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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**KOSOVO**

**FOLLOW-UP OPINION**

**TO THE PREVIOUS OPINIONS  
CONCERNING AMENDMENTS TO THE LAW ON THE KOSOVO  
PROSECUTORIAL COUNCIL**

**Adopted by the Venice Commission  
at its 137<sup>th</sup> Plenary Session  
(Venice, 15-16 December 2023)**

**on the basis of comments by**

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## I. Introduction

1. By letter of 1 August 2023, Mr Glauk Konjufca, Speaker of the Assembly of Kosovo, requested an opinion of the Venice Commission on a revised version of the Draft Law on Amending and Supplementing the Law No.06/L-056 on Kosovo Prosecutorial Council ([CDL-REF\(2023\)036](#)). The Venice Commission had issued two opinions on the previous versions of draft amendments to the Law on the Kosovo Prosecutorial Council, in December 2021 (hereinafter: “the December 2021 Opinion”, CDL-AD(2021)051) and in March 2022 (hereinafter: “the March 2022 Opinion”, CDL-AD(2022)006). The Venice Commission therefore decided to use the format of a follow-up opinion for the analysis of the revised text.

2. Mr António Henriques Gaspar (Member, Portugal) Mr Pere Vilanova Trias (Member, Andorra) and Mr James Hamilton (former Member for Ireland, Expert) acted as rapporteurs for this follow-up opinion.<sup>1</sup>

3. On 11 September 2023, the rapporteurs held online meetings with representatives of the Ministry of Justice, the Assembly of Kosovo, the Kosovo Prosecutorial Council (hereinafter: “KPC”), the European Union Office and other international stakeholders as well as civil society organisations working in the justice sector. The Commission is grateful to the authorities of Kosovo and the staff of the Council of Europe office in Kosovo for the excellent organisation of the online meetings.

4. This follow-up opinion was prepared in reliance on the English translation of the proposed amendments. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meeting on 11 September 2023. The draft opinion was examined at the joint meeting of the sub-commissions on the Judiciary and on the Rule of Law on 14 December 2023. Following an exchange of views with Ms Albulena Haxhiu, Minister of Justice of Kosovo, it was adopted by the Venice Commission at its 137<sup>th</sup> Plenary Session (Venice, 15-16 December 2023).

## II. Background

6. After the March 2022 Opinion, the Assembly of Kosovo adopted Law No. 08/L-136 on Amending and Supplementing the Law No 06/L-056 on Kosovo Prosecutorial Council (hereinafter: “the Basic Law of 2019”).

7. On 5 April 2023, the Kosovo Constitutional Court (hereinafter: “KCC”), upon request of some members of the parliamentary opposition, ruled that some of the adopted amendments - including those concerning the power of the Ombudsperson to appoint one of the lay members of the KPC - were incompatible with the Constitution of Kosovo and annulled the amendments in their entirety.<sup>2</sup>

8. In reply to the previous recommendations of the Commission and the ruling of the KCC, the Government of Kosovo prepared a revised draft of the amendments and submitted it to the Assembly of Kosovo.

9. This follow-up opinion will assess the revised draft amendments in the light of the previous recommendations of the Commission. Furthermore, it will also examine whether the recommendations concerning the transitional provisions and other provisions which remain valid have been followed.

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<sup>1</sup> The opinion was assigned number 1149/2023.

<sup>2</sup> [Kosovo Constitution Court Judgement](#) in Cases No. KO100/22 and KO101/22, paras. 258-267.

10. The March 2022 Opinion contained five key recommendations:

- in order to exclude possible undue influence of the PG on other prosecutorial members in the KPC the law should make it clear that the prosecutorial members sit in the KPC in their personal capacity and that the PG cannot not use his/her powers of their hierarchical superior, directly or indirectly, to influence their work in this body;
- “vision” should not be in the list of criteria used by the Committee tasked with the pre-selection of the lay members;
- the law could provide for procedural safeguards making the process of pre-selection of lay members more objective: participation of experts, reasoning;
- the law should describe more clearly the process of election of prosecutorial members by the prosecutorial community (probably by introducing some form of a preferential voting);
- the procedure of pre-selection of lay members should also be clarified; in particular, while the Committee may filter out some candidates not enjoying sufficient support, it should provide the Assembly with a sufficiently long list of acceptable candidates to choose from.

### III. Analysis

11. Two of the main recommendations of March 2022 Opinion concerned the process of election and the status of the prosecutorial members of the KPC.

#### A. Excluding potential undue influence of the Prosecutor General

12. The KPC is currently composed of thirteen (13) members. Nine (9) are prosecutors elected by their peers, the Prosecutor General (hereinafter: “PG”) is an *ex officio* member and three (3) are lay members; one is a lawyer from the Bar, another is a law professor, and one is a “representative” of the civil society. For the last several years, the KPC functioned with eleven (11) members since the Assembly failed to secure the election of two lay members due to the lack of nominations for one lay member from the Kosovo Bar Association and lack of interests from representatives of civil society organisations to apply for the other vacant position of one lay member.

13. Under the draft amendments, the KPC will consist of seven (7) members; three (3) prosecutors elected by their peers (two from the Basic Prosecution offices and one from the Appellate and the Special Prosecution Offices), three (3) lay members elected by the Assembly (one of them is elected based on the nominations received from the Ombudsperson on the basis of proposals of civil society organisations) and the PG who serves as *ex officio* member. The new composition is in line with the long-standing position of the Commission that where prosecutorial councils exist, the prosecutors elected by their peers should represent a “substantial part”, yet not necessarily the majority of members.<sup>3</sup>

14. However, in the March 2022 Opinion, the Commission flagged out the risk of the PG becoming an overly powerful figure in a KPC dominated by the prosecutors and recommended the revision of the text to include provisions avoiding the undue influence of the PG on prosecutorial members of the KPC. It is therefore positive that the revised draft contains the provision stating that the members of the KPC serve in an individual capacity, do not report to the PG in their capacity as members of the KPC, and that the PG cannot use his/her hierarchical

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<sup>3</sup> Venice Commission, [CDL-AD\(2021\)051](#), Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo, para. 26. See also [CDL-AD\(2014\)008](#), Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, para. 45.

position to influence their voting, both directly and indirectly.<sup>4</sup> The Commission considers that the essence of its recommendation regarding the addition of provisions excluding any potential undue influence of the PG has been followed.

15. It is also welcome that the wording of this provision refers to the potential influence of the PG beyond the prosecutorial members of the KPC to include all members of the KPC. However, the Commission would like to note a possible contradiction between Article 3 and Article 6 of the new draft, which states that the lay member of the KPC elected by the Assembly, based on nomination by the Ombudsperson, does not serve in the KPC as a representative of the Ombudsperson, but as a representative of civil society organisations.<sup>5</sup> In the opinion of the Commission, if all KPC members serve in an individual capacity, they should not represent any organisation but exercise their duties in an independent, professional and impartial manner guided by the Constitution, laws and the public interest.

16. Therefore, the Commission invites the Kosovo authorities to address the potential contradiction between Article 6 and Article 3 of the proposed amendments to clarify that the lay member of the KPC nominated by the Ombudsperson (and all lay members) act independently in the exercise of their functions in the KPC.

### **B. Election of prosecutorial members of the KPC**

17. The March 2022 Opinion recommended that the Law should describe more clearly the process of election of prosecutorial members by the prosecutorial community (probably by introducing some form of a preferential voting). It raised concerns about the practical application of the principle “one prosecutor – one vote” in the voting process for the three prosecutorial members of the KPC and invited the authorities to consider as a possible solution the use of a proportional voting system, for instance allowing prosecutors to mark three names on the general list of the candidates (or less, if less than three vacancies are to be filled).

18. Under Article 10/A (11) and (12) of the current draft, the voting procedures remain the same. Voting for the prosecutorial members of the KPC will take place in a general conference through a secret vote, each prosecutor will cast one vote for each open position and the candidate who receives the highest number of votes is to be elected. Effectively the current proposal would mean that if the prosecutors participating and voting in the general conference were divided into different blocks, the largest block could secure all of the positions of the KPC reserved for the prosecutorial members. This recommendation has therefore not been followed.

19. The Commission would like to make the following additional remarks in relation to the election of prosecutorial members of the KPC. Article 10/A (5) on the composition of the Electoral Commission (the EC) stating that it consists of three persons, one from among the prosecutors on the KPC, one from the prosecutors from the office of the PG, and one *ex officio* member of the KPC Secretariat, calls for an important cautionary remark. The principal task of the KPC Secretariat is to provide support to the KPC and its various committees, including those involved in the pre-selection of new members. Its Executive Director and staff members are, in principle, responsible to the KPC members in discharging their duties. If this is the case, it does not seem appropriate for a member of the Secretariat in a seemingly auxiliary position *vis-à-vis* the KPC members to take part in the selection of candidates for office on an equal footing with prosecutors.

20. Furthermore, Article 9 (2) stating that chief prosecutors of any prosecution office cannot simultaneously serve as KPC members may have the unintended consequence of excluding some of the most senior prosecutors from the governance of the prosecution system. In the past, some prosecutorial members of the KPC were elected while they were still probationary

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<sup>4</sup> Article 3 of the draft amendments adding a paragraph in the Article 4 of the Basic Law of 2019.

<sup>5</sup> Article 6 of the new draft adding a new paragraph 6/a to the Article 9 of the Basic Law of 2019.

prosecutors who arguably did not have the requisite knowledge of the prosecution system, which is not desirable. In principle, senior prosecutors who are familiar with the intricacies of the prosecution service and its challenges should not be precluded from the membership without good cause. Thus, the Commission invites the drafters to reflect on the consequences of the proposed solution.

21. Finally, one of the main concerns raised in the December 2021 Opinion concerned the process of pre-selection of the prosecutorial members by the EC, which would be capable of rejecting candidates with reference to their “high integrity” and “managerial skills”. While the March 2022 Opinion considered this recommendation to have been addressed, the Commission notes that, in its current form, the added definitions in Article 2 in conjunction with the new text of the Article 10/A, (1) and (10) appear to suggest that the EC may reject candidates on the basis of imprecise notions of “high integrity” and/or “managerial skills”, which candidates have to demonstrate during the selection process.

22. Since definitions are generally intended to provide clarity and guidance for the application of substantive concepts appearing in the operational articles of the law, the reading of the definitions in conjunction with the terms “high integrity” and “managerial skills” may leave open the possibility for the EC to apply these imprecise criteria to disqualify candidates.<sup>6</sup>

23. Therefore, Commission invites the drafters to refer to its relevant recommendations and revise these provisions to ensure that candidates are rejected only on the basis of clearly defined criteria and eligibility requirements.

### **C. Procedure and method for the election of the lay members of the KPC**

24. The key recommendations related to the lay members in the March 2022 opinion concerned the criteria for the pre-selection of candidates and the necessary procedural safeguards to make the process of selecting the lay members more objective, notably through the participation of experts, but also by providing the Assembly with a larger pool of candidates following a well-reasoned ranking process.

#### **1. Criteria for the pre-selection of the lay members**

25. In the March 2022 Opinion, the Venice Commission stated that candidates for lay members should not be rejected on account of their “vision” or “ideas” because that may politicise the pre-selection process.

26. This criterion of “vision” does not explicitly appear in the text of the revised amendments. It is welcome that this recommendation has been taken into consideration and formally addressed. However, as stated in the comments on the selection of prosecutorial members, the added definitions of Article 2 read in conjunction with the text of the Article 7 (1) and (2) of the amendments modifying the Article 10 of the Basic Law of 2019 appear to suggest that the Panel administering the pre-selection process may reject candidates on the basis of vaguely formulated notions of “high integrity” and/or “managerial skills”, which candidates have to demonstrate during the selection process. In particular, the reference under the definition of managerial skills to the phrases “..... *the ability to connect things in a broader context, as well as the articulation of long-term plans of the organisation*” can be seen as an implicit reference to the “vision” and allow for the disqualification of candidates - who in the view of the Panel -

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<sup>6</sup> Based on the written comments from Kosovo authorities received by the rapporteurs on 12 December 2023, the words “in addition to the condition” (Article 10/A.8) was wrongly translated from the Albanian language and should have been translated into “except for the condition” foreseen by sub-paragraph 1.3 of Article 8 of the Law (përveç kushtit in Albanian). In such case, the EC will only be able to exclude candidates with reference to the formal criteria of eligibility and shall not assess the high integrity and managerial skills of candidates.

have not demonstrated such ability. Therefore, the Commission invites the drafters to revise the said provisions to ensure that candidates are not excluded on the basis of vague and imprecise criteria but only with reference to the formal criteria (such as education, professional seniority, citizenship, no indictment etc.).

27. In the light of the above, the Commission finds that this recommendation has only partially been followed.

## **2. Procedural safeguards and the manner of election of lay members**

28. The draft examined in March 2022 envisaged that out of the three lay members, one would be directly appointed by the Ombudsperson on the basis of proposals of civil society organisations, and two lay members would be elected by the Assembly following a pre-selection by the “relevant assembly committee”. Following the KCC judgment, the drafters have departed from that solution and now propose a more indirect role for the Ombudsperson, who shall submit to the Assembly two (2) nominations based on the proposals received from civil society organisations.

29. The Assembly elects one of the two candidates nominated by the Ombudsperson, as well as the two other lay members (from a list of two candidates for each position) through a simple majority vote by secret ballot.

### **- The Ombudsperson’s role in nominating one lay member of the KPC**

30. The Commission previously proposed several options to reduce the risk of politicisation of the lay component of the KPC including by reserving a certain number of seats to representatives of external independent institutions such as the Bar, the law faculties, the Ombudsperson, etc.

31. At that time, two alternatives proposed for the purpose of offsetting the risk of politicisation, namely the election of the lay members by parliament by a qualified majority (with an effective anti-deadlock mechanism) or the election of the lay members by parliament on the basis of a proportional system (so that lay members are elected by different political forces) were not considered by the Kosovo authorities as viable. Most importantly, the introduction of “qualified majority solutions” that would have enabled some of the lay members to receive support beyond the ruling majority in the Assembly were found to be impossible without amending the Constitution which currently requires a simple majority for decisions related to the KPC.<sup>7</sup>

32. In reviewing the draft amendments concerning the Ombudsperson’s power to appoint one of the lay members of the KPC, in the March 2022 Opinion, the Commission acknowledged that the Ombudsperson can be seen as an independent body in the Kosovo legal order, while at the same time cautioning that his/her involvement in this process should not compromise his/her ability to make independent determinations concerning matters involving the KPC.<sup>8</sup> The KCC found that the power of the Ombudsperson to appoint one lay member of the KPC violated the Constitution on account of the constitutional competences of the Ombudsperson to monitor the activities of public authorities, including the KPC and of the fact that the Constitution assigns the exclusive right to elect all lay members of the KPC to the Assembly.<sup>9</sup>

33. In the current draft, the Ombudsperson does not have the power to appoint one of the three lay members of the KPC directly, and instead may only nominate two candidates for such

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<sup>7</sup> Article 65 (10) and Article 80 (1) of the [Constitution of Kosovo](#).

<sup>8</sup> Venice Commission, [CDL-AD\(2022\)006](#), Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo, para. 12.

<sup>9</sup> [Kosovo Constitution Court Judgement](#) in Cases No. KO100/22 and KO101/22, paras. 258-267.

position, on the basis of proposals received by the civil society. The Ombudsperson's competence to nominate candidates is also provided for in the transitional provisions for the interim composition of the KPC. Out of the eight (8) new lay members elected by the Assembly, two of them will be elected on the basis of four (4) nominations of the Ombudsperson upon proposals from civil society organisations.<sup>10</sup> The Ombudsperson has to issue detailed rules on the nomination procedures for the lay members by means of an internal regulation.<sup>11</sup>

34. Although the KCC did not specifically rule on whether even the power of the Ombudsperson to merely nominate candidates may be incompatible with his/her constitutional mandate to monitor the public authorities, such question may be raised. As it belongs to the Constitutional Court to answer to it, the Venice Commission will confine its assessment to the question of whether or not the involvement of the Ombudsperson in the selection procedure through the submission of candidates may be capable of offsetting the risk of politicisation identified in the earlier opinions.<sup>12</sup>

35. At the outset, the Commission observes that the role of the Ombudsperson under the current draft differs substantially from his/her role to appoint one lay member proposed in March 2022 and raises new difficulties. Under the proposed solution, the quality of the candidates and their political neutrality will largely depend on the proposals of the civil society organisations in accordance with the legal requirements established by the Assembly. Yet, the Ombudsman may be able to choose the two best candidates, which means he/she can exclude candidates that he/she considers to be unsuitable or politically affiliated.

36. In any event, under the current draft, the Assembly retains the power to accept or reject the nominations submitted by the Ombudsperson. This has also been the view of the Commission in respect to other external bodies with a right to make nominations in other similar cases.<sup>13</sup>

37. Nevertheless, if the Assembly refuses to elect any of candidates nominated by the Ombudsperson, this may arguably weaken the authority of the Ombudsperson towards other state institutions and the public. If the process is repeated and political developments in the Assembly result in continued failure to support any of the nominations of the Ombudsperson, the latter may be justifiably expected to avoid any further entanglement in what he/she may perceive as an essentially political process.

38. It is worth noting that the proposed amendments do not clarify whether in the event that none of the candidates nominated by the Ombudsperson receives the required majority to be elected, a second round of voting has to take place in which the candidate receiving the highest number of votes is considered as elected, because Article 9 of the Basic Law of 2019 which regulated this matter has been deleted through Article 6 of the proposed amendments.<sup>14</sup> The Law should reintroduce the regulation of this matter.

39. The involvement of the Ombudsperson does not necessarily lead to an endorsement or confirmation one of the two shortlisted candidates nominated by him/her by the Assembly, as a corollary of the power of the Assembly to elect is the right to reject both of the nominees submitted by the Ombudsperson, and to ask him/her to put forward new candidates on the basis of proposals by civil society organisations. If this interpretation is correct, the Ombudsperson's role

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<sup>10</sup> Article 21 (2) of the text supplementing the Basic Law of 2019.

<sup>11</sup> Article 20 of the new draft adding a new paragraph 3/a to Article 37 of the Basic Law of 2019.

<sup>12</sup> Venice Commission, [CDL-AD\(2022\)006](#), Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo, para. 12. Venice Commission, [CDL-AD\(2021\)051](#), Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo, paras. 31, 32, 42, 47, 49.

<sup>13</sup> Venice Commission, [CDL-AD\(2015\)039](#), Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, para. 48.

<sup>14</sup> Article 9 of the Basic Law of 2019 deleted through Article 6 of the proposed amendments.



- as far as the force of substantive legitimacy is concerned – has been reduced to an intermediary between the Assembly and civil society organisations. It also creates a further risk of politicising the Ombudsperson's role.

40. In sum, in the Commission's view, there exists a tension between the constitutional requirement that the Ombudsperson's role should not impinge on the Assembly's power to elect the lay members and the need for a strong input of the Ombudsperson to offset the risk of politicisation stemming from the simple majority vote in the Assembly. As a consequence, the current solution is insufficient for the purpose of offsetting the risk of politicisation in the election of the lay member upon the nomination of the Ombudsperson.

- **The election of the two other lay members by the Assembly**

41. To counter the risk of politicisation both at the pre-selection and voting stage, the Commission had advised the Kosovo authorities to consider various options for a properly organised elective procedure including; 1) establishing a selection body which is truly pluralistic, 2) a selection process that ensures that the candidates put forward for election by the Assembly have support across the broad political spectrum, and 3) ensure that the majority in the Assembly should not be able to circumvent or sabotage the selection procedure. These conditions were aimed to cumulatively provide sufficient safeguards against the risk of politicisation stemming from the right of the ruling majority in the Assembly to elect as lay members candidates which it favours.

42. Under the new draft, the selection of the lay members will be administered by the "relevant committee". The composition of this committee is not described in Article 10 (4) but according to the scope of the responsibilities this should be the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency.<sup>15</sup> It consists of eleven members, five from the opposition and six from the parliamentary majority; one of which is the Chairperson.

43. From the perspective of the diversity of opinions it reflects, it is positive that this committee includes members from various parliamentary parties, which means that this body is formally pluralistic. Since the Panel is a working body of this committee, it may also be expected to include several deputies from various political parties. However, the Constitution of Kosovo and the Rules of Procedure of the Assembly provide additional procedural rights in the relevant committees and its working bodies to the ruling majority including the power to elect a chairperson who has important prerogatives for calling the meetings (albeit not exclusively) and setting the agenda.<sup>16</sup> This committee does not have to act on the basis of a consensus and can decide on a majority vote.

44. The selection process goes through the following phases. First, the relevant assembly committee announces the vacancy in print and electronic media for a maximum of twenty days including the requirements which the Committee establishes itself. Second, after the expiry of the deadline for the application, the Panel conducts a preliminary assessment of the candidates who meet the eligibility requirements (to be elected as a member). Third, the Panel interviews each eligible candidate to evaluate their integrity, competency, and managerial skills, including a concept paper with data and practical examples which each candidate must submit to demonstrate the fulfilment of the requirements, and which is made public on the official website of the Assembly. Fourth, the Panel shortlists the candidates based on their concept paper and the results of the interview and proposes to the Assembly a shortlist of two candidates for each position, along with the justification for prioritising one candidate over the other. Fifth, a simple majority present and voting in the plenary session of the Assembly elects

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<sup>15</sup> Article 77 of the [Constitution of Kosovo](#) and Chapter VIII for the [Rules of Procedures of Assembly of Kosovo](#).

<sup>16</sup> Article 43 and 44 of the [Rules of Procedures of Assembly of Kosovo](#).

one of the candidates (from the two shortlisted) for each of the positions being elected as lay members of the KPC.

45. The Commission welcomes the fact that the drafters have tried to address some of the recommendations of the Commission concerning the openness and transparency of the selection process by including provisions on the publication of the concept paper of each candidate, their announcement on the Assembly website as well as the obligation of the Panel to provide reasoning for its ranking of the candidates.

46. The Commission, notes, however, that the Assembly majority has several instruments at its disposal to ensure that their favourite candidates are elected. For example, the Panel can limit the pool of candidates to only two per each position ensuring that those who are not favoured by the ruling majority never make it to the plenary session. Alternatively, in the unlikely event that there are two strong candidates who are not favoured by the Assembly Committee but are very hard to reject in the selection phase, they can purposefully be pitted against one another so that only one can be elected. In this respect, it should be underlined that the draft does not clarify why the Panel should choose two candidates for each position of lay member, as opposed to proposing four candidates from whom the Assembly could elect two in one single round of election. It should also be noted that the ideas in a “concept paper” might not necessarily be the ideas of the candidate although presumably those ideas can be tested in the interview process.

47. To reduce the risks of excessive political influence in the selection process, the Assembly should be able to choose from a sufficiently large pool of candidates, ranked by the Committee according to a chosen decision-making process. The Venice Commission recalls its advice that it would be useful not to limit the pool of candidates but to give the Assembly more names to choose from (rejecting only those candidates who do not obtain some minimal support of the Committee members). In the light of the above, the earlier recommendation on enlarging the pool of shortlisted candidates submitted to the plenary session has not been followed.

48. Moreover, as the draft stands now, the procedure of selection of the candidates remains entirely within the control of the Assembly Committee and the Panel. Contrary to the advice set out in the March 2022 Opinion, no expert input is envisaged in the selection process.<sup>17</sup> The recommendation of including expert input in the selection process, should, therefore, be considered not to have been followed.

49. In the light of the above, the Commission is not convinced that the method and procedure of selection of the three lay members elected by the Assembly has addressed the essence of the recommendation, which was to ensure a pluralistic composition of the KPC in order to reduce the risk of politicisation in the election of lay members. This proposal will need to be further elaborated to strike a fair balance between the risk of corporatism in a KPC dominated by prosecutorial members and the risk of politicisation of the lay members elected by a simple majority of the same Assembly which the Commission has discussed in similar contexts.<sup>18</sup>

50. The Commission understands the difficulty of implementing its earlier recommendations regarding the appointment of the lay members, on account, on the one hand, of the impossibility to confer to the Ombudsperson or other independent body the power to nominate the lay members directly, as the Constitutional Court has ruled, and, on the other hand, of the impossibility to introduce a qualified majority vote in the Assembly for the election of the lay members without modifying the Constitution.

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<sup>17</sup> Venice Commission, [CDL-AD\(2022\)006](#), Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo, paras. 22-28.

<sup>18</sup> Venice Commission, [CDL-AD\(2021\)012](#), Opinion on the Draft Amendments to the Law on State Prosecution Service and the Draft Law on Prosecutor’s Office for Organised Crime and Corruption of Montenegro, para 36.

51. Yet, the importance of preventing the politicisation of the KPC is paramount. As previously stressed by the Venice Commission, “..each state must devise its own formula to create a pluralistic prosecutorial council.”<sup>19</sup> The Commission is of the view that if constitutional amendments on the election of lay members with qualified majorities are not possible in the current circumstances, the Law should devise a solution which provides for input from independent experts and bodies to strengthen the impartiality and objectivity of the selection process in the Assembly committee.

#### **D. Transitional provisions for the temporary composition of the KPC**

52. The previous opinions had advised against the transitional provisions which provided for the early termination of the mandates of the current members of the KPC. The current draft has abandoned that solution proposing a different temporary composition by adding to the existing eleven-member KPC, eight additional lay members until 11 January 2026, when most of the current members end their terms of office. Out of the eight lay members, two will be elected by the Assembly based on the nominations of candidates by the Ombudsperson, whereas the remaining six will be elected by the Assembly within three months from the entry into force of the proposed amendments.

53. The Commission notes that the drafters have made efforts to reflect the principle of substantial representation of prosecutors elected by their peers, as the ratio during the transitional period will be ten prosecutorial members and nine lay members. However, the temporary composition of the KPC will function based on the new rules on the quorum and decision-making majorities and thus merits a careful analysis in the light of the international standards and principles outlined in the previous opinions of the Venice Commission.

54. At the outset, the Commission finds the legislative drafting technique of Article 21 to be quite unusual. It describes itself as a “transitional provision” but in essence it proposes an interim composition of the KPC (increased number of the lay members) which goes in the opposite direction to the intended destination of the KPC, namely a reduced membership to seven members. The provision therefore appears to be a temporary amendment rather than a transitional provision in the usual sense of that term.

55. Under Article 22, which is a normal transitional provision fixing dates for the coming into effect of the provisions of the amending Law, 11 January 2026 is also the date when paragraphs 2, 3 and 4 of Article 10 and Article 13 of the amending Law come into effect. These provisions concern the requirement for members of the Council to act on a full-time basis<sup>20</sup>, the suspension of the duty of prosecutors while serving as a KPC member<sup>21</sup> and the incompatibility requirements for the KPC members to serve as a judge or an employee of the state administration.<sup>22</sup> The delayed entry into force of these provisions enables the Assembly majority to provisionally appoint sitting judges and other officials of state administration to serve as lay members until 11 January 2026. The long-term plan is to have only seven full-time members of the Council.

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<sup>19</sup> Venice Commission, [CDL-AD\(2013\)028](#), Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paras. 5-8.

<sup>20</sup> Article 10 (2) of the proposed amendments states “The Council members, other than the Chief State Prosecutor, shall serve in the Council on a full-time basis.”

<sup>21</sup> Article 10 (3) of the proposed amendments states “The Council members from among the prosecutors, other than the Chief State Prosecutor, shall suspend the duty of prosecutor during their service as the Council members, but they shall not lose the status of prosecutor and shall have the right to be reinstated to service as prosecutor of the Prosecution Office in which they were appointed before the commencement of the term of Council member.”

<sup>22</sup> Article 10 (4)/a of the proposed amendments states “A Council member shall not, for the duration of his/her term, exercise the function of a judge, or an employee of the administration, including the performance of duties in the Government or in administrative bodies, institutions established by the Constitution or law.”

56. The Commission recalls that one of the main reasons to have only full-time members is to prohibit the simultaneous exercise of other functions and strengthen the Council's independence. The legislator's reason for choosing this short-term measure could be partly economic, a Council of 19 full-time members in a state with just over two hundred prosecutors seems excessively large. However, if this is the rationale, it is not clear on what principle the legislator is proposing to increase the membership in such a dramatic fashion only to reduce it drastically after only two years.

57. The Commission observes that the delayed entry into force of the incompatibility clauses during the transitional period appears to go in the opposite direction of the longer-term dispensation and increases the risk of political influence over the KPC. This is because the provisionally appointed lay members will have expectations to seek election in the KPC after their term ends on 11 January 2026 (which is allowed under Article 21 (6) of the transitional provisions), return to their previous position or be transferred to some other function. Thus, there are good reasons to believe that they are likely to be vulnerable to the pressures of the ruling majority and can be reasonably expected to side with the government.

58. Furthermore, the Commission is not convinced that the temporary enlargement of the Council where all lay members will be elected by the simple majority of the assembly advances the policy goal of significantly improving the overall system and performance of the KPC. The Commission recalls that two vacancies have not been filled for several years because they are seen as unattractive by those considered qualified. The solution now proposed in Article 21 (2) of the amending Law envisages to hold eight separate elections - one for each lay members' vacancy - among the deputies in the Assembly. If the Assembly found it difficult to devise a workable system to fill the existing vacancies of two lay members, it is unclear how it will be able to select 16 eligible candidates for lay members and elect them in eight separate elections, a process requiring a considerable effort to appoint good candidates who meet all the requirements. This raises an obvious question about the suitability of the candidates who are expected to emerge under the new dispensation and their potential links to the assembly majority.

59. Moreover, in the event the proposed amendments are adopted in early 2024, the interim composition of the KPC will be in place for less than two years. This will essentially mean that the KPC - within a period of less than two years - will have to operate with three different compositions namely, 11 members until new lay members are elected, 19 members until 11 January 2026 and 7 members from that period onward. The measure is not only too complex and impractical but given its temporary nature may practically result in a more chaotic situation, which is counterproductive to the integrity, reputation and efficiency of the KPC.

60. From a precedent-setting standpoint, the Commission has consistently held the view that it is incorrect to allow for a complete renewal of the composition of a prosecutorial council following each parliamentary election, when the ruling majority changes.<sup>23</sup> Although the proposed measures have abandoned the complete renewal of the KPC through the early termination of mandates of the current members, the Commission finds the efforts to significantly alter the composition of constitutional bodies through lay members supported by the ruling majority as objectionable.

61. Most importantly, as emphasised in the KCC judgement, the significant increase of the lay members and the attendant risk of politicisation of the KPC stemming from such an increase

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<sup>23</sup> Venice Commission, [CDL-AD\(2021\)051](#), Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo December Opinion, paras. 57-59. See also Venice Commission, [CDL-AD\(2021\)030](#), Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, para. 40 et seq., with reference to the opinion of the Venice Commission [CDL-AD\(2021\)012](#), Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption.

would nullify the requirement of integrity, independence, and stability of the mandates of constitutional bodies like the KPC whose exercise of the functions must not be dependent on the contingent majorities or the will of a new majority in Parliament.<sup>24</sup>

62. While the Commission does not dispute the fact that there is a risk of corporatism in the current governance of the KPC, the enlargement of the composition with eight more members strengthens the risks of politicisation of the KPC as, at least in theory, the additional members elected by the Assembly are likely to be chosen exclusively by the ruling majority. Even if the change of the composition may be said to be designed as a one-off exceptional measure to eliminate the culture of corporatism, such a change is being introduced in a climate of polarisation, will be operational only for a short period of time (less than two years in the best case scenario), is fraught with dangers of blockages and politicisation and gives rise to a suspicion that the “enlarged KPC” will be subject to considerable political influence before the “reduced KPC” is established.

63. This would be less problematic if there were weighty considerations of public interest which would lead to a significant improvement of the performance and operational efficiency of the KPC. The Commission accepts that a significant overhaul of the membership through the increase of lay members who are not perceived as political appointees or affiliated with the ruling majority may be capable of countering the risk of corporatism. Under the proposed amendments, until all members of the KPC are elected (19), decision-making majority shall be half of the sitting elected members (5 out of 9), which means that the prosecutors would still be able to govern alone as they have been doing thus far.

64. Even if the new lay members are elected on time and outstanding vacancies filled, the quorum can easily result in a paralysis of the system as the prosecutors who owe their mandate to their peers and the temporarily assigned lay members who owe their mandate to the simple majority in the Assembly will likely have no incentives to engage in loyal cooperation and pass the necessary decisions. In the final analysis, the new composition, quorum, and decision-making rules risk plunging the KPC into another period of institutional chaos and paralysis.

65. Based on the above, in the opinion of the Venice Commission, the proposed transitional arrangements raise serious concerns as to their conformity with international and European standards: they effectively increase the risks of politicisation, create conditions inconducive to the institutional stability and operational efficiency of a constitutional body like the KPC and may be perceived by future majorities as a *carte blanche* to exert their political influence on the KPC by enlarging the membership after every general election.

### **E. Other recommendations**

66. In its March 2022 opinion, the Commission invited the Kosovo authorities to review the wording of Article 8 (1.6) of the revised draft which establishes the ineligibility criteria and excludes from the competition persons “in a marital or extramarital relationship” with the members of the Parliament or the Government, or the President of Kosovo.<sup>25</sup> The term “extramarital relationship” remains unchanged in the proposed amendments.<sup>26</sup> In the interest of enhancing the clarity and foreseeability of the legislation, the Commission reiterates its suggestion to replace this term with a more neutral formula which addresses the concerns as to that person’s objectivity. The specific language could be informed by applicable ineligibility criteria defined in the conflict-of-interest or other relevant laws.

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<sup>24</sup> [Kosovo Constitution Court Judgement](#) in Cases No. KO100/22 and KO101/22, paras. 393 and 403.

<sup>25</sup> Venice Commission, [CDL-AD\(2022\)006](#), Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo para.16.

<sup>26</sup> The expression “sex of the couple” appears to be a translation issue as the Albanian version uses “gjinisë së krushqisë” which would be translated in English as the “gender of the in-laws”.

67. Under Article 13 (1.3), the mandate is terminated due to the failure to attend to the activities of the KPC for more than three months without a certified justification. Given the risk of the use of absenteeism as an obstructionist strategy discussed in earlier sections, three months seem a very lengthy period during which it is permissible not to attend to the activities of the KPC given that it is meant to be a full-time occupation. Consideration should be given to revise this provision to reflect the full-time mandate of the KPC members.

68. In the previous opinions, the Commission advised the Kosovo legislators to establish rules that do not allow prosecutorial members to govern alone while at the same time excluding the possibility of blockages of meetings by the members elected by a simple majority in the assembly or situations where they can consistently outvote the prosecutorial members of the KPC.<sup>27</sup> In the seven-member KPC (after January 2026), the quorum will be five. In other words, the four prosecutorial members (3 elected and the PG) would need at least one lay member to hold valid meetings and lay members would need two prosecutorial members to hold a meeting. The same can be said for the temporary composition of the Council (19 members until January 2026 if outstanding vacancies are not filled) in which the quorum of twelve members requires the attendance of two lay members to hold meetings. In the light of the insufficient pluralism in the lay component, there is a significant risk of blockages if the lay members appointed by Assembly chose not to attend meetings thus paralysing the activity of the KPC. To reduce the possibility of blockages, the Commission recommends that the Law should provide for more stringent and effective disciplinary measures for failure to participate effectively in the activities of the KPC without a valid justification.

69. Article 5 of the current draft, amending and supplementing Article 8 of the Basic Law of 2019, on “Conditions for appointment as a Council member” provides for separate criteria for candidates among the prosecutors and lay members. The draft Law explicitly prohibits candidates with any criminal offense regardless of whether or not it was committed through negligence, from becoming lay members, whereas it allows exceptions for prosecutor members of the KPC if the criminal offense was committed through negligence. It is not clear if the requirement of “having no indictment filed against him/her” which is relevant to both prosecutorial and lay members, refers to the pending indictment or any indictment in the past. As a result, the criteria for lay members may turn out to be more rigorous than for the prosecutor members, potentially creating a double standard in the requirements for these positions.

70. Regarding Article 8 (2.2), the requirement for a KPC member’s degree to be in law, economics, management, or public administration may seem, in the case of the lay members, somewhat narrow. Since these areas already extend beyond law, consideration should be given to find a formulation that does not exclude candidates with backgrounds other disciplines including history, politics, sociology, psychology, criminology among others.

71. Article 8 (2.5) would benefit from more precise guidance on what is a “political entity”. It is not clear if certain types of political foundations registered as NGOs, campaigning organisations or political think tanks would fall under this prohibition. It is also unclear what is a political appointee and whether this includes advisers or party supporters who never formally joined a party.

72. Article 9 (4) provides that members of the KPC reflect the multi-ethnic nature and principles of gender equality in the Republic of Kosovo. This provision seems to be merely a matter of pious exhortation but, in absence of further details, it remains too ambiguous to be efficiently enforced in practice.

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<sup>27</sup> Venice Commission, [CDL-AD\(2021\)051](#), Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo, paras. 28 and 33. Venice Commission, CDL-AD(2022)006, Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo para.16.

73. In Articles 10 (2) and 10A (4) it is envisaged that an election may take place for a prosecutor member where a vacancy arises before the mandate of the Council runs out. Whereas according to Article 12 (1) and 13 (3) the term of office is to be a full term of five years. The implications of these solution are not clear as it would follow that different members might end their tenure at different times.

74. Article 12 could include another provision to ensure continuity of the KPC stating that “the members elected or appointed externally remain in office until they are effectively replaced, in accordance with normal procedures.”

75. Article 16 (1a) envisaging that a standing committee must have at least one member of the KPC is rather unusual as committees by their very nature are collective bodies. This may be a moot issue if the standing committees, in practice, are composed of prosecutors outside of the KPC members. Nevertheless, as the provision is worded, it is confusing and may need revision.

#### **IV. Conclusion**

76. At the request of the Speaker of the Assembly of Kosovo, Venice Commission examined the draft Law on amending and supplementing the Law on the Kosovo Prosecutorial Council. The proposed amendments were prepared to address the recommendations in two previous opinions of the Venice Commission and the judgment of the Constitutional Court of Kosovo issued in April 2023.

77. The Commission finds that the newly proposed composition of the KPC with three prosecutors elected by their peers is in line with the Venice Commission’s position that prosecutors elected by their peers should represent a “substantial part”, yet not necessarily the majority of members of a high prosecutorial council.

78. The Commission welcomes the fact that some of the recommendations on the process of election and on the status of the prosecutorial members of the KPC have been addressed, notably through the additional provisions designed to reduce the influence of the Prosecutor General over other members of the KPC.

79. At the same time, other recommendations regarding the removal of pre-selection criteria which are imprecise and may lead to disqualification of the candidates – both prosecutorial and lay members - as well as the recommendations on making the selection process more objective have only partially been followed and remain outstanding.

80. The recommendations regarding the election process of prosecutors, as well as those aimed at strengthening the pluralistic nature of the KPC and enlarging the pool of shortlisted candidates submitted to the plenary session have not been followed.

81. It is positive that the drafters have taken measures to comply with the ruling of the Constitutional Court of Kosovo, as is required by the Rule of Law. In this respect, while the Commission notes that it is not competent to decide whether the involvement of the Ombudsperson in a nomination capacity is compatible with the Constitution, it finds the diminished role now envisaged for the Ombudsperson insufficient to offset the risk of politicisation in the election of one of the lay members of the KPC, as the discretionary power to elect or reject the nominations rests with the Assembly’s majority.

82. In the assessment of the Commission, the procedure for the election of all three lay members by the Assembly proposed in the draft amendments gives too much power to a majority-dominated parliamentary committee, thus failing to offer sufficient safeguards against manipulation or the perception of manipulation.

83. The Venice Commission, therefore, makes the following key recommendations:

- Appropriate safeguards against the risk of politicisation in the process of selection and election of the lay members of the KPC both at the pre-selection and the nomination stage should be introduced. If constitutional amendments for the election of lay members with qualified majorities are not possible in the current circumstances, the Commission recommends the adoption of a solution which provides for input from independent experts and bodies in the Assembly committee selection process. This recommendation has been made previously and remains valid.
- In line with the earlier recommendations made in the December 2021 and March 2022, the draft Law should make clear that candidates for both prosecutorial and lay members of the KPC cannot be rejected on the basis of imprecise notions like “high integrity” and/or “managerial skills” linked with the added definitions in Article 2, but only on the basis of clearly defined criteria and eligibility requirements. This recommendation has been made previously and has not been fully addressed.
- If a temporary solution is maintained in the future drafts, the transitional provisions for the temporary composition of the KPC should be revised to avoid the “KPC enlargement” with members elected by the simple majority of the Assembly, a measure that would increase, even if temporarily, the risk of politicisation of the KPC and is against the integrity and stability of the mandates of constitutional bodies like the KPC. This is a new recommendation made in reference to the proposal to increase the membership of the KPC by eight lay members until 11 January 2026.
- To avoid undue blockages of the KPC's functioning, the Law should provide for more stringent and effective disciplinary measures for failure to participate effectively in the activities of the KPC without a valid justification. This recommendation has been made previously and remains valid in respect to the multiple quorums introduced by the proposed amendments.

84. Other recommendations for further clarification and/or improvement of the proposed amendments are made in the analysis section.

85. The Commission wishes to express its satisfaction with the constructive approach of the Kosovo authorities. It encourages them to continue these efforts and remains at their disposal in this endeavour.