

**SUPPORT TO CRIMINAL JUSTICE REFORMS
IN THE REPUBLIC OF MOLDOVA**



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**COMMENTS OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE
OF LAW (DIRECTORATE OF HUMAN RIGHTS) OF THE COUNCIL OF EUROPE
ON THE REVISED DRAFT LAW ON THE PUBLIC PROSECUTION SERVICE OF
THE REPUBLIC OF MOLDOVA**

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A. Introduction

1. These comments are concerned with the Revised Draft Law on the Public Prosecution Service of the Republic of Moldova ('the Revised Draft Law'), which has been approved by the Government of the Republic of Moldova and submitted to the Moldovan Parliament for further examination and adoption.
2. The Revised Draft Law was 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 ('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 ('the Joint Opinion')¹.
3. The present comments first identify those aspects of the Joint Opinion that have been satisfactorily addressed in the Revised Draft Law. They then consider those aspects of the Joint Opinion that have not been completely addressed, those which have not been addressed at all and a few matters for which clarification seems to be required. No remarks are made with respect to provisions that were considered appropriate or unproblematic in the Joint Opinion. The comments conclude with an overall assessment of the compatibility of the Draft Law with the European and international standards².
4. These comments have been based on an English translation of the Revised Draft Law and of the current Law. The comments have 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 consultants Mr Jeremy McBride, Barrister, Monckton Chambers, former Chair of the Scientific Committee of the European Union's Agency for Fundamental Rights, and Mr James Hamilton, former Director of Prosecution Service of Ireland and member of the Venice Commission in respect of Ireland.

B. Positive changes

5. The Revised Draft Law has addressed the following recommendations in the Joint Opinion in a satisfactory manner³:
 - redrafting Article 1 to focus the wording on the core role of the Prosecution Service [para. 31] since the institution's responsibility for criminal proceedings is stated as the lead one and the reference to "other proceedings" and

¹ CDL-AD(2015)005.

² For the relevant standards see paragraph 15 of the Joint Opinion.

³ The paragraph numbers in square brackets are the relevant ones in the Joint Opinion

"protection of the rights and legitimate interests of individuals, society and the State" is necessarily circumscribed by the substantial removal of non-criminal functions in other proceedings in the formulation of Article 5;

- excluding influence and interference from any source to protect independence [para. 33] by the addition of "any other institutions, organizations or individuals" in Article 3(3);
- providing sufficiently clear guidance as to the harmonization of the principles of procedural independence and procedural hierarchy [para. 35] since Article 12(1) makes it clear that the Prosecutor General and his or her deputies are managers of the Public Prosecution Service, administrative activity is further defined as organisation and conduct of the activity of the subdivisions and Article 13 sets out in detail the powers involved by virtue of being a hierarchically superior senior prosecutor from the procedural point of view;
- removing the power to notify the Superior Council of Magistrates about the actions of judges that may constitute disciplinary offences [para. 59] since this is no longer found in Article 6(1);
- elaborating the provisions dealing with the specialized prosecution services [para. 78] as Article 9 is now much more detailed as regards their powers, relations with others involved in their work and the autonomy of the prosecutors concerned;
- qualifying the freedom of prosecutor to express views on case files that could be prejudicial to the conduct of a prosecution or infringe the right to the respect of private life of any participant in criminal proceedings [para. 82] as this is subjected in Article 15(2)(d) to a requirement not to infringe the presumption of innocence, the right to privacy of any person or affect the criminal proceedings;
- harmonizing the suspension from office of prosecutors running as candidates in an election with the prohibition on membership of political parties, participation in political activities and expression of political beliefs [para. 84] by the elimination of the former from what is now Article 54(2);
- bringing the appointment procedure for selection and appointment of prosecutors of the Autonomous Territorial Unit of Gagauzia into line with the organic law on ATU of Gagauzia [paras. 95-99] by providing in Article 25(3) that candidates are to be proposed by the People's Assembly of Gagauzia and selected by the Superior Council of Prosecutors;
- reducing the interval between performance evaluations [para. 104] as this will be every 4 (rather than 5) years under Article 28(2);
- precluding the participation of members of the Superior Council of Prosecutors in disciplinary proceedings that they have initiated or which have been brought against them [paras. 122, 123 and 138] as that is the effect of Article 49(8);
- specifying a mechanism to regulate the dismissal of the Prosecutor General [para. 128] as Article 57(6) requires that the President of the republic do this

"per the final court judgment or decision of the Superior Council of Prosecutors";

- precluding members of the Superior Council of Prosecutors from serving two consecutive terms [para. 134] as that is the effect of Article 72(1);and
- specifying the persons who can appeal to the Superior Council of Prosecutors against decisions of the Colleges [para. 141] as Article 84(5) now provides that this is just to be the person against whom the judgment was made and, in disciplinary cases, the person filing the complaint and the prosecutors' Inspection.

C. Incomplete changes

6. The Revised Draft has not, however, fully addressed the following recommendations in the Joint Opinion⁴:

- making more explicit the independence of the Prosecution Service from the judiciary and vice versa [para. 29] since, although Article 3(3) now provides that it is independent from "judicial powers", there is no corresponding provision with respect to the judiciary - is there intended to be done in the law on the judiciary - and it is also still stated in Article 1 that it is a "public institution within the judicial authority";
- making more specific reference to the provisions of the Draft Law and the Code of Criminal Procedure as to how a senior prosecutor may review a prosecutor's work [paras. 37 and 38] since there is a reference in Article 3(6) to Article 15 of the Revised Draft Law - which presumably is meant to be Article 13 - but there is no reference to any specific provision in the Code of Criminal Procedure;
- providing a more precise and narrow delineation of the powers of the Prosecution Service outside of criminal law [paras. 40-47] since, although no specific provision on representing the public interest is now found in the Revised Draft Law, the scope of the powers in Article 5(1)(j) and (l) respectively to initiate civil actions and to examine requests and petitions are not further defined in any other provision;
- stipulating that all specific orders by a senior prosecutor must always be made in writing and that verbal orders must either be confirmed in writing or withdrawn [para. 73] as Article 13(3) only specifies that the orders shall be formulated in writing and does not deal expressly with verbal orders;
- specifying who can challenge the actions, inactions and acts of prosecutors and how often this can be done [paras. 108 and 109] as Article 32(4) specifies that such challenges are to be by persons "whose legitimate interests were affected" but it is not made clear that this can only be done once and there is

⁴ The paragraph numbers in square brackets are the relevant ones in the Joint Opinion

no indication of the modalities involved in such challenges and whether or not a prosecution can be compelled or restrained by a court;

- extending the scope of immunity from liability for statements [para. 112] as Article 33(3) now uses the formulation "statements made by observing the professional ethics" which is insufficient to cover all lawful actions taken in the course of a prosecutor's duties;
- requiring the provision of incentive measures to be reasoned and linked to performance evaluation [para. 114] as Article 34(2) requires them to be based on criteria established by regulation but there is no requirement for the application of this criteria to be articulated in a given case or for the criteria to be linked to performance evaluation;
- refining and clarifying the scope of disciplinary offences [para. 119] as there remain problems of vagueness in their formulation despite the efforts to simplify them in Article 37. In particular "inappropriate fulfilment of duties" - if that is an accurate translation - is a rather inexact term. as is "undignified attitude or manifestations affecting the honour" and so on.. Moreover, the offence of "incorrect" application of legislation - while an improvement on the previous formulation of "intentional misapplication" - does not seem to be compatible with the offence of "severe violation of the legislation";
- including precise criteria as to whether or not a particular candidate is qualified to be an inspector [para. 124] as there are requirements for an appointment but nothing specifically related to the function of being an inspector is included in any of those listed in Article 51(2);
- specifying the sectors from which the civil society members of the Superior Council of Prosecutors are to be drawn [para. 132] as Article 68(4) provides for one to be elected from the Council of Lawyers Union but the other two can be freely chosen by the President and the Parliament;
- addressing the situation of the salary of civil society members of the Superior Council of Prosecutors who are lawyers [para. 137] as Article 73(3) provides a salary of 50% of the salary of prosecutor members which, while meaning an increase from the 30% of the salary of the Prosecutor General proposed in the earlier draft to 37.5% of that salary, does not necessarily deal with the issue raised in the recommendation; and
- providing guarantees with respect to rights under Articles 6 and 8 in connection with the power of the Colleges of the Superior Council of Prosecutors to request the provision of documents and information [para. 140] as the exclusion of private legal entities from those required to comply with such requests does not preclude the possibility of the relevant rights being violated in the case of others obliged to comply with such requests.

D. Recommendations not addressed

7. The Revised Draft has, moreover, not taken into account the following recommendations in the Joint Opinion⁵:
- making more distinct the applicability of the opportunity principle [paras. 32 and 106] as it is still not specified in Article 3 and the statement of the prosecutor's discretion in Article 32(1)(d) has also not been developed in this regard;
 - providing sufficiently clear guidance as to the harmonization of the principles of procedural independence and procedural hierarchy [paras. 35 and 69-73] as there are still no clear rules as to when and by whom revision of decisions taken by prosecutors may be done and as the observance of a two-tier procedural hierarchy
 - specifying that the power of access to premises in Article 6(1)(a) is subject to the safeguards in the Criminal Procedure Code [para. 58] as this is not specified in Article 6(1)(a);
 - limiting the duty of denunciation of violations of the law to ones concerning the criminal law [para. 60] as this is not a constraint in Article 6(3)(f);
 - setting out all the duties of the Prosecutor General [para. 64] as Article 11(1)(k) remains open-ended in this regard;
 - limiting the capacity of prosecutors from different levels to act as senior prosecutors for administrative purposes[para. 67] as this possibility is retained in the formulation in Article 12(1);
 - providing clarity as to the prosecutors' place within the judicial system and their distinctiveness from the judicial authority [para. 80] as this is not a feature of any of the provisions in the Revised Draft Law;
 - enabling compelling evidence of incompatibility and breach of the selection procedure to be a complete bar on appointment as Prosecutor General and establishing a judicial mechanism to resolve disputes over these issues [para. 92] as these do not feature in Article 17;
 - providing a 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 [para. 101] as this does not feature in Article 25;
 - clarifying the arrangements for protecting data gathered pursuant to health checks and the criteria relevant for the proposed psychological and psychiatric assessment [para. 103] as these are still not specified in Article 21;
 - extending the restriction on search and seizure powers with respect to prosecutors to what is in their possession [para. 111] as Article 33(2) is still limited to objects and documents that are owned by them;

⁵ The paragraph numbers in square brackets are the relevant ones in the Joint Opinion

- clarifying how criminal investigations with respect to prosecutors are to be undertaken and guaranteeing independence for those who undertake such investigations [para. 113] as this still does not feature in Article 33 or elsewhere in the Revised Draft Law;
- removing 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 [para. 115] as this remains the formulation of the relevant provisions in Articles 35(1) and 40(1);
- changing the focus for the extension of the limitation of the period in which disciplinary proceedings can be brought from the nature of the violations to the reasons for the disciplinary action [para. 116] as there has been no change in the formulation of Article 39(2);
- adjusting the effect of the stipulation that disciplinary sanctions are "in force" for one year [para. 117] as this remains the formulation found in Article 40(3);
- setting out disciplinary offences according to levels of severity or gravity [para. 120] as no such organisation of them is found in Article 37. However, the more significant shortcoming is that most of the categories - as already noted - remain vague and are potentially capable of ranging from the relatively minor to the very serious;
- simplifying the disciplinary procedure [para. 121] as the structure of Chapter VII has not been modified in this respect;
- providing that the *ex officio* members of the Superior Council of Prosecutors be ones without voting rights [para. 131] as this limitation is not included in Article 68;
- precluding members of the Superior Council of Prosecutors from becoming - for a certain period - candidates for appointment as Prosecutor General [para. 133] as such a restriction is not included in Articles 17 or 68;
- precluding the term of office of the President of the Superior Council of Presidents from being coterminous with that of its members [para. 135] as there is no such provision in Article 70;
- merging the College for prosecutors' selection and career with the College for prosecutors' performance evaluation [para. 139] but both are retained as separate Colleges in Article 81;
- introducing a provision on gender balance in the prosecution service [para. 143] as this is not to be found in the Revised Draft Law; and
- ensuring 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 [para. 14E] as there is only provision in Article 96 for the supplementation of legislation in a manner that does not contradict the special legislation governing the status and activity of prosecutors.

E. Matters requiring clarification

8. There are three matters relating to the Revised Draft Law that are in need of some clarification:
 - whether the circumscription of the competence of the Prosecutor General to represent the general interests of society, defend the rule of law and the rights and liberties of citizens under Article 124 of the Constitution gives rise to any concerns about constitutionality in that, unlike the provisions on the appointment of the Prosecutor General in Article 17(9)-(11), there is no delay - pending a constitutional amendment - on the entry into force of the provisions affecting this, notwithstanding that the roles concerned are distinct from those of supervising and executing the criminal prosecution;
 - whether it is envisaged amending the Constitution - as recommended in paragraph 130 of the Joint Opinion - to include in it basic provisions on the role, composition and functioning of the Superior Council of Prosecutors; and
 - what are the implications of the entry into force of the Revised Draft Law for the performance of functions by prosecutors that are not being retained - notably with respect to protecting the legitimate rights and interests of the person, society and state - that have been initiated but not completed as this is not addressed in the transitional provisions in Article 97.

F. Conclusion

9. The effect of the changes effected in the Revised Draft Law is to move significantly towards the fulfilment of the recommendations made in the Joint Opinion. Indeed, these changes have addressed substantially three of the five key recommendations in it, namely, with respect to the powers of the Prosecution Service outside of criminal law, the mechanism for the dismissal of the Prosecutor General and the arrangement for appointing prosecutors in the Autonomous Territorial Unit of Gagauzia.
10. However, a few recommendations relating to making more precise the provisions on internal independence of prosecutors and related safeguards (notably as regards individual orders from superior prosecutors being in writing, limitation on the number of levels of hierarchical control over a prosecutor's acts, increased clarity as to decisional discretion of the prosecutor and who may change his or her actions or inactions) and ensuring the harmonization of the Revised Draft Law's provisions with those in the Code of Criminal Procedure and other relevant legislation have not been addressed in full in the case of the latter or substantially in the case of the former.

11. Furthermore, the non-fulfilment of some recommendations in the Joint Opinion poses in some instances a risk that violations of Article 8 of the European Convention on Human Rights will ensue, leaves certain issues which can genuinely and properly be disputed without a means of resolution and entails a degree of incoherence in the overall reform being effected.
12. In addition, there is a need for the clarification of one important matter relating to the compliance of provisions in the Revised Draft Law with the Constitution pending the latter's amendment.
13. Undoubtedly, the Revised Draft Law represents a further step towards establishing a modern, autonomous and efficient system of prosecution but this would be much more substantially achieved through addressing some of remaining recommendations of the Joint Opinion that are outstanding, either partly or in their entirety.
14. It is understood that work is under way to finalise the Revised Draft Law, notably as regards reviewing the prosecutor's work, and also to make adjustments to provisions in the Constitution and other legislation. Such adjustments may result in some of the comments above becoming redundant but it is not possible to reach a conclusion in that regard until this work is finalised.