Continued support to the criminal justice reform in Ukraine

Подальша підтримка реформи кримінальної юстиції в Україні

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OPINION

OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW OF THE COUNCIL OF EUROPE

on

the Draft Law of Ukraine "On Amendments to some legislative acts of Ukraine in connection with the adoption of the Law of Ukraine "On Amending the Constitution of Ukraine (as to Justice)" (with regard to the improvement of the performance of the Qualifications and Disciplinary Commission of Prosecutors)"

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A. Introduction

1. This Opinion is concerned with the proposed amendments to be made to the Law of Ukraine "On the Public Prosecutor's Office" ("the Law on the PPO") by the Draft Law of Ukraine ref.no.7165 "On Amendments to some legislative acts of Ukraine in connection with the adoption of the Law of Ukraine "On Amending the Constitution of Ukraine (as to Justice" (with regard to the improvement of the performance of the Qualifications and Disciplinary Commission of Prosecutors) ("the Draft Law").

2. The proposed amendments are stated by the "Explanatory Note" to them to be aimed at implementing the provisions introduced into the Constitution relating to "the selection of public prosecutors, their professional training, performance evaluation, and consideration of cases concerning their disciplinary liability". As such it is said to be primarily concerned with the role of the Qualifications and Disciplinary Commission of Public Prosecutors ("the QDCP").

3. It is understood that an alternative draft dealing with the role of the QDCP has also been submitted to the Verkhovna Rada but the Opinion is only concerned with the proposed amendments in the Draft Law, as only this was the subject of the request for an expertise received by the Council of Europe.

4. It is also understood that there may be an intention not to proceed with certain of the proposed amendments (as mentioned by some of the stakeholders during meetings held in Kyiv on 20-21 February). However, the Opinion still addresses these topics given that it analyses the Draft Law submitted to the Council of Europe for an expertise in its entirety.

5. The Opinion reviews the compliance of the proposed amendments with European standards, particularly the European Convention on Human Rights ('the European Convention'), the case law of the European Court of Human Rights ("the European Court") and the Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine by the Venice Commission and the Directorate of Human Rights ("the Joint Opinion")[1].

6. In addition, it considers the conceptual consistency of the proposed amendments with Article 131[1] of the Constitution, the entire judicial system, its self-governing bodies, Law of Ukraine "On the Judiciary and Status of Judges" ("the Law on JSJ") and the recent reforms of the Ukrainian Public Prosecutor's Office.

7. Remarks will, however, only be made with respect to those proposed amendments that are considered to be inappropriate or to require some improvement.

[1] Adopted at the plenary session of the Venice Commission, 11-12 October 2013 (CDL (2013)039).

8. *Any recommendations for action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicized.*

9. The Opinion first makes some general observations on the proposed amendments before providing an Article-by-Article analysis of the provisions requiring comment.

10. This Opinion has been based on English translations of the Draft Law (comparative table), the Explanatory Note and the Law on JSJ provided by the Council of Europe's secretariat, as well as their original texts (in Ukrainian)[2] and current (Ukrainian) version of the Law on the PPO[3].

11. Its preparation has benefitted from meetings on 21 and 22 February 2018 with representatives of the Parliamentary Committee on the Law Enforcement, members of the QDCP, the Deputy Prosecutor General, the Chairman of the Council of Prosecutors of Ukraine and staff of the General Prosecutor's Office, members of the National Academy of Public Prosecutors of Ukraine ("the National Academy") and representatives of civil society, as well as consultations with international stakeholders. The authors of the Opinion have also been provided with written comments on the provisions of the Draft Law prepared by the National Academy.

12. The Opinion also takes into account a needs assessment report ("the Report") concerning the Council of Prosecutors of Ukraine and the QDCP which was commissioned by the Council of Europe in the framework of the Project "Continued Support to the Criminal Justice Reform in Ukraine".[4] The Report contains numerous recommendations aimed at achieving the enhanced independence and effectiveness of these bodies.

13. Of particular relevance for the QDCP was the recommendation in the Report that the Law on the PPO should specify that members of the QDCP are not under the instruction of any office of the prosecution service and are only accountable to the All-Ukrainian Conference of Prosecutors and provide for an institutional structure ensuring that minimum influence on the budget of the QDCP is available to other offices of the prosecution service, as well as that this law or regulation should stipulate that appropriate secretarial assistance to the QDCP be established as a separate entity under its authority. In addition, there were numerous recommendations relating to the functions and procedures of the QDCP concerning matters such as recruitment, training, merit-based transfer of prosecutors, and ensuring the compliance of disciplinary procedures with European Convention standards.

[2] The Ukrainian texts were consulted where the English translation appeared to be unclear or erroneous.

[3] https://www.gp.gov.ua/ua/konstitution_zakoni_ukraine.html

[4] *Needs Assessment Report on the Council of Prosecutors of Ukraine and the Qualification and Disciplinary Commission of Prosecutors*, Kyiv 2017

14. This opinion has been developed by Mr. James Hamilton[5], Mr Jeremy McBride[6] and Mr. Erik Svanidze[7] under the auspices of the Council of Europe's Project "Continued Support to the Criminal Justice Reform in Ukraine" funded by the Danish government.

B. General Observations

15. According to the Explanatory Note and, as is evident from the majority of the proposed amendments, the Draft Law has been prepared with a view to the further reinforcement and advancement of the system of prosecutors' self-governing and support bodies in Ukraine, in particular, the QDCP. In this connection, it is to be welcomed that the Draft Law strives to harmonise the organisation of these bodies and their procedures with those introduced for the judiciary.

16. In particular, the proficiency test which determines the ranking of candidate public prosecutors would, if the Draft Law is adopted, be held after the special training has taken place. This would remedy the present arrangement under which, there is no incentive to do well in the special training. This change is very practical and was one of the recommendations made in the Report.[8]

17. Furthermore, the proposed amendments to Article 79 would address the need recognised in the Joint Opinion[9] for the budgetary and secretariat arrangements of the QDCP to be separate from those of the Prosecutor General's Office in order to secure the former's independence from the latter.

18. The proposed amendment to Article 40 of the Draft Law addresses one of the key pending recommendations suggested in the Joint Opinion, namely, that concerning the issue of technical vetting with respect to the suitability of candidates for appointment to the post of the Prosecutor General.[10]

19. However, recommendations in the Joint Opinion concerning the ending of a vote of no confidence by the Verkhovna Rada as a basis for removing the Prosecutor General have still to be addressed. Nonetheless, it is recognised that for this to occur, some further amendment to the Constitution would be necessary.

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[8] Recommendation 2.2.

[9] See paras. 161 and 173 of the Joint Opinion.

[10] See paras. 119 and 199 of the Joint Opinion.

20. Furthermore, the proposed amendments to Article 39 in respect of the appointments of public prosecutors to administrative office do not address the Joint Opinion's recommendation that the arrangements should be strengthened to ensure that the possibility of reappointment to such an office does not lead to the holders of these positions compromising their independence.[11]

21. *There thus continues to be a need for these arrangements to be strengthened*.

22. Also the Draft Law does not address the concern of the Joint Opinion about the possibility of a victim being denied a remedy on account of the dismissal of a complaint where – pursuant to Article 46.2(4) - the prosecutor concerned has been dismissed or his or her powers have been terminated.[12] As the Joint Opinion observed, in some instances this could entail a violation of Article 13 of the European Convention.

23. *There thus remains a need to clarify what other action can be taken by the victim in such a case*.

24. In addition, it should be noted that GRECO has criticised the limited range of disciplinary sanctions available in Article 49[13], a position which has been endorsed in the Report[14]. GRECO also pointed out that there was no requirement that any sanction imposed must be proportionate to the offence.[15]

25. *There is thus a need for these concerns to be addressed*.

26. Although, the disciplinary procedures are generally appropriate for providing a fair hearing and an impartial tribunal, there is no specific procedure for seeking the recusal of a member carrying out the inquiry on grounds of partiality.

27. *There is thus also a need for this matter to be addressed.*

28. The need to modify Article 50 so that it no longer provides the choice in disciplinary cases of appealing either to the administrative court or the High Council of Justice remains. Such a choice was considered in the Joint Opinion to be "an unnecessary duplication of procedures and would lead to inconsistent decision-making".[16] Nonetheless, it is recognized that some further amendment to the Constitution would be necessary for this point to be addressed.

29. Some of the proposed amendments would entail no more than technical adjustments to existing provisions, including an appropriate updating of the legislative cross-referencing in specific provisions to take account of the replacement of the Law of

[11] Paragraph 116.
[12] Paragraph 131.
[13] GRECO 4th Evaluation Round Report, Ukraine,19-23 June 2017, para 260
[14] Paragraph 2.5 and Recommendation 2.5.
[15] 4th Evaluation Round Report, para. 260.
[16] Paragraph 140.

Ukraine "On the Principles of Preventing and Combating Corruption" by the Law of Ukraine "On Corruption Prevention" ("the Law on Corruption Prevention"). As such they are clearly unproblematic.

30. However, the proposed introduction of assistant prosecutors as a new category of Public Prosecution Service staff,[17] the arrangements for evaluation of prosecutors under uncertain institutional arrangements[18] and some other proposals are not strictly limited to the QDCP framework. These will be considered in the Article-by-Article analysis.

31. Moreover, the proposed arrangements for the evaluation of prosecutors substantially depart from the evaluation system that was introduced for judges under the Law on JSJ. Furthermore, as will be seen below, these arrangements are highly questionable on account of the lack of sufficient guarantees with regard to prosecutors' security of tenure and their individual (internal) independence.

32. Furthermore, unlike the arrangements in the Law on JSJ, Articles 19^1, 33^1 and 34 of the Draft Law do not specifically provide for judicial avenues for challenging evaluation, competition results and relevant decisions of the QDCP. This could entail potential inconsistency with the requirements of the European Convention.[19]

33. There are, therefore, some significant aspects of the proposed amendments that must be regarded as contrary to European standards and the declared intention of unification of the selection and career development procedures for judges and prosecutors in Ukraine. These are outlined further in the following section of the Opinion.

34. The Draft Law proposes a set of amendments to the general provisions concerned with appointment to public prosecutor's position(s) and entering the profession, namely, Articles 29, 31 and 38. The changes – which would result in these provisions dealing only with the selection procedures for, and the rules applicable to, filling the positions in local prosecutors' offices – would effectively lead to the exclusion of any further possibility of "outsiders" being appointed directly to positions at regional and general prosecutor's office. This is because, if adopted, it would henceforth only be possible for an intending prosecutor to enter the system through becoming a prosecutor in a local office, taking part in the prescribed procedures and passing the relevant competitions. Thus, instead of resolving some inconsistency in the existing Law where Article 27 does not require prosecutors of regional prosecutor's offices to have previous prosecutorial experience and Article 28 refers to "Selection of

[17] See comments to Article 13^1 below.

[18] See comments to Articles 19^1 and 43^1 below.

[19] See also the *Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service*, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para. 49.

candidates for the position of a prosecutor of a local prosecutor's office", the Draft Law proposes to elevate the latter to a questionable crosscutting approach.

35. Although there are no international standards in this regard, pragmatic considerations in the context of Ukraine point to the desirability of opening up the whole system (and not just the local prosecutor's offices) to appropriate, qualified newcomers to positions all the levels of prosecutorial hierarchy. Certainly, this would not disadvantage those prosecutors who start their careers in a local prosecutor's office as the specific profile and qualifications requirements for more senior positions are sufficient to ensure that their further career development would not be impeded by competition from such any outsiders. There does not, therefore, seem to be any compelling justification for introducing this kind of formal limitations and excessively closing up the system.

36. *Consideration should thus be given to resolving this issue in the light of the above factors*.

37. Furthermore, it should also be borne in mind that there are also a number of recommendations in the Joint Opinion unrelated to the functioning of the QDCP which have yet to be addressed in the revision of the Law on the PPO.[20]

38. In addition, the proposed amendments do not address any of the recommendations made in the Report for guaranteeing the independence and effective operation of the Council of Prosecutors of Ukraine.

39. *There is thus still a need for these recommendations to be addressed.*

40. For the sake of streamlining and facilitating the legislative process, it could be considered to limit the Draft Law to and prioritize at this stage the issues strictly related to the QDCP, including conceptual aspects of the prosecutors' career development and disciplinary matters, as well as prosecutorial support arrangements in general. The remaining shortcomings and further potential improvements could be addressed under another, more comprehensive set of amendments.

C. Article-by-Article Analysis

Article 9

41. Sub-paragraph 1(4) would be amended to provide that where the QDCP makes a decision in a disciplinary matter the Prosecutor General should issue an order concerning the disciplinary sanction to be imposed rather than making a decision on

[20] See further Opinion of the Directorate General Human Rights and Rule of Law of the Council of Europe on the Draft Amendments to the Laws concerned with the Functioning of Prosecution in view of the Amendments to the Constitution of Ukraine (draft Law of Ukraine No.5177), (Council of Europe, 2016), (DGI (2016)20.

the disciplinary sanction. This amendment appears to be intended to emphasise the independence of the QDCP's decision-making powers and to remove any discretion from the Prosecutor General. However, although this would be entirely appropriate, this effect is insufficiently explicit in this regard, if this is indeed the intention.

42. *This provision should thus be re-formulated so that it is made explicit that the Prosecutor General's only function in respect of disciplinary sanctions is to give effect to the decision of the QDCP.*

Articles 11, 13 and 39

43. The comments in the preceding two paragraphs are equally applicable to the similar role of the head of a regional public prosecutor's office dealt with in sub-paragraph 1(8) of Article 11.

44. *This provision should thus be re-formulated so that it is made explicit that the only function of the head of a regional public prosecutor's office in respect of disciplinary sanctions is to give effect to the decision of the QDCP.*

45. There is no indication in the Explanatory Note as to why it is proposed that the powers of the head of a local public prosecutor's office to notify the QDCP of vacancies in his or her office, to appoint or dismiss persons from administrative positions should be transferred to the head of the applicable regional public prosecutor's office, which be the effect of the additions to Article 11.1(5), the deletions of sub-paragraphs 1(3) and (4-1) from Article 13 and of the changes made to paragraph 4 of Article 39.

46. This seems inconsistent with the responsibility under Article 13.1(2) of the head of a local office for organising its operation. Furthermore, it could add to the bureaucracy regarding appointments and dismissals and undermine the autonomy that such a head should enjoy through the removal of its administrative and technical components, thereby reinforcing the hierarchical structure of the Public Prosecution Service.

47. *There is thus a need to clarify the rationale for this proposed change and, insofar as this is driven by considerations of increasing efficiency, to consider how this goal might be more appropriately achieved through the use of an online database or other IT-based tools.*

Article 13[1]

48. This provision would introduce the position of a public prosecutor's assistant in local public prosecutor's offices. Despite the terms of paragraph 1, there is nothing in the Draft Law as to status and conditions for the activities of a public prosecutor's assistant nor is there specific provision – unlike in Article 157.1 of the Law of

Ukraine "On the Judiciary and Status of Judges – for each public prosecutor in a local office to have an assistant.

49. These matters are also not discussed in the Explanatory Note, which only indicates that the new position will not lead to an overall increase in the total number of employees in public prosecutor's offices. It is undesirable for there to be no indication at this stage as to whom exactly such assistants will assist and as to how they are expected to function. Undoubtedly the assumption is that they are to act under the authority of a local public prosecutor but this is something that ought to be spelled out so that all involved in criminal or other proceedings can appreciate what assistants can actually be authorised to do.

50. *There is thus a need for provision to be made for the competences and responsibilities of a local public prosecutor's assistant to be specified in the Draft Law rather than this being left for regulation by the Prosecutor General and the Council on Public Prosecutors of Ukraine. In this regard, it should be made clear that a local public prosecutor's assistant does not have any independent procedural standing or role. Moreover, it is not sufficient in this context to state their function is only "technical"; their specific role and competences need to be prescribed.*

51. Paragraph 3 would seem to envisage the appointment of a local public prosecutor's assistant becoming a career track for appointment as a public prosecutor. This is not objectionable in itself but there is no clarity as to how this relates to the candidacy of others who have not been assistants, which remains a prescribed route for appointment as a public prosecutor. Certainly, it would be undesirable for appointment as a local public prosecutor's assistant becoming, in practice, the only point of entry to public prosecutorial appointments or becoming a means to circumvent the ordinary conditions and procedures for the appointment of public prosecutors.

52. It may be that this will be dealt with in the "special provisions" to be made in a decision of the QDCP but this is a matter that requires fuller consideration at this stage, given that it may lead to the unequal treatment of candidates who have not been an assistant.

53. At the same time, there is no indication as to the arrangements to be made for developing the skills of assistants and ensuring that they develop the necessary competences for becoming a public prosecutor. In particular, there is a risk that, without consideration given to the latter now, the persons appointed as assistants will not develop the independence of mind required to be a public prosecutor.

54. *There is thus a need for careful consideration of the above-mentioned issues relating to the career track for the appointment as a public prosecutor in order to avoid*

circumventing the ordinary conditions and procedures for the appointment of public prosecutors.[21]

Article 19[1]

55. This provision addresses both "continuous[22] training" and evaluation.

56. It is unclear how exactly the former – which is dealt with in paragraph 1 – relates to the obligation in Article 19(2) for prosecutors to "regularly take training courses at the National Academy. Such training shall include the rules of the prosecutorial ethics". Undoubtedly, the new provision could well be concerned with more than updating of relevant developments – which might be the aim of the provision in Article 19(2). Indeed, the possible need for something more than such updating might well be what is intended by the reference to "upgrading qualification" but it could equally be no more than attending a certain number of courses during the three-year period, In any event, there is no indication in this proposed provision or elsewhere in the Draft Law as to what actually is entailed in such "upgrading" (as opposed to the means of obtaining this, namely, at the National Academy) or as to why this needs to occur every three years.

57. Certainly, it is undesirable for what "upgrading" actually means to be left unclear and also for there to be no specification as to the overall amount of training that can be required of a public prosecutor; *cf.* the requirement set out in Article 89.2 of the Law of Ukraine "On the Judiciary and Status of Judges that each judge is obliged to undergo training for not less than 40 hours once every three years. Such a specification would be desirable given that a failure to fulfil training requirements could be a basis for disciplinary proceedings under the proposed Article 43[1].

58. Moreover, it is undesirable for all in-service training to be restricted to that provided by the National Academy as conferences and other professional events organised by other institutions could also be relevant to the work of public prosecutors.

59. *There is thus a need to harmonise the provisions in Article 19(2) and the proposed new provision. In addition, there is a need to clarify both what "upgrading" means in substance and what the overall training requirements are for prosecutors and to reconcile them accordingly. The overall training requirements should be more specific – such as by specifying a certain number of hours - and allow for some training to be obtained through attendance at events organised by bodies other than the National Academy. In setting the training requirement, the actual capacities of the National Academy and other providers should be assessed, thereby preventing undue and frequent modification of the requirement, reinforcing security of tenure and providing more solid grounds for individual long-term planning of career and*

[21] See also the general comment in para. 40 above as to limiting the scope of the Draft Law.
[22] Presumably the English word "continuing" is what is intended.

capacity building. There is also a need to make provision as to how outside conferences and similar events are to be recognised for training purposes

60. Paragraph 1 also provides that the curriculum and the procedure of a training for maintaining and upgrading qualification of prosecutors is to be approved by the QDCP. However, neither the proposed amendments nor the Law on the PPO specify any requirement for the QDCP to consult the General Prosecutor's Office, the Council of Public Prosecutors of Ukraine or the All-Ukrainian Conference of Public Prosecutors as to what might be considered to be necessary or desirable to be covered by this curriculum. Similarly, there is no provision requiring any prior discussion with the National Academy before a curriculum is approved so that it can be established whether what will be required is in fact feasible. Such consultation and discussion is likely to be essential if the curriculum being approved is both to meet the needs of all concerned and to be satisfactorily delivered.

61. *Provision should thus be made for such consultation and discussion prior to the approval of the curriculum*.

62. Although it is clearly important for the performance of public prosecutors to be evaluated, the proposed arrangements in paragraphs 2-6 significantly deviate from the principles and system of selection and evaluation for judges in the Law on JSJ. Thus, the latter differentiates between the qualification (proficiency) evaluation and regular evaluation of judges that are meant to establish their professional aptness and individual capacity building needs respectively, with the possibility of carrying out an evaluation of qualification being limited to those instances where either this has been formally requested for the purposes of participation in selection (competition) procedures or this is required within the disciplinary framework.

63. In contrast, the proposed arrangements in these paragraphs effectively merge the two forms of evaluation, subject prosecutors to a comprehensive proficiency examination on a regular basis with particular emphasis being placed on complaints concerning their alleged failure to perform. Furthermore, not only could the results be taken into account in deciding on appointments to an administrative position but a failure to pass such an evaluation would, pursuant to sub-paragraph 13 of paragraph 1 of Article 43^1 of the Draft Law, then become a ground for disciplinary liability of prosecutors.

64. Not only would such an approach be highly time-consuming and potentially have more to do with quantitative measures than quality but it would also be likely to significantly undermine public prosecutors' security of tenure and their individual independence.

65. Furthermore, it is improbable – notwithstanding the suggestion in the paragraph 2 to the contrary - that scheme envisaged in these paragraphs could serve to identify individual needs and to provide encouragement. This is because – apart from the link to disciplinary proceedings already mentioned - the three-year interval which is being

proposed seems to allow for an unduly long time to elapse before addressing those needs or providing such encouragement.

66. It should also be borne in mind that a system of performance management involving the cooperation of the person assessed with the line manager is, in practice, essential to a properly run office which operates on a hierarchical principle. Such performance management would benefit from a more frequent dialogue – e.g., every year - between prosecutors and their line managers since this would enable the individual needs (including training) of the latter to be more promptly addressed.

67. *Whatever scheme there is for performance evaluation, it could be useful to provide for a set of measures outlined in the preceding paragraph as an auxiliary, consultative tool for addressing performance management considerations.*

68. It should also be noted that there is no indication as to how the proposed three-yearly evaluation is to mesh with the requirement to undergo advanced training no less than every three years.

69. In addition, paragraphs 5 and 6 omit to specify the profile of evaluators or the composition of relevant commissions and no mention is made in the list of the National Academy's activities in Article 80.7 of its staff having any role to play in the evaluation process.[23]

70. Finally, as already noted, no specific provision is made for the possibility of a judicial challenge to evaluation decisions.

71. *The present provisions should thus be revised. In particular, disciplinary procedures should be separated from performance evaluation procedures even though there might be some overlaps such as a performance assessment leading to other procedures and vice versa. Moreover, it needs to be kept in mind that a negative performance evaluation can originate from factors other than those connected to a disciplinary offence. It is thus inappropriate for it to be specified that repeatedly low or negative overall evaluation results shall lead to disciplinary commissions instigating disciplinary proceedings. In addition, the provisions should also specify how the bodies responsible for evaluation should be composed. It should also make it clear that the system of evaluation should not merely concentrate on quantitative measures but should also be concerned with quality. Explicit provision should also be made for the possibility of a judicial challenge to evaluation decisions – indicating exactly how this can be undertaken - rather than relying on unspecified constitutional provisions that allow for challenge to QDCP decisions.*

72. Paragraph 4 provides that the regulation on evaluation is to be approved by the Prosecutor General upon submission by the QDCP. However, this formulation leaves it unclear as to where the real power to regulate will reside. In particular, while the

[23] *Cf.* sub-paragraph 1 of Article 90.2 of the Law on JSJ.

power of initiative rests with the QDCP, it is unclear whether or not the Prosecutor General has any power of veto. On the other hand, paragraph 5 provides that the evaluation criteria, as well as the composition of the evaluation commissions must be approved by the QDCP.

73. *There is thus a need for clarification regarding the resolution of any disagreement between the Prosecutor General and the QDCP regarding the regulation on evaluation or who is to have the decisive say*.

74. *However, as the development of the system of performance evaluation of prosecutors is something currently being addressed by a working group under the General Prosecutor's Office, it would be appropriate for this - in consultation with all stakeholders – to consider further all the issues raised above relating to the performance evaluation scheme and only proceed with amendments to the Law on the PPO once a consolidated position on this has been reached*.

Article 29

75. Paragraph 2 seems to duplicate certain elements of the content of paragraph 1.

76. *There is thus a need to clarify whether paragraph 2 should be retained and, if not, to delete it.*

Article 32

77. The existing provision in paragraph 2 that allows for an appeal by a candidate public prosecutor against a decision denying his or her admission to the succession pool would not be retained in the amended article. Instead there would be a requirement for the QDCP to give a motivated decision for the termination of a candidate's further participation in the selection process. This does not seem a sufficient safeguard as a motivation can be expressed in very general terms without giving much in the way of real information.

78. *There is thus a need for the right of appeal to a court of law be retained.*

79. Paragraph 4 would now provide that, as part of the vetting procedures, candidate public prosecutors would be entitled to receive information about themselves that relates to their "possible professional inadequacy" rather than as at present their "dishonesty". This change is not addressed in the Explanatory Note.

80. *There is thus a need for clarification as to the intended effect of the proposed change.*

Article 33

81. Paragraph 1 seems to provide that both practical and theoretical training be undertaken at the National Academy when it is really more suited only to undertake the provision of training of a theoretical character. It may, of course, be that the intention is that the responsibility for organising but not delivering the practical training is intended to be conferred on the National Academy, which would be appropriate.

82. *There is thus a need to clarify and probably to revise paragraph 1 accordingly*.

83. Paragraph 2 provides for the QDCP to approve the programme, curriculum and procedure of the special training for candidate public prosecutors. However, neither the proposed amendments nor the Law on the PPO specify any requirement for the QDCP to consult the General Prosecutor's Office, the Council of Public Prosecutors of Ukraine or the All-Ukrainian Conference of Public Prosecutors as to what might be considered to be necessary or desirable to be covered by this programme, curriculum and procedure. Similarly, there is no provision requiring any prior discussion with the National Academy before a curriculum is approved so that it can be established whether what will be required is in fact feasible. Such consultation and discussion is likely to be essential if the curriculum being approved is both to meet the needs of all concerned and to be satisfactorily delivered.

84. *Provision should thus be made for such consultation and discussion prior to the approval of the curriculum*.

85. Furthermore, there is no recognition in this provision that different approaches might be required with respect to the special training to be provided for candidate public prosecutors. Such recognition is needed not to just to take account of the different position of those who have been assistants and those who have not but also of the fact that some of the latter may have extensive experience in the criminal justice field (by virtue, e.g., of having been defence lawyers or judges) and will not, therefore, need the same training as other, less experienced candidates.

86. *There is thus a need for the present provision to stipulate that the special training required should take account of the specific experience of candidates*.

87. There is a lack of clarity as to what is understood by the "results of a special training" in paragraph 5 and "materials about candidates" in paragraph 6. In particular, it is not clear whether this is meant to indicate some kind of assessment or is no more than a record of attendance.

88. *There is thus a need for these terms to be clarified, not least given the obligation of reimbursement of funds spent on a candidate's special training that can arise in certain circumstances specified in paragraph 7*.

89. The requirement in paragraph 7 for such a reimbursement of funds is understandable in view of the importance of ensuring that this training is taken seriously and that there is no waste of public funds. However, there is a lack of precision regarding the circumstances in which such an obligation arises as neither "failed to follow the

procedures" nor "unsuccessful performance" of the special training really give a sufficient indication of what is entailed.

90. As regards the former, it is certainly improbable that a single instance of non-compliance with a particular procedure would be considered sufficient for this purpose but it is also not obvious when it could be said that the threshold has been crossed to justify a conclusion that there has been a failure to follow the prescribed procedures. Moreover, what is to be regarded as successful performance is also unclear, particularly as the proficiency test is something discrete from the completion of the special training

91. *There is thus a need for this provision to be modified so that there is greater precision as to when the reimbursement obligation can be imposed*.

Article 33[1]

92. It is not clear from this provision whether the new proficiency test would be as comprehensive as the existing test now held at the early stage of the selection procedure. In particular, there is no longer a reference to a requirement of knowledge of European human rights standards, which is clearly indispensable.

93. *There is thus a need to ensure that the new test for the ranking of candidates is at least as comprehensive as the existing one*.

94. It is also not clear what is the correlation between the competitive test, dealt with in Article 31 and the proficiency test provided for by the present provision. In particular, there is no clarity as to which of the two tests is more focused on the candidate's knowledge and skills and which of them is more about the suitability of the candidate's personality to undertake this type of job etc. It is also unclear whether the two tests, taken together, would go beyond a knowledge-oriented approach to evaluating candidates.

95. *There is thus a need to clarify the relationship between and the focus of both tests and to ensure that overall the assessment is not simply knowledge-based*.

96. As already noted, no specific provision is made for the possibility of a judicial challenge to the results of proficiency tests.

97. *Explicit provision should thus be made for the possibility of a judicial challenge to the results of proficiency tests.*

Article 34

98. As already noted, no specific provision is made for the possibility of a judicial challenge to decisions taken on filling vacancies.

99. *Explicit provision should thus be made for the possibility of a judicial challenge to decisions taken on filling vacancies.*

Article 41

100. Apart from cases of voluntary termination and transfer to a position in another public prosecutor's office, the other criterion specified in this provision concerning the dismissal of a public prosecutor from an administrative office is that of "improper performance of duties prescribed for the relevant administrative office" by the public prosecutor concerned. However, the Report stated that the criterion for dismissal "suffers from a lack of clarity and should be defined with greater precision".[24] Therefore, some reference in the Law on the PPO to the need for precision when dealing with these matters would be helpful.

101. *The need for precision in the regulatory framework concerning dismissal from an administrative position should thus be specified in this provision.*

Article 43

102. There is an inappropriate lack of clarity about what is envisaged by power in this provision to provide incentives and how this relates to the power in Article 81(2) to award bonuses. The concern expressed in the Joint Opinion about the latter – namely, that these "can lead to corruption or to undermine the independence of the prosecutor"[25] – could equally be applicable to "incentives". Furthermore there is no guarantee that the procedure envisaged for giving them – i.e., one to be approved by the Prosecutor General in agreement with the Council of Public Prosecutors of Ukraine – will provide for this to occur on the basis of wholly objective criteria, as was considered vital in the Joint Opinion.

103. *There is thus a need to specify in the proposed provision what exactly are intended to be the "incentives" and to require that, where given, this can only occur on the basis of objective criteria that are also prescribed.*

Article 43-1

104. The grounds for disciplinary action against a prosecutor have been expanded to cover failure to take measures within deadlines envisaged. However, it is not clear that a prosecutor having reasonable grounds for such a failure would have a defence in any proceedings brought in respect of it. Also a new ground refers to knowingly providing untruthful data or intentionally failing to mention data in the asset

[24] At page 15.
[25] Paragraph 179.

declarations required to be made by public servants. Further additional grounds are dishonest behaviour by the prosecutor and breach of the prosecutor's oath. These are, however, very vague provisions. The latter was criticised in the GRECO Report[26] and it is not clear whether the dishonesty involved must be such as could also entail criminal liability.

105. Undesirable vagueness is also a problem seen in the existing provisions.

106. Thus, the provision for liability as a result of "an intervention or any other influence of the public prosecutor in cases or the manner other than established by the law relating to the work of another prosecutor, staff members, officials or judges, including through public statements about their decisions, actions or inaction in the absence of signs of administrative or criminal offence" is also very broad and could easily be used to penalise a whistle-blower or even to suppress freedom of speech about matters which are the legitimate subject of public debate. At the least they are likely to have a chilling effect on honest discussion.

107. Moreover, the retention of liability for "breach of public prosecutor's oath" fails to take account of the view of the European Court that such a formulation left far too much scope for its arbitrary application in the absence of guidelines and practice establishing a consistent and restrictive interpretation of such a disciplinary offence.[27]

108. *There is thus a need to re-formulate all these grounds in a much more specific manner. In addition, it should be clarified whether or not reasonable grounds for failing to meet a deadline would be a defence in any disciplinary proceedings brought in respect of such a failure. If it would not be, such a defence should be explicitly specified in this provision.*

109. Furthermore, the provision that a failure to pass advanced training or to pass an evaluation test are disciplinary offences is completely at odds with the notion that training and evaluation should be directed to improve a prosecutor's capacity to perform his or her functions and that professional evaluation and disciplinary liability are two entirely different things. Certainly, the outcome of any such training or evaluation undertaken ought not to be a disciplinary matter.

110. *There is thus a need for this offence to be revised accordingly*.

Article 45

111. Although concern about the potential for the abuse of the possibility of making a disciplinary complaint in respect of a public prosecutor is understandable, there is a need to clarify what is the consequence of the phrase that would be

[26] GRECO 4th Evaluation Round Report, Ukraine, 19-23 June 2017, para 259

[27] *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, at para. 185.

introduced into paragraph 2, namely, that this would not be allowed "without reasonable grounds, using this right as an instrument for making pressure on prosecutor in relation to exercising his/her powers".

112. This would not be problematic if this were no more than a confirmation of the QDCP's ability under Article 46.2 to make a reasoned decision as to whether disciplinary proceedings should be initiated. However, the language used is certainly discouraging and even carries the implication of consequences for making a complaint that is considered not to be based on reasonable grounds or has an "improper" motive. This could lead to pressure being exerted on persons with legitimate complaints not to make them and could discourage or inhibit persons with legitimate complaints from coming forward.

113. *In view of the existing provision in Article 46.2, there does not seem to be any need for this addition and it should therefore be deleted.*

Article 46

114. It is not entirely clear what is the purpose of the addition proposed to be made to paragraph 6, which would allow the QDCP to "initiate internal [i.e., service] investigation against prosecutor, against whom disciplinary proceeding is being conducted". It would seem to be suggesting that an investigation can be carried out by the General Inspection of the General Prosecutor's Office into matters other than the subject of the disciplinary complaint, without being at all clear as to what the outcome would be. There is also the potential for such a function to conflict with the role of the State Bureau of Investigation.

115. Certainly, there should be no shutting of eyes to possible wrongdoing that is unrelated to the disciplinary complaint where that is uncovered in the course of the disciplinary proceedings. However, besides being debatable in terms of such an investigation's compliance with the Code of Criminal Procedure, there is no stipulation made for how the proceedings are to be handled should this occur. The mere mentioning of this possibility of carrying out a service investigation would be insufficient for this purpose and could not remedy the absence of any other provisions governing it.

116. This omission becomes particularly striking in view of the concept of a 'disciplinary case' and the more advanced procedures based on this that would be introduced into the Law on the PPO. Moreover, there is a risk of both sets of becoming not only unfair but also of suffering from a loss of focus.

117. *There is thus a need to clarify what is the objective of this addition and, insofar as it is warranted, to define the procedural and institutional essence of 'service investigations' and to ensure that there is a clear differentiation between them and any 'disciplinary case'.*

Article 48

118. The proposed amendment to paragraph 4 – which would allow the imposition of disciplinary liability up to a year after a ruling of the European Court reveals facts that would justify such liability being imposed – is not in itself inappropriate. However, such liability should not arise simply from the existence of an adverse judgment by the European Court[28]. Moreover, the proposed amendment also reveals the weakness of the general bar in this provision on disciplinary imposing liability more than a year after the offence was committed since it may take some time before the wrongdoing in question becomes apparent, particularly if efforts have been made to conceal it.[29]

119. *Consideration should thus be given to modifying the general bar so that it is not applicable where the commission of the offence could not be readily identified*.

120. The proposed revised stipulation in paragraph 8 that a decision on public prosecutor's disciplinary liability and imposing disciplinary sanctions shall be sent to the head of the public prosecutor's office, "who is authorized to apply disciplinary sanction" uses a formulation which suggests – when taken with the provisions in Articles 9.1(4) and 11.1(8) on deciding on a disciplinary sanction - that there might be some discretion as to the application of the sanction imposed. This would be inconsistent with the role given to the QDCP in disciplinary matters.

121. *There is thus a need to revise this provision to remove any impression that there is some discretion as to the implementation of disciplinary sanctions imposed by the QDCP.*

122. Neither this provision nor Article 47 stipulate any timeframe within which disciplinary proceedings should be conducted. This is undesirable from the perspective of the public prosecutor concerned and anyone affected by the disciplinary offence alleged to have been committed.

123. *Such a timeframe – which takes due account of the practicalities involved in conducting disciplinary proceedings - should thus be specified in this provision.*

Article 49

[28] See A*micus curiae* brief for the constitutional court on the right of recourse by the state against judges (Article 27 of the Law on Government Agent no.151 of 30 July 2015) Adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), CDL-AD (2016) 015.

[29] This is something about which GRECO has also expressed concern: 4th Evaluation Round Report, Ukraine, 19-23 June 2017, para 260.

124. The specification of the possible sanctions is unsatisfactory in that there is no requirement that the one actually imposed should be proportionate to the offence concerned and their range is, as GRECO has noted[30], unduly limited.

125. *There is thus a need for these concerns to be addressed.*

126. The inclusion of dismissal from an administrative position in the Public Prosecutor's Office as a possible disciplinary sanction does not necessarily conflict with the role of the Council of Public Prosecutors of Ukraine in recommending dismissal from such positions under Article 41 of the Law on the PPO on the basis of "improper performance of duties" since the latter may not involve a disciplinary offence. Nonetheless, the delineation between these two competences – which stem from quite discrete functions and responsibilities – is far from clear and could give rise to unnecessary confusion and conflict.

127. *There is thus a need for the respective grounds and competence of the QDCP and the Council relating to dismissal from an administrative office to be clearly defined and delineated.*

128. A possible disciplinary sanction that seems to have been overlooked is a temporary reduction in the salary of the prosecutor concerned.

129. *Consideration should thus be given to adding such a reduction to the list of possible sanctions for disciplinary offences*.

130. Although paragraph 3 provides that the QDCP may decide that "a public prosecutor (except for the Prosecutor General) can no longer hold the office" in the case of certain disciplinary offences being committed, there appears still to be uncertainty as to whether or not disciplinary proceedings can be brought against the Prosecutor General even if sanctions may not be imposed on him or her. The Joint Opinion had indicated that there was a need to clarify the disciplinary liability of the Prosecutor General[31] and this concern remains valid.

131. *The disciplinary liability of the Prosecutor General should thus be clarified*.

Article 51[1]

132. The proposed amendment would introduce an entirely new provision embodying a special rule for avoiding and resolving actual or potential conflicts of interest within the prosecution service.[32] However, there are various similarities and

[30] GRECO 4th Evaluation Round Report, Ukraine, 19-23 June 2017, para 260.

[31] Paragraph 137 of the Joint Opinion.

[32] An essentially similar proposed amendment was addressed in a previous opinion – *Opinion of the Directorate General Human Rights and Rule of Law of the Council of Europe on the draft amendments to the laws concerned with the functioning of Prosecution in view of the amendments to the Constitution of Ukraine (Draft*

overlaps between this proposed provision and the content of Article 28 of the Law on Corruption Prevention.

133. Thus, the provisions of the Law on Corruption Prevention explicitly refer and apply to the Prosecutor General of Ukraine, as well as to the officers and employees of the prosecution service in Article 3.1(1). Moreover, the proposed new provision would simply reiterate much of what is already stipulated in the Law on Corruption Prevention. In particular:

- paragraph 1 is practically identical to Article 28.1(1) of the Law on Corruption Prevention, to which law it explicitly refers;
- the reporting requirement in paragraph 2 is broadly in line with that in Article 28.1(2), subject to certain minor differences discussed below;
- paragraph 3 of both provisions are practically identical; and
- paragraph 5 is literally identical to Article 28.1(3) of the Law on Corruption Prevention.

134. The proposed new provision would introduce only two elements that are not found in in Article 28 of the Law on Corruption Prevention, both of which are problematic.

135. First, the Law on Corruption Prevention differentiates between subjects having an immediate supervisor (the original "керівник") and others, including those having no immediate supervisor and those holding a position in a collegial body. Whereas the former category is to report to their respective immediate supervisors, the latter ("collegial body members") are expected to report to the National Agency for Corruption Prevention ("the NACP"), or other authority, or to the collegial body if so determined by law. However, pursuant to the proposed provision, prosecutors exercising their powers in a collegial body should only report to the same collegial body which they are part of, but not to the NACP. As a result, there is a clear conflict between the two laws as under the Law on Corruption Prevention prosecutors in such situation should report to the NACP, which is not an option under the current Draft Law. This conflict of rules would need to be addressed.

136. It should also be noted that there is insufficient harmony between paragraphs 2 and 3 of the proposed amendment as regards the reporting obligations of prosecutors who exercise their powers in a collegial body since under the former reports go to the same collegial body but the relevant decision will be made, pursuant to the latter paragraph by the director supervisor or head of office "to whose responsibility dismissal/initiating dismissal from position belongs". The offices with such powers in Ukraine are the Council of Public Prosecutors of Ukraine,[33] the QDCP and the

Law of Ukraine No.5177), (DGI (2016)20 Strasbourg, 18 November 2016) – and the points made about are rehearsed here, albeit slightly modified, for convenience.

[33] Pursuant to Article 71 of the Law on the PPO.

High Council of Justice.[34] It could thus happen that the body receiving a report could be different from the one that is expected to act thereupon, which could lead to problems in practice.

137. Secondly, paragraph 4 of the proposed amendment is the only one that does not reflect the existing provisions of the Law on Corruption Prevention – despite seeming to originate from it – and its added valued is questionable. Under this provision, when the immediate supervisor of the prosecutor reporting an actual or potential conflict of interest or the head of the authority whose powers include dismissal/initiation of dismissal has "any doubts as to the procedure for preventing or resolving an actual or potential conflict of interest he shall apply in writing to the Council of Public Prosecutors of Ukraine, which shall then provide written guidance on the ways to prevent and resolve conflicts of interest".

138. A similar but significantly different solution is to be found in the Law on Corruption Prevention. Thus, Article 28.3 stipulates that whenever the NACP receives a notice from a person about the presence of a real or potential conflict of interest, it would explain within seven working days to the person reporting the procedure for her/his actions to resolve the conflict of interest. It thus refers to the situation where the individual reports directly to the NACP, as opposed to his/her immediate supervisor, who would then give guidance to him or her as to how to proceed in order to resolve the conflict. Equally, Article 28.5 refers to cases where the person, having doubts whether he/she is in a conflict of interest, can seek and obtain guidance from the territorial office of the NACP.

139. In the context of the Law on Corruption Prevention the immediate supervisor or the head of the authority in-charge of collegial body members is not expected to have "doubts" in such a matter that would require external assistance. It is, therefore, not clear why such a situation is considered more likely to arise in the prosecution service and thus require a specific legal provision dealing with it. Moreover, the proposed solution is strange as it applies to situations where the immediate supervisors have doubts related to the procedure for preventing or resolving the conflict in question and not the substantive issue itself (as in Article 28.5 of Law on Corruption Prevention). It might be expected that supervisors, given their respective positions, would be able to determine the relevant procedure without seeking external help. The approach found in the proposed amendment would not only deviate from the spirit of the Law on Corruption Prevention but would also unnecessarily blur the legal accountability of the immediate supervisors or the heads of authorities covering collegial bodies in such matters.

140. Furthermore, the proposed approach becomes even more questionable in light of the choice of the institution that would resolve any doubts as to the procedure to be followed. Thus, the choice of the Council of Public Prosecutors of Ukraine to play

[34] Pursuant to Article 62 of the Law on the PPO.

this role is not necessarily the best for two reasons. One, the Council is the authority whose powers include initiation of dismissal from administrative positions, as provided under Article 71.9(1) of the Law on the PPO. This would practically mean that the prosecutorial authority entitled to receive reports under the solution envisaged in Article 51-1(3) and the body entitled to provide guidance to the receiving authority under Article 51-1(4) is the same body. Second, the Council is envisaged at the highest body of prosecutorial self-governance with authority over issues such as initiation of dismissal from administrative positions, key issues for functioning of the prosecutions service. As such, it is not meant to handle conflict of interest issues on a daily basis and cannot be expected to have developed specialisation in this field.

141. *The proposed amendment should thus either not be retained or its provisions revised to preclude avoid unnecessary duplication of, and unfounded divergence from, the rules stated in the Law on Corruption Prevention.*[35]

Article 73

142. It is not clear why this provision should introduce into paragraph 1 the phrase "*take part* in the evaluation of public prosecutors" (emphasis added) as a function or role of the QDCP – since Article 19^1 would make it a body that can require an extraordinary evaluation, can propose the regulation governing evaluation, can approve the relevant criteria and can decide there should be a re-evaluation following an appeal. The approach taken in Article 93 of the Law on JSJ is of relevance in this regard. The QDCP is thus not really a participant in evaluation but a body with a regulatory function in respect of it.

143. *The wording of this provision should thus be rephrased to reflect the actual role of the QDCP.*

144. It might be useful to impose some general accountability requirement on the QDCP, such as that it report to the All-Ukrainian Conference of Prosecutors on its activities in a similar manner to the Prosecutor General being required under Article 6 of the Law on the PPO to report to the Verkhovna Rada.

145. *Consideration should thus be given to addressing the above suggestions.*

[35] Opinion of the Directorate General Human Rights and Rule of Law of the Council of Europe on the draft amendments to the laws concerned with the functioning of Prosecution in view of the amendments to the Constitution of Ukraine (Draft Law of Ukraine No.5177), paras 94-103. .

Article 74

146. Paragraph 4 would be modified so that the term of office of QDCP members is increased from three to six years. This does not seem problematic in itself but there is no accompanying change to the provision allowing for their re-appointment for a second term. This could lead to QDCP members who are prosecutors serving in this capacity for twelve years, i.e., for a major part of their professional career. At the same point, it could lead to at least a perceived and potentially an actual loss of independence as their decision-making could be affected by the prospect of securing re-appointment for such a significant period. A lengthy single term has been seen as a guarantee of the independence of the Prosecutor General and this provides a useful model to follow should the term of office of QDCP members be extended to six years.

147. *The proposed provision should thus be revised to remove the possibility of re-appointment for a second term*.

148. The present provisions on the composition of the QDCP would seem to envisage that all its members leave at the same point. This would have the consequence that there would be a complete loss of continuity and experience each time a QDCP is constituted, which could have a deleterious effect on its functioning. This would be the case even if the possibility of re-appointment was retained. However, a way of ensuring that there was some continuity and that not all experienced members departed at the same time would be to have an arrangement whereby appointments were staggered, with a third being appointed every two years (on the assumption that a six-year term is adopted).

149. *Consideration should thus be given to making provision for staggered appointments of the QDCP's members*.

150. In the course of the consultation concerning the provisions in the Draft Law, it was suggested that the general anti-corruption standards were not applicable to the members of the QDCP, its secretariat and its inspectors. This would certainly not be appropriate.

151. *There is thus a need to ensure that the anti-corruption standards are applicable to the members of the QDCP, its secretariat and its inspectors, insofar as that is not currently the position, notwithstanding that these might not be regarded as falling within the definition of public servants.*

Article 77

152. The comments in the two paragraphs relating to Article 73 are equally applicable to the introduction of paragraph 3^1 into this provision.

153. *The wording of this provision should thus also be rephrased to reflect the actual role of the QDCP.*

154. The proposal to modify paragraph 3 so that a failure to provide information will entail liability instead of being something that is to be addressed through taking legal proceedings to enforce the provision of the information concerned would reverse the Joint Opinion's recommendation that a court order be required before any obligation to provide information can be imposed on persons outside the prosecution service.[36]

155. *The proposed amendment to paragraph 3 should thus not be retained in the Draft Law.*

Article 78

156. The proposed new paragraph 3 would allow for the "impeachment" of, i.e., a no-confidence vote, in the QDCP's Chairman. If adopted, this would have the consequence of terminating the powers of the person concerned as Chairman. However, in view of the significance of such action, it seems inappropriate that there is no requirement that its proposal or adoption is not required to be for a particular reason, such as acting in a manner incompatible with the role or failing to discharge the responsibilities of a Chairman. It also seems inappropriate for the term for which the Chairman is supposed to serve to be no longer specified.

157. *There should thus be a requirement that a motion for impeachment be sought and approved on the basis of the grounds referred to in the preceding paragraph and the proposed deletion of the three-year term for a Chairman should not be maintained*.

158. Furthermore, there is some reason to doubt whether the QDCP is actually the right body to decide on the removal of its own Chairman since there could be a lack of objectivity on the part of the other members, as well as the risk of internal politics becoming a factor in any decision In any event, this is a matter for which the procedure should be specified, including who is entitled to initiate this.

159. *Some consideration should thus be given as to whether the proposed approach is really appropriate. However, whichever approach is adopted, there is also a need for the governing procedure to be specified in this provision.*

Article 79

160. The stipulation in the fourth sentence of paragraph 1 - namely, that the QDCP "shall be provided with all the necessary material means, devices, equipment and other property necessary for the conduct of official activities" – is not really consistent with the specification in the second sentences about the financing of the

[36] Paragraph 170.

QDCP being "at a level ensuring a proper execution" of its powers since the formulation of the former is more absolute in its language and, in any event, it should be for the QDCP to secure the devices, property and so on once it obtains the financing. The present language could lead to unrealistic expectations as to the provision being made available to the QDCP.

161. *These two sentences should thus be harmonised*.

162. Despite the importance attached to the institutional independence of the QDCP, this is not reflected in the provision made for its secretariat in paragraph 2.

163. *It would thus be appropriate to specify in this provision that the QDCP's secretariat should be entirely separate from the hierarchy of the public prosecution service in general and the General Prosecutor's Office in particular*.

164. Paragraphs 3-5 provide for inspectors but fail to address the scope of their actual competences.

165. *The competence of inspectors ought to be specifically governed by the provisions of the draft Law.*

166. The second sentence of paragraph 8 seems unnecessary as the remuneration of QDCP members should be dealt with in the financing of the QDCP as a whole, which has already been dealt with in paragraph 1. Insofar as there might be any doubt about that, this requirement could be spelt out in the latter paragraph.

167. *Paragraph 1 should thus be amended accordingly and the second sentence of paragraph 8 should be deleted*.

168. None of the proposed amendments to this provision make it clear that the secretariat (including) inspectors should be a permanent body so that they do not cease to be employed in it whenever the membership of the QDCP changes. Such a possibility could provide scope for corruption and cronyism. There might not be as high a risk if membership of the QDCP was, as has been suggested, staggered but it would be preferable for this to be explicitly addressed.

169. *There should thus be a provision indicating the permanent nature of the QDCP's secretariat (including inspectors)*.

Article 80

170. Paragraph 2 provides for the statute of the National Academy to be approved by the QDCP and the proposed Article 19^1 and the existing Article 33.2 provide for the QDCP to approve respectively the advanced training for public prosecutors and the programme, curriculum and procedure of the special training for candidate public prosecutors. However, the role of the QDCP and other prosecutorial bodies in relation to the other activities required to be undertaken the National Academy pursuant to paragraph 7 is not prescribed.

171. There is clearly a need for the National Academy to be given some direction by prosecutorial bodies as to its activities so that they adequately serve the requirements of individual public prosecutors and the public prosecution service. Equally, these bodies should have some role in overseeing the performance of the National Academy.

172. *It would thus be appropriate for the relationship between the National Academy and the prosecutorial bodies in respect of determining the substance of all the former's activities, as well as of evaluating the effectiveness of those activities, to be addressed in this provision*.

173. Paragraphs 3 and 4 provide for the QDCP to appoint and dismiss the rector and vice-rectors of the National Academy. However, no criteria or procedure for such appointment or dismissal is specified either in the Law or the provisions of the Draft Law. There is a need to ensure that those appointed can provide the leadership and management of the tasks specified for the National Academy in paragraph 7. The qualities required for these roles should therefore be the basis for all appointments and any dismissal should only occur where there is a failure to perform them satisfactorily or the appointee has acted incompatibly with his or her responsibilities. Furthermore, there should be a fair procedure to be followed before any dismissal decision is taken.

174. *This provision should thus be amended to remedy these omissions*.

D. Conclusion

175. The proposed amendments to the Law on the PPO Law will in many respects assist the purpose of strengthening the independence of the QDCP and the prosecutorial support arrangements.

176. However, the Draft Law has failed to address a number of matters concerning the prosecutorial self-governance and support arrangements on which the Joint Opinion and the GRECO Report have made recommendations.

177. In addition, there are many instances where there is a need for aspects of proposed amendments to be made more explicit or their content be elaborated so that their effect is both clearer and more consistent with European standards.

178. There is also a need to ensure that access to appointments in the Public Prosecutor's Office is not only through taking up a position in a local public prosecutor's office and, in particular, by becoming a public prosecutor's assistant.

179. The proposed arrangements for evaluation require more comprehensive discussion and revision in the light of the considerations expressed above.

180. The right of appeal against QDCP decisions at the outset of the selection process should not be deleted and there ought to be explicit provision made for the

possibility of judicial challenge to the results of proficiency tests and decisions on filling vacancies.

181. The proposed amendment to Article 45 on refusing to examine supposedly abusive complaints seems unnecessary given the existing provisions in the Law on the PPO.

182. In addition, the formulation of the provisions concerning the grounds for imposing disciplinary liability still needs greater precision.

183. There is also a need to avoid in the provisions concerned with conflicts of interest duplication of, and unnecessary divergence from, the rules in the Law on Corruption Prevention.

184. Thus, the adoption of the Draft Law would entail some genuine improvements to the Law on the PPO. However, there are also some significant aspects of the proposed amendments – as well as a good number of matters left unaddressed in them - which will require attention before a revised Law on the PPO can be regarded as entirely consistent with European standards.

185. Finally, consideration should be given to limiting the scope of the Draft Law so that priority is given to issues strictly related to the QDCP, including conceptual aspects of prosecutors' career development and disciplinary matters, as well as prosecutorial support arrangements in general. Other remaining shortcomings in the Law on the PPO, as well as further potential improvements to it, could then be addressed in a separate, more comprehensive set of amendments. This approach could streamline the legislative process and facilitate the Draft Law's adoption.