

EUROPEAN STANDARDS CONCERNING THE IMPOSITION OF DISCIPLINARY LIABILITY ON PROSECUTORS

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A. Introduction

1. This study is concerned with the European standards applicable to the imposition of disciplinary liability on prosecutors.
2. These standards can be derived, firstly, from the rights and freedoms in the European Convention on Human Rights (“the European Convention”), as elaborated in the case law of the European Court of Human Rights (“the European Court”).
3. In addition, they are set out in a number of soft law instruments. These comprise the Recommendation of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system¹, various opinions and a study of the European Commission for Democracy through Law (“the Venice Commission”)², two opinions of the Consultative Council of European Prosecutors (“the CCPE”)³ and recommendations made by the Group of States against Corruption (“GRECO”)⁴.
4. Also relevant for an understanding of the requirements to be observed in disciplinary proceedings are: the UN Guidelines on the Role of Prosecutors of 1990⁵; the standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors in 1999⁶; a guide produced in 2014 by the latter association together with the UN Office on Drugs and Crime on the Status and Role of Prosecutors⁷.

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¹ Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers’ Deputies, (“Recommendation Rec(2000)19”).

² To be found in the *Compilation of Venice Commission Opinions and Reports Concerning Prosecutors*, (CDL-PI(2018)001) and the *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System* (Study No. 494/2008, CDL-AD(2010)040, 3 January 2011 (“*The Prosecution System*”).

³ Namely, Opinion Nos. 4 on “Judges And Prosecutors In A Democratic Society”, (“the Bordeaux Declaration”) and 9 (2014) on European norms and principles concerning prosecutors (“the Rome Charter”).

⁴ In its 4th Evaluation Round, which was concerned with issues relating to the prevention of corruption in respect of members of parliament, judges and prosecutors (“4th Evaluation Round”).

⁵ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (“the United Nations Guidelines”).

⁶ 23 April 1999 (“the IAP Standards”). These were endorsed by the United Nations Commission on Crime Prevention and Criminal Justice (Resolution 17/2, 14-18 April 2008).

⁷ United Nations Office on Drugs and Crime, *The Status and Role of Prosecutors* (2014) (“the UNODC/IAP Guide”).

5. The study first addresses some general considerations regarding disciplinary schemes for prosecutors that have been identified in European and other standards. It then deals, in turn, with the extent to which those standards govern the grounds on which liability can be imposed, the conduct of proceedings to determine whether or not any such ground exists in respect of a particular prosecutor and, where it is established that a disciplinary offence has been committed, the sanctions to which the prosecutor concerned can then be subjected.

B. Some general considerations

6. The general considerations that need to be kept in mind at the outset relate to: the legitimacy of disciplinary proceedings; some limitations on disciplinary action; the relationship to criminal liability; the applicability of Article 6(1) of the European Convention; the relevance of case law not involving prosecutors; disciplinary action against the head of a prosecution service; and quasi-disciplinary action.

Legitimacy of disciplinary proceedings

7. It is important to appreciate that the legitimacy of subjecting prosecutors to disciplinary proceedings is recognised as a necessary consequence of the requirements expected of them in the performance of their functions.
8. In particular, they are expected to act with integrity⁸ and impartiality⁹.

⁸ Thus, the United Nations Guidelines provide that "Persons selected as prosecutors shall be individuals of integrity" (para. 1), the Venice Commission considers that prosecutors should be "suitable persons of high standing and good character" and that "It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone" (*The Prosecution System*, para. 18), the European Guidelines on Ethics and Conduct for Public Prosecutors adopted by the Conference of Prosecutor Generals of Europe ("the Budapest Guidelines") require that public prosecutors "at all times exercise the highest standards of integrity" (Title II) and the IAP Standards require that "Prosecutors shall ... at all times exercise the highest standards of integrity and care" (Title 1). Integrity is also one of the common values for judges and public prosecutors that are identified in the da Vinci Guidelines; Title 1, Chapter 1. European standards concerned with the prevention of corruption and conflicts of interest, addressed in GRECO's 4th Evaluation Round, also underpin the requirement for prosecutors to act with integrity; these are available at <https://www.coe.int/en/web/greco/evaluations>.

⁹ Thus Recommendation Rec(2000)19 specifies that "In the performance of their duties, public prosecutors should in particular: a. carry out their functions fairly, impartially and objectively" (para. 24) and the United Nations Guidelines provide that: "In the performance of their duties, prosecutors shall: (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or other kind of discrimination" (para. 13). Furthermore, having regard to their responsibilities in the criminal process, the Venice Commission has considered that "15. The prosecutor must act fairly and impartially. Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner. It is not the prosecutor's function to secure a conviction at all costs. The prosecutor must put all the credible evidence available before a court and cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case. Where evidence tending to favour the accused cannot be disclosed (for example, because to do so would compromise the safety of another person) it may be the duty of the prosecutor to discontinue the prosecution.16. Because of the serious consequences for the individual of a criminal trial, even one which results in an acquittal, the prosecutor must act fairly in deciding whether to prosecute and for what charges. 17. A prosecutor, like a judge, may not act in a matter where he or she has a personal interest, and may be subject to certain restrictions aiming to safeguard his or her impartiality and integrity. 18. ... Of course, where a prosecutor falls short of the required standard, the impartial judge maybe able to correct the wrong that is done. However, there is no guarantee of

9. Furthermore, prosecutors are expected to act autonomously¹⁰, to preserve professional confidentiality¹¹ and to respect human rights in the conduct of criminal proceedings¹².

such correction and in any event great damage can be caused. It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone”; *The Prosecution System*. In addition, the Budapest Guidelines require that “Public prosecutors should at all times and in all circumstances ... carry out their functions fairly, impartially consistently and expeditiously” (Title I, which is elaborated further in Titles II, III and IV) and the Rome Charter provides that “Striving for impartiality, which in one form or another must govern the recruitment and career prospects of public prosecutors, may result in arrangements for a competitive system of entry to the profession and the establishment of High Councils either for the whole judiciary, or just for prosecutors” (para. 54). Moreover, the IAP Standards provide as regards impartiality that; “Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall: carry out their functions impartially; remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity; have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect; always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness” (Title 3). Also, the UNODC/IAP Guide provides that: Prosecutors have great responsibility, and much is expected of them by society ... the accused expects that the evidence will be carefully considered and the law correctly applied and that where discretion can be used, it is used fairly and impartially”; p. 26. The issue of the impartiality of prosecutors has also been the subject of a Report of the Special Rapporteur on the independence of judges and lawyers; A/HRC/20, 191, 7 June 2012.

¹⁰ Autonomy is not always a quality referred to explicitly but it is implicit in the emphasis placed frequently on the independence of individual prosecutors. Thus, it is a quality that is expected of public prosecutors by Recommendation Rec(2000)19 (“11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out ... 13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that: *a.* the nature and the scope of the powers of the government with respect to the public prosecution are established by law; ... *e.* public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received; *f.* instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs *d.* and *e.* above but also to an appropriate specific control with a view in particular to guaranteeing transparency. 14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law”), the United Nations Guidelines (“4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability”), the Venice Commission (“31. The independence of the prosecution service as such has to be distinguished from any “internal independence” of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees for non-interference from their hierarchical superior”; *The Prosecution System*), the Bordeaux Declaration (“27. The independence of public prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and it is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised (Declaration, paragraphs 3 and 8). Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned”), the Rome Charter (“V. Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability”), the UNODC/IAP Guide (There are times when the

10. Indeed, the CCPE has underlined that

prosecutors must earn the trust of the public by demonstrating in all circumstances an exemplary behaviour. They must treat people fairly, equally, respectfully and politely, and they must at all

decisions made by prosecutors are viewed by some as being neither fair nor popular. The exercise of that discretion must always be made in an independent manner without fear of personal or financial retribution. In order to ensure that prosecutors maintain their independence and not be swayed or intimidated by the threat of liability, guidelines should be put in place to clarify what may constitute behaviour worthy of sanction or protection”) and the IAP Standards (“The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference”; Title 2).

¹¹ Thus, the United Nations Guidelines require that: “In the performance of the duties, prosecutors shall: ... (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise” (para. 13) and the Budapest Guideline state that: “Public prosecutors should at all times adhere to the highest professional standards and ... j. preserve professional confidentiality” (Title II). Furthermore, the European Court observed in a case that concerned the dismissal of the Head of the Press Department of the Prosecutor General’s Office for having disclosed to a newspaper information concerning the commission of a serious offence by the Deputy Speaker of Parliament, that it is “mindful that employees have a duty of loyalty, reserve and discretion to their employer. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion”; *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, at para. 70). Moreover, it observed in *Kudeshkina v. Russia*, no. 29492/05 that: “Disclosure by civil servants of information obtained in the course of work, even on matters of public interest, should therefore be examined in the light of their duty of loyalty and discretion” (para. 85). Furthermore, in *Di Giovanni v. Italy*, no. 51160/06, 9 July 2013, the European Court found no violation of the right to freedom of expression where disciplinary action was taken against a judge for having failed in her duty of respect and discretion *vis-à-vis* members of the National Council of the Judiciary on account of her having given a newspaper interview in which she stated that a member of the examining body for a public competition was opened to recruit judges and public prosecutors had used his influence to help a relative.

¹² See the importance attached by the European Court to public prosecutor in observing the presumption of innocence and the equality of arms and other rights of the defence in cases such as *Khuzhin and Others v. Russia*, no. 13470/02, 23 October 2008, *Moiseyev v. Russia*, no. 62936/00, 9 October 2008 and *Natunen v. Finland*, no. 212022, 31 March 2009. See also the recognition of the European Court of their role in ensuring respect for human rights through ensuring the conduct of thorough and effective investigations into various alleged violations in cases such as *Kaya v. Turkey*, no. 22729/93, 19 February 1998. The responsibility of public prosecutors regarding human rights is also underscored in Recommendation Rec(2000)19, which states that: “In the performance of their duties, public prosecutors should in particular: *b.* respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms” (para. 24). It is also emphasised in the Budapest Guidelines, which provide that: “Public prosecutors should at all times and under all circumstances ... respect, protect and uphold human dignity and human rights ... When acting in the framework of criminal proceedings public prosecutors should at all times: ... *a.* uphold the principle of fair trial as enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Proceedings and the Case-law of the European Court of Human Rights” (Titles I and III). In addition CCPE Opinion No. 11 (2016) on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime, under the heading “Management of cases”, provides that: “A high quality decision or other relevant action by a prosecutor is one which reflects both the available material and the law, and which is made fairly, speedily, proportionally, clearly and objectively. In this respect, it is obvious that prosecutorial actions should, in line with the ECHR and other relevant international instruments, respect the rights of victims, their families and witnesses and be balanced with the rights of the defendants, as well as with the public interest in prosecuting crimes. Therefore, prosecutors should seek to carry out their work in accordance with these principles”. Furthermore, it has been observed that: “Prosecutors are the essential agents of the administration of justice, and as such should respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Prosecutors also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary”; *Report of the Special Rapporteur on the independence of judges and lawyers*, (A/HRC/20, 191, 7 June 2012), para. 93. This quality is also seen in the concept of “loyalty” as defined in the *Guidelines for Initial Training of Judges and Prosecutors* prepared pursuant to a Leonardo da Vinci Partnership Project (“the da Vinci Guidelines”) (“4.4. Loyalty is the value of showing – usually by taking an oath – that one is bound by the rule of law. Loyalty implies two things: on the one hand the duty to exercise the powers entrusted in one and on the other hand the prohibition to exceed them”; Title I).

times adhere to the highest professional standards and maintain the honour and dignity of their profession, always conducting themselves with integrity and care.¹³

11. The existence of arrangements for imposing disciplinary liability on prosecutors is thus a necessary consequence of the need for them to be accountable for their actions and thereby secure the trust of the public.¹⁴

Some limitations on disciplinary action

12. While it is recognised that

there must be provision for public prosecutors – given the substantial powers they enjoy and the consequences that the exercise of those powers can have on individual liberties - to be made liable at disciplinary, administrative, civil and criminal level for their personal shortcomings,

it has also been emphasised that

such provision must be within reasonable limits in order not to encumber the system. The emphasis must therefore be on appeal to a higher level or to an ad-hoc committee and on disciplinary procedures, although individual prosecutors must, like any other individuals, be held responsible for any offences they may commit. Clearly, however, in systems where public prosecutors enjoy full independence, they carry greater responsibility.¹⁵

13. Similarly, although a disciplinary regime is seen as an important component in regulating prosecutorial conduct, it is also considered that such a regime

should not be used to sanction prosecutors for arbitrary or unfounded reasons.¹⁶

14. Thus, it has been underlined that

¹³ Conference of Prosecutors General of Europe, 6th session, European Guidelines on Ethics and Conduct for Public Prosecutors – “The Budapest Guidelines”, CPGE(2005)05, 31 May 2005, item II, cited in Bureau of the Consultative Council of European Prosecutors (CCPE-BU), *Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017*, CCPE-BU(2017)6, para. 32.

¹⁴ “Standards and principles of human rights establish that prosecutors are responsible in the performance of their duties and may be subject to disciplinary procedures”; paragraph 85 of the Explanatory Note to the Rome Charter. See also the *Interim report of the Special Rapporteur on the independence of judges and lawyers*, A/65/274, 10 August 2010; “15. Combating impunity entails bringing the perpetrators of violations to account, whether in criminal, civil, administrative or disciplinary proceedings ... 60. Human rights principles and standards relating to judges, magistrates, lawyers and prosecutors recognize that they have to be accountable in the discharge of their functions and that disciplinary proceeding can be initiated against them”. In addition, see the Updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1, which defines impunity as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims”.

¹⁵ Explanatory Memorandum to paragraph 11 of Recommendation Rec(2000)19, which provides that “States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the Public Prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out”.

¹⁶ The UNODC/IAP Guide, p. 32.

disciplinary action and dismissal, should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review¹⁷

and that

[t]he disciplinary system should be clear and transparent, with well-defined rules.¹⁸

15. Moreover, it needs to be kept in mind when considering recourse to disciplinary measures that these should

rather be an extraordinary measure than a daily management tool¹⁹.

Relationship to criminal liability

16. Although, as noted above, the Explanatory Memorandum to Recommendation Rec(2000)19 indicated disciplinary proceedings were preferable to criminal ones in respect of inappropriate conduct on the part of prosecutors, resort to the latter was not excluded.

17. Moreover, there may be instances where the institution of both disciplinary and criminal proceedings is seen as the necessary response to such conduct.

18. This will not, however, entail a violation of the prohibition of double jeopardy in Article 4 of Protocol No. 4 to the European Convention as disciplinary proceedings for which the most severe sanction is dismissal is not considered to amount to a criminal offence.²⁰ As a result there would not be considered to be any duplication of criminal liability whether the conviction occurred before or following the imposition

¹⁷ Paragraph XII of the Rome Charter, reaffirmed in paragraph 20 of Bureau of the Consultative Council of European Prosecutors (CCPE-BU), *Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017*, CCPE-BU(2017)6. The Explanatory Note states that “52. The appointment and termination of service of prosecutors should be regulated by the law at the highest possible level and by clear and understood processes and procedures. 53. The proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, salaries, discipline and transfer (which must be affected only according to the law or by their consent). For these reasons, it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal”.

¹⁸ The UNODC/IAP Guide, p. 32. See also the stipulation in paragraph 8 of the Bordeaux Declaration that among the minimal requirements for an independent status of prosecutors is that their career development and security of tenure – which necessarily relates to matters of discipline - be safeguarded through guarantees provided by the law. Paragraph 8 does not specifically mention discipline but it is included in paragraph 37 of its Explanatory Note.

¹⁹ *Thematic Directory of the principles for a draft Law on the Public Prosecution Office of Ukraine* (Council of Europe, 2013), para. 81.

²⁰ See, e.g., *Soysever v. Turkey* (dec.), no. 39826/98, 7 November 2000; “The Court notes that the essence of the sanction of discharge imposed to the applicant falls into the field of disciplinary proceedings in the armed forces and addresses itself only to one given group with a particular statute”. See also *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013; “93. ... in the present case the applicant, possessing a special status, was punished for failure to comply with his professional duties – that is, for an offence falling squarely under the disciplinary law. The sanction imposed on the applicant was a classic disciplinary measure for professional misconduct and, in terms of domestic law, it was contrasted with criminal-law sanctions for the adoption of a knowingly wrongful decision by a judge (see Article 375 of the criminal code above)”.

of a disciplinary sanction in respect of the same matter dealt with in the criminal proceedings concerned.²¹

Applicability of Article 6(1) of the European Convention

19. So far there appear to have been no cases before the European Court directly concerned with disciplinary action taken against prosecutors. This undoubtedly a reflection of the fact that it was only relatively recently that the European Court accepted that the right under Article 6(1) of the European Convention to a fair and public hearing in the determination of civil rights was generally applicable to disputes involving the authorities and public servants.²²
20. However, the European Court has since considered that Article 6(1) can be invoked in respect of judges, even if though they are not part of the civil service since they are form part of a typical public service.²³
21. There is no reason to suppose that it would not take a similar view of prosecutors, whatever their formal status might be under the constitution of a country.
22. Nonetheless, it is possible that Article 6(1) might not be regarded as applicable where the sanctions that are or could be imposed do not have a significant impact on the person concerned, so as to lead the proceedings concerned to be regarded as involving a dispute over his or her “civil rights”.
23. Thus, it is well-established that there would be such a dispute where the disciplinary proceedings could lead to the dismissal of the person concerned²⁴ or the early termination of his or her term of office²⁵, where they could result in the loss of a particular post and the transfer to another one²⁶ and where they could lead to a temporary suspension of the ability to pursue the profession concerned²⁷.

²¹ see, e.g., *Luksch v. Austria* (dec.), no. 37075/97, 21 November 2000 and *Müller-Hartburg v. Austria*, no. 47195/06, 19 February 2013 and *Biagioli v. San Marino* (dec.), no. 64735/14, 13 September 2016 as regards the former situation and *Šubinski v. Slovenia* (dec.), no. 48298/13, 13 September 2016 as regards the latter one.

²² In *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007. Article 6(1) will only *not* be applicable where (a) a State in its national law has expressly excluded access to a court for the post or category of staff in question and (b) the exclusion must be capable of being justified on objective grounds in the State’s interest. Access to a court will not be regarded as having been excluded where there is no appeal to a court against the ruling of a disciplinary body if that body itself fulfils the requirements of Article 6(1); *Kamenos v. Cyprus*, no. 147/07, 31 October 2017, at paras. 82-88.

²³ *Olujić v. Croatia*, no. 22330/05, 5 February 2009, at para. 32.

²⁴ See, e.g., *Olujić v. Croatia*, no. 22330/05, 5 February 2009 and *Vanjak v. Croatia*, no. 29889/04, 14 January 2010.

²⁵ See, e.g., *Sturua v. Georgia*, no. 45729/05, 28 March 2017.

²⁶ See, e.g., *Stojakovic v. Austria*, no. 30003/02, 9 November 2006, which concerned an applicant who had been recalled from the post as head of an institute and transferred to another post.

²⁷ See, *W.R. v. Austria*, no. 26602/95, 21 December 1999; “30. Having regard to this recent case-law, the Court observes that in the present case the possible penalties for disciplinary offences under section 12 of the Disciplinary Act 1872 and section 16 of the Disciplinary Act 1990, respectively, included a suspension of the right to practise as a lawyer for up to one year. Thus, the applicant ran the risk of a temporary suspension of his right to practise his profession. Indeed, the Bar Chamber, in the appeal proceedings, requested that a three month suspension be imposed. It follows that the applicant’s right to continue to practise as a lawyer was at stake in the disciplinary proceedings against him. Accordingly, Article 6 § 1 is applicable under its civil head”.

24. There would also be considered to be such a dispute where the outcome would affect the person's eligibility for a particular office or would have serious financial consequences for him or her.²⁸

25. In addition, there is likely to be considered to be a dispute about a person's "civil rights" in the case of a decision to suspend him or her pending the outcome of the disciplinary proceedings insofar as this effectively amounts to their determination.²⁹ The length of the suspension will not be the decisive basis for reaching such a conclusion³⁰; more attention will instead be paid to its actual effect, including the loss of salary and likelihood of considerable delay in a final determination being reached³¹.

See also *Ramos Nunes de Carvalho E Sá v. Portugal*, no. 55391/13, 21 June 2016 (which has been referred to the Grand Chamber), in which a judge had been suspended from her duties for 240 days.

²⁸ E.g., *Harabin v. Slovakia*, no. 58688/11, 20 November 2012; "122. In the present case the situation is different from that in *Olujić*, (cited above) in that the disciplinary proceedings did not lead to the applicant's dismissal. The Court has noted, however, that the conclusion that the applicant had committed a serious disciplinary offence may be of particular relevance to his eligibility to hold a judicial office, as under section 116(3)(b) in conjunction with section 117(7) of the Judges and Assessors Act 2000 a serious disciplinary offence committed by a judge who has earlier been sanctioned for a serious disciplinary offence renders that judge ineligible to continue in office. It is further relevant that the Constitutional Court's finding entailed a 70% reduction of the applicant's yearly salary. Those two factors, taken together, justify the conclusion that the disciplinary proceedings complained of gave rise to a dispute over the applicant's "civil rights". See also, *Tato Marinho dos Santos Costa Alves dos Santos and Figueiredo v. Portugal*, no. 9023/13, 21 June 2016, in which penalties involving the loss of between 25 and 50 days' salary had been imposed on the applicant judges and *Ramos Nunes de Carvalho E Sá v. Portugal*, no. 55391/13, 21 June 2016, in which one of the penalties imposed on a judge had been the loss of 20 days' salary. The latter case has been referred to the Grand Chamber).

²⁹ A change in the European Court's approach to the view taken of such interim measures was effected by its ruling in *Micallef v. Malta* [GC], no. 17056/06, 15 October 2009; "79. The exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same "civil rights or obligations" and have the same resulting long-lasting or permanent effects. 80. Against this background the Court no longer finds it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor is it convinced that a defect in such proceedings would necessarily be remedied at a later stage, namely, in proceedings on the merits governed by Article 6 since any prejudice suffered in the meantime may by then have become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation".

³⁰ This was made clear in *Micallef v. Malta* [GC], no. 17056/06, 15 October 2009 ("85. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable") and was reaffirmed in *Helmut Blum v. Austria*, no. 33060/10, 5 April 2016 ("62. As regards the argument raised by the applicant, the Court reiterates that the length of time the interim measure is or was in force is not decisive when examining if Article 6 will be applicable in the given case (see again *Micallef v. Malta* [GC], cited above, § 85)").

³¹ See *Müller-Hartburg v. Austria*, no. 47195/06, 19 February 2013 ("40. In the present case, the disciplinary authorities ordered that the applicant be struck off the register. Moreover, a temporary ban on practising as a lawyer had been imposed on the applicant as an interim measure while the disciplinary proceedings were pending. There can thus be no doubt that the applicant's right to continue to practise as a lawyer was at stake in the disciplinary proceedings. Consequently, Article 6 § 1 applies under its civil head", In this case, the disciplinary proceedings were delayed pending the outcome of criminal proceedings, with the result that they were pending for almost nine years), *Helmut Blum v. Austria*, no. 33060/10, 5 April 2016 ("63. In the present case, the provisions for interim measures under the Disciplinary Act provided, inter alia, for the withdrawal of

26. It should also be kept in mind that the applicability of Article 6(1) to disciplinary proceedings is determined not by the particular outcome in a case – which may not involve a particularly heavy penalty - but the possibility of those proceedings leading to one of the serious consequences previously discussed.³²

Relevance of case law not involving prosecutors

27. As has been noted³³, there have not been any cases before the European Court in which disciplinary proceedings involving prosecutors have been directly considered. However, the requirements elaborated by it in respect of the many cases determined by it in respect of disciplinary proceedings involving other professionals are of general application and thus of relevance for those concerning prosecutors.
28. Furthermore, it has been recognised by the CCPE that the proximity and complementary nature of the missions of judges and prosecutors creates similar requirements and guarantees in terms of their status and conditions of service, including those with respect to discipline³⁴ and thus the greater elaboration so far by the European Court of requirements governing the discipline of judges will be of especial importance for proceedings taken against.

Disciplinary action against the head of a prosecution service

29. There does not appear to be any position taken by the standards under consideration as to whether the head of the prosecution service should him or herself be amenable to disciplinary proceedings but there is considered that there should be no lack of clarity as to whether or not the possibility of instituting such proceedings against him or her exists.³⁵

the right to act as a representative before certain or all courts or administrative authorities as well as a temporary ban on practising as a lawyer. In the main proceedings, the disciplinary authorities may take measures ranging from a written reprimand to striking off the register (which means a ban on practising as a lawyer for a minimum of three years). The Court considers that in both the main and the injunction proceedings civil rights within the meaning of Article 6 were at stake”) and *Paluda v. Slovakia*, no. 33392/12, 23 May 2017 (in which “the suspension entailed the applicant’s disqualification from the exercise of his office and the withholding of 50% of his salary (see paragraph 10 above), while at the same time he continued to be subject to restrictions such as not being able to engage in gainful activity elsewhere” (para. 50).

³² *A. v. Finland* (dec.), no. 44998/98, 8 January 2004; “In the present case, the applicant was issued a mere warning. No measure withdrawing or affecting his right to exercise his profession was imposed. Nor was the warning made public or any financial consequences shown to have flowed from the warning. Thus, the concrete outcome of the proceedings was not directly decisive for the applicant’s right to continue to exercise his profession. However, it is undisputed that, when the proceedings were started, expulsion from the bar was not impossible. In other words, what was at stake was the applicant’s right to continue to exercise his profession as a member of the bar. The Court therefore assumes that Article 6 is applicable”.

³³ See para. 19 above.

³⁴ This similarity was recognised in paragraph 37 of the Explanatory Note to the Bordeaux Declaration.

³⁵ Thus the Venice Commission has observed that: “Article 50 is concerned with the disciplinary sanctions that may be applied against a public prosecutor and these are appropriate. However, paragraph 1 stipulates that these sanctions may not be applied against the Prosecutor General. This may be appropriate given the wide discretion over his or her removal but this stipulation still leaves it unclear as to whether disciplinary proceedings can nonetheless be instituted against the Prosecutor General, albeit without the possibility of imposing any sanctions. This uncertainty arises because the applicability of Articles 44-49 to the Prosecutor General is not

Quasi-disciplinary action

30. Finally, any action taken in respect of a prosecutor that is of a comparable nature to a disciplinary measure – even though not so formally described³⁶ - will need to take place in a manner consistent with the requirements discussed in the following sections.

C. Grounds for disciplinary action

31. There are no provisions in the European Convention or in any of the soft law standards that address the specific grounds on which disciplinary action might need to be taken against a prosecutor.
32. Nonetheless, the positive obligations arising under the right to life, prohibition of torture and inhuman and degrading punishment or treatment, the prohibition on slavery and forced labour, the right to liberty and security and the right to respect for private and family life under Articles 2, 3, 4, 5 and 8 of the European Convention could require disciplinary action to be taken against a prosecutor in order to protect the rights concerned.³⁷
33. It is also possible that the European Court might recognise positive obligations arising from the right to a fair trial under Article 6 that are relevant for a prosecutor's conduct

explicitly excluded. There is thus a need to clarify the disciplinary liability of the Prosecutor General"; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §137. GRECO in its 4th Evaluation Round recommended in respect of the Czech Republic that the Supreme Public Prosecutor and other chief prosecutors only be recalled (i.e., removed) in the context of disciplinary proceedings; para. 191.xi.

³⁶ The possibility of this occurring has been recognised by both the CCPE ("In introducing transfer or secondment against the will of a prosecutor, either internal or external, the potential risks should be balanced by safeguards provided by law (for example, a transfer which is disguising a disciplinary procedure)" (paragraph 69 of the Explanatory Note to the Rome Charter)) and the Venice Commission ("The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases"; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §76).

³⁷ This might, e.g., be the consequence of a failure to provide the legally obliged prosecutorial supervision over a search operation in a prison in which there was ill-treatment of the prisoners (as in *Karabet and Others v. Ukraine*, no. 38906/07, 17 January 2013) of the way in which criminal proceedings are handled (as in *M.C. v. Bulgaria*, 39272/98, 4 December 2003 in which the prosecutors forwent the possibility of proving the *mens rea* of the alleged perpetrators of a rape by assessing all the surrounding circumstances, such as evidence that they had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, and also by judging the credibility of the versions of the facts proposed by the three men and witnesses called by them, with the result they felt short of the requirements establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse). See also the violation of Article 8 found in *Craxi v. Italy (No.2)*, 25337/94, 17 July 2003 that resulted from the reading out in court by a prosecutor of intercepted telephone conversations and their release to the court's registry, to which the press had access, when this material included private matter not relevant to the proceedings.

of a case for which compliance would depend upon the action of a prosecutor and thereby require at least disciplinary action in certain cases of non-compliance.³⁸

34. At the same time, the taking of disciplinary action against a prosecutor should not be on grounds that conflict with rights under the European Convention that he or she has, such as to freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association.³⁹
35. However, this does not mean that conduct engaging these rights might not in some instances be incompatible with a person's obligations as a prosecutor and thus the taking of disciplinary action in respect of it be viewed by the European Court as an admissible restriction on the particular right concerned.⁴⁰ Nonetheless, in such cases, it will be seen that the application of a disproportionate penalty pursuant to such action would result in the finding that the right has been violated.⁴¹
36. The requirements expected of prosecutors in the performance of their functions previously discussed above⁴² will inevitably provide the main basis for stipulating the grounds on which disciplinary action may be taken against them.
37. Furthermore, breaches of the criminal law will in many instances be either directly incompatible with those requirements or make it untenable for the person concerned

³⁸ The European Court has, e.g., recognised that a court had an obligation to ensure practical and effective respect for the applicant's right to due process in the context of the inadequate legal representation of a defendant; *Czekalla v. Portugal*, no. 38830/97, 10 October 2002. A similar view might, e.g., ultimately be taken of the unjustified failure of a prosecutor to disclose evidence to the defence or to allow a defendant access to his lawyer during an interrogation. Moreover, it should be borne in mind that remarks by a prosecutor have in a number of instances been found to breach an accused person's presumption of innocence; see, e.g., *Khuzin and Others v. Russia*, no. 13470/02, 23 October 2002 and *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010)

³⁹ As, e.g., was found to have occurred in *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008 (which concerned the dismissal of the Head of the Press Department of the Prosecutor General's Office for having disclosed to a newspaper information concerning the commission of a serious offence by the Deputy Speaker of Parliament was considered by the European Court to have violated his right to freedom of expression since the Prosecutor General, although aware of the situation for some six months had shown no sign of having any intention to respond but instead gave the impression that he had succumbed to the pressure that had been imposed on his office and there were no other alternative channels open to the applicant, the disclosure had a bearing on issues such as the separation of powers, improper conduct by a high-ranking politician and the government's attitude towards police brutality which were very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate, the information was genuine, the applicant had no ulterior motive) and *Kayasu v. Turkey (No.1)*, no. 64119/00, 13 November 2008 (in respect of the dismissal of a prosecutor on account of the words used by him in a criminal complaint lodged by him acting as a private citizen against former generals of the army who had been the main instigators of a military coup). See also the finding in *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016 of a violation of the right to freedom of expression as a result of the premature termination by legislation of the mandate of the President of the Supreme Court as a result of the views he had expressed publicly in that capacity.

⁴⁰ As, e.g., in *W.R. v. Austria* (dec.), no. 26602/95, 30 June 1997 (which concerned the reprimand and fine imposed on a prosecutor for having insulted a judge by stating that the latter's legal view was ridiculous) and *Poyraz v. Turkey*, no. 15966/06, 7 December 2010 (which concerned a civil judgment against the applicant for defamation on the basis of a report which he had compiled as chief inspector of the Ministry of Justice and which had been leaked to the press, concerning allegations of professional misconduct on the part of a senior judge).

⁴¹ See paras. 96-98 below.

⁴² See paras. 8-10 above.

to continue to act as a prosecutor⁴³, although this will not necessarily lead to a permanent disqualification from being able to do so⁴⁴. However, it has been suggested that it would not be appropriate to take disciplinary action where a prosecutor has been convicted of an offence that is not especially serious in nature.⁴⁵

38. Moreover, it has been emphasised that any basis for imposing liability should not be concerned with action or inaction on the part of a prosecutor that could be regarded as only trivial in nature.⁴⁶
39. Furthermore, there is seen to be a need for the grounds for imposing disciplinary liability to relate only to the substantive action or inaction of a prosecutor so that they should not be concerned with mere perceptions as to what he or she may have done or failed to do.⁴⁷
40. In addition, it is well-established that the acquittal of someone against whom a prosecutor has brought proceedings should not of itself be the basis for any

⁴³ “Despite careful screening and hiring practices, a prosecutor may be found not to be a fit and proper person to engage in the conduct of prosecutorial duties because of unsatisfactory professional conduct or professional misconduct. In many parts of the world, definitions or guidance as to what constitutes unprofessional conduct or professional misconduct can be found in legislation that governs the prosecution service, in the ethics codes of the judiciary, the law societies or bar associations or other professional associations that govern the profession generally or in case law that establish tests for malicious or negligent prosecutions, for example. Breaches of a country’s criminal law by a prosecutor would obviously be viewed as unprofessional conduct, and if the criminal breach were attributed to conduct such as the trading of information on a file for financial gain, the breach would be professional misconduct as well”; UNODC/IAP Guide, p. 34.

⁴⁴ E.g., a conviction for driving under the influence of alcohol would undoubtedly undermine the authority that a prosecutor might be expected to command in the short term but the possibility of the rehabilitation of his or her standing in the future could not be excluded.

⁴⁵ As has been observed by the Venice Commission: “[...] [A]lthough the specificity of the service might warrant dismissal for almost any offence, this would perhaps be disproportionate in the case of minor administrative offences (e.g., with respect to motoring) [...]”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §137.

⁴⁶ A view expressed by both the Venice Commission (“Article 64 provides that the cutting of salary relates to unauthorised absence. Condemnation is a written notification indicating a fault and can be imposed for conduct harming respect and trust for the official position, discrediting the service by dressing in an inappropriate manner, using state owned instruments for private purposes, ill-treatment towards colleagues and other persons. The risk of abusing disciplinary power has been reduced by the fact that the final decision on disciplinary sanction is now made by the HSYK, but such a risk still remains. It is therefore highly recommended that the regulations on disciplinary sanctions be revised in order to reduce the reasons for such sanctions, to secure proportionality and to limit disciplinary sanctions to severe violations of the duties of [...] a prosecutor”; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §63) and the CCPE (“The CCPE Bureau therefore recommends ... specifying that only very serious and repetitive incompetence cases established through due disciplinary procedure, with a possibility of judicial appeal, may lead to dismissal”; Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3, 25 June 2018, para. 41).

⁴⁷ As has been observed by the Venice Commission: “It seems that causing a perception of something rather than actually doing it are not appropriate criteria for carrying out a serious sanction on a [...] prosecutor. A perception may be entirely wrong and it should be necessary to prove that the [...] prosecutor has engaged in misconduct rather than that some persons think he or she might have done. This is carried to extremes in Article 68(e) which permits a change of location where a judge is deemed to have: “*caused a perception that he has been involved in bribery or extortion even though no material evidence is obtained*”; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §71.

disciplinary liability.⁴⁸ However, this restriction would not preclude action being taken against a prosecutor where his or her failings in the course of a pre-trial investigation or the prosecution itself clearly led to an acquittal.⁴⁹

41. In prescribing disciplinary offences, there is a need for recognition in their formulation of the existence of circumstances that could afford a valid defence to any action or inaction that is otherwise unacceptable.⁵⁰
42. Although the elaboration of specific disciplinary offences may well reflect aspects of provisions in codes of ethics which have been drawn up for many prosecution services⁵¹, it should be borne in mind that the general and exhortative nature of some elements in them might make them an inappropriate basis for disciplinary action.⁵²
43. Also of relevance for any link between disciplinary offences and codes of ethics is that it is essential that the formulation of any grounds for disciplinary action must never be imprecise or vague.⁵³

⁴⁸ See, e.g., the views of the Venice Commission (“Article 44 should explicitly rule out that an acquittal of a person accused by a prosecutor can result in disciplinary proceedings against the prosecutor unless the charges were brought due to gross negligence or maliciously. It seems that because of fear of performance indicators and of disciplinary proceedings prosecutors exert pressure on the judges to avoid acquittals. Currently prosecutors seem to feel obliged to win all cases lest they face disciplinary action. In a democratic system under the rule of law, prosecutors are parties subject to the principle of the equality of arms and necessarily lose cases without this resulting in disciplinary action against them”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §128) and of the CCPE (“In a democratic system under the rule of law, an acquittal of an individual should not result in disciplinary proceedings against the prosecutor responsible for the case”; Explanatory Note to the Rome Charter, para. 86).

⁴⁹ Such as might occur following the unjustified withholding of evidence from the defence or the unjustified restriction on a suspect’s access to legal advice during interrogation.

⁵⁰ Thus, the Venice Commission has observed of one provision that: “[...] Persons who leave their posts without permission or excuse for more than 10 days or who do not attend work for a total of 30 days in the year are deemed to have resigned from the profession. There does not seem to be any exception in this last provision made for persons who are ill and this should be remedied”; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§48-49.

⁵¹ Thus, in its 4th Evaluation Round, GRECO recommended in respect of Azerbaijan that violations of the Prosecutorial Code of Ethical Behaviour be clearly included within the range of the disciplinary offences under the Prosecutor’s Office Act and the Act on Service in the Prosecutor’s Office; para. 128.xvii.

⁵² This seems to have been recognised in a point noted in the draft structure for Opinion No. 13 of the CCPE on Independence, accountability and ethics of prosecutors: “Relations between conduct and discipline. When there is a disciplinary code, there is a repressive aspect not necessarily to be recommended. Ethics has a broader spectrum that must be considered on a daily basis” (CCPE-GT(2018)1Prov3). This does not mean that clarity in the formulation of codes of ethics for prosecutors should not be sought and indeed this is something that has been repeatedly recommended by GRECO in its 4th Evaluation Round, particularly through the use of explanatory comments and/or practical examples; in respect of Albania (para. 146.x), the Czech Republic (para. 191.xii), Denmark (para. 180.vi), Estonia (para. 202.xv), Finland (para. 195.viii), Georgia (para. 204.xiii), Greece (para. 137.xiv), Italy (para. 198.ix), Lithuania (para. 236.xi), Malta (para. 152.viii), Republic of Moldova (para. 189.xvii), Monaco (para. 198.xii), Norway (para. 207.vii), Romania (para. 155.x), Serbia (para. 221.xi), Slovak Republic (para. 149.xii), Slovenia (para. 233.xiii), Sweden (para. 185.viii), Switzerland (para. 291.x), “the former Yugoslav Republic of Macedonia” (para. 251.xiv), Turkey (para. 241.xxi) and Ukraine (para. 273.xxvii).

⁵³ See, e.g., the following view of the Venice Commission (“Article 62 deals with disciplinary violations. Some of these provisions are somewhat vague and potentially dangerous and could perhaps be used to undermine a prosecutor or to control him. Criterion (b) referring to unequal interpretation or application of legislation is particularly dangerous. This seems to be capable of being applied in a very subjective manner. There is a need to distinguish between failure to work and the more subjective assessment of the quality of decisions which are made. If the latter is to be second-guessed unless in a severe case where decisions are patently insupportable

44. However, the European Court has acknowledged the difficulty of avoiding general language in formulating disciplinary offences because otherwise it may not be possible to deal with an issue comprehensively and constant updating may be required to deal with new circumstances. As a consequence, it considers that:

a list of specific behaviours but aimed at general and uncountable application, does not provide a guarantee for addressing properly the matter of the foreseeability of the law.⁵⁴

45. Thus, in tackling the quality of legal regulation and providing adequate legal protection against arbitrariness, the European Court has pointed out that:

it has found the existence of specific and consistent interpretational practice concerning the legal provision in issue to constitute a factor leading to the conclusion that the provision was foreseeable as to its effects (see Goodwin, cited above, § 33). While this conclusion was made in the context of a common-law system, the interpretational role of adjudicative bodies in ensuring the foreseeability of legal provisions cannot be underestimated in civil-law systems. It is precisely for those bodies to construe the exact meaning of general provisions of law in a consistent manner and dissipate any interpretational doubts (see, *mutatis mutandis*, Gorzelik and Others, cited above, § 65).⁵⁵

46. At the same time, it is also important that the gravity of particular offences is clearly indicated as this is essential for determining both the range of sanctions applicable for them and guiding decisions as to their imposition in particular cases.⁵⁶

47. Insofar as any link might be made between disciplinary action and the outcome of the performance evaluation of a prosecutor⁵⁷, this should certainly only occur where the

then there is a problem with the autonomy of the individual concerned” (CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors’ service of Moldova, §52) and “It is important, in light of their independence, that prosecutors have security of tenure. The terms under which they may be sanctioned (even removed from office) should therefore be phrased clearly and unambiguously. [...]” (CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§117, 118 and 120)) and of the CCPE (“As it was already mentioned, the CCPE indicated that the appointment and termination of service of prosecutors should be regulated by law at the highest possible level and by clear and understood processes and procedures.. Incompetent performance as a ground for dismissal seems to be a very broad and vague concept and it may be understood and interpreted in an arbitrary manner, opening the door for politically motivated or otherwise biased dismissals under the pretext of “incompetent performance”; Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3, 25 June 2018, para. 40). In its 4th Evaluation Round, GRECO recommended that disciplinary offences be defined clearly or more precisely in Georgia (para. 204.xv), Monaco (para. 198.xiv), Portugal (para. 189.xv), “the former Yugoslav Republic of Macedonia” (para. 251.xvi) and Ukraine (para. 273.xxix). It also recommended that the disciplinary arrangements in general be defined more clearly in Luxembourg; para. 159.xiv.

⁵⁴ *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, at para. 178.

⁵⁵ *Ibid*, at para. 179. The need for the publication of case law arising from disciplinary proceedings has also been recommended by GRECO in its 4th Evaluation Round; in respect of Andorra (para. 182.xii), Belgium (para. 175.xv), Montenegro (para. 137.x) and Switzerland (para. 291.xii). See also its recommendation that to create a compendia of rules of conduct be established by Belgium (para. 175.xiii) and Germany (para. 252.viii).

⁵⁶ Thus, the Venice Commission has observed that: “In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity”; CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 120.

latter actually discloses a prescribed disciplinary offence meeting the all the foregoing requirements. It seems improbable that a mere negative performance evaluation could provide a sufficient basis for disciplinary proceedings as such an evaluation could be attributable to factors that do not involve any misconduct and for which the more appropriate response would be the taking of certain remedial measures, in, particular, training.

48. Finally, there several issues regarding the extent of the period for which liability in respect of the commission of a disciplinary offence can endure and thus how long before it ceases to be possible to bring proceedings regarding it.
49. Thus, the Venice Commission has drawn attention to the possibility that – having regard to the circumstances surrounding the commission of disciplinary offences – a short limitation period may be inappropriate.⁵⁸ This is also the view of GRECO.⁵⁹
50. Furthermore, it should also be noted in this connection that the European Court has considered that a time-bar should not apply to crimes involving torture and inhuman treatment⁶⁰ and it is possible that a similar view might be taken of disciplinary liability in respect of such misconduct.
51. However, as regards disciplinary offences not involving such a serious violation of human rights, the position of the European Court is clear that legal certainty requires the stipulation of some limitation period.⁶¹

⁵⁷ The Venice Commission has observed that: “As an objective basis for disciplinary action, a performance evaluation system should be introduced in the Law. Such a system should provide for objective criteria for evaluation and include necessary guarantees for appeals against negative evaluations”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §127.

⁵⁸ Thus, it observed of a provision in a draft law that: “The 3 years extension of disciplinary liability for the violations mentioned under Article 39 (b), (c) and (e) is problematic. Firstly, because of the vagueness of the formulation of the violations concerned (see comments below). Secondly, the focus is on the nature of the violations rather than the reasons for disciplinary action not being taken before the regular time-limit of one year. Such reasons may include deliberate concealment or cases where the facts only come to light in judicial proceedings (especially ones in which a miscarriage of justice is established) at a later date. It is only these latter considerations which should justify a departure from the limitation period; CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§116, 122 and 123.

⁵⁹ This was the subject of recommendations in its 4th Evaluation Round in respect of Azerbaijan (para. 128.xxi), Poland (para. 224.xv) and Ukraine (para. 273.xxx). In the case of Poland, the possibility of interrupting or suspending the limitation period in specified circumstances was particularly recommended.

⁶⁰ See, e.g., *Abdulsamet Yaman v. Turkey*, 32446/96, 2 November 2004, *Beganović v. Croatia*, no. 46423/06, 25 June 2009 and *Valiuliene v. Lithuania*, no. 33234/07, 26 March 2013.

⁶¹ See *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013; “137. The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 51, Reports 1996-IV). Limitation periods are a common feature of the domestic legal systems of the Contracting States as regards criminal, disciplinary and other offences. 138. As to the applicant’s case, the facts examined by the HCJ in 2010 dated back to 2003 and 2006 (see paragraphs 17-18 above). The applicant was therefore placed in a difficult position, as he had to mount his defence with respect to events, some of which had occurred in the distant past. 139. It appears from the HAC’s decision in the applicant’s case and the Government’s submissions that domestic law does not provide for any time bars on proceedings for dismissal of a judge for “breach of oath”. While the Court does not find it appropriate to

52. However, so far, there is no guidance in European standards as to whether or not it ought to be possible - as has been the practice in some countries – for someone to escape the imposition of disciplinary liability entirely through resigning before disciplinary proceedings are instituted or they have reached a conclusion.

D. Conduct of disciplinary proceedings

53. The manner in which disciplinary proceedings is something addressed in some detail in the case law of the European Court regarding Article 6(1) of the European Convention, albeit not specifically with regard to prosecutors. However, the conduct of such proceedings is the specific focus of various European and international soft law standards. There is a good deal of coincidence between the requirements emerging from these two sources but certain points are only found one or other of them.

54. The starting point is that, as has already been seen⁶², disciplinary proceedings will in most instances need to fulfil the requirements of Article 6(1) to a fair hearing and the need for fairness in the conduct of such proceedings is echoed in many soft law standards⁶³.

indicate how long the limitation period should be, it considers that such an open-ended approach to disciplinary cases involving the judiciary poses a serious threat to the principle of legal certainty. 140. In these circumstances, the Court finds that there has been a violation of Article 6 § 1 of the Convention in this respect”. It is doubtful that the specific reference to the judiciary in connection with legal certainty was meant to be exclusive as the underlying problem is the difficulty in responding to allegations a long time after the events in question. Previously, in *Luksch v. Austria* (dec.), no. 37075/97, the fact that the relevant disciplinary law for accountants did not contain rules on limitation had not been considered by the European Court to disclose any appearance of a violation of Article 6(1).

⁶² See paras. 19-26 above.

⁶³ See Recommendation Rec(2000)19 (“5. States should take measures to ensure that: ... *e.* disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review”), the United Nations Guidelines (“21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review. 22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines”), the CCPE (“Given their important role and function, the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities. All guarantees attached to the disciplinary procedures should apply” and “States should take measures to ensure that disciplinary proceedings against prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review”; paragraphs 72 and 87 of the Explanatory Note to the Rome Charter) and the IAP Standards (“Article 6 In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled: ... 6.6 to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards; 6.7 to objective evaluation and decisions in disciplinary hearings”).

55. In elaborating what is entailed by these requirements, this section considers first the aspects relating to the body that conducts the disciplinary proceedings and then the ones dealing with the procedure to be followed.

The disciplinary body

56. It is well-established that conferring on a professional disciplinary body – as opposed to a court - the role of determining whether or not a disciplinary offence has been committed and then imposing some penalty where one is found to have been committed will not, in itself, be inconsistent with the requirements of Article 6(1).
57. However, where this is the approach adopted, the professional disciplinary body must either fulfil the requirements of Article 6(1) itself or its rulings must then be subject to subsequent review by a judicial body that (a) has full jurisdiction or provides sufficient review over the case that the body has determined and (b) provides the guarantees which are expected to be observed by this provision of the European Convention.⁶⁴

⁶⁴ In the case of *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013 the review provided by the High Administrative Court (“HAC”) was found not to be sufficient: “125. Firstly, the question arises whether the HAC could effectively review the decisions of the HCJ and Parliament, given that the HAC had been vested with powers to declare these decisions unlawful without being able to quash them and take any further adequate steps if deemed necessary. Even though no legal consequences generally arise from a decision being declared unlawful, the Court considers that the HAC’s inability to formally quash the impugned decisions and the absence of rules as to the further progress of the disciplinary proceedings produces a substantial amount of uncertainty about what the real legal consequences of such judicial declarations are. 126. The judicial practice developed in this area could be indicative in this respect. The Government submitted copies of domestic court decisions in two cases. However, these examples show that after the HAC had declared the judges’ dismissal unlawful, the claimants had had to institute separate proceedings for reinstatement. This material does not shed light on how disciplinary proceedings should be conducted (in particular, the steps which should be taken by the authorities involved after the impugned decisions have been declared unlawful and the time-limits for those steps to be taken) but squarely suggests that there is no automatic reinstatement in the post of judge exclusively on the basis of the HAC’s declaratory decision. Therefore, the material provided indicates that the legal consequences arising from the HAC’s review of such matters are limited and reinforces the Court’s misgivings about the HAC’s ability to handle the matter effectively and provide a sufficient review of the case. 127. Second, looking into the manner in which the HAC arrived at its decision in the applicant’s case and the scope of the dispute, the Court notes that important arguments advanced by the applicant were not properly addressed by the HAC. In particular, the Court does not consider that the applicant’s allegation of a lack of impartiality on the part of the members of the HCJ and of the Parliamentary Committee was examined with the requisite diligence. The Government’s assertions in this respect are not convincing. 128. Furthermore, the HAC made no genuine attempt to examine the applicant’s contention that the parliamentary decision on his dismissal had been incompatible with the Status of Members of Parliament Act 1992 and the Rules of Parliament, despite the fact that it had competence to do so (see Article 171-1 §§ 1 and 5 of the Code of Administrative Justice, cited in paragraph 62 above) and the applicant clearly raised the matter in his claim and submitted relevant evidence (see paragraphs 29 and 33 above). No assessment of the applicant’s evidence was made by the HAC. Meanwhile, the applicant’s allegation of the unlawfulness of the voting procedure in Parliament was further reinterpreted as a claim about the unconstitutionality of the relevant parliamentary resolution. By proceeding in this manner, the HAC avoided dealing with the issue in favour of the Constitutional Court, to which the applicant had no direct access (see *Bogatova v. Ukraine*, no. [5231/04](#), § 13, 7 October 2010, with further references). 129. Therefore, the Court considers that the review of the applicant’s case by the HAC was not sufficient and thus could not neutralise the defects regarding procedural fairness at the previous stages of the domestic proceedings”. In this case, the HAC also failed to provide the guarantees required under the European Convention since “the judicial review was performed by judges of the HAC who were also under the disciplinary jurisdiction of the HCJ. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ’s independence and impartiality (as examined above), the Court is not

58. The second approach has been often used and it has thus shaped some of the stipulation found in the soft law standards.⁶⁵

persuaded that the judges of the HAC considering the applicant's case, to which the HCJ was a party, were able to demonstrate the "independence and impartiality" required by Article 6 of the Convention" (para. 130). See also the conclusion about the insufficiency of the review of disciplinary decision by a court reached in *Ramos Nunes de Carvalho E Sá v. Portugal*, no. 55391/13, 21 June 2016 (now referred to the Grand Chamber): "86. In the instant case the question that arises is whether the scope of the review conducted by the Supreme Court of Justice in respect of the HCJ's disciplinary powers was sufficient. The applicant disputed the facts as established by the HCJ. She contended that she had not called Judge H.G. a "liar" nor had she, in the course of her conversation with Judge F.M.J., asked him to discontinue the proceedings against the witness on her behalf. Both situations concerned questions of fact that were crucial to the outcome of the two sets of disciplinary proceedings against her. The applicant never had an opportunity to have the Supreme Court of Justice re-examine these decisive facts (see Tsfayo, cited above, § 48), the first of which was, moreover, disputed between the members of the HCJ (see paragraph 16 above). Hence, the Court notes that the Supreme Court of Justice confined itself to conducting a review of lawfulness with regard to the establishment of the facts (see, conversely, *A. Menarini Diagnostics S.r.l. v. Italy*, no. [43509/08](#), § 64, 27 September 2011). It is clear from the manner in which the Supreme Court of Justice arrived at its decision in the applicant's case, and from the subject-matter of the dispute, that it did not properly address important arguments advanced by the applicant (see, mutatis mutandis, *Oleksandr Volkov*, cited above, § 127). 87. As regards the review of the legal issues, the Court notes that, in the view of the Supreme Court of Justice, the HCJ's powers did not come within the scope of the courts' review where the disciplinary body was ruling on conduct alleged to be incompatible with a judge's duty of diligence. Furthermore, with regard to the extent of the powers of the Judicial Division of the Supreme Court of Justice, the Government maintained that it was not for the highest court to encroach on the discretionary powers of the administrative authorities (see paragraph 40 above). The Court notes that the appeal body reviews, from the perspective of lawfulness in the broad sense, compliance with Article 266 § 2 of the Constitution, which states that the administrative authorities must exercise their powers in accordance with, among other principles, the prohibition on acting in excess of those powers (see paragraph 40 above). The Court concludes from this that the Supreme Court of Justice adopts a restrictive approach to the scope of its own jurisdiction to review the disciplinary activities of the High Council of the Judiciary. 88. The judicial practice developed in this area is indicative in this regard (see paragraphs 33 and 40 above). Thus, the foregoing considerations indicate that the legal consequences arising from the Supreme Court of Justice's review of such matters are limited, and these considerations reinforce the Court's misgivings about that court's ability to handle the matter effectively and provide a sufficient review of the case (see, mutatis mutandis, *Oleksandr Volkov*, cited above, § 126). 89. The Court therefore considers that the review conducted by the Supreme Court of Justice in the applicant's case was insufficient".

⁶⁵ See, e.g., the Explanatory Memorandum to Rec(2000)19 ("As to disciplinary decisions (*e*), it should at the end of the day be possible for prosecutors to submit them to review by an independent and impartial entity. However, this is not meant to prevent the requirement of previous administrative or hierarchical review") and the observations made by the Venice Commission as to the need for a right of appeal ("[...] Given the power of the disciplinary commissions to dismiss a [...] prosecutor, an appeal to a court of law would be essential, at least for cases where a serious penalty was imposed" (CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §110) and "An appeal to a court against disciplinary sanctions should be available" (*The Prosecution System*, para. 52)) and that this should preferably be rehearing rather than review ("This Article provides for the right of the prosecutor, subject to disciplinary sanction, to appeal to the Administrative Court. However, the basis for the exercise of this right is not clear. Is it a right to a rehearing – which is preferable – or is it purely procedural review?"; CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §38). See also the views of CCPE ("States should take measures to ensure that disciplinary proceedings against prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review"; paragraph 87 of the Explanatory Note to the Rome Charter), the United Nations Office on Drugs and Crime ("A decision of a disciplinary hearing should also be subject to appellate review should either party see fit"; the UNODC/IAP Guide, p.32) and of the Special Rapporteur on the independence of judges and lawyers ("70. Given their important role and function, the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities.⁴⁴ There should be a framework for dealing with internal disciplinary matters and complaints against prosecutors, who should in any case have the right to challenge – including in court – all decisions concerning their career, including those resulting from disciplinary proceedings"; Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/20/19, 7 June 2012). In addition, Article 21 of the United

59. Nonetheless, national practice and the recommendations of the bodies responsible for developing the soft law standards have increasingly focused on the use of the first approach.⁶⁶
60. Whether or not a particular professional disciplinary tribunal fulfils the requirements of Article 6(1) is a matter of fact in each case but useful guidance as to the approach to be followed in determining this issue can be seen in the recent ruling of the European Court in respect of the Supreme Council of Judicature in Cyprus, of which it said

86. The SCJ is composed of all thirteen judges of the Supreme Court. Pursuant to Article 153 § 8 of the Constitution the proceedings before the SCJ are of a judicial nature and the judge concerned is entitled to be heard and present his case to it. The practice and procedure to be followed in disciplinary proceedings against judges are set out in detail in the relevant Procedural Rules. Rule 13 secures for the judge against whom proceedings have been taken all the rights provided for under Articles 12 § 5 and 30 of the Constitution, which provide equivalent safeguards to Articles 6 §§ 1, 2 and 3 of the Convention (see paragraphs 46 and 47 above). The SCJ holds hearings, summons and hears witnesses, assesses evidence and decides the questions before it with reference to legal principles.

87. In those circumstances, the Court finds that the disciplinary proceedings were conducted before a court.⁶⁷

61. What is particularly important about the observations of the European Court was the emphasis on the procedures to be followed rather than the members of the Supreme Council of Judicature being judges. This is because the European Court does not require the members of a court to be professional judges; they can be lay persons, civil servants and even members of the armed forces so long as they comply with the requirements of independence and impartiality under Article 6(1) of the European Convention.⁶⁸

Nations Guidelines provides that: “21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review”. In addition, GRECO in its 4th Evaluation Round recommended that a right of appeal to a court against disciplinary decisions be introduced by the Czech Republic (para. 191.xiv) and Turkey (para. 241. xv). It also recommended that Spain develop “a specific regulatory framework for disciplinary matters in the prosecution service, which is vested with appropriate guarantees of fairness and effectiveness and subject to independent and impartial review” (para. 169.xi)

⁶⁶ See, e.g., *The Prosecution System* (“64. A Prosecutorial Council is becoming increasingly widespread in the political systems of individual states. A number of countries have established prosecutorial councils but there is no standard to do so”) and the Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3 (“Both the CCPE and Venice Commission have underlined that setting up a Prosecutorial Council is a very welcome step towards depoliticisation of a Prosecutor’s Office”; para. 45). See also GRECO’s recommendation in its 4th Evaluation Round that disciplinary proceedings in respect of prosecutors in be handled outside the immediate hierarchical structure of the prosecution service in Hungary (para. 222.xvii) and the Russian Federation (para. 294.xxi).

⁶⁷ *Kamenos v. Cyprus*, no. 147/07, 31 October 2017

⁶⁸ See, e.g., *Langborger v. Sweden* [P], no. 11179/84, 22 June 1989, *Ettl and Others v. Austria*, no. 9273/81, 23 April 1987 and *Engel and Others v. Netherlands* [P], no. 5100/71, 8 June 1976.

62. Moreover, despite approval being given to prosecutorial disciplinary bodies whose membership is restricted to prosecutors⁶⁹, European soft law standards increasingly see a less exclusive approach as being more appropriate, with membership being extended to persons such as lawyers, legal academics and members of civil society⁷⁰.
63. However, these standards still suggest that either the majority of members of such prosecutorial disciplinary bodies should be prosecutors⁷¹ or that they cannot be outvoted⁷².

⁶⁹ See, e.g., this view of the Venice Commission: “[...] Article 65.6 of the draft Law sets out that in proceedings against judges, the commissions should be composed of judges, while in proceedings against prosecutors, it shall consist of prosecutors – this solution is to be welcomed. [...]”; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §95.

⁷⁰ See, e.g., the following views of the Venice Commission, the CCPE and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR): “65. If they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors. 66. Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics” (*The Prosecution System*); “[...] [I]t would be preferable that disciplinary decisions be made by a small body none of whose members is also on the Prosecutorial Council, and which would contain an element of independent outside participation. Should the proposed scheme be maintained, it would be advisable to specify, in line with Article 136 of the Constitution (stressing the autonomy of the state prosecution), that the Chair of the Prosecutorial Council entrusted with disciplinary decisions, as well as the Chair of the Disciplinary panel, must be lay members, not state prosecutor members [...]”; CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §100; “33. The main novelty of Article 1 of the Draft Law is the establishment of the Prosecutorial Council, via the new Article 81, which is a very welcome step towards depoliticisation of the Prosecutor’s Office. In addition, it is very important that the Prosecutorial Council is conceived as a *pluralistic body*, which includes MPs, prosecutors, members of civil society and a Government official” Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039); and “This Amendment establishes that the “HPC shall have eleven members: four deputy public prosecutors elected by public prosecutors and deputy public prosecutors, five prominent lawyers elected by the National Assembly, the Supreme Public Prosecutor of Serbia and the minister in charge of the judiciary. Both the CCPE and Venice Commission have underlined that setting up a Prosecutorial Council is a very welcome step towards depoliticisation of a Prosecutor’s Office and therefore, it is very important that it is conceived as a pluralistic body, which includes prosecutors, members of civil society and a government official. In order to ensure the neutrality of this body, the independence of the Prosecutorial Council and its members should be clearly stipulated”; Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3, paras. 46-47.

⁷¹ See, e.g., the following views of the Venice Commission, the CCPE and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR): “It is welcome that a significant number of members of the Council are prosecutors elected by their peers (four out of nine) and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. Notably, in one of its previous opinions the Venice Commission noted that “the balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers [...] seems appropriate” (See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, para 36) and “The Venice Commission has also pointed out in particular that if such councils are

composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input into the appointment and disciplinary process and thus to shield prosecutors, at least to some extent, from political influence. Moreover, in one of its previous opinions, the Venice

64. This is also the approach now being taken by the European Court, at least in the case of bodies dealing with the disciplining of judges where the majority of members are drawn from or appointed by executive and legislative bodies, leading to doubts considered to be well-founded as to the independence and impartiality of the bodies concerned.⁷³

Commission noted that the balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers, seems appropriate. In light of the above, the Bureau of the CCPE recommends reconsidering the composition of the HPC and making sure that it is composed of a majority, at least slight, of prosecutors from all levels of the prosecution service, and that the other part includes lawyers, legal academics and members of civil society, while there remains only one member from the executive power” (Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3, paras. 45-48). This is also a recommendation made by GRECO in its 4th Evaluation Round; in respect of Armenia (para. 233.xiii), Bulgaria (para. 153.xiv) and Ukraine (para. 273.xxiii).

⁷² “If members of such a council were elected by Parliament, preferably this should be done by qualified majority. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other’s appointment and disciplinary proceedings because due to their ‘daily prosecution work’ prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings. In such a case, the Council could be split in two chambers, like in France, where the *Conseil supérieur de la magistrature* sits in two chambers, which are competent for judges and prosecutors respectively’, *The Prosecution System*, para. 66.

⁷³ See *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013; “109. The Court has held that where at least half of the membership of a tribunal is composed of judges, including the chairman with a casting vote, this will be a strong indicator of impartiality (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 58, Series A no. 43). It is appropriate to note that with respect to disciplinary proceedings against judges, the need for substantial representation of judges on the relevant disciplinary body has been recognised in the European Charter on the statute for judges (see paragraph 78 above). 110. The Court notes that, in accordance with Article 131 of the Constitution and the HCJ Act 1998, the HCJ consists of twenty members, who are appointed by different bodies. However, what should be emphasised here is that three members are directly appointed by the President of Ukraine, another three members are appointed by the Parliament of Ukraine, and another two members are appointed by the All-Ukrainian Conference of Prosecutors. The Minister of Justice and the Prosecutor General are ex officio members of the HCJ. It follows that the effect of the principles governing the composition of the HCJ, as laid down in the Constitution and developed in the HCJ Act 1998, was that non-judicial staff appointed directly by the executive and the legislative authorities comprised the vast majority of the HCJ’s members. 111. As a result, the applicant’s case was determined by sixteen members of the HCJ who attended the hearing, only three of whom were judges. Thus, judges constituted a tiny minority of the members of the HCJ hearing the applicant’s case (see paragraph 24 above). 112. It was only in the amendments of 7 July 2010 that the HCJ Act 1998 was supplemented with requirements to the effect that ten members of the HCJ should be appointed from the judicial corps. These amendments, however, did not affect the applicant’s case. In any event, they are insufficient, as the bodies appointing the members of the HCJ remain the same, with only three judges being elected by their peers. Given the importance of reducing the influence of the political organs of the government on the composition of the HCJ and the necessity to ensure the requisite level of judicial independence, the manner in which judges are appointed to the disciplinary body is also relevant in terms of judicial self-governance. As noted by the Venice Commission, the amended procedures have not resolved the issue, since the appointment itself is still carried out by the same authorities and not by the judicial corps (see paragraphs 28-29 of the Venice Commission’s Opinion, cited in paragraph 79 above). 113. The Court further notes that in accordance with section 19 of the HCJ Act 1998, only four members of the HCJ work there on a full-time basis. The other members continue to work and receive a salary outside the HCJ, which inevitably involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality. In particular, in the case of the Minister of Justice and the Prosecutor General, who are ex officio members of the HCJ, the loss of their primary job entails resignation from the HCJ”. See also the finding in *Ramos Nunes de Carvalho E Sá v. Portugal*, no. 55391/13, 21 June 2016 that the independence and impartiality of the High Council of the Judiciary could be open to doubt where, even though judges had formed a majority of the members of the formation having examined the cases, judges had been in the minority during the deliberations that led to the relevant determinations. The European Court also noted with

65. Similar concerns would undoubtedly be considered justified by the European Court were the majority of members of a prosecutorial disciplinary body drawn from or appointed by executive and legislative bodies.
66. Apart from the considerations just discussed, the need for the members of a disciplinary tribunal to satisfy the requirement of independence will not, in the view of the European Court, be fulfilled where they are subject to the possibility of removal during their mandate or to any form of hierarchical dependence.⁷⁴ However, the European Court will not regard independence as being in question simply because those serving on the disciplinary body are still members of the relevant profession.⁷⁵
67. The need for independence in the composition and operation of a prosecutorial disciplinary body has also been emphasised by the Venice Commission on a number of occasions.⁷⁶ It is also a concern of GRECO.⁷⁷
68. A lack of impartiality of members of the disciplinary body deciding a particular case will be established for the purpose of Article 6(1) where, apart from them acting with actual personal bias⁷⁸ against the person being disciplined, that has an objective basis for his or her fears that they will not act impartially on account of factors such as their earlier involvement in the matter, their expression of an opinion regarding the

concern that the law did not provide for any particular requirement regarding the qualifications of non-judicial members of the High Council of the Judiciary. This case has been referred to the Grand Chamber. See also GRECO's recommendation in its 4th Evaluation Round that a disciplinary process be established in Turkey "guided by objective criteria without undue influence from the executive powers"; para. 241.xv.

⁷⁴ Neither was found to be established in either *Ouendeno v. France* (dec.), no. 39996/98, 9 January 2001 or *Gubler v. France*, no. 69742/01, 27 July 2006.

⁷⁵ See *Di Giovanni v. Italy*, no. 51160/06, 9 July 2013, which concerned judges serving on the National Council of the Judiciary who had decided disciplinary proceedings in respect of the applicant judge.

⁷⁶ See, e.g., the following observations: "[...] However, disciplinary measures should not be decided by the superior who is thus both accuser and judge, like in an inquisitorial system. Some form of prosecutorial council would be more appropriate for deciding disciplinary cases"; CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §77; "[...] [S]ince the disciplinary plaintiff is elected after obtaining the opinion of the session of the Supreme State Prosecution Office, among its prosecutors, one may wonder how objective the disciplinary plaintiff is likely to be where the complainant is the Supreme State Prosecutor. An alternative may be, to ensure complete autonomy and independence to the 'disciplinary plaintiff', that she/he be not a state prosecutor of the Supreme State Prosecution Office and be not elected 'after obtaining the opinion of the session of the Supreme State Prosecution Office'; CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §99; "As regards the Disciplinary Committee, it is welcome that Article 114 now provides that the president of the Committee must be a lawyer member of the Prosecutorial Council [...]. The new provision enhances the credibility and democratic legitimation of the disciplinary procedure while at the same times minimising the risk that the objectivity of the process is questioned. Under the draft, however, the members of the Committee are appointed on the nomination of the Supreme Public Prosecutor (in the capacity of President of the Council). For the reasons explained above, this remains a problematic solution and should be reconsidered"; and "The new paragraph 3 of Article 114 provides that the Supreme Public Prosecutor shall not be a member of the Disciplinary Committee. [...] [t]his appears to be a desirable provision [...]" CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §§52- 54.

⁷⁷ Thus, in its 4th Evaluation Round, it recommended that the operational independence of the Judicial Service Commission – which is concerned with disciplinary proceedings against prosecutors – be enhanced; para. 198.vii.

⁷⁸ As to which, see *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005.

matter under consideration or their possible interest in the outcome of the proceedings.⁷⁹

69. The possibility of the impartiality requirement not being satisfied has also been the focus of observations by the Venice Commission with respect to draft legislation dealing with prosecutorial disciplinary bodies.⁸⁰ It has also been a concern expressed by GRECO.⁸¹
70. The European Court has not had the occasion to rule on the need for a possibility to challenge a member of a disciplinary body where the person being disciplined is concerned about a lack of impartiality but such a requirement is implicit in its finding that the failure to uphold a challenge resulted in the body being composed of persons about whom there was an objective basis for fearing that they would not act impartially.⁸² The importance of having a specific provision allowing for members of a prosecutorial disciplinary body to be challenged for possible bias by the person being disciplined has also been emphasised by the Venice Commission.⁸³
71. Finally, in order to fulfil the requirements of Article 6(1) of the European Convention, a prosecutorial disciplinary body dealing with a particular case should always be constituted in accordance with the specific legal provisions governing this, including those relating to the term of office of its members. Any failure in this regard will

⁷⁹ One or more of such factors were found to be present in, e.g., *Gautrin and Others v. France*, no. 21257/93, 20 May 1998, *Olujić v. Croatia*, no. 22330/05, 5 February 2009, *Harabin v. Slovakia*, no. 58688/11, 20 November 2012 and *Sturua v. Georgia*, no. 45729/05, 28 March 2017.

⁸⁰ “[...] [S]ince a [disciplinary] complaint may be initiated by a person who is a member of the Council or represented on the Council, there should be a provision excluding such a person from participating in the ensuing proceedings”; CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §96. “[...] If a member of the Superior Council of Prosecutors has initiated the proposal [for disciplinary proceedings] then clearly that person should not vote on the proposal or take part in the decision made by the Superior Council. However, the present text does allow him or her to vote [...] and it seems that this would be the case even for the person accused. It is important to ensure that people who can initiate disciplinary proceedings do not themselves participate in making the decision as it is necessary that such decisions are made by a fair and impartial tribunal even though there is an appeal to the Superior Council and thereafter to the courts”; CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors’ service of Moldova, §66.

“[T]he same issue of impartiality does arise in a different form as there is no provision precluding the SCP member who has initiated disciplinary proceedings from taking part in the determination of an appeal against a decision of the Disciplinary Board. Disciplinary proceedings may also be taken against members of the Superior Council. If any such member appeals a decision against him/herself taken by the Disciplinary Board, the Draft Law should prevent him/her from hearing the case against him/herself, so as to avoid any threats to the impartiality required of members of the Superior Council. [...]”;

⁸¹ Thus, in its 4th Evaluation Round, it recommended in respect of the Republic of Moldova that “appropriate measures be taken to ensure that the composition and operation of the Superior Council of Prosecutors be subject to appropriate guarantees of objectivity, impartiality and transparency, including by abolishing the ex officio participation of the Minister of Justice and the President of the Superior Council of Magistracy”; para. 189.xv.

⁸² As was the case, e.g., in *Harabin v. Slovakia*, no. 58688/11, 20 November 2012.

⁸³ “The Draft Law should also be amended to include a provision that allows a challenge to the member of the agency performing disciplinary proceedings and his or her recusal in cases when there are reasons for doubts concerning his or her impartiality”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §§135 and 136.

result in the body concerned not being a “tribunal established by law” for the purposes of Article 6(1).⁸⁴

Procedures to be followed

72. The specific requirements to be followed in the conduct of disciplinary proceedings in order to comply with Article 6(1) are extensive.
73. In the first place, there is the need for the person subject to the disciplinary proceedings to know the case that he or she has to meet. This will necessitate, in particular, the disclosure of documents on which the allegations against him or her are based.⁸⁵
74. The importance of the prosecutor knowing the case against him or her has also been emphasised by the Venice Commission⁸⁶ and the United Nations Office on Drugs and Crime.⁸⁷

⁸⁴ As was found to have occurred in *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013; “152. As to the instant case, it should be noted that, by virtue of Article 171-1 of the Code of Administrative Justice, the applicant’s case could be heard exclusively by a special chamber of the HAC. Under section 41 of the Judicial System Act 2002, this special chamber had to be set up by a decision of the president of the HAC; the personal composition of that chamber was defined by the president, with further approval by the Presidium of that court. However, by the time this was undertaken in the present case, the president’s five-year term of office had expired. 153. In that period of time, the procedure for appointing presidents of the courts was not regulated by domestic law: the relevant provisions of section 20 of the Judicial System Act 2002 had been declared unconstitutional and new provisions had not yet been introduced by Parliament (see paragraphs 41 and 49 above). Different domestic authorities had expressed their opinions as to that legal situation. For example, the Council of Judges of Ukraine, a higher body of judicial self-governance, considered that the matter had to be resolved on the basis of section 41 § 5 of the Judicial System Act 2002 and that the First Deputy President of the HAC, Judge S., was required to perform the duties of president of that court (see paragraph 51 above), while the General Prosecutor’s Office took a different view on the matter (see paragraph 52 above). 154. Accordingly, such an important issue as the appointment of the presidents of the courts was relegated to the level of domestic practice, which turned out to be a matter of serious controversy among the authorities. It appears that Judge P. continued to perform the duties of the president of the HAC beyond the statutory time-limit, relying essentially on the fact that procedures for (re)appointment had not been provided for by the laws of Ukraine, while the legislative basis for his authority to act as president of the HAC was not sufficiently established. 155. Meanwhile, during that period Judge P., acting as president of the HAC, constituted the chamber which considered the applicant’s case and made proposals for the individual composition of that chamber. 156. In these circumstances, the Court cannot conclude that the chamber dealing with the applicant’s case was set up and composed in a legitimate way satisfying the requirements of a “tribunal established by law”. There has therefore been a violation of Article 6 § 1 of the Convention in this respect”. Furthermore, the European Court found that the dismissal of the applicant was contrary to domestic law in that it “was voted on in the absence of the majority of the MPs. The MPs present deliberately and unlawfully cast multiple votes belonging to their absent peers. The decision was therefore taken in breach of Article 84 of the Constitution, section 24 of the Status of Members of Parliament Act 1992 and Rule 47 of the Rules of Parliament, requiring that members of Parliament should personally participate in meetings and votes. In these circumstances, the Court considers that the vote on the applicant’s dismissal undermined the principle of legal certainty, in breach of Article 6 § 1 of the Convention” (para. 145).

⁸⁵ E.g., the disclosure of investigation files was found by the European Court not to have occurred in *Aksoy (Eroğlu) v. Turkey*, no. 59741/00, 31 October 2006, *Güner Çorum v. Turkey*, no. 59739/00, 31 October 2006 and *Kahraman v. Turkey*, no. 60366/00, 31 October 2006.

⁸⁶ “Article 71 [...] provides for the right of a [...] prosecutor to defend himself or herself in disciplinary cases. The Article requires that the [...] prosecutor be informed in a way which includes separately and clearly the actions attributed to him or her, the subject matter of the investigation and the place, time and aspects of the actions which are alleged to have occurred. The [...] prosecutor has the right to require the testimony of the witness and the collection of evidence in his or her favour. They have the right to examine the files in person or through their legal representatives and to receive copies and may also defend themselves orally or in writing before the HSYK or via their legal representatives. These provisions seem clear and appropriate and the

75. Secondly, the possibility of suspending a prosecutor pending the outcome of disciplinary proceedings might be appropriate given the nature of the offence concerned or the surrounding circumstances.⁸⁸ However, where this is to be regarded as amounting in itself to the determination of the “civil rights” of the prosecutor concerned⁸⁹, the proceedings leading to the suspension decision must themselves be compliant with the requirements of Article 6(1)⁹⁰.

amendment is a considerable improvement to the text. The right of defence will be regulated in a more detailed manner, increasing the protection of the [prosecutor] concerned. Nevertheless, such procedural safeguards in the disciplinary proceeding are not a sufficient substitute for legal remedies against decisions which interfere with subjective rights [of prosecutors] and the absence of any right of appeal to a court of law is a serious defect in the draft Law”; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §75.

⁸⁷ “Prosecutors subject to disciplinary hearings should be made aware of the allegations of their misconduct, and this should be communicated to the prosecutors clearly and effectively”; the UNODC/IAP Guide, p. 32.

⁸⁸ The suspension in *Müller-Hartburg v. Austria*, no. 47195/06, 19 February 2013 concerned disciplinary proceedings in respect of an alleged breach of a trusteeship agreement by a lawyer, in *Helmut Blum v. Austria*, no. 33060/10, 5 April 2016 it related to proceedings in respect of alleged double representation and falsification of evidence by a lawyer and in *Paluda v. Slovakia*, no. 33392/12, 23 May 2017 it concerned offences arising from the bringing by a judge of a criminal complaint against the President of the Supreme Court for abuse of authority and a public statement by the judge that the President was improperly distributing the cases before the Supreme Court. The European Court made no finding as regards the merits of the suspensions in these cases.

⁸⁹ See para. 25 above.

⁹⁰ Thus, in *Paluda v. Slovakia*, no. 33392/12, 23 May 2017, the European Court stated that: “49. From the procedural point of view, the Court observes that, in connection with his suspension, the applicant was heard neither in respect of the suspension nor the underlying disciplinary charges. 50. Furthermore, although the suspension itself does not constitute the subject of the present complaint, the Court considers its repercussions on the applicant relevant to the assessment of the proportionality of the absence of access to court in relation to that suspension. From that perspective, the Court notes that the suspension entailed the applicant’s disqualification from the exercise of his office and the withholding of 50% of his salary (see paragraph 10 above), while at the same time he continued to be subject to restrictions such as not being able to engage in gainful activity elsewhere (see paragraph 27 above). 51. While the restoring of the withheld part of his salary is of importance in relation to redressing the effects of the suspension on the applicant, as such it has no direct connection with the fact that he had no access to court in relation to it. As regards the lack of access to court, there do not appear to have been any additional corrective or remedial measures taken at the time of the suspension or thereafter. 52. As to the duration of the applicant’s inability to challenge his suspension, the Court observes that it could last as long as the suspension did itself. Thus, by law, it could last for as long as two years. In the absence of any indication to the contrary, it is assumed that it did indeed last for two years (given that the disciplinary proceedings themselves lasted two years and nineteen days (from 8 September 2009 until 27 September 2011)). 53. In sum, the applicant had no access to proceedings before a tribunal within the meaning of Article 6 § 1 of the Convention in relation to a measure that placed him for two years in the situation of being unable to exercise his mandate and having one half of his salary withheld, while at the same time being unable to exercise other gainful activity. 54. Moreover, the Court notes that the Government have not invoked and nor has it established otherwise any conclusive reason for denying the applicant judicial protection in respect of that measure. In this regard, the Court considers it important to draw a clear distinction between the arguably compelling reasons for suspending a judge facing a certain type of disciplinary charge and the reasons for not allowing him or her access to a tribunal in respect of that suspension. In the Court’s view, the importance of this distinction is amplified by the fact that the body taking that measure and the procedure in the course of which it was taken fell short of the requirements of Article 6 § 1 of the Convention and the fact that the measure was taken within as particular a context as that pertaining to the present case. 55. In view of the foregoing considerations, the Court concludes that the applicant’s lack of access to court could not have been proportionate to any legitimate aim that it pursued and that, accordingly, the very essence of that right was impaired (see *Baka [GC]*, cited above, § 121). There has accordingly been a violation of Article 6 § 1 of the Convention”.

76. The Venice Commission also recognises that a prosecutor’s suspension pending the outcome of disciplinary proceedings might be appropriate⁹¹ but it has also indicated that such a measure should not normally affect his or her salary or other material conditions⁹².
77. Thirdly, although the linkage of a system of discipline often tends to be closely linked to the hierarchical organisation of the prosecutor’s office so that “disciplinary measures are typically initiated by the superior of the person concerned”⁹³, there is beginning to be recognition that the proceedings would benefit from them being conducted by an appropriately qualified disciplinary prosecutor⁹⁴.
78. Fourthly, the proceedings should be held in public unless – as authorised by Article 6(1) - it can be shown that the exclusion of the press and public was strictly necessary in the interests of morals, public order or national security, in the interests of juveniles, for the protection of the private life of the parties or to prevent prejudice to the interests of justice. This is a test that is unlikely to be satisfied in most disciplinary proceedings concerned with those working in the criminal justice system since public scrutiny is crucial to ensuring the accountability of the system’s operation.⁹⁵

⁹¹ “Furthermore, consideration should be given to the inclusion of a power in this provision to suspend a public prosecutor pending the outcome of disciplinary proceedings. This is an important element of international standards on the investigation of serious human rights violations”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §133.

⁹² “Article 66 is concerned with the suspension of a public prosecutor's powers when on secondment or in the course of a pre-trial investigation or judicial proceedings, pursuant to Articles 155-158 of the Criminal Procedure Code, and is appropriate. However, it would be clearer if the relevant Articles of the Criminal Procedure Code were specifically stated in paragraph 1.2. Furthermore, it should be made clear that the suspension is of the prosecutor’s powers but not of his or her salary or material or social support”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §153. However, see also its concern for criteria where salaries are reduced; “In Section 87.3 ASPGPOPEPC the prosecutor is entitled to a salary of an amount that is equal to the total of his/her basic salary and regular supplements for the duration of suspension. Fifty per cent of this amount may be withheld until the termination of suspension. There are no criteria when 50 per cent of the salary can be retained. This could be used to put pressure on the prosecutor. Discretion should be removed in this case”; CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §79. See also para. 25 above.

⁹³ *The Prosecution System*, para. 51.

⁹⁴ Thus, the Venice Commission has observed of a draft law that: “The new proposal in Article 112 is that the Disciplinary Prosecutor should be a judge appointed by the Prosecutorial Council on a proposal of the President of the Supreme Court. While one can see merit in such a solution, it would be desirable to make it clear that the appointee will not act in a judicial capacity while exercising the function of Disciplinary Prosecutor. An alternative, to avoid that disciplinary investigations against public prosecutors be conducted by a judge and that the President of the Supreme Court be involved, would be that the disciplinary prosecutor be appointed by the Prosecutorial Council from among qualified lawyers, with the same requirements of the lay members of the Council. This would give increased autonomy and independence to the disciplinary investigations, which is of particular importance both for the public prosecutors and the general public”; CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §§52- 54. Also, GRECO in its 4th Evaluation Round recommended in respect of Bulgaria that the ethics commissions established in prosecution offices be given the right to initiate disciplinary proceedings; para. 153.xviii. In addition, see GRECO’s concern that in Bulgaria the Inspection of Prosecutors’ “statutory and budgetary dependence on the Prosecutor General may lead to self-censorship in sensitive cases” (para. 186).

⁹⁵ Thus attempts to justify holding proceedings in private were unsuccessful in, e.g., *Diennet v. France*, no. 18160/91, 26 September 1995, *Serre v. France*, no. 29718/96, 29 September 1999, *Hurter v. Switzerland*, no. 53146/99, 15 December 2005, *Olujić v. Croatia*, no. 22330/05, 5 February 2009, *Nikolova and Vandova v. Bulgaria*, no. 20688/04, 17 December 2013, *Ramos Nunes de Carvalho E Sá v. Portugal*, no. 55391/13, 21 June 2016 (which has been referred to the Grand Chamber) and *Mutu and Pechstein v. Switzerland*, no. 40575/10, 2 October 2018.

79. Fifthly, there is no case law or explicit soft law standard concerning the possibility of a prosecutor subject to disciplinary proceedings having the benefit of legal representation in them. Nonetheless, in the light of what may be at stake for a prosecutor in these proceedings, an entitlement to be legally represented may nonetheless be required under Article 6(1), even if there is no obligation for the cost to be borne by the State.⁹⁶
80. Sixthly, the prosecutor concerned should have the possibility of an oral hearing, i.e., one in which he or she and any witnesses will testify and be examined before the disciplinary body.⁹⁷ The right to an oral hearing is particularly important as it enables the disciplinary body to assess the credibility of those appearing it. The need for such a right has also been emphasised by the Venice Commission⁹⁸ and any waiver of it should be unequivocal.

⁹⁶ The relevant principles were summarised by the European Court in *P. C and S. v. United Kingdom*, no. 56547/00, 16 July 2002 as follows: “88. There is no automatic right under the Convention for legal aid or legal representation to be available for an applicant who is involved in proceedings which determine his or her civil rights. Nonetheless, Article 6 may be engaged under two interrelated aspects. 89. Firstly, Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36). Failure to provide an applicant with the assistance of a lawyer may breach this provision where such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory as is the case in certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or the type of case (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, §§ 26-28, where the applicant was unable to obtain the assistance of a lawyer in judicial separation proceedings). Factors identified as relevant in *Airey* in determining whether the applicant would have been able to present her case properly and satisfactorily without the assistance of a lawyer included the complexity of the procedure, the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses, and the fact that the subject matter of the marital dispute entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. In such circumstances, the Court found it unrealistic to suppose that the applicant could effectively conduct her own case, despite the assistance afforded by the judge to parties acting in person. 90. It may be noted that the right of access to a court is not absolute and may be subject to legitimate restrictions. Where an individual's access is limited either by operation of law or in fact, the restriction will not be incompatible with Article 6 where the limitation did not impair the very essence of the right and where it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). Thus, although the pursuit of proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice, and the manner in which it functions in particular cases may be shown not to have been arbitrary or disproportionate, or to have impinged on the essence of the right of access to a court (see *Del Sol v. France*, no. [46800/99](#), ECHR 2002-II, and *Ivison v. the United Kingdom* (dec.), no. [39030/97](#), 16 April 2002). It may be the case that other factors concerning the administration of justice (such as the necessity for expedition or the rights of others) also play a limiting role as regards the provision of assistance in a particular case, although such restriction would also have to satisfy the tests set out above. 91. Secondly, the key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance by a lawyer and manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair (see, for example, *McVicar v. the United Kingdom*, no. [46311/99](#), §§ 50-51, ECHR 2002-III). There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures”.

⁹⁷ As was found by the European Court not to have occurred in *Stojakovic v. Austria*, no. 30003/02, 9 November 2006 and *Gülmez v. Turkey*, no. 16330/02, 20 May 2008

⁹⁸ Thus, it has observed that “In the case of prosecutors other than the Public Prosecutor of the Republic decisions on dismissal are taken by the Council of Public Prosecutor. [...] Again, there are no provisions

81. Seventhly, the person subject to the disciplinary proceedings should be able to have examined witnesses who could substantiate his or her defence.⁹⁹
82. Eighthly, the equality of arms also requires that the person subject to the disciplinary proceedings should have an opportunity to comment on statements relied upon in the proceedings¹⁰⁰ and to respond to submissions made against the person subject to the disciplinary proceedings¹⁰¹.
83. Ninthly, the European Court has not had occasion to rule on the applicability of the privilege against self-incrimination in the context of disciplinary proceedings. Moreover, as has been seen¹⁰², such proceedings are not regarded as criminal ones and so a compulsion for a prosecutor to testify would not be contrary to this privilege but it would be violated if the testimony so given was then used in subsequent criminal proceedings.¹⁰³
84. Nonetheless, the need to take account of the privilege against self-incrimination in the organisation of disciplinary proceedings has been recognised by the Venice Commission.¹⁰⁴

relating to the right of a prosecutor to appear before the council and make a defence or to know in advance the case to be made” (CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of “the former Yugoslav Republic of Macedonia”, §61) and that “In disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. [...]”; *The Prosecution System*, para. 52).

⁹⁹ Thus, in *Olujić v. Croatia*, no. 22330/05, 5 February 2009 the European Court held that: “84. The Court observes further that, although it is not its task to examine whether the court’s refusal to admit the evidence submitted by the applicant was well-founded, in its assessment of compliance of the procedure in question with the principle of equality of arms, which is a feature of the wider concept of a fair trial (see *Ekbatani v. Sweden*, 26 May 1988, § 30, Series A no. 134), significant importance is attached to appearances and to the increased sensitivity of the public to the fair administration of justice (see *Borgers v. Belgium*, 30 October 1991, § 24, Series A no. 214-B). In this connection the Court notes that the NJC admitted all the proposals to hear evidence from the witnesses nominated by the counsel for the Government and none of the proposals submitted by the applicant. 85. It is not the Court’s function to express an opinion on the relevance of the evidence or, more generally, on whether the allegations against the applicant were well-founded. However, it is for the Court to ascertain whether the proceedings in their entirety, including the way in which the evidence was taken, were fair (see *Asch v. Austria*, cited above, § 26). In the circumstance of the present case, the Court finds that the national authorities’ refusal to examine any of the defence witnesses led to a limitation of the applicant’s ability to present his case in a manner incompatible with the guarantees of a fair trial enshrined in Article 6 (see, *mutatis mutandis*, *Vidal v. Belgium*, cited above, § 34). There has therefore been a violation of Article 6 § 1 as regards the principle of equality of arms”.

¹⁰⁰ As was the European Court found had not occurred in *Vanjak v. Croatia*, no. 29889/04, 14 January 2010 when the disciplinary body took account of statements made by persons who had not been examined as witnesses and thus not heard by it.

¹⁰¹ See, e.g., *Baccichetti v. Italy*, no. 22584/06, 18 February 2010 in which it was found that the disciplinary body but not the applicant had been aware of a report relevant to the proceedings before it that concerned his alleged failings.

¹⁰² See paras. 17-18 above.

¹⁰³ As was found to have occurred in *Saunders v. United Kingdom* [GC], no. 19187/91, 17 December 1996.

¹⁰⁴ Thus, it observed of a draft law that: “Furthermore there is a need to clarify whether or not the power [of the disciplinary body] to interrogate individuals is governed by the privilege against self-incrimination and, insofar as it is not, the protection afforded by this privilege needs to be extended to any such interrogation”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §171.

85. Tenthly, no special requirements governing the admissibility of evidence in disciplinary proceedings have been elaborated so far and so the general requirement under Article 6(1) that this should be “fair” will need to be observed.¹⁰⁵
86. This will preclude, in particular, the use of evidence obtained by torture¹⁰⁶, confessions obtained through the use of inhuman and degrading treatment¹⁰⁷, confessions or other statements made without the assistance of a lawyer¹⁰⁸ and evidence obtained through the incitement to commit an offence¹⁰⁹.
87. However, the mere fact that evidence has been obtained illegally will not lead to the proceedings being regarded as unfair, notwithstanding that the means used involved a violation of the right to respect for private life under Article 8 of the European Convention¹¹⁰.
88. Eleventhly, the ruling of the disciplinary body should be reasoned and the European Court will be particularly concerned about rulings which do not address matters affecting the credibility of evidence relied upon by it.¹¹¹
89. The Venice Commission has also drawn attention to the importance of dissenting opinions by members of a prosecutorial disciplinary body in respect of its ruling (if any) being disclosed.¹¹²
90. Twelfthly, there is a need to ensure that the proceedings before a disciplinary tribunal and its subsequent ruling do not breach the presumption of innocence under Article 6(2) of the European Convention as a result of the making of a statement that the prosecutor concerned is guilty of an offence, either where the criminal proceedings concerned are still pending¹¹³ or they have come to an end (whether following an acquittal or as a result of being discontinued)¹¹⁴.

¹⁰⁵ *Schenk v. Switzerland*, no. 10862/84, 12 July 1988.

¹⁰⁶ *Harutyunyan v. Armenia*, 36549/03, 28 June 2007.

¹⁰⁷ *Hajnal v. Serbia*, no. 36937/06, 19 June 2012.

¹⁰⁸ *Vanjak v. Croatia*, no. 29889/04, 14 January 2010.

¹⁰⁹ *Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008.

¹¹⁰ As in *Khan v. United Kingdom*, no. 35394/97, 12 May 2000. However, note that in *Terrazzoni v. France*, no. 33242/12, 29 June 2017, the European Court found no violation of Article 8 where, in disciplinary proceedings against a judge, use had been made of a transcript of a telephone conversation that had been intercepted by chance in criminal proceedings in which the judge concerned had not been involved. It was significant for this conclusion that the interception had been carried out in accordance with the requirements of Article 8 and that there had been effective scrutiny capable of limiting the interference in question to what was necessary in a democratic society.

¹¹¹ See, e.g., *Vanjak v. Croatia*, no. 29889/04, 14 January 2010, in which the European Court found that a police disciplinary court had not given satisfactory reasons for accepting a confession by the applicant as accurate and genuine when he had claimed that it had been obtained under pressure.

¹¹² “There is also a need to clarify the point of the provision made in paragraph 6 specifying the non-disclosure of any dissenting opinions as these could be important for the exercise of the right of appeal under Article 51. Insofar as a public prosecutor does not have access to them for this purpose, the provision should be amended accordingly”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §§135 and 136.

¹¹³ See, e.g., *Matijasevic v. Serbia*, no. 23037/04, 19 September 2006.

¹¹⁴ See, e.g., *Asan Rushiti v. Austria*, no. 28389/95, 21 March 2000 and *Vulakh and Others v. Russia*, no. 33468/03, 10 January 2012.

91. However, the finding of a breach of a disciplinary offence involving the same matter as a criminal offence in respect of which the person has either been acquitted or the relevant proceedings have been discontinued will not breach the presumption of innocence where the standard of proof used in the disciplinary proceedings is less exacting than that used in the criminal ones, there was an independent establishment of the facts by the disciplinary body and the constitutive elements of the two offences are not identical.¹¹⁵
92. Thirteenthly, the ruling of the disciplinary body should generally be pronounced publicly in the sense that its text is accessible to anyone interested in reading it. This would not be required if there are compelling reasons for keeping it confidential but, in practice, the European Court is unlikely to consider this justified given the possibility of just denying access to particular information that needs to be kept confidential.¹¹⁶ Furthermore, the pronouncement must occur in a timely manner.¹¹⁷

¹¹⁵ Thus, the European Court stated in *Vanjak v. Croatia*, no. 29889/04, 14 January 2010 that: “68. As to the present case, the Court notes that the Constitutional Court in dismissing the applicant's complaint relied, inter alia, on a different standard of proof required in disciplinary proceedings from that required for a conviction of a criminal offence. The Court reiterates that it has accepted the justifiability of similar reasoning in the context of civil tort liability ... 69. The Court firstly notes that in the disciplinary proceedings the applicant was not found guilty of a criminal offence but of a disciplinary one. Although the first-instance disciplinary decision stated that the applicant had committed a criminal offence, this was rectified by the appellate disciplinary body, which expressly stated that the act in question had constituted a disciplinary offence of inappropriate conduct. It further asserted that no one could be considered liable for a criminal offence as long as his or her liability had not been established in a final judgment. 70. As to the factual basis of the disciplinary offence against the applicant, the Court notes that the disciplinary bodies found that the applicant had acted as an intermediary in procuring illegally a certificate of Croatian citizenship for a third person and had passed on a sum of money for that purpose. These findings sufficed to establish the applicant's disciplinary responsibility. The Court considers that the disciplinary bodies were empowered to and capable of establishing independently the facts of the case before them. In doing so the Court does not consider that such language was used – other than what was rectified by the appeal court – so as to call in question the applicant's right to be presumed innocent. 71. In this connection the Court points out that one of the crucial elements of the criminal offence in respect of which an investigation in respect of the applicant was opened and later on discontinued was that the applicant himself had taken the money (see paragraphs 14 and 15 above). This aspect was, however, not decisive for the disciplinary offence in question. Thus, the constitutive elements of the disciplinary and the criminal offences in question were not identical. 72. In view of this, the Court considers that the decision on the applicant's dismissal did not run contrary to the right guaranteed under Article 6 § 2 of the Convention”.

¹¹⁶ Thus, in *Nikolova and Vandova v. Bulgaria*, no. 20688/04, 17 December 2013 the European Court stated that: “84. In the instant case the Court notes that, owing to the classification of the first applicant's case as secret, not only did the Supreme Administrative Court examine the case in camera (see above), but the judgments given were not delivered in public and were not available at the registry of the court or on its Internet site, nor could the first applicant herself obtain a copy. The file was not declassified until after the expiry of the statutory time-limit in July 2009, that is to say, more than five years after the final judgment of the Supreme Administrative Court had been delivered. 85. Accordingly, the judgments given by the Supreme Administrative Court in the applicant's case were not delivered publicly and were entirely unavailable to the public for a considerable period of time. The Court has previously had occasion to observe that where a court case involves the handling of classified information, techniques exist for allowing some degree of public access to the decisions given while maintaining the confidentiality of sensitive information. Some States Parties to the Convention have adopted such mechanisms, opting, for instance, to publish only the operative part of the judgment (see *Welke and Białek*, cited above, § 84) or to partially classify such judgments (see *A. and Others v. the United Kingdom* [GC], no. [3455/05](#), § 93, ECHR 2009). The Court is not convinced that in the instant case the protection of the confidential information contained in the file made it necessary to restrict the publication of the judgments in their entirety, still less for such a considerable period of time. Furthermore, as the Court noted above on the subject of the holding of public hearings, the restrictions on publication of the judgment resulted from the automatic classification of the entire file as secret, without the domestic courts having conducted an assessment of the necessity and proportionality of such a measure in the specific case. 86. Accordingly, there

93. Fourteenthly, a prosecutor subject to disciplinary proceedings should have sufficient opportunity to prepare his or her defence in the event of a requalification of the facts by an appellate body.¹¹⁸
94. Finally, the length of the proceedings as a whole needs to be reasonable.¹¹⁹
95. In addition to the requirements arising from Article 6(1) of the European Convention, it should also be noted that GRECO has recommended that the time-limits within which investigations into alleged disciplinary offences must be concluded should not be so short as to prevent these being done thoroughly.¹²⁰

D. Sanctions

96. There is no case law regarding the specific nature of the sanctions that may be imposed for a disciplinary offence committed by a prosecutor or indeed anyone other professional. Nor is this issue addressed in the soft law standards.
97. However, the European Court has made it clear that the sanctions actually imposed in disciplinary proceedings must be ones provided for by law.¹²¹
98. Moreover, on many occasions where disciplinary proceedings have the potential to violate rights under the Convention such as freedom of expression, the European Court has emphasised the importance of the sanctions actually imposed respecting the principle of proportionality.¹²²

has been a violation of Article 6 § 1 owing to the fact that the judgments given in the instant case were not made public”.

¹¹⁷ Cf. the three months’ delay found acceptable in *Lamanna v. Austria*, no. 28923/95, 10 July 2001 with the elapse of more than five years before publication which contributed to the violation found in the *Nikolova and Vandova* case. This was also the subject of a recommendation by GRECO in its 4th Evaluation Round in respect of Portugal; para. 189.xii.

¹¹⁸ *Villnow v. Belgium*, no. 16938/05 16938/05, 29 January 2006.

¹¹⁹ See, e.g., *W.R. v. Austria*, no. 26602/95, 21 December 1999, *Luksch v. Austria*, no. 37075/97, 31 December 2001, *Ouendeno v. France*, no. 39996/98, 16 April 2002, *Malek v. Austria*, no. 60553/00, 12 June 2003, *Marschner v. France*, no. 51360/99, 28 September 2004, *Schmidt v. Austria*, no. 513/05, 17 July 2008, *Olujić v. Croatia*, no. 22330/05, 5 February 2009, *Müller-Hartburg v. Austria*, no. 47195/06, 19 February 2013 and *Helmut Blum v. Austria*, no. 33060/10, 5 April 2016 (in which the acknowledgement of the delay and the consequent reduction in the penalty imposed meant that the applicant was found no longer to be a victim). In its 4th Evaluation Round, GRECO recommended in respect of Bosnia and Herzegovina that the disciplinary procedure be revised “to ensure that cases are decided in a timely manner” (para. 157.xiv).

¹²⁰ 4th Evaluation Round, in respect of Andorra (para. 182.xii)

¹²¹ See *Rodriguez Hermida v. Spain* (dec.), no. 40090/98, 27 April 1999, in which it found an allegation that this had not been the case was unsubstantiated. In its 4th Evaluation Round, GRECO also recommended that the sanctions that might be imposed in Luxembourg be defined more clearly; para. 159.xiv.

¹²² See, e.g., *Houdart and Vincent v. France* (dec.), no. 28807/04, 6 June 2006 (“The Court reiterates that in assessing the proportionality of interference [with the right to freedom of expression], the nature and severity of the penalties imposed are also factors to be taken into account (see *Paturel v. France*, no. [54968/00](#), § 47, 22 December 2005). The Court observes, in this connection, that the penalty imposed by the professional disciplinary bodies, namely a warning, is the most moderate disciplinary penalty available. It notes that the penalties for defamation under the Freedom of the Press Act of 29 July 1881 are much harsher. Furthermore, the

99. In addition, it has assessed as proportional the reduction of a salary imposed as a disciplinary sanction imposed on a judge when finding that this did not entail a violation of the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the European Convention.¹²³

100. The European Court has also concluded that the forfeiture of a civil servant's retirement benefits following his dismissal from the public service for having committed serious offences against property, as well as abuse of office and concealment, was not in violation of Article 1 of Protocol No. 1, essentially because it did not leave him without any means of subsistence.¹²⁴

publication itself was not subjected to any restriction. The Court thus finds that the penalty imposed on the applicants cannot be regarded as disproportionate to the legitimate aim pursued. The impugned interference may accordingly be regarded as "necessary in a democratic society") and *Schmidt v. Austria*, no. 513/05, 17 July 2008 ("43. As regards the proportionality of the penalty at issue, the Court observes that the most lenient sanction provided for in section 16 (1) of the Disciplinary Act was applied, namely a written reprimand. 44. In sum, the Court considers that the domestic authorities gave relevant and sufficient reasons for their decision. They did not go beyond their margin of appreciation when issuing a reprimand against the applicant. 45. It follows that there has been no violation of Article 10 of the Convention").

¹²³ See *Harabin v. Slovakia*, no. 58688/11, 20 November 2012; "156. The Government argued that the disciplinary measure in issue had a legal basis and that it did not amount to a disproportionate interference with the applicant's right under Article 1 of Protocol No. 1. On the basis of the applicant's indication, it followed that the remaining 30% of his monthly salary which he continued receiving while the sanction applied corresponded to approximately EUR 1,800. That sum was more than double the average salary within Slovakia's national economy in 2011. 157. The applicant argued that the penalty imposed was disproportionate with regard to any legitimate aim, and that it had a substantial impact on his family, as he was supporting two minor children. In his view, the sanction should have concerned exclusively the supplementary part of his pay, which related to his role as President of the Supreme Court, but not his remuneration as a judge. The sanction was disproportionate also in view of the range of pecuniary penalties under the Criminal Code and the restrictions in law in respect of judges suspended from office pending the outcome of disciplinary proceedings. 158. The Court notes that the sanction imposed on the applicant, namely a 70% reduction in his annual salary, resulted in a reduction of his remuneration of a total of EUR 51,299.96. The sanction thus amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. In order to be compatible with Article 1 of Protocol No. 1, such interference must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see, for example, *Beyeler v. Italy* [GC], no. [33202/96](#), §§ 108-114, ECHR 2000-I). 159. The applicant was sanctioned in the context of disciplinary proceedings pursuant to Article 136 § 3 of the Constitution, and the sanction was imposed under section 117(5)(c) of the Judges and Assessors Act 2000. The interference complained of was thus provided for by law, as required by Article 1 of Protocol No. 1. 160. The Constitutional Court sanctioned the applicant after it had concluded that he had breached his responsibilities in the context of the administration of courts under section 42(2)(a) of the Courts Act 2004. The Court is of the view that the interference pursued a legitimate aim in the public interest, namely to ensure monitoring of appropriate use of public funds and compliance by the applicant with his statutory obligations as President of the Supreme Court. 161. While it is true that the amount of the sanction is not negligible, the Court nevertheless considers that, in the circumstances, in imposing it the Constitutional Court did not act contrary to the requirement under Article 1 of Protocol No. 1, according to which there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised".

¹²⁴ *Philippou v. Cyprus*, no. 71148/10, 14 June 2016; "71. The Court observes that it was open to the PSC to impose any of the ten penalties provided for by section 79(1) of the Public Service Law. In the circumstances, it was inevitable that the penalty imposed on the applicant would be at the more severe end of the sliding scale of penalties, and after hearing the applicant's counsel, the PSC chose the most severe penalty, namely dismissal. As a result, section 79(7) of the above Law applied, that is, the applicant forfeited his retirement benefits. 72. In practice, and again differently from the case of *Apostolakis*, that did not leave the applicant without any means of subsistence. In this respect the Court notes that the forfeiture concerned the applicant's public service retirement benefits, that is, a retirement lump sum and a monthly pension (see paragraph 17 above). He remained eligible to receive, and did receive from August 2012, a social security pension from the Social Insurance Fund to which he and his employer had contributed (see paragraph 39 above).

101. The need for proportionality to be respected where sanctions are imposed for disciplinary offences committed by prosecutors is a general consideration that the soft law standards expect to be observed.¹²⁵
102. Furthermore, it has been recognised that the proportionality of specific sanctions imposed on a prosecutor can be better judged if there is a clear indication in the formulation of particular disciplinary offences concerned as to how serious their commission is to be viewed.¹²⁶
103. Moreover, proportionality will be more readily achievable if the scale of sanctions available to the disciplinary body is sufficiently extensive enough so that the circumstances of the individual case can be taken into account.¹²⁷
104. Nonetheless, the case law of the European Court has also made it clear that, in cases involving serious misconduct, the sanctions imposed should not be trivial¹²⁸. A similar view has been expressed by the Venice Commission¹²⁹ and GRECO¹³⁰.

¹²⁵ This has been emphasised by the Venice Commission (“[...] The sanction of a 20% cut in salary for a period of three months for a minor disciplinary offence (Article 98) seems disproportionate”, (CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §95) and “In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity”, (CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§117, 118 and 120)), the CCPE (“The ability to transfer a prosecutor without his/her consent should be governed by law and limited to exceptional circumstances such as the strong need of the service (equalising workloads, etc.) or disciplinary actions in cases of particular gravity, but should also take into account the views, aspirations and specialisations of the prosecutor and his/her family situation”, (paragraph 70 of the Explanatory Note to the Rome Charter)) and the United Nations Office on Drugs and Crime (“If a prosecutor is found guilty of professional misconduct, the sanctions that are imposed should be proportional to the gravity of the infraction committed and be based in law”, (the UNODC/IAP Guide, p. 32)). This was also recommended by GRECO in its 4th Evaluation Round in respect of Georgia (para 204.xv) and “the former Yugoslav Republic of Macedonia” (para. 251.xvi; in particular it was recommended that “dismissal of a prosecutor is only possible for the most serious cases of misconduct”) see also fns. 127 and 130 below

¹²⁶ Thus, the Venice Commission has stated that: “In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity”; CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 120.

¹²⁷ Thus, in *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, the European Court observed that: “At the time when the applicant’s case was determined, only three sanctions for disciplinary wrongdoing existed: reprimand, downgrading of qualification class, and dismissal. These three types of sanction left little room for disciplining a judge on a proportionate basis. Thus, the authorities were given limited opportunities to balance the competing public and individual interests in the light of each individual case” (para. 182). In its 4th Evaluation Round, GRECO recommended that Ukraine extend “the range of disciplinary sanctions available to ensure better proportionality and effectiveness”; para. 273.xxix.

¹²⁸ This is especially the case where the misconduct has implications for the protection of the right to life and the prohibition on torture and inhuman and degrading treatment or punishment. See, e.g., *Gafgen v. Germany* [GC], no. 22978/05, 1 June 2010 (“125. As to the disciplinary sanctions imposed, the Court notes that during the investigation and trial of D. and E., both were transferred to posts which no longer involved direct association with the investigation of criminal offences (see paragraph 50 above). D. was later transferred to the Police Headquarters for Technology, Logistics and Administration and was appointed its chief (see paragraph 52 above). In this connection, the Court refers to its repeated finding that where State agents have been charged with offences involving ill-treatment, it is important that they should be suspended from duty while being investigated or tried and should be dismissed if convicted (see, for instance, *Abdülşamet Yaman*, cited above, §

105. An increase in a disciplinary penalty on an appeal has not been considered by the European Court to disclose any appearance of a violation of Article 6(1).¹³¹
106. The Venice Commission has drawn attention to the desirability of some flexibility in the application of any disqualifications – such as eligibility for promotion or transfer – that are consequential upon a disciplinary sanction having been imposed.¹³²
107. At the same time, it has pointed out the potential danger of the disciplinary system being undermined where there is a broad discretion to end a prosecutor’s disciplinary history prematurely.¹³³
108. Finally, it should be noted that the imposition of a sanction – especially one with serious consequences for the individual concerned, such as dismissal – is likely to entail a violation of the right to respect for private life under Article 8 of the

55; Nikolova and Velichkova, cited above, § 63; and Ali and Ayşe Duran, cited above, § 64). Even if the Court accepts that the facts of the present case are not comparable to those at issue in the cases cited herein, it nevertheless finds that D.’s subsequent appointment as chief of a police authority raises serious doubts as to whether the authorities’ reaction reflected, adequately, the seriousness involved in a breach of Article 3 – of which he had been found guilty”) and *Myummyun v. Bulgaria*, no. 67258/13, 3 November 2015 (“70. In this case, the Ministry of Internal Affairs carried out an internal inquiry and promptly opened disciplinary proceedings against the three police officers who had ill-treated the applicant. However, the proceedings did not lead to sanctions in relation to the ill-treatment to which they had subjected the applicant. Their only result was that two of the officers, Mr N.K. and Mr I.K., were deprived of the chance of promotion for three years for having unlawfully detained the applicant (see paragraph 22 above). Those proceedings cannot therefore be regarded as an adequate procedural response to the act of torture to which the applicant fell victim”).

¹²⁹ Thus, it has stated that “In relation to the commission of a criminal offence conviction for an offence followed by imprisonment for at least six months is grounds for dismissal. This is a clear provision and there is no difficulty implementing it. However, there seems to be a somewhat lenient approach to prison sentences. It should be taken into account that in many states normally any kind of prison sentence means that a prosecutor is no longer qualified as a prosecutor. This is quite important to protect the reputation of the whole prosecution service [...]” (CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of “the former Yugoslav Republic of Macedonia”, §56) and that “According to the Article 95.1.e, the term of office of a judge or a prosecutor shall cease ‘if he/she was sentenced to prison by a final verdict’. Criminal conviction may not necessarily result in a prison sentence, however, the conviction, in most cases, should lead to the termination of office” (CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §122).

¹³⁰ In its 4th Evaluation Round it recommended that sanctions be “dissuasive and proportionate” (in respect of Armenia (para. 233.xviii), Bosnia and Herzegovina (para. 157.xiv)) or “adequate” (in respect of Azerbaijan (para. 128.xvii)).

¹³¹ In *Luksch v. Austria* (dec.), no. 37075/97, 21 November 2000, in which the suspension-period imposed on an accountant had been altered by the Appeals Board from “up to one year” to “one year”.

¹³² “Disciplinary sanctions are “in force” one year from their application, during which the prosecutor cannot be promoted to a higher position and cannot benefit from incentive measures (Article 42.5). It is suggested to reconsider this provision. On the one hand, a warning or a reprimand is usually not ‘in force’ for a specific period of time, but simply stands. On the other hand, it appears inflexible to exclude promotion etc. for a certain time regardless of the individual circumstances”; CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§117, 118 and 120.

¹³³ Thus, it has observed of a draft law that: “There is also a need to specify in paragraph 3 the grounds on which the head of the relevant public prosecutor's office can request the history of a disciplinary sanction imposed on a public prosecutor to be effectively ended prematurely as such a discretion could undermine the effectiveness of the disciplinary process”; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, § 138.

European Convention where this has occurred contrary to national law or any of the requirements of the European Convention discussed above.¹³⁴

¹³⁴ Thus, in *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, the European Court held that: “166. The dismissal of the applicant from the post of judge affected a wide range of his relationships with other persons, including relationships of a professional nature. Likewise, it had an impact on his “inner circle” as the loss of his job must have had tangible consequences for the material well-being of the applicant and his family. Moreover, the reason for the applicant’s dismissal, namely breach of the judicial oath, suggests that his professional reputation was affected. 167. It follows that the applicant’s dismissal constituted an interference with his right to respect for private life within the meaning of Article 8 of the Convention” and that: “186. ... the interference with the applicant’s right to respect for his private life was not lawful: the interference was not compatible with domestic law and, moreover, the applicable domestic law failed to satisfy the requirements of foreseeability and provision of appropriate protection against arbitrariness. 187. There has therefore been a violation of Article 8 of the Convention”.