SUPPORT TO CRIMINAL JUSTICE REFORMS IN THE REPUBLIC OF MOLDOVA

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POST-ADOPTION REVIEW OF THE LAW ON THE PUBLIC PROSECUTION SERVICE OF THE REPUBLIC OF MOLDOVA, ADOPTED ON 25 FEBRUARY 2016

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

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A. Introduction

1. This review is concerned with the Law on the Public Prosecution Service of the Republic of Moldova (hereinafter "the Law"), which was adopted by the Moldovan Parliament on 25 February 2016 and subsequently promulgated by the President of the Republic of Moldova on 17 March 2016.

2. The Law is substantially based on a revised draft (hereinafter "the revised draft") prepared by a working group under the authority of the Ministry of Justice following the adoption of a joint opinion on an earlier draft by the European Commission for Democracy through Law (hereinafter "the Venice Commission"), the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law of the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights (hereinafter "the Joint Opinion")[1].

3. The revised draft was itself found to have satisfactorily addressed many, but not all, of the concerns that were raised in the Joint Opinion and the subsequent Council of Europe Expert Comments on the Revised Draft Law on the Public Prosecutor's Office of the Republic of Moldova(hereinafter "the Comments on the revised draft")[2].

4. The present review now examines the extent to which the Law continues to address satisfactorily the concerns raised in the Joint Opinion, as well as the extent to which there have been changes in the adopted text that deal satisfactorily with concerns not previously been addressed, embody other positive developments or give rise to new concerns. In addition, it notes any aspects of the Joint Opinion that have not been completely addressed or not addressed at all. The comments conclude with an overall assessment of the compatibility of the Law with the European and international standards[3].

5. This review has been based on an English translation of the Law and of the former law[4]. The review has been prepared under the auspices of the Council of Europe's Project "Support to criminal justice reform in the Republic of Moldova", financed by the Danish Government, on the basis of contributions provided by the Council of Europe consultant Mr Jeremy McBride, Barrister, Monckton Chambers.

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[1] CDL-AD(2015)005.

[2] *Expert Comments on the Revised Draft Law on the Public Prosecutor's Office of the Republic of Moldova Prepared by the Directorate of Human Rights, Directorate General of Human Rights and Rule of Law of the Council of Europe on the basis of contributions by: James Hamilton and Jeremy McBride, (*DGI (2015) 13 (June, 2015).

[3] For the relevant standards see paragraph 15 of the Joint Opinion.

[4] Law on public prosecution service no. 294-XVI of 25 December 2008.

B. The Law

Introduction

6. The provisions of the Law are examined on an Article by Article basis. However, no remarks are made with respect to provisions that were considered appropriate or unproblematic in the Joint Opinion or the Comments on the revised draft and which have not subsequently been changed. In addition, no comments are made with respect to changes that have no substantive effect on the relevant provisions, are purely typographical in nature or involve changes to cross-references to other provisions in the Law.

7. One change that recurs throughout the Law is the addition of "official" before most references to a "website" of either the General Prosecutor's Office or the Superior Council of Prosecutors[5]. It is questionable whether this is really necessary given that the institution is mentioned in the text but it is certainly not problematic. No further reference to this change is made when discussing individual Articles of the Law.

8. *Recommendations for any action that might be necessary to ensure compliance with European standards are italicised.*

Article 1

9. The only change to this provision is the removal of "the State" from the reference to the role of the public prosecution service in the "protection of rights and legitimate interests". This should be viewed as positively as there is no reference to "the State" in the corresponding provision in Article 23 of the Constitution. It thus further reinforces the Comments on the revised draft that this provision had met the concern of the Joint Opinion that the core role of the public prosecution service should be its responsibility for criminal proceedings[6].

10. The Comments on the revised draft also raised the issue of the independence of the judiciary from the prosecution service on account of the continued reference to the service being a "public institution within the judicial authority", which had also been a concern raised in the Joint Opinion[7].

11. However, it was subsequently clarified in course of discussion with the Working Group responsible for drafting the Law ("the Working Group") that this concern was unfounded since the structure of Chapter IX of the Constitution of the

[5] This occurs in Articles 11(3), 17(5), 17(8), 24(1), 24(3), 24(5), 30(1), 51(4), 66(4), 66(10), 67(2), 77(5), 77(8), 83(15), 84(6) and 85(1).
[6] Paragraph 31.
[7] Paragraph 29.

Republic of Moldova clearly distinguishes the courts and the public prosecution office as distinct institutions[8].

12. In addition, the effect of Chapter IX also satisfactorily resolved the concern in the Joint Opinion that

> increased clarity is needed as to the prosecutors' place within the judicial system as well as their relations with and distinctiveness from the judicial authority[9].

These are not, therefore issues that needs to be pursued further.

Article 3

13. The main change to this provision is the addition of an entirely new paragraph 7 which provides

> The prosecutor shall through his/her activity ensure the supremacy of the law, to respect human rights and freedoms, their equality before the law, ensure the legal treatment without discrimination of all the participants of judicial proceedings regardless of their quality, comply with the Ethics code of prosecutors and to participate at the continuous professional training.

14. The content of the new paragraph 7 is in some respects an elaboration of the governing principles set out in paragraph 4 but it also emphasises some important aspects of professionalism applicable to serving as a public prosecutor. The addition should, therefore, be regarded as welcome.

15. Paragraph 6 still does not make reference to any specific provision in the Code of Criminal Procedure, as recommended in the Joint Opinion[10]. The concern regarding this issue related, in particular, to how – apart from the guidance found in Article 15 with respect to procedural hierarchy - a superior prosecutor may review a prosecutor's work.

16. However, it has since been established in discussions with the Working Group that this is a matter covered in detail in the Criminal Procedure Code with the exception of the question when the senior prosecutor is entitled to look for a consultation regarding a case. This seems, therefore, to be a matter more of legislative style than substance and there should not be any uncertainty as to which provisions are relevant. In the circumstances the omission of any specific reference to the Criminal Procedure Code and other relevant legislation does not seem to be a fundamental problem and this issue does not need to be pursued.

17. The Comments on the revised draft also indicated that the recommendation in the Joint Opinion that this Article – as well as the statement regarding the prosecutor's

[8] In particular, Article 116 provides that judges sitting in the courts of law are independent and both the office of judge and the office of public prosecutor are incompatible with holding any other position.

[9] Paragraph 80.

[10] Paragraphs 37 and 38.

discretion in what was Article 32(1)(d) - should make more distinct the applicability of the opportunity principle[11].

18. However, it has since been established in discussions with the Working Group that the Joint Opinion was based on a misunderstanding in that the Republic of Moldova operates the legality principle and the opportunity principle is not part of its legal system. As a result, the reference in Article 32(1)(d) to "discretion in decision-making granted by the law to the prosecutor exercising his/her functions" refers only to discretions expressly granted by law (such as the prosecutor's discretion to choose what he or she considers the appropriate sentence) and is not intended to give a general discretionary power to prosecutors. There is thus also no need for this issue to be pursued, although that does not mean that consideration should not be given to the adoption of the opportunity principle by the Republic of Moldova.

Article 5

19. There has been an elaboration of sub-paragraph (j) so that the role in respect of civil actions arises not where a criminal prosecution is terminated but where a "criminal investigation is not initiated or terminated".

20. This change would seem to be widening the role of the public prosecution service in civil proceedings, which was already considered to be a matter of concern in the Joint Opinion on account of the lack of precision regarding that role and the need to limit the initiation of civil actions to cases where this occurs within criminal proceedings[12]. However, it has since been established in discussions with the Working Group that the functions of public prosecutors in relation to civil actions are dealt with in the Civil Procedure Code[13].

21. *Nonetheless, as it has not been possible to review the content of the latter Code, it would be appropriate for this to be checked so as to ensure that the amended sub-paragraph (j) is not conferring a function that has no connection with criminal proceedings and thus runs counter to the recommendations of the Joint Opinion.*

22. There has been no elaboration in the Law as to the procedure of consideration of requests and petitions that is authorised in sub-paragraph (l). The Joint Opinion observed that, in the absence of a criminal element, such requests or petitions are usually handled by other institutions (public administration agencies, or, as appropriate, ombudspersons or other bodies) and recommended that this function, if maintained, should "be subject to judicial control, better specified and

[11] Paragraphs 32 and 106.
[12] Paragraph 46.
[13] Civil Procedure Code of the Republic of Moldova, no. 225 of 30.05.2003

harmonized with the provisions regulating such procedures in the Moldovan legislation"[14].

23. However, this concern can be regarded as being met by the fact that prosecutors follow the general provisions on examining requests and provisions[15], which provide for the possibility of judicial control where the answer is considered unsatisfactory.

Article 6

24. This provision has been modified through the replacement of "administrative" by "contraventional" in paragraph 1(a) and the addition of two new sub-clauses in paragraph 3, namely,

> c) ensure the respect for rights and fundamental freedoms in exercising his/her duties;
> f) submit an annual affidavit showing that he/she is not an investigating officer, including undercover officer or informer or employee of the body conducting the special investigative activity;

25. The first change appears designed to meet the concern in the Joint Opinion that the power of access to premises in Article 6(1)(a) is subject to the safeguards in the Criminal Procedure Code[16], in that it makes it clear that this power is concerned with only proceedings relating to crimes and contraventions rather than of a more general administrative nature.

26. In discussions with the Working Group, it was suggested that Article 6 (1) (a) was clear and the provision would apply only where the prosecutor is performing functions in criminal proceedings so that access to premises would be subject to the safeguards contained in the Criminal Procedure Code.

27. *However, there is still a need to clarify that proceedings in respect of contraventions are covered by the same guarantees that apply to crimes under the Criminal Procedure Code. This is because proceedings in respect of contraventions are regulated by the Contraventions Code.*

28. The addition of the new sub-clause (3)(c) reinforces the addition of paragraph 7 in Article 3 and this rehearsal of the obligation of public prosecutors to respect human rights is not unwelcome.

29. The addition of the new sub-clause (3)(f) does not deal with a matter addressed in the Joint Opinion but it is an appropriate measure to reinforce the distinct roles of public prosecutors and investigators, particularly given the responsibility of the former for leading the investigation. The addition is thus not inappropriate.

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[14] Paragraph 47.
[15] The Law on petitions no. 190-XIII of 19.07.94, the Law on access to information no. 982-XIV of 11.05.2000 and the Public Prosecution Service internal Regulation on examination of petitions.
[16] Paragraph 58.

30. This provision does not include any limitation on the duty of denunciation of violations of the law in paragraph 3(j) to ones concerning the criminal law as was recommended in the Joint Opinion[17]. Such a limitation was recommended as it was considered that criminal prosecution was the main task on which prosecutors should focus.

31. However, it has since been established in discussions with the Working Group that the provision in Article 6 (3) (f) is intended effectively as a whistleblowing measure. Thus, the intention is that where the prosecutor becomes aware of a violation of law it should be drawn to the attention of the appropriate authority. If it concerns a breach of criminal law the prosecutor deals with it, otherwise it is referred to the appropriate authority. The prosecutor can also deal with misdemeanours although generally it seems that prosecutors are reluctant to do so. As a result, it does not seem that the failure to address the concern raised in the Joint Opinion relates to a matter of fundamental importance. This issue should not, therefore, be pursued.

Article 7

32. The only change to this provision is the specification in paragraph 3 that the consent of the Superior Council of Prosecutors to the establishment of and any changes to the structure of the General Prosecutor's Office, territorial and specialized prosecutor's offices, as well as their locations, should be "written". This is not a matter raised in the Joint Opinion but the requirement of written consent will clearly prevent any misunderstanding or misrepresentation of the position of the Superior Council of Prosecutors and the change is thus not inappropriate.

Article 9

33. The significant changes to this provision comprise the entire recasting of paragraph 2 and the insertion of an entirely new paragraph 3 and the consequential renumbering of the former paragraph 3 and subsequent paragraphs, as well as revisions to all those paragraphs.

34. The recasting of paragraph 2 is as follows:

> The duties, competence, organization and functioning of specialized prosecutor's offices are regulated by special laws, criminal procedure legislation and their own regulations of activity.

This means that many aspects of the detailed regulation of specialised prosecutor's offices will be essentially governed by a separate legislative regime from the Law. *They will, therefore, need to be separately evaluated in due course.* However, these offices are still regulated by the remaining points covered in this provision, as well as

[17] Paragraph 60.

by provisions in the Law dealing with appointment, budget, direction by the General Prosecutor's Office, membership of the Superior Council of Prosecutors, procedural hierarchy, remuneration and transitional arrangements[18]. As a result, the present change is not in itself a matter for concern. Indeed, the reformulation of paragraph 2 effectively addresses the following observation in the Joint Opinion

> Given the complexity of the tasks of fighting corruption and organized crime, having only a few paragraphs within one single article deal with these future specialized services appears insufficient. In addition, there is no indication as to whether the mandate, powers and modes of operation of the future offices will be regulated by subsequent regulations[19].

35. The new paragraph 3 provides that

> The specialized prosecutor's office is headed by the chief-prosecutor, who is assimilated to the General Prosecutor, who is helped by a deputy or where appropriate, by deputies, assimilated to the chief-prosecutor of the subdivision of the General Prosecutor's Office. Within the specialized prosecutor's office may be established subdivisions and these may have regional offices or representatives in the territory

This is, in most respects the content of what had been paragraph 2 before its recasting. The significant difference is the stipulation that the chief prosecutor of such an office "is assimilated to the General Prosecutor". It is unclear what exactly this means, particularly given that Article 13(1)(d) provides that for such a chief prosecutor the hierarchically superior prosecutor is "the General Prosecutor, as appropriate, the deputy Prosecutor General, in accordance with the established competency".

36. *Although there appears to have been no diminution in the way the present provision meets the concern in the Joint Opinion that there should be elaboration of the powers and autonomy of prosecutors in these offices, there is a need to clarify the meaning of this term so as to be satisfied that its implications are positive rather than negative in this regard.*

37. The change in what is now sub-paragraph 4(a) from "code of criminal procedure" to "criminal procedural legislation" reflects a realistic assessment that the code may not cover all the relevant procedural standards governing the criminal justice system.

38. The changes to what is paragraph 5 allow for the extension of the competence of the Prosecutor's Office for Special Causes regarding the performance of criminal investigation beyond those specified to matters "given … in the law" and replaces the list of bodies in respect of which it leads such investigation by the more general term "central specialised bodies". Both changes will enable the role of the Office to evolve without the need for the Law to be amended, leaving any such amendment to be made to the more specific legislation concerned.

[18] In Articles 8, 21-22, 39, 60, 69, 91 and 99-100.
[19] Paragraph 78.

39. In paragraph 6 there is no longer a reference to the selection of criminal investigation officers and investigative officers by reference to the Regulation of the Prosecution Service, which accords with the stipulation in paragraph 2 that the functioning of specialized prosecutor's offices is to be regulated by their own regulations of activity. In addition, it is provided that special legislation will govern budgetary arrangements for staff seconded to the specialized prosecutor's offices. Neither change is problematic.

40. In terms of the elaboration of the arrangements for specialized prosecutor's offices, a particularly important issue to be addressed will be the investigation of ill-treatment contrary to Article 3 of the European Convention. Both the European Court and the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment ("CPT") have been concerned about the ineffectiveness of practice in this regard prior to the establishment of the current specialized anti-torture division within the General Prosecutor's Office.

41. *In elaborating the arrangements for specialized prosecutor's offices, it will be important for full account to be taken of concerns expressed by the CPT and the European Court about past practice. These concerns have implications for the structure of the offices, the independence of specific units and the specificity of the approach required to ensure that the investigation of cases involving allegations of torture and inhuman and degrading treatment is effective.*

Article 10

42. The deletion of what was paragraph 1 – which specified the different categories of territorial prosecution offices – and its replacement by an expanded version of what was paragraph 2 enables the competence for such offices to be determined by the Regulation of the Public Prosecution Service. This will allow for some optimization in the organization of such offices as a particular office's competence will no longer be limited to a municipality, rayon or town and so will be able to be adjusted according to changes in population and workload.

43. However, although the deletion of the former paragraph 1 also removes the specification within the category of territorial prosecution office of the prosecution offices of the Administrative Territorial Unit of Gagauzia (which are to be merged pursuant to Article 99(10)), this specific office is not subject to the new regime determining competence. This is because what is now paragraph 2 has been recast to provide

> The prosecutor's office of the Administrative Territorial Unity of Gagauzia (hereinafter the Prosecutor's Office of ATU Gagauzia) is a territorial prosecutor's office which exercises its attributions in the territory of the respective administrative territorial unity.

Thus, the special legal status of Gagauzia – which was a matter of concern in the Joint Opinion[20] - would seem to continue to be recognised in this regard.

44. The changes to this provision should not, therefore, be regarded as problematic, provided that there is nothing in the organic Law on Special Legal Status of Gagauzia (Gagauz-Yeri) that could preclude the merger of the various prosecutor's offices in ATU Gagauzia and that there was consultation about this with the authorities there, since this was considered necessary in the Joint Opinion[21].

45. *There is a need, therefore, to clarify whether or not such a merger would be precluded by anything in the organic Law on Special Legal Status of Gagauzia (Gagauz-Yeri) and whether there was consultation about this with the authorities in ATU Gagauzia.*

Article 11

46. The changes to this provision are essentially ones that clarify its content and do not involve any substantive change.

47. However, this provision has not addressed the concern in the Joint Opinion that all the duties of the Prosecutor General should be specified rather than left open-ended in sub-paragraph 1(k)[22].

48. Nonetheless, it has since been established in discussions with the Working Group that, although this provision was intended to permit additional duties to be conferred on the Prosecutor General by ordinary law, any such provision would have to be consistent with the powers of the public prosecution service contained in the organic law governing the service since in the case of inconsistency the organic law prevails. As a result there is no compelling reason to pursue this issue further.

Article 12

49. There was concern in the Joint Opinion about the capacity of prosecutors from different levels to act as senior prosecutors for administrative purposes[23] and this continues to be possible pursuant to paragraph 1. However, that concern was linked to concerns about the giving of instructions on procedural issues and it has been clarified that the prosecutors concerned would not have that competence[24]. This issue does not, therefore, need to be pursued.

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[20]See paragraphs 27 and 95-9.
[21]Paragraph 98.
[22]Paragraph 64.
[23]Paragraph 67.
[24] Thus, Article 12(1) relates only to the administrative hierarchy".

Article 13

50. In the review of the revised draft it was stated that the concern of the Joint Opinion that all specific orders by a senior prosecutor must always be made in writing appeared not to be met, because it did not deal expressly with verbal orders[25]. However, that appears to reflect a misunderstanding of the text[26] and it is now clear that the need for writing applies to all orders so that there is no scope for verbal ones to be given. There is, therefore, no need for this issue to be pursued.

Article 14

51. Two deletions have been made to paragraph 1 from the version of this provision in the revised draft.

52. The first is the deletion of "creative and sports" from the activities that can be undertaken by public prosecutors in derogation from the bar in paragraph 1 on undertaking any remunerated or non-remunerated activities. The effect of this will be to prevent public prosecutors engaging in the relevant activities unless, presumably, they are organised within the framework of the Public Prosecution Service. It is not known what was the rationale for this deletion. Certainly the resulting bar on undertaking these activities could have an adverse effect on a public prosecutor's personal development and physical fitness. It may be that the aim is to ensure that there is no risk of some form of improper association developing but this seems an extreme response to the possibility of this occurring.

53. *It would be appropriate, therefore, for the need to retain this deletion to be reviewed.*

54. The second one entails the complete removal of the phrase "The prosecutor may obtain income from his/her property". Undoubtedly the possibility of obtaining such income could be connected with the risk of corruption, particularly where the property concerned has been improperly acquired. In view of the concern about the incidence of corruption within the Public Prosecution Service, this does not seem to be an unreasonable restriction and is an appropriate companion to the requirement under Article 6(3)(g) to make a declaration of income and property.

Article 16

55. The only change to this provision relates to paragraph 3. It entails the responsibility for endorsing the regulation laying down the model of robe for public prosecutors and its distinguishing marks is that of the Supreme Council of Prosecutors rather than the Public Prosecutor's Office. This change is consistent

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[25] Paragraph 73.

[26] Thus, Article 13 (3) in the Romanian language states that "instructions shall be given in writing".

with the Council's role in the self-management arrangements being introduced by the Law. It is thus entirely appropriate.

Article 17

56. This provision has been changed by adding a new condition for appointment as Prosecutor General, requiring the online transmission of the interview phase, revising the publication arrangements relating to the competition for appointment and the documentation to be submitted by candidates and revising the wording with respect to activities after the Prosecutor General's term of office ends.

57. The new condition involves a bar on candidates having been a member of the Superior Council of Prosecutors in the preceding 6 months, which is inserted into sub-paragraph 1(e), with the consequence that the condition that was there relating to political activity has been added to the one in sub-paragraph 1(d). The new condition addresses the suggestion in the Joint Opinion that, for a certain period, members of the Superior Council of Prosecutors should be precluded from being candidates for appointment as Prosecutor General[27]. Such a limitation is important as it not only reinforces the independence and impartiality of such members but also could help reduce the risk of corporatism developing as a result of the self-management arrangements being introduced, which was something that the Joint Opinion also adverted to. Certainly, it would be undesirable for the Supreme Council of Prosecutors to be expected to organise the competition for appointment where that included one of its members. Moreover, the scope of the restriction being imposed is not too great and does not prevent prosecutors who have been on the Council from applying for the appointment.

58. The only potential problem is that the formulation used is a little unclear as to when the 6 months runs from[28]; is it the date of the competition being opened, the date of appointment or something else? This would seem to be resolved by reading this provision with the amendment to paragraph 4 of Article 75 in which it is now provided that elected members of the Superior Council of Prosecutors shall not participate in the competition for appointment as Prosecutor General "during the mandate, as well as in the period of 6 months after its termination".

59. *Nonetheless, there is a need to check that this is so and that no amendment to the Law is thus necessary*. Otherwise the new condition is quite appropriate.

60. The stipulation that the interview phase should be transmitted online in real time forms a new second sentence for paragraph 3, with the existing one on the use of objective criteria for selection becoming a new paragraph 4. Although the online requirement is undoubtedly intended to promote transparency and public

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[27] Paragraph 133.

[28] *Cf.* the bar on political activity which specifies "before the announcement of the contest".

confidence in the selection process, there is a risk that its occurrence in real time will give candidates being interviewed at a later stage of the proceedings over those who have been interviewed first since they will be able to see which questions are posed and the reaction to the way in which these are answered.

61. *It would be appropriate, therefore, for steps to be taken to preclude candidates from having the opportunity to watch the transmission of interviews prior to their own interview.*

62. Also introduced into paragraph 3 is a requirement for the Superior Council of Prosecutors to ensure the access of media representatives to the meeting at which the interviews takes place. This is entirely appropriate.

63. The stipulation in paragraph 5 that competition details should be published on the official websites of both the General Prosecutor's Office and the Superior Council of Prosecutors, rather than in the Official Gazette of the Republic of Moldova, is unlikely to prejudice any potential applicants and is not inappropriate.

64. The addition to paragraph 6 of the requirement that candidates must submit not only a curriculum vitae and a criminal record certificate but also "the concept of management and institutional development" is not inappropriate given the requirements for appointment. Indeed, the last item should assist the selection process in view of the important role management and leadership skills should play in making an appointment.

65. The changes do not address the point made in the Joint Opinion that compelling evidence of incompatibility and breach of the selection procedure should be a complete bar on appointment as Prosecutor General and the concern expressed in it that there was no judicial mechanism to resolve disputes over these issues[29]. In discussions with the Working Group, it was suggested that there was no problem since Article 17 requires that a person appointed as Prosecutor General must comply with the requirements referred to in Article 22 - which include the submission of a criminal record certificate and the declaration of personal interests - and also Article 20 makes good reputation and lack of criminal record requirements for appointment. Moreover, the Working Group underlined that the Superior Council of Prosecutors is required to follow the applicable legal procedures and that Article 17 (10) applied only if for some reason it fails to do so, the intention being to exclude any discretion on the part of the President.

66. However, this response misses the point. It is, of course correct that the two reasons specified should be a bar on appointment. Nonetheless, the way paragraph 10 is formulated (at least in the English text), there would seem to be no bar on the

[29] Paragraph 92.

Superior Council of Prosecutors proposing the same candidate in respect of which the President found one or other reason for non-appointment, but on the second occasion this could not be invoked because the provision stipulates that it can be invoked "only once". Moreover, this response does not address the point about the absence of any judicial mechanism to resolve disputes.

67. *There is a need, therefore, to clarify whether the above reading of the text is correct and, if so, there is a need to revise it in the light of the Joint Opinion's comment. Furthermore, there is a need to clarify whether or not there really is no judicial mechanism and, if that is the case, to establish one.*

Article 20

68. This provision has been changed by replacing "good" in respect of "reputation" by "irreproachable", by modifying the explanation for having such a reputation and also by modifying the requirements for an appointment as chief prosecutor of the ATU Gagauzia Prosecutor's Office.

69. The first change – to sub-paragraph 1(f) may be just a matter of translation as the draft reviewed for the Joint Opinion used the term "faultless".

70. In the definition of irreproachable reputation there is no longer a reference to a violation of "functional" as opposed to "professional activity", nor to failure to comply with the standards laid down in the Code of Ethics for prosecutors. The deletion of the former does not seem problematic as functionality has more to do with competence than reputation. Furthermore, the deletion of the latter is probably not problematic since a serious failure to comply with the Code of Ethics should have resulted in dismissal for violation of professional activity.

71. *Nonetheless, it would be appropriate for the career progression of prosecutors found to have failed to comply with the standards in the Code of Ethics to be monitored so as to ensure that the requirement of an irreproachable reputation is not being watered down.*

72. Paragraphs 5 and 6 is the first of several provisions dealing with appointment of prosecutors of the Autonomous Territorial Unit of Gagauzia ("ATU Gagauzia"), an issue of concern in the Joint Opinion on account of the special status accorded to it by Article 111 of the Constitution and Articles 21 and 27 of its organic Law on Special Legal Status of Gagauzia (Gagauz-Yeri)[30].

73. The present provisions – which deal with the position of chief prosecutor and deputy chief prosecutor of the ATU Gagauzia Prosecutor's Office –replace those dealing with the appointment of the prosecutor of ATU Gagauzia. However, this

[30] Paragraphs 14D and 27.

provision deals only with the requirements for applying for the position of chief prosecutor and that was not an issue specifically addressed in the Joint Opinion, as the concerns in it about prosecutorial appointments for ATU Gagauzia did not deal with them but rather the process of appointment.

74. Nonetheless, the requirements that are specified for chief and deputy chief prosecutors – experience in the last 10 years continuously in the area of law, of which 5 years as prosecutor or judge, not being a member and/or not performing political activities in a political party or socio-political organization in the last 3 years before the announcement of the competition and knowledge of the Gagauz language – are not ones specified for other chief or deputy chief prosecutors. The language requirement is undoubtedly justified given the location of the posts concerned. However, the first two might be seen as discriminatory in that they are comparable to those for appointment as Prosecutor General and are more exacting than those for a Deputy Prosecutor General. The chief and deputy chief prosecutor of ATU Gagauzia is undoubtedly not in exactly the same position as other chief prosecutors, not least in having *ex officio* membership of the Superior Council of Prosecutors, but it is not evident that that justifies the differential treatment involved.

75. *There is a need, therefore, for the introduction of the first two conditions in paragraph 5(a) and (b) to be explained and justified.*

Article 21

76. In the Comments on the revised draft it was noted that there had been no clarification of the arrangements for protecting data gathered pursuant to health checks and the criteria relevant for the proposed psychological and psychiatric assessment, which had been a concern expressed in the Joint Opinion[31].

77. However, in discussions with the Working Group it was pointed out that arrangements for protecting data gathered pursuant to health checks and the criteria for psychological and psychiatric assessment are set out in secondary legislation made by the joint order of the Ministers of Justice and Health. There is thus no need for this matter to be pursued.

Article 22

78. The only change in this provision is the deletion of what had been paragraph 4 of the revised draft, which had stated that

> Only the candidates for the prosecutor position who have passed the test at the simulated behavior detector (polygraph) are registered in the Registry

[31] Paragraph 103

This is not objectionable but it is probably of no substantive consequence as paragraph 2(k) still requires candidates to submit a “certificate confirming the test at the simulated behavior detector (polygraph)” and a negative result will undoubtedly lead to a negative assessment of the individual concerned.

Article 25

79. There are two changes to this provision. The first concerns the proposal and selection of candidates to the office of the prosecutor of the ATU of Gagauzia– (i.e., the chief prosecutor)-and the second relates to access to state secrets by a prosecutor following appointment.

80. The change to the provision in paragraph 3 concerning the proposal and selection of candidates to the office of the prosecutor of the ATU Gagauzia involves, firstly, the addition of an additional deadline for candidates to be proposed by the People’s Assembly. While the general rule of 3 months’ notice – which was appraised positively in the Comments on the revised draft - is retained, it is now further stipulated that this should occur within 2 months from the occurrence of vacation if this is happening “before the mandate expires. This change does not alter the fact that the proposal is still made by the People’s Assembly, which was the concern expressed in the Joint Opinion. It is not evident that this change gives rise to any problem of compliance with the Joint Opinion, the Constitution or organic Law on Special Legal Status of Gagauzia (Gagauz-Yeri).

81. However, the revised paragraph 3 does not indicate to whom the proposal should be made. Previously it had been to the Superior Council of Prosecutors and it was also stipulated that the Council should select the candidate to be appointed according to the general procedure. The latter may now be implicit in the stipulation in paragraph 1 that the appointment of prosecutors is to be by the Prosecutor General on a proposal from the Council but there is certainly a lack of clarity on this point. In any event, the present provision does not appear to mean that the proposal by the People’s Assembly will be automatically selected. This was why the Joint Opinion suggested at least a transitional solution, namely, that lower prosecutors within Gagauzia should be appointed by the Prosecutor General upon the proposal of the Prosecutor [now the chief prosecutor] of Gagauzia, with the consent of the People's Assembly, after prior consultation with the Superior Council of Prosecutors[32].

82. *The considerations that led to this recommendation remain applicable and the Law should be amended accordingly.*

[32] Paragraph 99

83. The issue of access to state secrets by prosecutors following their appointment was not something found in the draft considered in the Joint Opinion or in the revised draft. Furthermore, the text dealing with this, although proposed in the version considered by the Parliament of Moldova, was not actually adopted. The text that was not included in the Law would have required access to be allowed on the "restricted" basis once 6 months have elapsed from an appointment. Such access may be necessary for the functions to be performed by a public prosecutor but it is not essential that this be addressed in the Law.

84. A concern identified in the Joint Opinion[33]was that there was no mechanism to resolve disputes where the Prosecutor General refuses - for valid reasons - to appoint a candidate for appointment as a prosecutor proposed by the Superior Council of Prosecutors.

85. However, it has since been clarified in discussions with the Working Group that, in the event of disagreement between the Prosecutor General and the Superior Council, the will of the latter prevails since, following the rejection of a candidate by the Prosecutor the General Council may nominate the same person again and on that occasion – pursuant to the last sentence of paragraph 2 - the proposal is mandatory for the Prosecutor General. There is, therefore, no need to pursue this issue further.

Article 26

86. This provision – which concerns the selection of candidates for selection of chief prosecutor of ATU Gagauzia - is an entirely new one since there was nothing comparable to it in either the draft considered in the preparation of the Joint Opinion or in the revised draft.

87. Under this provision, the selection of the chief prosecutor is a matter for the People's Assembly under the conditions and criteria set out in the Law and the regulation approved by the Superior Council of Prosecutors. This entails a public competition, the use of the scoring system applied by the Council, verification by the Council of procedural compliance and candidate suitability, with a power of reasoned rejection, and the ability of the People's Assembly to repeat a nomination with the vote of 2/3 of its members but a need for a fresh competition where the same candidate is rejected twice for nonconformity with conditions and criteria. A candidate rejected twice cannot be proposed again. This scheme effectively implements the proposal made in the Joint Opinion, namely, that

> the Prosecutor of Gagauzia would be appointed by the Prosecutor General at the proposal of the People's Assembly of Gagauzia, following prior consultation with the SCP, and not vice versa, as provided in the Draft Law[34].

[33] Paragraph 101.
[34] Paragraph 99.

This issue does not, therefore, need to be pursued further.

88. However, the Law is not clear whether this process is also to be applied to the appointment of deputy chief prosecutor or this is to be governed by that for prosecutors working in the ATU Gagauzia Prosecutor's Office under Article 25(3).

89. *This is clearly something that needs to be resolved and it would be preferable for the procedure in Article 26 to be followed.*

Article 27

90. The changes to this provision relate to the oath to be taken upon appointment as a prosecutor.

91. Firstly, the content of the oath has been changed so that appointees no longer swear "to protect the legal order" and "the general interests of society". The former deletion is unproblematic given that the appointee still swears to "abide by the Constitution, and by the laws of the Republic of Moldova" and similarly so is the latter one as it reflects the changes made by the Law to the functions of prosecutors.

92. Secondly, it is now required that the declaration recording the taking of the oath be signed by person taking it and not just by the Prosecutor General and the President of the Superior Council of Prosecutors. Furthermore, there is no longer a stipulation that the oath is only to be taken once. Both changes are desirable as they will serve to underline the undertaking made by prosecutors, especially as their careers progress through further appointments.

Article 33

93. There are just two changes to this provision. One replaces "prosecution bodies" in paragraph 1(f) by "Public Prosecution Service" and the other deletes the reference the annulment by hierarchically superior prosecutors of prosecutors' decisions that are "unfounded" as opposed to "illegal". Neither are problematic. In fact, the term "unfounded" was neither in the draft reviewed for the Joint Opinion, nor in the revised draft. Its introduction would have widened the ability of a hierarchically superior prosecutor to interfere with decision-making by a prosecutor and its elimination thus reinforces his or her independence.

94. In the Comments on the revised draft it was suggested – I response to a concern expressed in the Joint Opinion[35] – that there was a need to specify who can challenge the actions, inactions and acts of prosecutors and how often this can be

[35] Paragraphs 108 and 109.

done as paragraph 4 (of what was then Article 32) does not make it clear that this can only be done once or indicate the modalities involved in such challenges, including whether or not a prosecution can be compelled or restrained by a court.

95. However, in discussions with the Working Group, it was pointed out that challenges to the acts of prosecutors could only be made once because, according to the Criminal Procedure Code, there is a very strict time limitation and such challenges must be made within a matter of days. Thus, by the time a challenge has been dealt with any further challenge would be time-barred. As this seems to resolve the concern that has been raised, there is no need for it to be pursued further.

Article 34

96. In the Comments on the revised draft of what was then Article 33, it was suggested that there was still a need – in line with a concern expressed in the Joint Opinion[36] – to extend the restriction on search and seizure powers with respect to prosecutors to what is in their possession as paragraph 2 was limited to objects and documents that are owned by them.

97. However, in discussions with the Working Group it has been pointed out that Article 33 is consistent with what is already in the Criminal Procedure Code and adds nothing new. Thus, the prosecutor does not have an immunity or inviolability other than for those activities carried out in the course of duty. In these circumstances, there is no reason to prevent the seizure of material which does not belong to the prosecutor which is found in the course of a search. As the concern expressed can be regarded as being allayed, there is no need for this matter to be pursued.

98. In the Comments on the revised draft it was also suggested - in response to a concern expressed in the Joint Opinion[37] - that there was a need to extend the scope of immunity from liability for statements as the one provided in paragraph 3 in respect of "statements made by observing the professional ethics" was insufficient to cover all lawful actions taken in the course of a prosecutor's duties.

99. However, in discussions with the Working Group, it was pointed out that, according to the Law on freedom of expression there is a full protection for all statements made by prosecutors in court as it provides for privilege against defamation actions for statements made in court. Moreover, with regard to any statements made outside court, it was considered reasonable that protection should only extend to statements made in accordance with the code of professional ethics.

[36] Paragraph 111.
[37] Paragraph 112.

100. This seems to resolve satisfactorily the concern that had been expressed and there is thus no need for the issue to be pursued further.

101. The Comments on the revised draft additionally stated – in respect of another concern expressed in the Joint Opinion[38] - that there was still a need to clarify how criminal investigations with respect to prosecutors are to be undertaken and guaranteeing independence for those who undertake such investigations.

102. Although Article 33(4) and (5) does provide some mechanisms for the investigation and prosecution of prosecutors, this does not go as far as the Joint Opinion considered appropriate when it stated that there was a need to

> ensure that a mechanism exists whereby independence from the hierarchy of the Prosecution Service is guaranteed to those in charge of such investigations. Consideration may be given to assigning this task to an existing independent body or creating a separate independent body for this purpose.

103. *There is, therefore, a need for further consideration to be given to establishing such a mechanism in a future amendment to the Law.*

Article 35

104. In the Comments on the revised draft – responding to a concern in the Joint Opinion[39] – it was stated that there was still a need to require the provision of incentive measures to be reasoned and linked to performance evaluation as there was no requirement in paragraph 2 (of what was then Article 34) for the application of the relevant criteria to be articulated in a given case or for the criteria to be linked to performance evaluation.

105. However, in discussions with the Working Group it was suggested that the criteria for the award of incentive measures would be set out in regulations.

106. *There is a need, therefore, to ensure that this issue is in fact addressed in the regulations and that these do require the reasoning for an award to be articulated in the manner that is suggested already to be the current practice.*

Article 37

107. The change to this provision – the deletion of "procedure" after "equity" – may be just a matter of translation as the draft considered for the Joint Opinion had the phrase "fairness of proceedings". The latter is what "equity" means and the word "procedure" is unnecessary. Insofar as there is any real change this is not problematic.

[38] Paragraph 113.
[39] Paragraph 114.

Article 38

108. The only change to this provision is the addition of a new disciplinary violation, namely, "intentional hindrance, by any means, of the activity of the Prosecutors inspection". This is not inappropriate.

109. However, while this violation is quite specific, the Comments on the revised draft noted with respect to the other violations – in response to a concern expressed in the Joint Opinion[40] – that there was a need to refine and clarify their scope as there remained problems of vagueness in their formulation despite the efforts to simplify them. In particular, it was pointed out that "inappropriate fulfilment of service duties" is a rather inexact term, as is "undignified attitude or manifestations affecting the honour, professional untrustworthiness, prestige of the Public Prosecution Service". Moreover, it was indicated that the violation "incorrect" application of legislation - while an improvement on the previous formulation of "intentional misapplication" - did not seem to be compatible with the offence of "severe violation of the legislation".

110. Furthermore, this provision does not set out the disciplinary violations according to levels of severity or gravity as was recommended in the Joint Opinion[41] since they are potentially capable of ranging from the relatively minor to the very serious.

111. *There is thus a need for their application to be monitored and, in the light of this experience, for renewed efforts to refine and clarify their scope, as well as to distinguish their different levels of gravity.*

Article 39

112. Three changes have been made to this provision.

113. The first is the introduction of a clarification into paragraph 1 that College of discipline and ethics is subordinated to the Superior Council of Prosecutors, which is a reflection of the actual position under the Law and is not problematic.

114. The second is the swapping of the content in paragraphs 3 and 4, without any substantive change, so that a temporary reduction in salary as a sanction precedes demotion. This accords with listing the sanctions in order of gravity and is entirely appropriate.

115. *However, it should be noted that the list of sanctions in paragraph 1 has not similarly been modified and it would be appropriate for this to be done*.

[40] Paragraph 119.
[41] Paragraph 120.

116. The third is the introduction into paragraph 6 of the phrase “de jure” before “released from serving any service duties”, which makes it clearer that a prosecutor once dismissed has no legal basis to act in that capacity. This is not inappropriate.

Article 40

117. The recommendation in the Joint Opinion[42] that there should be a change in the basis for extending the general one-year limitation period for bringing disciplinary proceedings to three years – namely, from the nature of the violations to the reasons for the disciplinary action – has not been met in paragraph 2.

118. The concern about the basis for the extension of the limitation period partly related to the vagueness in the formulation of the disciplinary violations and the formulation introduced into the revised draft and retained in the Law has minimised this particular shortcoming. However, the reason for the recommendation was also that it was more appropriate that any extension of the limitation period should only be justified by the reasons for disciplinary action not being taken within the normal deadline, such as 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. The proposed change would not actually have made the provision overcomplicated or affected its workability and there remains a risk that belated disciplinary proceedings will be instituted for improper reasons.

119. *The operation of the power to extend the limitation period should thus be kept under review, with a view to implementing the change should its misuse become apparent.*

Article 41

120. This provision has not been amended. As a result there has been no change to the stipulation in paragraph 3 that the term of action for disciplinary sanctions is one year. The effect of this is that – pursuant to paragraph 5 and Article 20(7) - during this period a prosecutor cannot be promoted to a higher position and cannot benefit from incentive measures. However, the Joint Opinion had recommended that this be reconsidered, stating that

> 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[43].

[42] Paragraph 116.
[43] Paragraph 117.

The duration of disciplinary sanctions cannot be regarded as a concern of the Joint Opinion that is fundamental. Nonetheless, there is certainly scope for the application of paragraph 3 to have harsh effects in particular cases.

121. *There is a need, therefore, for the operation of this provision to be monitored and further consideration to be given to its possible revision in the future.*

122. In the Comments on the revised draft, it was suggested that there was a need to remove the contradiction between the stipulations that that the disciplinary procedure applies to prosecutors who have ceased the employment service and that disciplinary sanctions shall be applied only to acting prosecutors as this remains the formulation of the relevant provisions in Articles 36(1) and paragraph 1 of this provision. This reflected a concern raised in the Joint Opinion[44]. There has been no change to these provisions.

123. However, in discussions with the Working Group, it was suggested that there was no contradiction between Article 35 (1) and Article 40 (1). Thus, while the disciplinary procedure can apply to former prosecutors, none of the disciplinary sanctions can be applied since none of them is appropriate to a person who is not a serving prosecutor. Moreover, this does not mean that a finding of a breach of discipline is without remedy since such a finding can affect the entitlement of the former prosecutor to pensions and allowances. In view of this explanation – which is consistent with the fact that none of the sanctions prescribed apply to persons who are no longer prosecutors - there does not appear to be any need for this issue to be pursued.

124. *Nonetheless, consideration should perhaps be given to adding to the list of sanctions a reduction or loss of pension as serious misconduct by a prosecutor who leaves the service should not be left unsanctioned.*

Article 52

125. Two additions have been made to this provision.

126. The first is the addition of sub-paragraph (f), specifying that the duties of the Inspection of prosecutors also include "other duties provided by legislation or regulations on activity". This is not problematic.

127. The second provides that the salaries of the Chief Inspector and the inspector from the Prosecutors Inspection are to be equivalent to that of the chief prosecutor and prosecutor respectively of the territorial prosecutor's office, "taking into account their corresponding seniority. This is not inappropriate.

[44] Paragraph 115.

128. In the Comments on the revised draft it was indicated, having regard to the recommendation in the Joint Opinion[45], that there was a need to include in this provision precise criteria as to whether or not a particular candidate is qualified to be an inspector since the present requirements do not contain anything specifically related to the function of being an inspector. There has been no change to the provision to address this recommendation.

129. In discussions with the Working Group, it was suggested that any relevant competencies for the appointment of inspectors could be taken into account by the persons responsible for evaluating the merits of the candidates.

130. However, this suggestion does not address the concern in the Joint Opinion that the qualities required to be an inspector should actually be identified in advance of the selection process.

131. *There continues, therefore, to be a need for this concern to be addressed but this could be achieved through subordinate measures so long as these are adopted before the selection process is undertaken.*

Articles 36-52

132. In the Comments on the revised draft it was noted that, contrary to the suggestion in the Joint Opinion[46], the structure of Chapter VII had not been modified so as to simplify the disciplinary procedure since it appeared to be rather elaborate in view of the different steps involved. The suggestion in the Joint Opinion was based on the experience of other disciplinary arrangements and acting upon it was not a fundamental requirement for compliance with European standards.

133. *Nonetheless, the operation of the procedure should be kept under review in case the structure does lead to prejudice to either prosecutors or those who have complained about their conduct.*

Article 55

134. Two changes have been made to this provision.

135. The first is the addition to paragraph 2 of a stipulation that in other cases than those mentioned in the first sentence – namely, maternity leave and leave for taking care of a child – any suspension of a prosecutor is to be by an order of the Prosecutor General, at the proposal of the Superior Council of Prosecutors rather

[45] Paragraph 124.
[46] Paragraph 121.

than by the Prosecutor General acting alone. This is consistent with the role accorded by the Law in this regard to the Superior Council of Prosecutors and this addition is just rectifying an omission from the text.

136. The second is the deletion of "material and" from the stipulation in paragraph 3 that "dismissal" does not imply the cancellation of material and social guarantees. The use of the word "dismissal" is perhaps a mistranslation since the present provision is concerned with suspension but, *if not, the Moldovan text should obviously be corrected*. It is not known why the deletion of the protection for material guarantees has been made, particularly since this might not be appropriate in certain cases of suspension (such as for maternity leave and leave to take care of a child).

137. *There is a need, therefore, to clarify why this deletion was made and to ensure that it does not lead to unjustified prejudice in certain cases of suspension.*

Article 58

138. Two changes have been made to this provision.

139. The first – to paragraph 2 - adds to a third case in which dismissal is to take place by order of the Prosecutor General or refusal submitted in writing, namely a refusal of transfer to another body in the Public Prosecutor's office if the body where the prosecutor has worked is subject to liquidation or reorganization. This is not problematic.

140. The second – to paragraph 3 – makes the 5 day deadline for a dismissal order being made (that runs from the date of the interference or the case being brought to the attention of the Prosecutor General) applicable to all the grounds of dismissal except resignation of one's own initiative rather than just refusal of transfer and appointment to an incompatible office. This is also not problematic.

Article 60

141. In this provision paragraph 3(c) provides for an increase of 12% compared to his/her salary for exercising the duties of chief prosecutor. This is not a new provision and is unproblematic. However, in the draft considered before adoption by the Parliament of Moldova, there was an additional provision that the increase would be 11% in the case of the chief prosecutor of ATU Gagauzia. This would potentially have been an unjustified differentiation in treatment between chief prosecutors.

142. *There is now a need, therefore, to clarify that there is now no differentiation between chief prosecutors and that the one for ATU Gagauzia will also receive the 12% increase.*

Article 67

143. The only change is to provide in paragraph 3 that regulations approved by the General Assembly of Prosecutors are to be published on the official websites of the General Prosecutor's Office rather than in the Official Gazette of the Republic of Moldova.

144. *This is not inappropriate but, as in other provisions of the Law reference is made to only one official website, there is a need to ensure that there is consistency in the Law's provisions on this point.*

Article 69

145. There have been three changes to this provision.

146. Firstly, it is now provided that there is now an additional *ex* officio member of the Superior Council of Prosecutors, namely, the new post of chief prosecutor of ATU Gagauzia. This gives effect to a recommendation in the Joint Opinion[47] but also leads paragraph 3 being amended so as to reduce the number of elected prosecutor members from 6 to 5 and keep the total membership to 12.

147. Paragraph 4 of this provision has been amended in two respects.

148. Firstly, it is made clear that the President appointing one of the members of civil society to the Superior Council of Prosecutors is the "President of the Republic. This is appropriate.

149. Secondly, it is now specified that civil society candidates for membership of the Superior Council of Prosecutors "shall have higher law education and experience in the domain of law of at least 3 years". This can be regarded as meeting the suggestion in the Joint Opinion that

> Regarding the civil society members of the SCP, it could be useful to specify, in the light of their relevance to the functioning of the criminal justice system, the most relevant sectors that they should come from (the bar, human rights NGOs etc.) and their suitable legal training/experience[48].

150. However, it is now provided that one of the civil society members is now to be chosen by the Academy of Sciences of Moldova rather than, as in former drafts, the Council of Lawyers Union. It is understood from discussions with the Working Group that this change reflected the view of prosecutors that lawyers should not participate in the selection of members of the Superior Council of Prosecutors as prosecutors did not participate in elections for members of the Council of Lawyers Union. However, this misses the point that the aim is to

[47] Paragraph 99.
[48] Paragraph 132.

ensure that civil society members should be drawn from those involved in the functioning of the criminal justice system. It is not evident that the Academy of Sciences of Moldova is better placed than the Council of Lawyers Union to choose legal practitioners for appointment.

151. *This does not seem an appropriate change and, insofar as it is not a translation error or there is a compelling justification for it being made, it should be reversed.*

152. In the Comments on the revised draft it was stated that the suggestion in the Joint Opinion that the *ex officio* members of the Superior Council of Prosecutors should be ones without voting rights[49] had not been acted upon and that is still the position in the Law.

153. *The failure to act upon the suggestion of the Joint Opinion remains a matter of concern and there will be a need to continue to press for the Law to be amended so as to remove the voting rights of the ex officio members.*

Article 70

154. There has been a deletion from sub-paragraph 1(q) in respect of certain powers of the Superior Council of Prosecutors in relation to office employees. These are certainly matters which can probably be dealt with just as well in the regulations made pursuant to sub-paragraph 1(a) and the deletion is also not problematic.

Article 71

155. There has been no change to this provision and so the suggestion in the Joint Opinion that the terms of office of the President of the Superior Council of Prosecutors and of its members should not be coterminous has not been acted upon[50]. This suggestion was to facilitate the choice of the President by reference to the experience of a person's performance as a member, as well as to limit the possibility of members being subordinate to the Prosecutor General.

156. *It is probably not absolutely essential that the suggestion in the Joint Opinion be acted upon but it would be desirable for it to borne in mind in the early years of the Superior Council of Prosecutors' operation so that it can be assessed whether such a change in the respective terms of office might actually prove useful.*

Article 74

[49] Paragraph 131.
[50] Paragraph 135.

157. There has been no change to this provision and so it does not address the concern in the Joint Opinion as to the disparity between the salaries of members of the Superior Council of Prosecutors who are representatives of civil society and those who are prosecutors[51].

158. In discussions with the Working Group, it was suggested that the Moldovan authorities felt that the legislation has now gone as far as it would be possible to go to deal with this matter and that the solution found was a reasonable one because the civil society members are entitled to continue their activity in the civil society, unlike other members of the Superior Council.

159. This is not an entirely unreasonable response, particularly as there was some change to the salary for civil society representatives, following the Joint Opinion. It does not seem appropriate, therefore, to pursue this issue.

Article 75

160. The only change to this provision is the amendment of paragraph 4 whereby it is now provided that elected members of the Superior Council of Prosecutors shall not participate in the competition for appointment as Prosecutor General "during the mandate, as well as in the period of 6 months after its termination". This is entirely appropriate since, as already noted[52], it is directed to a concern raised in the Joint Opinion.

Article 81

161. There has been no change to this provision and so the suggestion in the Joint Opinion[53] that Colleges for selection and career and for performance evaluation be merged. This suggestion followed the opinion of the Venice Commission concerning the draft law that it examined in 2008[54].

162. In discussions with the Working Group, it was stated that the Moldovan authorities were against the merging the College for performance evaluation with the College for the selection and career prosecutors and considered that this was essentially a policy choice for them to make and did not raise any issue of legal principle.

163. This is an entirely valid response and the suggestion was only made with a view to promoting a simpler administrative structure. There is, therefore, no need for this issue to be pursued.

[51] Paragraph 137.
[52] See para. 63 above.
[53] Paragraph 139.
[54] *Opinion on the Draft Law on the Public Prosecutor's Service of Moldova*, 13-14 June 2008, CDL-AD(2008)019, para. 56.

Article 83

164. There has been no change to this provision, which means that the concern raised in the Joint Opinion that there was no indication in sub-paragraphs 2(13) and 14 either as to the consequences of prosecutors, public authorities and public legal entities not fulfilling the obligation to provide the documents and information that Colleges have to request in the exercise of their powers or as to how its implementation will take account of the privilege against self-incrimination and the right to respect for private life under Articles 6 and 8 of the European Convention on Human Rights[55]. In the Joint Opinion it had been recommended that clarification be provided on these matters and, if necessary, that adequate guarantees be introduced for the respect of the fundamental rights that are engaged by these provisions.

165. In discussions with the Working Group, it was suggested that this point was somewhat hypothetical and that it was difficult to envisage in what circumstances the right not to incriminate oneself would apply to a request for documents or information from prosecutors, public authorities or public legal entities in the context of disciplinary proceedings against prosecutors.

166. This may well be the case but it would have been preferable for there to be a clear stipulation that – like prosecutors in Article 3(7) - the Colleges are bound to respect human rights, including those under Articles 6 and 8 of the European Convention. The operation of the power to request documents and information should, therefore, be kept under review to ensure that it does not give rise to the possible difficulties anticipated in the Joint Opinion.

Article 91

167. There are two changes to this provision.

168. The first is to specify in paragraph 2 that the budgets of the specialized prosecutor's offices are to be reflected separately in the budget of the Public Prosecution Service. This is consistent with these offices being partly governed by special laws and is not problematic.

169. The second is the addition in paragraph 3 "of the Public Prosecution Service" after "draft budget", which undoubtedly removes any possible confusion as to which budget is meant given that the preceding paragraph now refers to both that budget and those of the specialized prosecutor's offices. It is thus not inappropriate.

Article 95

[55] Paragraph 140.

170. The only change is the deletion of the phrase “subordinated to the General Prosecutor’s Office” after “Prosecutor’s Offices” in a connection with the specification about the seal of these offices. This deletion is more symbolic than substantive but is consistent with the harmonisation of procedural independence and procedural hierarchy seen in the Law. The deletion is thus not inappropriate.

Article 98

171. The changes to this provision concern paragraphs 1, 10 and 11.

172. Those to paragraph 1 concern the date of entry into force of the Law, both as regards the generality of its provisions and certain ones for which a later date is specified.

173. The general date for entry into force of the Law’s provisions is now 1 August 2016 rather than 1 January 2016. The provisions for which entry into force has been delayed pending the adoption of the constitutional amendment required to enhance the role of the Superior Council of Prosecutors have correctly been renumbered as paragraphs 10-12 of Article 17 (following the addition of a paragraph in that provision) and there has been a deletion of the word “corresponding” before “amendment”. In addition, the stipulation of the continuing in force of one provision from the former law until “the entry of the Constitution amendments” – which relates to the mandate of the Prosecutor General being 5 years rather than the 7 envisaged in the Law - has been supplemented by the indication that the provisions in Article 70(1)(d) of the Law “will be applied correspondingly”. Furthermore, the implementation of the provisions in Article 16 has been delayed until 1 January 2017.

174. The delayed entry into force of the generality of the Law’s provisions is realistic given that it was adopted after that date and is not problematic.

175. The delayed entry into force of Article 17(10) and (11), as well as the change in the term of a Prosecutor General’s mandate, until the Constitution is changed was recognised as unavoidable in the Joint Opinion[56]. However, the need for clarity as to when that occurs is necessary and it is regrettable in this connection that paragraph refers to amendment in both the singular and the plural.

176. *It will be important to ensure that there is no ambiguity as to the entry into force of Article 17(10) and (11) and the ceasing of Article 40(1) of the former law to have effect once the Constitution is indeed amended.*

177. The reference to the manner in which Article 70(1)(d) of the Law – which concerns the role of the Superior Council of Prosecutors in organising the

[56] Paragraph 90.

competition for the appointment of the Prosecutor General – is to be applied until the amendment of the Constitution is not inappropriate.

178. The delayed entry into force of the provisions in Article 16 – which concerns the Dress Code – is not inappropriate as it will allow prosecutors sufficient time to make the practical changes that these entail.

179. The changes to paragraphs 10 and 11 both concern the publication arrangements for the regulations supporting the implementation of the Law and the secondary legislation of the Superior Council of Prosecutors. These are now to be published on the official website of the General Prosecutor rather than in the Official Gazette of the Republic of Moldova, which is not inappropriate.

Article 99

180. This provision was not contained in either the draft examined in the Joint Opinion or in the revised draft on which comments were prepared in June 2015.

181. Paragraphs 1-6 deal with the termination of the Prosecutor's Offices at the level of the Court of Appeal, the Military Prosecutor's Office and the Transport Prosecutor's Office, the transfer of the staff concerned, the transmission of the movable and immovable property and of files and other documents and the distribution of the cases managed by those offices. The arrangements made in them are a necessary consequence of the changes to the prosecution system made by the Law and they are not problematic.

182. Paragraphs 7 and 8 provide respectively for the Prosecutor's office for Combating Organised Crime and for Special Case to begin functioning and the Anticorruption Prosecutor's Office to continue its activity. Both provisions are appropriate.

183. Paragraph 9 provides that prosecutors from the Anticorruption Prosecutor's Office and the General Prosecutor's Office

> may be reappointed or transferred according to the competence, to the position of prosecutor to specialized prosecutor's offices or General Prosecutor's Office, without competition, except of reappointment or transfer to a position of the chief prosecutor.

This is not inappropriate.

184. Paragraph 10 provides for the merging of prosecutor's offices in the ATU Gagauzia into a single prosecutor's office, the transmission from those offices to new one movable and immovable property, archives, files, materials and other documents managed. In addition, it provides for the prosecutors from the offices concerned to continue, without competition, their activity in the new single office

and for the chief prosecutors of the merged to continue their activity as deputies of the chief prosecutor of the new single office until the expiry of their mandates.

185. *This seems, in principle, unproblematic but, as already noted*[57]*, there is a need to clarify whether there is anything in the organic Law on Special Legal Status of Gagauzia (Gagauz-Yeri) that would preclude the merger of the various prosecutor's offices in ATU Gagauzia and whether there was consultation about this with the authorities there.*

186. Paragraph 11 provides for the merger of various prosecutor's offices merging into one office, namely, the Prosecutor's Office of Chisinau municipality with effect from 1 January 2017, the transmission of the files, materials and other documents from the offices concerned, the continued activity in the new office of the prosecutors working in them and the appointment of the various chief prosecutors as deputies of the chief prosecutor of the new office until the expiry of their mandate. These arrangements are not inappropriate.

187. Paragraph 12 sets out the options for other chief prosecutors who are removed as a result of the reorganization performed under the Law, namely, to choose to remain in a vacant position of prosecutor, without competition. Although this might be seen as affecting the vested interests of the chief prosecutors concerned, and thus their rights under Article 1 of Protocol No. 1, it is unlikely that this would be regarded by the European Court as a disproportionate interference given the importance of the reform for the general interest and the fact that the chief prosecutors are not expected to seek any appointment through competition.

188. Reflecting the general interest referred to in the preceding paragraph, Paragraph 13 stipulates that henceforward "the position of chief prosecutors and their deputies are occupied only through competition".

189. Neither this provision nor Article 99 seem to address the issue raised in the Comments on the revised draft regarding the implications of the entry into force of the Law for the performance of those functions of prosecutors which are not being retained - notably with respect to protecting the legitimate rights and interests of the person, society and state – and which have been initiated but not completed by the time its entry into force occurs. The failure to deal with this matter could prove prejudicial, in particular, to the interests of individuals within the Republic of Moldova.

190. *There is a need to clarify what arrangements have been or will be made in respective of such cases.*

[57] See para. 45 above.

Article 100

191. This provision is comprised partly of text found at the end of the equivalent of what is now Article 98 when that was examined for the Joint Opinion but also of some entirely new text.

192. Paragraph 1 thus has the obligation in the earlier draft for the Government to submit to Parliament within 3 months proposals for bringing the legislation in force into conformity with the Law, as well as the obligation for the Government to bring its normative acts into conformity with the Law. However, an exception is made as regards the former obligation for "the drafts of special laws referring to the functioning of the specialised prosecutor's offices", for which the deadline specified is 1 May 2016. In view of the timing of the promulgation of the Law by the President, this amounts to a deadline of just over 2 months for the submission of these drafts. Neither period is unreasonable. Indeed, some speed in this process is necessary in order to ensure that related legislation is changed before or very soon after the Law's entry into force.

193. These provisions also meet the concern in the Joint Opinion that

> the transitional provisions provide for the appropriate harmonization of the Revised Draft Law's provisions with those of the Code of Criminal Procedure and any other relevant legislative provision[58].

194. Paragraph 2 provides for the former law to be abrogated once the Law enters into force. However, there seems to be an error resulting from the separation of this provision from what is now Article 98 in that the making of an exception to the abrogation refers to the "provisions provided in para. (1) of the current Article" when it is actually paragraph 1 of Article 98 that provides for one element of the former law to remain in force.

195. *There is a need to amend – with some urgency - this provision so as to refer correctly to Article 98(1), as otherwise there will be an inappropriate inconsistency between the relevant provisions of the Law.*

196. Paragraph 3 provides that

> Until harmonizing the legislation with the current Law, the legislative acts in force and other normative acts shall be applied insofar as they do not contradict the current Law.

This is not inappropriate.

[58]Paragraph 14E.

C. Conclusion

197. The Law has to a very large extent given effect to the recommendations and suggestions in the Joint Opinion so that the regime that will govern the Public Prosecution Service of the Republic of Moldova will be broadly in conformity with European standards.

198. In particular, the role of the Prosecution Service is clearly focused on responsibility for criminal proceedings, there are more precise provisions on the internal independence of prosecutors and related safeguards, there has been an elaboration of the provisions relating to the powers of the specialized prosecution services and the autonomy of the prosecutors concerned, there is now a mechanism to regulate the dismissal of the Prosecutor General and the interval between performance evaluations has been reduced.

199. Nonetheless there are certain provisions that still require some further amendment to satisfy European standards: Article 25(3) [para. 82]; Article 26 [para. 89]; Article 39(1) [para. 115]; Article 69 [paras. 151 and 153]; and Article 100(2) [para. 195].

200. There are also two provisions in respect of which it is either necessary to reverse the deletions that have been made to text that has previously been considered satisfactory or to ensure that it does not lead to unjustified prejudice: Article 14(1) [para. 53]; and Article 55(3) [para. 137].

201. Furthermore, there is one other in which the changes need to be explained and justified before it can be determined that they are compatible with European standards: Article 20(5) & (6) [para. 75].

202. Moreover, there are a number of other provisions for which some element of clarification is required in order to ensure that they are actually in conformity with European standards: Article 5(j) [para. 21]; Article 6(1)(a) [para. 27]; Article 9(3) [para. 36]; Article 10(1) [para. 45]; Article 17(1)(e) [para. 59]; Article 17(10) [para. 67]; Article 67(3) [para. 144]; and98 and 99 [para. 190].

203. In addition, there are certain provisions for which the practical arrangements concerning their implementation, including the adoption of regulations, will be decisive for their compliance with European standards: Article 17(3) [para.61]; Article 35 (2) [para. 106]; Article 52 [para. 131]; and Article 98(1) [para. 176].

204. There are also a number of provisions for which their operation needs to be monitored and/or consideration should be given to their amendment in the future in the light of the experience from their application: Article 20 (2) [para. 71]; Article 34 [para. 103]; Article 38 [para. 111]; Article 40(2) [para. 119]; Article

41(3) [para. 121]; Articles 36-52 (the disciplinary structure as a whole) [para. 133]; and Article 71 [para. 156].

205. It is noted that the recommendation of the Joint Opinion that consideration be given to including in the Law a provision on gender balance in the prosecution service[59] does not appear to have been addressed. Certainly there is no such provision in it. The recommendation in the Joint Opinion reflected the calls at both the international and regional levels for gender-balanced representation in all publicly-appointed positions. This is an important objective and consideration should thus now be given to securing it through the measures taken to implement the Law.

206. Finally, two other changes are required for the effective implementation of the Law. Firstly, the appropriate amendments to complementary legislation and the various internal measures need to be adopted in a timely way so that there is no delay or obstacle to the application of the Law's provisions. Secondly, there remains a need for the Constitution of Moldova to be amended so as to enable the new system for the appointment of the Prosecutor General to be introduced.

[59] Paragraph 143.