



THE
HUMAN RIGHTS ACTION
DRAFT REPORT

**Election, promotion and determination of
professional liability of state prosecutors
in Montenegro
2020-2021**



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Human Rights Action – HRA

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INTRODUCTION

This report mainly analyses the work of the Prosecutorial Council regarding the application of its powers to elect and dismiss heads of state prosecutor's offices and state prosecutors,¹ ascertain the termination of the office of heads of state prosecutor's offices and state prosecutors,² decide on disciplinary responsibility of state prosecutors and heads of state prosecutor's offices,³ and consider complaints on the work of state prosecutors and heads of state prosecutor's offices in terms of the legality of their work.⁴

The report also contains the analysis of the work of the Commission for the Code of Ethics of State Prosecutors, which is charged with providing opinions on whether specific conduct of a state prosecutor was in line with the Code of Ethics of State Prosecutors.⁵

The report also includes two special sections: the first, which analyses the Law on Amendments and Supplements to the Law on the State Prosecutor's Office,⁶ which called into question the constitutionally guaranteed independence of the State Prosecutor's Office,⁷ and the last, dedicated to the practice of the former Government Commission for Allocation of Housing Assistance to State Prosecutors, which threatened the independence of this state body for years.

Conclusions and recommendations are provided at the end of the report. We emphasise that it is necessary for the Government to soon begin work on new and more complete Amendments and Supplements to the Law on State Prosecutor's Office in line with the expectations of the European Commission. Also, the new composition of the Prosecutorial Council should act more conscientiously and professionally than the previous one when taking decisions on the election, promotion and termination of office and when establishing the responsibility of state prosecutors.

The new Prosecutorial Council should not ignore the long-standing criticism of the European Commission⁸ and the Human Rights Action; it should completely explain its decisions, and

¹ Constitution of Montenegro, *Official Gazette of Montenegro*, nos. 1/2007 and 38/2013, Article 136, paragraph 4, items 2 and 3

² *Ibid*, item 3

³ Law on State Prosecutor's Office, *Official Gazette of Montenegro*, nos. 11/2015, 42/2015, 80/2017, 10/2018 and 76/2020, 59/2021, Article 37, paragraph 1, item 3

⁴ *Ibid*, item 10

⁵ *Ibid*, Article 21

⁶ Law on Amendments and Supplements to the Law on State Prosecutor's Office, *Official Gazette of Montenegro*, no. 59/2021 of 4 June 2021

⁷ Constitution of Montenegro, *Official Gazette of Montenegro*, nos. 1/2007 and 38/2013, Article 134, Article 136, paragraph 1

⁸ In its reports from 2015, the European Commission criticised the lack of reasoning in the decisions of the Prosecutorial Council. The latest report for 2021 states, among other things, that: "Both Councils should accelerate efforts to improve the transparency of their work, including the publication of fully reasoned decisions on promotion, election and disciplinary cases. Transparency has improved slightly in the Judicial Council, and has decreased in the Prosecutorial Council. The Prosecutorial Council must show a much more proactive approach to issues within the prosecutorial organisation, including

examine complaints about the work of state prosecutors and heads of state prosecutor's offices much more thoroughly. In each of the cases where it finds a violation of the law, the Council should seriously consider initiating an appropriate procedure for establishing responsibility, in order to discourage the repetition of the same practice. We especially appeal to the new Prosecutorial Council to deal with the problem of rejecting more than 90% of criminal charges each year due to the statute of limitations for criminal prosecution, for which no state prosecutor has ever been held accountable.

Unlike the earlier ones, new Prosecutorial Councils must not allow the executive ever again to provide financial assistance to state prosecutors to address their housing needs, given that such long-standing practice of the former government has called into question the independence of state prosecutors, and that the European Commission has identified it as an issue that causes concern.⁹ It is interesting to note that none of the state prosecutors ever complained that such a practice endangers their independence, and that the Commission for the Complaints of State Prosecutors and Heads of State Prosecutor's Offices has not received a single complaint, on any grounds, since its establishment in 2018.

The report covers the period from the beginning of 2020 to the end of July 2021, when the Prosecutorial Council held its last session of this year. For the purposes of drafting the report, the Human Rights Action attended the sessions of the Prosecutorial Council at which interviews were conducted in procedures for the election i.e. promotion of state prosecutors. It also analysed extensive documentation, including all the decisions of the Council on issues that were the subject of the report, as well as the complaints on the work of state prosecutors that were filed with the Council during the reporting period.

The report was prepared as part of the project "Strengthening Safeguards of Judicial Independence in Montenegro", with thanks to the Kingdom of the Netherlands for its financial support.

Human Rights Action is a citizens' association which - among other activities - has been monitoring and analysing the work of the Judicial and Prosecutorial Councils since 2008. We have published the following publications in this area to date: Proposal to Reform the Election of Judges in Montenegro, Analysis of the Reform of the Election of Judges in Montenegro (2007-2008), Analysis of the Work of the Judicial Council of Montenegro (2008-2013), Report on the Implementation of the Judicial Reform Strategy 2007-2012), Report on the Implementation of the Judicial Reform Strategy 2014-2018 During the Period 2014-2016, Responsibility for Violations of Judicial Ethics in Montenegro - Work of the Commission for the Code of Ethics for Judges, and Election and Promotion of Judges and Prosecutors in Montenegro (2016-2019). These and other publications are available at: www.hraction.org/hra-publikacije-hra-publications/.

the professionalism of the heads of state prosecutor's offices and state prosecutors, and their responsibility, and protect the reputation of the prosecutorial profession..." (translation by HRA), European Commission, Montenegro Report 2021, 19 October 2021, p. 19.

⁹ European Commission, Montenegro Report 2021, *op.cit*, p. 19

In the report, when we spoke about women, we tried to use terms in the female grammatical gender, in accordance with the instructions from the Register of Women's Occupations, Ranks and Titles of the Ministry of Human and Minority Rights - Department for Gender Equality. However, for the sake of economy, these terms were not used consistently. Therefore, the terms "state prosecutors", "eminent lawyers", "council members" and the like should be viewed [in the original version of the text] as applying equally to all persons holding those positions.

The objective of both this report and the public advocacy of the Human Rights Action is to improve the work of the State Prosecutor's Office and the Prosecutorial Council, in order to establish the rule the law in Montenegro and, in particular, to ensure respect for human rights in accordance with international standards.

Tea Gorjanc Prelević,
Editor of the Report and the Executive Director of the Human Rights Action

CONCLUSIONS

Conclusion on the Amendments to the Law on the State Prosecutor's Office

Amendments to the Law on the State Prosecutor's Office, which entered into force in June 2021, were not sufficient, in either scope or quality, to allow for the necessary reform of the organisation of prosecution which would ensure the rule of law and increase the confidence of citizens and professional public in the realisation of public interest. There is a need for further work on amending this Law, which is exactly what the European Commission expects from Montenegro.

The aim of the amendments to the Law on the State Prosecutor's Office was to subject the State Prosecutor's Office – for the purpose of the reform - to a greater political control, especially with regard to changing the composition of the Prosecutorial Council and terminating its mandate. However, this approach called into question the constitutionality of the adopted solutions, because the Constitution of Montenegro envisages the State Prosecutor's Office as an independent state body whose independence is ensured by the Prosecutorial Council. In addition to constitutional limitations, solutions that allow the executive branch of power to exercise a dominant influence over the Public Prosecutor's Office prevent the implementation of the rule of law in relation to that branch of power.

Composition of the Prosecutorial Council

According to the changed composition of the Prosecutorial Council, its majority now consists of members outside of the ranks of state prosecutors. In this way, on the one hand, the danger of corporate governance by prosecutors is avoided; however, on the other hand, greater political influence on the Prosecutorial Council is made possible and its independence reduced, since eminent lawyers are elected by a simple majority in the Parliament of Montenegro. The representative of the Ministry in the Council directly represents that parliamentary majority, that is, the executive branch of power. This problem was pointed out by the Venice Commission, and later also by the European Commission in its report on Montenegro. An improvement has been made insofar as one member of the Prosecutorial Council from the ranks of eminent lawyers is now nominated by non-governmental organisations. However, in order to be elected, even that one candidate must receive the support of the parliamentary majority.

Earlier recommendation of the Venice Commission on the fair representation of all levels of prosecutor's offices in the Prosecutorial Council, which would have allowed for at least two

members of the Council to be from the basic prosecutor's offices, has not been adopted either.

Prevention of the conflicts of interest and independence from political influence

Although provisions on the prevention of conflicts of interest have been introduced for all members of the Council, as well as an additional criterion for ensuring independence from political influence among the members of the Council from the ranks of eminent lawyers – which, in principle, represents progress and was praised by the Venice Commission - 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.

The law does not define conflicts of interest that could arise in the course of the term of office. Conflict of interest is defined in a milder way when it comes to Council members from the ranks of state prosecutors compared to members from the ranks of eminent lawyers. Greater guarantees in this regard apply to members of the Agency for the Prevention of Corruption, the Agency for Electronic Media, or the Council of Radio and Television of Montenegro than to members of the Prosecutorial Council, which is not justified given that the Constitution granted the Council the task to ensure the autonomy of the State Prosecutor's Office.

Termination of the mandate of the Prosecutorial Council

The amendments to the Law set a precedent based on which the mandate of the Prosecutorial Council was suspended because the new parliamentary majority changed its composition in accordance with the law. This introduced the rule of political influence, i.e. the practice according to which from now on any political majority can dismiss a Prosecutorial Council that does not suit it, and thus affect the cases the Council is considering. This decision violated the constitutional principle of independence of the State Prosecutor's Office, as well as legal certainty, since members of the Council were dismissed by a decision of the political majority without establishing any responsibility and reasons for dismissal. The Venice Commission was explicitly against this solution, and the European Commission pointed this out in its report.

Proclamation of the Prosecutorial Council

The authority to proclaim the composition of the Prosecutorial Council should not have been transferred from the President of Montenegro to the Speaker of the Parliament, given that the legislature is already dominantly involved in the election of members of the Council. It would have been enough to specify that authorisation and thus prevent possible obstruction.

Proclamation of the partial composition of the Prosecutorial Council by the Speaker of the Parliament of Montenegro in early August 2021 led to the suspension of the work of the Council, which - from that day until November, when work on this report was completed - did not hold a single session.

Convening a session of the Prosecutorial Council

The amendments to the Law contain one positive novelty: a session of the Prosecutorial Council can be convened at the request of at least three of its members, so it no longer depends only on the will of the president of the Council.

The 'acting' situation

According to the adopted Law, the acting Supreme State Prosecutor (SSP) can also be someone who is not a state prosecutor. It is possible for the acting Supreme State Prosecutor to be elected indefinitely, meaning that the 'acting' situation can last forever. This indulges in political irresponsibility and circumvents the constitutionally prescribed manner of electing the Supreme State Prosecutor. The Venice Commission has explicitly criticised this solution.

Dismissal of State Prosecutors

New provisions allow for the dismissal of a public prosecutor in an arbitrary manner. The provisions are imprecise and too broadly worded, leaving room for arbitrary action. The opportunity to specify disciplinary offences by amending the law was missed (more information below, under Disciplinary Responsibility).

New Composition of the Disciplinary Council

Prescribing the new composition strengthened the independence of the Disciplinary Council, because members who are not state prosecutors are now the majority.

However, the reform of the system of establishing responsibility in a state prosecutor's office must go beyond these amendments to the Law, in order to both simplify the system and make it more serious, given that it did not yield results (more information below, under 'Acting upon complaints' and 'Disciplinary responsibility').

Proposal for dismissal of the Head of a State Prosecutor's Office

A proposal for the dismissal of the head of a state prosecutor's office can now be submitted by three members of the Prosecutorial Council, which is a useful improvement of the system of establishing responsibility.

Submission of the Reports to the Parliament of Montenegro

A positive novelty was introduced in relation to the previously prescribed obligation of the Supreme State Prosecutor and Chief Special Prosecutor to submit work reports to the Parliament of Montenegro or the working bodies of the Parliament at their request, while the possibility of requesting and submitting a report was excluded in the case of circumstances of individual cases whose processing is under way. In that domain, political pressure on the prosecution was prevented and the recommendation of the Venice Commission was fulfilled.

Application of the Amendments to the Law on the State Prosecutor's Office from June 2021

The Law on Amendments to the Law on the State Prosecutor's Office, which entered into force in June 2021, was applied in practice based on the interpretation of public officials based on their political interests. Such interpretation and application of the Law led to a blockade of the work of the Prosecutorial Council, which has not held a single session since July 2021.

Proclamation of the Prosecutorial Council

The work of the Prosecutorial Council was blocked when the Speaker of the Parliament of Montenegro hastily proclaimed its partial composition on 5 August 2021- without five members from the ranks of eminent lawyers, who were not elected - because the mandate of the old members of the Council from among the ranks of eminent lawyers was effectively suspended. The proclaimed yet incomplete Council could not begin to operate because, by law, its constitutive session must be attended by all the members.

Election of the Supreme State Prosecutor

Public criticism of the Prosecutorial Council by representatives of the executive, for announcing a new competition for the election of the Supreme State Prosecutor (despite the fact that the announcement was made in accordance with the Law on Amendments and Supplements to the Law on the State Prosecutor's Office) put political pressure on the Prosecutorial Council and the State Prosecutor's Office. Arbitrary announcements on initiating proceedings to establish responsibility and dismiss members of the Prosecutorial Council represented additional inappropriate political pressure on that body.

Suspension of initiated procedures for the election of State Prosecutors

All initiated procedures for the election of heads of state prosecutor's offices and state prosecutors, as well as the procedure for the election of the Supreme State Prosecutor, have been suspended by force of law. Such a suspension of the initiated election procedures is unjustified, because the Law has not changed the conditions for election. This strengthened doubts about the political influence on the prosecution.

Obligation to submit a Report to the Parliament of Montenegro

Representatives of the legislature unlawfully asked the acting Supreme State Prosecutor to submit reports related to the work of the Prosecutorial Council and unjustifiably accused the Council of deliberately delaying the election of prosecutors, which is a form of inappropriate political pressure on the Prosecutorial Council.

APPLICATION OF THE LAW ON THE STATE PROSECUTOR'S OFFICE IN 2020 AND 2021

Inappropriate influence of the executive on State Prosecutors through arbitrarily granted housing assistance

The executive branch has been exercising undue political influence over the judiciary and the prosecution for years, by awarding - in a non-transparent procedure - apartments to judges and state prosecutors at the cost of 20% of their estimated value, as well as financial assistance to address their housing needs.

The executive continued this practice even after the year 2014, when the law excluded their ability to regulate issues related to resolving housing needs of judges and state prosecutors. At the same time, the executive for years would not approve funds for the Prosecutorial Council to address the housing needs of state prosecutors, due to which state prosecutors had to resolve their housing issues exclusively through the Government Commission.

Loan repayment agreements concluded by the Government with judges and state prosecutors do not contain elements of loan agreements and are in fact seeming or fictitious agreements. Such agreements are null and void.

A significant number of judges and state prosecutors who have received assistance from the Government had already had their housing issues adequately resolved, and the adoption of certain unlawful decisions to address the housing needs of state prosecutors by the Government Commission was initiated by the Prosecutorial Council, headed by its president, who was simultaneously the Supreme State Prosecutor. This practice indicates a well-founded suspicion that these were actually criminal acts with elements of corruption.

Termination of a Prosecutor's Office due to retirement

The Prosecutorial Council did not apply the provisions of the Law on Pension and Disability Insurance (LPDI), which entered into force on 12 August 2020, according to which men acquire the right to retire when they reach 66 years of age, and women when they turn 64. In practice, the Council applied the provisions of the law that had ceased to be in effect, with the justification that the amendments to the law were contrary to the Constitution of Montenegro, despite the fact the Constitutional Court is the only body that can assess the constitutionality of the laws. In this way, the Prosecutorial Council went beyond its competence and endangered the rule of law.

In the case of the acting Supreme State Prosecutor, Ivica Stanković, not even the previous legal provisions - those that prescribed the termination of the prosecutorial office due to the

acquisition of the right to retirement after 40 full years of service, which were in effect before the 2020 LPDI amendments - were applied. He thus continued to discharge office for two years after it had to be terminated by force of law.

The Law on the State Prosecutor's Office does not prescribe sanctions or any consequences in the event that the obligation to inform the Prosecutorial Council about the occurrence of reasons for termination of prosecutor's office is not fulfilled.

The Draft Law on the Prosecutor's Office for Organised Crime and Corruption, which was later withdrawn, showed the political intent to terminate the mandate of the Chief Special Prosecutor by way of a law, and to remove special prosecutors from the existing Special State Prosecutor's Office.

The Law on Amendments and Supplements to the Labour Law, which was enacted without a public debate, was also aimed at terminating the office of the Chief Special Prosecutor. However, the application of that Law was subsequently postponed.

The actions of the ruling majority and the proposing and passing of laws that were aimed at specific persons (*ad hominem*) represented attempts to abuse legislative powers. The responsibility of state prosecutors can be established and their removal or dismissal decided upon exclusively in a legally conducted procedure, and not "by force of law", that is, based on the will of the ruling political majority, as if it were a medieval practice of witch-hunting.

ESTABLISHING THE RESPONSIBILITY OF STATE PROSECUTORS FOR VIOLATIONS OF LAW AND ETHICS

Prosecutorial Council's acting upon complaints filed for unlawful work

In practice, complaints about the work of state prosecutors proved to be an ineffective means of verifying the legality of their actions. None of the 157 complaints against the work of prosecutors, which have been decided upon since the beginning of 2020, has led to the initiation of disciplinary proceedings, although there have been cases of serious omissions and violations of the law. The complaint against the state prosecutor regarding whom it was established - in a final judgment, in the opinion of the Ombudsman, and in the judgment of the European Court of Human Rights - that he violated basic human rights, was rejected as well. The complaint filed due to the actions of the state prosecutor's office in the case of police torture, regarding which an effective investigation was demanded by the European Commission, the US Embassy, the Embassy of the United Kingdom and the head of all UN agencies in Montenegro, was also rejected without an explanation. Frequent untimely

actions of state prosecutors on filed criminal charges, as well as violations of the right to defence, were especially tolerated.

In some cases, in which omissions were indeed identified, it was not clearly stated that the complaint was well-founded; instead, prosecutors were given “instructions” on how to remedy said omissions. In a small number of cases (7 in total) in which complaints were found to be well-founded, the Prosecutorial Council also gave instructions on how to remedy the omissions, without considering the possibility of establishing disciplinary responsibility or violation the Code.

The Prosecutorial Council decided on complaints in the form of arbitrary one-sentence notices, without prior discussion or reasons that would show why such a decision was made.

The practice of the Prosecutorial Council in deciding upon complaints about the work of state prosecutors is incomprehensible and encourages legal uncertainty, because same situations were treated differently.

There was no time limit for deciding upon complaints, and decisions were not made in a timely manner. For example, the Prosecutorial Council has not decided for more than a year on a complaint that, in a specific case from 2015, a criminal report had not resulted in a decision in five years.

The Prosecutorial Council decided on complaints superficially and arbitrarily, without following the prescribed procedure and without adequately verifying the allegations contained therein. Such a practice contributes to the irresponsible work of state prosecutors and is particularly unacceptable because members of the Complaints Review Commission receive remuneration for their work in the Commission. Of the 157 complaints that were decided upon, only in 7 cases was it clearly stated that the complaint was founded, in one that the complaint was partially founded, in 12 cases instructions were given to eliminate irregularities without comment on the merits of the complaint itself, and in 136 cases it was stated that the complaint is unfounded.

Practice of the Commission for the Code of Ethics

The number of complaints filed against state prosecutors for violations of the Code was small – only 9 from the beginning of 2020 to September 2021 - and the Commission for the Code of Ethics of State Prosecutors found violations of the Code in only two cases.

The Commission did not take a proactive approach to affirm respect for ethical principles and did not monitor the application of the Code beyond the complaints, although such monitoring was prescribed. In 2021, in only two cases in which a violation of the Code was

established its opinions contained valid explanations, and reasons from which it could be established that the opinion was correct and legal.

The Commission did not submit a single proposal for establishing disciplinary responsibility, although cases in which a violation of the Code was established indicated that a disciplinary violation was committed as well.

The Law on the State Prosecutor's Office and the Code of Ethics of State Prosecutors do not differentiate between certain violations offences and violations of the Code, so the same behaviour can be interpreted as a disciplinary violation or as an ethics violation. This causes legal uncertainty, reduced accountability and unequal treatment of public prosecutors.

Disciplinary offences

The system of disciplinary responsibility of state prosecutors for disciplinary offences related to the performance of the prosecutorial function and acting in specific cases has not taken root in practice. For the past six years, no state prosecutor has been disciplined for any omissions made in any particular proceeding. Only two disciplinary procedures were initiated, at the initiative of the Anti-Corruption Agency, against state prosecutors who have failed to report property.

The annual reports on the work of the Prosecutorial Council and the State Prosecutor's Office, as well as the complaints that were submitted to the Prosecutorial Council, indicate justified suspicion of numerous omissions in the work of state prosecutors. For example, of the total number of criminal charges filed over the years, more than 90% were dismissed due to the statute of limitations for criminal prosecution. However, reasons for such decisions have never been established, nor has any state prosecutor been held accountable for a disciplinary offence for "failure to act in cases within the time limits prescribed by law, causing obsolescence, impossibility to conduct proceedings and other consequences prescribed by law". Also, the authorised proposers did not initiate disciplinary proceedings against the Chief Special Prosecutor when he unlawfully published material obtained by use of secret surveillance measures. Also, the procedure for establishing disciplinary responsibility was not initiated against the state prosecutor regarding whom it was established in a final judgment, the Ombudsman's opinion, and the judgment of the European Court of Human Rights that he had violated basic human rights.

The performance of all state prosecutors was rated as excellent, which shows that the system of disciplinary responsibility and the system of performance evaluation of state prosecutors are not based on objective criteria and do not show the real situation when it comes to responsibility, omissions, and the quality of work of state prosecutors.

Legal descriptions of some disciplinary offences are still too vague, allowing for arbitrary interpretation by the authorised proposer of disciplinary proceedings, the Disciplinary Prosecutor or the Disciplinary Council, and thus unequal treatment of prosecutors.

Performance evaluation

The system of performance evaluation of state prosecutors in Montenegro is unrealistic, biased and insufficiently transparent. Decisions on the evaluation of state prosecutors made by the Prosecutorial Council show that the work of all 17 state prosecutors who were evaluated from the beginning of 2020 to the end of July 2021 was graded exclusively with the highest mark, “excellent”, and that in the process of election all state prosecutors received the maximum number of points based on this criterion, including those whose work was found to include serious omissions.

The prescribed criteria and sub-criteria for the performance evaluation of state prosecutors, i.e. the evaluation of the quality of their work, are not sufficient and do not enable an objective evaluation of the work of state prosecutors.

Election of State Prosecutors

The decisions of the Prosecutorial Council on the election of state prosecutors were not sufficiently reasoned and it could be clearly concluded from them whether they were made in accordance with the law, whether the procedure was followed, and whether all criteria or sub-criteria were applied and with what result. Also, the decisions of the Prosecutorial Council to elect someone as a state prosecutor for the first time are essentially decisions made without an explanation, because there is no indication of how, and on what basis, a person was given the mark “satisfactory” at the initial training. None of the decisions on the election of heads of state prosecutor’s offices contained an explanation regarding the fulfilment of the requirements related to work experience. In its last report, as well as in several earlier ones, the European Commission criticised the Prosecutorial Council for its insufficiently reasoned decisions.

In the process of promotion, the evaluation of the interview was always decisive for the election of state prosecutors, because the performance of all the candidates was evaluated with the best possible mark – “excellent”. However, none of the election decisions provided an explanation of how the prescribed criteria for evaluating the interview were assessed based on the prescribed indicators.

Most decisions of the Prosecutorial Council on the election of state prosecutors and heads of basic state prosecutor's offices contained an instruction that a lawsuit against a decision should be filed through the Prosecutorial Council, which is contrary to the law which stipulates that a lawsuit should be filed directly with the Administrative Court. Such an instruction can have a deterrent effect on those who are considering filing a lawsuit.

RECOMMENDATIONS

Recommendations for further Amendments to the Law on the State Prosecutor's Office

The Law on the State Prosecutor's Office needs to be further amended. Judging by its latest report on Montenegro from October 2021, the European Commission expects Montenegro to do exactly that.

Composition of the Prosecutorial Council

Introduce additional guarantees against political influence on eminent lawyers, e.g. by allowing non-governmental organisations, the Academy and the Bar Association to elect at least two members. The Venice Commission made such a suggestion, which the European Commission reiterated in its report.

Ensure fair representation of all levels of prosecutor's offices in the Prosecutorial Council so that at least two members of the Council are elected from the basic prosecutor's offices, as recommendation by the Venice Commission in 2014 and 2015.

Prevention of conflicts of interest and independence from political influence

Adopt a solution according to which a *member of the Prosecutorial Council cannot be someone who is a member of the party council, another party official or a person who was actively engaged in the political party*, and tie this restriction to performing political functions in the course of the last 10 years (it was accepted to tie it to the last five).

Rules on the prevention of conflicts of interest and ensuring independence from political influence should be defined the same way for all members of the Prosecutorial Council, regardless of whether they come from the ranks of eminent lawyers, or state prosecutors. Also, prescribe that these rules shall apply during the entire term of office, and not only during the elections.

Proclamation of the Prosecutorial Council

Return the competence to proclaim the composition of the Prosecutorial Council to the President of the state, and specify his/her powers in order to prevent possible political obstruction. Specify the proclamation of the composition of the Council as a formal statement

and announcement of the result of the selection made by other bodies, as proposed by the Venice Commission.

The 'acting' situation

Amend the law to prevent a situation in which an acting Supreme State Prosecutor can discharge the office of Supreme State Prosecutor indefinitely. The Venice Commission has explicitly criticised this, pointing out that the focus should be on finding a mechanism to prevent blockade, and not on maintaining the acting situation indefinitely. Back in 2014, it had proposed a solution where, in case the SSP is not elected even after the second round of voting, the Prosecutorial Council is to propose two candidates. The Assembly can then elect the SPP by a simple majority. In March 2021, the Venice Commission proposed that one of the existing prosecutors be elected as acting SSP - which would ensure continuity and legitimacy of the function and create an incentive for the ruling majority to seek a compromise regarding the election of the permanent SSP. It also proposed prescribing the unblocking mechanism in the Constitution.

Dismissal of a State Prosecutor

The most serious disciplinary offences that constitute grounds for dismissal of a state prosecutor should be prescribed precisely, to avoid arbitrary action as much as possible.

Termination of the Prosecutor's Office due to retirement

The Prosecutorial Council should apply the Law on Pension and Disability Insurance in light of the Law on the State Prosecutor's Office, and terminate the office of all state prosecutors who have met the conditions for retirement. Such prosecutors may apply to the Constitutional Court for suspension of the enforcement of these lawful decisions until a decision is made on the submitted initiative to review the constitutionality of this Law.

The law should also prescribe a violation of a responsible person who fails to notify the Prosecutorial Council in a timely manner of the occurrence of reasons for termination of prosecutorial office.

Disciplinary responsibility

We reiterate the earlier recommendation - that the disciplinary prosecutor should be empowered to initiate disciplinary proceedings - and we point to the Venice Commission's 2015 suggestion to elect a person outside the prosecution to that position, which would increase democratic legitimacy and credibility in establishing disciplinary responsibility.

Each member of the Prosecutorial Council should have the power to initiate disciplinary proceedings against a state prosecutor, and the Prosecutorial Council should be authorised to initiate the procedure for dismissal of the Supreme State Prosecutor (to be finally decided upon by the Parliament of Montenegro).

The Disciplinary Council should not be empowered to impose disciplinary sanctions, but only to conduct proceedings, while the Prosecutorial Council should decide on sanctions for all types of offences. As an alternative, consider a special body - whose members are not members of the Prosecutorial Council - which would make decisions on sanctions, in accordance with the opinion of the Venice Commission from 2014.

Specify descriptions of disciplinary offences to avoid vague terms e.g. with regard to the number of cases in which a public prosecutor should fail to act in a timely manner in order for his/her responsibility to be able to be established, and to allow for a clear distinction between disciplinary offences and violations of the Code of Ethics.

The law should also prescribe respect for the principle of proportionality between a disciplinary offence and a disciplinary sanction, in accordance with the Action Plan for Chapter 23.

We reiterate the following recommendation: The disciplinary offence of a prosecutor unjustifiably failing to act within the legal time limit, and thus causing the statute of limitations, inability to conduct proceedings and other consequences prescribed by law, should be prescribed as one of the most serious offences, which would entail the dismissal of the state prosecutor as a disciplinary sanction.

RECOMMENDATIONS REGARDING THE APPLICATION OF THE LAW ON THE STATE PROSECUTOR'S OFFICE

Inappropriate influence of the executive on State Prosecutors through arbitrarily housing assistance

The Protector of Property and Legal Interests of Montenegro should initiate civil proceedings to determine the nullity of the seeming or fictitious contracts that were used by the executive to grant funds to judges and state prosecutors, in order to also compensate the state, that is, return the funds that were granted under these null and void contracts.

The State Prosecutor's Office should individually review, *ex officio*, each case in which such assistance was granted, and establish whether any of them contain elements of criminal offences that are prosecuted *ex officio*. Given the number of such cases, and the legitimate public interest in establishing the rule of law, the State Prosecutor's Office should prepare and publish a report on the investigation of these cases.

State prosecutors, as well as judges and all other civil servants, should not, in principle, receive housing assistance from the state; instead, they should have adequate salaries and - like all other citizens - apply for housing loans from banks under market conditions that are equal for all.

Proclamation of the Prosecutorial Council

The Parliament of Montenegro should, as a matter of urgency, elect the remaining members of the Prosecutorial Council from among eminent lawyers, so that the Council can be constituted and begin to perform its numerous tasks.

Election of the Supreme State Prosecutor

Public officials, particularly those from the executive branch of power, should advocate for the proper application of legal provisions and, in particular, refrain from statements that could be interpreted as political influence or pressure on the prosecution. The responsibility of members of the Prosecutorial Council and state prosecutors should be established exclusively in a legally conducted procedure, without arbitrary accusations and announcements by officials of the executive and legislative branches that they will be dismissed and prosecuted.

Termination of Prosecutor's Office due to retirement

Immediately after its constitution, the Prosecutorial Council must issue decisions regarding the termination of office of all state prosecutors whose function has been *de jure* terminated in accordance with the Law on Pension and Disability Insurance.

The Law on the State Prosecutor's Office should be supplemented by prescribing an offence of the head of the State Prosecutor's Office who fails to timely notify the Council of the occurrence of such conditions.

ESTABLISHING RESPONSIBILITY FOR UNLAWFUL WORK AND VIOLATION OF ETHICS

Acting upon complaints

In relation to the handling of complaints about the unlawful work of state prosecutors, the Prosecutorial Council should:

- Fully respect the procedure prescribed for acting upon complaints about the work of state prosecutors;
- Amend the Rules of Procedure of the Prosecutorial Council with provisions stipulating that decisions on submitted complaints must contain explanations with clear reasons for the decision made, and from which it can be determined which actions were taken to verify the allegations of the complaint (bear in mind that this will also constitute a response to the European Commission's criticism from the annual reports);
- Equalise the practice in deciding upon submitted complaints, so that the same situations result in the decisions;
- Always consider initiating the procedure of individual responsibility of state prosecutors based on well-founded complaints, especially in cases of serious violation of the prescribed deadlines and in cases when such (absence of) acting is repeated;
- Supplement the Rules of Procedure of the Prosecutorial Council by prescribing a deadline for deciding upon complaints, and provide more detailed provisions on the complaints procedure.

Compliance with the ethical norms

The Law on the State Prosecutor's Office and/or the Code of Ethics should be amended to clearly distinguish between the disciplinary offences and the violations of the Code, minimise the space for arbitrariness and uneven treatment of state prosecutors, and avoid situations where two proceedings are conducted regarding the same action of the prosecution. Also, all violations of the Code should be relevant in evaluating the work of state prosecutors.

The Prosecutorial Council should abolish special remuneration for work in commissions, because members of the Prosecutorial Council already receive compensation for their work in the Council; as an alternative, the amount of remuneration for their additional work should be determined in accordance with the actual effect thereof, if handling complaints requires additional engagement.

The Commission for the Code of Ethics should:

- Improve the practice by establishing the facts more thoroughly, e.g. also based on hearing the complainant and other participants in or witnesses to the event, and issue opinions that contain a clear and complete explanation;
- Submit proposals for establishing disciplinary responsibility whenever there is a suspicion that a disciplinary violation has been committed, or at least explain, with arguments, why it believes that the issue at hand does not constitute a disciplinary violation;
- Proactively and systematically monitor the application of the Code, and, in case of its violation, initiate proceedings on its own.

Disciplinary offence

Prescribe the obligation to publish complete data on the statute of limitations for criminal prosecution, including judgments rejecting the charges for this reason. Prescribe the obligatory investigation of each such case and the publication of the reasons for the occurrence of obsolescence, and, in accordance with these findings, initiate procedures for establishing disciplinary responsibility and/or criminal liability of holders of judicial office. The Prosecutorial Council should form a commission to deal only with this issue.

Descriptions of disciplinary offences in the law need to be clarified. In particular, disciplinary offences should be clearly defined and distinguished from acts of violation of the Code of Ethics, in order to prevent arbitrary interpretation and unequal treatment of prosecutors.

Election of State Prosecutors

Decisions of the Prosecutorial Council must include a valid reasoning/explanation and reasons that clearly indicate how the facts were established and how the law was applied in the specific case. Also, decisions should contain an instruction concerning a legal remedy, in accordance with the law.

Performance evaluation

HRA reiterates earlier recommendations stating that the quality of work of state prosecutors and judges should be evaluated in relation to the following:

- Decisions of the Constitutional Court and the European Court of Human Rights (in that sense, if necessary, also make an exception in relation to the three-year scope of evaluation);
- The number of upheld or rejected motions to order and extend detention, and
- The number of accepted complaints on rejection of criminal charges.

HRA supplements these recommendations because we believe that the quality of the work of state prosecutors should be assessed in relation to the final judgments of regular courts.

HRA emphasizes that it is necessary to amend the rule on the performance evaluation of state prosecutors, which is illogical, incomplete and unfair. This rule enables, among other things, career advancement of prosecutors whose quality and quantity of work is unsatisfactory, and career advancement of those who have been found to have behaved in an unsatisfactory manner towards clients, colleagues and employees as a result of multiple violations of the Code of Ethics.