

IAP Information Note No. 6

PUBLIC PROSECUTION SERVICE: STRUCTURE AND COMMENTS BY COE BODIES

The structure of public prosecution service in Ukraine is regulated by the Constitution of Ukraine (“the Constitution”) and the Law of Ukraine on the Public Prosecution Service 1991.

A. Structure of the public prosecution service in Ukraine

According to Article 13 of the Law on the Public Prosecution Service, the prosecution service is composed of the Office of the Prosecutor General (who heads the public prosecution service), the Office of the Prosecutor of Crimea, and the offices of regional prosecutors, the prosecutors of Kyiv and Sebastopol (which are equivalent to regional prosecutors’ offices), city prosecutors and district, inter-district and city district prosecutors. Each prosecutor service has its own investigators. The investigators of prosecution service carry out investigations in those cases which fall within their investigative jurisdiction according to the law, or in cases transferred to them by a prosecutor (Article 17).

Under Article 14 of the Law the structure of the Prosecutor General Office (“PGO”), and the organisation of its structural subdivisions, are determined by the Prosecutor General. Thus, the structure of the PGO may change with a change of the Prosecutor General.

B. Functions of the Public Prosecution Service

The public prosecution service in Ukraine has been consistently criticised for having wide functions which go far beyond participation in criminal proceedings. The functions of the public prosecution service in Ukraine, according to Article 121 of the Constitution, are the following:

- 1) to conduct the state prosecution in court proceedings;
- 2) to represent the interests of citizens or the State in court in cases envisaged by law;
- 3) to supervise compliance with the law of the investigating organs;
- 4) to supervise the execution of court judgments in criminal proceedings;
- 5) to supervise compliance with human and citizen’s rights and freedoms and the observance of laws relating to such rights and freedoms by the executive organs, organs of local self-governments and their officials.

In addition, paragraph 9 of the Transitional Provisions of the Constitution of Ukraine empowers the prosecution service to conduct preliminary investigations pending the creation of a pre-trial investigations system and the adoption of appropriate legislation. The same provision envisages that the prosecution service will continue to carry out the function of supervision of the observance and application of laws until the relevant laws concerning such supervision are introduced.

The prosecution’s function to supervise compliance with the law and respect for human rights by various state organs is referred to as the ‘general supervision’ function.

Function of ‘general supervision’

The function of ‘general supervision’ is enshrined in paragraph 5 of Article 121 of the Constitution. Initially, when the Constitution was adopted in 1996 the function of ‘general supervision’ was envisaged as a temporary function, which was governed by the Transitional

Provisions of the Constitution. It was introduced into the text of Article 121 of the Constitution in 2004. According to the current edition of Article 121, the public prosecution service retains the function of general supervision.

The Venice Commission has criticised on numerous occasions the conferment on the prosecution service of the function of ‘general supervision’.¹ In its opinion conferring such functions went well beyond the task of prosecuting criminal offences and the defending public interest through the criminal justice system. The Venice Commission, referring to the Parliamentary Assembly Recommendation 1604 (2003) on the role of the Public Prosecutor’s service in a democratic society governed by the rule of law, and paragraph 12 of Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe, expressed the view that such function went against European standards in the field.²

The Venice Commission has strongly and consistently welcomed any proposals to abolish the function of ‘general supervision’. Thus, in its Opinion on the Draft Law of Ukraine Amending the Constitution, adopted in 2009, the Venice Commission made the following comments: ‘...Particularly positive is the proposal to abolish the competence of the prosecutor (always strongly criticised by the Venice Commission), “to supervise over the respect for human rights and freedoms and over how laws governing such issues are observed by executive authorities, bodies of local self-government and by their officials and officers”. This provision is a typical example of a reminiscence of the old system of the Soviet *prokuratura*. The proposal to eliminate this provision from the Constitution of democratic Ukraine is therefore very welcome and an important step towards the fulfilment of the commitment of Ukraine towards the Council of Europe “*the role and functions of the Prosecutor's Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards;*”...’³

In the view of the Venice Commission the best solution was to limit the role of the procuracy to criminal prosecution.⁴ At the same time the Commission did not exclude the possibility of the prosecution service having functions of a non-penal character. However, entrusting such functions to the prosecution service should be accompanied by appropriate safeguards. In any event, because the prosecution service in Ukraine was based on the model of the Soviet *prokuratura*, a model that reflected a non-democratic past and was incompatible with the European standards, it was not considered a suitable model for Ukraine that had undertaken to reform the prosecution service when joining the Council of Europe.⁵

In October 2014 the Venice Commission issued its Opinion on the Draft Law Amending the Constitution of Ukraine submitted by the President of Ukraine on 2 July 2014. The Commission welcomed the removal from the Constitution of Ukraine of the provision granting the public prosecution service the function of general supervision.⁶

Function of representation of interests of individuals and the state

The Venice Commission has also criticised other powers of a non-penal nature entrusted to the public prosecution service, such as the representation of the interests of citizens in legal

¹ See [Opinion](#) of the Venice Commission of 12 October 2004, § 15; [Opinion](#) of 13 June 2005, §§ 37-9; [Opinion](#) of 17 October 2006, § 19; [Opinion](#) of 16 June 2008, § 76; [Opinion](#) of 15 June 2009, § 95; [Opinion](#) of 27 October 2009, §§ 8-18; [Opinion](#) of 15 October 2012, §§ 11-13.

² See [Opinion](#) of 13 June 2005, §§ 37-9.

³ See [Opinion](#) of 15 June 2009, § 95.

⁴ See [Opinion](#) of 17 October 2006, § 24.

⁵ See [Opinion](#) of 27 October 2009, § 16.

⁶ [Opinion](#) of the Venice Commission on the Draft Law Amending the Constitution of Ukraine, 27 October 2014, § 41.

proceedings regardless of the wishes of the individual, and the representation of the interests of the State in courts.⁷ The latter was considered as being too broad and, in the absence of a definition or restriction on the notion of ‘interests of the state’, as serving as a sort of equivalent of the ‘general supervision’ power.⁸ It considered that bodies such as Ombudsperson were more suited to represent the interests of individuals against the State and regretted that the Ukrainian authorities had not followed its earlier recommendation in this respect.⁹

Functions of supervising investigations and conducting investigations

The Venice Commission found unproblematic the function of supervision over the observance of laws by agencies conducting detective operations, inquiries and pre-trial investigations, as well as coordination between the law enforcement agencies.¹⁰ However, it welcomed the removal of the function of preliminary investigations and the elimination of investigators from prosecutors’ offices, since the function of preliminary investigations had been conceived as a temporary power of the prosecution service, which was reflected in the text of paragraph 9 of the Transitional Provisions of the Constitution referred to above.¹¹

Under the new Criminal Procedure Code (“CPC”) adopted in 2012, the public prosecution service will continue to carry out pre-trial investigations of crimes committed by the State officials, pending the establishment of the State Bureau of Investigations by November 2017.

In its reports on visits to Ukraine the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) stressed that ‘in order for the investigation of complaints against Internal Affairs officers to enjoy public confidence and be effective, the procedure involved must be, and be seen to be, independent and impartial. The fact that prosecutors base their decisions as to whether or not to open a preliminary investigation on evidence collected by officers from the same service as those who are the subject of the investigation, casts serious doubt on the independence and impartiality of the current procedure’.¹²

The CPT also perceived a conflict of interest in the functions imposed on the prosecution service, in particular that of prosecuting on behalf of the State and at the same time overseeing the observance of the rights and freedoms of the individual and the proper conduct of investigations. As a result, the CPT urged Ukrainian Government to set up an independent agency entrusted with the task to carry out the investigation of complaints against public officials. Such agency should, in the view of the CPT, be ‘demonstratively separate’ from the structures of the Ministry of Interior and the prosecution service.¹³ The Council of Europe Commissioner for Human Rights has also encouraged the Ukrainian authorities to establish an independent police complaints mechanism.¹⁴

⁷ [Joint Opinion](#) on the Draft Law on the Public Prosecutor's Office of Ukraine of the Venice Commission of 14 October 2013, §§ 28 and 37, 75.

⁸ *Ibid.*, § 37, 88.

⁹ [Opinion](#) of the Venice Commission on the Draft Law Amending the Constitution of Ukraine of 27 October 2014, § 42.

¹⁰ [Joint Opinion](#) of 14 October 2013, § 100.

¹¹ [Opinion](#) of 20 December 2010, § 68; [Opinion](#) of 15 October 2012, § 22; [Joint Opinion](#) of 14 October 2013, § 194.

¹² [Report](#) on the visit to Ukraine by CPT from 9 to 21 September 2009, § 20.

¹³ *Ibid.*

¹⁴ [Report](#) by the Commissioner for Human Rights of the Council of Europe, 4 March 2014, § 32.

Recognising the urgency of the issue, in 2012 and 2014 the CPT called on the Ukrainian authorities to step up their effort in creating of State Bureau of Investigation and ensuring its independence.¹⁵

C. Prosecutor General

The Prosecutor General of Ukraine heads the public prosecution service. He or she is appointed for a period of five years. The Prosecutor General is appointed and dismissed by the President of Ukraine subject to the consent of the Verkhovna Rada. The Verkhovna Rada may also express a vote of no confidence in the Prosecutor General.

The relevant provisions of the Constitution do not specify the grounds for dismissal of the Prosecutor General. This question is regulated by the Law on the Public Prosecution Service. Article 2 of the Law contains an open-ended list of grounds which may serve as a basis for the dismissal of Prosecutor General: in addition to enumerating specific grounds for dismissal such as the expiration of the term of service, the health condition and breach of the requirements as to incompatibility, the provision goes on to state that Prosecutor General may be dismissed on ‘other grounds’.

The Venice Commission has welcomed amendments that would set out exhaustively the grounds for which the Prosecutor General may be dismissed.¹⁶ It also recommended setting out the grounds for dismissal in the Constitution itself and introducing a mandatory requirement that, before any decision is taken, an expert body should give an opinion as to whether there were sufficient grounds for dismissal.¹⁷ The Venice Commission maintained that there was a need for a professional, non-political expert body to be involved in the process of appointment of the Prosecutor General in order to avoid the politicisation of the process owing to the requirement to obtain the consent of the Parliament.¹⁸

The Prosecutor General is to be dismissed in case of serious violations of the law and after a fair hearing.¹⁹ According to the Venice Commission, the lack of clear procedural guarantees might lead to misuse of the power of dismissal and the vote of no confidence might interfere with the independence of the Prosecutor General, especially where these powers were concentrated in the hands of highly political institutions. The Venice Commission recommended that ‘comprehensive criteria and procedures for the appointment and dismissal of the Prosecutor General should be established and that neither the President nor Parliament should have an unfettered discretion in this respect.’²⁰ Furthermore, in one of its latest opinions, Venice Commission suggested that the combination of excessive centralisation under the Prosecutor General and the dependence of the post on political organs cast a doubt on the independence or autonomy of the prosecution service.²¹ It recommended that the Constitution be amended to provide that the President might dismiss the Prosecutor General only for specific grounds and that the Prosecutor General should benefit from a fair hearing. Article 122 of the Constitution should be amended to remove a no confidence vote against the Prosecutor General.²²

¹⁵ [Report](#) on the visit to Ukraine by CPT from 1 to 10 December 2012; § 39; and [Report](#) on the visit to Ukraine CPT from 9 to 21 October 2013, § 25.

¹⁶ [Opinion](#) of 12 October 2004, § 22.

¹⁷ [Opinion](#) of 17 October 2006, § 34.

¹⁸ [Opinion](#) of 15 October 2012, § 33.

¹⁹ *Ibid.*, § 14.

²⁰ *Ibid.*, §§ 36-37.

²¹ See [Joint Opinion](#) of 14 October 2013, §§ 13-15

²² *Ibid.*, § 120

A further threat to independence identified by Venice Commission was the relative shortness of the term of office of the Prosecutor General, combined with the lack of clear provisions as to the impossibility of re-election. The Venice Commission proposed that Article 122 of the Constitution of Ukraine be amended to provide for a longer mandate than the current five years and to exclude the possibility of re-election.²³

In its Opinion adopted in October 2014 concerning the constitutional reform in Ukraine, the Venice Commission reiterated its concerns about the independence of the Prosecutor General. It criticised the proposal of the Ukrainian authorities to remove the involvement of the Verkhovna Rada in the process of dismissal of the Prosecutor General. The Commission stated that the appointment and dismissal of the Prosecutor General by both the President and the parliament should be maintained; however, as recommended by the Commission in its previous opinions, the possibility of Verkhovna Rada expressing a vote of no confidence resulting in the resignation of the Prosecutor General should be removed; the Prosecutor General's term of office should be extended and re-appointment should be excluded; and the grounds for dismissal should be laid down in the Constitution or set out in a law referred to in the Constitution.²⁴

D. Other issues related to independence of public prosecution service

As noted above, Articles 6 and 7 of the Law on the Public Prosecution Office provide for the independence of the public prosecution service in carrying out its activities. Interference by any state authorities or state officials with the prosecution's activities is prohibited. Any submissions of the state authorities addressed to the prosecution service concerning a specific case may not contain any instructions or demand a specific result.

As further noted, the Criminal Procedure Code contains a separate provision aimed at ensuring the independence of the prosecution service while fulfilling its function of supervision of pre-trial investigations. It provides for the independence of the prosecution and outlaws any interference by any state body which is not authorised to do so (Article 36 of the CPC).

In the opinion of Venice Commission the independence of inferior prosecutors might be secured by ensuring that 'instructions to an inferior prosecutor should be given in writing, and oral instructions should be confirmed in writing upon requests (or withdrawn) and in case of an allegation that an instruction is illegal a court or an independent body like a prosecutorial council should decide on the legality of the instruction'.²⁵

The Venice Commission has also expressed the view that certain provisions aimed at ensuring the independence of the prosecution service might in fact result in imposing liability for 'interfering' with the activities of the prosecution service in a way which curtailed media freedom and public comment and in a manner which was inconsistent with Article 10 of the European Convention of Human Rights.²⁶ In particular, the provision contained in the first paragraph of Article 7 that prohibited any interference by the mass media with the activities of the prosecution service in its supervision of the observance of laws or the investigation of crimes might potentially result in an unjustifiable restriction of reporting and investigation by the media.

²³ *Ibid.*, §§ 117, 199

²⁴ See [Opinion](#) of the Venice Commission on the Draft Law Amending the Constitution of Ukraine, 27 October 2014, § 43-47.

²⁵ See [Joint Opinion](#) of 14 October 2013, § 64

²⁶ [Joint Opinion](#) of 14 October 2013, §§ 54, 200.

E. Criticism by other CoE monitoring bodies (GRECO, Council of Europe Commissioner for Human Rights)

In the course of its evaluation of the situation in Ukraine, the Group of States against Corruption (“GRECO”) recommended that Ukraine undertake reforms aimed at enhancing the independence of the prosecution service from political powers and providing the prosecution with powers concentrated on the leading of pre-trial criminal investigations and prosecutions.²⁷ Like the Venice Commission, GRECO criticised the wide non-penal powers entrusted to the prosecution service in the Ukrainian system. In March 2014 GRECO noted the reform initiatives that had been launched by the Ukrainian authorities, including the proposed legislative amendments concerning the prosecution service which appeared to take into account European standards. However, given that the reform initiatives were at the stage of draft legislation, GRECO concluded that the recommendation on reform of the prosecution service had only partly been implemented.²⁸

The Council of Europe Commissioner for Human Rights also emphasised, on several occasions, the need to reform the prosecution service in Ukraine. In an early report of September 2007 the Commissioner was concerned by the wide range of powers concentrated in the hands of the prosecution service, including the function of supervision of the observance of “rights and freedoms of citizens and the fulfillment of laws” by bodies of executive power and by bodies of local self-government. The prosecution, in his opinion, combined the contradictory functions of pre-trial investigations and prosecution on behalf of the State. According to the Commissioner, the prosecution’s task should be limited ‘to the prosecution of criminal offences and defending the public and State interest’.²⁹

In the subsequent report of 2012, the Commissioner reiterated his longstanding recommendation to reform the prosecution service and to limit its functions to prosecution on behalf of the State.³⁰ In his latest reports and statements on Ukraine, the Commissioner urged the Ukrainian Government to reform the prosecution service, to introduce measures which would de-politicise the prosecution service and ensure ‘clear and transparent criteria and procedures for the selection, appointment and promotion of individual prosecutors based on the qualifications and merits of individual candidates’.³¹

Finally, the Commissioner stated that ‘the role of prosecutors in combating impunity and ill-treatment is crucial. They should be encouraged to investigate and prosecute promptly any allegation of human rights violations in accordance with Section VIII.1 of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations. While the authorities are under obligation to investigate any criminal acts, allowing human rights violations committed by law enforcement officials to go unpunished poses a direct threat to the rule of law. Therefore, they must be a priority for the criminal justice systems of all member states’.³²

²⁷ Joint First and Second Evaluation Rounds, [Report](#) of 21 March 2007, §§ 86, 242.

²⁸ Joint First and Second Evaluation Round, [Fourth Addendum](#) to the Compliance Report on Ukraine, 28 March 2014, §§ 18-22.

²⁹ [Report](#) by the Commissioner for Human Rights of the Council of Europe, 26 September 2007, §§ 25-28.

³⁰ [Report](#) by the Commissioner for Human Rights of the Council of Europe, 23 February 2012, §§ 56-58.

³¹ [Report](#) by the Commissioner for Human Rights of the Council of Europe, 4 March 2014, § 73.

³² *Ibid.*, § 28.