



Montenegro
Agency for Prevention of Corruption

Number: 03-04-1848

Date: July 27, 2023

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 PROVISIONS RELEVANT TO APPOINTMENT OF STATE
PROSECUTORS TO THE SPECIAL STATE PROSECUTOR'S OFFICE OF
MONTENEGRO

Assessing the catalog of criminal offenses under the jurisdiction of the Special State Prosecutor's Office, and the legislator's intention to ensure the application of the best candidates for the chief special prosecutor and special prosecutors, who will be chosen by the Prosecutorial Council after a public announcement, the Agency recognized the importance of conducting the proceedings ex officio, and reviewing provisions regulating the appointment of the state prosecutor to the Special State Prosecutor's Office for a certain period of time, at the request of the chief special prosecutor, for the purpose of performing urgent tasks, increased workload or due to handling a specific case.

In this regard, the relevant provisions of the Law on the State Prosecutor's Office were reviewed, as well as the provisions of the Law on the Special State Prosecutor's Office and the Rulebook on Internal Operations of the State Prosecutor's Office, the annual work reports of the Prosecutorial Council and the State Prosecutor's Office (2019-2022). Additionally, recommendations were made in order to eliminate arbitrariness, inconstancy and potential abuse in the application of the institution of appointment of state prosecutors to the Special State Prosecutor's Office pursuant to Article 24 of the Law on the Special State Prosecutor's Office.

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 interpretation and 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.

Assessing the catalog of criminal offenses under the jurisdiction of the Special State Prosecutor's Office, and the legislator's intention to ensure the application of the best candidates for the chief special prosecutor and special prosecutors, who will be chosen by the Prosecutorial Council after a public announcement, the Agency recognized the importance of conducting the proceedings ex officio, and reviewing provisions regulating the appointment of the state prosecutor to the Special State Prosecutor's Office for a certain period of time, at the request of the chief special prosecutor, for the purpose of performing urgent tasks or increased workload.

II CORRUPTION RISK ASSESSMENT AND ANALYSIS OF RELEVANT PROVISIONS REGULATING APPOINTMENT OF STATE PROSECUTORS FOR A CERTAIN PERIOD OF TIME TO THE SPECIAL STATE PROSECUTOR'S OFFICE

In the Constitution of Montenegro ("Official Gazette of Montenegro", No. 1/2007, Amendments I to XVI - 38/2013-1) in Amendment X paragraph 4 it is stated that the function of the state prosecutor is permanent, except for a person who is appointed for the first time to this position, and therefore is elected for a period of four years.

Article 49 of 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) states that when it comes to general conditions, a person who meets the general requirements for working in a state body, and who has graduated from the Faculty of Law VII1-level of education qualification and has passed the bar exam, can be elected as the state prosecutor and the head of the state prosecution office.

When it comes to the special conditions for the state prosecutor, Article 50 paragraph 1 states that a person has to have the experience of working for at least two years after the passed bar exam as an adviser in the state prosecution office or in the court, or as an attorney-at-law, notary, deputy notary of professor of law science; or have the experience of working for at least four years in other jobs in the field of law.

Additionally, in paragraphs 2 and 3, it is said that a person who has worked as a state prosecutor or a judge for at least eight years can be elected as a state prosecutor in the high state prosecutor's office, while a person who has worked as a state prosecutor or a judge for at least 15 years can be elected as a state prosecutor in the Supreme State Prosecutor's Office.

Article 17 paragraph 4 of the Law states that the head of the State Prosecutor's Office and the State Prosecutor perform prosecutorial functions in the State Prosecutor's Office to which they were elected or to which they were assigned, or transferred in accordance with this law.

Pursuant to the competences prescribed by the Law (Article 37 paragraph 1 item 15), the Prosecutorial Council adopts (Article 56 paragraph 4 of the Law) a plan for vacancies no later than the end of the calendar year for the next two years. Additionally, Article 57 of the Law states that vacant posts of state prosecutors in basic state prosecution office are filled in based on the internal advertisement for voluntary reassignment of state prosecutors from one basic state prosecution office to another basic state prosecutor's office, i.e., based on a public announcement published by the Prosecutorial Council. Furthermore, in Article 75 paragraph 1 of the Law, it is stated that the state prosecutor, i.e., the judge, is entitled to be promoted to the state prosecution office of a higher rank if his work is graded excellent or good in accordance with the law and if he/she meets the specific requirements stipulated for the election to that state prosecution office.

In Chapter V of the Law, which refers to the reassignment and transfer of state prosecutor in Article 81 paragraph 2 of the Law, it is stated that the Prosecutorial Council may, with the consent of the state prosecutor, reassign the state prosecutor to another state prosecution office of the same or lower instance for a period not longer than one year if the timely performance of duties in the state prosecution office, to which the state prosecutor is transferred, is called into question as a result of the state prosecutors of that state prosecution office being recused or prevented from performing prosecutorial function or due to a massive case backlog that cannot be reduced with the existing number of state prosecutors or due to some other justified reasons. The procedure for temporary reassignment to another state prosecutor's office is regulated by Article 82 of the Law. Furthermore, this Chapter of the Law elaborates provisions related to the reassignment of the State Prosecutor to another body (Article 83 of the Law), the transfer of State Prosecutors to another State Prosecutor's Office without the consent of the State Prosecutor (Article 84 of the Law) and the permanent voluntary transfer of the State Prosecutor through internal advertisement (Article 85 of the Law).

Article 136 of the Law states that the organization of the work of the State Prosecutor's Office is regulated by the Rulebook on internal operation of the state prosecutor's office which is adopted by the Ministry of Justice after having previously obtained opinion of the Prosecutorial Council.

When it comes to the assignment of cases, Article 140 of the Law states that it is done in a way that ensures impartiality, independence and efficiency of work.

In Article 17, paragraph 2, item 3 of the Law, it is stated that the Special State Prosecutor's Office is managed by the Chief Special Prosecutor, and in Article 13, it is stated that the Special State Prosecutor's Office performs tasks in accordance with a special law regulating the conditions for the election of heads and state prosecutors in the Special State Prosecutor's Office, jurisdiction and organization of the Special State Prosecutor's Office and other issues of importance to the work.

In Article 1 of the Law on the Special State Prosecutor's Office ("Official Gazette of Montenegro", no. 10/15 and 53/16), it is stated that this law regulates the organization and competence of the Special State Prosecutor's Office, the conditions and procedure for the election of the chief special prosecutor and of special prosecutors and the relationship with other state bodies and state administration bodies, as well as other issues of importance for the work of the Special State Prosecutor's Office. Furthermore, in Articles 2 and 3 of the Law, it is stated that the Special State Prosecutor's Office is competent to act before the Special Department of the High Court in Podgorica, and a catalog of criminal offenses for which the Special State Prosecutor's Office is competent is provided. Article 4 of the Law states that the prosecution of the perpetrators of the crimes listed in Article 3 of this Law is carried out by the chief special prosecutor as the head of the state prosecutor's office and special prosecutors as state prosecutors, whose number is determined by the Prosecutorial Council in accordance with the Law on the State Prosecutor's Office, as well as that for his/her work and the work of the Special State Prosecutor's Office the chief special prosecutor is accountable to the supreme state prosecutor, and special prosecutors are accountable to the chief special prosecutor for their work.

Bearing in mind the competences of the Special State Prosecutor's Office in Article 12 of the Law, it is stated that a person who meets the general requirements for work in a state body, and who has graduated the Faculty of Law VII1 level of education qualification, has passed the bar exam and has at least 12 years of work experience as a state prosecutor, judge or attorney-at-law may be elected for a chief special prosecutor, while the election of a special prosecutor in Article 13 of the Law requires at least ten years of work experience as a state prosecutor, judge or attorney-at-law, in addition to other conditions that are also foreseen for the chief special prosecutor.

Furthermore, in Article 14 paragraph 1 and Article 22 of the Law, it is stated that the Prosecutorial Council elects the chief special prosecutor and special prosecutors on the basis of a public announcement, that the chief special prosecutor is elected for a period of five years, while the special prosecutor is elected to a permanent position if he/she worked for at least four years as a state prosecutor or judge, and if he/she did not work as a state prosecutor or judge for at least four years, he/she is elected for a period of four years.

Article 22 paragraph 4 and Article 25 prescribe that the provisions of the Law on the State Prosecutor's Office, which regulate the election of state prosecutors who are elected to a permanent position, are applied accordingly to the procedure of election to the permanent position of a special prosecutor. And the provisions of the Law on the State Prosecutor's Office apply to taking of the oath and entry into office duties, rights of candidates and judicial protection of candidates.

When it comes to the reassignment of state prosecutors, Article 24 paragraphs 1 and 2 of the Law prescribe that the Prosecutorial Council may, at the request of the chief special prosecutor, reassign a state prosecutor to the Special State Prosecutor's Office for a certain period of time in order to carry out urgent tasks or because of increased workload, all with the written consent of the state prosecutor who is being reassigned and that this reassignment can last for a maximum of two years.

Paragraph 3 of the same article of the Law provides that the Prosecutorial Council may, at the request of the chief special prosecutor, reassign the state prosecutor to the Special State Prosecutor's Office for a certain period of time in order to handle a specific case, and that this type of reassignment may last no longer than one year and it may be extended under the same conditions.

Bearing in mind the complexity of the work of the Special State Prosecutor's Office, i.e., the influx and complexity of cases, and the high requirements for the selection of special state prosecutors from Article 13 of the Law on the Special State Prosecutor's Office, which states that a person who meets the general requirements for working in a state body, and who has graduated from the Faculty of Law VII1-level of education qualification and has passed the bar exam and has at least 10 years of work experience as a state prosecutor, judge or attorney-at-law can be elected as the special state prosecutor, the legislative intent to select the best prosecutors with specialized experience for the positions in question is recognized. So, in this context, the Agency reviewed the application of the institution of reassignment of state prosecutors to the Special State Prosecutor's Office in accordance with Article 24 of the Law on the Special State Prosecutor's Office, and the elaboration of the procedures in the specific case.

In the Report on the Work of the Prosecutorial Council and the State Prosecutor's Office for 2019¹, based on the decisions of the Prosecutorial Council and at the request of the Chief Special Prosecutor, prosecutors were assigned to the Special State Prosecutor's Office for a specific period of time, for the purpose of performing tasks of an urgent nature or an increased volume of work, i.e. for handling specific cases, with the written consent of the state prosecutor. The prosecutors who were assigned included one from the Supreme State Prosecutor's Office for the entire year 2019, one from the Higher State Prosecutor's Office in Podgorica until June 28, 2019, and one from the Basic State Prosecutor's Office in Podgorica from November 1, 2019.

Also, in the Report on the Work of the Prosecutorial Council and the State Prosecutor's Office for 2020², based on the decisions of the Prosecutorial Council and at the request of the Chief Special Prosecutor, and in accordance with Article 24 of the Law on the Special State Prosecutor's Office, two prosecutors were assigned to the Special State Prosecutor's Office for a specific period of time, for the purpose of

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² chrome-extension://efaidnbmnnnibpcajpcgclcfefindmkaj/https://www.tuzilastvo.me/static/drtz/doc/IZVJESTAJ_O_RADU_ZA_2020_GODINU.pdf

performing tasks of an urgent nature or an increased volume of work, i.e. for handling specific cases, with the written consent of the state prosecutor. The assigned prosecutors included one state prosecutor from the Supreme State Prosecutor's Office for the entire year 2020 and one state prosecutor from the Basic State Prosecutor's Office in Podgorica starting from March 1, 2020.

Furthermore, in the Report on the Work of the Prosecutorial Council and the State Prosecutor's Office for 2021³, based on the decisions of the Prosecutorial Council, at the request of the Chief Special Prosecutor, and in accordance with Article 24 of the Law on the Special State Prosecutor's Office, two state prosecutors from the Supreme State Prosecutor's Office were assigned to the Special State Prosecutor's Office until August 5, 2021, for the purpose of performing tasks of an urgent nature or an increased volume of work, i.e. for handling specific cases, with the written consent of the state prosecutor.

Also, in the Report on the Work of the Prosecutorial Council and the State Prosecutor's Office for the year 2022⁴, which is currently in the parliamentary procedure, it is stated that, by the decision of the Prosecutorial Council dated June 7, 2022, two state prosecutors from the Basic State Prosecutor's Office in Podgorica and one state prosecutor from the Higher State Prosecutor's Office in Podgorica were, at the request of the Chief Special Prosecutor and in accordance with Article 24 of the Law on the Special State Prosecutor's Office, temporarily assigned to the Special State Prosecutor's Office, for the purpose of performing tasks of an urgent nature or an increased volume of work. However, by examining the decision of the Prosecutorial Council, it is evident that they were assigned to the Special State Prosecutor's Office for a period of 2 years⁵.

Reading the mentioned reports on the work of the Prosecutorial Council and the State Prosecutor's Office, it is noticeable that, in accordance with Article 24 of the Law on the Special State Prosecutor's Office, state prosecutors from the Basic, Higher, and Supreme State Prosecutor's Offices were assigned to work in the Special State Prosecutor's Office.

In this regard, as the specific requirements for a state prosecutor in these prosecutor's offices vary, in accordance with Article 50 of the Law on the State Prosecutor's Office, a person may be selected as a state prosecutor in the Basic State Prosecutor's Office if they have at least two years of work experience after passing the judicial exam, serving as an advisor in the state prosecutor's office or court, as an attorney, notary, deputy notary, or a professor of legal sciences, or at least four years of work experience in other legal positions. It is also stated that a person may be selected as a state prosecutor in the Higher State Prosecutor's Office if they have worked as a state prosecutor or judge for at least eight years, and for the Supreme State Prosecutor's

³ chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.tuzilastvo.me/static/drtz/doc/IZVJESTAJ_O_RADU_TUZILACKOG_SAVJETA_I_DRZAVNOG_TUZILASTVA_ZA_2021._GODINU.pdf

⁴ chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/732/3100-17953-00-72-23-9.pdf

⁵ https://www.tuzilastvo.me/tzsv/sadrzaj/nddy

Office, a person must have at least 15 years of experience as a state prosecutor or judge. According to Article 24 of the Law on the Special State Prosecutor's Office, the mentioned categories of state prosecutors can be temporarily assigned to work in the Special State Prosecutor's Office, even though the requirements for the selection of state prosecutors in the Basic and Higher State Prosecutor's Offices are lower than those required for a special state prosecutor.

Alongside this question, it is clearly stated in Chapter V of the Law on the State Prosecutor's Office, which deals with the assignment and deployment of state prosecutors, in Article 81, paragraph 2 of the Law, that the Prosecutorial Council may, with the consent of the state prosecutor, temporarily assign them to another state prosecutor's office of the same or lower rank for up to one year. This can be done in cases where the state prosecutor of that prosecutor's office is disqualified or unable to perform their prosecutorial function due to a large number of pending cases that cannot be handled with the existing number of state prosecutors or for other justifiable reasons that jeopardize the regular performance of duties in the state prosecutor's office to which the state prosecutor is assigned. The mentioned provision does not leave room for the assigned state prosecutor to lack the necessary conditions to carry out the tasks assigned to them when being transferred to another prosecutor's office, given that such an assignment can only be conducted to another state prosecutor's office of the same or lower rank.

The question here pertains to the fulfillment of the requirements for working in the Special State Prosecutor's Office by state prosecutors from other prosecutor's offices, as well as the extent of their authority, status, and job description as "assigned prosecutors" while performing tasks recognized in the Law on the Special State Prosecutor's Office as "urgent matters," "increased workload," and "handling specific cases" in Article 24. In Article 24, paragraphs 5 and 6 of the Law on the Special State Prosecutor's Office, it is defined that during their work in the Special State Prosecutor's Office, the assigned state prosecutor referred to in paragraphs 1 and 3 of this article is entitled to a salary equal to that of a special state prosecutor and the right to receive allowances for accommodation and travel expenses. The Special State Prosecutor's Office covers the salary and expenses incurred during the assignment to the Special State Prosecutor's Office.

III FINAL ASSESSMENTS

After conducting an analysis of the relevant regulations governing the work of both the State Prosecutor's Office and the Special State Prosecutor's Office, particularly the procedures related to the institute of assigning state prosecutors to the Special State Prosecutor's Office, and being aware that this institute has been used in accordance with Article 24 of the Law on the Special State Prosecutor's Office to assign state prosecutors from the Basic, Higher, and Supreme State Prosecutor's Offices, where the specific requirements for state prosecutors vary from 2 to 8, 10, and 15 years of "specific" work experience, the Agency has noted that the issue of meeting the necessary requirements for working in the Special State Prosecutor's Office by state prosecutors from other prosecutor's offices is not regulated, as well as the scope of their

authority, status, and job description, which are essential for performing "urgent matters" and handling cases of "increased workload" and "specific cases" as specified in Article 24 of the Law on the Special State Prosecutor's Office.

Considering that neither the Law on the State Prosecutor's Office nor the Law on the Special State Prosecutor's Office, nor the Rulebook on the Internal Operations of the State Prosecutor's Office ("Official Gazette of Montenegro," No. 6/16, 29/17, and 68/22) specify the minimum requirements that state prosecutors should meet when being assigned to the Special State Prosecutor's Office, and more importantly, as these regulations do not define the scope of authority, status, and job description of the prosecutors who are assigned to the Special State Prosecutor's Office in accordance with the provisions of the Law on the Special State Prosecutor's Office, the Agency calls upon the relevant ministry to propose appropriate solutions in this area to ensure the qualification of state prosecutors who would perform "urgent matters" and be assigned due to "increased workload" and "handle specific cases" in accordance with Article 24 of the Law on the Special State Prosecutor's Office.

In addition to establishing criteria that clearly determine their qualification for working in this Prosecutor's Office, the Agency believes it is necessary to legislatively specify the scope of authority, status, and job description of the mentioned individuals to ensure that the assigned prosecutors, besides being qualified to perform specific prosecutorial tasks, have the authority to carry out prosecutorial actions in a capacity similar to that of a special state prosecutor and be responsible for the actions they undertake.

In the Law on the Special State Prosecutor's Office, unlike some solutions in comparative law, Article 4 clearly stipulates that the prosecution of perpetrators of criminal offenses listed in Article 3 of this law is carried out by the Chief Special State Prosecutor as the head of the state prosecutor's office and the special prosecutors as state prosecutors, whose number is determined by the Prosecutorial Council in accordance with the Law on the State Prosecutor's Office. It is also specified that the Chief Special State Prosecutor is accountable for his/her work and the work of the Special State Prosecutor's Office to the Supreme State Prosecutor, while the special prosecutors are accountable for their work to the Chief Special State Prosecutor. Due to the mentioned provision, it is essential that the law clearly regulates how the assigned prosecutors are integrated into this part of the prosecutorial organization in terms of authority, status, and job description. Additionally, the law needs to specify the content of the justification for the request submitted by the Chief Special State Prosecutor to the Prosecutorial Council, as well as the content of the justification for the decision made by the Prosecutorial Council based on this request, in order to preserve the principles of transparency, objectivity, and selection based on merits and qualifications required for the respective positions.

The issue of the authority and status of the assigned prosecutors during the period of their assignment (one or two years) in the Special State Prosecutor's Office is crucial due to the application of complex rules for evaluating state prosecutors and the heads of state prosecutor's offices, especially concerning the criteria of quantity and quality of work. This is all done to ensure that the legal solution promotes transparency and

does not allow any category of state prosecutors to be placed in a privileged or subordinate position.

The lack of well-defined legal procedures for assigning prosecutors to work in the Special Prosecutor's Office, and the "relativization" of the fact that the Law on State Prosecutors only regulates the issue of assigning state prosecutors to another prosecutor's office under the condition that it is of the same or lower rank, and that the legal provisions regarding the conditions that a prosecutor must meet do not limit the assignment in cases when it is carried out at the request of the Chief Special Prosecutor, should not justify the practice of "assigned prosecutors" having a status that they should not have according to the Law on the Special State Prosecutor's Office, as Article 4 of the Law stipulates that the prosecution of perpetrators of criminal offenses listed in Article 3 of this Law is carried out by the Chief Special Prosecutor as the head of the state prosecutor's office and the special prosecutors as state prosecutors, whose number is determined by the Prosecutorial Council in accordance with the Law on State Prosecutors, but not the assigned prosecutors under Article 24 of the same Law. Therefore, the Agency's recommendation is, in order to preserve legal certainty until the mentioned procedures are defined, that all actions of these prosecutors should be "approved" or signed by the Chief Special Prosecutor as the one whose request the Prosecutorial Council acted upon.



DIRECTOR

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