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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

FINAL OPINION

ON

THE REVISED DRAFT LAW ON THE PUBLIC PROSECUTION OFFICE

OF MONTENEGRO

adopted by the Venice Commission
at its 102nd Plenary Session
(Venice, 20-22 March 2015)

on the basis of comments by

Mr Guido NEPPI MODONA (Substitute Member, Italy)
Mr Jørgen Steen SØRENSEN (Member, Denmark)
Mr James HAMILTON (Expert, Former Member, Ireland)

I. INTRODUCTION

1. On 24 December 2014, the Speaker of the Parliament of Montenegro requested the opinion of the Venice Commission on the revised Draft Law on the Public Prosecution Service of Montenegro (hereinafter, "the Draft Law") (CDL-REF(2015)0), version dated 4 December 2014.

2. At its 101st Plenary Session (Venice, 12-13 December 2014), the Venice Commission had already adopted, at the request of the Ministry of Justice of Montenegro (dated 2 September 2014), an Interim Opinion[1] on an earlier Draft Law on the State Prosecution Service of Montenegro. The Opinion of the Venice Commission had been 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.

3. Mr Guido Neppi Modona, Mr Jørgen Steen Sørensen and Mr James Hamilton have been invited to act as rapporteurs on behalf of the Venice Commission.

4. At its 101st Plenary Session, having been informed that the Montenegrin authorities had in the meantime amended the earlier Draft Law taking into account the Commission's assessment and that they would intend to seek the Commission's opinion on the revised Draft Law, the Commission authorised the rapporteurs, in the light of the urgency of the domestic proceedings, to send the forthcoming draft opinion to the Parliament of Montenegro prior to its 102nd Plenary Session.

5. The present Opinion was adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015).

II. PRELIMINARY REMARKS

A. Background

6. The background to the request to the Venice Commission for legal assessment of the draft law on public prosecution office of Montenegro is related to the judicial reforms which are ongoing in Montenegro following the amendment of the Constitution in 2013 and to the country's efforts towards its EU integration. Since this background is set out in the Commission's Interim Opinion, the present document will not elaborate further on this matter.

7. In its Interim Opinion, the Venice Commission concluded that the earlier Draft law provided a good legal basis for an effective work of the prosecution service in Montenegro, of high technical quality and in line with the rules and principles provided for in the Constitution (as amended in 2013), the European applicable standards, and the Commission's previous recommendations.

8. Notwithstanding this overall positive assessment of the Draft Law, the Interim Opinion also recommended that a number of its provisions be reviewed or further improved to comply with the relevant standards, in particular that:

[1] See CDL-AD(2014)042, *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).

- 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; a qualified majority of two-thirds and anti-deadlock mechanisms be introduced for the election of the eminent lawyers members;

- the disciplinary plaintiff and the president of the disciplinary panel be elected from lawyers outside the prosecution service, as a way to give increased credibility and democratic legitimation to the disciplinary procedure, in line Article 136 of the Constitution guaranteeing the autonomy of the state prosecution,;

- the supervision system by the Ministry of Justice over the activities of the prosecutorial management be revised to guarantee full and effective respect of the independence of the public prosecution and the functional immunity of individual public prosecutors.

9. The Venice Commission also emphasized, in relation to the implementation of the future law, the necessity of ensuring full respect of the principles of legal continuity and life tenure of current public prosecutors, as well as stability in function and autonomy, for prosecutors, heads of prosecution offices and the public prosecution as a whole.

10. The present Opinion will deal with the most relevant improvements introduced by the new version of the Draft Law and the provisions which could be further improved by the Parliament in accordance with the recommendations of the Venice Commission.

11. This Opinion is based on the English translation of the Draft Law provided by the Montenegrin authorities. Although the new draft contains many provisions which appear to be identical to those in the earlier Draft Law, the entire text has been re-translated in the meantime, as a result of which many provisions which appear not to have been changed in the original language now read quite differently in English. Since the translation may not always accurately reflect the original version on all points, certain issues raised may be due to problems of translation.

III. THE REVISED DRAFT LAW ON THE PUBLIC PROSECUTION OFFICE

A. General provisions

12. The General Provisions, referred to as “basic provisions” in the English language version of the earlier draft, contain several improvements introduced following the recommendations of the Venice Commission.

13. **Article 2** contains a specific reference to prosecuting “misdemeanour criminal offences”. This appears to be a clarification rather than a change of substance since the earlier text referred to “other punishable acts that are prosecuted *ex officio*”, a term which the Interim Opinion had criticised as unclear. The same wording should be used in new Article 16.

14. Following the Venice Commission recommendation, **Article 4** provides that the Public Prosecutor shall exercise the prosecution of criminal offenses “impartially and objectively, pursuant the principles of legality and equality before the law”. The reference to ensuring the public interest and the “respect for and protection of human rights and freedoms”, functions

belonging rather to the ombudsman, has been rightly deleted.

15. It is welcome that **Article 5**, though still headed "publicity", taking into account that the prosecutor's preliminary investigations are, for evident criminal procedure reasons, secret, does not provide any more for the publicity of the prosecution operations. However the new provision is too generic and tautological, merely stating that the "operation of the Public Prosecutor Office shall be provided in the manner prescribed by law" and says nothing about publicity, Despite this, the later sections of the draft dealing with data protection and public relations, discussed below, are less restrictive of publicity than in the earlier text. It is recommended to clearly establish that the "operations of the Public Prosecution Office are secret, unless the law stipulates otherwise", and to modify the title of the Article.

16. **Article 6** now refers to prosecutors' right and duty to develop their professional skills which meets the Commission's earlier criticism.

17. Finally, a new **Article 10** - the last one of the General Provisions - fairly provides that in this law the use of masculine gender implicitly includes the same term in feminine gender.

B. Establishment, organisation and jurisdiction of the Public Prosecution Office

18. Dealing with the Special Public Prosecutor's Office, **Article 13** provides, like Article 12 of the earlier draft, that the new Office "shall operate in accordance with a special law...". Yet, the new Office is formally included in the structure of the Public Prosecution Office by **Article 11 paragraph 3** of the Draft Law. The Venice Commission in its Interim Opinion on the Special Prosecutor's Office recommended unifying in the same law the Public Prosecution Office and the new Special Office, *inter alia* in order to avoid the risk of inconsistency with Article 134 of the Constitution, which provides a unique Public Prosecution Service. The choice of the Montenegrin Authorities to provide a special law for the Special Prosecutor could have as a positive effect that of providing a framework for increased autonomy of the new Office and for ensuring its effectiveness against organised crime and corruption.

19. The only change in this Chapter is to **Article 16** (corresponding to former Article 15) which now refers to "other offences punishable by law". This new text seems to meet the earlier criticism in the Interim Opinion. As previously mentioned, it is recommended to harmonise its wording with the new wording of Article 2 containing a specific reference to prosecuting "misdemeanour criminal offences".

C. Prosecutorial Council

20. As far as the Prosecutorial Council is concerned, some provisions of the Draft law should be further improved. The composition and mandate (term of office) of the Council (**Articles 18, 19 and 28**) remain unchanged. The system of Council elections remains as proposed in the earlier draft. The recommendations of the Commission concerning the system of elections, in particular relating to the complexity of the system of electing members who are prosecutors and the method of election of the eminent jurists by the Parliament have not been addressed. The critical remarks of the Commission concerning the multiplicity of prosecutorial structures (Interim Opinion paragraphs 50 to 51) have not been addressed either. More specific comments on these matters are made in the following paragraphs.

1. Proportional representation of all levels of the prosecution service

21. **Article 18** still provides that, out of the five public prosecutor members elected by the Prosecutorial Conference, only one is elected from among basic Public Prosecutor's Offices, while four are elected from among public prosecutors belonging to the Supreme, Special and High Public Prosecutor's Offices. To ensure a proportional and fair representation of all levels of the prosecution service, at least two members should be elected from among Basic

Public Prosecutor's Offices, taking also into account that the Supreme Public Prosecutor is *ex officio* the President of the Prosecutorial Council. Moreover, the election procedure provided for by **Articles 23-25**, unchanged, remains too complex and should be simplified.

2. Election of prosecutors' representatives

22. In this context it may be noted also that, given the other important functions of both the Conference of Public Prosecutors and the Committee for the Code of Ethics for Public Prosecutors apart from the election of the Council's members, it does not seem a particularly appropriate drafting solution to deal with the establishment and powers of these two bodies solely in the context of those elections as is done in **Articles 20 and 21**. The Code of Ethics itself is important enough to warrant its own section in the draft law. The inappropriateness of this solution is confirmed by the fact that the provision establishing the Ethics Committee (**Article 21**) has been amended in the revised draft to include a provision allowing any person to contact that Committee to comment on whether the behaviour of a public prosecutor is in accordance with the Code of Ethics (see also paragraph 31 below).

3. Election of eminent lawyers as members of the Prosecutorial Council

23. In order to avoid politicisation of the appointments, **Article 26** dealing with the election of four eminent lawyers by the Parliament, should be modified as suggested by the Venice Commission. A qualified majority of two-thirds should be required, as provided by Article 91 of the Constitution for the Judicial Council. The fact that the Constitution does not expressly provide a qualified majority for the parliamentarian election of the lay members of the Prosecutorial Council is not an obstacle, since the qualified majority is aimed to enhance the guarantees of autonomy and independence of the four lawyers elected by the Parliament. The requirement of a qualified majority would imply that an anti-deadlock mechanism should be foreseen, for instance a three-fifth majority for a subsequent voting, as it is provided for the Judicial Council by Article 91 of the Constitution; an alternative would be to propose of higher number of candidates and the election with the absolute majority of the members of the Parliament. In addition, as recommended in the Interim Opinion, clarity should be provided on what is meant by the "competent working body of the Parliament", in charge of making candidates' proposals.

24. **Article 27** of the new Draft Law introduces a ban on members of the Prosecutorial Council being promoted within or appointed (for the eminent lawyers members) to the Prosecution Service. This is in line with the recommendation of the Commission in the Interim Opinion and is to be welcomed. The provisions in **Article 29** relating to termination of the mandate of the Council's members have been amended to reflect this change.

25. **Article 30** dealing with removal from office defines what is meant by performing duties in a "negligent or unprofessional manner". It is not clear however whether the definition is intended to be comprehensive or intended merely as an example of negligent behaviour. The definition should be comprehensive as it is important not to leave scope for argument. An offence making a person unworthy of membership of the Council is defined as a criminal offence prosecuted *ex officio* carrying a prison sentence of at least six months. Moreover, the last paragraph of this new Article 30 refers to rules governing the disciplinary procedure of public prosecutors, now applicable also to the removal of members of Prosecutorial Council. These changes reflect recommendations in the Interim Opinion of the Commission.

26. Regrettably, the new Draft Law does not take into account the concern expressed by the Interim Opinion over the requirement that the proposal for dismissal of a Council's member for having performed his/her duties in a "negligent or unprofessional manner" must be sent to the body that elected that member[2]. This means that the dismissal proposal may be declined

[2] See CDL-AD(2014)042, paragraphs 54-56

even where there are grounds for dismissal. The Commission reiterates its recommendation that the provision on remission of the dismissal decision to the electing body - an external, and sometime political body - be deleted and that the dismissal be decided upon by the other members of the Council, with a qualified majority, without the member concerned.

27. **Article 33** dealing with remuneration reflects the comments in the Interim Opinion that it is unwise to allow the Council to establish its own remuneration and places a cap of 80% of the average gross salary in Montenegro on the amount which may be paid. The amount payable for membership of Committees is similarly limited to 40% by virtue of **Article 36**.

28. **Article 38** (former Article 36) deals with the establishment of the number of public prosecutors. This number is to be related to performance benchmarks. The earlier provision allowed for the determination of that number by the Council on the proposal of the Minister of Justice, on the initiative of the Supreme Public Prosecutor. The involvement of the Minister of Justice in this decision is absent in the new text. This change reinforces the autonomy of the Prosecutor's Office and aims at providing an objective basis for the decision concerning numbers and should be welcomed. The change meets the criticisms expressed in the Interim Opinion (paragraph 62).

4. Competences

29. The competences and responsibilities of the Council remain unchanged despite the recommendations made in the Interim Opinion.

30. One matter which was raised in the Interim Opinion is the power to comment on the incompatibility of performing certain activities with the exercise of the Prosecutor's Office. The Interim Opinion questions whether such a function might not more appropriately be conferred on the Ethics Committee. The new draft retains this as a function with the Council (**Article 37 (8)**). In addition, **Article 101** provides that prosecutors as well as the heads of prosecution offices may seek a ruling from the Council on incompatibility.

31. At the same time, however, **Article 21**, which establishes the Ethics Committee, introduces a new provision according to which any person may contact the Committee to comment on whether or not a prosecutor's behaviour is in accordance with the Code of Ethics. The provision is silent as to what action the Committee should take in response to such a comment, but presumably it is intended that the Committee should have power to intervene in the specific case; otherwise it is difficult to see the added value of the provision. However, if this interpretation is correct it compounds the problem identified in the Interim Opinion, since the result would be that both the Council and the Committee would have jurisdiction to deal with such a matter. In any event, since in the framework of the disciplinary proceedings only the Disciplinary Committee or the Prosecutorial Council may take decisions on disciplinary responsibility (see **Article 117** of the Draft Law), the Ethics Committee should only have the authority to give advice to these bodies and not to give rulings.

32. The **former Article 41** which provided for the Council to use the expert assistance of a psychologist in the procedures of election and evaluation has been deleted. The provision had been criticised in paragraph 79 of the Interim Opinion. Its deletion is welcome.

D. Election of Heads of the Public Prosecutor's Office/public prosecutors

1. Election of the Supreme Public Prosecutor

33. The conditions for the election of the Supreme Public Prosecutor have been broadened: **Article 43** of the revised Draft law provides that a person with 15 years working experience as a prosecutor *or a judge* (this was absent in the earlier draft) is eligible, as well as a person who has 20 years experience on other legal matters. This is to be welcomed. However, a

few detailed comments are called for.

34. First, the draft does not address the position of persons who have a mixed experience in a satisfactory manner. For example, would a person with 10 years experience as a law professor followed by 11 years as a judge be eligible? It would be clearer if instead of saying "on other legal matters" provision was for "20 years as a public prosecutor, judge or working on other legal matters" in addition to the provision of qualifying a person who has 15 years as a prosecutor or a judge. Moreover, it should be made clear that the 15 years could consist of some period served as a judge and some period served as a prosecutor. Perhaps the text is not ambiguous in the Montenegrin language.

35. Secondly, the concept of "other legal matters" (to replace "other duties in the field of law" in the earlier draft) is still very broad. In such an important matter it is of particular importance to be very precise. For example, one might specify practice as a lawyer or employment as a lecturer in a University faculty of law. There are other matters one might wish to add. In any case, the use of a general term rather than a precise list of qualifying experiences or occupations is likely to give rise to dispute.

36. The new text has to a large extent clarified the election procedures which are to be followed. In addition to a procedure for a public announcement of a vacancy, **Articles 45-47** provide for applications to be made to the Prosecutorial Council who are to list the candidates meeting the statutory requirements. The comments of the enlarged session of the Supreme Public Prosecutor's Office are then to be obtained. Finally, the Council is to submit a reasoned proposal nominating one single candidate to the Parliament as well as the full list of names of qualified candidates. These changes would seem to meet the recommendations in paragraph 73 of the Interim Opinion. Clarity still needs to be provided - and an anti-deadlock mechanism, as suggested in the Interim Opinion - for the case where the Parliament fails to elect the Supreme Public Prosecutor even after the second voting (according to **Article 91 of the Constitution**, a qualified majority of three-fifth is required in such a case and the Supreme Public Prosecutor shall be elected from among the list including all the candidates that meet the legal requirements).

37. It is to be welcomed that, as provided by **Article 48,** a person may only be elected as Supreme Public Prosecutor for a maximum of two terms.

2. Conditions for the appointment of public prosecutors/heads of the Public Prosecutor's Offices

38. **Article 49** makes three changes to the general conditions for the appointment of public prosecutors. Firstly, the express requirement (in former Article 45) to be a citizen of Montenegro has been deleted. However, there is a new requirement that candidates meet the general requirements for work in state authorities which presumably include a citizenship requirement. Secondly, instead of having passed the judicial examination the requirement is in the new draft (**Article 49**) to have passed the bar examination. As already suggested by the Venice Commission, it would be useful to clarify whether the law degree must be conferred only by a Montenegrin University (or degrees conferred elsewhere are also accepted), and whether the Montenegrin citizenship is provided as a general requirement.

39. These general conditions have to be looked at together with the special conditions relating to the candidates' work experience for each particular position. These provisions should be harmonised with those regulating conditions for the appointment as special prosecutor in the revised Draft Law on the Special Prosecutor's Office, articles 12 and 13, making reference to the 'judicial exam' and not to the 'Bar exam'. This difference in the wording of the two drafts may also result from a translation problem.

40. The new draft opens positions in the Prosecutor's Office to judges as well as prosecutors, and takes account of experience in other legal matters when calculating whether candidates have the necessary experience. In the opinion of the Venice Commission, such a broadening of the opportunity to work in the Prosecutor's Office can only be to the advantage of prosecutors themselves and to the functioning of the Office, provided it is implemented in such a way as to ensure fairness of competition between persons whose experience will not always be directly comparable, and that experienced prosecutors are given comparable opportunities to apply for positions within the judiciary.

41. The special conditions for appointment as a public prosecutor in the Basic Public Prosecutor's Office (**Article 50**) require two years experience as an adviser in the Prosecutor's Office or the court, or as an attorney, notary, deputy notary, or as a professor of law, or at least four years in other legal matters. It is not clear what these "other legal matters" might be and they should be clearly defined. To be appointed to the High Public Prosecutor's Office, eight years as a prosecutor or judge is required, and for the Supreme Public Prosecutor's Office 15 years as a prosecutor or judge. As an alternative, 20 years of any type of legal experience (including "other legal matters") will qualify for both the High and Supreme Public Prosecutor's Offices. Subject to the recommended clarity concerning "other legal matters" these changes should be welcomed.

42. The only change introduced by the revised Draft Law for the appointment as Head of the Public Prosecutor's Office, following from the opening of the access to the position prosecutor to judges, is that in the case of persons with experience as judges their performance in that capacity is to be taken into account in the evaluation. This change does not require any particular comment (**Articles 51 and 53**).

3. Appointment of Public Prosecutors in the Basic, High and Supreme Public Prosecutor's Offices

43. Under the earlier draft (**former Article 55**), persons applying for appointment as a public prosecutor for the first time were required to undergo a written examination from which they were exempt if they had passed the judicial examination (**former article 57**). This approach is maintained in **articles 59 and 60** of the revised Draft Law; the only difference is that, in the new draft, reference is made to the bar examination instead of the judicial examination. The "score on a written test" is also a criteria for the selection of public prosecutors in the High Public Prosecutor's Office and the Supreme Public Prosecutor's Office, to which **article 60** on the written testing applies by virtue of **Article 72**. However, having passed the bar examination/the judicial examination is, under both drafts (see **new Article 49** and **former Article 45**), one of the two general conditions for being appointed as public prosecutor and Head of a Public Prosecutor's Office, therefore applicable to all candidates. One may wonder which candidates will be required to undergo the written examination and which is the function that the written testing is meant to fulfil. In addition, as previously mentioned, it is not clear whether the reference to the bar examination, instead of the judicial examination, is due to a problem of translation or involves a substantial change to the earlier draft (see also comments in paragraph 39 above).

44. **Article 61** retains the provision whereby interviews are conducted by the Council itself. The critical remarks made in the Interim Opinion in relation to this system (paragraph 78) have not been taken on board.

E. Seconding and assigning the Public Prosecutor

45. **Articles 81 and 82** appear to be unchanged from the earlier Articles 69 and 70 except that a new paragraph has been added to **Article 82** providing for the costs of the secondment to be borne by the recipient office. It seems that the two Articles should be read

together and that Article 82 is intended to set out the procedure to be followed in cases to which Article 81 applies. However, if the two Articles were merged this would be clearer as would be the case if the second paragraph of Article 82 made it clear that the consent of the prosecutor was required. As in the case of the **earlier Articles 69 and 70**, Article 81 requires consent to a transfer while Article 82, only mentioning the obligation to consult the concerned prosecutor, seems to allow a compulsory transfer. However, these provisions are placed under the heading "Seconding to another Public Prosecutor's Office *with* the consent of the Public Prosecutor" (*emphasis added*). It is strongly recommended that clarity be provided on this important issue as well as a possibility to appeal against compulsory transfers. In addition, the terminology used in the two Articles - "secondment", "temporary transfer", "temporary assignment" - should by unified.

46. **Article 84** specifically deals with the secondment/transfer of a prosecutor to another Prosecutor's Office *without* his or her consent (*emphasis added*), in cases of reorganization of the Public Prosecutor's Office leading to the lowering the number of positions of public prosecutors involving the termination of certain such position. While the secondment under Articles 81 and 82 appears to be temporary (for a period "up to one year"), no such mention is made under Article 84, which seems to mean that, in this case, the secondment/transfer is not only compulsory but also permanent. Here again, it is essential to ensure that a possibility to appeal against such a measure is provided.

F. Evaluation of public prosecutors

47. These provisions appear to be unchanged from the earlier draft; therefore the Commission's earlier comments and recommendations remain applicable (see paragraphs 82 to 91 of the Interim Opinion). In particular, it was recommended that a more independent evaluation commission and improved evaluation criteria be provided.

G. Incompatibility and termination of prosecutorial office

48. **Article 101** now permits the prosecutor in addition to the heads of Public Prosecutor's Offices to seek a ruling on incompatibility. Assuming that this should be a function of the Prosecutorial Council, this provision is to be welcomed (see also paragraph 30 above).

49. The provision in **former Article 90** whereby a court considering sentence in the case of a prosecutor who has committed a criminal offense in discharging the duties of his or her office could ask the Council for an opinion on whether a custodial sentence was appropriate has rightly been deleted (see paragraph 93 of the Interim Opinion).

H. Disciplinary responsibility and removal

50. A number of changes have been introduced to this part of the Draft Law. As recommended by the Venice Commission, clarification is provided with regard to the criminal offenses associated with the most severe disciplinary responsibility: offenses that, as mentioned in **Article 108**, paragraph 4, number 1, make the prosecutor "unworthy of the prosecutorial office". These are now defined in paragraph 5 of the same article as criminal offenses prosecuted *ex officio* with a prison sentence of at least six months. In addition, the repetition in relation to disclosure of confidential data (**in former Article 97**) in paragraph 2(8) and 2(10) has rightly been removed.

51. It is also noted that, following the recommendation of the Venice Commission, the method of appointing the *Disciplinary Prosecutor* (or *Disciplinary Plaintiff*) has been changed in new draft **Article 112**. Under the earlier proposal (**former Article 101**) the Council was to elect this person from among the prosecutors of the Supreme Public Prosecution Office. While perhaps not necessarily creating a conflict of interest except in a case where the Supreme Public Prosecution Office is the complainant, such a proposal would not have been

desirable as both the Council and that Office are very close to the Supreme Public Prosecutor. Given that the Council may end up conducting a hearing and giving a decision it is preferable that they keep a distance from such steps as appointing a Disciplinary Prosecutor.

52. The new proposal in **Article 112** is that the Disciplinary Prosecutor should be a judge appointed by the Prosecutorial Council on a proposal of the President of the Supreme Court. While one can see merit in such a solution, it would be desirable to make it clear that the appointee will not act in a judicial capacity while exercising the function of Disciplinary Prosecutor. An alternative, to avoid that disciplinary investigations against public prosecutors be conducted by a judge and that the President of the Supreme Court be involved, would be that the disciplinary prosecutor be appointed by the Prosecutorial Council from among qualified lawyers, with the same requirements of the lay members of the Council. This would give increased autonomy and independence to the disciplinary investigations, which is of particular importance both for the public prosecutors and the general public.

53. As regards the *Disciplinary Committee,* it is welcome that **Article 114** now provides that the president of the Committee must be a lawyer member of the Prosecutorial Council, in accordance with Article 136 of the Constitution establishing that "*[t]he Supreme State Prosecutor shall chair the Prosecution Council except in a disciplinary proceeding*". The new provision enhances the credibility and democratic legitimation of the disciplinary procedure while at the same times minimising the risk that the objectivity of the process is questioned. Under the draft, however, the members of the Committee are appointed on the nomination of the Supreme Public Prosecutor (in the capacity of President of the Council). For the reasons explained above, this remains a problematic solution and should be reconsidered.

54. The new paragraph 3 of **Article 114** provides that the Supreme Public Prosecutor shall not be a member of the Disciplinary Committee. While this appears to be a desirable provision, it is perhaps unnecessary, since **Article 36**, paragraph 2, already provides that the President of the Prosecutorial Council cannot be president or member of the committees, and therefore also of the disciplinary committee.

55. **Article 116** provides that the hearing is to be held by the Disciplinary Committee or the Prosecutorial Council. No mechanism is provided to decide which it is to be. Nor is it clear who makes such a decision or on the basis of which criteria. All these elements should be set out clearly.

56. **Article 120**, dealing with *Exemption* (see **formal Article 109**, entitled *Recusal*), provides that the members of the Disciplinary Committee or the Council should not participate in its activities where there are circumstances that raise doubts as to their impartiality. The new wording clarifies that the provision refers only to activities relating to the taking of decisions on disciplinary responsibility. Paragraph 2, making reference also to the "exemption of the President of the Prosecutorial Council", lacks clarity (probably one or more words are missing). The decision whether to exclude a member rests with the Council as seem to be the case for the decision on exempting the Supreme Public Prosecutor, in his/her capacity as President of the Prosecutorial Council. However, as far as the Disciplinary Committee is concerned, since the Supreme Public Prosecutor should not be part of it, the question of his or her exemption should even not arise. This provision should therefore only be of relevance for the cases when the decision on disciplinary responsibility is taken by the Prosecutorial Council (see also comments on **Article 116** above).

57. **Article 123** establishes new rules for the costs of the proceedings. These are now only borne by the Prosecutorial Council where the proposal for establishing disciplinary responsibility is rejected. Previously the draft provided for the Council to pay costs in every case, including cases where disciplinary liability was established.

I. Internal organisation of work of the Public Prosecution Office

58. Most of the provisions in this Part are unchanged. There are however a number of changes.

59. **Article 131** (former **Article 127**) is redrafted to make specific reference to the Special Prosecutor's Office. First, it is recommended to ensure that all general instructions and policy guidelines issued to special prosecutors should be published, including in the annual report submitted by the Special Office to the Prosecutorial Council (and the Parliament).

60. Secondly, it is noted that there is now, in **Article 131**, an express provision allowing the Supreme Public Prosecutor to issue instructions in individual cases to the Supreme Special Prosecutor, who in turn can give such instructions to other special prosecutors. This is in the same terms as the power to instruct other prosecutors' offices.

61. Instructions given in an individual case are subject to the safeguards set out in **Article 132.** While these appear to comply with the provisions of *Recommendation REC(2000)19 of the Committee of Ministers of the Council of Europe*[3] *(paragraph 10)*, as an added safeguard, in case an instruction is alleged illegal, a court or an independent body should decide on the legality of the instruction. As stated by the Venice Commission In its Report of on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service: "*[a]ny 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*".[4] Hence, the right to complain to such a body should be made available. More generally, it would have been desirable to have strengthened the possibilities for judicial review of prosecutorial decisions[5]. To do so would provide a further safeguard against potential political interference with the decisions of special prosecutors.

62. With regard to the transfer of cases from the Special Prosecutor to the Supreme Public Prosecutor, the former provision which referred to doing so if there were grounds for suspicion that prosecutors in that office had committed a criminal offence falling within the jurisdiction of the Special Public Prosecutor's Office (**former Article 129** paragraph 3) has been replaced by a provision which simply states that, due to exemption (recusal) or other legitimate reasons "that may affect the further proceedings", such cases may be transferred to the Supreme Public Prosecutor's Office (**new Article 133**, paragraph 3). This is a welcome amendment (see also comments in the Interim Opinion[6]).

63. Some important changes have been introduced with regard to the disclosure of information on the work of the Public Prosecution Office by the new **Article 135,** which deals with relations with the public. Under this provision, the Supreme Public Prosecutor or a person authorised by him or the heads of offices may now give out information. While the publicity of the prosecution operations is no longer mentioned in new **Article 5** of the Draft Law, there seems to exist, as it results from the new **Article 135**, an attempt to permit providing more information than is possible at present, and to limit the prohibition on information to the names of participants and the content of actions taken, but the provision is

[3] See *Recommendation (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 (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies).*

[4] See CDL-AD(2010)040, paragraph 59; see also the Interim Opinion (CDL-AD(2014)042, paragraph 107.

[5] *See CDL-AD(2014)041, paragraph 50: "To be in line with the requirements of the rule of law, these internal guarantees should be coupled with accountability guarantees, including judicial review of prosecutorial measures, accessibility and transparency".*

[6] Interim Opinion, paragraphe 108 : "*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*".

somewhat unclear as the distinction between information about an action taken and the content of actions taken is rather obscure, at least in the English translation. In addition, while the earlier rule (last paragraph of **former Article 131)** allowed disclosure of information only in relation to preliminary investigation (though prohibiting the disclosure of the names of those involved and of the content of the actions undertaken), this limitation is absent from the new Draft Law. On the whole, **Article 135** remains rather unclear and gives the impression that a clear approach on how far the Prosecution Office can or should go in providing information to the public is still missing.

64. **Article 149** is a new provision relating to the cooperation with the police and other authorities. It provides for consultation meetings with the police and/or other authorities to clarify contentious issues or give detailed instructions to be followed in individual cases. Presumably, it is not intended to introduce the consent of the police officer or other officials as a pre-requirement to the prosecutor's instructions in individual cases (where the prosecutor has power to give an instruction); yet, prior consultation may be helpful or sometimes even necessary.

J. Supervision of work of the prosecutors

65. These provisions have been amended and the overall tenor is to make it clear that the Ministry of Justice's supervision relates only to the organisation of work and the application of the rule book in relation to the administration, especially in relation to matters such as filing, keeping official records and proper work and operation of administration and not to prosecutorial decision making. **Article 159** as it now stands seems to make this clear. More generally, it is important that the inspection supervision (control) be conducted in such a way so as to ensure effective respect of independence of the prosecutorial activity of individual public prosecutors and their functional immunity. It is recommended that this important requirement be explicitly stated by the Draft law.

66. In this connection, it is particularly welcome that the reference to the Ministry proceeding upon applications and complaints against the work of public prosecutors has been deleted from the Draft Law. F**ormer Article 156** concerning the submission of data to the Ministry has also been deleted. These changes amount to a welcome clarification. They are underlined by the new **Article 163** which provides for minutes of the inspection to be submitted to the Head of the Public Prosecutor's Office for necessary action rather than to the Minister (as was provided by **former Article 161**) although of course the Minister receives these for his/her information.

K. Data protection

67. The provisions on data protection have been simplified. The rule applying the law on data protection is reiterated and in addition there is a prohibition on providing data on the personal and family life of persons and the financial position of legal persons which prosecutors have learned about during legal proceedings (**Article 165**). This echoes the changes in **Article 135**.

L. Transitional and final provisions

68. Under the Revised Draft it is intended to maintain the existing Prosecutorial Council in office until the termination of the current mandate (**Article 184**). This is consistent with the recommendations of the Venice Commission in other cases[7].

[7] *See CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), paragraphs 58-61*

69. As far as the public prosecutors (former deputy public prosecutors) are concerned, the Draft Law introduces a deadline (July 2015) for their appointment, under the privileged conditions set out under Article 135i of the Law on Public Prosecution (as amended in September 2013). The Venice Commission wishes to underline, as it did in its Interim Opinion, that it is essential that this process be conducted in line with the European standards, and in particular with due regard to the principles of legal continuity and of life tenure.

IV. CONCLUSION

70. The Venice Commission welcomes the fact that the Montenegrin Government took into account many of the recommendations expressed in the Interim Opinion adopted at its 101st Plenary Session with regard to an earlier version of the Draft Law on the Public Prosecution Office of Montenegro (CDL-AD(2014)042. The revised Draft Law contains a considerable number of improvements, most of which appear to have been introduced in response to the comments of the Venice Commission.

71. A number of matters raised by the Commission have nevertheless not been addressed or the solutions proposed are still to be improved, notably:

- The multiplicity of prosecutorial structures entailing the risk of sometimes overlapping functions;
- in relation to the Prosecutorial Council:
  - the procedures for elections to the Prosecutorial Council, in particular: the need to simplify these procedures and to ensure the fair and proportional representation of basic public Prosecutor's Offices in the Council, as well as to apply the qualified majority for the election of the lay members of the Council;
  - the decision on the dismissal of Prosecutorial Council members, which should be taken only by the other members of the Council, without involving external bodies;
  - the variety of functions to be carried out by the Prosecutorial Council, and the appropriateness of some of these functions (such as conducting all interviews) being carried out by the Council itself rather than being delegated;
- the need for increased clarity for certain criteria for appointment as public prosecutor as well as for the secondment/transfer system of public prosecutors, where a possibility to appeal against compulsory transfers should be provided;
- the system of performance evaluation, where a more independent evaluation commission and improved evaluation criteria should be provided;
- the need to appoint the disciplinary prosecutor from among eminent lawyers and to reconsider the appointment of the members of the Disciplinary Committee on the nomination of the Supreme Public Prosecutor.

72. Taking into account the relevant improvements of numerous provisions of the earlier draft law, the Venice Commission has reason to believe that the Parliament will be able to insert further improvements, as specified above.

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