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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DIRECTORATE OF HUMAN RIGHTS OF THE DIRECTORATE GENERAL OF**  
**HUMAN RIGHTS AND RULE OF LAW**  
**(DGI)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS**  
**AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**JOINT OPINION**

**ON THE DRAFT LAW ON THE PROSECUTION SERVICE**

**OF THE REPUBLIC OF MOLDOVA**

**adopted by the Venice Commission**  
**at its 102<sup>nd</sup> Plenary Session**  
**(Venice, 20-22 March 2015)**

**on the basis of comments by**

**Mr Serhii KIVALOV (Member, Ukraine)**  
**Mr Jørgen Steen SØRENSEN (Member, Denmark)**  
**Mr Kaarlo TUORI (Member, Finland)**  
**Mr Andras VARGA (Member, Hungary)**  
**Ms Lorena BACHMAIER WINTER (Expert, DGI)**  
**Mr Jeremy McBRIDE (Expert, DGI)**  
**Mr John PEARSON (Expert, OSCE/ODIHR)**

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## **I. Introduction**

1. On 18 November and on 19 November 2014 respectively, the Minister of Justice of Moldova sent letters to the Venice Commission and, through the OSCE Mission in Moldova, to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "OSCE/ODIHR"), requesting assistance from both institutions in reviewing the Draft Law on the Prosecution Service of the Republic of Moldova (CDL-REF(2014)052), hereinafter the "Draft Law").
2. Both OSCE/ODIHR and the Venice Commission confirmed their willingness to review the draft amendments. Mr Serhii Kivalov, Mr Jørgen Steen Sørensen, Mr Kaarlo Tuori and Mr Andras Varga acted as rapporteurs on behalf of the Venice Commission. Ms Lorena Bachmaier Winter and Mr Jeremy McBride, experts of the Directorate of Human Rights of the Council of Europe's Directorate of Human Rights (DG I) and Mr John Pearson, OSCE/ODIHR expert, also contributed with written comments to the present Opinion.
3. On 5-6 February 2015, a joint delegation of the Venice Commission, DG I and the OSCE/ODIHR visited Chisinau and held meetings with representatives of the authorities (the Ministry of Justice, the Parliament, the General Prosecutor's Office, the Superior Council of Prosecutors) as well as professional associations of prosecutors and lawyers and civil society. The delegation is grateful to the Moldovan authorities and to other stakeholders met for the excellent co-operation during the visit.
4. The present joint opinion was adopted by the Venice Commission at its 102<sup>nd</sup> Plenary Session (Venice, 20-21 March 2015).

## **II. Scope of the opinion**

5. The scope of this Joint Opinion covers only the Draft Law, submitted for review. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the criminal procedure system of Moldova.
6. The Joint Opinion raises key issues and provides indications of areas of concern. In the interests of concision, the Joint Opinion focuses more on problematic areas rather than on the positive aspects of the draft amendments. The ensuing recommendations are based on relevant international human rights and rule of law standards and OSCE commitments, Council of Europe standards, as well as good practices from other OSCE participating States and Council of Europe member states. Where appropriate, they also refer to the relevant recommendations made in previous OSCE/ODIHR-Venice Commission opinions.
7. This Joint Opinion is based on the English translation of the Draft Law provided by the Moldovan authorities. Errors from translation may result.
8. In view of the above, OSCE/ODIHR, the Venice Commission and DG I would like to make mention that this Joint Opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation that OSCE/ODIHR and the Venice Commission may deliver in the future.

## **III. Executive summary**

9. At the outset, OSCE/ODIHR, the Venice Commission and DG I welcome the Draft Law, which represents, overall, a substantial improvement of the current Law regulating the operation of the Moldovan Prosecution Service and reflects a genuine effort to modernize the existing legal framework, in line with relevant European standards and best practices. It appears to be of good technical and structural quality, and it deals in detail - although in some cases in a too detailed manner - with many important aspects of the functioning of the

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Prosecution Service. Many of the proposed changes entail the implementation of recommendations in the Opinion adopted by the Venice Commission in 2008 on a previous version of the Draft Law (*Opinion on the Draft Law on the Public Prosecutor's Service of Moldova*, 13-14 June 2008, CDL-AD(2008)019, hereinafter "the 2008 Opinion" - see paragraph 17 below).

10. The proposed changes concern various steps to secure the autonomy of individual prosecutors and the service's own independence from external influence, the structure of the service and its demilitarisation, the appointment, tenure and removal of the Prosecutor General, the appointment and promotion of other prosecutors, as well as the performance evaluation and the disciplinary procedures.

11. It is particularly positive that the Draft Law proposes a significant reduction of the number of tasks of the Prosecution Service by specifying that provisions not related to the prosecution service's core role, such as its participation in civil cases and the supervision of the compliance with the law, will expire within three years from the entry into force of the Draft Law, thereby providing sufficient time to draft legislation which will transfer these responsibilities to other bodies. This will also allow the Prosecution Service to focus on its core task of criminal prosecution. While it would seem desirable to consider amending the Constitution to define the competences of the Prosecution Service more closely and narrowly, a constitutional amendment does not seem required for the changes envisaged in this regard by the Draft Law.

12. The new procedure for the appointment of the Prosecutor General envisaged by the Draft Law is, in the specific circumstances prevailing in the Republic of Moldova, clearly preferable to the current procedure but can, as acknowledged by the Transitional Provisions, enter into force only once the Constitution has been amended. This is a further aspect making it desirable to amend the Constitution.

13. In addition, the emphasis on the independence and neutrality of the prosecution service, improved rules on internal independence, the competitive recruitment of prosecutors and the focus on objective criteria in their performance evaluation, are significant steps to ensure a professional and politically independent prosecution service. Substantial amendments have also been introduced to the provisions concerning the prosecutorial self-administration bodies. In particular, the powers of the Superior Council of Prosecutors have been enhanced.

### **Key recommendations**

14. The above-mentioned improvements are welcome. The OSCE/ODIHR, the Venice Commission and DG I, however, suggest the following improvements to the Draft Law:

- A. To provide a more precise and narrow delineation of the powers of the Prosecution Service outside of criminal law and for judicial supervision of prosecutors' actions in this area, including during the transitional period, and to consider amending the Constitution with a view to defining the competences of the Prosecution Service more closely and narrowly;
- B. To include more precise provisions on the internal independence of prosecutors and related safeguards (the requirement that individual orders from hierarchically superior prosecutors be reasoned and given in writing, the limitation of the number of levels of hierarchical control over the prosecutor's acts, increased clarity as to the decisional discretion of the prosecutor and who may change his/ her actions or inactions; more precisely defined disciplinary offences and increased guarantees for the impartiality of the disciplinary proceedings);
- C. To include a specific mechanism for the dismissal of the Prosecutor General, distinct from the provisions regulating dismissal of other prosecutors and based on clear conditions and criteria;

- D. To reconsider the proposed provisions with respect to prosecutors in the Autonomous Territorial Unit (ATU) of Gagauzia, which are not compatible with the provisions of organic law on the ATU of Gagauzia. This is problematic not only since such contradictions within the applicable legislation have to be avoided in general but also since any interference with the status of Gagauzia in the current context raises sensitive issues and would require, if done at all, appropriate consultation of the competent bodies of Gagauzia;
- E. To ensure that the Transitional Provisions provide for the appropriate harmonization of the provisions of the Draft Law with those of the Code of Criminal Procedure and any other relevant legislative provisions.

#### IV. Analysis and recommendations

##### A. International standards

15. The OSCE/ODIHR, DG I and the Venice Commission have examined the Draft Law in the light of the standards of the Council of Europe and of the OSCE that are of relevance to legislation dealing with the operation of public prosecution services, as well as of existing good practices in the field, as available in particular in:

- the European Convention on Human Rights (hereinafter ECHR) and the related case law of the European Court of Human Rights;
- OSCE commitments, such as the 1990 OSCE Copenhagen Document, which provides that “the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution”<sup>1</sup> and the 2006 Brussels Declaration on Criminal Justice Systems, which states that “[p]rosecutors should be individuals of integrity and ability, with appropriate training and qualifications; prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law;” and that “[t]he office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges”.<sup>2</sup>
- Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system<sup>3</sup>;
- Recommendation CM/Rec(2012)11 of the Committee of Ministers to member states on the role of public prosecutors outside the criminal justice system<sup>4</sup>;
- Recommendation 1604 (2003) on the Role of the Public Prosecutor’s Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe<sup>5</sup>;
- the Venice Commission’s *Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service*<sup>6</sup> (hereinafter “Report on the Prosecution Service”) and related Venice Commission opinions;
- the European Guidelines on Ethics and Conduct for Public Prosecutors (“the Budapest Guidelines”) adopted by the Conference of Prosecutors General of Europe<sup>7</sup>;
- the Opinion No. 3(2008) of the Consultative Council of European Prosecutors on ‘The Role of Prosecution Services Outside the Criminal Law Field’<sup>8</sup>;
- the Opinion No.12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No.4 (2009) of the Consultative Council of European Prosecutors

<sup>1</sup> OSCE Copenhagen Document (1990), par 5.14.

<sup>2</sup> 2006 Brussels Declaration on Criminal Justice Systems (MC.DOC/4/06).

<sup>3</sup> Adopted on 6 October 2000.

<sup>4</sup> Adopted on 19 September 2012.

<sup>5</sup> Adopted on 27 May 2003.

<sup>6</sup> CDL-AD(2010)040, Venice, 17-18 December 2010).

<sup>7</sup> On 31 May 2005; CPGE (2005)05.

<sup>8</sup> CCPE(2008)3, adopted 15-17 October 2008.

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(CCPE) on "Judges and prosecutors in a democratic society" ('the Bordeaux Declaration')<sup>9</sup>.

## B. Background

16. Since becoming independent in 1991, the Republic of Moldova has undertaken a number of reforms in an attempt to reform the Soviet type justice system then in place with a view to modernising it and bringing this system in compliance with European and international standards. The most recent reform to the Public Prosecution Service was in 2008.

17. In 2008 the Venice Commission provided an assessment<sup>10</sup> of a draft Law which was subsequently adopted, with some revisions, as the current Law on the Public Prosecutor's Service of Moldova<sup>11</sup> (hereinafter "the current Law"). An expert assessment of the current Law was prepared for the Council of Europe and the European Union in 2009 ('the 2009 Assessment').<sup>12</sup>

18. The Draft Law under examination has been prepared by a working group of the Ministry of Justice and the Public Prosecution Service of the Republic of Moldova, pursuant to the *Justice Sector Reform Strategy for 2011-2016* ('the Strategy'), adopted by the Parliament of Moldova on 25 November 2011. Prior to preparing the Draft Law, the working group had elaborated a concept paper ('the Concept Paper')<sup>13</sup> setting out its position on developing legislation aimed at implementing the reform of the Prosecution Service, as enshrined in the Strategy.

19. As indicated in the Concept Paper, the adoption of the Strategy reflects the recognition by the State "of many problems affecting the activity of the system of entities of the Prosecutor's Office" with a need for interventions aimed at:

- enhancing the procedural independence of prosecutors;
- ensuring the specialization of prosecutors in specific cases and examining the possibility for the functioning of specialized Prosecutor's Offices;
- establishing certain criteria and clear and transparent procedure for selecting, appointing, and promoting prosecutors;
- reviewing the procedure of appointing the Prosecutor General;
- reviewing the rules on the liability of prosecutors;
- capacity building of the Superior Council of Prosecutors (SCP)<sup>14</sup>.

20. The general objective of the Strategy - as well as the Concept Paper and subsequently, of the current Draft Law - was to build a justice sector that is accessible, efficient, independent, transparent, professional, and responsible towards society, while complying with European standards, ensuring the rule of law and the observance of human rights, and contributing to ensuring the trust of society into the administration of justice<sup>15</sup>.

## C. Recommendations contained in the 2008 Venice Commission Opinion

21. In its 2008 Opinion, despite its overall positive assessment of the then draft Law, the Venice Commission pointed to one major outstanding problem, namely, the need to clarify to what extent the individual prosecutor has autonomy in decision-making or is subject to hierarchical control. In particular, it recommended that the law should clearly specify under which circumstances the prosecutor's autonomy can be overridden by a senior prosecutor<sup>16</sup>.

<sup>9</sup> CM(2009)192, 15 December 2009.

<sup>10</sup> Opinion on the Draft Law on the Public Prosecutor's Service of Moldova, 13-14 June 2008, CDL-AD(2008)019.

<sup>11</sup> Law nr. 294-XVI of 25.12.2008.

<sup>12</sup> *Assessment report on the new Law on the Public Prosecution Service of the Republic of Moldova*, (DGHL (2009) 13, 27 July 2009).

<sup>13</sup> *Concept on Reforming the Prosecution Service*, November 2013.

<sup>14</sup> *Ibid.*

<sup>15</sup> The Concept Paper, p. 2.

<sup>16</sup> Paragraph 71.

22. With respect to the definition of the function of the prosecutor's office in the draft Law, in terms that were almost identical to Article 124 of the Constitution, the Commission made the following comment: *"The text of the Constitution and the new provision of Article 1 of the Draft Law can on the face of it be understood in either of two ways. On the one hand, it may be that the reference to representing the general interests of society and protecting law and order is intended to confer a discrete function on the prosecutor's office over and above the business of criminal prosecution. On the other hand, it may be that the correct interpretation is merely that in conducting criminal prosecution the Prosecution Service is to represent the general interests of society and protect law and order. On the whole, it seems that the former interpretation is the correct one since the existing Prosecution Service in Moldova continues to exercise certain prokuratura-style functions and in the absence of anything in the draft text to indicate that this is to change one can only assume that this will continue to be the case. **If indeed this change represents a retreat from the earlier proposal to confine the prosecutor's office to the function of criminal prosecution this would be a substantial disimprovement in the proposal.** The obvious solution to this problem is an **amendment to Article 124 of the Constitution**"<sup>17</sup>."<sup>18</sup>*

23. To help improve the draft Law, the Venice Commission also formulated the following findings and recommendations:

- *Any "supervisory role" of the prosecutor should be limited to making an appeal in cases where he or she is a party to the proceedings.*
- *The choice between the opportunity principle and the legality principle should be clearly specified.*
- *The powers of Article 6 to request information and to inspect premises are too far reaching and should be made dependent on a decision by a judge.*
- *The powers of the prosecutor to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings should at most be subsidiary only.*
- *For the appointment of prosecutors, there are a number of options which could include the Superior Council simply giving an opinion on the suitability of all the candidates or alternatively ranking them in order of preference.*
- *A recommendation for appointment of a prosecutor should come from the Prosecutor General with the Superior Council having the right to refuse to appoint a person but only for good reason. This would require an amendment to Article 125(2) of the Constitution.*
- *It would be appropriate that there be an assessment of the performance of prosecutors at intervals much closer than five years.*
- *The promotion of prosecutors requires a greater degree of objective transparency such as recommendations of suitability by an appropriate board. This should not be left to the sole discretion of an immediate superior.*
- *The disciplinary criterion of "unequal interpretation or application of legislation" is dangerously vague and could be used to exert pressure on a prosecutor.*
- *There should be personal liability on prosecutors only if they have acted in bad faith or in some very improper manner.*
- *Two members of civil society are elected by the Board. It would be preferable to have them elected by Parliament."*

#### **D. Constitutional and legal framework**

24. At present, the organization and activity of the Prosecution Service in the Republic of Moldova is regulated by the Constitution of the Republic, Law No.294-XVI of 25 December 2008 "On the Public Prosecutor's Service of the Republic of Moldova" (in force since 17

<sup>17</sup> *Ibid.*, paragraph 12.

<sup>18</sup> Under article 124 of the Constitution: "(1) *The Office of the Prosecutor represents the general interests of the society and defends rule of law and the rights and liberties of the citizens, it also supervises and exercises, according to the law, the criminal prosecution and brings the accusation in the courts of law.*

(2) *The public prosecution system includes the General Prosecutor's Office, territorial and specialised prosecution offices.*

(3) *The structure, scope of competence and the manner of operation of the prosecution offices shall be provided for by law."*

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March 2009, having replaced the now void Law On the Public Prosecutor's Service No.118-XV of 14 March 1993) and the Criminal Procedure Code (hereinafter CPC). Lesser but important components of prosecutorial functions and powers are regulated by Law No.59 of 29 March 2012 "On the Special Investigation", and Law No. 320 of 27 December 2012 "On the Functioning of Police and Status of Police Officer" as well as the Civil Procedure Code.

25. The constitutional framework for the mandate, powers and operation of the Prosecution Service is to be found in Articles 124 and 125<sup>19</sup> of the Constitution.

26. As stipulated by the current Law (Article 1), the Prosecution Service of the Republic of Moldova is an autonomous office within the judicial authority which, subject to its powers and competence, represents general interests of society and protects law and order and rights and freedoms of citizens, manages criminal prosecution and conducts it, and represents the prosecution at the court of law, in accordance with appropriate law.

27. Also, special circumstances of the Republic of Moldova, as set out in Article 111 of its Constitution and Articles 21 and 27 of its organic Law on Special Legal Status of Gagauzia (Gagauz-Yeri)<sup>20</sup> (hereinafter "the Law on Gagauzia"), need to be taken into account when assessing the adoption of structural changes of the Prosecution Service. According to Article 21.1 of the Law on Gagauzia, "*the Prosecution Service of Gagauzia operates in accordance with the Law on the Prosecution Service of the Republic of Moldova (unless otherwise provided by the present law)*".

## E. Specific comments

### 1. Chapter I. General provisions

#### Institutional position and role of the Prosecution Service

28. The *Recommendation (2000)19 of the Committee of Ministers on the Role of public prosecution in the criminal justice system* allows for a plurality of models of the Prosecution Service. According to Article 1 of the Draft Law, the choice of the Republic of Moldova is for an "*autonomous public institution within the judiciary*", separate from the executive and the legislative.

29. In line with this, Article 3.3, referring to the principle of "Prosecution Service' independence" specifies that this "*excludes the possibility of Prosecution Service's subordination to legislative and executive authority, as well as influence and interference from other state bodies and authorities [...]*". Although this is not inconsistent with Recommendation Rec(2000)19<sup>21</sup>, a clearer distinction - as was pointed out in the 2008 Opinion<sup>22</sup> - should be made between courts of law and the branch of the judiciary exercising powers of prosecution. While the term "autonomous" under Article 1 appears to indicate that the Prosecution Service is also independent of other branches of the judiciary, it is recommended that the "*independence*" of the Prosecution Service from the judiciary and vice versa be made more explicit.

<sup>19</sup> "(1) *The Prosecutor General shall be appointed by the Parliament following the proposal submitted by the President of the Parliament.*

(2) *The hierarchically inferior prosecutors are designated by the Prosecutor General and are subordinated to the latter.*

(3) *Term of office of the prosecutor is 5 years.*

(4) *The office of prosecutor is incompatible with any other public or private remunerated position, except for didactic and scientific activity.*

(5) *In exercising their mandate, the prosecutors shall abide only by the law."*

<sup>20</sup> Law n° 344 of 23.12.1994, (which may be amended based on the vote of three fifths of the elected Parliament members).

<sup>21</sup> See paragraphs 17-20.

<sup>22</sup> Paragraphs 6 and 13.



30. Article 1 refers to the Prosecution Service protecting the "*legitimate rights and interests of the person, society and state*", following in somewhat broader terms the formulation used in Article 124.1 of the Constitution<sup>23</sup>. The formulation used in the current Law - which is even closer to that in the Constitution - was a matter of concern in the 2008 Opinion<sup>24</sup> since it was seen as potentially entailing the risk of being interpreted in a broad way so as to encompass the general supervision powers of the old Soviet *prokuratura* model.

31. Undoubtedly, the present provision, without the adjective "general" before "interests of society" and the specification that this representative function is "within the limits of its powers and competences", read in conjunction with other provisions the Draft Law<sup>25</sup>, is an improvement: the role of the Prosecution Service is more clearly focused on criminal justice functions, thereby meeting some of the past concerns. At the same time, the proposed wording remains somewhat vague and seems to still allow for a broad interpretation of the functions of the prosecutorial service, especially if this provision is read in the light of Articles 5 and 7 on prosecutors' powers in representing the public interest. It is recommended to redraft Article 1 in more specific terms and to focus the wording on the core role of the Prosecution Service, which is to conduct criminal prosecution (for prosecutorial powers outside the scope of criminal prosecution see comments on Articles 5 and 7 below).

### **The principle of legality**

32. Article 3.1 states that the Prosecution Service operates based on the "principle of legality". It is not entirely clear whether this is simply a general statement to specify that the Prosecution Service operates in accordance with the law or whether the "principle of legality" (requiring prosecution in all cases where the elements of a crime are fulfilled) as opposed to the "principle of opportunity" (leaving some discretion as to the need to prosecute to the prosecuting authority) and thus regulates a fundamental substantial issue of criminal procedure law. Although Article 34.1.d, which mentions the prosecutor's discretion in decision-making, seems to confirm that the opportunity principle applies, this fundamental distinction should be more clearly specified, and, if the principle of opportunity is to be applied, the rights of victims, including remedies for decisions not to prosecute, should be provided for.

### **The principle of procedural independence**

33. Article 3.3 states that: "*[t]he principle of Prosecution Service' independence requires its political neutrality and excludes the possibility of Prosecution Service' subordination to legislative and executive authority, as well as of influence or interference from other state bodies and authorities in the Prosecution Service' activity*". This is a clear statement which, with the inclusion of principle of the 'political neutrality' of the Prosecution Service (absent from the current Law), is of particular significance for the approach that underlies the Draft Law. However, it is suggested to exclude influence and interference from any source and not just from state bodies and authorities.

34. At the same time, Article 12 of the Draft Law establishes the authority of the Prosecutor General as hierarchically superior to all prosecutors, thus empowering him/her to manage, control, organize and co-ordinate the activity of territorial and specialized prosecutorial organs (Article 12.1 and Article 12.2.a). In addition, for the actual operation of the system, Article 14 sets out the "*administrative hierarchy of the positions of prosecutors*" and Article 15 the "*procedural hierarchy of prosecutors*". The hierarchy principle is confirmed by Article 3.6 enabling the hierarchical revision of prosecutorial work.

<sup>23</sup> "*The Office of the Prosecutor represents the general interests of the society and defends rule of law and the rights and liberties of the citizens, it also supervises and exercises, according to the law, the criminal prosecution and brings the accusation in the courts of law*".

<sup>24</sup> Paragraphs 7-12 of the 2008 Opinion of 2008.

<sup>25</sup> See Article 5 (l): "*Prosecution service:[...] l) represents the public's interests in cases established by this Law*".

35. According to earlier opinions of the Venice Commission on the matter, the two principles mentioned - procedural independence and procedural hierarchy - are not mutually exclusive in their application, but have to be applied in a concerted and harmonious way. As stated in the Report on the Prosecution Service, "...there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. ... the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts".<sup>26</sup> While the basic provisions of the Draft Law generally fit into that concept, the Draft Law does not provide sufficiently clear guidance on how these two principles should be harmonized in practice (see comments under specific articles).

### **Hierarchical control**

36. It is welcomed that the Draft Law removes the unequivocal hierarchical administrative control, currently provided by the Article 2.5 of the current Law, whereby "*internal hierarchical control and judicial control are principles that ensure the exercise by [the] hierarchically superior prosecutor of the right to verify the correctness and legality of the activity and decisions adopted by [the] hierarchically inferior prosecutor, as well as the possibility of contesting the prosecutor's decisions and actions of procedural character with a court of law*". Instead, Article 3.6 of the Draft Law provides that the prosecutor's work "*may be subject to review from the superior prosecutor and the court*", in accordance with the Draft Law and the Code of Criminal Procedure.

37. However, with its overly abstract character, the new formula in Article 3.6 may be seen as contradicting the guarantees laid down in Article 3.4 for the "procedural independence" of the prosecutor: "*Prosecutor operates under the principles of lawfulness, reasonableness and procedural independence, which enables him/her to take independently and unipersonally decisions on cases s/he examines*." Although some guidance on how the superior prosecutor may review the prosecutor's work can be found in Article 15 on the procedural hierarchy of prosecutors, Article 3.6 should be made more specific, including by making clearer references to other relevant provisions of the Draft Law and of the Code of Criminal Procedure.

38. More generally, it is essential to ensure that, read in conjunction, the provisions of the two acts ("this law and the Code of Criminal Procedure") and any other relevant legislative provisions, clearly delineate and circumscribe the hierarchical control in question. It is important for prosecutors that the law provides clear rules as to when and by whom such revision may be done (any superior prosecutor or only the immediate supervisor), and on what grounds and under what conditions. Moreover, the extent to which the superior prosecutor may review the work of subordinates should likewise be specified (see also comments on Article 15 of the Draft Law).

## **2. Chapter II. Areas of activity and competence**

### **Functions of the Prosecution Service outside the criminal field - general considerations**

39. As previously indicated, Article 1 of the Draft Law sets out that the Prosecution Service is "*an autonomous public institution within the judiciary, which, within the limits of its powers and competences, contributes to the rule of law, justice enforcement, protection of legitimate rights and interests of person, society and state*". This provision, which seems to allow for both a narrow and a broad interpretation (so as to encompass the old model of general supervision powers) of the functions of the prosecutorial service, should be read in conjunction with Article 5, which provides the list of functions of the Prosecution Service, Article 6 on rights and obligations of the prosecutor in performing his or her functions and Article 7 regulating the prosecutors' powers in representing the public interest (see specific

<sup>26</sup> CDL-AD(2010)040, paragraph 28.

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comments below).

40. Article 5, in addition to functions related to the primary role of the Prosecution Service - criminal prosecution -, retains functions exceeding this area, although the scope of these functions has been reduced compared to the current Law. This approach, although in accordance with Article 124 of the Constitution, is not in line with the international trend of confining competences of the Prosecution Service to criminal prosecution.

41. In previous opinions addressing reforms of the prosecutorial service of countries in democratic transition, as well as in its 2010 *Report on the Prosecution Service*, the Venice Commission has consistently expressed strong caution as to the preservation of the Soviet model of the Prosecution Service, exerting vast powers beyond the realm of criminal justice. As the Commission observed: “[t]here is a very strong argument for confining Prosecution Services to the powers of criminal prosecution and not giving them the sort of general supervisory powers which were commonly found in “prokuratura” type systems... there are no common international legal norms and rules regarding tasks, functions and organisation of Prosecution Service outside the criminal law field ... however, where other functions [outside the criminal law field] are exercised they must not be functions which interfere with or supplant the judicial system in any way”.<sup>27</sup>

42. In its 2012 *Opinion on the Draft Law on the Public Prosecutors Office of Ukraine*<sup>28</sup>, the Commission once more emphasized, as a central issue in the context of judicial reforms in ex-Soviet countries, the necessity to remove powers outside of the criminal law field from the prosecutor’s competences. It also found problematic, *inter alia* in light of Article 6 of the ECHR, the prosecutor’s ability to represent the interests of citizens. The Commission acknowledged that, in the past, such competences might have been justified as a way to address the failure of the responsible institutions to ensure the proper application of laws and observance of human rights. In the Commission’s view, a modern and efficient European prosecution service should concentrate on the criminal law sphere, which should represent its main, if not only, area of concern. Powers relating to the general supervision of legality should be taken over by courts and human rights protection by ombudsperson institutions. Maintaining such far-reaching competences and related powers would result in the prosecution service remaining an unduly powerful institution, posing a serious threat to the separation of powers in the state and to the rights and freedoms of individuals.

43. The Commission pointed out in this context that the Committee of Ministers’ *Recommendation on the role of public prosecutors outside the criminal justice system*<sup>29</sup> providing for limitations on the powers the public prosecutor may have outside the criminal law field “*should not be seen as recommending that prosecution services should have such powers.*”<sup>30</sup> In addition, as recommended by the Committee of Ministers in its recommendation, where the public prosecution has a role outside the criminal justice system, “*appropriate steps should be taken to ensure that this role is carried out with special regard to the protection of human rights and fundamental freedoms and in full accordance with the rule of law, in particular with regard to the right to a fair trial [...].*” Any related powers should be defined in a clear and restrictive manner and be subject to judiciary control.

44. In view of the historical and political background of the prosecution system in the Republic of Moldova, the remarks above are entirely relevant (see specific observations below).

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<sup>27</sup> CDL-AD(2010)040, paragraphs 73, 77, 78.

<sup>28</sup> CDL-AD(2012)019.

<sup>29</sup> Recommendation CM/Rec(2012)11.

<sup>30</sup> CDL-AD(2012)019, paragraph 99.

### Specific observations

45. Certain powers listed under Article 5, i.e. under subparagraphs c)<sup>31</sup> and j)<sup>32</sup> may be interpreted as intimating, in pursuance of a longstanding tradition, a wider supervisory function of the observance of the law. However, ensuring compliance with the law by public entities where criminal offences are not involved is a task that is better performed by independent supervisory authorities.

46. Second, prosecutors are still authorized to initiate civil actions, although, compared to the Law in force, this function is narrowed to one connected to criminal proceedings only. Although this more narrow wording of the Draft Law is to be welcomed, it is recommended that the Draft Law be more precise on what is meant, in Article 5.d<sup>33</sup>, by civil cases where the “*proceedings were instituted by the Prosecution Service*” and to consider consolidating this provision, even during the transitional period, with the one limiting the initiation of civil actions to cases where this occurs within criminal proceedings (Article 5.i).

47. The list in Article 5 also includes, as an additional function, the consideration of “requests, complaints and petitions according to competence” (Article 5.k). 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). No details are provided as to the procedure of consideration of such petitions by the Prosecution Service or the types and status of formal acts issued by the prosecutors in pursuit of that function. If maintained, this function, as well as related procedures, should be subject to judicial control, better specified and harmonized with the provisions regulating such procedures in the Moldovan legislation.

48. The most problematic function listed in Article 5 is that of the prosecution’s representation of the public’s interest, “*in cases established by this Law*” (Article 5.l), a function which was also touched upon, and criticized, in the 2008 Opinion. Provisions of Article 7 lay down the tasks specifying this function (Article 7.1), related procedural steps (Article 7.2 and 3) and powers conferred to prosecutors in this context (Article 7.4).

49. The concept of public interest is not defined. Instead, Articles 7.1 and 7.2 set out that, pursuant to a notification by private parties or public authorities, the prosecutor can act in the public interest in case of a “*breach of provisions of a normative act whereby the rights or legal interests of individual, society were violated and this violation undermines the public interest*”. If the examination of the notification reveals facts that are subject to criminal or administrative liability, the prosecutor may “initiate criminal prosecution or administrative proceedings” (Article 7.3 and Article 7.6). The ability to represent the interests of citizens is, however, problematic as prosecutors are also mandated to act in pursuit of the state interest, which could clearly run counter to the interests of any individual being represented. There are other bodies - such as the ombudsperson - that would be better suited to defend the interests of the individual against the state.

50. Overall, it is positive that, compared to the current Law, the Draft Law deals with the supervisory role of the Prosecution Service in a more detailed and comprehensive way. Yet, regardless of the technical improvements introduced by the Draft Law, prosecutors are still entrusted, in implementing this role, with far-reaching powers (Article 7.4) which the Venice Commission has already found problematic in previous opinions. In addition, some of these powers remain, in the current wording, too vaguely or broadly defined and are likely to be interpreted and applied in an arbitrary manner.

<sup>31</sup> “Prosecution service: [...] c) performs, including *ex officio*, control over the enforcement of the law on special investigation activities and on the registration of notifications”.

<sup>32</sup> “Prosecution service: [...] j) supervises the compliance with laws in the Armed Forces, penitentiaries, temporary detention facilities and in application of measures to protect witnesses, victims of crime and other participants in criminal proceedings”.

<sup>33</sup> “Participates, under the law, in trials of civil cases, including administrative ones, where the proceedings were instituted by Prosecution service”.

51. Article 7.4.a confers on prosecutors, in the examination of notifications, the power “to initiate, to cease, to participate in the judicial examination of the case on defending the public interest, with the right to make claims”. It is suggested that reference to the relevant provisions of the Code of Civil Procedure be made. Also, it should be made clear that the prosecutor’s powers to initiate, cease or participate in the judicial examination of a case are only those of the individual and his/her legal representative under the Code of Civil Procedure. Moreover, the prosecutor’s power to make claims on behalf of others, if maintained, should only be a subsidiary power, clearly limited to cases of legal incapacity to act, and this should be established in court in advance.<sup>34</sup>

52. The wide powers in subparagraphs (b) and (d)<sup>35</sup>, granting the prosecutor access to public premises and documents, and requesting expertise and other support activities for documents received by the prosecution, potentially run counter to rights under Articles 6 and 8 of the ECHR, notwithstanding that only the premises of public entities are now involved (thus partially meeting the concern in the 2008 Opinion). Such powers, providing the prosecutor with an extensive ability to intrude into the functioning of the executive, also raise concerns from the perspective of the separation of powers in a democracy. They should also be subject to judicial control.

53. Also, the power in subparagraph (e) - to require that persons guilty of a violation be held disciplinarily liable - may raise questions in the light of the presumption of innocence. In view of the separate power to require an initiation of disciplinary proceedings in subparagraph (h), this provision should be deleted so that it is clearly left to the proceedings to determine whether the violation alleged by the prosecutor did in fact take place.

54. As to the power to summon and to request explanations in subparagraph (f), although its scope has been narrowed to “representatives of public institutions and legal entities”, it remains unclear to what extent the privilege against self-incrimination and defence rights under Article 6 ECHR must be observed in the procedure concerned. Clarity and, as needed, appropriate arrangements should be introduced to ensure respect of the above rights.

### **Transitional period**

55. Taking into account the above concerns, the proposed exclusion, after a three year transitional period, of prosecutors’ powers in the non-criminal field enumerated in Article 5 (d), 5 (j) 5 (l) and Article 7 of the Draft Law is to be welcomed, as the expiry of these powers would move the prosecutor’s office away from being a *prokuratura*-style general oversight body (see Article 101.2 of the Final and Transitional Provisions).

56. Yet, during the transitional period, the above provisions will still be in force, and will continue to confer upon prosecutors considerable powers to act outside the criminal field. These powers should either be removed from the Draft, or should be more narrowly circumscribed. Moreover, these powers, in particular those in Article 7(4) - and the right, which is not set to expire, to control the enforcement of the law on special investigation authorities and registration of notifications under Article 6.1.a - should only be exercisable with the prior authorisation of a court. Also, since these matters, as well as prosecutors’ “rights and obligations” ( stipulated in Article 6) may be regulated by the Criminal Procedure Code, it is important to make sure, for the purpose of clarity and legal certainty, that provisions of the two acts are harmonised, including, should this Draft Law be adopted, by

<sup>34</sup> See also CDL-AD(2008)019, paragraph 30.

<sup>35</sup> “4. The prosecutor, in the examination of notification, has the following rights:

[...] b) to have free access to the premises of public institutions and legal entities acting in the public interest and to the documents, materials and other information held by them relevant for consideration of notification about violation of a public interest;

[...] d) to request from the state institutions or from local public authorities to conduct expertise, inspections, audit on materials, information, communications received by the prosecution bodies and to demand presentation of these actions;”

subsequently amending the Criminal Procedure Code. To this effect, the Transitional and Final provisions may specifically call for changes to the Criminal Procedure Code.

57. Finally, it would be important to clarify - and this should be underpinned by an appropriate amendment to Article 124 of the Constitution<sup>36</sup> - what approach to follow once the transitional period is over, including, possibly, to indicate the bodies (which should be entirely separate from the Prosecution Service) which will be entrusted with the powers concerned.

### **Rights and obligations of the prosecutor**

58. In general, Article 6 confers far reaching rights on prosecutors, corresponding to the functions conferred to them both within and outside the criminal sphere (e.g. “*free access to the premises of public institutions, economic companies, other legal entities*”, in Article 6.1.c). These powers are exercised “under the law”, which may refer to appropriate safeguards in the Criminal Procedure Code. It is recommended to specify that such powers shall be exercised within the limits of the Criminal Procedure Code and, more generally, to ensure that, as recommended in relation to the wide powers provided to prosecutors under Article 7, they are subjected to judicial review (see also paragraph 57 above).

59. Article 6.1.a enables prosecutors to initiate disciplinary proceedings against criminal investigators, workers of special investigation bodies etc., for violations of the law and failure or improper fulfilment of their duties within criminal proceedings. Considering the reported tension between prosecutors and investigators in the Republic of Moldova, it is questionable whether these provisions will actually be conducive to enhancing the climate of trust and cooperation necessary for the effective prosecution of cases. Similar questions may be raised by article 6.1.b enabling prosecutors “*to notify the Superior Council of Magistrates about the actions of judges that may constitute disciplinary offence*”.

60. The “whistle blower” provisions in Article 6.3.f), g) and h), require prosecutors to denounce and record violations of the law, inform their superiors of requests made in violation of the law, and to report instances of corruption. If fully implemented and associated with adequate safeguards against abuse and bad faith reporting, these provisions will be beneficial in the fight against corruption. It would be more appropriate, however, to limit the denunciation obligation to violations of criminal law and not the law generally, since criminal prosecution is the main task on which prosecutors should focus.

61. It is also important to mention that Section 2 on “Conducting and carrying out criminal investigation”, Section 3 on “Participation of prosecutor in the administration of justice” and Section 4 “Acts of the Prosecutors”, present in the current Law, are not part of the Draft Law. During the discussions held in Chisinau, it appeared that, in light of the stipulations in Article 2.1 and 2.4 of the Criminal Procedure Code that “[c]riminal proceedings are regulated by the provisions of the Constitution of the Republic of Moldova, international treaties to which the Republic of Moldova is a party and this Code” and that “[l]egal norms of a procedural nature contained in other national laws may be applied only if they are included in this Code”, procedural matters had been deliberately removed from the Draft Law. It is recommended that, if adopted, the above-mentioned transfer of former provisions of the Law on the Prosecution Service be coupled with the overall examination of the provisions regulating the prosecutor’s functions in the CPC; this should cover the internal coherence of the said provisions as well as their consistency with the future prosecution law, in the light of the recommendations made in the present Opinion. For example, the retention of the power of prosecutors personally to carry out investigations under Article 51.1-7 seems an inappropriate duplication of the investigator's role and runs counter to the prosecutor's role in leading the investigation. Also, particular attention needs to be paid to issues related to the orders that the prosecutor may receive from his/her supervisor, which should be addressed in a consistent manner by the two acts.

<sup>36</sup> See 2008 Opinion, paragraph 12.

### 3. Chapter III. Structure and staff of the Prosecution Service

62. This Chapter regulates structural issues - hierarchical structure and mode of operation - of the Prosecution Service. In addition, it provides rules intended to harmonise the two key principles set out as a basis for the operation of the Service - procedural (functional) autonomy and procedural hierarchy.

#### Duties of the Prosecutor General

63. Article 12 states that the Prosecutor General is “hierarchically superior to all prosecutors” in the Prosecution Service, speaking of a “single system” which includes: the General Prosecutor Office; territorial prosecution offices; and specialized prosecution offices, as defined in Article 10. He/she “leads, controls, organizes and coordinates” these offices’ activity (Article 9.3.a) and exerts control over prosecutors’ activity (Article 12.2.c).

64. The stipulation that the Prosecutor General can have “other duties prescribed by law” in addition to those listed in this provision (Article 12.2.l) should be re-examined since all such duties should be set out in the Draft Law, as already noted in the 2008 Opinion<sup>37</sup>.

#### Internal Independence

65. In its 2008 Opinion, the Venice Commission explained that “[t]he hierarchical model is an acceptable model although it is perhaps more common where Prosecution Services are sited within the judiciary for the individual prosecutor to be independent. The hierarchical model is more commonly found where the Prosecution Service is regarded as a part of the executive. A hierarchical system will lead to unifying proceedings, nationally and regionally and can thus bring about legal certainty.”<sup>38</sup> The Commission however expressed concern about the “obvious contradiction between the principle of the autonomy of the individual prosecutor referred to in Article 2.4 and the principle of hierarchical control referred to in Article 2.5”.

66. The present Draft Law constitutes a clear reflection of the drafters’ efforts to better harmonize the general principle of hierarchical superiority with what appears to be an ambition to confer significant independence on the individual prosecutor. In particular, Articles 14 and 15 are aimed at providing clearer rules, on the one hand for the hierarchical operation of the Prosecution Service and at the same time at introducing additional safeguards for the functional independence of prosecutors. Yet, these provisions still raise a number of important questions for the future activity of the service and of individual prosecutors.

#### Administrative hierarchy of the positions of prosecutors

67. Article 14, dealing with the “*administrative hierarchy of the positions of prosecutor*”, sets out the different hierarchical levels of the Prosecution Service and the subordinate relations between the Prosecutor General, his/her deputies and the heads of subdivisions of his/her Office, chief prosecutors of specialized/territorial offices, and the prosecutors from territorial offices. Article 14.1 states that “*methodological and regulatory orders, dispositions, indications and instructions*” of superior prosecutors (as detailed in Article 14.2) are mandatory for hierarchically lower prosecutors. While the explicit exclusion from that list of orders which “concern specific cases” has to be welcomed, the concerns expressed in the 2008 Opinion<sup>39</sup> in relation to the hierarchical subordination of prosecutors (“who is more senior to other

<sup>37</sup> Paragraph 21.

<sup>38</sup> Paragraph 15.

<sup>39</sup> “If every single instruction or decision of any prosecutor can be appealed right up the line to the prosecutor general such that the decision of a territorial prosecutorial can be overridden by the decision of a prosecutor of the level of the court of appeal, which in turn can be overridden by a prosecutor in the general prosecutor’s office which in turn can be overridden by the head of a subdivision of the general prosecutor’s office, which in turn can be overridden by the deputy of the prosecutor general, which in turn can be overridden by the first deputy of the prosecutor general and which can finally be overridden by the prosecutor general, the system would appear to be highly cumbersome, slow and inefficient” (CDL-AD(2008)019, para 39).

persons”) remain valid. This means that, in practice, prosecutors from different levels may act as “superior prosecutors” in relation to a lower prosecutor (see comments on Article 15 below).

68. In this context, it is noted that, as indicated in article 9.2, divisions in the General Prosecutor Office may be headed both by “chief prosecutors or by civil servants”. It is recommended that this provision makes it clear that the possibility of civil servants heading divisions should not extend to ones involving the exercise of prosecutorial functions.

### **Procedural hierarchy - functional autonomy of prosecutors**

69. The 2008 Opinion recommended that the law should clearly specify under which circumstances a prosecutor’s autonomy can be overridden by a senior prosecutor. Article 15 of the Draft tries to respond to that recommendation, by detailing the duties of superior prosecutors under the procedural hierarchy on the one hand, and by providing safeguards for the functional independence of lower prosecutors on the other.

70. It is positive that, within the hierarchy set out by Article 14, the hierarchical control over a prosecutor’s acts is limited to reviewing and cancelling illegal decisions or acts (Article 15.2.b), which eliminates the possibility of reviewing their “correctness” (understood as “opportunity”). This is in line with the drafters’ decision to not retain the principle of “hierarchical control” among the basic principles of the Moldovan prosecution (see Article 3), as done by the current Law, which allows a superior prosecutor to verify the “correctness and legality” of the prosecutor’s acts.<sup>40</sup>

71. The Draft Law also specifies that even though the superior prosecutor can “give guidance on procedural actions concerning the case”, such guidance “cannot refer to the solution of the case” (Article 15.2.c). Moreover, while written and lawful instructions by superior prosecutors are obligatory for subordinated prosecutors (Article 15.3), a prosecutor is entitled to refuse to obey a disposition that is manifestly unlawful or conflicts with his/her legal conscience and can challenge it before a hierarchically higher prosecutor (Article 15.4). These are welcome changes that are likely to help further strengthen the functional independence of prosecutors<sup>41</sup>.

72. The possibility of a prosecutor to request that an order from a hierarchically superior prosecutor be given in writing has not been retained in the Draft Law<sup>42</sup>. Moreover, though it may be implied in Article 15.3, it is not expressly stated that verbal orders are not binding, which would remove all doubt as to the validity of any informal instructions that may be given. It is recommended to stipulate that all specific orders by a superior prosecutor must always be made in writing and that verbal orders must either be confirmed in writing, or withdrawn. The lower-ranking prosecutor should also be entitled to request further reasoning for the instruction, which should also be provided in writing. In addition, as underlined by the Venice Commission, “[i]n case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction”.<sup>43</sup>

73. Overall, the procedural hierarchy laid down in the Draft Law still lacks clarity and seems to allow the involvement of too many hierarchical levels, especially for prosecutors of the lowest ranks. The wording of Article 15.3 is not precise enough to ensure that the system apparently envisaged by Article 15.1, namely the establishment of a two-tier procedural hierarchy for the Prosecution Service, is indeed in place. This provision seems to allow more than one superior prosecutor to interfere with a subordinate prosecutor’s work, to review his/her work and give him/her orders. This may become even further sophisticated in the rules of procedure of the Prosecution Service. Clarity in this respect is of particular importance for the purpose of challenging an order under Article 15.4 as there could be

<sup>40</sup> See Current Law, Article 2(5).

<sup>41</sup> See paragraphs 19 and 3.4

<sup>42</sup> Article 56(3).

<sup>43</sup> See CDL-AD(2010)040, paragraph 59.



various superior prosecutors in a given case. It is recommended that the hierarchical system be more clearly defined and that the intervention of a superior prosecutor be limited to two levels above a respective prosecutor, or supplemented with the specification that only orders (“indications”) of the directly superior prosecutor (in the sense of Article 15.1) are meant by these. The Draft Law should also specify the difference between orders etc. covered by Article 14 (under the “administrative hierarchy”) and those covered by Article 15 (“under the procedural hierarchy”). In this way the work of the lower level prosecutors can be made easier and the possibility of excessive influence limited.

74. The autonomy of individual prosecutors also appears to have been enhanced by further changes introduced by the Draft Law, such as the new composition and system for appointing the members of the Disciplinary Board<sup>44</sup>, which helps to reduce their dependence upon the powers of superior prosecutors and the Prosecutor General. The link established between prosecutors’ and judicial salaries in Article 63<sup>45</sup> is also a positive change as it could contribute to tackling corruption and thus reinforcing independence.

75. That said, in the interest of ensuring consistency of prosecutorial acts with prosecutorial policy, a certain degree of hierarchical interference may be legitimate, if combined with appropriate rules and guarantees. In addition, to avoid the risk of corporatism in this profession, specific arrangements may be helpful, such as the appropriate inclusion of outside/civil society input in self-governing bodies of prosecutors.

### **Specialized prosecution offices**

76. The Draft Law (Article 10) only provides for two specialized prosecution services, the Anti-Corruption Prosecutor's Service and the Organised Crime Prosecution Service, thereby eliminating the Military Prosecution Service, the Transport Prosecution Service, and the Court of Appeal Prosecution Service. However the Draft Law appears to leave open the possibility of creating, by law, other specialized Prosecution Services. The Draft Law further provides, in Article 10.5, that investigation officers, experts and other personnel may be employed by these future offices or seconded to them.

77. In the Republic of Moldova, there already exists a prosecution office specialized in fighting corruption, namely the Anticorruption Prosecution Office (APO). However, corruption is mainly tackled by the National Anticorruption Center (NAC), a specialized body established by special law in 2002 and transformed into an independent structure in 2012. NAC competences are related to corruption prevention and combating corruption crimes, money laundering and terrorist financing. It has the right to conduct criminal investigations and its competences in the concerned areas are regulated by the Criminal Procedure Code. The APO’s main task is to oversee criminal investigation in such cases; this includes the right to take over a criminal case from NAC. At present, however, the APO reportedly does not have its own or not sufficient criminal investigation officers or experts, nor does it enjoy sufficient operational independence. This means that in practice, for complex cases, joint teams are formed with NAC staff. In addition, the legislation does not appear to contain thresholds or other criteria to distinguish between cases that should be addressed by the APO, and those under the competences of the NAC.

78. 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.

79. It appears that the Draft Law envisages that the specialized services will continue to

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<sup>44</sup> Boards subordinated to the SCP consist of 7 members: 5 elected by the General Assembly of Prosecutors among prosecutor; 2 elected by the SCP, through public competitor, from among civil society (Draft Law, Article 86).

<sup>45</sup> Prosecutors’ salary is established in dependence of judges’ salary, and determined by the level of prosecution office and the seniority in prosecution’s position.

operate under the general rules applicable to the Prosecution Service and individual prosecutors. It is essential, however, that within this framework, all the conditions and necessary safeguards - as well as operational resources - are in place to ensure the efficient and autonomous functioning of these services. These include a clear delineation of the services' relations with the National Anticorruption Center, a clear definition of the respective prosecutors' powers, specific rules for their relations with investigation officers, experts and the various public authorities, as well as, above all, adequate safeguards for the functional autonomy of prosecutors, in accordance with existing standards and best practices in this field.<sup>46</sup> The concerned provisions of Draft Law should be revised and completed accordingly.

#### 4. Chapter IV. Status of Prosecutor

80. Chapter IV mainly regulates incompatibilities, prohibitions and the dress code of Prosecutors. While elements of relevance for the prosecutors' status may be identified throughout the Draft Law, it would nonetheless be desirable to define this status in a more precise, comprehensive and consistent way. In particular, 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. The Draft Law would benefit from combining these defining elements, as well as prosecutors' resulting rights and obligations, into a single section.

##### Incompatibilities and prohibitions

81. Apart from requiring prosecutors to avoid and declare any conflict of interest that arises, Article 17 prohibits them from engaging in eight different forms of activities. The prohibited activities are in many respects the same as those found in Article 35.2 of the current Law. However, the Draft Law does not mention the prohibitions on: 1/ participating in trials in which the prosecutor has a family relationship with any of the participants (Article 35.2.a of the current Law); and 2/ expressing views in public on matters under investigation or for which information is due, apart from those under his/her management (Article 35.2.d of the current Law). At the same time, it introduces prohibitions on participating in strikes or picketing and on holding or exercising the function of prosecutor if this would imply being directly subordinated to specified relatives by blood, adoption or marriage.

82. The removal of the restriction on expressing views is in principle not problematic since it is in line with the right to freedom of expression that prosecutors should enjoy<sup>47</sup>. Yet, the exercise of this freedom still needs to be conducted in a manner consistent with the status of a prosecutor, to avoid disclosure of matters that could be prejudicial to the conduct of a prosecution or could unjustifiably infringe the right to respect of private life of any participant in criminal proceedings<sup>48</sup>. It would be appropriate, thus, for the stipulation in Article 35.2.d of the current Law to be retained, subject to a qualification to that effect.

83. The introduction of a bar on exercising the functions of a prosecutor where directly subordinated to a relative is not specifically required by European and international standards but could well contribute to strengthening public confidence in the public Prosecution Service. Its implementation would require effective monitoring of the process of appointing and promoting prosecutors.

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<sup>46</sup> See "Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro", CDL-AD(2014)041, paragraph 78.

<sup>47</sup> See, e.g., ECtHR, *Guja v. Moldova*, no. 14277/04, 12 February 2008.

<sup>48</sup> These interests are distinct from the general interest in illegal conduct and wrongdoing being reported, an instance of which led to the finding of a violation of Article 10 in the *Guja* case after a prosecutor was sanctioned for disclosing letters about certain cases to the press.

84. The prohibition on membership of political parties, participation in political activities and expression of political beliefs in Article 17.2.a reflects a similar prohibition contained in the current Law (in Article 35.2.b). This was considered appropriate in the 2008 Opinion<sup>49</sup>. At the same time, Article 58.2 of the Draft Law allows for the suspension from office of prosecutors when running as candidates in an election. It would be important to harmonize the two provisions to ensure a consistent approach.

85. The provision in Article 18 requiring prosecutors to wear gowns rather than uniforms (see article 55 of the current Law), would constitute a positive step towards the demilitarization of the prosecution service and will contribute to the prosecutor being seen as an actor on a par with the defense counsel. This will be beneficial to the right to a fair trial, and in particular the principle of equality of arms.

## **5. Chapter V. Selection and career of prosecutors**

86. The Chapter concerned with the appointment and evaluation of prosecutors has been substantially changed compared to the current Law. In particular, a significant change has been introduced in relation to the appointment of the Prosecutor General.

### **Appointment of the Prosecutor General**

87. Article 19 on the appointment of the Prosecutor General introduces a number of important changes. First, it entrusts the President of the Republic with the appointment of prosecutors, instead of, as is currently the case, the Parliament upon a proposal by the Speaker of the Parliament. Second, the appointment is to be made following a competition organised and assessed by the Superior Council of Prosecutors (SCP), with the latter then nominating the candidate with the highest score to the President. Although that candidate can be rejected by the President on a reasoned basis for violation of the law, violation of the selection procedures or for undeniable evidence of the candidate's incompatibility with the position of Prosecutor General, he or she must be appointed if he or she is re-nominated by two-thirds of the members of the SCP (Article 19.10 and 11). Based on the composition of the SCP (Article 72), this essentially means that e.g. the prosecutors elected by the General Assembly of Prosecutors and the members representing civil society may effectively override any rejection by the President.

88. Moreover, the conditions for applying for the position of Prosecutor General may preclude the appointment of persons belonging to a political party or involved in political activity in the three years prior to the announcement of the competition and thus contribute to depoliticising this office<sup>50</sup>.

89. Finally, the proposed seven year term of the Prosecutor General rather than the current five years is to be welcomed as this is both a sufficiently long period that goes beyond the term of any one government or of the President, and it also removes a significant threat to independence by excluding re-appointment. This gives effect to the Venice Commission's general recommendation concerning the term of office for a Prosecutor General<sup>51</sup>.

90. If adopted, these changes - which go beyond the recommendations from the 2008 Opinion and appear to follow the guidance provided by the Venice Commission in its Report on the Prosecution Service<sup>52</sup> - could do much to enhance the independence and suitability of persons appointed to the office of Prosecutor General, and would also strengthen the independence of the Prosecution Service per se. However, their adoption would first require

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<sup>49</sup> See 2008 Opinion, paragraph 41.

<sup>50</sup> A recommendation in *Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights*, 30 September 2013, section I.

<sup>51</sup> Report on the Prosecution Service, paragraph 35.

<sup>52</sup> Paragraphs 35-37.

an amendment to Article 125 of the Constitution, which provides for the Prosecutor General to be appointed by the Parliament, upon nomination by the Speaker of the Parliament, for a term of 5 years. In addition, as mentioned, the strong powers of the SCP in this appointment mechanism give rise to some comments.

91. Undoubtedly, in view of the specific circumstances prevailing in the Republic of Moldova, the selection of the Prosecutor General based on his/her competence is of particular importance for the depoliticisation of the office. One may note in this context that, when it comes to the dismissal of the Prosecutor General by the President during his or her single term of seven years, Articles 60 and 61.6 do not appear to foresee the involvement of the SCP, which may be useful as an additional safeguard. It is worth noting also that there is no explicit regulation in the Constitution about the dismissal of the Prosecutor General. This is also an issue which may need to be addressed in the context of a possible amendment of the Constitution.

92. This being said, the proposed new system appears debatable. In particular, it is difficult to understand why the “undeniable evidence of candidate's incompatibility”, as well as the violations of the law or of the legal procedures - referred to in Article 19.10 - are not sufficient reasons by themselves to prevent an appointment, as seems to be possible under Article 19.11. In addition, no judicial mechanism seems to be in place in case of dispute on such issues. In any event, it would seem possible to give the Council a role in identifying candidates even without constitutional amendments.

93. It is noted in this context that, as stipulated by the Final and Transitional Provisions of the Draft Law (Article 101.1.a and b), the implementation of the new appointment system will only apply upon expiry of the term of office of the present Prosecutor General – which, from the perspective of stability and continuity, is a welcome provision - and in any case only “after appropriate modification of the Constitution”. It is important to mention that any amendment of the Moldovan Constitution requires a 2/3 majority in Parliament, which is unlikely to happen in the current political set-up.

94. To accommodate the perspective of independence, under the current circumstances, the Moldovan legislator could consider including an additional transitional clause, providing that the Speaker of Parliament who, under Article 125.1 of the Constitution and the current Law, submits a candidature for the position of Prosecutor General to the Parliament for approval, should be bound by the determination of that candidature by the Supreme Council of Prosecutors following the procedure stipulated by Article 19.2-8 of the Draft. This could contribute to legitimizing the choice made by the SCP.

### **Appointment of the Prosecutor for the Autonomous Territory of Gagauzia**

95. Article 27.3 of the Draft Law stipulates that the prosecutor of the Autonomous Territorial Unit (ATU) of Gagauzia shall be appointed after consultation with the People's Assembly of Gagauzia. The Draft Law thereby changes the appointment procedure for these prosecutors from one where the People's Assembly of Gagauzia (which submits proposals for prosecutors to the Prosecutor General - Article 40.5 of the current Law) plays a decisive role to one where the legislature of Gagauzia is merely consulted.

96. Furthermore, Articles 21-27 on the procedure of selection and appointment of prosecutors no longer require the proposal by the Gagauzian Prosecutor or the consent of the People's Assembly of Gagauzia for the appointment of prosecutors within Gagauzia.

97. Neither of these proposed changes seems to be in line with Article 21 of the organic “Law on ATU of Gagauzia”. Furthermore, no mention is made in the “Final and Transitional Provisions” of the Draft Law of the conditionality of such changes upon amendments to the Constitution and the above-mentioned Organic Law.

98. In this connection, during the visit to Chisinau, local interlocutors involved in the elaboration of the Draft Law expressed their concern that the ATU Gagauzia as an

“integral”<sup>53</sup> part of the Republic of Moldova needs to fully embrace the new and progressive measures envisaged by the reform of the entire prosecution system. This concern is certainly legitimate. However, it is equally important to stress that, in the particular circumstances of the Republic of Moldova, any reform involving changes likely to infringe the Law on Gagauzia would undoubtedly be a highly sensitive/problematic step. Hence, in the preparation of such an important reform - which must in any case be based on broad consensus involving the various stakeholders concerned - all necessary attention should be paid to the broader social and political context and its potential implications. In no event should such reform be implemented without adequate consultation of representatives of Gagauzia<sup>54</sup>. It is also important to mention that, in accordance with Article 111 of the Constitution, organic laws governing the special status of ATU Gagauzia may only be amended with the vote of three fifths of the members of the Moldovan Parliament.

99. The Moldovan legislator may wish to consider a transitional solution, in line with Article 21.2 of the Law on Gagauzia, which would involve securing for the prosecutor of the ATU Gagauzia an *ex officio* membership in the Supreme Council of Prosecutors<sup>55</sup>, while bringing Article 27.3 of the Draft Law in compliance with Article 21.1 of the Law on Gagauzia; this would mean 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. In addition, to be in line with Article 21.3 of the Law on Gagauzia, Article 27 of the Draft Law should be supplemented with the provision that lower prosecutors within Gagauzia shall be appointed by the General Prosecutor of the Republic of Moldova upon the proposal of the Prosecutor of Gagauzia, with the consent of the People's Assembly, after prior consultation with the Superior Council of Prosecutors. In parallel, amendments in the spirit of the current version of Article 27 of the Draft Law may be launched, first to the Organic Law on Gagauzia, in consultation with all stakeholders concerned.

#### **Appointment of other prosecutors - other human resources issues**

100. Article 21 of the Draft Law sets out the principles of a competition-based appointment of prosecutors, through an objective, impartial and transparent selection process. This is a welcome new provision.

101. In relation to the appointment of prosecutors, the SCP is provided with very strong powers. As stated in Article 27.2, a 2/3 majority of the SCP may always override objections made by the Prosecutor General. This is a new provision, aimed at strengthening the role of the Council in the appointment process and thereby its overall legitimacy. Here too, the Draft Law does not address potential disputes in situations where the refusal of the proposed candidate by the Prosecutor General is based on valid objections.

102. The Draft Law provides for a relatively elaborate procedure of the appointment of prosecutors of all levels. In particular, it introduces additional requirements for candidates to prosecutorial positions, including subjective personality criteria such as personal integrity (Article 19.3), a faultless reputation (Article 23.1.f) and, to a certain degree, observance of the rules and standards of professional ethics (Article 21.2.e and Article 23.2.d). Especially in a younger democracy, it would be important to ensure that these subjective criteria contribute to efficiency and do not allow for bias and abuse. The Draft Law should specify how to determine whether or not the candidates meet those criteria and perhaps also make it possible for candidates to challenge decisions on appointments in court.

103. Similarly, there is a need to clarify the way in which the health check required under Article 24 for appointment and after every five years of service is to be implemented, with a

<sup>53</sup> See article 111, Constitution of the Republic of Moldova on the Autonomous Territorial Unit of Gagauzia.

<sup>54</sup> See also related comments in the “*Opinion on the Law on Modification and Addition in the Constitution of the Republic of Moldova in Particular Concerning the Status of Gagauzia*”, CDL-AD (2002)20, 8-9 March 2002.

<sup>55</sup> Under the current Law, the Prosecutor Gagauzia is *ex officio* member of the “Board of the Public Prosecutor’s Service”, a consultative body for the organisation of the activity of the Prosecutor General. Such a body no longer exists in the Draft Law.

view to ensuring that the information gathered thereby is not disclosed or stored in a manner incompatible with the right to respect for private life<sup>56</sup>. If needed, appropriate arrangements should be made to safeguard the right in a manner consistent with Article 8 ECHR. Moreover, it would be useful to specify which criteria will be of relevance in the “*psychological and psychiatric assessment of candidates for prosecutor’s office and of prosecutors in office*”.

### **Performance evaluation**

104. In accordance with Article 30.2, prosecutors undergo performance evaluation only once every five years. As noted in the 2008 Opinion (paragraph 46), five years seems a long time to wait to formally point out possible deficiencies in the professional competence of a prosecutor; a more ongoing and frequent process of monitoring and evaluation by a prosecutor’s supervisor would be more beneficial to their professional development. It is recommended to reduce the interval of five years and to clarify that training needs should be determined in a consultative process between the prosecutor and their superior(s).

## **6. Chapter VI. Ensuring the prosecutors’ independence**

### **Safeguards for prosecutor’s independence**

105. Article 34 summarises the most important safeguards provided by the Draft Law for the prosecutors’ independence. These mainly include the strict delineation of their duties, the appointment, suspension and dismissal procedures, their inviolability, their decisional discretion, and material, social and other resources and conditions.

106. Article 34.2 states that “in decision making, the prosecutor is independent, under the law”, whereas, Article 34.1.d refers to the “decisional discretion” granted to prosecutors by law. As already emphasized, it is important to clarify, in the law, whether individual prosecutors shall act on the basis of the principle of legality (meaning prosecution of all cases fulfilling the elements of a crime) or the principle of opportunity (which allows for prosecutorial discretion as to the decision of whether or not to prosecute). A combined reading of Article 34.1.d (“decisional discretion”), Article 34.2 (“independent, under the law”) and Article 3.4 (“taking “independently and unipersonally decisions on cases s/he examines”) would suggest that the opportunity principle would be applicable here (see also comments on Article 3.1 above).

#### *Hierarchical control - prosecutor’s orders*

107. Under Article 34.3, if a decision taken by a prosecutor is “illegal”, it can be cancelled “based on grounds by the superior prosecutor.” This must presumably be understood in conjunction with Article 15.2.b, which specifies the actions to be taken by the superior prosecutor in the context of procedural hierarchy (see related comments). Furthermore, actions, inactions and acts of prosecutors may be challenged with the superior prosecutor and the decision taken by the latter can be challenged further in court (Article 34.4). While this provision, especially as regards the availability of judicial supervision, is in principle to be welcomed, it raises several issues.

108. First, it leaves some room for potential abuse, since Article 34.4 does not specify who may challenge the actions, inactions and acts of prosecutors, or how often they may do so. Some limitation as to who may challenge (e.g. only interested parties) and how often they may do so (e.g. a decision not to prosecute may only be challenged once) would serve the interest of legal certainty and clarity. As it stands, anyone could potentially challenge the decision not to prosecute someone, and such challenges could be made numerous times. Whilst this issue may be regulated in the Criminal Procedure Code, the necessary clarifications should be provided, either by expressly stating the modalities of such appeals,

<sup>56</sup> See ECtHR, *M S v. Sweden*, no. 20837/92, 27 August 1997 and *L H v. Latvia*, no. 52019/07, 29 April 2014.

or by reference to other applicable provisions, e.g. in the Criminal Procedure Code.

109. In addition, although it would provide victims of crime with an opportunity to challenge a decision not to prosecute, Article 34.4 does not solve fundamental questions raised in the 2008 Opinion, namely: “Can a court of law compel a prosecutor to institute a prosecution? Can a court of law restrain a prosecutor from prosecuting?”<sup>57</sup> There is thus a need to clarify the scope of the challenge set out in this provision.

### **Prosecutor’s inviolability**

110. It is important for their independence that prosecutors enjoy inviolability, although this should not be absolute (an exception may be made, for example, in cases of corruption). As stated in Article 35.1<sup>58</sup>, inviolability (partial or full) of prosecutors is meant to contribute to the protection of prosecutors’ independence in decision-making. Article 35 actually appears to cover both functional (substantial) immunity and procedural guarantees (judicial inviolability).

111. The restriction on powers of search and seizure in Article 35.2 aimed at protecting the inviolability of a prosecutor is in principle appropriate. However, the restriction extends only to “his/her” goods, objects, documents or correspondence rather than what is in his or her possession. This could lead to unjustified interference with the right to respect for private life under Article 8 of the ECHR and to a breach of the prohibition on self-incrimination under Article 6(1) as a result of undue emphasis on who has title to the items in question at the time of the search and seizure. Hence, the inviolability mentioned in Article 35 should cover all items in the prosecutor’s possession.

112. Article 35.3 notes that a prosecutor “*cannot be held legally liable for his/her opinion expressed within criminal prosecution and in the process of contributing to justice*”. Whilst this provision appears to cover some aspects of the prosecutorial function, e.g. statements by the prosecutor that in his/her opinion, a person is guilty of a crime, it does not cover the entire range of actions undertaken by prosecutors in the fulfilment of their duties, such as ordering various investigative activities, procedural actions, etc. The provision should be phrased more widely, for example by stating that the prosecutor enjoys inviolability/immunity for lawful official actions taken in the course of his/her duties.

113. A further important aspect in ensuring prosecutor’s inviolability is the question as to who investigates and prosecutes cases against members of the Prosecution Service. Under Article 35.4, criminal prosecution against a prosecutor may only be initiated by the Prosecutor General. Also, criminal prosecution against the Prosecutor General can now only be initiated by a prosecutor appointed by the SCP (Article 35. 5), and not, as in the current Law, by the Parliament at the proposal of the Speaker. This is a welcome stipulation intended to enhance the independence of the Prosecutor General. However, since the Prosecution Service is a hierarchically organized and centralized body, it may be difficult for prosecutors to investigate criminal cases against other prosecutors (especially against the Prosecutor General). The Draft Law should clarify how investigations into possible criminal conduct of prosecutors are to be undertaken, and 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.

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<sup>57</sup> 2008 Opinion, Paragraph 18.

<sup>58</sup> “*Prosecutor’s inviolability provides safeguards of protection against any interference and intrusion in his her work*” (Article 35.1).

## 7. Chapter VII. Incentive measures. Disciplinary and patrimonial liability

### Incentive measures

114. Article 36 on incentive measures is unchanged from the provisions in the current Law, apart from the absence of any reference to conferring a higher classification grade or a special military grade. The arrangements for providing the incentives listed are not in themselves problematic; however, as regards the awarding of bonuses in particular, the observation in the 2008 Opinion that this should be done "*in a very objective, impartial and transparent manner (...) [and that there] are doubts about a body which is largely selected by prosecutors exercising such functions*"<sup>59</sup> remains relevant. It would be appropriate, therefore, for the provision of incentive measures to be reasoned and to be linked as much as possible to the procedure for performance evaluation. Article 36 should be revised accordingly.

### Disciplinary liability and disciplinary sanctions

115. Under Article 37, provisions on disciplinary liability shall apply to prosecutors in office, as well as to prosecutors "who have ceased labour relationship", before the expiration of the time-limits provided for in Article 41. Under Article 41.1, prosecutors may be held disciplinarily liable within one year from the date of committing the disciplinary offence (with certain specified exceptions in Article 41.2). It is understood that this extension to prosecutors having ceased their employment (see Article 37) aims at preventing resignation being used to evade accountability for wrongdoing. However, applying the provisions to persons no longer occupying the position of a prosecutor seems to contradict Article 42.1, which lays down that disciplinary sanctions shall apply to prosecutors in office.

116. The 3 years extension of disciplinary liability for the violations mentioned under Article 39 (b), (c) and (e) is problematic. Firstly, because of the vagueness of the formulation of the violations concerned (see comments below). Secondly, the focus is on the nature of the violations rather than the reasons for disciplinary action not being taken before the regular time-limit of one year. Such reasons may include deliberate concealment or cases where the facts only come to light in judicial proceedings (especially ones in which a miscarriage of justice is established) at a later date. It is only these latter considerations which should justify a departure from the limitation period. Article 41 should be revised accordingly.

117. Disciplinary sanctions are "in force" one year from their application, during which the prosecutor cannot be promoted to a higher position and cannot benefit from incentive measures (Article 42.5). It is suggested to reconsider this provision. On the one hand, a warning or a reprimand is usually not "in force" for a specific period of time, but simply stands. On the other hand, it appears inflexible to exclude promotion etc. for a certain time regardless of the individual circumstances.

### Disciplinary offences

118. It is important, in light of their independence, that prosecutors have security of tenure. The terms under which they may be sanctioned (even removed from office) should therefore be phrased clearly and unambiguously. The Draft Law generally complies with these principles both in substantive and procedural terms.

119. However, the concern expressed in the 2008 Opinion as to the vagueness of some of the disciplinary offences remains applicable to a number of those listed in Article 39 of the Draft Law, notably, those in paragraph 1(b) and (d)<sup>60</sup>. As the Venice Commission has observed, with such provisions it is difficult if not impossible to "*distinguish between failure to*

<sup>59</sup> Paragraph 51.

<sup>60</sup> "b) intentional misapplication or improper application of repeated grave negligence of legislation, if it is not justified by the change of the practice in application of legal norms established in the current legal system or in the system of jurisprudence; (...) d) interference with the activity of another prosecutor or interventions of any kind with authorities, institutions or officials for a solution another than within the legal provisions in force of some requests, claiming or accepting resolution of personal interests or interests of his/her family members".



*work and the more subjective assessment of the quality of decisions which are made*"<sup>61</sup>. In addition, there are violations which duplicate each other: there is "improper performance of duties" but also "failure or delay in fulfilling the duties" and "violation [...] of the deadlines of fulfilling the procedural actions."<sup>62</sup> Similarly, Article 39.f and 39.m list violations of provisions concerning incompatibilities and restrictions/prohibitions under the law, which is not problematic in itself, but requires a clear reference to where those incompatibilities and restrictions are listed. Also, Article 39 (k) lists "serious violation of working regime". To avoid such problems of vagueness and undue duplication, the concerned provisions should be refined and clarified.

120. In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity.

### **Disciplinary proceedings**

121. Disciplinary cases against prosecutors are decided by the Disciplinary Board in accordance with the procedure specified in Chapter VII (Articles 43 to 54). In accordance with Article 44.1, disciplinary cases may be commenced - by means of a notification - by any interested person, members of the SCP, the Evaluation Board and the Inspection of Prosecutors. The notification, to be submitted to the Secretariat of the SCP, is subsequently forwarded to the Inspection of Prosecutors. After verification of the notification, the Inspection decides to either terminate the disciplinary proceedings or, where grounds for disciplinary liability are identified, to submit the file, together with the inspector's related report, to the Disciplinary Board. Once a decision is taken by the Disciplinary Board, it may be appealed to the SCP (Article 54.1). The SCP is subject to judicial review by the Supreme Court of Justice. The procedure, with its different steps (including the requirement to go through the Secretariat of the SCP) seems quite elaborate; consideration may be given to simplifying it.

122. In the 2008 Opinion, the Commission raised the concern that any member of the Superior Council who had initiated disciplinary proceedings was not then precluded from voting on a decision with respect to the suspension of a prosecutor as a sanction<sup>63</sup>. This possibility does not arise precisely in the same way in the Draft Law, as there is no provision allowing for the suspension of prosecutors by the Disciplinary Board. However, the same issue of impartiality does arise in a different form as there is no provision precluding the SCP member who has initiated disciplinary proceedings from taking part in the determination of an appeal against a decision of the Disciplinary Board.

123. Disciplinary proceedings may also be taken against members of the Superior Council. If any such member appeals a decision against him/herself taken by the Disciplinary Board, the Draft Law should prevent him/her from hearing the case against him/herself, so as to avoid any threats to the impartiality required of members of the Superior Council. This situation appears to be covered by Article 81 requiring SCP members to abstain from participating in the examination of issues where doubts may be raised about their objectivity. This provision, somewhat broadly formulated, could be complemented (for example in Article 54) by adding a clear reference to certain obvious cases where members of the SCP should be excluded, such as participation in the hearing of a disciplinary case brought against oneself, or participation in a hearing that they themselves have initiated.

### **Inspection of prosecutors**

124. The introduction in Article 55 of an Inspection of Prosecutors to be selected by public competition (to be organized by the General Prosecutor's Office) is appropriate. It would be desirable for such a competition to be regulated in a similar manner as that for prosecutors,

<sup>61</sup> See 2008 Opinion, paragraph 52.

<sup>62</sup> Paragraphs (a), (j) and (c) respectively.

<sup>63</sup> Paragraph 66.

with an evaluation board subordinated to the SCP to ensure that the requirements for becoming an inspector are met. Furthermore, the Draft Law should include precise criteria for judging whether a particular candidate is qualified to be an inspector.

125. Furthermore, the functions conferred on the inspection of prosecutors by article 55.7 seem to overlap with those of Boards under the SCP, at least where individual issues are involved; however, the Inspection is subordinated to the Prosecutor General (article 55.1 and 55.6) rather than the Council. It is recommended that article 55 be reviewed with a view to addressing the inconsistency noted.

### **Dismissal of the Prosecutor General**

126. As previously noted, there is no constitutional mechanism for the dismissal of the Prosecutor General. Under Article 61.6.2 of the Draft Law, the Prosecutor General may be removed from office by the President of the Republic when a disciplinary sanction of dismissal having been applied to him/her becomes irrevocable (Article 61.1.c). Under Article 40.1.d, dismissal may be applied as a disciplinary sanction by the Disciplinary Board of the SCP in not explicitly defined grave cases (“as a result of committing a disciplinary offence”). Under Article 39, there are disciplinary offences, in particular lit. j), k), l) and quite especially n), which are described in a too vague manner. Moreover, under Article 44, any person can claim such alleged disciplinary offences in his/her notification.

127. It is also noted that, among the reasons for dismissal of prosecutors, thus including the Prosecutor General, Article 61 lists “being medically regarded as unable to work for fulfilling the duties”. This should be determined by a medical certificate. It should also be made clear whether the decision of the President to dismiss the Prosecutor General on this account is subject to judicial challenge so as to provide a safeguard against any abuse of this power.

128. In view of the above comments, it is recommended to include in the Draft Law a specific mechanism for the dismissal of the Prosecutor General, distinct from the provisions regulating dismissal of other prosecutors and based on clear conditions and criteria (see also related comments under the section on “Appointment of the Prosecutor General”).

## **8. Chapter XI. Superior Council of Prosecutors**

129. Chapter XI regulates the mandate, composition, competence and operation of the SCP (SCP), which is, alongside the General Assembly of Prosecutors, one of the two bodies of self-administration of the Prosecution Service. As indicated in Article 71, the Council is an independent body with the status of legal personality, set up in order to “*participate in establishing, operation and ensuring the self-administration of the prosecution system*”.

130. It is worthwhile recalling, in this connection, that the Draft Law refers to the Prosecution Service as an “*autonomous public institution within the judiciary*” (Article 1), thereby providing it with a specific place in the constitutional structure of the country. However, while the representative body of judges - the Superior Council of the Magistracy - has constitutional status<sup>64</sup>, the SCP is not mentioned in the Constitution. Given the key role of this body as a “*safeguard for the independence and impartiality of individual prosecutors*” (Article 71.2) and for the autonomy of the Prosecution Service (Article 68), it would be advisable, when the Moldovan Constitution is amended, to include in the Constitution basic provisions on its role, composition and functioning.

### **Membership and self-governing nature**

131. A wide membership range and greater competences (compared to the current Law) are envisaged for the SCP in the Draft Law, aimed at strengthening the independence of the

<sup>64</sup> Articles 122 and 123 of the Constitution.

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Prosecution Service and its institutional autonomy. The Prosecutor General, the President of the Superior Council of the Magistracy and the Minister of Justice are *ex officio* members of the SCP. Six members are elected by the General Assembly of Prosecutors, from among all prosecutors in office, and three are elected by competition from among civil society and appointed by decision of the Parliament (Article 72). The self-governing nature of the SCP might be questioned given the *ex officio* membership of the Minister of Justice and of the President of the Superior Council of Magistracy. It is suggested to consider their membership being one without voting rights.

132. 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. In addition, their appointment by the Parliament seems problematic if the goal is really to have a Council free of political influence. If this system is maintained, one option could be to establish a committee within Parliament, on which all parties are represented equally, to deal, according to a transparent procedure, with the issue of appointment of civil society members. Another solution could be to provide for their appointment by representatives of their profession - Lawyers' Union, assembly of university senates, etc.

133. Prosecutors who are elected as members of the SCP are detached from office while serving on the Council. For the sake of their independence and impartiality while serving on the Council, it is suggested to preclude SCP members from becoming candidates for the appointment as Prosecutor General, for example by placing a bar on those who have been members within the 12 months prior to the process of selection.

#### **Term of office**

134. Article 76 foresees a term of office for the elected SCP members of 4 years, but sets no limit to the number of times SCP members may be re-elected. This may have the undesirable effect of entrenching certain individuals in the SCP bureaucracy, and of SCP members losing their connection to prosecutorial practice, since during their term on the Council its members are not active prosecutors (Article 72.8). It is recommended to consider limiting SCP members to a single term in office or providing for some gap before re-election (two terms being the maximum suitable).

135. It is also noted that the duration of terms of members coincides with that of the SCP President<sup>65</sup>. A period of 3 years for the latter might be more appropriate so that candidates can be assessed from their initial service on the Council. Moreover, an arrangement whereby not all members are elected at the same time (one-third every two years), which could also limit the potential issue of the prosecutorial members being subordinate to the Prosecutor General, may be considered. This could also be addressed through the relevant transitional arrangements.

136. It is worth noting in this context that, as a novelty compared to the current Law (Article 83), the SCP President may only be elected, under Article 74 of the Draft Law, from among elected prosecutors-members. One might wonder whether such an option is not conducive to a corporatist approach within the Council.

#### **Remuneration of SCP members**

137. According to Article 77, prosecutors who are members of the SCP receive a "salary" representing 75% of the salary of the Prosecutor General or their own salaries where higher, while members from civil society receive a "monthly allowance" amounting to 30% of the salary of the Prosecutor General. The difference is striking given that members from both

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<sup>65</sup> The SCP President is elected from among the elected prosecutor members, by secret vote, for a term of office of four years, by a majority vote of its members.

categories are dedicating the same commitment to their work within the SCP. One justification for this difference may be that, whereas prosecutor members are detached from their office during the membership to the SCP (Article 72.8), this does not seem to be the case for civil society members. However, as required in Article 72.9, SCP members, except for *ex officio* members, cannot exercise any other gainful activity apart from teaching, creation and scientific activity or in public association. If some SCP members may earn a salary from such activities, the Draft Law does not seem to address the situation of lawyers who may be members of the SCP, for which the 30% “monthly allowance” may be too low. Clarification and, if needed, specific arrangements for this category of members, should be provided.

### **Recusal and abstention**

138. Article 81 rightly foresees non-participation of SCP members on matters where doubts about their objectivity may exist. It may be useful to be more explicit at least in two clear-cut cases: first, to specify that members of the SCP should not hear cases brought against themselves, and second, that they should not hear cases they themselves have initiated (see also comments related to the “Disciplinary proceedings” above).

### **Subordinated Bodies**

139. The 2008 Opinion<sup>66</sup> noted that too many boards were foreseen in the Draft Law examined then. Under the Draft Law, in addition to the SCP itself and the General Assembly of Prosecutors (a new self-administration body of the Prosecution Service), three subordinated bodies will be operating under the SCP: a) the Board for selection and career of prosecutors; b) the Board for prosecutor’s performance evaluation; and c) the Disciplinary Board. In comparison to the previous Draft Law under review, this means that there is now one additional board under the SCP, namely the Board for prosecutor’s performance evaluation. To reduce the number of boards, it is recommended to consider merging this Board with the Board for selection and career, so that there is one Board exercising both functions.

140. Article 86.2.13 and 86.2.14 authorises SCP boards to request the provision of documents and information that they need from prosecutors, public authorities and public and private legal entities and impose a duty on all of these bodies and persons to provide such documents and information. There is, however, no indication either as to the consequences of not fulfilling this obligation 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 ECHR. It is recommended to provide clarification on these matters and, if necessary, adequate guarantees for the respect of the fundamental rights that are engaged by this provision.

141. Article 88.4 provides standing to appeal to the SCP against decisions of the Boards not only to “*the persons against whom the decision was adopted*” but also to “*other persons, where appropriate*”. This lacks clarity as to who the latter might be. This provision should be revised to specify the persons concerned, i.e., for the decisions of Disciplinary Board, by making reference to Article 54.1 of the Draft Law.

### **Personnel and budget of the Prosecution Service**

142. Article 93 of the Draft Law provides that, in addition to prosecutors, the personnel of prosecution offices include civil servants (inspectors, consultants, specialists) and technical staff. It is important that subsequent regulations - and appropriate practical arrangements - duly address the problem, raised during the exchanges held in Chisinau, of prosecutors overwhelmed with technical tasks and deprived of sufficient support staff.<sup>67</sup>

<sup>66</sup> See 2008 Opinion, paragraph 56.

<sup>67</sup> According to a recent study elaborated by the Legal Resources Center of the Republic of Moldova (*Study on optimisation of the structure of the prosecution service and the workload of prosecutors from the Republic of*

143. The Draft Law currently also contains no provision on gender balance in the prosecution service. Various recommendations at the international and regional level call for gender-balanced representation in all publicly-appointed positions. This objective is in line with the Beijing Platform of Action, which urges States to establish the goal of gender balance in power structures.<sup>68</sup> It is recommended to consider including a provision on gender balance in the prosecution service in the Draft Law.

## 9. Transitional and final provisions

144. As previously noted, the functions of the Prosecution Service in Moldova are in the process of being reduced and steps are being taken towards a gradual diminution, in line with previous recommendations of the Venice Commission, of the scope of prosecutorial responsibilities outside the criminal justice field. However, some Prosecution Service responsibilities will remain under the Draft Law until they are abolished, in accordance with its Final and Transitional provisions.

145. For instance, Article 101.2 provides that the provisions referring to participation in the trial of civil and administrative cases, to law enforcement in the Armed Forces, in prisons and places of temporary detention, as well as related procedures and prosecutors' rights, "are in force for a period of three years from the date" of the Draft Law's entry into force. However, some powers of the prosecution in the current Law which are relevant to the Draft Law provisions being phased out are not preserved in the Draft Law for the duration of the transitional period. For instance, the current Law (Article 15) provides that, in addition to exercising a monitoring role with respect to places of detention, prosecutors are required to monitor people involuntarily placed in hospitals for psychiatric assistance. The Draft Law does not include a comparable provision. Moreover, under the current Law, if a prosecutor identifies illegal detention, he/she can immediately and unconditionally free the person. There is no reference in the Draft Law to this remedial power.

146. It is important to ensure that, if maintained, even during this transitional period, any non-criminal competences of prosecutors be specified, in the concerned provisions of the Draft Law, in a clear and restrictive manner, be governed by the principles of legality, transparency and impartiality and full respect of fundamental rights, and associated with relevant judicial review. More specific recommendations formulated in the present Opinion in relation to such competences should also be taken into account.

147. Further transitional provisions refer to the amendment of the Moldovan Constitution as a pre-requisite for the entering into force of important amendments introduced by the Draft Law - including a new system for appointing the Prosecutor General. In view of the complex political situation in the Republic of Moldova and of the difficulty to reach the consensus needed for the amendment of the Constitution, potential alternative solutions may be envisaged, in line with the general aim underlying the Draft Law, i.e. a clear move towards a modern, autonomous and efficient system of prosecution.

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*Moldova*, Chisinau, June 2014), there are at present too many prosecutors in the country. According to the study, the current structure of the prosecution service puts a burden on the service itself and creates difficulties in its internal management, in particular due to the lack of technical personnel. As of 31 December 2012, there were 771 prosecutor positions in Moldova, assisted by 363 persons, 210 of whom are public servants and 153 are technical staff units (0,47 positions of assisting staff per prosecutor).

<sup>68</sup> See paragraph 190 under Strategic Objective G.1. "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>; See also paragraphs 9-10 of the *Appendix to the Recommendation Rec(2003)3 of the Committee of Ministers to Member States on the balanced participation of women and men in political and public decision-making*, adopted on 30 April 2002