



# **RISK OF POLITICIZATION OF THE PROSECUTORIAL COUNCIL OF MONTENEGRO**

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**POLICY STUDY**





**Publisher:**  
Centre for Monitoring and Research (CeMI)  
Bul. Svetog Petra Cetinjskog 96, VI/12  
E-mail: [info@cemi.org.me](mailto:info@cemi.org.me)  
[www.cemi.org.me](http://www.cemi.org.me)

**Authors:**  
Zlatko Vujovic  
Vladimir Simonovic

**Year of Issue:**  
2023




International Foundation  
for Electoral Systems



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## INTRODUCTION

The issue of political interference in the work of the prosecution system in Montenegro has been a subject of debate and concern for several years. Despite some efforts to reform the system and strengthen the autonomy of the state prosecution service, allegations of political interference in the work of prosecutors persist. One of the main concerns in that regards is the composition of the Prosecutorial Council and the influence of political parties on the selection and appointment of the members of the Prosecutorial Council.

This policy paper aims to evaluate the political influence in the functioning of the Prosecutorial Council following the adoption of amendments to the Law on the State Prosecutor's Office in 2021. These amendments were introduced by the new ruling majority formed after the change of government in 2020, with the apparent aim of increasing their political influence on the Prosecutorial Council of Montenegro. The latest EU Annual Report on Montenegro highlights that the Venice Commission's recommendations on the risks of politicization of the Prosecutorial Council, as outlined in their 2021 Opinion, have not been addressed. This situation poses a significant obstacle for Montenegro in meeting the interim benchmarks for EU accession negotiations in Chapter 23. Policy paper is divided in four thematic chapters:

The policy paper is divided into four thematic chapters. The first chapter presents and elaborates on the constitutional and legal prerogatives of the Prosecutorial Council of Montenegro. The second chapter discusses the process of adoption of the amendments to the Law on State Prosecution Service from 2021 and presents key observations on the new composition of the Prosecutorial Council of Montenegro. The third chapter assesses the Council's performance from the perspective of certain controversial decisions that raise concerns about the legality of its actions and indicate potential political influence on the Council's work. The fourth and final chapter presents and justifies recommendations for improving institutional performance and the legislative framework.

It is worth noting that the Ministry of Justice plans to conduct a comprehensive review of the Law on the State Prosecutor's Office in 2023. This policy paper proposes specific policy recommendations that can help bring the Law and practice of functioning of the Prosecutorial Council in line with international best practices. The legal and policy recommendations outlined in this study can serve as a solid baseline for advocating for sustainable changes to the Law on the State Prosecution Service and ensuring full alignment with the Venice Commission's recommendations.

## **CHAPTER 1.**

# **DEFINING THE ROLE OF THE PROSECUTORIAL COUNCIL: CONSTITUTIONAL AND LEGAL COMPETENCIES**

The role of the Prosecutorial Councils in democratic societies is crucial for ensuring the autonomy, accountability, and integrity of the prosecution service. Prosecutorial Councils are typically independent bodies composed of a variety of stakeholders, including prosecutors, lawyers, and other legal experts, and are responsible for ensuring that prosecutors carry out their duties in an impartial and effective manner, in line with the law and professional standards. One of the key functions of Prosecutorial Councils is to oversee the appointment and dismissal of prosecutors, which must be carried out in a transparent and objective manner, with the aim of ensuring that prosecutors are selected based on their professional qualifications and experience rather than political affiliations or other factors. Prosecutorial Councils are responsible for ensuring that prosecutors are adequately trained and supported in their work. This includes that the Councils are coordinating training needs for prosecutors with central training institutions, as well as ensuring that prosecutors have access to the resources and support, they need to carry out their duties effectively. Finally, it is crucial to secure the accountability of the Council and its members, as well as their compliance with ethical and professional standards.

The Prosecutorial Council of Montenegro is the key administrative body that governs the prosecution service and manages the career and the status of state prosecutors. The Constitution of Montenegro stipulates that the Prosecutorial Council ensures the autonomy of the State Prosecutor's Office. The Constitution defines the key competencies of the Council, which include determining the proposal for the election of the Supreme State Prosecutor, electing and dismissing the heads of state prosecutor's offices and state prosecutors, determining the termination of the function of the heads of state prosecutor's offices and state prosecutors, proposing to the government the amount of funds for the work of the state prosecutor's office, submitting an annual report on the work of the State Prosecutor's Office to the Parliament, and performing other tasks determined by law.

The competencies of the Prosecutorial Council are further elaborated by the Law on State Prosecution Service, which specifies that the Council is in charge of determining the number of state prosecutors; the proposal for dismissal of the Supreme State Prosecutor; of deciding on the disciplinary responsibility of state prosecutors and heads of state prosecutor's offices; of overseeing the training of state prosecutors and heads of state prosecutor's offices; ensuring the use, functionality, and uniformity of the Judicial Information System (JIS) in the part relating to the State Prosecutor's Office; to keep records of data on state prosecutors and heads of state prosecutor's offices; to adopt the Rules of Procedure of the Prosecutorial Council; to provide opinions on the incompatibility of certain jobs with the exercise of prosecutorial function; to consider complaints of state prosecutors and heads of state prosecutor's offices and take positions on the endangerment of their independence; to consider complaints about the work of state prosecutors and heads of state prosecutor's offices regarding the legality of their work; to establish a Commission for the Evaluation of State Prosecutors; to appoint a disciplinary prosecutor; to establish the methodology for preparing the report on the performance of the State Prosecutor's Office and the annual schedule of work; to issue official ID cards to state prosecutors and heads of state prosecutor's offices and to keep records of official ID cards and perform other tasks determined by law. The Law prescribes that state prosecution offices are obliged to provide to the Prosecutorial Council, upon its



request, all data and information within their competence. In addition, the State Prosecution is obliged to enable the Prosecutorial Council, upon its request, to have direct access to official files, documents, and data, as well as to provide it with copies of the requested files and documents. Heads of state prosecutor's offices, state prosecutors, and employees of state prosecutor's offices are obliged, in accordance with the requests of the Prosecutorial Council, to attend meetings of the Prosecutorial Council. Practice of organizing consultative meetings with heads of state prosecution offices and prosecutors has intensified over the past year since the establishment of the new composition of the Prosecutorial Council of Montenegro. In just the past few months, the Prosecutorial Council organized presentation of work of the heads of several state prosecutor's offices (The High Prosecution Office in Podgorica, the Basic Prosecutor's Office in Podgorica, the Basic Prosecution Office in Bijelo Polje, the Basic Prosecution Office in Pljevlja, the Basic Prosecution Office in Ulcinj etc.).

In accordance with the Law on State Prosecution Service, members of the Prosecutorial Council are appointed for a four-year term. However, legislative changes can be used to remove council members who do not align with the political interests of those in power, compromising the Council's independence. This is precisely what occurred in Montenegro after controversial amendments to the Law on State Prosecution Service were adopted in June 2021, leading to the premature termination of council members' mandates before their elected term was completed. In August 2021, the Speaker of the Parliament proclaimed an incomplete composition of the Prosecutorial Council, solely to terminate the mandate of the council's members elected in 2018. Only six of the eleven council members were proclaimed (four state prosecutors, the acting Supreme State Prosecutor, and a representative of the Ministry of Justice). By this decision, the Speaker of the Parliament clearly exceeded his competencies. The European Commission's 2021 Annual Report on Montenegro asserted the early termination of council members' mandates, scheduled to end in January 2022, was not in line with the Venice Commission's recommendations and raised concerns about the independence of the judiciary. This politically motivated decision, aimed solely at terminating the mandate of former council members, has significantly hindered the efficiency of the council's work. Since the proclamation of the 'incomplete' composition of the Prosecutorial Council in August 2021, the council did not convene any session until early 2022.

"The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council.

Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. [...]"<sup>1</sup>

<sup>1</sup> VC Opinion on Draft Amendments to the Law on State Prosecution Service, March 2021 – Quote from the Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, 2013 §§71-72)

The Constitution and the Law on State Prosecution Service define the role and competencies of the Prosecutorial Council, providing it with a crucial role in safeguarding the autonomy of the Prosecution Service. As such, any attempt to interfere with the functioning and independence of the Prosecutorial Council, such as to cut-short the mandate of the Council's members, undermines the rule of law and the autonomy of the state prosecution service. Terminating the mandate of members before the end of their elected term is an example of negative practice and it compromises the independence of the Prosecutorial Council. Council members are appointed for a four-year term, and their mandate should not be terminated prematurely unless there are legitimate reasons for doing so. If council members are prematurely removed from their positions, it can create the impression that they were removed for political reasons rather than for legitimate reasons related to their performance. Additionally, the early termination of council members' mandates can compromise the Council's ability to carry out its functions effectively and efficiently. As such, it is essential to respect the four-year mandate of Council's members in order to safeguard the autonomy of the Council.

## CHAPTER 2.

# NAVIGATING POLITICAL INFLUENCES: THE COMPOSITION OF THE PROSECUTORIAL COUNCIL

The Constitutional reform in Montenegro in 2013 was carried out with the aim of strengthening the independence and accountability in the judicial system and was a key event for the opening of negotiations between Montenegro and the EU in Chapter 23. The constitutional amendments largely concerned the Prosecutorial Council, which received its final organizational structure after the adoption of the Law on State Prosecution Service in 2015, which was aligned with the reformed Constitution and relevant international standards. With the adoption of the 2015 Law on State Prosecution Service, Montenegro took a significant step towards fulfilling the interim benchmark related to the judiciary, which states that *Montenegro implements constitutional amendments in line with the recommendations of the Venice Commission and European standards and best practices. Subsequently, Montenegro adopts implementing legislation.*

The composition of the Prosecutor's Council in Montenegro is regulated by the Law on State Prosecution Service. For the purposes of this study, we will present two structures of the Council that were established since the adoption of the Law in 2015 and subsequent amendments in 2021. Both Council structures received approval from the Venice Commission to some extent. However, the analysis will also address certain political circumstances that have increased the risk of politicization of the Council's work in both convocations of the Prosecutorial Council. The 2015 version of the law established a Prosecutorial Council of a balanced composition in which five members were elected by the General conference of prosecutors (according to the quotas of representation of different levels and types of prosecution offices), four eminent lawyers ('lay members') were elected by the Parliament by a simple majority vote, one member delegated by the Ministry of justice and Presiding member is Supreme State Prosecutor ex-officio. In this structure, prosecutors represent 6 out of 11 members of the Prosecutorial Council, but only five of them are "elected by their peers", while the Supreme State Prosecutor who is at the same time presiding member of the Council ex officio was appointed by 2/3 or 3/5 majority vote in the Parliament.

The change of power in Montenegro after 2020 Parliamentary elections resulted in significant changes in the Prosecution Service, as the new government sought to reform the prosecution and to appoint new Prosecutorial Council and acting Supreme State Prosecutor. It is noteworthy that the idea to change the Law on the State Prosecutor's Office was suggested immediately following parliamentary elections (in September 2020) by one of the leaders of the non-governmental sector, Vanja Calovic (MANS), who highlighted in one public appearance that *"the Prosecutorial Council can be changed by changing the law, which only requires a simple majority of 41 MPs". Ms Calovic further emphasized that "the new Prosecutorial Council can then appoint a new acting Supreme State Prosecutor,"* which could pave the way for the election of a new Chief Special Prosecutor.<sup>2</sup>

In February 2021, the Parliamentary majority proposed amendments to the Law on State

<sup>2</sup> See more: <https://old.dan.co.me/?nivo=3&datum=2020-09-22&rubrika=Vijest%20dana&clanak=760148&najdatum=2020-09-18>

Prosecution Service, proposing new structure of the Prosecutorial Council, which would have a slight majority of lay members (five lay members, four prosecutors, ex officio Supreme State Prosecutor and representative of the Ministry of Justice), along with the new Law on the Prosecutor's Office for Organized Crime and Corruption, which envisaged the abolition of the Special State Prosecutor's Office and the formation of a new prosecutor's office with the same jurisdiction but with a different name. Intentions of the 'political takeover of the prosecutor's office' by the new parliamentary majority could not have been more directly expressed. Following pressure from the international community, the parliamentary majority decided to withdraw the proposed laws from the legislative process. However, the Ministry of Justice immediately took over the legislative process and initiated consultations with the Venice Commission regarding both proposed laws.

During the consultations, the Venice Commission issued two opinions on proposed laws. In the first opinion, issued in March 2021, the Venice Commission strongly criticized adoption of the Law "on the Prosecutor's Office for organized crime and corruption" amending the Law on the Special State Prosecutor's Office (the Law on the SSPO). Venice Commission recognized political intention of the parliamentary majority to remove former Chief Special Prosecutor, under the pretext of adopting the new piece of legislation and renaming the institution in charge for fight against organized crime. The Venice Commission recalled that the prosecution service should enjoy autonomy and security of tenure of prosecutors.

"However, in the case at hand it is the draft law itself which directly provides for the removal of the SSP from his position. In this part the draft law is a non-normative, ad hominem piece of legislation. The Venice Commission is concerned with such abuse of the legislative powers: it undermines legal certainty (because normally the removal of a prosecutor should be based on the grounds provided by a law in advance) and is contrary to the nature of the legislative activity, which is to define general rules of behaviour, not to take executive action in respect of specific individuals or situations."

"...If the current SSP is guilty of any misbehaviour, he should face disciplinary or criminal liability, and not be replaced under the pretext of a legislative reform."

Assessing proposed version of the amendments to the Law on State Prosecution Service, the Venice Commission asserted that proposed new composition of the Prosecutorial Council is not as such directly contrary to the European standards and could be explained by the need to avoid corporatism. However, the Venice Commission noted that in the current setting – where all lay members are elected at the same time by a simple majority of votes in Parliament – this reform may lead to the increased politicisation of the Prosecutorial Council. The Venice Commission proposed few alternative solutions with the aim of reducing political influence on the Prosecutor's Council.

“To avoid it, the authorities have a choice of options. For example, lay members may be elected by a qualified majority. But in this case an effective anti-deadlock mechanism should be in place.

Another option would be to elect the lay members on the basis of a proportional system (so that they represent different political forces) or to provide for their nomination or even direct appointment by external non-governmental actors (such as universities, the Bar, the Judiciary etc.). Ideally, the composition and the method of election of lay members should be entrenched in the Constitution.”

Following criticism from the Venice Commission, the ruling majority has withdrawn the adoption of the Law on the Prosecutor’s Office for Organized Crime and Corruption. However, in April 2021, the cabinet of the then-Deputy Prime Minister Abazovic organized public consultations, in the form of round tables, on a new version of amendments to the Law on State Prosecution Service. Subsequently, the ruling majority MPs re-submitted new amendments for adoption. This was just a confirmation that the legislative process was politically driven, with the aim of strengthening the political influence of the current ruling majority on the work of the prosecution organization. The main change in the new amendments, in relation to the previous text that was commented on by the Venice Commission, is that one of the five eminent lawyers was proposed to be delegated by non-governmental organizations. However, the majority of members still come from the ranks of non-prosecutor members, and no additional mechanisms have been provided to prevent political influence on the council, such as a qualified majority for the election of members in the Parliament. In addition, new amendments introduced a possibility of the same person to be elected as acting supreme state prosecutor in the period of two terms of six months each. Political interests in the implementation of the law targeted this provision. In fact, in the last few months, the Government tried to modify this provision and ensure that the mandate of the elected acting supreme state prosecutor is extended for an indefinite period. Further elaboration on this matter will be provided in the next section of the study.

CeMI and the Association of Lawyers of Montenegro have expressed concerns about the government’s round tables, calling them “false consultations” and stating that the government is not prepared to lead a consultative process “in an inclusive and consistent way.”<sup>3</sup> They argued that the consultations organized by the government did not follow the Decree of the Government (Official Gazette of Montenegro 41/18). NGOs provided a detailed assessment of the proposed revised version of the law, claiming that it is not aligned with the recommendations issued by the Venice Commission in March 2021 and, more importantly, with the Constitution of Montenegro. Furthermore, CeMI and the Association of Lawyers of Montenegro criticized the proposed composition and manner of election of the members of the Prosecutorial Council, claiming that it would create significant room for undue political influence on the selection procedure as well as on the future performance of the Prosecutorial Council.

In June 2021, the Parliament passed controversial amendments that envisage change of the structure of the Prosecutorial Council. The adopted amendments reduced the number

<sup>3</sup> See more: <https://www.pobjeda.me/clanak/strucna-javnost-dovedena-u-zabludu>

of Prosecutorial Council members from the ranks of state prosecutors from five to four, increasing the number of members from the ranks of eminent legal professionals from four to five (4 eminent lawyers and one representative of NGOs). Therefore, unlike the previous law in which the majority of members were state prosecutors, the new law does not provide state prosecutors a majority in the Prosecutorial Council. The majority now consists of council members who are not state prosecutors, namely distinguished legal professionals and a representative of the Ministry of Justice. This allowed for greater political influence on the Prosecutorial Council, as eminent legal professionals and NGO representative are elected by a simple majority in the Parliament of Montenegro, as noted by the Venice Commission in its opinion from March 2021.

The Law contains provisions on prevention of conflicts of interest and independence from political influence. The law lists three criteria that would disqualify a person – eminent lawyer from being appointed as a member of the Council. These include being a spouse/partner or relative of certain high-ranking government officials, being a member or official of a political party in the last five years (presidents, members of the presidency, their deputies, members of the executive and main boards), or having served as a prosecutor in the past eight years. The Venice Commission welcomed the introduction of the new ineligibility criteria asserting that those create some “safety distance” between lay members and party politics, which could make the PC more politically neutral and avoid conflict of interest. However, as noted by the NGO Human Rights Action (HRA) these provisions are not sufficient because they do not prevent a member or official of a political party from being elected to the Prosecutorial Council as soon as s/he resigns from membership in said party. In addition, the Law stipulates that a member of the Prosecutorial Council from among the state prosecutors cannot be the spouse or relative of a deputy, member of the Government of Montenegro, and the President of Montenegro.<sup>4</sup>

While the adoption of a solution with majority of lay members over prosecutors in the Prosecutorial Council may seem like a viable solution to some, it represents a significant departure from the standard established by the Consultative Council of European Prosecutors (CCPE) in its Opinion No. 13.<sup>5</sup> The CCPE advocates for a Council composition with a majority of prosecutors elected by their peers, as this ensures the independence of the self-governance body. The recent amendments to the Law on State Prosecution Service in Montenegro, supported by the Venice Commission, appear to prioritize a pragmatic solution to a specific problem in one country rather than a position that unequivocally supports prosecutorial self-governance.<sup>6</sup> While it has previously expressed that a ‘significant part’ of the Council should be prosecutors elected by their peers, the Venice Commission highlighted in its Opinion that ‘it has never insisted that prosecutors should necessarily be in the majority’, although the Council of Europe’s Consultative Council of European Prosecutors (CCPE) has recommended that ‘prosecutors should be in a slight majority’. The Venice Commission underlined that proposed new composition as such ‘is not contrary to the European standards’, adding however that if lay members continue to be elected by a simple majority in Parliament, that could increase the dependence of the Prosecutorial Council on political power, compared to the 2015 model.<sup>7</sup>

4 See more: [https://www.hrraction.org/wp-content/uploads/2022/01/Analiza-postupka-izbora-ispravljena\\_za-web-1.pdf](https://www.hrraction.org/wp-content/uploads/2022/01/Analiza-postupka-izbora-ispravljena_za-web-1.pdf)

5 CCPE, Opinion no. 13(2018) of the Consultative Council of European Prosecutors: “Independence, accountability and ethics of prosecutors”.

6 See more: <http://ricl.iup.rs/369/1/03%20Kne%C5%BEevi%C4%87%20Bojovi%C4%87%2C%20%C4%86ori%C4%87.pdf>

7 See more: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2021\)016-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2021)016-e)



The presence of non-prosecutorial members in the Prosecutorial Council, particularly attorneys, may give rise to potential conflicts of interest and compromise the autonomy of the state prosecution service. Attorneys on the Council may have personal or professional relationships with individuals who are subject to prosecution, thereby compromising their impartiality and undermining the integrity of the Council. Currently, there are four attorneys in the composition of the Prosecutorial Council of Montenegro. When the majority of Council members are appointed by the executive and legislative branches of government, as is the case in Montenegro, there is a risk that they may seek to influence the Council's decisions to advance their own political interests or agendas, rather than to uphold the principles of the rule of law and prosecutorial autonomy. This dynamic can have a profound impact on the effectiveness of the prosecution service, as the Council's decisions may be subject to undue political pressure or influence.

In addition, the current configuration of power in the Prosecutorial Council raises concerns about the sustainability of its decision-making processes, particularly in the event that a new Supreme State Prosecutor is elected to a full term through a 2/3 or 3/5 majority in Parliament. As the president and most significant figure in the Prosecutorial organization, the Supreme State Prosecutor would enjoy the greatest degree of legitimacy obtained from Parliament. However, in the present Council structure, the new Supreme State Prosecutor may lack sufficient influence over decision-making processes, as 6 out of 11 members elected by a simple majority in Parliament and represent the Ministry of Justice will essentially manage the Council. This situation creates the possibility of the permanent Supreme State Prosecutor being reduced to a mere figurehead or a puppet in the hands of those who hold the majority in the Council, which could compromise the autonomy of the prosecution service.

Considering the crucial role of the Prosecutorial Council in upholding the autonomy and integrity of the state prosecution service, it is imperative to ensure that its composition and decision-making procedures are not influenced by undue political pressure or interference. To this end, it is necessary to introduce parity between Council members coming from the prosecutorial and lay-members of the Council. The permanent Supreme State Prosecutor, should have a decisive role in the decision-making process due to their high level of legitimacy acquired through parliamentary voting. Furthermore, additional measures should be implemented to reinforce the integrity of non-prosecutorial members, ensuring that they possess no conflicts of interest or relationships that may compromise their impartiality. Such measures should be introduced through comprehensive revision of the Law on state Prosecution Service that is announced for 2023, and would be instrumental in preserving the independence of the Council and maintaining the fundamental principles of the rule of law in Montenegro.

### **CHAPTER 3.**

## **THE IMPACT OF A NEW COMPOSITION ON THE INSTITUTIONAL PERFORMANCE OF THE PROSECUTORIAL COUNCIL**

After a five-month standstill since the Speaker of the Parliament proclaimed the incomplete composition of the Prosecutorial Council, the Parliament elected five new lay members to the Council in late December 2021, including four lawyers and one representative from the NGOs. The constitutive session of the Council was held on 24 January and 5 February 5th of 2022. Since its establishment, 36 regular and one extraordinary session of the Council were held (2022: 16 regular sessions; by 1 May 2023: 10 regular and one extraordinary session). The Council made decisions on certain issues electronically in 37 cases in total. The level of transparency demonstrated by the Prosecutor's Council with regards to certain critical decisions has been limited. While the Council has been proactive in its communication with the heads of prosecution offices, there has been a lack of significant progress in the application of its key competencies. The Ethics Commission has functioned with limited capacity, while the system of professional evaluation of state prosecutors has yet to produce objective outcomes. Furthermore, there have been numerous instances of political pressure, as evidenced by statements made by politicians, which have unduly influenced the work of the prosecutor's office.

Against this background, the Council's performance in the last period has been marked by several controversial decisions that raise concerns about the legality of its actions and indicate potential political influence on the Council's work. One such decision is the initiative to amend the Law on State Prosecution Service in close coordination with the government in January 2023. Additionally, the appointment of the current Acting Supreme State Prosecutor from within the Council's members represents a flagrant violation of the provisions of the Law on the State Prosecution Service. Finally, the Council's confirmation of the mandate of a former Acting Supreme State Prosecutor as a prosecutor in the Supreme State Prosecutor's Office, as per the Ministry of Justice's opinion, represents a circumvention of the provisions of the Law on State Prosecution Service.

### **3.1. CONTROVERSIAL APPOINTMENTS OF THE ACTING SUPREME STATE PROSECUTORS: CASE FROM 2022**

During the constitutive session of the Council in January/February 2022, the termination of the acting supreme state prosecutor's mandate was declared, and a call for interested candidates for the new acting supreme state prosecutor was announced. New provisions of the law allowed for candidates 'outsiders' to apply for the acting supreme state prosecutor position, unlike previous legal solutions. Although two candidates applied for this position, none of them received a majority of votes from the members of the Prosecutorial Council to be elected as acting supreme state prosecutor. Subsequently, on the proposal of a member of the Council from among eminent lawyers, the Council appointed a state prosecutor from the High Prosecution Office in Podgorica, who did not submit the application to the call for interested candidates, as the Acting Supreme State Prosecutor for a period of six months. This process and Council's decision indicate that the scenario of electing new acting supreme state prosecutor was prepared in advance. It was noticeable that four prosecutors - members of the did not propose their 'prosecutorial candidate' for the position of acting supreme state



prosecutor. Their passive attitude on this important issue was most likely caused by the fact that they knew in advance that their candidate would not have the required majority to be elected to the position of acting supreme state prosecutor. This decision was the first consequence of the change in the balance of decision-making power within the Prosecutorial Council and evidence of the political influence on the processes within the Prosecutorial Council. This was later confirmed by the Government's public engagement in proposing new set of amendments to the Law on state prosecution service with aim to extend the mandate of the acting supreme state prosecutor for indefinite period.

The Acting Supreme State Prosecutor remained in her position for 12 months, which is the legal maximum of 6+6 months, until her mandate expired on 5 February 2023. However, before the end of her mandate, the Prosecutorial Council attempted to amend the Law on the State Prosecutor's Office in two occasions to extend the mandate of the Acting Supreme State Prosecutor. During the session on 14 December 2022, the Prosecutorial Council proposed changes to the Law on the State Prosecutor's Office to the Montenegrin Parliament. Information on initiative submitted to the Parliament was not publicly announced in the information from the session. The proposed changes were aimed at extending the mandate of the current Acting Supreme State Prosecutor indefinitely - until the election of a new Supreme State Prosecutor in a full mandate. Human Rights Action (HRA) sharply criticized this Council's initiative, assessing that 'the Venice Commission has already criticized such ad hominem changes to the law because they threaten legal certainty and they are contrary to the nature of legislative activity, which means defining general rules of conduct, instead of taking executive actions in relation to specific individuals or situations.'<sup>8</sup> In reality, this initiative was aimed at protecting the position of a specific individual serving in the temporary role of Acting Supreme State Prosecutor.

As the Parliament did not consider the initiative, the Prosecutor's Council took it a step further. In close communication with the government in the first half of January, a scenario was prepared in which the government, at the Council's initiative (adopted at electronic session on 13 January – again without any public record), proposed amendments to the law to extend the mandate of the acting supreme state prosecutor before its expiration on 5 February. Under the pretext of maintaining continuity at the head of the prosecutor's organization, it became clear that the government's political intention was to preserve the acting chief prosecutor's position indefinitely. The government's political intention was supported by the majority of the Council's members, including eminent lawyers, who strongly defended the "prolongation" of the acting mandate during the Council's session in January. *"I believe that the State Prosecutor's Office should have continuity in its work, so I am not a supporter of bringing in someone new to act as an official every six months to a year, as this requires new training and adaptation to perform the function" one of the eminent lawyers stated during the session.*<sup>9</sup> This statement contains elements of non-compliance with the law and international standards that members of the Prosecutorial Council are obligated to adhere to. Only one eminent lawyer – representative of NGOs expressed his reservations towards proposed initiative. During the Government's session on 20 January, the Prime Minister fully supported the proposed initiative of the Prosecutorial Council. Even though these are fundamental changes to the law that partially undermine the Constitutional principles related to the duration

<sup>8</sup> See more: <https://www.hraccion.org/2022/12/22/protest-zbog-zakulisnog-predlaganja-izmjena-zakona-o-drzavnom-tuzilastvu/>

<sup>9</sup> See more: [https://sudovi.me/static/tzsv/doc/Zapisnik\\_sa\\_1\\_sjednice\\_Tuzilackog\\_savjeta\\_2023.pdf](https://sudovi.me/static/tzsv/doc/Zapisnik_sa_1_sjednice_Tuzilackog_savjeta_2023.pdf)

of the mandate of the Supreme State Prosecutor, the Prime Minister characterized them as “technical changes”, adding that his primary interest is in ensuring that the State Prosecutor’s Office functions at full capacity and provides results, particularly in the fight against organized crime and corruption.

The proposed changes to the Law on State Prosecution have been strongly criticized by the EU. According to the EU, the draft amendments to the State Prosecutor’s Office do not respect the recommendations of the European Commission and the Venice Commission. “The EU urges the Parliament to reconsider this vote and instead appoint a permanent Supreme State Prosecutor in accordance with the Constitution of Montenegro” EU statement reads.<sup>10</sup> After receiving strong messages from Brussels, the Government made the only possible move - it withdrew the proposed changes from the Parliamentary procedure and announced that it would begin working on a comprehensive revision of the state prosecution law in February 2023.

### **3.2. CONTROVERSIAL DECISION TO CONFIRM THE MANDATE OF FORMER ACTING SUPREME STATE PROSECUTOR IN THE SUPREME STATE PROSECUTOR’S OFFICE**

Following termination of the mandate on 5 February, the Council decided by majority voted that former acting Supreme State Prosecutor remains as state prosecutor in the Supreme State Prosecutor’s Office, starting from February 6, 2023. This decision was made by the direct political influence of the executive power, through the Opinion of the Ministry of Justice, which was made at the request of the Prosecutorial Council, which was chaired by the Acting Supreme State Prosecutor whose rights after the termination of mandate have been being decided. Namely, the Ministry of Justice gave the interpretation 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 in full capacity, and accordingly therefore, after the expiration of the time for which he was appointed, the incumbent has the right to remain as a state prosecutor in the Supreme State Prosecutor’s Office, based on Article 48 paragraph 2 of the Law on the State Prosecution Service<sup>11</sup> Nonetheless, it should be noted that the aforementioned provision of the Law on State Prosecutor’s Office exclusively grants this opportunity solely to the permanent Supreme State Prosecutor, who is selected through the parliamentary procedure following the completion of a full mandate as the head of the prosecution service.

An acting position is a temporary appointment made to fill a vacancy in the office or position until a permanent appointment can be made through the regular selection process. The purpose of an acting position is to ensure continuity and effectiveness in the work during the period between the departure of the previous occupant of the position and the appointment of a permanent replacement. The position of “acting official” is inherently temporary in nature, and those who apply for such a position are well aware of this fact in the moment of application or appointment. Consequently, upon the conclusion of their temporary assignment, they are expected to return to their permanent position that they were covering before. In the present case, it follows that the Acting Supreme State Prosecutor ought to have returned to her previous post as a prosecutor in

<sup>10</sup> <https://www.vijesti.me/vijesti/politika/640530/eu-preispitati-glasanje-o-izmjename-zakona-o-vdt-u>

<sup>11</sup> See more: [https://sudovi.me/static/tzsv/doc/Zapisnik\\_sa\\_XI\\_sjednice\\_TS-2022.pdf](https://sudovi.me/static/tzsv/doc/Zapisnik_sa_XI_sjednice_TS-2022.pdf)

the Higher State Prosecutor's Office in Podgorica, and that any subsequent consideration of her candidacy for a permanent position within the Supreme State Prosecutor's Office should have been conducted in accordance with the transparent and competitive promotion procedures set forth in the Law on the State Prosecutor's Office. This decision by the Council represents a severe compromise to the system of prosecutor appointment established in 2015 under the new Law on State Prosecution Service.

### **3.3. CONTROVERSIAL APPOINTMENTS OF THE ACTING SUPREME STATE PROSECUTORS: CASE FROM 2023**

Considering that Plan A, which aimed to extend the mandate of the former Acting Supreme State Prosecutor, had failed, the Prosecutorial Council had to initiate the process of electing a new Acting Supreme State Prosecutor. This procedure was also marked by serious procedural shortcomings and a conscious circumvention of the law in the process of electing a new Acting Supreme State Prosecutor. The procedure began with two candidates applying for the public call of the Prosecutor's Council, but neither received the necessary majority vote before the Council. Following a similar pattern to the election of the Acting Supreme State Prosecutor in 2022, a member of the Prosecutor's Council from the ranks of eminent lawyers proposed a member of the Council from the rank of prosecutors as the new Acting Supreme State Prosecutor. Knowing that this was prohibited under the Law on the State Prosecution Service, the candidate for the position of Acting Supreme State Prosecutor resigned from the Council shortly before the vote, in order to be eligible for election as the Acting Supreme State Prosecutor.

The Law on State Prosecution Service stipulates that members of the Prosecutorial Council are prohibited from being appointed as heads of state prosecution offices or being promoted during their mandate in the Council. The Administrative Court has already established a legal principle to which while serving as council members, they cannot even be nominated for professional promotion on appointment to the head of prosecution office. Therefore, the Prosecutorial Council should not have considered the selection of senior state prosecutor and member of the Council for the position of acting supreme state prosecutor from the list of prosecutors with at least 15 years of prosecutorial experience, because at the time the list was drawn up, she was a member Prosecutor's Council. Resigning just before the election to a managerial position is a formalistic circumvention of the prohibition, Human Rights Action stated in their critical public statement.<sup>12</sup> Representative of the NGOs in the Prosecutorial Council has asserted that the appointment of new acting supreme state prosecutor is contrary to the spirit of the Law on the State Prosecutor's Office.<sup>13</sup> In addition, a major issue is the fact that the Acting Supreme State Prosecutor who was appointed had participated in the selection process for two candidates who applied for the position of Acting Supreme State Prosecutor, and who were both involved in the same procedure. This raises systemic concerns about the adherence to basic principles in the decision-making process of the Prosecutorial Council.

The new composition of the Prosecutorial Council has not shown adequate attention to the integrity of the decision-making process. This raises concerns about the potential for political

<sup>12</sup> See more: <https://www.hraction.org/2023/02/09/tuzilacki-savjet-izigrao-zabranu-izbora-clana-savjeta-na-rukovodecu-funkciju/>

<sup>13</sup> See more: [https://www.vijesti.me/vijesti/crna-hronika/642457/muk-imenovanje-begovic-suprotno-duhu-zakona-o-drzavnom-tuzilastvu?utm\\_source=vijesti&utm\\_medium=article\\_related&utm\\_campaign=article\\_intext\\_related](https://www.vijesti.me/vijesti/crna-hronika/642457/muk-imenovanje-begovic-suprotno-duhu-zakona-o-drzavnom-tuzilastvu?utm_source=vijesti&utm_medium=article_related&utm_campaign=article_intext_related)

influence on the work of the Council. This is particularly worrying given recent controversial decisions by the Council, such as the attempt to extend the mandate of the Acting Supreme State Prosecutor and the appointment of the Acting Supreme State Prosecutor from the ranks of the Council's members. The decision to confirm the mandate of the former Acting Supreme State Prosecutor in the Supreme State Prosecutor's Office after the termination of her mandate also appears to be influenced by political pressure, as evidenced by the Opinion of the Ministry of Justice, which was made at the request of the Council. It is crucial for the Prosecutorial Council to maintain its independence and impartiality in order to ensure the rule of law and the fair and effective administration of justice, and any influence or interference from political actors should be avoided. These shortcomings not only compromise the independence and professionalism of the Council but also undermine the overall credibility and effectiveness of the prosecution service in Montenegro.

### **3.4. ENDANGERING THE AUTONOMY OF THE STATE PROSECUTION SERVICE THROUGH POLITICAL STATEMENTS**

Political statements that undermine the autonomy of the state prosecution service pose significant challenges for various reasons. Primarily, such statements create a sense of political interference that can threaten the impartiality and independence of the prosecution service. Additionally, they can instill a sense of fear in prosecutors who may be hesitant to pursue politically sensitive cases due to potential repercussions or retaliation. This can lead to a self-censorship that undermines the rule of law and the democratic process. Any attempt to undermine its independence or integrity of the state prosecution service or individual state prosecutors threatens the very foundations of the legal system and can have serious consequences for the country as a whole. In the recent period, several examples of statements that undermine the autonomy of the state prosecution service in Montenegro have been observed.

One of the most prevalent practices observed in recent times has been the tendency of high-ranking government officials to issue statements welcoming investigations initiated by the Special State Prosecution Office and to attribute them to their own efforts. Such statements create an impression that politicians are directly interfering with the work of the state prosecution service. Officials from the executive branch who claim credit for initiating certain investigations send a message to the public that the prosecution is under their control, and that they are the ones who decide when and whom to prosecute. This undermines the integrity of state prosecutors and the prosecution service as a whole.<sup>14</sup> These statements were widely criticized by civil society and the international community for their interference with the independence of the judiciary. In the latest Annual Report on Montenegro, the EU has urged political leaders should refrain from statements that undermine the independence of the judiciary and the autonomy of the state prosecution service.<sup>15</sup> Such statements by political stakeholders can have a significant impact on the work of the judiciary and undermine public trust in the justice system. It is important for political leaders to respect the independence of the judiciary and refrain from making statements that could be perceived as attempts to influence its work.

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<sup>14</sup> See more: <https://www.hracion.org/wp-content/uploads/2022/10/Analiza-postupaka-izbora-tuzilaca-u-CG-2022-FINAL.pdf> page 81

<sup>15</sup> See more: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Montenegro%20Report%202022.pdf>

The Prosecutorial Council has only reacted once to these inappropriate statements by public officials. Following the statement by the President of Montenegro, in July 2022<sup>16</sup> in which he “threatened” the prosecutors that they will be responsible if the court does not convict the persons who have been prosecuted, the Prosecutorial Council issued a press release calling on high public officials and politicians not to threaten state prosecutors, emphasizing that public officials, especially those with the highest formal and political power, have a special responsibility to encourage state prosecutors to act lawfully and efficiently, rather than threaten them with consequences or imply that their decisions will not be forgotten.

Proactive communication by the Council in cases of political statements undermining prosecutorial independence is crucial as it can help to counteract any negative effects of the political statements and restore public trust in the independence and integrity of the state prosecution service. In addition, adequate communication sends a message to political stakeholders that their statements will not be tolerated and that the Council will take action to protect the autonomy of state prosecutors. By effectively and proactively communicating its stances on political interference, the Council can demonstrate its commitment to upholding the autonomy of the state prosecution service and the rule of law. The Council’s original statement has been translated for the purpose of this study, serving as an exemplar of effective communication in similar circumstances.

“The Prosecutorial Council calls on high public officials and politicians to refrain from public statements that may imply a call to state prosecutors to make or not make a particular decision within their jurisdiction.

High public officials, especially those with the greatest formal and political power, have a special responsibility to encourage state prosecutors to act lawfully and effectively, instead of making threats that they will be held accountable and that their decision-making will not be forgotten.

The Prosecutorial Council calls on politicians not to attribute the results of state prosecutors to their own merits, as this indirectly undermines the integrity of state prosecutors and the prosecution service as a whole.

The Prosecutorial Council emphasizes that it is the prosecutor’s right to seek pre-trial detention as an ultimate measure to secure an uninterrupted criminal procedure, but it is also their independent and professional right to make other decisions in criminal cases in order to fulfil their legal responsibilities, with an obligation to act promptly and effectively in such cases.

The Prosecutorial Council calls on all social and political entities to respect the presumption of innocence without exception, but also not to seek or demand privileges for any individual on any basis.

The Prosecutorial Council encourages state prosecutors to continue to improve the results in prosecuting criminal offenders, especially in the areas of corruption and organized crime, lawfully and effectively, regardless of the different views, opinions, and messages expressed in the public sphere.”<sup>17</sup>

<sup>16</sup> <https://www.vijesti.me/vijesti/politika/613025/djukanovic-zaprijetio-tuziocima-odgovarace-ako-sud-ne-osudi-medenicu-vukotica>

<sup>17</sup> See more: <https://sudovi.me/tzsv/sadrzaj/xjLn>



## POLICY RECOMMENDATIONS

Recommendation 1: The Law on State Prosecution Service should be revised to ensure that the composition of the Prosecutorial Council is free from undue political influence and to strengthen the autonomy, accountability, and integrity of the state prosecution service.

The Ministry of Justice announced that the Working Group for the revision of the Law on State Prosecution Service is formed and tasked to draft amendments to the Law on State Prosecution Service and to propose it for Government's adoption in 2023. We expect that this time the Government will implement a fully inclusive consultation process on this key law from the perspective of EU integration and the fulfilment of the interim benchmarks for Chapter 23. Measures should be taken to ensure that parity between Council members coming from the prosecutorial and lay-members of the Council. It should be strongly advisable to introduce balanced composition of the Council with following structure:

- Permanent Supreme State Prosecutor (ex officio President of the Prosecutorial Council)
- Four state prosecutors elected by their peers (by the General Conference of state prosecutors)
- Four lay members elected by the Parliament (simple majority)
- One representative of the Ministry of Justice.

Given the legitimacy obtained through a parliamentary vote, Supreme State Prosecutor should have a decisive role ('golden vote') in the decision-making process. Additionally, measures to strengthen the integrity of non-prosecutorial members with no conflicts of interest or relationships that could compromise their impartiality should be introduced. Considering that early parliamentary elections are scheduled in Montenegro on 11 June, it is recommended that this process be postponed until the new Parliament and Government are constituted, which will have full legitimacy to decide on these issues.

### **Recommendation 2: To improve professional capacity of members of the Prosecutorial Council**

Members of the Council should devote more time and show full commitment to performing their functions in the capacity of members of the Prosecutorial Council. Consideration should be given to the introduction of a system in which members of the Prosecutorial Council, or at least half of them, are fully dedicated to their duties in the Council (100% of their working time). This could be achieved by requiring state prosecutors elected as members of the Council to suspend their prosecutor functions and fully devote themselves to their professional obligations in the Council during their 4-year mandate. The same could be prescribed for members selected from the ranks of distinguished legal professionals. Such a measure would improve the professional capacity of the Council's members and ensure their focus is solely on the Council's mission. This would also reduce the potential for conflicts of interest and ensure the Council is better equipped to make objective and unbiased decisions.

**Recommendation 3: To ensure merit-based appointment of the Supreme State Prosecutor**

This recommendation is crucial for strengthening the autonomy of the state prosecution service in Montenegro and its implementation will certainly mark the beginning of the final phase in the negotiations with the European Union. It is important that the appointment process is transparent, fair, and free from political interference, and that candidates are proposed to the Parliament based on their qualifications, experience, and integrity. In April 2023, the Prosecutorial Council proposed to the Parliament former acting Supreme State Prosecutor for the position of permanent Supreme State Prosecutor. Considering that parliamentary elections are scheduled in Montenegro on 11 June, Parliamentary vote in this process will be most likely postponed until the new convocation of the Parliament is constituted. A merit-based appointment process will help to ensure that the Supreme State Prosecutor is independent, impartial, and committed to upholding the rule of law, which is essential for maintaining public trust in the prosecution service.

**Recommendation 4: The Prosecutorial Council needs to enhance the integrity of the decision-making process.**

It is recommended that the Council takes additional measures to enhance the integrity of its decision-making processes. The decision-making process in the Prosecutorial Council should be guided solely by the principles of impartiality and independence and should not be influenced by personal or political interests. It is essential to ensure that the council members, both from within the rank of prosecutors and 'outsiders' (lay members) are selected based on their professional qualifications and experience and are free from conflicts of interest that may compromise their impartiality. Additionally, measures should be taken to prevent overvoting between the members coming from prosecutors and lay members of the Council, as this can lead to a situation where decisions are made based on the interests of the majority, rather than on the principles of justice and the rule of law. To enhance the integrity of the decision-making process, the Prosecutorial Council should establish clear rules and procedures for conducting its meetings, ensuring transparency and accountability in all of its activities. Targeted training programs for the council members should be developed to enhance their knowledge of legal and ethical standards, and to equip them with the necessary skills to perform their roles effectively and impartially.

**Recommendation 5: The Prosecutorial Council needs to continue with practice of addressing issues within the public prosecution service, including through proactive consultations with the heads of state prosecution offices.**

The Council should maintain its practice of proactively addressing issues within the public prosecution service. This can be achieved through regular consultations with the heads of state prosecution offices. By doing so, the Council can identify any systemic issues or challenges that may affect the independence and effectiveness of the prosecution service and take appropriate measures to address them. It is crucial that the Council maintains open communication channels with the state prosecution offices. This approach can help to strengthen the integrity and accountability of the prosecution service and ensure that it operates in accordance with the principles of the rule of law.

**Recommendation 6: Proactive communication by the Council in cases of political statements undermining prosecutorial independence should be further enhanced.**

To ensure the protection of prosecutorial autonomy, in efforts to implement the recently adopted The Communication Strategy of the State Prosecution Service and the Prosecutorial Council 2023-2025, the Council should continue to improve its proactive communication practices in cases where political statements may affect the autonomy and integrity of the state prosecution service. This can be achieved by establishing clear guidelines for public statements and proactive consultations with relevant stakeholders, such as the heads of state prosecution offices. Additionally, the Council should consider increasing its public outreach efforts to raise awareness and understanding of the importance of prosecutorial autonomy and the Council's role in safeguarding it. By strengthening its communication practices, the Prosecutorial Council can enhance the trust of the public in the integrity of the state prosecution service.

**Recommendation 7: The government should ensure adequate working conditions and functioning of the Prosecutorial Council**

Adequate working conditions for the Prosecutorial Council and the state prosecutor's offices located in Podgorica, with a particular focus on the Special State Prosecutor's Office, should be provided by the government without further delay. This includes providing necessary resources such as office space, equipment, and staff, as well as addressing any other logistical needs. Additionally, the government should ensure that the budget allocated to the prosecution service is sufficient to meet its operational needs and support its activities in an effective and efficient manner. By providing necessary resources and support, the government can help strengthen the independence and effectiveness of the prosecution service in Montenegro.

**Recommendation 7: The financial independence and budget management capacity of the Prosecutorial Council should be strengthened.**

The Prosecutorial Council should strengthen its capacity for planning, executing, and monitoring the implementation of the program budget for the operation of the Council and each state prosecutor's office. This would enable more effective and efficient use of financial resources and ensure that the needs of each office are adequately addressed. It would also facilitate better monitoring of financial performance and progress towards strategic goals, allowing for timely corrective action if necessary. Strengthening budget planning and execution capacity would ultimately lead to a more transparent and accountable prosecution service.





