

STANDING POINTS FOR ADOPTING THE LAW ON THE HIGH PROSECUTORIAL COUNCIL



Kingdom of the Netherlands

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 **Norway**

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STANDING POINTS FOR ADOPTING THE LAW ON THE HIGH PROSECUTORIAL COUNCIL

1. INTRODUCTION

The Constitution of the Republic of Serbia of 2006 introduced the State Prosecutorial Council (hereafter: the SPC) in the constitutional system of the Republic of Serbia for the first time, as a special body with the basic function of guaranteeing and protecting the independence of the public prosecutor's offices. Until 2001, there were no judicial councils in Serbia, and the High Judicial Council, as a special state body responsible for nominating judges and public prosecutors and appointing deputy public prosecutors, was first introduced by the Law on High Judicial Council of 2001, although there was no constitutional basis for the introduction of that body into the legal system according to the then valid Constitution of the Republic of Serbia of 1990. Article 165 of the Constitution of the RS of 2006 empowered the SPC to propose to the National Assembly candidates for the first election for deputy public prosecutors, to elect deputy public prosecutors to a permanent position, to elect deputy public prosecutors to a permanent position in more (or in second) public prosecutor's offices (promotion) and to decide on the termination of office of deputy public prosecutors. Although Article 164, para 1 of the Constitution defined the SPC as "an autonomous body which shall provide for and guarantee the autonomy of public prosecutors and deputy public prosecutors", the issue of the autonomy of that body remained problematic considering its composition and the selection of elected members. The SPC had eleven members: the Republic Public Prosecutor, the Minister responsible for justice, the president of the competent committee of the National Assembly and eight elected members, six of whom were public prosecutors or deputy public prosecutors, one lawyer and one professor of the Faculty of Law, who were elected by the National Assembly. Such a composition and method of selection of the elected members of the SPC permitted a big influence by the two other branches of government (politics) on the Public Prosecutor's Office and called into question the possibility of that body to fulfil its constitutional role to safeguard the autonomy of the Public Prosecutor's Office. Hence, constitutional amendments were made. The Action Plan for the implementation of the National Strategy for the Reform of the Judiciary of 2012 envisaged the change of constitutional provisions related to the judiciary with the aim of depoliticizing the judiciary and strengthening the independence of the

judiciary and the autonomy of the Public Prosecutor's Office. The procedure for amending the Constitution of 2006 (hereafter: the previous text of the Constitution) was completed at the beginning of 2022, when the National Assembly adopted the Amendments to the Constitution of the Republic of Serbia in the part related to the judiciary (hereafter: the amended text of the Constitution). According to the amended constitutional provisions, the prosecutorial council is named the High Prosecutorial Council (hereinafter: the HPC), and its composition, method of electing members and competences were significantly changed. According to the amended text of the Constitution, the HPC is regulated by Articles 162 - 165a. Due to harmonization with the new constitutional solutions, it is necessary to adopt a new Law on the High Prosecutorial Council. The goal of the constitutional amendments was to reduce the political influence on the Public Prosecutor's Office and to strengthen its autonomy, hence the new legislative solutions should reflect that. At the same time, we must not disregard the fact that a law can only elaborate (regulate in more detail) the concept, the scope of work and the functioning of an institution prescribed by the Constitution, but the constitutional orders in these domains cannot be changed, nor can they be expanded or narrowed, unless such a possibility is foreseen in the Constitution itself.

2. Jurisdiction of the High Prosecutorial Council - Article 162

a) The term High Prosecutorial Council

Article 162, para 1 of the amended text of the Constitution expand the notion of the HPC in a way that this body now safeguards and guarantees the autonomy of not only the Supreme Public Prosecutor, the chief public prosecutors and public prosecutors, but also, unlike the previous constitutional solution, the Public Prosecutor's Office as a body. In still valid Law on the SPC, the constitutional provision was adopted, which defines the SPC as an autonomous body that safeguards and guarantees the autonomy of public prosecutors and deputy public prosecutors, so this provision should be harmonized in the same way - by literally adopting the provision of Article 162, para 1 of the amended text of the Constitution – "The High Prosecutorial Council is an autonomous state body that safeguards and guarantees the autonomy of the Public Prosecutor's Office, the Supreme Public Prosecutor, the chief public prosecutors and public prosecutors." Furthermore, the Law on the SPC (Article 2, para 2) states that the SPC cooperates with the High Judicial Council, governmental and other bodies and organizations, prosecutorial councils of other countries and international

organizations. There is no reason to limit cooperation with other countries only to prosecutorial councils, so it should be extended to all judicial councils, which includes prosecutorial, judicial and combined judicial councils (competent for both the judiciary and the prosecution).

b) Election, status and other competences of the HPC

Article 162, para 3 of the amended text of the Constitution prescribes that the HPC proposes to the National Assembly the election and termination of the office of the Supreme Public Prosecutor, appoints the executive of the office of the Supreme Public Prosecutor, elects the chief public prosecutors and public prosecutors, decides on the termination of their office and on other status matters of the Supreme Public Prosecutor, chief public prosecutors and public prosecutors and exercises other competences determined by the Constitution and the Law. As the responsibilities pertaining to election and status are primarily the subject of the Law on Public Prosecution and not the Law on the HPC, they will not be discussed in detail in this text. The Law on the HPC should contain a special provision that will list all the functions of the HPC. Apart from the electoral competences (nomination, election and dismissal), the competences related to the status of the Supreme Public Prosecutor, chief public prosecutors and public prosecutors should be clearly stated there. Namely, according to the current legal solutions, the decision-making on status issues is divided between the Republic Public Prosecutor and the SPC. According to the amended text of the Constitution, the decision-making on status issues is a sole competence of the HPC. Hence, the provision prescribing the competences of the HPC needs to be expanded (compared to the provision prescribing the competences of the SCP) so that it decides on all status issues, such as the appointment of public prosecutors to another public prosecutor's office. It should be stated that the HPC has a special competence to indicate unlawful influences on the Public Prosecutor's Office and take measures to eliminate such influences. As Article 162, para 2 of the amended text of the Constitution leaves room for the HPC's competences to be prescribed by law, they should also be specified in regulating the HPC's competence. These are mainly normative, budgetary and disciplinary competences, and it should be prescribed that the HPC indicates the need for standardization of public prosecutor's practice and uniformity of activities. Thus, the HPC would not fall under the jurisdiction of the Supreme Public Prosecutor and the chief public prosecutors, because the HPC would not issue mandatory instructions or binding orders, nor proposals, but would only indicate such a need to the competent authority - the Supreme Public Prosecutor.

c) Budgetary competence of the HPC

Although the amended text of the Constitution does not expressly grant the budgetary (financial) autonomy to HPC, Article 162, para 2, as already described, still allows the introduction of budgetary autonomy of the HPC by law. It is important that the Public Prosecutor's Office has budgetary autonomy because it is an autonomy in relation to the executive power (which proposes the Budget Law) and the legislative power (which enacts the Budget Law), which reduces political influence on the Public Prosecutor's Office. It is difficult to imagine that one body, specifically the Public Prosecutor's Office, is autonomous from those on which it financially depends (the Government and the National Assembly). The Law should stipulate that the resources for the functioning and work of the HPC and the Public Prosecutor's Office are adopted on the proposal of the HPC. The HPC should spend those funds autonomously. The Government should not be allowed to interfere in how the budget of the HPC is spent and to prevent, postpone or limit the application of the HPC's budget. The Law on the HPC should regulate in detail the procedure for determining the HPC's budget proposal, so that the Minister responsible for finance and the Government cannot change the HPC's proposal. If the HPC and the Government (Minister responsible for financial affairs) do not agree with the HPC's budget proposal, the law should prescribe a mechanism for resolving this conflict, which will make it impossible that the budget proposal is changed against the will of the HPC. The option that the HPC's budget is proposed by any other body must absolutely be excluded.

3. Composition of the High Prosecutorial Council - Article 163

a) Composition

Article 163, para 1 of the amended text of the Constitution prescribes that the HPC consists of eleven members: five public prosecutors elected by the chief public prosecutors and public prosecutors, four prominent lawyers elected by the National Assembly, the Supreme Public Prosecutor and the Minister responsible for justice. Compared to the previous text of the Constitution, the number of public prosecutors and *ex officio* members decreased by one member, but the number of prominent lawyers increased from two to four. There is a majority of public prosecutors in the HPC, but there is also a majority of members elected by the National Assembly. Hence, it is particularly important to legally regulate the term "prominent lawyer" and the procedure for selecting prominent lawyers.

b) Work and decision-making

Article 163, para 2 of the new Constitution stipulates that the Minister shall not vote in the procedure for determining the disciplinary responsibility of a public prosecutor. This is the only constitutional provision related to the HPC's works, and all other issues in the domain of its work and decision-making are left to the legislation. Thus, the Law should determine how HPC sessions are convened and what the required quorum for work and decision-making is. It should also be prescribed that the HPC sessions are open to the public, and that exceptionally the HPC can close the session for justified reasons provided by the Law. As the majority of HPC members (six out of eleven) are elected by the National Assembly, a simple majority for decision-making would not be appropriate for a quorum and decision-making because it would allow sessions to be held and decisions to be made without the vote of one elected member - a public prosecutor. That is why law should prescribe a qualified majority for both the decision-making and the quorum. HPC should be enabled by the Law to form permanent and temporary working bodies to exercise its competences. It should also be stipulated that the decisions of the HPC must be justified. It should be left to the HPC to settle other issues important for its work by its own acts (the Rules of Procedure of the HPC, the rules of procedure of working bodies, appropriate rulebooks, and other acts).

c) Elected members of the HPC – public prosecutors

In previous laws, there were different solutions on who can be an elected member of the HPC from among public prosecutors and deputy public prosecutors. Namely, those could be public prosecutors and deputy public prosecutors with a permanent tenure, with at least eight years of the tenure. Later, this was changed, and all public prosecutors (except the Republic Public Prosecutor, who was member and the President of the HPC *ex officio*) and all deputy public prosecutors with a permanent tenure could be elected as elected members, while deputy public prosecutors elected for a period of three years could not be elected to the HPC. Since in the amended text of the Constitution there is no longer the so-called probationary period (appointment for a period of three years), and it is not allowed for chief public prosecutors to be members of the HPC, the law should stipulate that only public prosecutors can be members of the HPC. Due to the importance and responsibility of the function of the public prosecutor, there is no justification for setting stricter conditions for the election to the HPC than for the election of public prosecutors, so the Law should allow all public prosecutors to be elected members of the HPC. Considering the responsibility of the function of a member of the HPC and the scope of the HPC's

work, the law should prescribe that an elected member of the HPC from among public prosecutors cannot perform the public prosecutor's duty during the term of office in the HPC. Pertaining to the election of public prosecutors to the HPC, the amended text of the Constitution stipulates, in Article 163, paras 3, 4 and 7, that the election shall be regulated by law, that during the election, the broadest representation of public prosecutors shall be considered, and that the chief prosecutor may not be elected to the HPC. The election of public prosecutors to the HPC can be regulated in two ways. One is to take over the provisions of the existing Law on the SPC, i.e. that public prosecutors from the public prosecutor's office of one level elect only a member or members of the HPC from the public prosecutor's office of their level, and that the chief public prosecutors do not have passive voting rights. A weakness of this method is the unequal right to vote, so the vote of a higher-ranking public prosecutor is worth more than the vote of a lower-ranking public prosecutor. For example, according to the current Law on the SPC, the Republic Public Prosecutor's Office, whose electorate has less than fifteen voters, is represented by one member, while the basic public prosecutor's offices, whose electorate consists of several hundred voters, which is more than half of the total number of voters, is represented by two members. Hence, the votes of the deputy public prosecutors in the Republic Public Prosecutor's Office are worth ten times more than the votes of the deputy public prosecutors in the basic public prosecution offices. That problem could be solved by changing the structure of the elected prosecutors' part of the HPC so that the public prosecutors of the Supreme Prosecutor's Office do not represent a separate electorate, but the same electorate as the public prosecutors of special jurisdiction. Thus, public prosecutors at the national level (Supreme Public Prosecutor's Office and public prosecutor's offices of special jurisdiction) would elect one representative, public prosecutors of appellate public prosecutor's offices also one representative, as well as public prosecutors of higher public prosecutor's offices, while public prosecutors of basic public prosecutor's offices would elect two representatives. The other way is that all public prosecutors, regardless of the rank, elect all five public prosecutors to the HPC, and that the Law regulates the composition of the prosecutors' part of the HPC according to the rank of the public prosecutor's office. That model would allow the principle of equal voting rights, but there may be objections that the members of the HPC from among higher-level public prosecutor's offices are not representatives of the public prosecutor's office of their rank because they may be elected by the votes of those of lower level. It could be questioned whether such a decision is against Article 163, para 4 of the amended text of the Constitution - to consider the widest representation of public prosecutors.

d) HPC members elected by the National Assembly – prominent lawyers

In the amended text of the Constitution, the notion of prominent lawyer is not specified in detail. The criteria are at least ten years of experience in the legal profession, that the candidate is worthy (without determining the meaning of worthiness) and that s/he is not a member of a political party. It is left to the Law to determine the criteria more closely for the election and the incompatibility with the function of a member of the HPC elected by the National Assembly. A prominent lawyer needs to have a law degree and meet the general requirements for working in state bodies. The Law should also stipulate that a prominent lawyer should have significant experience and knowledge relevant to the work of the Public Prosecutor's Office, that s/he does not perform the function of a judge or public prosecutor and is below the retirement age. In particular, it should be prescribed that a candidate for the HPC elected by the National Assembly cannot be a person who exerted illegal influence on the public prosecutors or judges, as well as a person who, in public, expressed positions that threaten the autonomy of the Public Prosecutor's Office or the independence of the judiciary. Published professional or academic papers in the field of law, especially on topics of importance for the work of the Public Prosecutor's Office, academic titles, participation in assessment or educational bodies, at round tables, legal consultations or seminars, as well as professional recognition among the professional public should be especially valued when electing members of the HPC by the National Assembly.

The public call for the election should be announced by the President of the National Assembly and managed by the competent committee of the National Assembly (Committee for Justice). The Law should prescribe that the public call is announced at least six months before the end of the HPC member's term of office, and if the HPC member's position ends before the end of the term for which s/he was elected, within 15 days after the end of the term of office. Along with the application, the candidate should submit evidence that s/he is eligible to be an elected member of the HPC. In the selection process, information on the candidate important for the selection should be obtained from the authorities, organizations and other legal entities where the candidate performed tasks of importance for the work of the public prosecution, i.e. the judiciary, and the opinions of those authorities, organizations and legal entities about the candidate. The Committee should conduct an interview with the eligible candidates in the presence and with participation (interviewing) of the general and professional public, and a public hearing should be organized to introduce the candidate in the presence of representatives of the general and professional public. Based on this

selection process, the Committee would shortlist a double number of candidates compared to the announced number of HPC members. The proposal would be submitted to the President of the National Assembly, who schedules a session of the National Assembly for the election of HPC members based on the Committee's proposal. The Law would have to determine the deadline for scheduling and concluding that session, and a reasonable deadline is thirty days. The Assembly elects HPC members with a two-third majority. If a required number of candidates is not elected after the announcement of the voting results, the vote is repeated, but only for the candidates who received the most votes. For example, if all four HPC members are elected, the Committee proposes eight candidates. If only one candidate is elected after the vote, and the seven candidates do not receive a two-third majority, the vote should be repeated, but not for all seven remaining candidates, but only for the three candidates who received the largest number of votes in the previous vote. The vote in both the Committee and the National Assembly should be secret. If after the second vote, not all members of the HPC for which the competition has been announced are elected, the President of the National Assembly schedules consultations with the presidents of parliamentary groups to reach an agreement on the two-thirds majority. Following the consultations, the vote on all the candidates proposed by the Committee should be resumed. If the number of members of the HPC for which the competition has been announced is not selected even after the deadline set for the selection of candidates, the President of the National Assembly convenes a five-member commission under Article 163, para 6 of the amended text of the Constitution, which elects members of the HPC from among all eligible candidates by secret vote within the period specified by law. If the Commission does not elect the required number of members within a certain period, the President of the National Assembly announces a new competition for the seats in the HPC that have not been filled.

The amended text of the Constitution stipulates that a member of the HPC elected by the National Assembly must be worthy of the office, that s/he cannot be a member of a political party, and that other conditions for the election and incompatibility of the function of a HPC member are regulated by law. The Constitution does not define worthiness, so that concept should be more closely regulated by the Law, based on general ethical principles. Worthiness implies moral qualities (integrity, honesty, conscientiousness, fairness, autonomy, impartiality, etc.) of a member of the HPC and the conduct in accordance with those qualities. Regarding the incompatibility of functions and jobs with the function of a HPC member, the Law should prescribe that an elected HPC member cannot hold office in national, provincial or local self-government bodies or public services, that s/he cannot be a member of a political party or act

politically, and that s/he cannot provide legal services or give legal advice for a fee. It should also be prescribed that other functions, jobs or private interests that harm the reputation or autonomy of the HPC are incompatible, and the decision on the incompatibility of such posts or private interests should be entrusted to the HPC's Ethics Committee, which would decide based on the Code of Ethics. On the other hand, it should be regulated that a HPC member can engage in artistic, teaching, and scientific activities, after working hours and for a fee, without special approval and can be a member of an assessment body (for example, for the bar exam).

4. Mandate of members of the High Prosecutorial Council and President and Vice-President of the High Prosecutorial Council - Article 164

a) Mandate

In the amended text of the Constitution, the previous constitutional decision that the mandate of the elected members of the HPC (public prosecutors and prominent lawyers) is five years has been retained. The mandate of the *ex officio* members of the HPC - the Supreme Public Prosecutor and the Minister responsible for justice is attached to their functions and lasts as their posts last. To exclude a conflict of interest, the decision should be kept that during the term of office in the HPC, public prosecutors cannot be elected as chief public prosecutors or as public prosecutors in another public prosecutor's office.

b) HPC President and Vice-President

The amended text of the Constitution differs in relation to the President and Vice-President of the HPC, and it stipulates that the President is elected by the HPC from among the members who are public prosecutors, and the Vice-President is elected by the National Assembly from among the members elected by the National Assembly, for five years, so that the term of office of the HPC President and Vice-President overlaps with the term of office of a member of the HPC. It was left to the law to regulate the competences of the President and Vice-President. The President should be responsible for representing the HPC, convening HPC meetings and presiding over the meetings, harmonizing the work of the HPC and ensuring the implementation of decisions. The Law should leave space for the President to perform other tasks based on general acts of the HPC.

The Vice-President performs the duties of the President in case of his absence or incapacity.

c) Termination of mandate

Article 164, para 4 of the amended text of the Constitution prescribes that the mandate of a HPC member ends before the end of the term for which s/he was elected if s/he requests so or is sentenced to a prison sentence of at least six months, that a HPC member who is a public prosecutor ends the mandate when his/her office of public prosecutor is terminated, and a HPC member who is not a public prosecutor when s/he permanently loses the ability to perform the function of a HPC member. Paragraph 5 of the same Article prescribes that the HPC decides on the termination of the mandate, and against that decision an appeal to the Constitutional Court is permitted, which excludes the right to a constitutional appeal. Although it seems that the amended text of the Constitution clearly prescribes the reasons for early termination of the mandate, the law should extend those reasons to the following situations: if a HPC member loses his/her citizenship, if s/he becomes a member of a political party, if s/he performs a function or engages in activities that are incompatible with the function of a HPC member and if s/he is unworthy. This is not against the Constitution because there is a constitutional basis in Article 163, paras 8, 9 and 10 of the amended text of the Constitution. Those provisions stipulate that a HPC member must be worthy of that position, that s/he cannot be a member of a political party, and that other conditions for election and incompatibility with the position of a HPC member are regulated by law. Citizenship of the Republic of Serbia, as a general condition for a public administration post, is prescribed by law, and the Law should regulate which posts are incompatible with the function of a HPC member. The Law should also regulate the termination procedure, which should have two stages - determining the reason for the termination of the position of a HPC member and deciding on the termination. Only a member of the HPC should have the right to submit a proposal. The member of the HPC against whom the proposal for termination of office is submitted should be legally granted the right to be immediately informed about the proposal, the right to know the content of the proposal and the evidence, the right to a proxy, the right to give explanations and evidence for his/her allegations and to present the allegations in writing or orally before the HPC. The HPC could decide to reject the proposal or to accept it and to terminate the office of the HPC member, and the HPC member against whom the proposal is submitted should not participate in the decision-making. Article 164, para 5 of the amended text of the Constitution stipulates that an appeal to the Constitutional Court is allowed against the decision of the HPC on the

termination of office of a HPC member, which excludes the right to a constitutional appeal.

5. Legal remedy against a decision of the High Prosecution Council - Article 165

Article 165 of the amended text of the Constitution stipulates that an appeal to the Constitutional Court against a decision of the HPC is allowed in cases prescribed by the Constitution and law, which excludes the right to a constitutional appeal. An appeal to the Constitutional Court against the HPC's decision is allowed in three situations: against the HPC decision on the termination of the office of the chief public prosecutor (Article 158, para 8), against the HPC decision on the termination of the office of the public prosecutor (Article 160, para 5) and against the HPC decision on the termination of the office of a HPC member (Article 164, para 5). The Law should prescribe a deadline for submitting an appeal to the Constitutional Court, which should not exceed 15 days, and a deadline for the Constitutional Court's decision on the appeal, which should not exceed 30 days. Those deadlines must be regulated and must not be long so that the Public Prosecutor's Office and the HPC do not stay incomplete for long, since the decision of the Constitutional Court on the appeal postpones the call for the election of the chief public prosecutor, public prosecutor or HPC members in place of the dismissed chief public prosecutor, public prosecutor or HPC member.

6. Immunity of members of the High Prosecution Council - Article 165a

The amended text of the Constitution significantly expanded the immunity of HPC members compared to the immunity of SPC members. Members of the HPC cannot be liable for the opinion in connection with the exercise of the function of a HPC member and for voting when deciding in the HPC. The members of the HPC cannot be deprived of their freedom without the approval of the HPC in criminal proceedings for a crime committed by them as HPC members. As the mentioned provisions of the amended text of the Constitution on the immunity of the HPC members are clear and precise, there is no need to further develop them, so it is enough for the Law to simply take them from the Constitution.

7. Transitional and final provisions of the Law on the HPC

Transitional and final provisions of the Law on the HPC should regulate deadlines for the election of HPC members elected by the National Assembly and for the beginning of the HPC's work. Those provisions should also solve the problem of current HPC members from among deputy public prosecutors, given that the SPC has six such members, and the future HPC will have five. Article 4, para 2 of the Constitutional Law for the Implementation of the Act on Constitutional Amendments of the Republic of Serbia prescribes that the members of the existing SPC from among deputy public prosecutors (not public prosecutors) continue to perform their functions as members of the HPC until the end of the mandate for which they were elected. As all the current elected members of the SPC from among public prosecutors and deputy public prosecutors (six) are deputy public prosecutors and not public prosecutors, the problem could be solved so that the mandate in the HPC is not given to members who were elected to the SPC from among public prosecutors. As there are two such members of the SPC, the transitional and final provisions should also prescribe a deadline for the election of another member of the HPC from among public prosecutors. The provisions should determine the deadlines for the adoption of the HPC's acts necessary for the HPC's functioning (Rules of Procedure) and the exercise of the HPC's competence (regulations on the election of public prosecutors and chief public prosecutors, regulations on disciplinary responsibility and disciplinary procedure, etc.), as well as deadlines for the establishment of permanent working bodies of the HPC.

8. Conclusion

The Constitution establishes the status and competence of the HPC as an autonomous body that safeguards and guarantees the autonomy of the Public Prosecutor's Office, the Supreme Public Prosecutor, the chief public prosecutors, and public prosecutors. Amendments to the constitutional framework alone are not enough to strengthen the autonomy of the Public Prosecutor's Office and reduce the dangerous political influence, but the constitutional tendency should be strengthened with adequate and clear legal solutions. Good legal solutions can improve the legal framework even when constitutional norms are unfavourable, but faulty legal solutions can "spoil" even the best constitution. Finally, it should be noted that the mere modification of the legal framework is not enough to obtain an autonomous and a "free" from politics HPC, because the quality of the norm does not depend only on its content, but primarily on how it is applied, with the

content and method of application largely conditioned by the level of legal and political culture. However, a favourable legal framework (constitutional provisions on the HPC and the Law on the HPC) is a necessary condition for strengthening the capacity of the HPC as an autonomous judicial body capable of fulfilling its constitutional role of protection from illicit influences and ensuring and guaranteeing the autonomy of the Public Prosecutor's Office and its officials.