report, § 50

[28] Joint Opinion on the draft Law on the Public Prosecutor's Office of Ukraine CDL-AD(2013)025, 14 October 2013, § 14

[29] CDL-AD(2008)005

IV. CONCLUSIONS

121. The Venice Commission welcomes the efforts made by Montenegro, as part of the process aiming at the European integration of the country, to improve and modernise the legal framework for the operation of the State Prosecution Service, in line with the applicable European standards and relevant constitutional amendments adopted in 2013.

122. Overall, the Draft Law on State Prosecution Service of Montenegro is of high technical quality and in conformity with the rules and principles provided for in the Constitution, the European applicable standards, and previous recommendations of the Venice Commission. It provides a good legal basis for an effective work of the prosecution service in Montenegro.

123. Notwithstanding this overall positive assessment of the draft, there are also a number of provisions which should be reviewed or further improved to comply with the relevant standards. It is recommended in particular that:

- the scope of the activities of the prosecution service be limited to the criminal field, and that the law clearly state that state prosecutors shall carry out their functions impartially and objectively, on the basis of the principles of legality and equality before the law;

- the procedures for proposal and election of the Prosecutorial Council members from among state prosecutors be simplified and a proportional and fair representation of all levels of the prosecution service be secured; for the election of the eminent lawyers members a qualified majority of two-thirds and anti-deadlock mechanisms be introduced;

- in order to give increased credibility and democratic legitimation to the disciplinary procedure and in line Article 136 of the Constitution guaranteeing the autonomy of the state prosecution, the disciplinary plaintiff and the president of the disciplinary panel be elected from lawyers outside the prosecution service (and without requesting the opinion of the session of the Supreme State Prosecution Office);

- the proposed system of supervision by the Ministry of Justice over the activities of the prosecutorial management be revised with a view to guaranteeing full and effective respect of the principles of independence of the State prosecution and functional immunity of individual state prosecutors.

124. The Venice Commission further stresses, in relation to the future implementation of the draft law, the necessity of ensuring full respect of the principles of legal continuity and life tenure of current state prosecutors, as well as stability in function and autonomy, for prosecutors, heads of prosecution offices and the state prosecution service as a whole.

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