SUPPORT TO CRIMINAL JUSTICE REFORM IN UKRAINE

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COMMENTS OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW (DIRECTORATE OF HUMAN RIGHTS) OF THE COUNCIL OF EUROPE ON THE LAW OF UKRAINE ON THE PUBLIC PROSECUTION SERVICE OF 14 OCTOBER 2014

prepared on the basis of contributions by

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A. Introduction

1. These comments are concerned with the Law of Ukraine *On the Public Prosecution Service* ('the Law') that was adopted by Verkhovna Rada on 14 October 2014 and promulgated on 25 October 2014. The Law replaces the 1991 Law of Ukraine *On the Public Prosecution Service* with later amendments.

2. The present comments review the compliance of the Law with European standards[1], including and primarily with those reflected in the recommendations of the Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine by the Venice Commission and the Directorate of Human Rights ('the Joint Opinion')[2].

3. The comments first suggest an outline of the key positive provisions and changes made to previous drafts that are embodied in the Law and which are in line with the Joint Opinion. There is then a Section by Section analysis of the provisions in the Law, which highlights instances where particular recommendations in the Joint Opinion have not been addressed and identifies questionable matters not previously included in the version of the draft law with which that opinion was concerned. The analysis proposes some suggestions for resolving or alleviating these remaining problems in the text, as well as focusing upon other matters which will need to be addressed in order to ensure the effective and genuine implementation of the Law and developing relevant practices. The comments conclude with an overall assessment of the compatibility of the Law with the European standards.

4. Except for the initial outline of positive developments, provisions that are not questionable, deemed compatible or brought in line with the standards in question will generally not be noted.

5. However, certain technical problems - mainly apparent oversights in the finalisation of the text - are noted. Nonetheless, the references to these should be taken as illustrative rather than exhaustive as only the more obvious ones have been noted. *There is a need to make a very close review of the text to ensure that its provisions are all entirely consistent with each other.*

6. When commenting on earlier drafts of legislation to reform the Public Prosecution Service, it was recognized that some of the reforms would raise issues related to the Constitution of Ukraine[3]. This was especially so with respect to the function of

[1] These standards can be found in a synthesised form in the Thematic Directory of Principles for a Draft Law on the Public Prosecution Office of Ukraine prepared as part of the Council of Europe Project "Support to criminal justice reform in Ukraine", financed by the Government of Denmark. They were presented to the Ukrainian authorities by the Council of Europe in April 2013.

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

[3] The relevant provisions of the Constitution for the present comments include: Article 85(25) - establishing the authority of the Verkhovna Rada to grant consent for the appointment or dismissal by the President of the Prosecutor General and to take a vote of no confidence in the Prosecutor General, the result of which shall be his

'general oversight', which was a function of the Public Prosecutor's Office, authorized both in the 1996 Constitution and in the 2004 Constitution, as well as decisions concerning appointment and dismissal of the Prosecutor General.

7. The former function was a particular reason for the scope of functions of the Prosecutor General´s Office being found in a number of Council of Europe opinions, resolutions and reports, adopted since 1995, to considerably exceed what a public prosecution service should exercise in a democratic society and thereby to endanger the balance between the authorities of the state.

8. The present Constitution, which was adopted on 21 February 2014, replaced the 1996 Constitution - which had been in force since 2010 pursuant to a judgment of the Constitutional Court - by a reintroduction of the 2004 Constitution. However, as regards reform with regard to the public prosecution's powers of general oversight, the return to the 2004 Constitution is of little help since this entailed the reintroduction of Part 5 of Article 121[4] and thereby had to some extent the effect of making those elements of the general oversight permanent, whereas these had been transitional under the 1996 Constitution[5].

9. There is presently an ongoing process intended on the reform of the 2004 Constitution. However, although this is noted below as something that should lead to the adoption of provisions that are needed to ensure that full effect is given to certain recommendations of the Joint Opinion, it will be seen below that a number of efforts have been made in the Law to try and accommodate those recommendations within the framework of the existing constitutional framework.

10. Nonetheless, it will only be through appropriate amendments to the Constitution that full compliance with the recommendations of the Joint Opinion can be achieved.

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or her resignation from office; Article 92(14) - requiring regulation of the organisation and operation of the procuracy to be done by law; Article 106(11) - establishing the authority of the President to appoint and dismiss the Prosecutor General, with the consent of the Verkhovna Rada; Article 121 - setting out the tasks of the Prokuratura; Article 122 - providing for the appointment and dismissal of the Prosecutor General and his or her term of authority; Article 123 - determining the organisation and procedure of the Prosecution; Article 129(5) - providing that a main principle of judicial proceedings is prosecution by the Prosecutor in court on behalf of the State; Article 131(2) and (3) on the competence of the High Council of Justice towards Prosecutors; and Chapter XV - setting out the transitional provisions.

[4] "Supervision over the respect for human and citizens´ rights and freedoms and over how laws governing such issues are observed by bodies of executive power, bodies of local self-government and by their officials and officers".

[5] Thus Article 9 of Chapter VX of the 1996 Constitution provided that: "The procuracy continues to exercise, in accordance with the laws in force, the function of supervision over the observance and application of laws and the function of preliminary investigation, until the laws regulating the activity of state bodies in regard to the control over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect".

11. These comments have been based on an English translation of the Law[6] and have been prepared by the Council of Europe consultants Ms Lorena Bachmaier Winter, Dr., Prof, Law School, University of Complutense, Madrid, Spain, Mr Mikael Lyngbo, Legal Expert of the Danish Helsinki Committee for Human Rights, former chief of police, public prosecutor and a ranking official in the Danish Security Service, Mr Jeremy McBride, Barrister, Monckton Chambers, London, co-founder and former Chair of INTERIGHTS and former Chair of the Scientific Committee of the European Union's Fundamental Rights Agency, and Mr Eric Svanidze, former prosecutor and Deputy Minister of Justice of Georgia and former member of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, under the auspices of the Council of Europe's Project "Support to criminal justice reform in Ukraine", financed by the Danish Government.

[6] The consultants were also provided with the original text of the Law, which was consulted where the language of the English translation seemed uncertain or required some further clarification.

B. Positive developments

12. The Law has introduced a number of conceptual or important novelties and addressed many points made in the Joint Opinion and earlier opinions of the Venice Commission and assessments suggested by the Council of Europe experts. In terms of limiting the scope of the functions of the prosecution service, the most significant development is that the Law has done away with the function of general oversight and omitted any reference in Article 2 to supervision over the respect for human and citizens' rights and freedoms and over how laws governing such issues are observed by bodies of executive power, bodies of local self-government and by their officials and officers. The latter function is according to the transitional provisions now to be performed exclusively by representing the interests of a citizen or state in the court[7].

13. In addition, the Law establishes, although with some room for further reinforcement and advancement, a set of institutional, procedural and other instruments designed to safeguard the principle of independence of individual public prosecutors and of the Public Prosecution Service in general. These comprise more solid and meaningful self-governing bodies, careful delineation of the managerial and organisational powers of the Prosecutor General and of the heads of prosecutor's offices[8] and the distinction of those powers from the procedural competences and avenues for lawful exercise of procedural hierarchical prerogatives, as well as an improved framework supporting the internal (individual) independence of prosecutors.

14. However, all of these arrangements will require vigilance over their actual implementation and will need to be underpinned by a positive approach on the part of all involved in the operation in practice of the Public Prosecution Service.

15. The provisions of Part 1 of Article 42 that concern the dismissal of the Prosecutor General from an administrative position have been formulated to give effect to and seem to go beyond the recommendation in paragraphs 122 and 199 of the Joint Opinion that the Qualifications and Disciplinary Commission should play an advisory role in this regard. However, the proposed wording of Part 4 lacks precision as to the sequence of the obtaining of the opinion of the Qualifications and Disciplinary Commission or the High Council of Justice and could be interpreted as suggesting that it is to be sought after the decision to dismiss. So long as that is not a correct reading of this provision, then - albeit with some further shortcomings[9] - the

[7] Clause 1 of Section XIII.

[8] The Law has thus omitted a provision referring to 'directing' of activities of subordinated prosecutors' offices (former paragraph 3 of Part 1 of Article 9 of the Draft Law as adopted in the first reading). Furthermore, it has fine-tuned the wording of what is now paragraph 7 of Part 1 of Article 9 so as to address the concerns raised in paragraph 50 of the Joint Opinion that the power to approve acts on issues relating to the organisation of the activity of the Public Prosecution Service should not run counter to legislation or extend to the exercise of prosecutorial discretion, thereby encroaching unjustifiably on the independence of prosecutors. Moreover, Parts 1 and 2 of Article 17 now specify that administrative orders are to be issued only in writing.

[9] See the comments on Article 42 below.

Prosecutor General can now only be dismissed in case of resignation or upon the adoption of relevant motions of the Qualifications and Disciplinary Commission or the High Council of Justice. *However, effecting the changes really required to comply with the Joint Opinion will necessitate the amendment of Article 122 of the Constitution*.

16. Although the Prosecutor General cannot be dismissed through a disciplinary procedure, the existence of the option of initiating a disciplinary procedure against him or her can then serve as an opening for his or her dismissal.

17. Furthermore, there will now be a more efficient, streamlined and predictable disciplinary framework, which will include a power to suspend a public prosecutor pending the outcome of disciplinary proceedings, as well until the completion of the adjudication of administrative corruption offences (Articles 46 and 64).

18. At the same time, this framework is furnished with provisions that include certain elements of the privilege against self-incrimination (Article 46), a right to challenge the participation of particular members of the Qualifications and Disciplinary Commission in the process (Article 47), a bar on any member of the who performed the inquiry and prepared the opinion on alleged misconduct voting or being present during the determination of the disciplinary proceedings and a requirement that a copy of any dissenting opinion be handed over to the public prosecutor who is the subject of disciplinary proceedings, thereby potentially facilitating any appeal that he or she might wish to make against the ruling of the Commission in the case (Article 48).

19. In addition, appropriate grounds for the exercise of the power to deem a public prosecutor to have no history of disciplinary sanctions are now specified (Article 49) and the arrangements for publishing on the website of the Qualifications and Disciplinary Commission the details of issues to be considered at its meetings is now made subject to the protection against disclosure of the identity of public prosecutors subject to disciplinary proceedings that have yet to be determined (Article 78)

20. Moreover, the absence now of any provision for members of the Qualifications and Disciplinary Commission to have the status of public prosecutors while on secondment to it reinforces their separation from those whom they are charged to regulate (Article 79).

21. The Law also establishes a solid framework for the self-governance of public prosecutors. The institutional set-up[10], composition[11] and competences of the bodies

[10] The Qualifications and Disciplinary Commission is made a legal entity with its own seal and accounts (Article 73). Furthermore, the specification in Article 74 that the Commission shall be valid if at least nine members are appointed resolves the uncertainty created by previously stipulating that such validity depended upon the appointment of two-thirds of its eleven members were appointed. In addition, there is now no provision

concerned, as well as the general arrangements for funding them, are in line with the basic principles and European standards developed in this regard[12].

22. This focus on self-governance is also reinforced by the absence now of any provision stipulating the attendance of the President, the Chairman of the Verkhovna Rada, the Ombudsman of Ukraine and members of the High Council of Justice and the Qualifications and Disciplinary Commission at meetings of the All-Ukrainian Conference of Public Prosecution Employees.

23. The novelties or improvements introduced in line with the Joint Opinion and European standards also include:
    - a specific reference to the presumption of innocence in the list of principles for the work of the Public Prosecutor's Office (in Article 3);
    - a requirement that all general instructions and policy guidelines issued to public prosecutors must be processed as normative acts and published and can thus be challenged in court (in Part 5 of Article 6 and Part 2 of Article 9);
    - an authorisation for specialisation within the Public Prosecution Service (in Article 7);
    - a stipulation that the scope of justified criticism of operations of the public prosecutor shall be defined with regard to the European Convention on Human Rights ('the European Convention') and the case law of the European Court for Human Rights ('the European Court') (in Article 16);
    - the clarification that a 'representative mandate' relates only to 'public elective office' and the exclusion from the scope of incompatibility limitations of participation of public prosecutors in bodies within religious or civil society organisations, as well as the removal of the bar on public prosecutors running as a candidate for elective offices at central or local government authorities or taking part in election campaigns (Article 18);
    - the specific stipulation that the issuing of instructions beyond a public prosecutor's competence shall entail liability under the law (Article 25);
    - the extension of the duration of a proficiency test's validity from two to three years (Article 31);
    - the making of a link between the special training and the courses provided by the National Academy of Public Prosecutors (Article 32);
    - a stipulation that the training for intending public prosecutors is to be for a year rather than for the six months suggested in earlier drafts and thus is likely

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authorising the chairman, the vice-chairman and secretaries of the Commission to participate in the consideration of issues by prosecutorial self-governance bodies.

[11] Thus, there is provision for a wider outside representation in the membership of the Qualifications and Disciplinary Commission that includes persons being appointed to it by or on behalf of academic circles, defence lawyers and the Parliamentary Commissioner for Human Rights (Article 74), which has the potential to increase public confidence in this new body. Furthermore, the provision in Article 75 for the appointment of representatives of law universities and academic institutions is much simpler than that previously proposed.

[12] But see para 161 below.

to ensure an appropriate skills and knowledge base for those concerned, (Article 33);

- an explanation of the basis for determining a candidate's successful completion of the special training and the provision for appeals against a decision that the training was not completed successfully, informing candidates of the results of their assessment and the exclusion of those not completing the training successfully from the succession pool for the positions of public prosecutor (Article 33);
- the specification of criteria governing appointment and re-appointment to administrative positions, which are now outlined as 'professional and moral qualities of the candidate, as well as his/her management and organizational skills and work experience' (Article 39);
- the possibility to draw upon outside experience when appointing someone to the post of Prosecutor General (Article 40);
- the clarification that a court warrant is required before any liability for non-compliance with an order of the Qualifications and Disciplinary Commission can be imposed (Article 46);
- the specification that the international co-operation undertaken by public prosecutor's offices must be subject to constitutional guarantees and international commitments of Ukraine with regard to human rights (Article 92)[13];
- the amendment to Article 7 of the Code of Administrative Offences no longer refers to corruption (Clause 2 of Section XII)

C. Section-by-Section analysis

Preamble

24. This refers to the 'procedures' rather than 'principles' of procedural self-governance which seems to have been introduced at some stage after the end of May. However, the former was the term used in the version reviewed in the Joint Opinion and was not actually commented upon. Nonetheless, 'procedures' is a more accurate reflection of the content of the Law.

Section 1. Principles of Organisation and Operations of Public Prosecution Service

Article 2

25. This describes the functions of the Public Prosecution Service in accordance with Parts 1-4 of Article 121 of the Constitution, thereby omitting any reference to the

[13] These are not all the provisions that have reflected and taken into account the Joint Opinion. As suggested, the list only includes some of those regarded as significant.

function of general oversight Part 5[14]. The latter function is according to Section XIII to be performed exclusively by representing the interests of a citizen or state in the court[15].

26. Nonetheless, while some restriction on the scope of the function of general oversight is potentially a major achievement, *ultimately the only fully satisfactory implementation of the recommendations in paragraphs 16-29 and 75 of the Joint Opinion will be through an amendment to the Constitution which strips the Public Prosecution Service of all functions beyond the criminal justice field*.

27. However, the issue of representation of interests of an individual or the state is now limited to the cases stipulated by this Law rather than the law in general, as recommended in paragraph 36 of the Joint Opinion.

28. Although the interests of the state are not qualified here by the word 'specific' - as recommended in paragraph 37 of the Joint Opinion - this is done in paragraph 3 of Article 23 by the specification that these interests must be 'legal' ones. This concern can thus be regarded as having been, in principle, satisfactorily addressed but there is a need for particular attention to be paid to the way that this provision is applied in practice.

29. Furthermore, notwithstanding these limitations on the function of representation, the retention of this function means that the comments made in the Joint Opinion as to the desirability of stripping the Public Prosecution Service of all functions beyond the criminal justice field and the recommendation made in paragraph 35 to amend the Constitution accordingly remain valid.

30. Moreover, given the concern in paragraph 35 of the Joint Opinion about the excessive nature of the powers of public prosecutors, the stipulation in Part 3 that "the Public Prosecutor's Office shall not be charged with functions that are not established in the Constitution of Ukraine" is appropriate.

Article 3

31. The statement of principles of operation of the Public Prosecutor's Office has been altered in two respects.

32. Firstly, the definition of the rule of law is no longer defined as the recognition of the individual and his or her rights and freedoms 'as the greatest values and determine the content and direction of the state functions', which was adversely commented upon in

[14] Section 4 (Articles 22 ff.) of the Law, dealing with Exercise of the Public Prosecutor´s Powers subsequently has no articles on the general oversight function.

[15] Section XIII, Part 1 ("The Public Prosecutor´s offices shall oversee the compliance with the rights and freedoms of a human being and a citizen and the corresponding laws by the executive authorities, local self-government agencies and their officials and officers exclusively by representing the interests of a citizen or state in the court")

paragraph 39 of the Joint Opinion. Instead the rule of law and 'recognition of an individual, his/her life and health, honour and dignity, inviolability and security' together comprise the highest social value. This is not inappropriate.

33. Secondly, there has not been a harmonisation of the remainder of the list of principles with the Code of Professional Prosecutorial Ethics and Conduct adopted in 2012 - as suggested in paragraph 40 of the Joint Opinion, but the presumption of innocence cited in the Code has been added to the list and there is also a new principle of 'strict compliance with professional ethics and conduct', which can be regarded as satisfactorily addressing the concern raised.

Article 5

34. The suggestion in paragraph 43 of the Joint Opinion - together with paragraphs 101-103 - that it should be made clear that the exclusivity of the execution of prosecutorial functions does not apply to the performance of other entities such as the Ukrainian Parliamentary Commissioner for Human Rights has not been addressed. However, as the existence of the latter office is acknowledged in clause 4 of paragraph 1 of Article 74 of the Law and in the amendments to other legislation effected in transitional provisions Section XII, it is doubtful whether the omission of any reference to it in the present provision will prove problematic.

Article 6

35. This provision is more extensive than that reviewed in the Joint Opinion. In particular, it clarifies that the obligation in both Parts 2 and 3 to provide information extends to generalised statistical and analytical data and applies to the regional and local prosecution offices, meeting points raised in paragraphs 45 and 46 of the Joint Opinion.

36. In addition, the reporting obligation for public prosecutor's offices is to be fulfilled 'not less than twice a year' seems more extensive than in certain earlier drafts. However, although openness and transparency are certainly positive elements, in most other countries it is considered sufficient to issue just one annual report and this might be taken into account in the form of reporting adopted.

37. Taking into account that the provision has not retained the previously criticized reference to providing ‘responses to requests’ and 'other information methods', *the remaining concerns as to the risk of the reporting obligation becoming a mere formality and not taking into account other contemporary formats of communication with the public are matters which will need to be kept in mind when implementing this obligation*. The specific reference to the use of websites is, however, encouraging.

38. It is noted that the reference in an earlier draft to reporting on the current status of the rule of law - which might be seen as retaining an element of the task of 'general oversight' - has not been retained.

39. However, it should also be noted that the requirement in Part 2 for the Prosecutor General to personally report to Verkhovna Rada at least once a year at a plenary session does give rise to a possible risk of political pressure, especially taking into consideration the still existing possibility for the Verkhovna Rada to express its non-confidence in him or her[16]. *The way in which this reporting obligation is handled - in terms of the way in which reports are both presented and discussed - will, therefore, need to be kept under review.* Nonetheless, the fact that these reports are meant to be 'in a format of generalised statistical and analytical data' should diminish the scope for improper attempts to focus the discussion on individual cases.

40. Of most importance in the final version of this provision is the stipulation in Part 5 that 'The public prosecutor's offices of Ukraine publish their internal regulatory acts on organization and operations of the Public Prosecution Service of Ukraine in accordance with the procedure established by law'. This appears to meet the concern in paragraph 65 of the Joint Opinion that all general instructions and policy guidelines issued to public prosecutors must be published, which is confirmed by the clarification of the exact 'procedure established by law' that will govern this in paragraph 2 of Article 9. *Ensuring that this is achieved in practice will need to be closely monitored.*

Section 2. Organisational Principles of the Public Prosecution Service

Article 7

41. This provision and certain others in the Law mirror earlier amendments to the preceding Law and provide for reinstatement within the Public Prosecution Service of a distinct (autonomous) system of military public prosecution offices topped by the Chief Military Public Prosecutor's Office constituting a part of General Prosecutor's Office.

42. The considerations that in 2012 led the Venice Commission to welcome the abolishment of a system of military public prosecution offices in Ukraine concerned the uniformity that would be ensured by consistent principles of organisation and operation, the uniform status of all public prosecutors, the uniform procedure for organisational support for public prosecutors' work, the sole and exclusive funding of the Public Prosecution Service out of the state budget, and the issues of the internal operation of the Public Prosecution Service being addressed by prosecutorial self-governance bodies. Furthermore, it regarded the abolition of a separate military public prosecution system as a necessary simplification of the system[17]. Furthermore, prior to that, in its 2009 opinion, the Venice Commission had criticised the comprehensive structure of military public prosecutor's offices that mirrored the structure of

[16]Under Article 122 of the Constitution.
[17]Paras. 26-27 of the Venice Commission Opinion on the draft Law on the Public Prosecutor's Office of Ukraine, CDL-AD(2012)019.

government as a whole and represented the typical Soviet type approach, where a prosecutors' office was primarily concerned with acting as a watchdog on the public administration[18].

43. Apart from the country-specific reasons, an abolition of a specialised system of military public prosecutor's offices would be in line with the overall historical trend of splitting and further distancing the prosecution from the military chain of command up to attribution of this function to the ordinary (civilian) system. Although different forms of institutional affiliation of military prosecutors, including a status of serving officers, are regarded as useful for ensuring that the prosecutors will be specialists in military law (specific regulations) and will thus be familiar with the military context, it has been suggested that 'bearing in mind that some legal systems grant prosecutors broad powers in terms of determining charges, when to discontinue prosecution, the examination of evidence, and the possible cross-examination of defendants and other witnesses, their independence from the chain of command is an important consideration"[19].

44. The present provision is thus consistent with European standards and practice.

45. Part 2 provides for military public prosecution offices to perform the functions of regular public prosecutor's offices 'in exceptional circumstances' where these fail to perform them 'in certain administrative-territorial areas of Ukraine' The taking on of these functions by military public prosecutor's offices requires a prior decision by the Prosecutor General. *It will be important to ensure that the use of this power is truly exceptional.*

46. Part 5 gives effect to the suggestion in paragraph 48 of the Joint Opinion that there be a possible authorisation for specialisation within the Public Prosecution Service, for example on anti-corruption, organized crime or juvenile justice.

47. Apart from these changes, the only other change made to this provision from that reviewed by the Joint Opinion is the introduction of a reference to an Appendix that lists local and military public prosecutor's offices.

Article 8

48. This provision, which now provides for the Chief Military Public Prosecutor to be one of the Prosecutor General's Deputies, slightly simplifies the internal structure of the Office - instead of Main Directorates, Directorates and Departments there are now to be just departments and units - and provides for the establishment of the Chief Military Public Prosecutor's Office as a structural unit, as well as allowing for the

[18] 2009 Opinion on the draft Law of Ukraine on the Office of the Public Prosecutor, CDL-AD(2009)048, para. 21.See also below the comments to the amendments to Article 9 of the Law.

[19]"Handbook on human rights and fundamental freedoms of armed forces personnel", OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Centre for the Democratic Control of Armed Forces (DCAF), 2008, p. 228.

performance of other responsibilities for the Chief Military Public Prosecutor to be prescribed by an order of the Prosecutor General. *It will be important to ensure that these 'other functions' do not lead to an extensive interpretation of the 'exceptional circumstances' in which in Article 7 authorises military public prosecution offices to perform the functions of regular ones nor any militarisation of the Public Prosecution Service*.

Article 9

49. The suggestion in paragraph 50 of the Joint Opinion that the scope of the power of the Prosecutor General in paragraph 7 of Part 1 be clarified has not been addressed in this provision. It thus remains unclear whether this provision is concerned only with matters of internal organisation and does not relate to any exercise of prosecutorial discretion and thereby extends the power set out in paragraph 9 of Part 1.

50. *Particular attention should, therefore, be paid to the implementation of this power, as well as the power in paragraph 2, which concerns organising the operations of public prosecutor's offices, to ensure that it is not used so as to extend to the exercise of prosecutorial discretion, and, thus, encroach unjustifiably on the independence of prosecutors*.

51. However, Part 2 has been appropriately extended (a) to clarify that the orders of the Prosecutor General must not only be within the scope of his administrative powers but be based upon the Constitution and laws of Ukraine, (b) to require that orders of a regulatory and legal nature be subject to state registration by the Ministry of Justice and be included in the Single National Register of Regulatory Acts, (c) to require orders that are regulatory acts be published after inclusion in that Register (d) to require all orders to be published on the official website of the Prosecutor General's Office, (e) to provide that orders cannot come into force before publication and (f) to make it clear that orders can be contested in the administrative court.

52. The first of the additions mentioned in the preceding paragraph can be seen as partly meeting the suggestion in paragraph 51 of the Joint Opinion that the nature and extent of the powers conferred by 'other laws' in what is now paragraph 10 of Part 1 be clarified. However, there continues to be a need to identify all the powers conferred by 'other laws' and consider whether their retention would be compatible with the approach being adopted by the Law. *Insofar as the answer to this question is negative, it would be appropriate either to repeal or amend the provisions concerned to ensure such compatibility*.

53. The Prosecutor General no longer has the express power to appoint employees of the Prosecutor General's Office who are not public prosecutors and to perform the distribution of duties amongst the Deputies. The former is not problematic but the distribution of duties among the First Deputy and Deputies of the Prosecutor General is important and it will need to be clarified whether there remains an implied power

for the Prosecutor General to do this pursuant to the general provision to issue orders within the competence.

54. Part 3 stipulates that, in the absence of the Prosecutor General, his or her functions are to be exercised by the First Deputy and in the latter's absence by a Deputy. However, this leaves unclear which Deputy this should be. There is no problem in leaving these issues to the regulatory framework but it would not generally be appropriate for the Chief Military prosecutor to take on the Prosecutor General's functions in the absence of him or her and of the First Deputy. This is certainly a matter that needs to be regulated but having deleted the phrase 'in accordance with the distribution of their functions', this is something left open. *There is a need, therefore, for the specific distribution of functions to Deputies to be monitored*.

55. It is unclear why the Prosecutor General should appear to be given the power to 'decide on' a disciplinary sanction or a ban to hold the position to be imposed on a public prosecutor, at least in the sense that some discretion is connoted by the wording used. Certainly, it would be incompatible with the Commission's role in these matters for anyone else to exercise any discretion as to the implementation of its decisions. It would, therefore, be preferable for it to be specified that the Prosecutor General shall 'implement' rather than 'decide on' disciplinary sanctions and bans. This approach should apply equally to the similar power given to the head of a regional public prosecutor's office. *There is a need, therefore, to reformulate these powers conferred on the Prosecutor General and the head of relevant regional public prosecutor's offices by Articles 9 and 11 so as to remove any discretion as to the implementation of disciplinary sanctions and bans.*

Articles 11 and 13

56. The only significant addition to the provisions reviewed in the Joint Opinion is the stipulation in Part 2 in both of them that the head of a regional or local public prosecutor's office 'shall issue orders on matters falling within the scope of his/her administrative powers'. This power is not objectionable in principle but there is no corresponding provision to the requirement in Part 2 of Article 9 relating to the publication of orders of the Prosecutor General that are of a regulatory nature. As such, this provision could be seen to run counter to the concern expressed in paragraph 65 of the Joint Opinion that all general instructions and policy guidelines should be published, unless they are only of an administrative nature, which Part 2 of Article 17 provides can be in writing initially and can be required to be reiterated in writing if given orally. *Although it is probable that this power is in fact limited to the operation of the regulatory framework, it would be appropriate to keep the actual use of such orders under review.*

57. *Furthermore, it would be necessary to pay attention to the implementation of the provisions specifying the powers of the heads of regional and local public prosecutor's offices, particularly those paragraphs 2 and 4 of Part 1 of Article 11 and*

paragraph 2 of Part 1 of Article 13, so that they do not extend to the exercise of prosecutorial discretion, and, thus, encroach unjustifiably on the independence of prosecutors.

58. Moreover, the deletion in comparison to the versions from the earlier drafts of former paragraph 4 of Part 1 of Article 11 and paragraph 6 of Part 1 of Article 13 - which envisaged control over the administration and analysis of statistical data, the organization of studies and generalization of the administration of legal practices and the analysis of information for public prosecutors so as to improve the performance of their functions - is debatable since relevant analytical and managerial activities are indispensable for the proper organisation and operation of the system at the regional level. *Insofar as there are concerns about improper influence over the analysis of statistical data, a solution might be to reinforce the units that undertake this function and to introduce contemporary technologies in this area, as well as to ensure its detailed regulation through the issuing relevant instructions by the Prosecutor General*.

59. It should be noted that there is no provision in either of these Articles covering the appointment and dismissal of the public prosecutors in local public prosecutors' offices, as compared with the existence of the relevant powers in respect of public prosecutors in the Prosecutor General's Office and in regional public prosecutors' office. *This has presumably been overlooked but clearly needs to be remedied.*

60. See also paragraph 55 above in respect of the implementation of decisions of the Qualification and Disciplinary Commission.

Article 14

61. This provision was not in the version considered in the Joint Opinion and the question of the headcount and structure of public prosecutor's offices was thus not addressed in it. However, it does not seek to define the number of public prosecutors by reference to a population-related ratio nor set a maximum number of public prosecutors, which led to an expression of concern by the Venice Commission in respect of another draft law[20].

62. Instead, the present provision stipulates that the number of public prosecutors and other employees is to be established by law and approved by an order by the Prosecutor General which has been approved by the Council of Public Prosecutors and is to be based on the amount of work for the Public Prosecution Service and

[20] Thus the Venice Commission's Draft Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (prepared by the Ukrainian Commission on strengthening democracy and the rule of law), CDL (2012) 068-e: '29 stated that 'It is unusual for a law to set a maximum number of prosecutors at the various levels of the PPO. This should be reconsidered, as the development of crime patterns in various parts of Ukraine may warrant temporary or permanent increases in the number of prosecutors and, under the current wording of the draft Law, would need an amendment to the law. This is impracticable and might be revisited'

within the expenditures allocated in the State Budget. This is an appropriate approach as it allows flexibility to accommodate changing workloads.

Section 3. The Status of Public Prosecutors

Article 15

63. The list of public prosecutors has been amended to accommodate the position the Deputy Prosecutor General who is the Chief Military Public Prosecutor and also omits reference to certain 'senior' public prosecutors. These changes are not of any significance.

Article 16

64. The addition to Part 5 concerning the duty to respect the independence of public prosecutors of the stipulation that the 'scope of fair criticism of operations of a public prosecutor shall be established according to the European Convention and Fundamental Freedoms and the case law of the European Court is entirely appropriate and gives effect to the recommendation in paragraph 54 of the Joint Opinion.

Article 17

65. The changes to these provisions (a) allow for orders - which can relate only to organisational aspects of a public prosecutor's work - to be given in writing, (b) establish a right for oral orders to be confirmed in writing, (c) state that a public prosecutor is not obliged to follow orders and instructions which raise doubts as to their legality unless they are received in writing or are 'obviously criminal orders or instructions' and (d) also states that a public prosecutor can report to the Council of Public Prosecutors of Ukraine any threat to his/her independence due to an order or instruction issued by a higher public prosecutor.

66. These changes do not fully address the concerns expressed and the recommendations made in paragraphs 61, 63 and 64 of the Joint Opinion since there is no general requirement for orders concerning the performance of prosecutorial function to be in writing. There is a limit on the ability to decline orders in writing and there is no possibility of a public prosecutor requiring that he or she be discharged from the obligation to handle the case concerned.

67. Regrettably this arrangement - and in particular the stipulation on oral instructions - significantly undermines the overall appropriateness of the set of guarantees of individual independence of prosecutors that have already been noted[21]. The Law has thus failed to take into account the recommendation in paragraph 61 of the Joint Opinion that, in view of the country-specific circumstances, it would be appropriate to underline the protection against hierarchical interference in individual cases by

[21] See para. 13 above.

stipulating that any specific orders or instructions given to a public prosecutor by a Higher Public Prosecutor must always be made in writing together with the right of the public prosecutor concerned to request further reasoning for the instruction, which should also be provided in writing. *Pending relevant legislative amendments, it would, therefore, be advisable for a practice to be adopted which discouraged the use of oral instructions save for those extraordinary situations in which written ones cannot be issued, with those orders being automatically confirmed in writing*.

68. However, the ability to complain to the Council of Public Prosecutors of Ukraine does give effect to a recommendation made in paragraph 63 of the Joint Opinion.

Article 19

69. The only change to this provision is the introduction of a requirement to take an annual 'secret integrity test' to be carried out by internal security units pursuant to a procedure approved by the Prosecutor General.

70. Tests are not, in themselves, problematic but there is no definition of the relevant criteria for them. In a former draft of the law they were defined as "the creation of circumstances and conditions favourable for a corruption abuse by a certain prosecutor". This was, however, much more imprecise than an even earlier formulation which required public prosecutors to comply with certain standards of conduct, namely, respect for individuals and confidentiality and compliance with anti-corruption laws and prosecutorial ethics.

71. Moreover, when such tests are used there is a need to elaborate the norms with regard to handling the result of such tests and their linkage to any eventual criminal proceedings. There is provision in Part 3 of Article 46 on the results of such tests finding a disciplinary offence being a mandatory ground for the initiation of disciplinary proceedings. However, this does not address the issue of possible criminal proceedings.

72. Furthermore, the operation of such tests could prove to be problematic with respect to rights under Article 6 and 8 of the European Convention. In particular, the risk of the procedure leading to incitement to commit offences so that proceeding in respect of them would be contrary to Article 6(1) should not be discounted[22]. *There is a need for more elaboration of the standards governing the use of these tests and monitoring of their application in practice. In particular, it would be advisable to seek external assistance and take into account best practices with regard to integrity testing of public prosecutors and judges.*

73. *However, the operation of such a test could be linked with the recommendation in paragraph 72 of the Joint Opinion that public prosecutors might be required to make*

[22] See, e.g., *Ramanauskas v. Lithuania* [GC], no. 74420/01, 5 February 2008.

an annual declaration of assets, income, expenses and financial liabilities. In this connection, it should be noted that there is already a provision in paragraph 4 of Part 1 of Article 43 on disciplinary liability for failure to comply with unspecified 'legal procedures' for submitting such a declaration. The effective implementation of this provision could make a useful contribution to ensuring the integrity of public prosecutors.

74. The recommendation in paragraph 71 of the Joint Opinion that paragraph 3 of Part 4 should specify that prosecutors should abide by all laws and not just the one on anti-corruption has not been addressed. *It would be appropriate for this provision to be amended accordingly.*

75. The suggestion in paragraph 70 of the Joint Opinion that the source of 'the rules of professional ethics' - to which paragraph 4 of Part 4 refers - be identified has also not been acted upon. However, Part 2 of Section XII does address the concern expressed in the Joint Opinion that there was nothing in the transitional provisions to ensure that the Code of Professional Ethics and Conduct of Public Prosecutors adopted in 2012 would continue to be applicable until a new one is approved by the All-Ukrainian Conference of Public Prosecutors.

Section 4. Exercise of Public Prosecutor's Powers

Articles 23 and 24

76. Article 23 details the function of the public prosecutor according to Part 2 of Article 121 of the Constitution[23] and paragraph 2 of Part 1 of Article 2 of the Law on representation. According to European standards, functions other than those of criminal prosecution for a prosecutor should be carried out in such a way as to respect the principle of separation of state powers, including the respect for the independence of the courts and the principles of subsidiarity, speciality and impartiality of prosecutors[24]. A number of measures have indeed been taken in the Law to limit the concern about the function of representation.

77. Thus, the Law provides that public prosecutors shall intervene only when individuals or their representatives do not perform or improperly perform such protection (Article 23.1), it excludes representation of the State in a number of cases (Article 23.3) and it provides that the public prosecutor shall justify grounds for representation in court and that the citizen or his/her legal representative and the State institutions can challenge the existence of grounds for representation (Article 23.4).

[23] I.e., "representation of the interests of a citizen or of the State in court in cases determined by law"
[24] See paragraph 17 of the Joint Opinion.

78. This however does not change the fact that the public prosecutors are mandated to act in pursuit of both the state interest and the interest of the individual and that those interests could clearly run counter to each other[25].

79. Moreover, the lack of clarity as to the scope of the competence entailed by the function of the representation of the interests of individuals conferred by these provisions - as to which there was concern expressed in paragraphs 76-79 of the Joint Opinion - have not been entirely eliminated from the formulation used in this provision.

80. However, having regard to the limited group of individuals affected and looked at in their entirety and taken with Part 3 of Section XII - which amends Article 29 of the Economic Procedural Code, Article 45 of the Civil Procedural Code, Article 60 of the Code of Administrative Legal Proceedings and Article 128 of the Criminal Procedure Code to have added to them the requirement that a public prosecutor, in order to represent the interests of a citizen, must produce 'written consent for representation from a legal representative or the agency authorized by law to protect the rights, freedoms and interests of the corresponding person' - these provisions can be regarded as limited both to the exercise of only the powers available to the individual concerned and to being subsidiary in nature. In this regard, therefore, the provisions can be seen as giving effect to the recommendations in paragraphs 81 and 82 of the Joint Opinion.

81. Furthermore, the addition of 'foreigner or stateless' person to 'citizen' to those whose interests can be represented meets the concern about possible unjustified differential treatment expressed in paragraph 80 of the Joint Opinion. However, it should be noted that Part 4 and Section XIII still refers to the representation of the interests of a *citizen*. This may be a matter of translation but, as regards the latter, this is unlikely to be significant in practice as it is only concerned with the implementation of Part 5 of Article 121 of the Constitution.

82. In addition, the absence of the additional basis for representing the interests of a citizen (not the individual) - namely, the inflicting of damage as a result of a criminal offence or other publicly dangerous act - meets the objection raised as to possible conflict with Article 128 of the Criminal Procedure Code that was raised in paragraph 83 of the Joint Opinion.

83. Moreover, the fact that representation of state interests is, as previously noted, limited to legal ones by Part 3 of Article 23 and that there can be no representation of the interests of a state company, is giving effect respectively to the recommendations in paragraphs 88 and 89 of the Joint Opinion. In addition, the scope of the power of representation is also limited by it not being permitted in respect of legal relations

[25] See paragraph 28 of the Joint Opinion.

concerning the electoral process, conducting of referendums, activities of the Verkhovna Rada and President of Ukraine, the establishment and activities of the media as well as political parties, religious organizations, organizations engaged in professional self-government and other civil associations, as well as by the requirement for a written instruction or order of the Prosecutor General of Ukraine or his/her First Deputy or a Deputy with the respective competence where the representation concerns the interests of the Cabinet of Ministers of Ukraine and the National Bank of Ukraine. This mitigates, but does not make acceptable, the existence of this power. Certainly, now allowing representation of the Cabinet of Ministers of Ukraine and the National Bank of Ukraine with the authorisation in writing of the Prosecutor General or a Deputy seems a retrograde step. *Those bodies should be more than competent to decide on matters relating to their own representation*.

84. Also, as recommended in paragraphs 85 and 87 of the Joint Opinion, the grounds for the performance of the function must be justified to the satisfaction of a court - which is established by the amendments to the relevant legislation in Parts 3 and 8 of Section XII[26] - and can be challenged by the individual or entity whose interests are involved.

85. The powers in Part 4 of Article 23 with respect to obtaining information for the purpose of representation of interests are much more limited than those considered to be of concern in paragraphs 90-93 of the Joint Opinion, but there is still a right of access to material held by public bodies without a court warrant, notwithstanding the possible issues affecting the right to respect for private life under Article 8 of the European Convention that could arise.

86. Furthermore, it should be noted that Section XII provides for the amendment of Part 5 of Article 46 of the Civil Procedural Code by giving to the public prosecutor (or the Parliamentary Human Rights Commissioner of Ukraine) the right to see the case materials in court, to make notes, to obtain copies of documents that are in the case 'in order to decide upon the issues of the existence of grounds for initiation of judicial review of the case, considered without their participation, involvement in the cases initiated on the basis of lawsuits (applications) of other person'. There is a similar amendment to paragraph 3 of Part 1 of Article 7 of the Law of Ukraine *On Enforcement Proceedings* to enable public prosecutors to decide whether to join them. *This does not comply with the recommendation in paragraph 94 of the Joint Opinion that this should only be with the prior authorisation of the court concerned and this provision should be amended to achieve such compliance*.

87. All the powers referred to in the previous two paragraphs are ones that paragraph 93 of the Joint Opinion noted are exercisable through the normal means available in civil procedure, while providing the appropriate measure of judicial control which the provisions under discussion lack. Therefore, *pending the complete abolition of this*

[26] See para. 80 above.

function for public prosecutors, there is a need at the very least to establish strict control over exercise of these powers by public prosecutors so that they are not abused and used in effect for purposes of general oversight and pre-investigative inquiry, which the Law and the Criminal Procedure Code have respectively sought to abolish.

88. The provisions in Part 5 of Article 23 - which refer to filing 'requests for pre-trial settlement' - are less extensive than those considered problematic in paragraph 96 of the Joint Opinion but, while no longer listing the specific measures that might be suggested by a public prosecutor, does not set any limit on what might be proposed and is still formulated in a manner that is more akin to coercion than negotiation. This may result in an unfair advantage. *The operation of this power - which is not actually necessary for someone acting as a representative in civil proceedings - thus needs to be kept under review, although its deletion would be a more appropriate solution*.

89. Although Part 6 of Article 23 still does not explicitly state, as recommended in paragraphs 79 and 95 of the Joint Opinion, that the public prosecutor should only have the procedural rights of the party being represented, the formulation of Parts 2 and 3 would suggest that the powers in Part 6 are now consistent with the position in the Joint Opinion. This would also seem to be confirmed by the addition of a Part 7 to Article 24 stating that the powers of public prosecutors contemplated in that Article 'shall be exercised within the scope and on the grounds established by procedural laws'.

90. At the same time, there is a need for special care to be taken to ensure the enhancement of the corresponding capacities of authorities and institutions immediately charged with the responsibilities of protecting the interests of relevant individuals and state, including by means of initiating and handling civil (administrative) proceedings. One of the most important of them is the free secondary legal aid system. *It is thus crucial that the authorities ensure an intensive timeframe for its extension for this purpose rather than postpone this to a later stage of reform*[27].

91. Finally, the inclusion of 'under new circumstances' with respect to seeking revision of court judgments in Part 4 of Article 24 meets the concern expressed in paragraph 99 of the Joint opinion that there might be a possibility to seek revision of a final judgment in the absence of such circumstances, contrary to Article 6 of the European Convention.

[27] Thus, it would be inappropriate to postpone the period for providing the free secondary legal aid in full to all categories of citizens envisaged by Article 14 of the FLA Law from *1 July, 2015* to *1 Jan, 2017*, as it is indicated in the draft law on certain amendments to the FLA Law registered by the Government in the Verkhovna Rada on 21 October 2014.

92. *However, a truly durable solution to the problems outlined above will entail the adoption of a constitutional amendment which abolishes the function of representing individuals provided for in Part 2 of Article 121*[28].

Section 5. Procedures for Taking Public Prosecutor's Office and Procedures For Dismissing a Public Prosecutor From an Administrative Position

Article 27

93. The only changes to this provision are (a) the specification that degrees obtained in the former USSR before 1 December 1991 to those that candidates for appointment as a public prosecutor can rely upon; (b) the requirement of five years' experience as public prosecutor in order to be a candidate for appointment at the Prosecutor General's Office; and (c) the specification of the conditions for appointment and service as a military public prosecutor. In addition, the reference to the regulation of the special features of appointment of the Prosecutor General - the meaning of which was considered unclear in paragraph 107 of the Joint Opinion - has not been retained. Neither the additions nor the deletion are inappropriate.

94. However, the definition of 'work experience' in paragraph 2 of Part 1 has not been changed, despite the recommendation in paragraph 106 of the Joint Opinion that it be reconsidered. *This should be reconsidered in the light of experience in selecting candidates for appointment as public prosecutors*.

95. Part 4 reflects the provisions of Article 46[1] of the previous Law that had been introduced in view of reinstatement of military prosecutor office.

96. Thus, it establishes a special requirement for prosecutors or investigators of military prosecution offices of being military officers on active duty or reservists. It seems to serve the purpose of ensuring their necessary proficiency in military matters. *However, it would be preferable to ensure this by specifying that military prosecutors and investigators should be required to have necessary proficiency in military matters and that the stipulation that non-military persons may be appointed military public prosecutors should not be limited to 'particular cases' but should be the norm*.

97. *Similarly, it would be preferable, contrary to what is provided in this provision and in paragraph 9 of Part 1 of Article 51, for military public prosecutors to be governed by the same disciplinary and service rules as other public prosecutors and not be a part of military chain of command in general*. Certainly, their implied subordination to the overall military hierarchy and chain of command will considerably undermine the appearance of independence and impartiality of individual military prosecutors.

[28] See paragraph 75 of the Joint Opinion.

Article 32

98. Parts 5 and 6 are entirely new provisions, enabling NGOs and individuals to file information about integrity of a candidate public prosecutor to the Qualifications and Disciplinary Commission of Public Prosecutors within one month of the official publication of the list of those candidates who have passed the proficiency test and providing for its examination before determining whether to admit the candidate concerned to the special training for candidates. The examination of the information is to take place during a meeting of the Commission attended by the candidate and it is provided that he or she is entitled to get familiar with the information, give explanations, rebut or deny it. However, although there is a provision in Part 2 for decisions denying candidates admission to the succession pool to be appealed by them in court, there is no similar stipulation that there should be such a possibility for candidates not admitted to special training as a result of decisions based on the information received from NGOs and individuals. *There is a need for such a possibility to be established if no existing procedure can be used. Furthermore, these decisions must be reasoned and the absence of this would make any appeal meaningless. There is a need to ensure, therefore, that there is also reasoning given for such decisions as a matter of practice*.

Article 38

99. This provision now specifies that the competition for transfer to another public prosecutor's office, including one at a higher level, 'shall include an assessment of professional skills, experience, moral and professional qualities of the public prosecutor and verification of his/her readiness for the exercise of powers in another public prosecutor's office, including higher level public prosecutor's office', which meets a concern raised in paragraph 115 of the Joint Opinion as to the need for criteria to be specified for such competitions.

Article 39

100. Parts 4 and 5 now have appropriate provisions requiring the Prosecutor General to motivate in writing any refusal to accept a recommendation, allowing the possibility of challenging this refusal in the Qualification and Disciplinary Commission and also allowing the Commission to repeatedly recommend a candidate who meets the specified requirements. Such provisions go some way to ensuring that there is no risk that independence could be lost in the case of reappointments, as noted in paragraph 116 of the Joint Opinion.

101. However, it should be noted that the appointment of the Deputy Prosecutor General who is the Chief Military Prosecutor General, as opposed to other Deputies, is not subject to the process of recommendation by the Qualification and Disciplinary Commission, leaving this entirely at the discretion of the Prosecutor General. *This position should be integrated with the general position for such appointments.*

102. However, this Article omits to specify how the appointment is to be made to the position of deputy head of a unit at a local public prosecutor's office, which is provided for in paragraph 16 of Part 1. *This needs to be remedied.*

103. Furthermore, it seems strange that the deputy head of a unit at a regional public prosecutors office should be appointed by the Prosecutor General but the head of a unit at the regional public prosecutor's office will be appointed by the respective head of the regional public prosecutor's office. *There is a need, therefore, to ensure greater coherence for the allocation of these powers.*

Article 40

104. This provision now meets the recommendation in paragraph 118 of the Joint Opinion that re-appointment to the post of Prosecutor General should not be possible after the specified term for appointment has been completed. However, it does not address the recommendation in the same paragraph that the term be longer than five years. *Thus, consideration to lengthening the proposed term of office of the Prosecutor General should be included in the constitutional reform process so that it is not coterminous with that of the President, as recommended in paragraphs 30 and 117 of the Joint Opinion.*

105. However, this provision does meet the recommendation in paragraph 118 of the Joint Opinion that eligibility for appointment as Prosecutor General should not be restricted to persons holding higher public prosecutor positions so that it is at least technically possible to appoint persons to this position from outside the public prosecution service. This is especially important at present due to the lustration procedures and the general demand for new persons to be involved in higher positions of responsibility.

106. The recommendation in paragraph 119 that - pending an amendment to Article 122 of the Constitution - there should be an advisory body to give non-binding advice on candidates for appointment before any decision is taken has not been implemented. Such an arrangement is not, however, precluded and there is a new provision - Part 7 - which requires a procedure to be established for the giving of consent to an appointment by the Verkhovna Rada that could be used for this purpose. Nonetheless, this would only partially address the concern expressed since only the Verkhovna Rada would be able to receive advice concerning candidate that have been nominated but the President would still be able to nominate them without receiving any such advice.

Article 41

107. Part 5 is a new provision dealing with the arrangements for appointment in a public prosecutor's office of someone after having been dismissed from an administrative office or having had his or her administrative powers terminated. These arrangements are not inappropriate.

Article 42

108. Dismissal by the President of the Prosecutor General from an administrative office now requires both the consent of the Verkhovna Rada and a motion of the Qualifications and Disciplinary Commission or High Council of Justice, where this is not upon the application of the Prosecutor General him or herself. There continues to be provision for termination of the Prosecutor General's powers in the administrative position in the case of a no confidence vote by the Verkhovna Rada.

109. This does not give full effect to the recommendation in paragraph 120 of the Joint Opinion that the dismissal of the Prosecutor General be only for specific grounds - certainly it is not clear that the grounds for dismissal specified in Part 3 of Article 51 as mandatory[29] are exhaustive ones - and following a fair hearing and that the provision for a vote of no confidence in the Verkhovna Rada be removed. However, this is understandable as it was recognised in the Joint Opinion that such a change requires an amendment to the Constitution. Nonetheless, the provision has been changed so as to appear to give effect to the recommendation in paragraphs 122 and 199 of the Joint Opinion by providing that, pending the constitutional amendment, the Qualifications and Disciplinary Commission play an advisory role.

110. Certainly, the wording of Part 1, in particular its original text[30], is probably to be interpreted as excluding any discretion of the President upon receiving a motion of the Qualifications and Disciplinary Commission of Public Prosecutors or High Council of Justice (which is included on account of the disciplinary role accorded it under Article 131 of the Constitution in respect of public prosecutors). The same applies to the relevant stipulation in Part 1 of Article 63.

111. However, in view of the nature of the list of grounds for dismissal of the Prosecutor General established by Part 3 of Article 51, it remains unclear what would be the effect of a positive opinion by the Qualifications and Disciplinary Commission on the performance of professional duties by the Prosecutor General of Ukraine issued in accordance with Part 4 of Article 42. It is unlikely that a positive opinion could outweigh violation of compatibility requirement, loss of Ukrainian citizenship, not to mention administrative or criminal conviction.

112. Moreover, the present provision, insofar as it deals with the voluntary standing down of a Prosecutor General, does not deal with the recommendation in paragraph 123 of the Joint Opinion that a formulation other than 'dismissal' for such a resignation be used. *This is a change that could be effected without a constitutional amendment*.

[29] I.e., inability to perform, violation of compatibility requirements, judgment for corruption offences, court judgment of guilt, citizenship issues and voluntary resignation.

[30] It uses 'звільняється' that is to be translated shall be dismissed or is dismissed.

113. As far as the internal procedure for developing and processing an opinion of the Qualifications and Disciplinary Commission in the course of dismissal or termination of powers of the Prosecutor General upon a vote of no confidence in the Verkhovna Rada is concerned, the Law has failed to meet the recommendations in paragraphs 120 and 122 of the Joint Opinion with respect to securing a right for the Prosecutor General to be heard before any adverse decision. Thus, Parts 2 of Articles 54, 56 and 57 of the Law just specify the body entitled to submit relevant motions with respect to a dismissal of the Prosecutor General to the President. There are no provisions regulating internal procedures to be followed for these purposes. Taking into account that it is only an administrative or criminal conviction that will have entailed a prior independent assessment by a court, it would be necessary to ensure that the Prosecutor General benefits from fair hearing in the course of process leading to opinion as to his/her dismissal for a violation of compatibility requirement or loss of Ukrainian citizenship, as well as with regard to no-confidence vote. *This deficiency should be remedied by means of introducing amendments specifying the procedures of issuing such an opinion by the Qualifications and Disciplinary Commission*[31].

114. In contrast to the dismissal of the Prosecutor General, the framework for termination of powers of the Prosecutor General upon a vote of no confidence in the Verkhovna Rada envisaged by paragraph 1 of Part 2 does not give sufficient effect to the further elements of the recommendations in paragraphs 122 and 199 of the Joint Opinion. Thus, whether taken separately or in combination with the proposed wording of Part 4, it lacks sufficient precision as to the sequence for obtaining an opinion of the Qualifications and Disciplinary Commission. Indeed, it can be interpreted as suggesting that its opinion is to be sought after the decision to terminate the powers[32] However, this omission could be also partially remedied already at this stage (i.e., prior to amending the Law in issue) by specifying the sequence in question in the procedures to be established by the Rules of the Verkhovna Rada as required by Part 2 of Article 63. Furthermore, there is no specification as to what would be the consequences of a positive appraisal of the General Prosecutor's professional performance by the Qualifications and Disciplinary Commission. Thus, although by this reference to professional performance, it suggests certain indications as to grounds for a no confidence vote, the provision fails to specify them in unequivocal terms. This turns the office into a political function. *It is evident that the framework is affected by the current wording of Article 122 of the Constitution and further steps in this regard should be made in the constitutional reform process*.

115. Furthermore, the concern raised in paragraphs 124 and 125 of the Joint Opinion as to the Prosecutor General continuing to be a public prosecutor after the completion of his or her term of office or a vote of no confidence by the Verkhovna

[31] The wording of amendments introduced to the Law on the High Council of Justice concern procedures applicable to a prosecutor and could be deemed to be applicable also to the Prosecutor General.
[32] It would be appropriate to use 'prior to' instead of 'if' at the beginning of this paragraph.

Rada has not been addressed as such a possibility is still found in Part 3 of Article 43. *This omission should be remedied.*

116. The present provision - together with Article 63 - has established a quite complicated system for getting rid of a Prosecutor General from his or her administrative position. Thus, the Prosecutor General can either be 'dismissed' according to Part 1 or his powers can be 'terminated' according to Part 2, while Article 122 of the Constitution also uses the term 'resign'. However, as the last provision does not seem to have the purpose of establishing any protection for the independence of the Prosecutor General against the President or the Verkhovna Rada, there is probably no contradiction between the Law and the Constitution. Nonetheless, it is clear from the Joint Opinion that there is a need for such protection for the Prosecutor General's independence and *there is, therefore, a considerable way to go to meeting the recommendation in paragraph 120 that dismissal be only for specific grounds and following a fair hearing and that there should be no power of removal following a vote of no confidence by the Verkhovna Rada. Effecting such changes will require the amendment of Article 122 of the Constitution and they must not be over looked in the reform process*.

Section 6. Disciplinary Liability of a Public Prosecutor

Article 43

117. The stipulation of the grounds for disciplinary liability has addressed the recommendation in paragraph 126 of the Joint Opinion that a 'regular violation of prosecutorial ethics' be defined.

118. In addition, a new ground has been added in paragraph 5, namely, 'actions which discredit the public prosecutor and may raise doubts on his/her objectivity, impartiality and independence and on integrity and incorruptibility of public prosecutor's offices'. This is not entirely inappropriate but *its application in practice will need to be closely monitored since the breadth of the formulation means that it could be used in a way that undermines the independence of public prosecutors*.

119. There is no mention of a performance evaluation system, as recommended in paragraph 127 of the Joint Opinion, to enable an objective basis for disciplinary action. *This does not require any legislative provision but appropriate advice should be sought in elaborating and implementing such a system.*

120. However, it is now provided in Part 3, as recommended in paragraph 128 of the Joint Opinion, that 'The acquittal of a person or closure of criminal proceedings by the court regarding him/her shall not serve as a ground for bringing to disciplinary actions the public prosecutor who has provided procedural guidance in a pre-trial investigation and/or prosecuted on behalf of the State in court in these proceedings,

except for the wilful breach of legislation or improper performance of duties'. *This provision should be taken into account when developing a system of performance indicators and evaluation.*

Article 45

121. The nature of the obligation to complain about the conduct of public prosecutors in Part 2, and in particular its applicability to persons other than public prosecutors, has not been clarified as recommended in paragraph 129 of the Joint Opinion. While the obligation to so complain is, and should be, one for public prosecutors, its applicability to other persons (except for the obligation of reporting relevant crimes) is highly questionable and the recommendation continues to be valid.

122. The recommendation in paragraph 130 of the Joint Opinion that Part 3 make more explicit the ability of Qualifications and Disciplinary Commissions to submit complaints has not been specifically addressed but, looking at the provision as a whole, it seems self-evident that this competence exists.

Article 46

123. The stipulation in paragraph 3 of Part 2 that 'the complaint (application) is based on circumstances not regulated by Article 43 of this Law' - rather than 'the complaint (application) concerning the person holding administration position, listed in paragraph 1 of Part One of Article 40 of this Law' - has the effect of making all those holding administrative offices (including the Prosecutor General) clearly subject to disciplinary proceedings, thereby resolving an uncertainty in this regard noted in paragraph 137 of the Joint Opinion.

124. However, the recommendation in paragraph 131 of the Joint Opinion to clarify the consequences flowing from paragraph 4 of Part 2 - the stopping of disciplinary proceedings where the public prosecutor concerned has been dismissed or had his or her powers terminated - has not been addressed. *It is important that this be remedied*.

125. As already noted, there is now provision in Part 3 for the results of an integrity test that find a disciplinary offence to be a mandatory ground for the initiation of disciplinary proceedings.

126. Although Part 6 now provides that there is no obligation for a public prosecutor who is the subject of disciplinary proceedings to provide explanations concerning him or herself, there is still no explicit protection, as recommended in paragraph 132 of the Joint Opinion, for others whose interests might be infringed by the disclosure obligation. *This omission could be remedied by specifying that the proceedings of the Qualifications and Disciplinary Commission is governed by the privilege against self-incrimination and other relevant safeguards*.

Article 50

127. Article 44 and Articles 45-49, which together establish and regulate the Qualifications and Disciplinary Commission as the agency conducting disciplinary proceedings against public prosecutors, is probably not compatible with the stipulation in Article 131 of the Constitution that the competencies of the High Council of Justice comprise 'the consideration of complaints regarding decisions on bringing to disciplinary liability …Prosecutors'. Accordingly, it is understandable that the present provision - pending a constitutional amendment - seeks to address this incompatibility by specifying a role for the High Council of Justice in this regard, namely, as an alternative to the administrative court as a route of appeal from a disciplinary ruling by the Qualifications and Disciplinary Commission. This means, of course, that the recommendation in paragraphs 140 and 201 of the Joint Opinion that an appeal should lie only to a court has not been implemented and *it should, therefore, be included as part of the constitutional reform process*.

Section 7. Dismissal of Public Prosecutors, Suspension and Termination of Public Prosecutor's Powers

Article 51

128. The view expressed in paragraph 144 of the Joint Opinion that dismissal for being put in a position of direct subordination to a close person is unduly harsh has not resulted in any modification of the provision for this in Part 1 (as well as in Article 55).

129. However, the removal from the reasons in Part 1 for the dismissal of a public prosecutor that he or she has been recognised as missing or dead and adding this reason to the grounds for termination of powers in the second Part 2 (there seems to be a numbering error in at least the English translation) is entirely appropriate and gives effect to the recommendation in paragraph 147 of the Joint Opinion.

130. On the other hand, the similar recommendation in paragraph 148 of the Joint Opinion concerning voluntary resignation as a ground for dismissal in paragraph 7 of Part 1 (and Article 58) has not been acted upon. *It is important that this be remedied.*

131. Moreover, no provision has been made for the possibility of challenging any reorganisation decision that results in a public prosecutor becoming liable to dismissal pursuant to paragraph 9 of Part 1 (and Article 60), as was recommended in paragraph 149 of the Joint Opinion. Such a dismissal is general ground normally regulated by administrative or labour law and this should be applicable for the purposes of challenging them. However, since the Law deals with some other such general grounds, including resignation, the recommendation in paragraph 149 remains valid. *It is to be expected, that, if deemed necessary, public prosecutors should be able to invoke and courts will apply general labour legislation*.

132. The reinstatement in the second Part 2 of 65 as the age at which the powers of a public prosecutor shall be terminated - reversing the increase to 70 noted in paragraph 151 of the Joint Opinion - is not inappropriate.

Article 52

133. The recommendation in paragraph 150 of the Joint Opinion that an alternative be found for the term 'long time' in Part 2 has not been acted upon but this is not of fundamental importance.

Section 8. Prosecutorial Self-Governance and Bodies Supporting the Prosecution Service

Article 67

134. Part 3 now makes it clear that the decisions of the All-Ukrainian Conference of Public Prosecution Employees are only binding insofar as they are within its competence. However, it still does not provide that they cannot be directed to individual public prosecutors. This change thus only partly gives effect to the recommendation in paragraph 155 of the Joint Opinion. *However, it is to be expected that this aspect will be fully taken into account in its rules of procedure and/or the practice developed in this regard.*

Article 69

135. Part 2 still does not clarify the nature of the voting system for the election of the delegates of the All-Ukrainian Conference of Public Prosecution Employees, referring only to a 'secret ballot from among freely nominated alternative candidates'. The latter indicates that there can be a choice of candidates but does not indicate whether a simple majority or some form of proportional voting system is to be used and thus does not give effect to the recommendation in paragraph 157 of the Joint Opinion. *This should be remedied.*

Article 71

136. The present provision does not indicate how the representatives are to be appointed to the Council of Public Prosecutors by the congress of representatives of law universities and academic institution - in contrast to Article 75, which concerns the election of representatives of law universities and academic institutions to the Qualifications and Disciplinary Commission - and indeed there is no such indication regarding the appointment of the other members of the Council of Public Prosecutors. Thus, the recommendation in paragraph 158 of the Joint Opinion has not been addressed. *Pending relevant special regulations being introduced, it can be suggested to follow the approach specified in Article 75 by way of analogy.*

Article 72

137. Part 2 now provides that the request for funds necessary for the operation of the bodies of prosecutorial self-governance shall be submitted to the Prosecutor

General's Office by the Council of Public Prosecutors, thereby giving effect to the recommendation in paragraph 160 of the Joint Opinion.

Article 76

138. Part 1 now extends the reasons for termination of membership of the Qualifications and Disciplinary Commission to situations where the member concerned has committed an action incompatible with such a position or has taken one of the offices specified in Part Two of Article 74 from which members cannot be selected. These extensions give effect to the recommendations in paragraphs 168 and 169 of the Joint Opinion.

139. However, the recommendation in paragraphs 167 of the Joint Opinion - which concerned the imprecision of termination because of impossibility to perform duties for health reasons - has not been addressed but, as with Part 2 of Article 52, but this is not of fundamental importance.

Article 77

140. The tasks specified for the Qualifications and Disciplinary Commission now specifically include its responsibility for selecting candidate public prosecutors, which is entirely appropriate.

141. Part 3 now provides for legal action to be taken to obtain information rather than conferring a broad right of access to it and thereby gives effect to the recommendation in paragraph 170 of the Joint Opinion. An extensive power of interrogation is also absent and Part 4 provides that a public prosecutor who is the subject of disciplinary proceedings shall not be held liable for refusal to give explanations about himself/herself, his/her family members and close relatives specified by law. This goes a considerable way to giving effect to the recommendation in paragraph 171 of the Joint Opinion but there is still no explicit protection for others whose interests might be infringed in the course of questioning. *This omission could be remedied by specifying that interrogation of individuals by the Qualifications and Disciplinary Commission is governed by the privilege against self-incrimination and other relevant safeguards*.

142. The stipulation in Part 2 that issues of hiring, firing, disciplinary liability and remuneration conditions, welfare support and social protection of secretariat members are set out in the Code of Labour Laws of Ukraine, the Law of Ukraine *On Civil Service,* this Law and other regulatory acts goes some way to meeting the concerns raised in paragraphs 173 and 174 of the Joint opinion. However, it does not clarify the criteria governing the selection of those working as secretariat members and does not make any provision designed to secure their independence. Along with other deficiencies of the Law, *these could be addressed in a statute for the Qualifications and Disciplinary Commission or in other pieces of secondary legislation to be developed for the purposes of the implementation of the Law.*

Article 80

143. The recommendation in paragraph 176 of the Joint Opinion that training in foreign languages be added to the remit of the National Academy of Public Prosecutors has not been addressed but this is not of fundamental importance.

144. It should be noted that the Law does not contain - as was originally proposed - provisions establishing advisory panels of public prosecutors, research and methodology boards and other prosecutorial institutions. However, in paragraphs 176 and 177 of the Joint Opinion it was suggested that there might be some overlap between these bodies and others to be established, as well as some uncertainty regarding their composition and operation, but the functions proposed in them were not generally considered inappropriate. Nonetheless, the Joint Opinion did consider it inappropriate - as was being proposed - for public prosecutors to be engaged in establishing and managing 'print houses, social welfare companies, healthcare establishment' and founding print media. There does not seem to be any authority to undertake such activities in the Law but it is also doubtful whether there needs to be a specific provision in it authorising the functions considered appropriate since they are likely to come within the powers and responsibilities of the Prosecutor General under Part 1 of Article 9. Furthermore, the absence of provision for such bodies mirrors the advancement of the system of professional self-governing bodies and the extension of their roles and is thus not problematic.

Section 9. Material and Social Support for the Public Prosecutors and other Prosecution Officers

Article 81

145. The arrangements in this provision (and Article 85) governing the salary of public prosecutors no longer provides for the payment of bonuses to public prosecutors. The latter were considered potentially problematic in paragraph 179 of the Joint Opinion - particularly because of the risk posed by them for corruption and loss of independence - and their absence from the Law is thus not inappropriate.

Article 83

146. The sort of material support envisaged in this provision was also considered inappropriate because the needs involved should be adequately addressed out of the salaries of public prosecutors as otherwise the resulting dependence would give rise to a risk of undue pressure or a reluctance to act independently. However, it was acknowledged that the provisions were less extensive than those previously in operation and it was recommended in paragraph 180 that this trend be pursued further over an appropriate transitional period. *Implementation of this recommendation should be acted upon.*

147. However, there ought to be particular concern about the material and social support for military public prosecutions being governed by the arrangements for military personnel as this will enhance their dependence on the military chain of command and undermine their independence. *This should not, therefore, be envisaged as a long-term arrangement.*

Articles 85-86

148. It is now provided that social and material support for public prosecutors is generally to be regulated by the Law of Ukraine *On Civil Service* and other relevant legislation and the rate for calculation of pensions has been reduced from 80 to 70% of a public prosecutor's salary. Such changes possibly reflect the economic situation faced by the country but they could also contribute to normalising the status of public prosecutors within society at large.

Section 10. Organisational Support to the Public Prosecution Service

149. There is no longer a provision dealing with guarantees and compensation for persons summoned to a public prosecutor's office and that omission addresses both the comment in paragraph 181 of the Joint Opinion that its location in a section material and social support for public prosecutors was inappropriate and the question raised in paragraph 182 as to whether the scope of the power of public prosecutors to summon persons to their offices referred to in Part 1 went beyond that provided for in what was then Article 24 of the Draft Law and Section 11 of the Criminal Procedure Code.

Section 11. International Cooperation

Article 92

150. The stipulation now in Part 1 that any co-operation of public prosecutor's offices with competent authorities of other countries 'may not contravene Ukraine's constitutional guarantees and commitments in regard to human rights' gives effect to the recommendation in paragraph 183 of the Joint Opinion.

Articles 93 and 94

151. The concern in paragraph 184 of the Joint Opinion that the Prosecutor General continued to have some responsibility for the conclusion and denunciation is now seen to be based upon a mistranslation of this provision. These provisions are not, therefore, problematic.

Section XII. Final provisions

Part 1

152. There is now a clear final deadline for the full entry into force of the Law - six months from the day following its publication (apart from certain specified exceptions which come into force the day after publication) - giving effect to the recommendation in paragraph 185 of the Joint Opinion.

Part 3

153. The retention in force of just a few provisions of the Law of Ukraine *On Public Prosecutor's Office,* namely, Clause 8, Part One, Article 15; Part Four, Article 16, Paragraph One, Part Two, Article 46-2; Article 47; Part One, Article 49 Part Five, Article 50; Parts Three, Four, Six and Eleven of Article 50-1; Part Three, Article 51-2; and Article 53 as to class ranks and uniform seems a very unusual approach to legislative drafting, particularly as other provisions from the old law are now in the new one. Furthermore, the retention of the provisions in respect of uniforms is surprising given that the Joint Opinion, in paragraph 194, had actually welcomed the abolition of the uniform for prosecutors. *The need for the retention of these provisions, at least in this manner, should thus be reviewed.*

Part 8

154. The amendment to Part 5 of Article 46 of the Civil Procedural Code, as already noted, gives the public prosecutor access to court materials without the court's prior authorisation and thus does not give effect to the recommendations in paragraphs 94 of the Joint Opinion. *This omission should be remedied.*

Part 62

155. The amendment paragraph 3 of Part 1 of Article 7 of the Law of Ukraine *On Enforcement Proceedings*, as already noted, gives the public prosecutor access to court materials without the court's prior authorisation and thus does not give effect to the recommendations in paragraphs 94 of the Joint Opinion. *This omission should be remedied.*

Section XIII. Transitional provisions

Part 4

156. This limits the pre-trial investigation function of public prosecutors to the entry into operation of the State Bureau of Investigation and no later than five years from the entry into force of the Criminal Procedure Code, which is a sufficient period to facilitate the transition.

Part 6

157. This omits to mention a need to appoint representatives of All-Ukrainian Conference of Public Prosecution Employees to the Qualification and Disciplinary Commission. However, taking into account that Article 68 of the Law provides for a biennial periodicity of holding All-Ukrainian Conference of Public Prosecution Employees, it is expected that it will be convened and decide on this and other issues (including the election of relevant members to the Council of Public Prosecutors of Ukraine) accordingly. Indeed, there is nothing in the Law that would prevent public prosecutors from convening an extraordinary All-Ukrainian Conference of Public Prosecution Employees, during which it could elect its members according to paragraph 3 of Part 2 of Article 67 and the procedural rules in Article 70. However, it is essential that this not only does actually occur in order to ensure that the Commission is truly representative but also that the process followed must be as near as possible to that set out in Article 69 of the Law so that there is no question that the spirit of the Law in this regard has been duly observed.

Part 8

158. The functions given to the High Council of Justice are rightly specified to be applicable until the appropriate amendments to the Constitution are made.

Part 11

159. The deadline for the expiry of the authorisation for investigators of the Public Prosecutor's Office to carry firearms is rightly set as the entry into operation of the State Bureau of Investigation and no later than five years from the entry into force of the Criminal Procedure Code.

Part 13

160. This has not turned the recommendation to the Prosecutor General's Office regarding implementation measures into requirements and so the recommendation in paragraph 191 of the Joint Opinion has not been addressed. *This omission should be remedied.*

161. Although the general arrangements for establishment of the Qualifications and Disciplinary Commission, as provided in the Article 72 of the Law are appropriate, it should be noted that the issue of securing the funding for this, especially in the transitional period before all the law's provisions enter into force in the spring of 2015, does not appear to have been satisfactorily addressed. Moreover, this is also an issue that is not adequately covered in the guidance to the Cabinet of Ministers as to the measures to be taken to secure additional recourses for other institutions, i.e. , the Coordination Center for Providing Free Legal Aid and the Parliamentary Commissioner for Human Rights of Ukraine. The failure to address this issue satisfactorily will inevitably undermine the independence of the Qualifications and Disciplinary Commission and the ability of all these institutions to perform the role

entrusted to them. *This issue should be satisfactorily addressed as a matter of urgency.*

D. Conclusion

162. Overall, the Law has been substantially improved as compared to the former law and earlier drafts proposed to replace it. The Law establishes a good foundation for a Public Prosecution Service that will operate in accordance with European standards. However, a precondition for achieving such a goal is that all stakeholders are committed to performing fully, loyally and positively all the immense work that effective implementation of the Law's provisions will require.

163. The formulation of a number of provisions have failed to give effect to the recommendations in the Joint Opinion, although the shortcomings concerning Articles 5 and 52 and Section 10 are not significant.

164. In some instances amendments to the Constitution are still required in order for problems to be satisfactorily resolved. This is the case regarding the term in office and the procedure of appointment and dismissal of the Prosecutor General, the total abolition of power in Part 5 of Article 121, the function of representation of the interest of individuals and the role of the High Council of Justice in disciplinary proceedings.

165. Other issues - particularly with respect to Articles 17, 23 27, 39, 42, 46, 51, 83 and Parts 3, 8 and 62 of part 5 of Section XII will require amendments to the Law.

166. However, there are many provisions - notably, with respect to Articles 6, 7, 8, 9, 11, 13, 19, 32, 43, 67, 71, 77 - for which solutions can be found through the specific manner in which the relevant provisions are implemented.

167. One omission in the Law that should be noted is the absence of any provision dealing with the regulation of the assignment and re-assignment of cases so as to ensure the impartiality and independence of the prosecution process and to maximise the proper operation of the criminal justice system[33]. This is, however, something that can also be addressed through practical arrangements so long as appropriate advice is ought and acted upon.

168. It should also be noted that some aspects of the Law are extremely detailed (especially in sections 3, 5, 6 and 8) and such a detailed regulation may cause confusion and result in an inability to distinguish more important issues from less

[33] See paragraph 30 of the Joint Opinion.

important ones. The latter could more appropriately be transferred to secondary legislation.

169. Finally, it is essential that all the necessary funding arrangements be put in place for the transitional period so that the Law can actually be duly implemented.

170. However, the Law now provides a very good basis for securing a criminal justice system that is compliant with European standards and the challenge is now for those charged with its implementation is to ensure that this opportunity is fully realised.