



*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 the Prevention of Corruption, acting ex-officio, the Agency for the Prevention of Corruption issues the following:

**OPINION ON THE LAW ON PUBLIC PROSECUTION OFFICE**

Having in mind the current procedure for electing new members of the Prosecutorial Council, and in the context of the recommendations given in the Opinion No. 03-02-255 on the Draft Law on Amendments to the Law on the Public Prosecution Office No. 23-2 / 21-2 (epa: 133 XXVII), the Agency for Prevention of Corruption, in line with its competencies as a central anti-corruption body, invites the Parliament of Montenegro to conduct the procedure of election of the members of the Prosecutorial Council from among eminent jurists in a way that will be politically relieved and not the result of political outvoting, but the outcome of the widest political dialogue and consensus, all with the aim of electing independent and professional members of the Council.

The Agency believes that the election of the Prosecutorial Council and other judicial officials represents public interest and a guarantee that the judicial system will function fairly and purposefully and that all the benefits of judicial independence will be provided, while only good and fair legal solutions can make our judicial system independent and strong ... which directly protects public interest, and increases public confidence in the work of relevant institutions.

Having in mind the importance and the role of the Prosecutorial Council, as a body whose range of competencies includes election, appointment, promotion, reassignment, sentencing and dismissal of public prosecutors, which is crucial for the career of public prosecutors, the Agency once again invites legislator to consider the current provisions regulating the composition of the Prosecutorial Council in the future (Article 18 of the Law), which prescribe that all members of the Prosecutorial Council shall be directly or indirectly elected by the Parliament of Montenegro, i.e the majority of members of the Prosecutorial Council shall be elected directly by the Parliament of Montenegro (Supreme State Prosecutor and

5 eminent jurists, one of whom is a representative of non-governmental organizations).

Additionally, the Agency invites the competent institution to consider the provisions governing the election of members of the Prosecutorial Council from among eminent jurists (Articles 26, 26a, 26b and 26c), bearing in mind the fact that those members of the Council do not originate from the prosecutorial system, while, at the same time they are directly elected and dismissed by the Parliament.

In this context, the Agency primarily emphasizes the necessity of prescribing precise formulations, i.e. elements that will be used to determine the fulfillment of requirements, especially the one concerning personal and professional reputation, as well as to achieve the greatest possible degree of transparency of the process of evaluation of submitted applications, precisely through establishment of a pre-defined methodology and well-known criteria for evaluating candidates, as well as through publication of relevant documentation of a candidates on the basis of which the evaluation procedure of the candidates were conducted, in order to provide for the competent working body of the Parliament to determine the list of candidates and thus minimize the space for arbitrary decision-making, as a suitable ground for various types of abuse.

## RATIONALE

### I THE PROCEDURE

The Law on Prevention of Corruption regulates the competence of the Agency for Prevention of Corruption (hereinafter: the Agency), pursuant to Article 78 paragraph 1 of the Law on Prevention of Corruption TO:

- "...gives initiatives for amendments of laws, other regulations and general acts, in order to eliminate possible risks of corruption or their harmonization with international standards in the field of anti-corruption;
- issues opinions on draft laws and other regulations and general acts with the aim of their harmonization with international standards in the field of anti-corruption;..."

Moreover, Article 79 of the same Law stipulates that the Agency may, on its own initiative or at the request of a government body, company, legal entity, entrepreneur or natural person, issue an opinion with the aim of prevention of corruption, reduction of corruption risks and strengthening ethics and integrity in state authorities and other legal entities, which contains corruption risk analysis, measures to eliminate the risk of corruption and prevent corruption.

In its Opinions, the Agency may refer to the provisions of the Constitution of Montenegro and relevant laws, not in terms of assessing constitutionality and legality, but in the context of implementing and achieving the purpose of Article 79 of the Law on Prevention of Corruption.

Having in mind the current situation regarding the election of members of the Prosecutorial Council from among eminent jurists, as well as the Opinion No. 03-02-255 on the Draft Law on Amendments to the Law on the Public Prosecution Office No. 23-2 / 21-2 (epa: 133 XXVII) and Opinion on the Draft Law on the Public Prosecution Office for Organized Crime and Corruption No. 23-2 / 21-2 (epa: 127 XXVII) No. 23-2 / 21-2 (epa: 127 XXVII), issued on February 15, 2021, the Agency as the central anti-corruption body, decided to conduct ex-officio procedure, starting from Articles 78 and 79 of the Law on Prevention of Corruption, in relation to the Law on the Public Prosecution Office, especially considering the importance of the Public Prosecution Office and the Prosecutorial Council and to once again analyse the Law, but this time in the part related to the composition and mandate of the Prosecutorial Council and the manner of electing the members of the Prosecutorial Council.

## **II ANALYSIS OF THE LAW ON STATE PROSECUTION OFFICE ("Official Gazette of Montenegro", No. 11/2015, 42/2015, 80/2017, 10/2018, 76/2020 and 59/2021)**

The Law on Public Prosecution Office regulates the establishment, organisation and jurisdiction of the Public Prosecution Office, organization of the work of the Public Prosecutor's Offices, composition, election, mandate, organization and operation of the Prosecutorial Council, in addition to other issues of significance for the work of the Public Prosecution Office and Prosecutorial Council. It is one of the systemic laws governing the independence of the judiciary. One of the most important institutes of this law is the Prosecutorial Council, which was introduced into the judicial system as a constitutional category with the task of ensuring the independence of the Public Prosecution Office and exercising a wide range of competencies, including election, appointment, promotion, reassignment, sentencing and dismissal of public prosecutors. These competencies are crucial in terms of the careers of public prosecutors, while the composition, appointment, mandate, organization and manner of work of the Prosecutorial Council are further regulated by the Law.

As a reminder, in relation to the subject of this Opinion, the Agency in its previous Opinion (No. 03-02-255 from February 15, 2021) determined that having in mind the importance and role of the Prosecutorial Council, it is necessary to minimize

political influence in the process of electing members of the Prosecutorial Council and called on the legislator to consider the proposed provisions which stipulate that all members of the Prosecutorial Council shall be directly or indirectly elected by the Parliament of Montenegro, i.e. the majority of members of the Prosecutorial Council shall be elected directly by the Parliament of Montenegro. This is stated in order to create the conditions necessary for Montenegro's accession to the European Union and to meet international principles that speak in favor of the fact that the independence of public prosecutors is inseparable from the Rule of Law.

Taking into account the time distance from the moment of determining the Draft Law, its passing and implementation, this assessment is still relevant, having in mind the Article 18 of the Law on the Public Prosecution Office which determines the composition of the Prosecutorial Council:

„The Prosecutorial Council shall have a President and ten members.

President of the Prosecutorial Council shall be the Supreme Public Prosecutor.

Members of the Prosecutorial Council shall include:

1) five Public Prosecutors who hold a permanent office and have at least five years of experience in the exercise of prosecutorial office, of which four working at the Supreme Public

Prosecutor's Office, Special Public Prosecutor's Office and High Public Prosecutor's Offices, and one working at the Basic Public Prosecutor's Offices, who shall be appointed and relieved from office by the Conference of Public Prosecutors;

2) four prominent jurists appointed and relieved from office by the Parliament of Montenegro (hereinafter: the Parliament) at the proposal of the competent working body;

3) one representative of the state administration body in charge of justice (hereinafter: the Ministry of Justice), appointed by the Minister of Justice from among the employees of the Ministry of Justice.

No member of the Prosecutorial Council shall be elected from among the Public Prosecutors whose performance was rated as not satisfactory or who were subject to a disciplinary sanction.

The composition of the Prosecutorial Council shall be promulgated by the President of Montenegro.

Administrative assistance to the Prosecutorial Council shall be provided by the Secretariat of the Prosecutorial Council..“

Namely, Article 18 of the Law on the the Public Prosecution Office stipulates that the members of the Prosecutorial Council shall be elected directly or

indirectly by the Parliament of Montenegro, i.e. the Parliament of Montenegro elects four public prosecutors and one representative of the state administration body responsible for judicial affairs indirectly, while the Supreme State Prosecutor and 5 eminent jurists shall be elected directly, provided that one of the eminent jurists is a representative of non-governmental organizations acting in the field of the Rule of Law, the Public Prosecution Office or the fight against corruption and organized crime, proposed by non-governmental organizations that meet the requirements prescribed by the law. In this way, a wide range of competencies of the Prosecutorial Council, which include election, appointment, promotion, reassignment, sentencing and dismissal of public prosecutors, become directly exposed to the influence of the executive and the legislative power. As assessed in the Opinion from February 15, 2021, in such a system there are a number of shortcomings, which lead to the risk of political pressure during the processing of cases, especially when it comes to cases involving politicians or persons whose protection is of interest to the politicians.

Having in mind the competencies of the Prosecutorial Council, the proposed legal solution opens space for political influence regarding the appointment and promotion when it comes to this profession, thus creating a serious threat to the independence and impartiality of the prosecutorial function. The independence of public prosecutors is inseparable from the Rule of Law, and the Venice Commission itself emphasizes the need to minimize political influence in the election of members of the Prosecutorial Council.

All international partners dealing with the Rule of Law state that an imperative in any democratic society it is to ensure the independence of the work of the prosecution office and freedom in acting or deciding without external influence. Also, it is necessary that the prosecution, within the competencies determined by the Constitution and the law, is inviolable in performing the entrusted tasks and protected from any external influence. Public prosecutors are at the forefront of the prosecution of serious crimes and therefore play an essential role in preserving public safety and protecting the Rule of Law. Thus, it is necessary for them to use their broad procedural powers in the interest of legal security of citizens and to perform their work in accordance with the principles of independence and freedom of action. Ways to limit the influence of the political power in the process of appointment of public prosecutors should be sought in terms of their direct participation in the election procedure itself.

Moreover, one of the relevant international standards that prescribes the necessity of independence of the prosecutor's office is given the United Nations Convention against Corruption (Law on Ratification of the United Nations Convention against Corruption ("Official Gazette of Serbia and Montenegro - International Agreements", No. 11/2005), that as an international instrument

meritorious in the field of prevention of corruption, in Article 11, which is related to measures related to the judiciary and the prosecutor's office, prescribes:

„Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.”

The Declaration entitled "Bordeaux Declaration", contained in the Opinion jointly adopted by the CCJE and the CCPE on 8 December 2009, states that:

“The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and public prosecutors is correctly observed. In a democracy based on the Rule of Law, it is the law that provides the basis for prosecution policy.”

The independence of public prosecutors is necessary to enable them to perform their function. Independence strengthens their role in the Rule of Law and in society, and is also a guarantee that the judicial system will function fairly and purposefully and that all the benefits of judicial independence will be realized (the Declaration, paragraphs 3 and 8).

Given the above, the established principles through reform of the normative framework, as well as previous achievements, should be improved in order to achieve better results in this area, but special caution and comprehensive analysis are necessary in order to adopt the best possible legal solutions, which would protect the prosecutorial system from political influence and create an environment where public prosecutors can exercise the entrusted competencies in accordance with the principles of independence and freedom of action.

Additionally, the definition of the Article 18 of the Law, which states in paragraph 3 items 2 and 4 that the members of the Prosecutorial Council shall include prominent jurists appointed and relieved from office by the Parliament of Montenegro, contributes to the significant number of members of the Prosecutorial Council who do not belong to the prosecutorial system, who were not acquainted with the prosecutorial work and the nature of its work, while at the same time have the power through the Prosecutorial Council to make very important decisions regarding the legality of public prosecutors and ultimately affect their work ... This statement leads to an analysis of the articles of the Law related to the manner of election and termination of office of the members of the Prosecutorial Council.

When it comes to the members of the Prosecutorial Council who come from among the Prosecutor's Office, Article 18 of the Law prescribes basic requirements that a prosecutor must meet in order to be appointed as a member of the Prosecutorial Council, while the manner of their appointment is gradually and in detail regulated by Articles 20 to 25 of the Law, which clearly explain the competencies of the Commission for the Election of Members of the Prosecutorial Council from among public prosecutors, the manner of determining the list of candidates, and the manner of voting and appointment state prosecutors for Prosecutorial Council by the Conference of Public Prosecutors

On the other hand, the analysis of Articles 26 and points a, b, c of the same Article of the Law, which prescribe the manner of appointing members of the Prosecutorial Council from among eminent jurists, requires special attention due to the fact that these members of the Council do not originate from the prosecutorial system, while they are directly appointed and relieved from office by the Parliament. Namely, the relevant articles of the Law state the conditions that a member of the Prosecutorial Council from among eminent jurists must meet, the procedure for applying of candidates, publishing a public call, the list of applicants, and other conditions required in the part relating to an eminent jurist who is a representative of a non-governmental organization.

Article 26 specifically states which person shall not be appointed as a member of the Prosecutorial Council, which is particularly good and important in terms of building and strengthening the integrity of members of the Prosecutorial Council, and thus directly reduces the potential possibility that the performance of the function in question may affect the private interests of these persons or persons related to them.

On the other hand, relatively low criteria, which imply 10 years of work experience as well as a widely set second criterion which says that the candidate must enjoy personal and professional reputation, are characterized by insufficient

precision and susceptibility to different interpretations when proposing and deciding upon the appointment, and thus the Agency emphasizes the need to prescribe precise formulations, ie. elements that will be used to determine the fulfillment of the requirements, especially the one concerning personal and professional reputation. This shortcoming in the existing Law can be compensated by the highest possible degree of transparency in the process of evaluation of submitted applications, especially through establishment of a pre-defined methodology and well known criteria for evaluating candidates, as well as by publishing relevant documentation according to which candidates were evaluated. In this way, the competent working body of the Parliament can provide a list of candidates on the basis of which the list of the proposed candidates is submitted to the Parliament, where the space for arbitrary decision-making, as a suitable ground for various types of abuse and influence, is minimized.

Moreover, and having in mind the composition of the Prosecutorial Council and the range of its competencies that are essential for the career of public prosecutors, such as election, appointment, promotion, reassignment, sentencing and dismissal of public prosecutors, the Agency recognizes the need to anticipate legal provisions which will regulate the issue of conflicts of interest, in order to have the greatest preventive effect in situations in which the private interest of the above-mentioned holders of office could be in conflict with the duties established by the relevant law. This specifically refers to the provision of a legal norm or the elaboration of Article 33 of the Rules of Procedure of the Prosecutorial Council ("Official Gazette of Montenegro", No. 67/2015, 57/2018 and 78/2021), which prescribes situations of exemption of the President and members of the Prosecutorial Council, which in paragraph 1 states:

„The President or a member of the Prosecutorial Council shall be excluded from the session if:

- the subject of decision-making relates to him/her, his/her spouse, or a person with whom he/she lives in an extramarital union, or his/her blood relative in any direct line to any degree, in a collateral to the fourth degree, and by in-law to the second degree;
- there are other circumstances that cast doubt on his/her impartiality.“

Given the composition of the Prosecutorial Council, and the "real" situation in which some members of the Prosecutorial Council, who do not belong to the prosecutorial system, have the opportunity to make very important decisions regarding the legality of public prosecutors and ultimately affect their work, it is necessary to regulate the situations for exemption of a member of the Prosecutorial Council, from among eminent jurists, from the work of the sessions, who acts as a defense counsel or attorney in a case in which the state



prosecutor is involved and which is discussed at the session of the Prosecutorial Council.

## V FINAL ASSESSMENT

Having in mind the current procedure for electing new members of the Prosecutorial Council, and in the context of the recommendations given in the Opinion No. 03-02-255 on the Draft Law on Amendments to the Law on the Public Prosecution Office No. 23-2 / 21-2 (epa: 133 XXVII), the Agency for Prevention of Corruption, in line with its competencies as a central anti-corruption body, invites the Parliament of Montenegro to conduct the procedure of election of the Prosecutorial Council members from among eminent jurists in a way that will be politically unburdened and not the result of political outvoting, but of the widest political dialogue and consensus, all with the aim of appointing independent and professional members of the Council.

The Agency believes that the election of the Prosecutorial Council and other judicial officials represents public interest and a guarantee that the judicial system will function fairly and purposefully and that all the benefits of judicial independence will be provided, while only good and fair legal solutions can make our judicial system independent and strong ... which directly protects public interest, and increases public confidence in the work of relevant institutions.

Having in mind the importance and the role of the Prosecutorial Council, as a body whose competences include election, appointment, promotion, reassignment, promotion, sentencing and dismissal of public prosecutors, which is crucial for the career of public prosecutors, the Agency once again invites legislators to, consider the current provisions, providing for the composition of the Prosecutorial Council in the future (Article 18 of the Law), which prescribes that all members of the Prosecutorial Council shall be directly or indirectly elected by the Parliament of Montenegro, i.e the majority of members of the Prosecutorial Council shall be appointed directly by the Parliament of Montenegro (Supreme State Prosecutor and 5 eminent jurists, one of whom is a representative of non-governmental organizations).

In addition, the Agency invites the competent institution to consider the provisions governing the election of members of the Prosecutorial Council from among eminent jurists (Articles 26, 26a, 26b and 26c), bearing in mind the fact that those members of the Council do not originate from the prosecutorial system, while they are directly appointed and relieved from the office by the Parliament.

In this context, the Agency primarily emphasizes the necessity of prescribing precise formulations, i.e. elements that will be used to determine the fulfillment of conditions, especially the one concerning personal and professional reputation, as well as to achieve the greatest possible degree of transparency of the process of evaluation of submitted applications, precisely through establishment of the pre-defined methodology and well-known criteria for evaluating candidates, as well as, through publication of relevant documentation of a candidates on the basis of which the evaluation procedure of the candidates was conducted, in order to provide for the competent working body of the Parliament to determine the list of candidates, and thus minimize the space for arbitrary decision-making, as a suitable ground for various types of abuse.

Also, having in mind the composition of the Prosecutorial Council, and the range of its competencies that are essential for the career of public prosecutors, the Agency recognizes the need to anticipate provisions related to conflict of interest management, in order to prevent situations in which private the interests of the above-mentioned holders of office could be in conflict with the duties determined by the law, and specifically proposes introduction of a legal norm or elaboration of Article 33 of the Rules of Procedure of the Prosecutorial Council in order to define situations of exclusion of a member of the Council who comes from among eminent jurists, and who acts as a defense counsel or attorney in the case in which the State Prosecutor is involved and which is discussed at the session of the Prosecutorial Council..

The existing legal framework needs to be further improved in order to provide for our judicial system to have the legal preconditions to be independent and to eliminate any space for political influence, with the aim of building a democratic society, as we strive for on the path to the EU membership.



DIRECTOR

Jelena Perović s.r.