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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**MONTENEGRO**

**URGENT FOLLOW-UP OPINION**

**TO THE OPINIONS ON THE LAW ON THE SPECIAL STATE  
PROSECUTOR'S OFFICE**

**Issued on 16 May 2024 pursuant to Article 14a  
of the Venice Commission's Revised Rules of Procedure**

**Endorsed by the Venice Commission  
at its 139<sup>th</sup> Plenary Session (Venice, 21-22 June 2024)**

**on the basis of comments by**

**Ms Renata DESKOSKA (Member, North Macedonia)  
Mr António Henriques GASPARG (Member, Portugal)  
Mr Pere VILANOVA TRIAS (Member, Andorra)**

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## I. Introduction

1. By letter of 1 April 2024, the Minister of Justice of Montenegro requested an urgent opinion of the Venice Commission on the draft law "On Amendments to the Law on the State Prosecutor's Office" ([CDL-REF\(2024\)012](#)), hereinafter the "draft law".

2. An urgent opinion of the Venice Commission has also been requested on the draft Law "On Amendments to the Law on the State Prosecution Service".

3. On 10 April 2024, the Bureau of the Venice Commission authorised the preparation of the Opinion through the urgent procedure, pursuant to Article 14a of the Commission's Revised Rules of Procedure. Furthermore, given the number of previous opinions adopted on the same Law (see para 10 below), it was decided to use the follow-up format to prepare this Urgent Opinion.

4. Ms Renata Deskoska (Member, North Macedonia), Mr António Henriques Gaspar (Member, Portugal) and Mr Pere Vilanova Trias (Member, Andorra) acted as rapporteurs for this Urgent Follow-up Opinion.

5. On 22-23 April 2024, the rapporteurs, along with Mr Mamuka Longurashvili and Ms Tania Van Dijk from the Secretariat, had online meetings with the Supreme State Prosecutor (*ex officio* President of the Prosecutorial Council), the Chief Special Prosecutor, representatives of the Ministry of Justice, the parliamentary majority and opposition, representatives of the Supreme Court of Montenegro, the High and Basic Courts in Podgorica, the Ombudsman, representatives of the Delegation of the European Union to Montenegro, as well as wit representatives of civil society organisations. The Commission is grateful to the Ministry of Justice of Montenegro and the Council of Europe Programme Office in Podgorica for the excellent support provided in organising the online meetings.

6. On 25 April 2024, the NGO "Centre for Civil Freedoms" provided comments on the draft Law. The NGO "Institut Alternativa" provided input on 26 April 2024. The Venice Commission is grateful to all the interlocutors for their input and welcomes their willingness to move forward with the reform of the Special State Prosecutor's Office.

7. This Urgent Follow-up Opinion was prepared in reliance on the English translation of the draft Law. The translation may not accurately reflect the original version on all points.

8. This Urgent Follow-up Opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings held on 22-23 April 2024. In line with paragraph 10 of the Venice Commission's Protocol on the preparation of Urgent Opinions ([CDL-AD\(2018\)019](#)), the draft Urgent Follow-up Opinion was transmitted to the authorities of Montenegro on 15 May 2024 for comments. It was issued on 16 May 2024, pursuant to the Venice Commission's Protocol on the preparation of urgent opinions and Article 14a of the Venice Commission's Revised Rules of Procedure. Following an exchange of views with Mr Bojan Božović, State Secretary, Ministry of European Affairs of Montenegro, and Ms Jelena Grdinic, Director General, Ministry of Justice of Montenegro, it was endorsed by the Commission at its 139<sup>th</sup> Plenary Session (Venice, 21-22 June 2024).

## II. Preliminary remarks

9. It is recalled that the State Prosecution Service of Montenegro consists of the Supreme State Prosecution Office, the Special State Prosecution Office, two High State Prosecution Offices and 13 Basic State Prosecution Offices (Article 11 of the draft Law) (see also Urgent Follow-up Opinion [CDL-PI\(2024\)012](#)).

10. The Law creating the Special State Prosecutor's Office (SSPO) was adopted in 2015. The SSPO deals with organised crime, high-level corruption, money laundering, terrorism and war crimes. The Venice Commission adopted four opinions concerning this Law in 2014,<sup>1</sup> 2015<sup>2</sup> and 2021.<sup>3</sup>

11. The present request for an urgent opinion is linked to Montenegro's EU integration process and, in particular, the need to meet the interim benchmarks' requirements in Negotiation Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security) before the issuance of the Interim Benchmark Assessment Report (IBAR) in June 2024. In parallel to submitting to the Venice Commission, the draft law was published on the Ministry of Justice website for public consultations.

12. This Urgent Follow-up Opinion will focus on the most important elements of the draft law. The absence of remarks on other aspects of the draft law should not be interpreted as their tacit approval.

### III. Background

13. In its 2015 Final Opinion, the Venice Commission welcomed some progress in implementing the 2014 recommendations. However, the Commission noted that the revised draft law did not address or only partly addressed a number of important concerns expressed in 2014, in particular:

- the need for increased accountability guarantees, including judicial review of prosecutorial measures, but also reporting to Parliament, as a way to minimise the risks of abuse and/or political pressure; in particular, the concerns relating to the power of the special prosecutor to issue certain instructions and take certain steps in relation to other institutions without judicial approval or control;
- the relationship between the special prosecutor and the police (to avoid overlapping or conflicting instructions on police officers, undue interferences and delays, as well as potential issues of data secrecy, clarity should be provided by the draft law on these important aspects in their work);
- the need for increased and efficient personal data protection guarantees;
- the situation of pending cases regarding offences that fall under the jurisdiction of the Office which are not concluded by other prosecution offices at the date of the entry into force of the Law on the Special Public Prosecutor's Office.<sup>4</sup>

14. The March 2021 recommendation to abandon the proposals to replace the SSPO with the new "Prosecutor's Office for Organised Crime and Corruption" (and the subsequent reassignment of prosecutors and redistribution of files) and to remove the Special State Prosecutor was fully addressed by the authorities, which was acknowledged in the July 2021 Urgent Opinion.<sup>5</sup>

15. The draft law under consideration contains an amendment to Article 3 (Jurisdiction) and a new Article 42a (a transitional provision on pending cases), on which the subsequent analysis will mainly focus.

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<sup>1</sup> Venice Commission, [CDL-AD\(2014\)041](#), Interim Opinion on the Draft Law on Special State Prosecutor's Office.

<sup>2</sup> Venice Commission, [CDL-AD\(2015\)002](#), Final Opinion on the revised draft Law on Special Public Prosecutor's Office.

<sup>3</sup> 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 and [CDL-AD\(2021\)030](#), Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service.

<sup>4</sup> Venice Commission, [CDL-AD\(2015\)002](#), para. 48.

<sup>5</sup> Venice Commission, [CDL-AD\(2021\)030](#), para. 21.

## IV. Analysis of the draft amendments

### A. Jurisdiction

16. It is recalled that under the operational conclusions related to the Negotiation Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security) there is a need to amend the Law in order to reduce the SSPO's jurisdiction only to high-level corruption cases. Moreover, the European Commission's 2023 report on Montenegro recommended improving the criminal sanctioning policy and criminal justice response to corruption, with a special emphasis on high-level corruption.<sup>6</sup>

17. According to the Explanatory Note of the draft law, the draft amendments aim at improving the efficiency of the SSPO's work. The implementation experience since 2015 revealed several major issues. Most importantly, the broad jurisdiction of the SSPO led to a heavy workload (48 staff, including 10 Special Prosecutors; up to 100 pending cases per Special Prosecutor),<sup>7</sup> making it difficult to allocate the necessary time and resources to a large number of complex cases. This situation also affected the High Court in Podgorica, which deals with cases falling under the SSPO jurisdiction (Article 2 of the draft law).

18. Under the draft amendments to Article 3 of the Law, the SSPO shall have jurisdiction over the following criminal offences: 1) organised crime, regardless of the duration of the prescribed punishment; 2) corruption if a high-ranking public official committed the following criminal offences: abuse of office, fraud in the conduct of official duty, trading in influence, inciting to engage in trading in influence, passive bribery, active bribery; 3) money laundering referred in Article 268 paragraphs 3 and 4 of the Criminal Code of Montenegro; 4) terrorism and 5) war crimes.

19. The draft law excludes corruption offences in the private sector and criminal offences related to electoral rights, which are dealt with in the Criminal Code.<sup>8</sup> The authorities provided the following clarifications in this regard.

#### 1. Corruption offences in the private sector

20. It is recalled that according to Article 2 of the draft law, the SSPO takes all actions falling within its jurisdiction only before the Special Division of the High Court in Podgorica.

21. If the proceeds of crime exceeding EUR 40,000 have been obtained by committing the offence of *abuse of position in business undertakings*, the prison sentence ranges from two to ten years (Article 272 para. 3 of the Criminal Code). This category of cases falls under the jurisdiction of the Basic courts.<sup>9</sup> According to Article 15 of the Law on State Prosecution Service, Basic state prosecutions take all actions falling within their jurisdiction before basic courts.

22. On the other hand, if the proceeds of crime exceeding EUR 40,000 have been obtained by committing the offence of abuse of position in the economy, the prison sentence ranges from two to twelve years (Article 276 para. 2 of the Criminal Code). This category of cases falls under the jurisdiction of High Courts.<sup>10</sup> According to Article 14 of the Law on State Prosecution Service, High State Prosecutor's Offices take all actions within their jurisdiction before High Courts.

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<sup>6</sup> European Commission, [Montenegro 2023 Report](#), p. 32.

<sup>7</sup> *Ibid.*, p. 23.

<sup>8</sup> See [Criminal Code of Montenegro](#), Articles 184-194 as regards electoral rights and Articles 272 and 276 as regards corruption in private sector.

<sup>9</sup> Article 14 of the [Law on Courts](#) (in Montenegrin).

<sup>10</sup> *Ibid.*, Article 14.

## 2. Electoral rights

23. It is recalled that the previous versions of the Law analysed by the Venice Commission in 2014 and 2015 did not envisage the SSPO's jurisdiction over criminal offences related to electoral rights. This specific category was introduced in Article 3 in 2016, following the compromise reached between the parliamentary majority and the opposition to ensure free and fair elections (October 2016). The amendment in question was of a temporary nature and was applied until the conclusion of all the proceedings initiated in connection with the October 2016 parliamentary election.<sup>11</sup> Criminal offences against electoral rights fall under the jurisdiction of Basic and High State Prosecutor's Offices, depending on the gravity of the offence and the sanctions provided for by the Criminal Code.

24. The amendments to Article 3 echo the 2014 Venice Commission recommendation to provide increased clarity with regard to the SSPO's mandate, which is welcome. Furthermore, given the law-implementation experience and jurisdiction of the State Prosecutor's Offices and Courts over specific categories of cases, such adjustments could allow the SSPO to focus its limited resources on the most important and high-level cases.

## 3. Other observations

25. The Venice Commission also recalls its specific observations made in the 2015 Final Opinion.

26. The term "organised crime" was not defined "although it may well be that it is defined elsewhere in the legislation of Montenegro"<sup>12</sup> it is noted that Article 401a of the Criminal Code of Montenegro defines a criminal organisation as "a group of three or more persons whose aim is to commit criminal offences punishable by imprisonment for four years or more, with the aim of acquiring unlawful gain or power".<sup>13</sup> The Venice Commission also recalls its previous recommendations that a sufficiently clear determination of the offences is essential both in terms of legal certainty and the SSPO's effectiveness. Care needs to be exercised to ensure that any definition of organised crime is not so wide as to catch every premeditated offence involving a number of persons, no matter how minor, as has been the case in some other jurisdictions.

27. The Commission questioned whether active bribery and inciting illicit influence should fall within the jurisdiction of SSPO, given that these offences "are more likely to be committed by persons from outside the public service who bribe an official [and] it ... makes no sense that one prosecutor's office would deal with one offender while a different office would deal with another in respect of the same single corrupt transaction in the course of which both offences had been committed."<sup>14</sup> Articles 422a and 424 of the Criminal Code define inciting illicit influence and active bribery, respectively.<sup>15</sup> Both Articles target any person outside the public service who offers or promises a gift or other benefit/bribe to an official. The rapporteurs were informed that, in practice, investigations are launched on a case-by-case basis against high-ranking officials and private persons allegedly inciting illicit influence or giving bribes in the same case. The Venice Commission recommends to specify the SSPO's jurisdiction over inciting illicit influence and active bribery to avoid overlapping with the competence of other state prosecutor's offices.

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<sup>11</sup> See [Decree](#) dated 30 July 2016 (in Montenegrin).

<sup>12</sup> Venice Commission, [CDL-AD\(2015\)002](#), para. 26.

<sup>13</sup> Provided that at least three of the following conditions are met: Each member has a predetermined or clearly defined task or role; its operation is planned for an extended period or indefinitely, is based on the application of certain rules of internal control and discipline of members, is planned and carried out on an international scale; it uses violence or intimidation, or there is a readiness for their use; it uses economic or business structures, money laundering or unlawfully acquired gains; it has an influence on political authority, mass media, legislative, executive, or judicial authority, or other important social or economic aspects. See the [Criminal Code of Montenegro](#).

<sup>14</sup> Venice Commission, [CDL-AD\(2015\)002](#), para. 27.

<sup>15</sup> See the [Criminal Code of Montenegro](#).

## B. Definition of "high-ranking public official"

28. In the 2014 Interim Opinion, the Venice Commission recommended providing a definition of "public official" together with a list of positions covered by such a definition that fall under the scope of the Law. Given the EU accession steps, the Venice Commission also considered it necessary to introduce a jurisdiction over the offences against the financial interests of the EU.<sup>16</sup> In the 2015 Final Opinion, the Commission welcomed the definition of "public official" in Article 3.<sup>17</sup>

29. The current version of the draft law replaced the definition of "public official" with the list of "high-ranking public officials".<sup>18</sup> During the online meetings, the rapporteurs were informed that the list is not exhaustive as some important categories, such as the officials of state-owned companies, are not listed among the categories of high-ranking public officials.

30. In view of the above considerations, the Venice Commission's recommendation may be considered to be partially followed in draft Article 3. In order to achieve clarity and coherence in the law and its interpretation, it is recommended to include in the list all the important categories (provided, for example, in the Criminal Code and other connected legislation; concerning specific financial bodies set up in the EU integration process, etc.).

## C. Transitional provisions

31. It is noted that the 2015 recommendation relating to transitional provisions (see para. 12 above) was made in the context of the future SSPO, which was going to take over from other prosecution services the cases falling under its jurisdiction. Given the time elapsed, that specific recommendation no longer seems relevant. However, in the current setting, when the reduction of the SSPO's jurisdiction would lead to the transfer (and not to takeover) of cases by the SSPO to other state prosecutor's offices, it raises new challenges due to the backlog in the SSPO.

32. The new Article 42a of the draft law provides that the cases where indictment motions have been submitted by the date of entry into force of the amended Law will be completed by the SSPO under the provisions of the current Law. Recalling the previous argument of the judges and prosecutors that transferring cases from the SSPO to other prosecutors would create serious administrative problems and lead to delays in criminal proceedings, loss of evidence, etc.,<sup>19</sup> the Venice Commission takes note of the solution proposed by the draft law. However, it has to be noted that without devising a specific procedure, it would be difficult to envisage expected improvement until the current case backlog is reduced; this might last several years and, therefore, continue to affect the efficiency of the SSPO.

<sup>16</sup> Venice Commission, [CDL-AD\(2014\)041](#), paras 39 and 40.

<sup>17</sup> "A public official, within the meaning of this Law, shall be a person who is elected, nominated or appointed to a state authority, state administrative authority, local self-government authority, local administration authority (hereinafter referred to as: official authority), independent authority, regulatory authority, public institution, public enterprise or to any other business organisation or legal entity that exercises public powers or undertakes activities of public interest or is owned by the state, as well as a person whose election, nomination and appointment are subject to the consent of the official authority", see [CDL-REF\(2015\)001](#), Article 3 of the revised draft Law on Special State Prosecutor's Office.

<sup>18</sup> President of Montenegro and the Secretary-General of the President; the President, a Member and the Secretary-General of the Parliament; the Prime Minister, a member and the Secretary-General of the Government; a State Secretary and a Director General in a Ministry; a head and an assistant head of the administration body in charge of: execution of criminal sanctions, protection of classified information, tax affairs, customs affairs, games of chance, capital projects, real estate, State property, environmental protection, inspection affairs; the Director of the Civil Aviation Agency, the Director of the Agency for the Prevention of Corruption, the Director of the Agency for the Protection of Competition; the Director and an Assistant Director of the Police Directorate; the Director of the National Security Agency; a Court President and a Judge; a Head of a State Prosecutor's Office, a State Prosecutor and a Special Prosecutor; the Mayor of the Capital City, the Mayor of the Old Royal Capital, a President of Municipality, the President of the Assembly of the Capital City, the President of the Assembly of the Old Royal Capital and a President of a Municipal Assembly; the President and a Judge of the Constitutional Court; the President and a Member of the Senate of the State Audit Institution; the President and a Member of the State Commission for the Control of Public Procurement Procedures; the President, the Secretary and a Member of the State Election Commission; the President and a Member of the Appeals Commission; the Governor and a Member of the Council of the Central Bank; the Ombudsman and his Deputy; the Protector of Property and Legal Interests of Montenegro and his Deputy.

<sup>19</sup> Venice Commission, [CDL-AD\(2021\)012](#), para 13.



33. To accelerate the reduction of the backlog within the proposed model, the Venice Commission suggests devising a case-processing strategy to categorise (and prioritise) the pending cases according to their importance, seriousness, and urgency. As part of this strategy, the less important cases could be taken over by the competent state prosecutor's offices.

#### **V. Links with the Law on the State Prosecution Service**

34. As noted in para. 2 above, an urgent opinion request was also submitted concerning the draft amendments to the Law on the State Prosecution Service. It is recalled that according to Article 7 of the draft law, "provisions of the Law on State Prosecution Service shall apply accordingly to the matters that are not regulated under this Law". It is also recalled that the Chief Special Prosecutor is accountable to the Supreme State Prosecutor (Article 4 of the draft Law), whose Office exercises institutional supervision over the operation of the SSPO (Article 5 of the draft Law) and who can issue instructions for proceedings in an individual case to the Special State Prosecutor (Article 131 of the Law on State Prosecution Service), and that the Supreme State Prosecutor can directly exercise all the authorities and undertake all the actions for which the Chief Special Prosecutor is authorised by law (Article 133 of the Law on the State Prosecution Service).

35. The above provisions show the strong hierarchical subordination of the SSPO to the Supreme State Prosecutor's Office. Detailed analysis and recommendations concerning the Law on the SSPO have been provided in the previous opinions of the Venice Commission.<sup>20</sup>

#### **VI. Other recommendations**

36. The Venice Commission understands the importance of the timely adoption of the current draft legislation for the EU integration process and welcomes its publication for public consultations. The rapporteurs also took note of the concerns raised by some interlocutors that more time could have been dedicated to the public debate, that the consultations with civil society were informal, and that there was only an invitation to submit written comments.

37. The Commission recalls that "when adopting decisions on issues of major importance for society, such as criminal justice and the fight against corruption, wide and substantive consultations are a key condition for adopting a legal framework which is practicable and acceptable for those working in the field".<sup>21</sup> Therefore, as in the previous opinions, the authorities are invited to ensure comprehensive dialogue with the major stakeholders, including civil society, at further stages of the legislative process.

38. No amendments were made to the Law in response to other previous recommendations of the Venice Commission. Therefore, they remain valid.

#### **VII. Conclusion**

39. The Montenegrin authorities' initiative to improve the Law on the Special State Prosecutor's Office is commendable. The Venice Commission welcomes the fact that the draft Law reduces the SSPO jurisdiction to high-ranking corruption offences. Nevertheless, most of the key recommendations made in the previous opinions have not been followed and thus remain valid. In particular, the Venice Commission recalls its key recommendations made in the 2015 Final Opinion:

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<sup>20</sup> Venice Commission, [CDL-PI\(2024\)012](#), [CDL-AD\(2015\)002](#) and [CDL-AD\(2014\)041](#).

<sup>21</sup> Venice Commission, [CDL-AD\(2018\)021](#), Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code, para 39. Regarding the importance of prior consultations with the public and main stakeholders, see [CDL-PI\(2021\)003](#), Compilation of Venice Commission opinions and reports concerning the Law making procedures and the quality of the law, paras 28-100.



- to increase accountability guarantees (including judicial review of prosecutorial measures) for minimising the risks of abuse and/or political pressure;
- to specify the criteria and procedure for the recruitment of special prosecutors and other staff, including police officers, their supervision and operational subordination, disciplinary procedures, safeguards against undue interference; inter-institutional relations, including with the police department, and the powers of special prosecutors in relations to other institutions;
- to ensure that all required guarantees for the protection of personal data are provided in the Law in line with European standards.

40. Regarding the proposed draft amendments to the Law, the Venice Commission wishes to make the following additional key recommendations, while further detailed recommendations are to be found in the text of this Opinion:

- to specify the SSPO's jurisdiction over inciting illicit influence and active bribery to avoid overlapping with the competence of other state prosecutor's offices;
- to include in Article 3 of the draft Law all the relevant categories in the list of "high-ranking public officials" (provided, for example, in the Criminal Code and other connected legislation concerning specific financial bodies set up in the EU integration process, etc.);
- to devise an appropriate strategy for reducing the case backlog in the SSPO.

41. The Commission invites the authorities to make full use of previous recommendations in order to provide the Special State Prosecutor's Office with the necessary autonomy, functional and accountability guarantees.

42. The Commission also invites the authorities of Montenegro to ensure comprehensive dialogue with the major stakeholders and civil society at further stages of the legislative process.

43. The Commission remains at the disposal of the authorities of Montenegro for further assistance in this matter.