



Montenegro
Agency for Prevention of Corruption

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Pursuant to Articles 78 and 79 of the Law on Prevention of Corruption (“Official Gazette of Montenegro”, no. 53/14 and 42/17) and Article 10 of the Statute of the Agency for Prevention of Corruption, acting ex officio, the Agency for Prevention of Corruption adopts:

OPINION ON THE LAW ON STATE PROSECUTOR’S OFFICE (“Official Gazette of Montenegro”, no. 11/15, 42/15, 80/17, 10/18, 76/20 and 59/21), WITH SPECIAL REFERENCE TO ARTICLE 48 (TERMINATION OF THE TERM OF OFFICE) AND ARTICLE 27 (PROHIBITION OF ELECTION TO THE PROSECUTORIAL OFFICE)

Assessing the importance of the procedure for the election of the Supreme State Prosecutor, and the overall importance and competence of the Prosecutorial Council, the Agency for Prevention of Corruption recognized the need to carry out an anti-corruption analysis of this regulation and made recommendations that particularly refer to articles 48 (Termination of the Term of Office) and 27 (Prohibition of Election to the Prosecutorial Office) of the Law on the State Prosecutor’s Office in order to improve them.

RATIONALE

I PROCEDURE

The Law on Prevention of Corruption (“Official Gazette of Montenegro”, no. 53/14 and 42/17) regulates the competence of the Agency for Prevention of Corruption (hereinafter referred to as the Agency) which, in accordance with Article 78 paragraph 1 of the Law:

- “...shall take the initiative to amend laws, other regulations and general acts, in order to eliminate the possible risks of corruption or to bring them in line with international standards in the field of anti-corruption;

- shall give opinions on draft laws and other regulations and general acts for the purpose of their alignment with international standards in the field of anti-corruption;”

Article 79 of the same Law establishes that the Agency may, on its own initiative or at the request of a government body, company, legal entity, entrepreneur or natural person, give an opinion for the purpose of improving the prevention of corruption, reducing the risk of corruption and strengthening of ethics and integrity in the authorities and other legal entities, which includes an analysis of the risk of corruption, measures to eliminate the risk of corruption and prevent corruption.

Bearing in mind that the Agency, in accordance with the implementation of legal competences, prescribed by the provisions of Articles 78 and 79 of the Law on Prevention of Corruption (“Official Gazette of Montenegro” no. 53/14, 42/17) aims to eliminate any arbitrariness in the application of regulations through analysis, as part of its regular activities, it monitors legislative activities in fields that carry a special risk in terms of preventing corruption.

Bearing in mind that at the end of June, the European Commission reminded in an informal document - non-paper, that the Supreme State Prosecutor's Office (SSPO) has been in acting state since October 2019, but that “the manner in which the Prosecutorial Council in February 2023 chose acting president of the SSPO caused serious concern regarding compliance with the provisions of the Law on State Prosecutor’s Office”... The Agency decided to review all relevant provisions governing the mentioned procedure for the election of the SSPO and acting SSPO, in order to discover and eliminate provisions that may lead to corruption risk.

The “Prosecutorial Laws” have been the subject of special attention of the Agency in the past in terms of anti-corruption assessment. Thus, in the past period, in accordance with the competences from Articles 78 and 79 of the Law on Prevention of Corruption (“Official Gazette of Montenegro”, no. 53/14 and 42/17), the Agency issued 4 opinions related to the area of prosecution, specifically:

1. OPINION ON THE PROPOSAL OF THE LAW ON AMENDMENTS TO THE LAW ON STATE PROSECUTOR’S OFFICE (February 15, 2021), in which it paid special attention to the importance, role and composition of the Prosecutorial Council, and the need to minimize political influence during the election of members of the Prosecutorial Council, and invited the proposer of regulations to consider the provisions proposed at the time which provide that all members of the Prosecutorial Council will be directly or indirectly elected by the Parliament of Montenegro, that is, the majority of the members of the Prosecutorial Council will be elected directly by the Parliament of Montenegro (Supreme State Prosecutor and 5 eminent lawyers);
2. OPINION ON THE PROPOSAL OF THE LAW ON PROSECUTOR’S OFFICE FOR ORGANIZED CRIME AND CORRUPTION (February 15, 2021), in which it was pointed out that, except for the change in the name of the body and the office holders in the said body, it does not contain digressions from the current Law on Special Prosecutor's Office, and it was concluded that the novelty provided for in Article 48, which refers to the status of the chief special prosecutor and special prosecutors who would have the status of unassigned prosecutors if the aforementioned Proposal of the Law was adopted, does not correspond to international standards in this area, which protect the permanence of the prosecutor's function, and does not support changes to existing laws, the sole purpose of which is to deprive the holders of public authority of their functions, without first questioning their abilities in procedures established by law, thus denying them, among other things, the opportunity to challenge the termination of their term of office before the competent courts;

3. OPINION ON THE LAW ON STATE PROSECUTOR'S OFFICE (December 29, 2021) in which, bearing in mind the procedure for election of new members of the Prosecutorial Council, the Agency called on the Parliament of Montenegro to conduct the selection of members of the Prosecutorial Council from among eminent lawyers in a way that will be politically unburdened, which will not be the result of a political override, but of the broadest political dialogue and consensus, all with the aim of electing independent and expert members of the Council. Additionally, and taking into account the importance and role of the Prosecutorial Council, the Agency invited the legislator to consider in the future the current provision that foresees the composition of the Prosecutorial Council (Article 18 of the Law), bearing in mind that it defines that the majority of the members of the Prosecutorial Council shall be elected directly by the Parliament of Montenegro (Supreme State Prosecutor and 5 eminent lawyers, one of whom is a representative of non-governmental organizations). The Agency also invited the competent institution to consider the provisions regulating the selection of members of the Prosecutorial Council from among eminent lawyers (Articles 26, 26a, 26b and 26c), bearing in mind the fact that these members of the Council do not come from the prosecutorial system, and that they are directly elected and dismissed by the Parliament, especially in the part of specifying the elements that will be used to determine the fulfillment of the election conditions, and to make the whole process transparent, and apart from the above, the need for additional elaboration of Article 33 of the Rules of Procedure of the Prosecutorial Council was specifically pointed out in order to define the situations of exemptions from the work of the session of the Prosecutorial Council for a member who comes from the ranks of eminent lawyers, and who acts as a defense attorney or attorney in a case involving the state prosecutor, which is discussed and decided at the session of the Prosecutorial Council, and
4. OPINION ON THE PROVISIONS RELEVANT TO THE REFERRAL OF STATE PROSECUTORS TO THE SPECIAL STATE PROSECUTOR'S OFFICE (July 27, 2023), in which the Agency called on the line ministry to propose adequate solutions in this area in order to ensure the qualification of state prosecutors who, according to the institute of referral, would perform "tasks of urgent nature", "in the event of an increased workload" and "work in a specific case", in accordance with Article 24 of the Law on the Special State Prosecutor's Office, as well as to regulate the scope of authority, status and job description of the mentioned persons and to eliminate any possible grounds for inequality of any kind and possible arbitrariness and selectivity in the use of this institute.

II CORRUPTION RISK ASSESSMENT AND ANALYSIS OF RELEVANT PROVISIONS OF THE LAW ON STATE PROSECUTOR'S OFFICE ("Official Gazette of Montenegro", no. 11/2015, 42/2015, 80/2017, 10/2018, 76/2020 and 59/2021)

The Law on State Prosecutor's Office regulates the establishment, organization and jurisdiction of the State Prosecutor's Office, the organization of the work of State Prosecutor's Offices, the composition, election, term of office, organization and manner of work of the Prosecutorial Council, as well as other matters of importance for the work

of the State Prosecutor's Office and the Prosecutorial Council. It represents one of the systemic laws regulating the independence of the judiciary. One of the most important institutes of the law in question is the Prosecutorial Council, which was introduced into the judicial system as a constitutional category with the task of ensuring the independence of the State Prosecutor's Office through the exercise of its powers and it's entrusted with a wide range of powers that include selection, appointment, promotion, referral to other work place, sentencing and dismissal of prosecutors. These competences are crucial in terms of prosecutors career, and the composition, election, term of office, organization and manner of working of the Prosecutorial Council are further regulated by law.

Article 18 of the Law on the State Prosecutor's Office determines the composition of the Prosecutorial Council, Article 37 establishes the Competences of the Prosecutorial Council, while Article 27 introduces a prohibition of election to the Prosecutorial Office, which states that during the term of office in the Prosecutorial Council, no member of the Prosecutorial Council from among state prosecutors can be elected to the state prosecutor's office of a higher level or for the head of the state prosecution, and no member of the Prosecutorial Council from among eminent lawyers can be elected as the state prosecutor or the head of the state prosecution.

Furthermore, Article 43 of the Law states that in order to be elected as the supreme state prosecutor, a person should: fulfill the general conditions for a state prosecutor; have a working experience of at least 15 years as a state prosecutor or judge or at least 20 years in other legal jobs and be characterized by professional impartiality, high professional and moral qualities.

Additionally, in Article 48, paragraph 1 of the Law, it is stated that the same person can be elected as the Supreme State Prosecutor two times at most, while in paragraph 2 of this article, it is stated that after the expiry of the term of office and upon termination of office of the Supreme State Prosecutor upon his/her own request, the Supreme State Prosecutor remains a state prosecutor in the Supreme State Prosecution Office. Furthermore, in Article 48, paragraphs 3, 4 and 5, it is stated that in the case referred to in paragraph 2 of this Article, as well as in the case of resignation or dismissal, the Prosecutorial Council appoints the Acting Supreme State Prosecutor, that a person who fulfills the conditions from Article 43 of this law, and that the acting supreme state prosecutor is appointed for a period of six months.

When it comes to Article 48 of the Law on State Prosecutor's Office, it is clear, from paragraph 4, that the acting Supreme State Prosecutor can be selected from among the prosecutors of the Supreme State Prosecutor's Office and other prosecutors' offices, as well as from lawyers who meet the conditions for the election of the Supreme State Prosecutor from Article 43 of the Law. This "novelty" which is reflected in the fact that a person who does not come from the ranks of prosecutors of the Supreme State Prosecutor's Office may be elected for the acting Supreme State Prosecutor, was introduced by the latest amendments to this regulation. Specifically, at that time, the proposer of the Proposal of the Law on Amendments to the Law on the State Prosecutor's Office 23-1/21-2 EPA185 XXVII stated in the explanation of this legal solution that this was proposed in order to expand the number of potential candidates, while maintaining high expertise criteria. This legal solution entered into force on June 12, 2021, and it replaced the then valid legal solution from March 20, 2015, which

stipulated in Article 48 paragraph 3 of the Law that the Prosecutorial Council appoints the Acting Supreme State Prosecutor from among the state prosecutors from the Supreme State Prosecutor's Office.

Although the proposed legal solution makes a wider circle of persons who can be candidates for the status of acting Supreme State Prosecutor and opens up space for proven professionals to temporarily lead the Supreme State Prosecutor's Office until the election of the Supreme State Prosecutor, it still leaves room that can make the system set up like this vulnerable.

The above conclusion is imposed, if one takes into account the opinion of the Ministry of Justice regarding the provisions of the Law on the State Prosecutor's Office, which refer to the legal institute of the Acting Supreme State Prosecutor's Office from July 28, 2022.

In the opinion in question, the application of the Law on State Prosecutor's Office was analyzed in relation to the case of state prosecutor Maja Jovanović, who was elected as acting Supreme State Prosecutor for a period of 6 months in accordance with Article 48, paragraph 4 and 5 and Article 184c of the Law on the State Prosecutor's Office by the Prosecutorial Council in the continuation of the First Regular Constitutive Session held on February 5, 2022. In this regard, the Ministry of Justice was requested, among other things, to interpret the application of Article 48 paragraph 2 of the Law on the State Prosecutor's Office, bearing in mind that it does not explicitly prescribe the status of the person appointed as acting Supreme State Prosecutor after the expiration of the term of 6 or 12 months, and the fact that acting Supreme State Prosecutor has the same scope of powers, rights, obligations and responsibilities when performing the function.

Thus, the Ministry of Justice mainly concluded that, bearing in mind that the acting Supreme State Prosecutor has the same powers, rights, obligations and responsibilities when performing the function of the Supreme State Prosecutor as the Supreme State Prosecutor himself/herself, and after the expiration of the time for which he/she was appointed, the incumbent has the right to remain as a state prosecutor in the Supreme State Prosecutor's Office, if he/she so requests, in accordance with Article 48 paragraph 2 of the Law on the State Prosecutor's Office.

Without disputing that the acting Supreme State Prosecutor has the same authorities, rights, obligations, and responsibilities when performing the functions of the Supreme State Prosecutor as the Supreme State Prosecutor himself, in this specific case, it must be noted that in relevant provisions, it is clearly stated that the Prosecutorial Council "appoints" the acting Supreme State Prosecutor, while the Parliament of Montenegro "elects and dismisses" the Supreme State Prosecutor.

In this regard, considering the fact that it is stipulated by legal solution that the acting Supreme State Prosecutor can come from the ranks of prosecutors of the Supreme and other prosecutor's offices, as well as from the ranks of legal professionals who meet the conditions for the appointment of the Supreme State Prosecutor according to Article 43 of the Law, and taking into account that the Supreme State Prosecutor's Office has been in an acting state since October 2019, by applying Article 48, paragraph 2 of the Law on State Prosecutor's Office in this interpretation by the Ministry of Justice, a significant number of individuals are enabled to become prosecutors of the Supreme State Prosecutor's Office after performing the function of the acting Supreme State

Prosecutor, through the interpretation of Article 48, paragraph 2 of the Law on State Prosecutor's Office, allowing for a "circumvention" of the strict legal procedure for obtaining this status in the Supreme State Prosecutor's Office.

Appreciating the above and considering the clear legal provision from Article 48, paragraph 2 of the Law on State Prosecutor's Office, which states that after the expiration of the term for which the Supreme State Prosecutor is elected and the termination of the function of the Supreme State Prosecutor, upon the prosecutor's own request, the Supreme State Prosecutor remains as a prosecutor in the Supreme State Prosecutor's Office, the Agency believes that there is no room for interpreting the legislator's intention in such an important provision.

Namely, in the relevant Law, in accordance with the powers prescribed in Article 37, paragraph 1, item 15, it is stipulated that the Prosecutorial Council adopts (Article 56, paragraph 4 of the Law) a plan of vacant positions by the end of the calendar year for the next two years. Additionally, Article 57 of the Law prescribes that vacancies for state prosecutors in basic state prosecutor's offices are filled through internal job posting for voluntary relocation of a state prosecutor from one state prosecutor's office to another, or based on a public announcement published by the Prosecutorial Council. Furthermore, Article 75, paragraph 1 of the Law states that a state prosecutor or judge has the right to advance to a higher-level state prosecutor's office if their work is evaluated with a grade of excellent or good in accordance with the law and if they meet special conditions prescribed for appointment to that state prosecutor's office.

However, with a view to potential future uncertainties in the application of this article of the law, the Agency is of the opinion that, considering the scope of individuals who can participate in the selection process for the acting Supreme State Prosecutor, it would be necessary to clearly regulate the rights of the acting Supreme State Prosecutor in the context of Article 48, paragraph 2 of the Law on State Prosecutor's Office. This is to ensure that such an important system is not vulnerable while simultaneously aligning it with the overall prosecutorial structure or system.

Any future legal provision addressing the potential future status of individuals appointed as acting Supreme State Prosecutor must be formulated in a way that does not necessitate interpretation or the need to infer the legislator's intent during its application. This is essential for preserving the prosecutorial organization, which is clearly delineated in the law, and for achieving consistency in the application of the law.

Here, it is emphasized that the Agency has pointed out the inadequacy of procedures in this area in earlier opinions, particularly in an opinion addressing the lack of procedures or minimum conditions that state prosecutors being assigned to the Special State Prosecutor's Office should meet. This would be accompanied by a clear legal definition of the scope of their powers, status, and job descriptions during the period of assignment to this prosecutor's office. Common to both processes is that through the interpretation of the law, there is a possibility of "circumventing" the procedures for the selection of individuals in these prosecutor's offices by the Prosecutorial Council, which, according to the Law, is obliged to appoint an individual with the best results in a lawfully conducted procedure to a systematically vacant prosecutorial position.

Furthermore, by analyzing the relevant provision and following the chronology of events related to the acting state in the Supreme State Prosecutor's Office, the Agency normatively analyzed the way of choosing the new acting Supreme State Prosecutor from January 19, 2023, to February 8, 2023. In the specific period of January 19, 2023, at the I session of the Prosecutorial Council, chaired by the acting Supreme State Prosecutor Maja Jovanović, among other things, a decision was made to invite interested individuals for the position of acting Supreme State Prosecutor, who meet the conditions prescribed by Article 43 of the Law on State Prosecutor's Office, to submit their resumes within 7 days from the date of publication, which was implemented on January 25, 2023. On February 6, 2023, the Prosecutorial Council issued a statement stating that at the V session of the Prosecutorial Council, chaired by the deputy president of the Prosecutorial Council, Nikola Samardžić, no decision was made to appoint one of the applicants who responded to the invitation to interested parties, which the Council had announced on January 25, 2023. Furthermore, on February 8, 2023, during the continuation of the V session of the Prosecutorial Council, the termination of Tatjana Begović's office, a member of the Prosecutorial Council, due to resignation, was noted. Subsequently, during the VI session of the Prosecutorial Council, chaired by the deputy president of the Prosecutorial Council, Nikola Samardžić, Tatjana Begović, a state prosecutor at the Higher State Prosecutor's Office in Podgorica, was appointed as the acting Supreme State Prosecutor for a period of six months, with the majority of votes.

In connection with this, the Agency considered the relevant provisions of the Law on State Prosecutor's Office in this specific case, with a special focus on Article 27 (prohibition of election to the prosecutorial function) of the Law on State Prosecutor's Office, which states that during the term of office in the Prosecutorial Council, a member of the Prosecutorial Council from the ranks of state prosecutors cannot be elected to a higher-level state prosecutor's office or as the head of a state prosecutor's office. Similarly, a member of the Prosecutorial Council from the ranks of distinguished legal professionals cannot be elected as a state prosecutor or as the head of a state prosecutor's office. This is especially relevant considering that in the specific situation, a prosecutor from a higher state prosecutor's office, who has resigned from the membership in the Prosecutorial Council and has been appointed as the acting Supreme State Prosecutor, could, upon the expiration of the term for which she was appointed, and if she requests it herself, in accordance with the interpretation of Article 48, paragraph 2 of the Law on State Prosecutor's Office, become a prosecutor of the Supreme State Prosecutor's Office.

Here, we must again return to the part of the opinion in which the Agency clearly distinguishes the terms 'elect' and 'appoint,' as in the specific case, Article 27 of the Law on State Prosecutor's Office stipulates that a member of the Prosecutorial Council from the ranks of state prosecutors cannot be 'elected' to a higher-level state prosecutor's office or as the head of a state prosecutor's office. According to the Agency's reasoning, the legislator in the relevant provision does not anticipate that a member of the Prosecutorial Council could not be 'appointed' (which has a temporary nature) as the acting Supreme State Prosecutor.

Nevertheless, considering the aforementioned chronology of events related to the appointment of the new acting Supreme State Prosecutor from February 8, 2023, and

particularly appreciating the assessment of the European Commission, which stated that 'the manner in which the Prosecutorial Council chose the acting president of the Supreme State Prosecutor's Office in February 2023 raised serious concerns regarding the respect for the provisions of the Law on State Prosecutor's Office'..., the Agency has considered ways to improve the existing provisions, especially those in Article 27 of the Law on State Prosecutor's Office.

In this regard, and in order for the limitation stipulated in Article 27 of the Law on State Prosecutor's Office to remain a robust mechanism for controlling real and potential conflicts of interest, the Agency proposes that future amendments to this law specify a statutory period during which this restriction applies, similar to the one in Article 15 of the Law on Prevention of Corruption. The Agency believes that the relevant ministry will carefully consider this recommendation and judiciously assess the necessary 'cooling-off period,' during which the aforementioned restriction would be in effect, in order to emphasize the significance of the provision and to eliminate the possibility of casting a shadow on the application of the prohibition outlined in Article 27 of the Law on State Prosecutor's Office, as well as to regulate through the proposed norm whether the mentioned prohibition applies to both the 'appointment' and 'election' of a member of the Prosecutorial Council to specific positions within the prosecutorial organization.

III FINAL ASSESSMENTS

Recognizing the importance of the procedure for the appointment of the Supreme State Prosecutor, the appointment of the acting Supreme State Prosecutor, and the overall significance and authority of the Prosecutorial Council, the Agency for the Prevention of Corruption has identified the need to conduct an anti-corruption analysis of the Law on State Prosecutor's Office, with a particular focus on Articles 48 (termination of office) and 27 (prohibition of election to the prosecutorial function), aiming to enhance these provisions.

In this regard, the Agency, considering all relevant provisions regulating the mentioned procedure for the appointment of the Supreme State Prosecutor and the appointment of the acting Supreme State Prosecutor, while not disputing that the acting Supreme State Prosecutor has the same powers, rights, obligations, and responsibilities as the Supreme State Prosecutor, has noted in this analysis that attention must be paid to the distinct terminological definitions of 'appointment' of the acting Supreme State Prosecutor by the Prosecutorial Council and the 'election and dismissal' of the Supreme State Prosecutor by the Parliament of Montenegro.

Considering the clear legal provision from Article 48, paragraph 2 of the Law on State Prosecutor's Office, which states that upon the expiration of the term for which they were elected and the cessation of the function of the Supreme State Prosecutor, when requested, the Supreme State Prosecutor remains as a state prosecutor in the Supreme State Prosecutor's Office, the Agency believes that there is no room for interpreting the legislator's intention in such an important provision.

However, with a view to potential future uncertainties in the application of this article of the law, the Agency is of the opinion that, considering the scope of individuals who can participate in the selection process for the acting Supreme State Prosecutor and the fact that the Supreme State Prosecutor's Office has been in an acting capacity since October 2019, in order to protect and preserve the integrity of the entire prosecutorial organization, it would be necessary to clearly legislate the rights of the acting Supreme State Prosecutor after the expiration of the designated period for performing the function, in the context of Article 48, paragraph 2 of the Law on State Prosecutor's Office. This would prevent such a crucial system from being vulnerable while simultaneously aligning with the overall prosecutorial structure and system.

On the other hand, considering the assessment of the European Commission outlined in an informal document - a non-paper, regarding the manner in which the Prosecutorial Council elected the acting president of the Supreme State Prosecutor's Office in February 2023, the Agency believes that it is necessary to further strengthen the already crucial provision of Article 27 of the Law on State Prosecutor's Office. The Agency urges the relevant ministry to enhance the mechanism for controlling actual and potential conflicts of interest outlined in Article 27 of the Law on State Prosecutor's Office by introducing an appropriate statutory period during which this limitation would apply. Furthermore, the Agency recommends establishing a necessary 'cooling-off period' upon leaving the position of a member of the Prosecutorial Council, in order to emphasize the significance of the provision in Article 27 of the Law, eliminate the

possibility of casting a shadow on the application of this significant legal prohibition, and define by law whether the prohibition applies to both the 'appointment' and 'election' of a member of the Prosecutorial Council to specific positions within the prosecutorial organization.

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