

IAP Information Note No. 7

PUBLIC PROSECUTION SERVICE: CURRENT STATE OF REFORM

When applying to join the Council of Europe in 1995, Ukraine committed itself to changing the role and functions of the prosecution service in order to bring the institution into line with Council of Europe standards. The adoption of the Law on the Public Prosecution Service in 2014, discussed below, was a significant step in fulfilling this commitment.

On 14 October 2014 a new Law on Public Prosecution was adopted (Law No. 3541).¹ The Law (except for certain provisions) will enter into force in April 2015.

The new law provides that the public prosecution service in Ukraine is composed of the PGO, regional and local prosecution services and military prosecution offices. It spells out the hierarchical relations between the prosecution offices at different levels and specifies the competences of the Prosecutor General and the prosecutors heading regional and local level public prosecution offices. It abolishes the function of ‘general supervision’ and provides that the public prosecution service shall only carry out functions that are conferred on it by the Constitution. The new law introduces and specifies the procedure for the appointment and dismissal, as well as the conduct of disciplinary proceedings concerning prosecutors. It also establishes bodies of prosecutorial self-government.

Law No. 3541 has been the subject of examination by the Venice Commission, which issued its opinion on the draft in October 2013.² The Venice Commission welcomed the draft and noted that it constituted a significant advance in the effort of the Ukrainian authorities to reform the prosecution service when compared to previous drafts examined by the Commission. It further stated that the draft contained provisions that brought Ukraine closer to complying with European standards in the reform of the prosecution service. Thus, the Venice Commission welcomed the following changes:

- the exclusion of the general supervision function from the functions of the Public Prosecutor's Office;
- the exclusion of the right of any public prosecutors to participate in the proceedings of the Verkhovna Rada, boards of ministries, central executive agencies, local councils and other administrative bodies;
- the enhanced statement of principles of operation of the Public Prosecutor's Office;
- the introduction of a statement of general rights and duties of a public prosecutor;
- the improvement in the provisions to secure the independence of public prosecutors;
- the elimination of investigators from public prosecutor's offices;
- the establishment of more specific criteria and processes for the appointment of public prosecutors;
- the improvement in the criteria and processes used for disciplinary action against public prosecutors;
- fuller provision regarding the grounds for dismissal of public prosecutors;
- the introduction of arrangements to secure self-governance within the Public Prosecution Service;
- the reinforcement of the provisions of the new Code of Criminal Procedure on the admissibility in criminal proceedings of evidence obtained by coercion outside of pre-trial investigations;

¹ The text of the law is available in Ukrainian at <http://zakon0.rada.gov.ua/laws/show/1697-18> (in Ukrainian).

² [Joint Opinion](#) on the Draft Law on the Public Prosecutor's Office of Ukraine, 14 October.

- the establishment of centres for free legal aid, to take over from the prosecutor's office the representation of the interests of individuals;
- the deletion of the article on the official uniform for prosecutors.³

At the same time, the Venice Commission has noted the need for further improvement of the proposed piece of legislation. In particular, the following issues needed to be addressed: the retention of the functions of representation of the interests of the individual and the State that go beyond the criminal justice sphere; the need to ensure the internal independence of public prosecutors by providing that instructions to inferior prosecutors should be given in writing and that oral instructions should be confirmed in writing upon request, and the need for a procedure in a court or an independent body to decide on the legality of an instruction; the potential unjustifiable restriction on media freedom, through the provisions prohibiting interference with public prosecution activities and rendering liable acts of 'disrespect'; and the threat to the independence of the PG resulting from the shortness of the term of office, combined with a possibility of re-appointment, as well the lack of adequate guarantees against dismissal.⁴

Law No. 3541 adopted in October 2014 takes into account certain criticisms expressed by the Venice Commission in October 2013. Thus, the law provides for 'written instructions'. It further limits the cases of representation of an individual's interests to those in which such representation is assented to by the individual concerned and in which the individual is unable for specified reasons to do so on his/her own. The prosecutor is required to justify the grounds for his/her intervention to represent the interest of an individual or state interest. As recommended by the Venice Commission⁵, the existence of such grounds for a prosecutor's intervention shall be confirmed by a court. In addition, the new law takes into account the recommendation to exclude any capacity of the prosecutors to represent the interests of State companies.⁶ The law also includes a reference to the European Convention on Human Rights for the purposes of determining whether criticism of the public prosecution office may be considered as interfering with its independence. Finally, while not taking account of the need to extend the term of office of Prosecutor General, as recommended by the Venice Commission, it expressly excludes the possibility of the re-appointment of Prosecutor General, and provides for the involvement in the procedure for the dismissal of the Prosecutor General of the Qualifications and Disciplinary Commission of Public Prosecutors or High Judicial Council.

Comments of the CoE Directorate of Human Rights on the Public Prosecution Service of 14 October 2014

In December 2014 the Council of Europe Directorate of Human Rights and Rule of Law presented its comments⁷ on the Law on the Prosecution Service adopted in October 2014.

In its view the Law introduced a number of important new changes and, taken overall, implemented the recommendations that had been expressed by the Council of Europe ("CoE") experts in the course of review of previous drafts on the public prosecution service. Thus, the removal of the function of general supervision was welcomed. It was, however,

³ See *Ibid.*, § 194.

⁴ See *Ibid.*, §§ 197-200.

⁵ See *Ibid.*, §§ 85 and 87.

⁶ See *Ibid.*, § 89.

⁷ [Comments](#) of the Directorate General Human Rights and Rule of Law (Directorate of Human Rights) of the Council of Europe on the Law of Ukraine on the Public Prosecution Service of 14 October 2014, 5 December 2014.

noted that for a fully satisfactory implementation of the recommendation it was necessary to introduce relevant changes into the Constitution of Ukraine.

The Directorate also noted the limitations imposed on the function of the public prosecution service to represent the interests of an individual and the State. However, concerns were expressed as to the problem of conflicts of interest that might arise in the representation by the public prosecution service of both the interests of the state and those of an individual. Concerns were also expressed about a lack of clarity as to the scope of the competence of the prosecution service in carrying out its representational function and the prosecution's right of access to material held by public bodies without a court warrant in the course of fulfilling this function. In the opinion of the Directorate, these concerns could be addressed in full by introducing constitutional amendments removing the representational functions from the competence of the public prosecution service.

The introduction of further instruments of safeguarding the independence of each individual prosecutor and the public prosecution service in general was also commended. At the same time, it was noted that the country-specific circumstances required solid protection against hierarchical interference in individual cases, which could be implemented by envisaging that specific instructions to a prosecutor from a higher prosecutor would always be given in writing, together with the right of the prosecutor concerned to request further written reasoning for the instructions.

The introduction of a regular reporting obligation on the part of the prosecution service, as well as other guarantees aimed at ensuring transparency, such as the obligation for public prosecution offices to publish their internal regulatory acts and ensure that orders of the Prosecutor General of a regulatory and legal nature should be subject to state registration and should enter into force only after official publication, was lauded as positive development. However, concern was expressed about the requirement for the Prosecutor General to personally report to the Verkhovna Rada at least once a year, which might in the view of the Directorate create a possible risk of political pressure being brought to bear in view of Parliament's retention of the right to express a vote of no-confidence, resulting in the resignation of the Prosecutor General.

While the new Law also took into consideration earlier recommendations to expressly exclude the possibility of re-appointment of the Prosecutor General, it disregarded the recommendation to extend the term of office of the PG beyond five years. It was further noted that it remained unclear whether the Law established an exhaustive list of grounds for dismissal of the Prosecutor General.

In general, the Council of Europe Directorate on Human Rights and Rule of Law considered the Law a substantial improvement when compared with the former law and earlier drafts and constituted a solid foundation based on the European standards for the operation of the public prosecution service in Ukraine. However, in order for this goal to be achieved, efforts would need to be made for the effective implementation of the new Law.