

Commentary of Institute Alternative on the Draft Law on Special State Prosecution Office

General comments and main problems of the Draft Law

The Draft Law on Special State Prosecution Office, deliberated at the public hearing, is not a result of identified problems in the work of the hitherto Department for combating organized crime, corruption, terrorism and war crimes and the proposed solutions do not correspond to its actual needs. This is most evident from the fact that a minimum of Draft provisions is related to special prosecutors, so the Department will not undergo any substantial changes. Hence, the focus of the Draft Law is on the changes related to other subjects (state authorities, especially the Police and other authorities that will reassign their employees to the Special Prosecution Office, banks, etc.), while the issues related to the Special Prosecution Office are neglected or regulated in the same manner as before, which is very problematic.

In short, according to this Draft Law:

- 1) The preconditions for the highest qualified legal experts, who have the capacity to conduct investigations in high-profile corruption and organized crime cases, to come to the position of Chief Special Prosecutor and special prosecutors have not been met.
- 2) The security risks in the selection of the Chief Special Prosecutor and special prosecutors have not been reduced.
- 3) Competencies are not defined in the manner which would allow Special Prosecution Office to attend to the most complex cases. On the contrary, SPO will be swamped with cases of low-profile corruption.
- 4) The authority of Chief Special Prosecutor in the Police Administration has not been strengthened.
- 5) Prescribing performance evaluation measures for the Chief Special Prosecutor and special prosecutors is entirely omitted.
- 6) Prescribing control procedures of dismissal of criminal complaints is entirely omitted.
- 7) The procedure for determining the number of special prosecutors has not been established.
- 8) Budgetary stability has not been provided and the budget amount determined for this Office is not known, since it is “drowned” within the overall budget of the State Prosecution Office.
- 9) Special reporting practice to the Parliament has not been established nor any additional reporting practice to the Prosecutorial Council.

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Although it is redundant to repeat, we remind that every Progress Report issued by the European Commission restates the same assessments on the alarming state of affairs in the area of corruption and organized crime and particularly point to the lack of track record of **proactive investigations in this field**¹. The burden of achieving results in this area is placed on the Special Prosecution Office. However, this Draft Law does not reflect even the slightest desire to actually improve the Special Prosecution Office, but only to have some “cosmetic” reforms.

In more detail

Article 5 - Conditions for appointment of Chief Special Prosecutor

Article 6 - Conditions for appointment of Special Prosecutor

Commentary:

The decision according to which the Chief Special Prosecutor and special prosecutors will be appointed exclusively from the ranks of prosecutors will not ensure that the most prominent legal experts in the field are appointed to these positions. Bearing in mind that the most challenging cases are placed under jurisdiction of this Office, it is more than obvious that the selection needs to be made from a wider array of professional backgrounds.

In this regard, a distinct lack of the Explanation of the Draft Law is a failure to provide accurate information on the number of state prosecutors that fulfill the criteria required for the positions of Chief Special Prosecutor and Special Prosecutor, although it is quite simple to determine the exact number when it comes to the State Prosecution Office.

This kind of solution will result in the persons currently holding the position of Special Prosecutor and possibly one or two state prosecutors from the Supreme State Prosecution Office being appointed to these positions. Consequently, it will lead to continuation of established practice which did not yield best results.

Recommendation: Instead of this solution, we suggest announcing public call and selecting from the wider pool of experts with experience in criminal matters, which would include investigative judges, police inspectors with experience in organized crime cases and expressed abilities and competences to conduct investigations in most serious cases, as well as lawyers and prominent legal experts. This would ensure a diverse experience in the work of the Prosecution and, thus, contribute to resolving complex cases.

¹ 2013 Montenegro Progress Report, p. 9

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Criteria: After passing the bar exam, 7 years of work experience in a legal profession as a judge, a state prosecutor, lawyer or police officer in activities of combating organized crime and corruption.

Further procedure would include Prosecutorial Council electing Chief Special Prosecutor upon the proposal of the Supreme State Prosecutor while special prosecutors would be elected by the Prosecutorial Council upon the proposal of Chief Special Prosecutor. In this manner, Chief Special Prosecutor would take responsibility for his/her team of special prosecutors.

In addition to being problematic, Articles 5 and 6 represent a technically imprecise solution, which does not stipulate the announcement of internal call for application of interested prosecutors, nor the deadline for application, procedure of validity check of submitted documentation, procedure in case of lack of sufficient number of applications, procedure in case that the Prosecutorial Council does not elect the proposed candidates. These will all result in problems in implementation.

Recommendation: The second required segment in the selection process - Security checks

Prosecutors (Chief Special Prosecutor and special prosecutors), as well as other employees in the Special Prosecution Office, must undergo prior and ongoing security and asset checks. It is the recommendation of IA for this to be an exclusive requirement for appointment of the Chief Special Prosecutor and special prosecutors. The necessity of this practice arises from the special sensitivity of the cases that fall under the competence of the Special State Prosecution Office.

In that sense, the law should prescribe the procedure and the role of the competent public administration body which would carry out checks, including a provision defining the necessary consent of the person over which the checks are performed. In the case of a negative opinion, an insight into the material collected should be provided and the possibility for the person in question to respond to such claims, as well as other available legal remedies.

Prescribing security checks as is suggested by IA will reduce the possibility of misuse within the very process of carrying out checks through the possibility of two-fold complaint procedure (before the authority that issues the decision and before the court) and ensure high level of integrity for the prosecutors with competences to deal with the most sensitive cases, as well as decrease the possibility of corruption and data leakage.

Candidates for the positions of Chief Special Prosecutor and Special Prosecutor shall give their consent for appointment, as well as provide data on their asset and income, in accordance with the legislation regulating the area of prevention of conflict of interests.

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Additionally, candidates shall be required to provide a statement of consent for the security and asset checks.

The Croatian legislation additionally provides the possibility of dismissal from duty in case of interference with carrying out ongoing security and asset checks.

Article 8 - Termination of function and mandate

Commentary and recommendation: Prescribe evaluation procedure and, accordingly, the basis for termination of function

The Draft Law completely omits measures for evaluation of performance of the Chief Special Prosecutor and special prosecutors. The legal basis for termination of function and mandate on the basis of inadequate performance or lack of competencies for work on cases under the jurisdiction of the Special State Prosecution Office is omitted as well. The decision on termination of function and mandate on the aforementioned basis shall be initiated by the Chief Special Prosecutor² and deliberated by the Prosecutorial Council.

We believe that the evaluation of work performance of the Chief Special Prosecutor and special prosecutors should be in accordance with the criteria that is more strict than the one for other state prosecutors (having in mind their favorable position when compared to other state prosecutors) and in case of failure to achieve satisfactory results, a possibility of reassignment of the special prosecutor in question to the State Prosecution Office where the function was performed prior to being appointed to the Special Prosecution Office, should be provided.

Article 9 - Jurisdiction

Commentary:

Jurisdiction defined in this manner completely undermines the efforts invested in the process of specialization of this Prosecution Office for the cases of high-profile corruption and organized crime, as well as the process of enabling it to tackle with the specific problems of Montenegrin society that arose as a result of a long and problematic transition.

² Modeled on Article 10, Paragraphs 2 and 3 of the Law on the Office for Suppression of Corruption and Organized Crime (hereinafter: the Law on USKOK).

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First of all, it is not clear why the proposer of the law considers High State Prosecution Offices incapable of dealing with the cases of corruption of lower social danger. As a result, these cases fell under the jurisdiction of the Special State Prosecution Office.

Recommendation: The issue of subject matter of the Special Prosecution is one of the key issues that needs to be addressed in line with the principle of unburdening SP of the cases other state prosecutions have capacity handling, i.e. jurisdiction should encompass all cases of organized crime and corruption if:

- a) committed by public officials (in accordance with the definition from the Law on Prevention of Conflict of Interest) or
- b) civil servants, loss above certain amount, or if value of the subject of the corruptive activity is above certain amount, according to the principle of higher social danger.

As a last resort, an alternative to proposals under a) and b) - only a qualified form of the enumerated criminal offenses of corruption.

Secondly, the area of war crimes and terrorism was removed from the jurisdiction of the SPO, whereas it was not prescribed by any other legislation under which jurisdiction former cases of the hitherto Department come under.

Recommendation: After Article 12 - Managing Special State Prosecution Office, it should be added the following:

Chapter - Control of dismissal of criminal charges

Since the work of the Special State Prosecution Office is managed by the Chief Special Prosecutor who is accountable for the work of the Special State Prosecution Office to the Supreme State Prosecutor, after the Article 12, it is necessary to add a separate chapter - Control of dismissal of criminal charges - in a way that the complaint to the decision of dismissal of criminal charges is submitted to the Supreme State Prosecutor.

This area is not adequately regulated in the Draft Amendments to the Criminal Procedure Code (Article 271a of the Amendments at the public hearing) either. Therefore, this issue leaves a lot of room for arbitrariness of state and special prosecutors and it should be regulated by this Law, as well.

Namely, the legislation allows to state prosecutors to independently assess whether criminal complaint fulfils conditions to be a criminal complaint and in the case of "poor quality" it can be ignored without issuing a decision on dismissal. Secondly, the practice has demonstrated a high level of abstraction and mystification of the concept of "characteristics of a criminal

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offence" by state prosecutors. This means that in the exact same situation state prosecutor from one Prosecution Office would consider that there are "characteristics of a criminal offence", and the other that there are no "characteristics of a criminal offence".

Prescribing the procedure of control of dismissal of complaints by the Supreme State Prosecutor, who is elected in accordance with the special constitutional procedure and, thus, enjoys wider societal support, will significantly improve supervision over the Special State Prosecution Office.

Recommended provisions:

(new) Article 13 - The objection to the decision on dismissal

If the Chief Special Prosecutor or Special Prosecutor dismisses criminal complaint due to the lack of basis to undertake the prosecution of criminal offense under the Article 9 of this Law, or if found that there are no grounds for prosecution against any of the persons from criminal complaint and no aggrieved party to refer to the possibility of taking prosecution, he/she shall be obliged to, alongside the decision on dismissal, refer the applicant to the possibility of filing a complaint to the Supreme State Prosecutor, within 15 days of receipt of the decision.

(new) Article 14 - The contents of the objection

In the objection under Article 14 of this Law, applicant must indicate the reasons why he/she considers that the decision of the Special State Prosecution Office is groundless, as well as information and facts the objection is based on.

After receiving the objection, the Supreme State Prosecutor shall request the case in question from the Chief Special Prosecutor who is obliged to submit it within three days.

After receiving the case, the Supreme State Prosecutor may request from the Special Prosecutor who acted in the case in question to carry out certain investigative actions.

(new) Article 15 - The decision on objection

The Supreme State Prosecutor shall reject the objection as inaccurate if found that it was submitted after the deadline for submission and that it was submitted by the person who is not authorized to file an objection.

The Supreme State Prosecutor shall reject the file an objection as unfounded if found that the decision of the Special State Prosecution Office is founded.

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If the Supreme State Prosecutor determines that the file an objection is founded, it will enjoin the Special State Prosecution Office to carry out an investigation or bring immediate charges.

Chapter IV - Relationship between Special State Prosecution Office and Police Administration (Articles 16 and 17)

Commentary:

While conducting research on the problems of cooperation and communication between the State Prosecution Office and the Police Administration, we noticed that one of the major problems in their cooperation is that the Police Administration is strongly hierarchically structured, so police officers are accountable not only to the State Prosecutor but to at least 3-4 supervisors in the police hierarchy, as well. It is a good solution to have a Police Department that will be connected to the Special State Prosecution Office. However, this chapter does not elaborate thoroughly on the forms of communication and cooperation between the two authorities.

Suggestions for improvement:

Recommendation: Prescribe participation of Chief Special Prosecutor in appointing Head of the Police Department

To further strengthen the authority of the Chief Special Prosecutor in this Department, it should be prescribed that the Director of Police shall, after obtaining the opinion from the Chief Special Prosecutor, appoint and dismiss the Head of the Police Department and issue a document which will more precisely regulate the work of the Department in accordance with the law.

Recommendation: The most important provisions of the Agreement on Joint Work of the State Prosecution Office and the Ministry of Interior - Police Administration during inspection and criminal proceedings should be translated into legal provisions

The necessity of concluding the Agreement on Joint Work, adopted on April 9, 2014, arose due to the problems experienced in practice. The Agreement is an expression of the need to improve:

a) the powers and activities of the Police in conducting inspection and providing information to the State Prosecutor on the receipt of criminal complaint or commencement of exercise of police powers and actions in conducting inspection;

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- b) managing police operations in conducting inspection by the State Prosecution Office;
- c) enforcement of evidence gathering procedures;
- d) work in official and important cases and coordination in these cases, and
- e) arrest and detention.

The Agreement specifically regulates the issues that have been under shared responsibility of the Police and the Prosecution, and thus a source of discord.

However, IA has conducted research on cooperation between the Police and the Prosecution in three Montenegrin municipalities (Podgorica, Bar, Pljevlja) during May and June 2014. Among 11 interviewed state prosecutors and 10 police officers, almost nobody was familiar with the Agreement, out of which prosecutors almost in absolute number.

The provisions of the Agreement under Articles 20, 21, 22, 23, and 24 should be incorporated into the Law. Additionally, it should be put under consideration to incorporate provisions under the Articles 23, 24 and 25 into the Criminal Procedure Code as they relate to secret surveillance measures or because these are technical provisions. With the jurisdiction set in this manner, the majority of offences for which the secret surveillance measures are imposed will be under jurisdiction of the Special Prosecution Office and, therefore, this Law.

Article 18 - Reassignment from administration authorities

Article 19 - Special investigation team

Commentary:

The same principle is not applied for state prosecutors and employees of other authorities, since an explicit "written consent (of the prosecutor) being reassigned" (Article 15, Paragraph 2) is sought, whereas Articles 18 and 19 do not mention consent and provide a legal basis for the heads of authorities to reassign a person requested by the Chief Special Prosecutor.

Although we believe that is a good solution for the Chief Special Prosecutor to be able request a specific person considered of particular relevance for the case in question (which is provided by the Article 18, Paragraphs 1 and 2), we believe that it is necessary to apply the same principle to the employees in other authorities.

Article 18 is additionally imprecise because it does not prescribe the obligation of head of the authority as a peremptory norm. It states the following: "head of the administrative authority shall take a decision" and does not address the possibility that the head refuses -

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which is not impossible, as head of the authority may consider that a specific employee is essential to the work of the authority in question.

Article 19, Paragraph 5 - Costs related to the work of the Special investigation team should not be regulated by the Agreement. As in other cases, it should be stipulated in the Draft Law that the revenues and expenditures are borne by the Special Prosecution Office, according to the principle that the burden of covering expenditures is borne by the authority which benefits from the labor of the employee. It is important to specify this by law in order to plan funding for the work of Special State Prosecution Office in a realistic manner, i.e. determine the implications of the law adoption on the budget.

Article 26 - Employees

Commentary:

In the Paragraph 2, it is referred to the Data Secrecy Law for the security checks procedure. This is insufficiently accurate since the Data Secrecy Law defines three types of security checks: basic, special, and special with an addition.

Secondly, it is omitted to stipulate that in the event of a negative opinion employment contract cannot be concluded. Under the Data Secrecy Law and following the security check, Authority for Data Protection issues a decision on obtaining or failure to obtain permission to access the secret information based on the Agency's opinion, so the appeal is submitted to the competent ministry of defense. Since the aforementioned is not adequate for this case, it is essential that this article is further developed in a way which will specify that here is being considered: a) a special security check, which includes an additional security check, b) that the National Security Agency shall deliver positive or negative opinion to the Prosecutorial Council (for special prosecutors) or to the Chief Special Prosecutor for employees, who shall c) issue a decision on fulfillment/non-fulfillment of the criteria for selection/employment, and that the applicants under which the checks were performed will have an opportunity to file an appeal or a lawsuit.

Recommendation: It should be stipulated by this Law that the Chief Special Prosecutor with the prior consent of the Minister of Justice shall issue systematization act of job positions of officials and employees in the Special Prosecution Office - modeled after Croatian practice. This is particularly important bearing in mind special expert staff that will be essential for the quality work of this Prosecution Office. Therefore, it should be allowed to the Chief Special Prosecutor to play an important role in creating jobs in the Special Prosecution Office.

Article 33 - Funds for work

Commentary:

The Draft Law stipulates that the funds for work of the Special Prosecution Office shall be provided within the budget of the State Prosecution Office, so it is not transparent how much money will the Special Prosecution Office have at its disposal. This will be an aggravating circumstance for the work of the Special Prosecution Office and therefore it is necessary to initiate solution towards the Ministry of Finance in order to formulate different budgeting for the State Prosecution Office and its constituent units in general, and especially for the Special Prosecution Office, as suggested by the Croatian expert who worked on the preparation of the model of this Law.

Article 35 - Information System

Commentary:

This provision is very general and it is not clear whether it refers to direct electronic access or request for information. It does not seem probable that this solution will be applicable in the near future. More details should be provided on the prerequisites that need to be fulfilled in order for enforcement of this provision to be in accordance with the Personal Data Protection Law, as well as on the technical barriers for its enforcement.

Part III of IA comments: Other issues not treated by the Draft Law

Recommendation: Stipulate by this Law the procedure for determining the number of special prosecutors. This would provide an opportunity for a more dynamic and more frequent initiation of solving the problem of shortage of special prosecutors in a manner that the Prosecutorial Council would make the decision on increasing the required number of prosecutors, in accordance with the needs and requirements suggested by the Chief Special Prosecutor. Prosecutorial Council has recently adopted the Decision according to which the Supreme State Prosecution Office will operate with nine prosecutors, but it is not clear based on which criteria and parameters the Decision has been adopted.

Recommendation: Chief Special Prosecutor should submit a special work report to the Prosecutorial Council at the request of at least three members of the Council. Additionally, the possibility of a special six-month reporting to the Parliament and the competent working body should be provided, bearing in mind the significance of the cases Special Prosecution Office deals with.