

HUMAN RIGHTS COMPLIANT CRIMINAL  
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**COMPARATIVE STUDY ON THE DISCIPLINARY LIABILITY OF PUBLIC  
PROSECUTORS IN SELECTED COUNCIL OF EUROPE MEMBER STATES**

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## ABBREVIATIONS

<b>art.</b>	Article
<b>CoE</b>	Council of Europe
<b>COPFS</b>	Crown Office and Procurator Fiscal Service of Scotland
<b>CPC</b>	Criminal Procedure Code
<b>CPS</b>	Crown Prosecution Service
<b>CEPEJ</b>	European Commission for the Efficiency of Justice
<b>CCPE</b>	Consultative Council of European Prosecutor
<b>GPP</b>	General public prosecutor
<b>GPPO</b>	General public prosecutor's office
<b>GRECO</b>	Group of States against Corruption
<b>LOPJ</b>	Organic Law on the Judicial Power
<b>MoJ</b>	Minister or Ministry of Justice
<b>PP</b>	Public prosecutor
<b>PPL</b>	Public prosecution law
<b>PPO</b>	Public Prosecutor's Office
<b>Prosecutorial Council</b>	State Prosecutor's Council
<b>PPS</b>	Public prosecution service
<b>PPSNI</b>	Northern Ireland has the Public Prosecution Service Northern Ireland
<b>RD</b>	Royal Decree
<b>SC</b>	Spanish Constitution 1978
<b>SFO</b>	Serious Fraud Office
<b>SP</b>	State prosecutor
<b>SPG</b>	State Prosecutor General
<b>SPO</b>	State Prosecutor's Office
<b>SPOA</b>	State Prosecutor's Office Act
<b>SP Rules</b>	State Prosecutorial Rules
<b>Supreme SPO</b>	Supreme State Prosecutor's Office

## EXECUTIVE SUMMARY

1. Disciplinary liability of prosecutors is rather meticulously regulated in all systems included in this study, except for the United Kingdom. Spain, Slovenia, and Italy have an exhaustive list of disciplinary offences that are listed in the laws. The United Kingdom (England & Wales and Scotland) does not have a numerous clauses of possible disciplinary offences. The code of conduct provides for the framework and any violation of the expected standards of behaviour or conduct set forth in that code can constitute a disciplinary offence if the offence is deemed to be severe enough.
2. The PPs can commit the disciplinary offence both, while performing their duties or outside the office, in their private life. In Italy even the separate lists of disciplinary offences are in the law, based on whether the offence can happen while performing the duties or in PPs private life. The third cluster of disciplinary offences in Italy is connected to commission of the criminal offence. In Spain the division of disciplinary offences is based on their seriousness – the disciplinary offence can be very serious, serious, and minor. In Slovenia all disciplinary offences are foreseen in one list, but in addition some of those regarding the circumstances of the offence, can mount to the level of serious disciplinary offence.
3. All countries have a code of ethics/conduct for prosecutors – it can either be specifically for prosecutors like in Slovenia and the United Kingdom, or it can be a code of ethics binding all magistrates (e.g. Italy). A breach of the code of ethics does not automatically constitute a disciplinary offence. Some unethical behaviours can be of such intensity that they also constitute disciplinary offences, but for that the behaviour or conduct in question must be explicitly defined as a disciplinary offence.
4. In all system included in this study, acting as a prosecutor in case of conflict of interest is the behaviour that can be a disciplinary offence, either as a specific disciplinary offence (Spain, Italy, Slovenia) or such conduct could breach the code of conduct and hence be a disciplinary offence (the United Kingdom – England & Wales and Scotland).
5. Sanctions that can be imposed to the PPs that have committed a disciplinary offence are rather similar in all countries included in this study. They range from reprimand or written warning (all countries), to financial sanctions (either cut in salary for certain period of time (Slovenia, the United Kingdom – England & Wales) or payment of a fine (Spain)), transfer of PP to a different office (Spain, Slovenia, Scotland), temporary ban on promotion (Slovenia, the United Kingdom – England & Wales, Spain) or dismissal from the office (all countries). Ban on taking up managerial positions or dismissal from such a position is also possible.
6. The gravity of the disciplinary offence affects the severity of the sanctions that can be imposed on the PPs. In Spain minor offences can only be punished either by warning or by fine up to 300 Euros, whilst severe offences are punishable with a fine from 300 up to 3000 Euros. Severity of sanction also depends on the level of responsibility of the PP by considering whether the disciplinary offence was committed intentionally, out of negligence or out of inexcusable negligence. The repetition of the disciplinary offences also affects the sanctions imposed (England & Wales, Italy, Scotland, Spain, Slovenia,).

7. The imposition of a sanction for a disciplinary offence is registered in personal records of the PP in Spain, Slovenia, and England & Wales and Scotland; for Italy there is no information on the matter. In the United Kingdom and in Spain the records about the sanction imposed for disciplinary offence are deleted from the personal record of the PP after certain period of time, unlike Slovenia where they are registered permanently. For example, in Spain the records are deleted after six months for minor offences, after two years – for serious offences and in four years – for very serious offences. In the United Kingdom – England & Wales the written warning and final written warning stay recorded for one year, for a sanction short of dismissal it stays on record for up to three years.
8. The disciplinary bodies are rather different in the observed countries. In the United Kingdom – England & Wales the managers of the prosecution offices also have a power to decide in disciplinary proceedings. In more serious cases the investigative officer is appointed, and the human resources unit is consulted. In Italy the disciplinary board of the High Judicial Council examines all disciplinary cases and imposes the disciplinary sanctions. In Spain the competent body to decide on the sanction depends on the type of the offence and sanction – it can be a Chief Prosecutor for issuing a warning, GPP for suspension, and Minister of Justice upon the proposal of the GPP and upon the positive report by the PPs Council for dismissal. The disciplinary proceeding in Spain in a serious case is conducted by the Prosecutor’s Inspectorate. In Slovenia the competent bodies in disciplinary proceedings are the disciplinary prosecutor and disciplinary court of the first and the second instances.
9. The inspection services for PPs exist in all countries included in this study, but in Slovenia this service is called the “expert supervision department” not the inspectorate. They all are responsible for the inspection/supervision of the work of PPs and the prosecution offices but have different responsibilities in the disciplinary procedure. In Scotland the Her Majesty’s Inspectorate of Prosecution and in England & Wales the Her Majesty’s Crown Prosecution Service Inspectorate have no competences in relation to disciplinary procedures. The expert supervision department in Slovenia has also no competences in disciplinary procedure.
10. In Italy the General Inspectorate of Justice is competent, among others, to conduct administrative enquiries about the disciplinary allegations against PP. The report following such investigation is sent to the MoJ who decides on the initiation of disciplinary proceeding. Similarly, in Spain – the Prosecutors Inspectorate is competent for the disciplinary proceedings and conducting the investigation; based on the findings, the inspectorate decides on proposing to GPP to open the disciplinary proceeding. After the disciplinary procedure has been completed, the Inspectorate proposes a proper sanction to the relevant body (either MoJ or GPP).
11. A disciplinary complaint or information on the conduct that could constitute a disciplinary offence can be reported anonymously in all countries and there are no requirements regarding the form of the complaint. In Spain there is a complaint form accessible on-line, but the use of it is not obligatory for the complaint to be considered.
12. The submission of the complaint does not automatically result in the initiation of the disciplinary procedure. And on the other hand – the complaint is not always

necessary c for the initiation of the disciplinary proceedings. In order to do it, in Italy, the MoJ and GPP can act upon the received complaints or information obtained in any other way, including via press. In Spain the chief prosecutor starts the preliminary investigation to establish whether the disciplinary offence might have been committed. In Slovenia the SPG, the head of the SPO, where the prosecutor who is suspected of disciplinary offence is situated, the Prosecutorial Council and the Minister of Justice can propose the initiation of the disciplinary proceeding, and also all of them, apart from the head of the SPO, can demand it. But the disciplinary procedure formally starts with the act of disciplinary prosecutor, and not when the complaint is received.

13. The disciplinary bodies are appointed by different authorities. In Scotland the Human Resources department supports the prosecution office in appointing an Investigative Officer and the deciding Manager, for each case at hand. Similar is in England & Wales – the person deciding in disciplinary procedure is appointed in a case at hand. In Spain there is no special body for imposing disciplinary sanctions, and the Disciplinary Unit of the Inspectorate carries out the preliminary investigation.
14. In Italy and Slovenia, the special disciplinary bodies are formed. In Italy members of the disciplinary board are members of the High Judicial Council, they are appointed for one year. In Slovenia the disciplinary prosecutor and disciplinary court are appointed, both for two years. Members of the disciplinary court are prosecutors and judges of higher ranks. The disciplinary prosecutor and court in Slovenia have no other competence outside the disciplinary proceedings.
15. The prosecutors involved in disciplinary proceedings have procedural guarantees. In all countries the prosecutors under the investigation can have access to legal aid and are informed of the stages of the procedure. In Spain in case the prosecutor is a member of professional organisation, this organisation can take part in the proceeding.
16. There are some differences in the disciplinary proceedings against prosecutors and judges, but no country reports of big, salient differences. In most cases, there is the difference regarding the body authorised to decide on the sanction for the disciplinary offence that was committed. In Italy there is no difference in procedures.
17. The statistics on disciplinary procedures are not detailed or easily accessible, unlike the statistics presenting the work of public prosecutors. The statistics on disciplinary procedures is available in Spain and Italy, the numbers of disciplinary cases for Slovenia and the United Kingdom are taken from the European Commission for the Efficiency of Justice (CEPEJ) report, from 2020, based on the 2018 data, accessible on their webpage. Apart from the number of initiated disciplinary proceedings in a given year, there are also data on reasons for initiating those proceedings.

## INTRODUCTION

18. Different countries place the prosecutorial service under different branches of government – some consider it as a part of the executive branch, others -as a part of the judiciary. But regardless of the position of public prosecutors' offices, prosecutors are granted independence while performing their duties. It is recognised

that properly functioning prosecution service is an important prerequisite for well functional criminal justice.

19. The trust people have in independence, professionalism and impartiality of the public prosecutors underpins the trust in the judiciary. Therefore, it is important not only to have such regulatory framework in place that supports independence of the prosecutors, but also assures their proper conduct, professionalism and diligence while performing their duties as well as outside their work.
20. The disciplinary responsibility of the public prosecutors is a remedy in rather serious cases of improper conduct. Firstly, the public prosecutors are bound by the moral and ethical standards that serve as a guidance for their work and behaviour and usually those standards are written in professional code of conduct. In some cases, the breach of that code amounts to the breach of professional duties and constitute the disciplinary offence.
21. The disciplinary offence can in worst cases result in the dismissal from the office. As this result is necessary and welcome when public prosecutors misuse their office or otherwise disrepute the profession and judiciary, it could be abused for undue pressure on public prosecutors. Therefore, it is important to have impartial bodies, deciding in the disciplinary procedure against public prosecutors, with members of those bodies that have knowledge and qualifications to assess the offence and its connection to the prosecutorial service. Further to support proper disciplinary system the disciplinary offences must be known in advance and be clearly defined. In the disciplinary procedure the procedural guarantees must be granted for the public prosecutors subjected to the procedure.
22. The purpose of this study is to provide a comparative overview of several solutions regulating the disciplinary liability and disciplinary proceedings of public prosecutors in selected Council of Europe (CoE) member states, namely Italy, Slovenia, Spain, and the United Kingdom (with focus on England & Wales and Scotland) . The comparative study is intended to support the authorities in Ukraine in the alignment of their public prosecution service with international standards.
23. This study has been consolidated by Gaja Štovičej<sup>1</sup>. The research methodology and questions for the study , including standards and background information, aim of the study, methodological principles and tools, topics and common structure of the country reports, table of contents for country reports were prepared by Lorena Bachmaier-Winter.<sup>2</sup> The country reports were prepared by Lorena Bachmaier-Winter (Spain), Gaja Štovičej (Slovenia), Mjriana Visentin (Italy),<sup>3</sup> and Ian Welch (UK with focus on England & Wales and Scotland).<sup>4</sup> The views and opinions presented in this comparative study are those of the authors and may not necessarily reflect the official position of the CoE.

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## STANDARDS AND BACKGROUND INFORMATION

### General standards on public prosecutors

24. The Prosecution service is an essential institution for the correct functioning of any justice system and in particular the criminal justice, but it is also a key institution to ensure the rule of law. Any legal system should ensure that the principles set out in the main international and Human Rights documents on the public prosecution are followed. The main European standards on the public prosecution can be found in: the European Convention on Human Rights ('the European Convention') and the related case law of the European Court of Human Rights ('the European Court');<sup>5</sup> Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system;<sup>6</sup> Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe;<sup>7</sup> the Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service by the European Commission for Democracy through Law ('the Venice Commission');<sup>8</sup> the European Guidelines on Ethics and Conduct for Public Prosecutors ('Budapest Guidelines');<sup>9</sup> "Judges and prosecutors in a democratic society" ('the Bordeaux Declaration');<sup>10</sup> Opinion No. 3 (2008) of the Consultative Council of European Prosecutors (CCPE) on "The role of prosecution services outside the criminal law field"; Opinion No. 13(2018) of the Consultative Council of European Prosecutor (CCPE) on "Independence, accountability and ethics of prosecutors".<sup>11</sup>
25. With regard to Ukraine, the Opinions of the Venice Commission on the draft Law on the PPO of Ukraine (CDL-AD(2012)019) and its preceding assessments of the (draft) legal framework on the PPS of Ukraine (Venice Commission's 2012 Opinion on the draft Law on PPS of Ukraine and other opinions respectively), the OECD Fourth Round of Monitoring Ukraine Progress Update 2019,<sup>12</sup> and the Evaluation Report of GRECO of Ukraine in 2017<sup>13</sup> have also been consulted.

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<sup>5</sup> See, e.g., *Schiesser v. Switzerland*, of 4 December 1979, Appl. No. 7710/76; *Vasilescu v. Romania*, of 22 May 1998, Appl. no. 27053/95; *Assenov and others v. Bulgaria*, of 28 October 1998, Appl.no. 24760/94; *Pantea v. Romania*, of 3 June 2003, Appl. no. 33343/96; *Jasinski v. Poland*, of 20 December 2005, Appl. no.30865/96; *Zinsat v. Bulgaria* of 15 June 2006, Appl. no. 57785/00; *Medvedyev v. France* [GC], of 29 March 2010, Appl.no. 3394/03; *Moulin v. France*, of 23 November 2010, Appl. no. 37104/06.

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

<sup>7</sup> Adopted on 27 May 2003.

<sup>8</sup> CDL-AD(2010)040, 3 January 2011.

<sup>9</sup> Council of Europe, 2005.

<sup>10</sup> Opinion No.12 of the Consultative Council of European Judges ('CCJE') and Opinion No.4 (2009) of the Consultative Council of European Prosecutors ('CCEP').

<sup>11</sup> The International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted on 23 April 1999 and subsequently endorsed by the United Nations Commission on Crime Prevention and Criminal Justice (Resolution 17/2, 14-18 April 2008, have also been taken into account.

<sup>12</sup> Istanbul Anti-Corruption Plan, accessible at:

<https://www.oecd.org/corruption/acn/OECD-ACN-Ukraine-Progress-Update-2019-EN.pdf>

<sup>13</sup> Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report of the Council of Europe's Group of States against Corruption (GRECO) of Ukraine, adopted by GRECO at its 76th Plenary Meeting, Strasbourg 19-23 June 2017.



26. CoE standards provide for extensive soft law and standards on the public prosecution fostering the autonomy and independence of the prosecution service, so that it is not politically controlled. The present trend in all European countries is to strive for a greater institutional independence of the PPS, that allows the prosecution to perform their duties without undue interferences –both internal and external– trying to strike the adequate balance between independence, hierarchical structure and coordination, accountability and efficiency of the PPS.

### **Independence of public prosecutors: a main trend**

27. As stated in the CCPE Opinion No. 13(2018) the status of independence of the prosecutors is crucial for ensuring the proper functioning of the justice system and ensuring the rule of law. To that end “Lines of authority, accountability and responsibility should be transparent in order to promote public confidence” (para. 41).

28. To that end, there is also the tendency to set up prosecutorial self-governing bodies, resembling those that are already existing within the judiciary, to carry out the assessment on performance, promotion, training, and also disciplinary proceedings of public prosecutors.<sup>14</sup> Prosecutorial councils are thus a more recent phenomenon, and therefore less common, emerging over the last ten to fifteen years and concentrated primarily in South Eastern Europe.<sup>15</sup>

29. There are no explicit international or regional European standards regarding judicial and prosecutorial councils let alone the specific methodology or technical requirements for peer elections to such councils. This in part owes to a wide diversity of councils across Europe (for those countries that utilize them) and considers that each council must be examined within its own unique historical context, legal culture and system, and legal and constitutional framework. It is common for these councils to contain at least a simple majority of judge or prosecutor-members alongside other representatives, which are often chosen from academia, bar associations, or executive structures. Judge and prosecutor-members are usually chosen through a peer-election process.

### **Independence and accountability of public prosecutors**

30. Independence must go hand in hand with accountability. In this regard, the CCPE Opinion No. 13(2018), para. 25 specifically expresses that: “As a means to ensure the independence of prosecutors, clear mechanisms with regard to instituting prosecution or disciplinary proceedings against prosecutors should also be

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<sup>14</sup> See e.g. Venice Commission “European standards on the Independence of the judiciary”, CDL-JD (2008)002, of 3 October 2008; Council of Europe Rec(2002)19 On the role of the public prosecution in the criminal justice systems, para.11.

<sup>15</sup> Specialized prosecutorial councils exist, for instance, in Bosnia and Herzegovina, Moldova, Montenegro, Serbia, and the Former Yugoslav Republic of Macedonia. France, Italy, and Turkey have judicial councils which cover both judges and prosecutors. See Venice Commission Report on European Standards as Regards the Independence of the Judiciary Part II: The Prosecutorial Service (2010) at footnote 6.

established.”<sup>16</sup> And in para.47 of the same CCPE Opinion No. 13(2018) it can be read that public prosecutors

*“are subject, where appropriate, to disciplinary proceedings which must be based on a law, in the event of serious breaches of duty (negligence, breach of the duty of secrecy, anti-corruption rules, etc.), for clear and determined reasons; the proceedings should be transparent, apply established criteria and be held before a body which is independent from the executive; concerned prosecutors should be heard and allowed to defend themselves with the help of their advisers, be protected from any political influence, and have the possibility to exercise the right of appeal before a court; any sanction must also be necessary, adequate and proportionate to the disciplinary offence.”*<sup>17</sup>

And para. 48:

*“Unless they are found to have committed a disciplinary offence or to have clearly failed to do their work properly, prosecutors, similar to judges, may not be held personally responsible for their choices of public action once they have been the result of a personal intellectual and legal analysis.”*

31. The report of the Venice Commission on European Standards as regards the Independence of the Judicial System: Part II “The Prosecution Service”,<sup>18</sup> with regard to the discipline of PPs states:

*“B. Discipline*

*Para. 51. The system of discipline is closely linked to the issue of the hierarchical organisation of the prosecutor’s office. In such a system, disciplinary measures are typically initiated by the superior of the person concerned.*

*Para. 52. In disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. In systems where a Prosecutorial Council exists, this council, or a disciplinary committee within it, could handle disciplinary cases. An appeal to a court against disciplinary sanctions should be available.”*

32. These principles are reflected adequately in art. 16.1 of the PPL,<sup>19</sup> but there is still a need to ensure whether the principle of independence is implemented in practice and

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<sup>16</sup> This paragraph continues: “For instance, there is a special procedure established by law in some member States which enables the initiation of proceedings for administrative and/or criminal offences allegedly committed by prosecutors.”

<sup>17</sup> See also Venice Commission Opinion CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§48-49: “[...] Persons who leave their posts without permission or excuse for more than 10 days or who do not attend work for a total of 30 days in the year are deemed to have resigned from the profession. There does not seem to be any exception in this last provision made for persons who are ill, and this should be remedied.”

<sup>18</sup> CDL-AD(2010)040, 3 January 2011.

<sup>19</sup> Art. 16. “1. Independence of a prosecutor shall be secured by:

if there is room for improvement in Section VI of the PPL: for the independence of any institution, it is not enough that the law provides for such a statement, but it requires that the adequate safeguards are adequately regulated and implemented.

33. Moreover, the disciplinary proceedings have to be respectful with the principle of impartiality and the due process safeguards, as required in the landmark judgment of the ECtHR in the *Volkov* case (although addressing a case of a disciplinary proceeding against a judge).<sup>20</sup>

### Some background information

34. Ukraine is currently under the process of setting up a newly designed Public Prosecution Service (PPS). Law on the Public Prosecution Service was amended on 19 September 2019,<sup>21</sup> but some of its provisions have been suspended until September 2021. In the interim, selection, promotion, appointment to administrative positions, disciplinary proceedings etc. is regulated mainly by temporary provisions.
35. However, these provisions are at present unclear, and refer to bylaws and regulations for setting up important bodies in the judiciary and in the prosecution service. According to the last compliance report of the Fourth Evaluation Round of the GRECO report on “Corruption prevention in respect of members of parliament, judges and public prosecutors”.<sup>22</sup>

*“GRECO notes that the new Law on the Reform of the Prosecutor’s Office drastically changes the situation assessed at the time of the evaluation visit, altogether suspending the prosecutorial self-governing bodies, in particular the Qualification Disciplinary Commission for a provisional period until 1 September 2021, with insufficient clarity on how their work will resume.”* (para. 133),

and also recognises that

*“While in the context of Ukraine, a comprehensive reform of the prosecutorial bodies may still be needed; it should be properly justified and explained. GRECO has most critical concerns regarding the suspension of the self-governing bodies, as these bodies are guardians of the independence and autonomy of prosecutors and should be in place to shelter the prosecution service from undue political influence, both real and perceived. Moreover, replacing the current system for recruitment and career progression of prosecutors with personnel commissions, without regulating by law their composition, functions, and procedures, is clearly unsatisfactory.”*

36. As was previously assessed by CoE consultants, the way the powers for accreditation, vetting, selection, appointment **and disciplining** of all prosecutors are provided in

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1) special procedures of his/her appointment to the position, dismissal from the position, and imposing of disciplinary sanctions;”

<sup>20</sup> See *Oleksandr Volkov v. Ukraine*, of 9 January 2013, Appl. no. 21722/11.

<sup>21</sup> Law of Ukraine No. 113-IX as of 19.09.2019 “Amending Certain Legal Acts of Ukraine to Take Priority Measures of the Reform of Prosecutor’s Offices.

<sup>22</sup> See Greco RC4(2019)8, published on 26 March 2020.

the Law as of September 2019 “raises concerns, as the procedures are either regulated in a very vague way in the Final provisions to the law; or are left to be regulated by the GPP, leaving wide margin of discretionary powers to the head of the prosecution service and creating legal uncertainty in the whole process (para. 35).”<sup>23</sup>.

37. With regard to the disciplinary proceedings against PPs, the main rules are to be found under Section VI PPL, titled “Disciplinary liability of a public prosecutor”. This section comprises arts. 43 to 50 PPL, although in art. 51 PPL (grounds for dismissal of PPs), the dismissal based on a disciplinary infringement is also mentioned (art. 51.3.4) PPL).
38. In practice, the way the grounds for disciplinary liability of public prosecutors is regulated seems vague and does not seem to serve as an effective safeguard for the independence of individual prosecutors. It has been recognised that because of the fear on the negative evaluation and the application in practice of the performance indicators and of the disciplinary proceedings, prosecutors in the past have tended to exert pressure upon judges to avoid acquittals.<sup>24</sup> Although acquittals shall not play any role anymore in the performance or as a disciplinary offence, public prosecutors still seem to feel obliged to win all cases where they have filed an indictment to prevent a potential disciplinary action.
39. The idea that in a democratic system under the rule of law, prosecutors are parties subject to the principle of the equality of arms and therefore they will necessarily lose cases, is still not interiorized by most of the public prosecutors, because they are still afraid that this may result in disciplinary action against them.
40. Against such background, it is very important that the conducts that constitute a disciplinary offence are defined with precision, and that there are diverse categories of offences and sanctions according to their gravity. Grounds as the failure in their performance or undue delays need to be precisely identified and should only lead to a disciplinary sanction if they are caused by a negligent or unprofessional conduct of the relevant public prosecutor. Prior reports have identified shortcomings related to the calculation and distribution of the workload of the public prosecutors, and the performance evaluations of PPs,<sup>25</sup> and this is why the reforms and the implementation of the disciplinary system has to be addressed jointly with the adequate workload calculation and distribution of work of each public prosecutor.

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<sup>23</sup> See the Post-adoption Assessment of the Law of Ukraine No. 113-IX as of 19.09.2019 “Amending Certain Legal Acts of Ukraine to Take Priority Measures of the Reform of Prosecutor’s Offices” prepared by *Prof. Dr. Lorena Bachmaier Winter and Mr. James Hamilton* in September 2019, accessible at: [https://www.coe.int/en/web/kyiv/human-rights-complaint-criminal-justice-system-in-ukraine/-/asset\\_publisher/RF0IUfQaQu5R/content/expert-assessment-on-the-draft-law-2411?inheritRedirect=false&redirect](https://www.coe.int/en/web/kyiv/human-rights-complaint-criminal-justice-system-in-ukraine/-/asset_publisher/RF0IUfQaQu5R/content/expert-assessment-on-the-draft-law-2411?inheritRedirect=false&redirect)

<sup>24</sup> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §128.

<sup>25</sup> The report “Organisational analysis of the General Prosecutor’s Office of Ukraine” of June 2019 prepared by CoE and *PricewaterhouseCooper*. This report contains key project results, including description of the current state of the General prosecutor’s office of Ukraine (GPO) across five streams of the organisational analysis; recommendations on potential opportunities for enhancing organisational efficiency of GPO; transformation action plan; and required organisational capacities for such transformation; see p. 1. Upon the findings of that study, it was recommended to “provide for regular monitoring and evaluation of workload of the GPO’s employees and take actions for its reduction (p. 17).

Avoiding discretionary performance evaluations that can hide arbitrary decisions in the workload, is crucial to prevent that such grounds are used –as has often happened in the past–, to bring an individual to disciplinary proceedings.

41. In this vein, the report prepared by CoE and *PricewaterhouseCoopers Advisory* concludes that there are no approved criteria and performance appraisal procedure for prosecutors, as in practice performance appraisal is done informally by the immediate supervisor.<sup>26</sup> In this regard the report recommends to “develop clear performance appraisal criteria and procedure for prosecutors; enhance current appraisal procedure for public servants (in particular through implementation of feedback gathering, etc.). Again, in that context, it becomes the more important, that performance or under-performance grounds are not unduly invoked to discipline individual PPs.

#### AIM OF THE STUDY

42. The comparative study shall provide information on the national legal framework on disciplinary offences and disciplinary proceedings against public prosecutors in selected CoE Member states, with the aim of providing guidance for the alignment of the disciplinary system of PPs in Ukraine with European standards and other CoE Member states.
43. To that aim, the comparative study shall include legal theoretical information but also data on its practical implementation, as far as such information is available and accessible. The sources of information shall be indicated in every report. The amount and quality of the statistical data available in each country differs greatly: while some countries have very detailed statistics on the number of disciplinary proceedings and also the type of offences that triggered those proceedings, as well as the outcome of them, in other countries, the available data are not so detailed. Nevertheless, where existing, such data should be included.

#### METHODOLOGICAL PRINCIPLES AND TOOLS

44. The comparative study shall be based on the information provided by experts on the topic of the research in a number of CoE member states. These countries should be representative from the point of view of geographical distribution (Eastern countries with similar background of the model and structure of the public prosecution service), and/or population as Ukraine, and other countries that have a complete

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<sup>26</sup> In the past, “the absence of a uniform way of compiling quantitative and especially qualitative criteria on the performance of public prosecutors made it difficult to identify the needs and develop a long-term planning. The amendments to the Law of Ukraine on PPS of 19.09.2019 vests the Prosecutor General with the power to approve prosecutors’ performance evaluation, and the Office of the Prosecutor General shall in the future adopt an order to in this area”, see Council of Europe, *Comparative study on the workload of public prosecutors in selected Council of Europe member States*, , prepared on the basis of expertise by *Lorena Bachmaier, Grażyna Stanek, James Hamilton, Gaja Štovičej and Catherine Carrie*, 2020, p. 10, accessible at: [https://www.coe.int/en/web/kyiv/hr-ccj-all-news/-/asset\\_publisher/xvwCoKapBWYR/content/comparative-study-on-the-workload-of-public-prosecutors-in-selected-council-of-europe-member-states?\\_101\\_INSTANCE\\_xvwCoKapBWYR\\_viewMode=view](https://www.coe.int/en/web/kyiv/hr-ccj-all-news/-/asset_publisher/xvwCoKapBWYR/content/comparative-study-on-the-workload-of-public-prosecutors-in-selected-council-of-europe-member-states?_101_INSTANCE_xvwCoKapBWYR_viewMode=view)

diverse historical background and prosecutorial culture, as well as geographical and demographical dimension. =

45. The reports on the national disciplinary systems in place for public prosecutors shall adhere to the general methodological principles of impartiality, objectivity, and confidentiality.<sup>27</sup> The experts carrying out the reports shall commit to provide truthful and accurate information, preserve the confidentiality of the data and make a declaration of non-conflict of interest.<sup>28</sup>
46. The reports shall be oriented to present the necessary general information regarding the functioning of the public prosecution service, as much as this is necessary for understanding the disciplinary proceedings and the context where the disciplinary liability is decided. Special attention is to be given that the theoretical and legislative information is combined with its practical implementation, so that it becomes clear what is meant in practice by these rules and how are they effectively interpreted and implemented.
47. Reference to best practices regarding the disciplinary liability of public prosecutors should be identified and clearly presented. But, also those shortcomings detected in the application of the rules, or the perception of the public prosecutors themselves on the rules on accountability and fairness of the disciplinary proceedings, should be included and it would be very positive to see them reflected in the national reports. Each national report shall be approximately 15-20 pages and should follow as much as possible the structure provided below, addressing the questions identified.
48. Uniformity in the country reports is fundamental in order to be able to carry out the comparative analysis. The attached questionnaire shall serve as guidance. Rapporteur for each country covered is requested to reply to the questions, but of course they may complete the report with issues not addressed in the questionnaire, but which might be important in the context of the precise country and its public prosecution service. It is also required that all experts comply with the same format and style rules. In order to ensure the collection of an appropriate range of data, the experts shall apply diverse methods for the gathering, analysis, and validation of the information. These should mainly include:
  - Information related to the applicable legal and regulatory framework.
  - Statistical information generated by domestic institutions on disciplinary proceedings (who initiated, infringement investigated/sanctioned, type of sanctions imposed, effects of the sanction, etc.)
  - Consultations with public prosecutors to obtain practical information, based on qualitative selection of persons to be interviewed.
49. The collected data in the national reports shall be analysed using the comparative method. The consolidated comparative report will include an introduction, executive summary, and conclusions.

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<sup>27</sup> See generally W.D. Crano, M.B. Brewer, A. Lac, Principles and methods of social research, Routledge: New York and London, 2015.

<sup>28</sup> Basic principles on human rights monitoring, available at: <https://www.ohchr.org/Documents/Publications/Chapter02-MHRM.pdf>

## TOPICS AND COMMON STRUCTURE OF THE COUNTRY REPORTS

50. Country reporters are asked, when responding to the questionnaire, to indicate also if questions are clearly decided, are controversial, or have not yet been addressed in their country; they should also refer to current reform projects. If adequate, they should also indicate the sources of their replies, that is whether the answers are based on a legal provision, they are derived from constitutional requirements, it has been established by the case law, it is found in the literature, or it is information from present practice (law in action), statistics and/or on their own evaluation. It would also be helpful if country reporters would underscore the relevant legal provisions/practice in their answers in short.
51. All country reports shall follow the same style/format as this concept paper, which shall serve as a model in that regard.<sup>29</sup>

## TABLE OF CONTENTS FOR COUNTRY REPORTS

52. Table of contents of the country reports shall be as follows.

### I. General Part

1. Please make a **brief introduction** on the general background on the constitutional and legal framework of the public prosecution service.
  - a. Constitutional principles, basic features and functions, their position *vis à vis* judges/judiciary and the executive power.
  - b. Status of the public prosecutors, selection, appointment, evaluation, and promotion
2. The introduction should also include information on:
  - a. Which body is responsible for defining the criminal policy?
  - b. Are there current reforms under way?
3. Please provide general statistical information on the PPO
  - a. Total number of public prosecutors, distribution per courts; rate per inhabitant; total number of criminal cases.

### II. Questionnaire on the disciplinary liability and disciplinary proceedings against public prosecutors

#### Disciplinary offences

1. What are the grounds for disciplinary liability and what are the disciplinary offences foreseen for public prosecutors in your legal system? Where are they regulated?
2. Is the acting in cases of conflicts of interest contemplated as a specific disciplinary offence?

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<sup>29</sup> Please, follow these basic indications. FONT: Text: Times New Roman 12; Footnotes: Times New Roman 10; Titles of paragraphs: Times New Roman 12 (blue, small caps, bold). All paragraphs shall be numbered. Hyperlinks and other style marks shall be deleted and, please, number the pages. Ensure that your information is underpinned with the necessary references and citations in footnotes.

3. Are the conducts that entail disciplinary liability sufficiently defined? Low performance or undue delays are considered as a disciplinary offence?
4. Is there any disciplinary offence regulated for “breach of oath”, for “unethical behaviour” or for improper private conduct? How do you deal with ethical issues that do not amount to disciplinary offences?
5. In the case that judges in your legal system have to make a declaration of assets for taking office, is it a disciplinary offence not presenting such declaration, or presenting incomplete or erroneous data?

### **Sanctions**

6. What are the sanctions foreseen for the disciplinary offences of PPs? Are they gradual and proportional?
7. Can you provide statistics on the number/type of sanctions imposed and the grounds that led to the sanction?
8. Is there a higher sanction in case of recidivism or repeated infringements?
9. Is the imposition of a sanction registered in the personal record of the relevant PP? In such case, for how long? What are the consequences of having the register of the sanction in such record not cancelled?

### **Disciplinary body**

10. What are the bodies in charge of disciplinary proceedings against PPs? Are there different bodies depending on the gravity of the infringement?
11. Who appoints the relevant disciplinary body and what is their composition? What are the requirements to be member of a disciplinary body? Is the disciplinary body independent?
12. Does the disciplinary body have other competences apart from carrying out the disciplinary proceedings? What are the capacities and staff of the disciplinary bodies?
13. Is there an inspection service for PPs in your country? In such a case, what is the relationship between such inspection service and the disciplinary body? Do they share competences?

### **Disciplinary proceedings**

*Please describe the whole proceedings considering also following questions:*

14. Who is entitled to file a disciplinary complaint against a PP? What are the means for filing it (written, online, signature of lawyer, statute of limitations)? What kind of requirements are to be met (formal and substantive)?



15. Are anonymous/confidential reporting of misconducts admitted in your system? Can a PP report about misconducts of their superior PP?
16. Who decides on the admissibility of the complaint?
17. What are the investigative measures and means of proof that are available to the disciplinary body when dealing with a complaint against a PP? Do they differ from other administrative proceedings?
18. Does the disciplinary body get appropriate cooperation from private/public entities in order to carry out the disciplinary proceedings? Are there specific powers to compel witnesses to attend or evidence to be submitted by third parties?
19. What are the procedural guarantees in the course of the proceedings? (hearing, remedies, access to evidence, access to lawyer, etc.)
20. How are criminal and disciplinary proceedings coordinated with criminal and/or administrative proceedings? Are the criminal investigations suspending the disciplinary proceedings and what happens in cases of dismissal of criminal proceedings and, respectively, in cases of conviction?
21. Are there salient differences in the disciplinary proceedings of judges and public prosecutors?

**A brief introduction on the general background on the constitutional and legal framework of the public prosecution service.**

53. In Italy, the principle of unity of the judiciary applies, which means that judges and public prosecutors belong to the same professional corpus of officials, i.e. magistrates with a common career structure and governed by the High Judicial Council (Consiglio Superiore della Magistratura – CSM). Therefore, the prosecutorial service is largely governed by the same rules in respect of judges, as per the provisions included in the Constitution, primary legislation and secondary regulation issued by the High Judicial Council. Thus, decisions regarding the professional status of prosecutors (e.g. appointment, appraisal, promotion, transfers, disciplinary liability) are taken in accordance with the rules for judges.
54. Italy has one of the lowest numbers of magistrates per capita in the CoE with about 9000 magistrates (for a total population of 60 million) of which 2250 are prosecutors.
55. Prosecutors, as members of the judiciary, are independent vis-à-vis the other State powers (Article 104, Constitution); they are to perform their duties without being subject to any external influence. They enjoy the guarantees established in the provisions concerning the organisation of the judiciary (Article 107, Constitution), including security of tenure.
56. Italy abides by the principle of mandatory prosecution (Article 112, Constitution). Prosecutors are responsible for directing the police in the conduct of investigations (Article 109, Constitution; Articles 56 and 327, Code of Criminal Proceedings). At the trial stage, the public prosecutor represents the prosecution before criminal courts. Public prosecutors are also responsible for the procedures for the execution of judgments.
57. The structure of the prosecution service mirrors that of the courts. According to Article 2 of Royal Decree No. 12/1941<sup>31</sup>, prosecutors' offices are attached to courts of first instance and juvenile courts, appellate courts, and the Court of Cassation. Therefore, the current structure of the prosecution service consists of 136 offices of first instance, established in each province or municipality where a court is in place; 26 offices at appellate courts; and one office at the Court of Cassation. With respect to organised crime and other serious criminal offences, prosecutorial functions are carried out by the District Anti-Mafia Divisions, which are set up within the prosecutor's office located in the district capitals. The National Anti-Mafia Division (Direzione Nazionale Antimafia), operating within the General Prosecutor's Office at the Court of Cassation, coordinates and supervises the investigations carried out by the District Divisions.
58. As for judges, the High Judicial Council is the key self-governing body, with major responsibilities to appoint, transfer, promote, and evaluate public prosecutors and to issue decisions on disciplinary offences (Article 105, Constitution). All decisions of

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<sup>30</sup> Prepared by Mjriana Visentin.

<sup>31</sup> Regio Decreto sull Ordinamento Giudiziario No. 12 del 30 Gennaio 1941 available at: [http://www.edizionieuropee.it/LAW/HTML/38/zn71\\_02\\_007.html#\\_ART18](http://www.edizionieuropee.it/LAW/HTML/38/zn71_02_007.html#_ART18)

the High Judicial Council concerning promotions, evaluations, and transfers and, in general, magistrates' careers are subject to appeal before the administrative court.

59. To become ordinary magistrates, candidates have to pass a competitive public examination (Article 106, Constitution). As a general rule only candidates who have a law degree and the diploma issued by the post-graduate Schools for Legal Professions are admitted to the examination.
60. Security of tenure is enshrined in Article 107 of the Constitution and magistrates may only be suspended, exempted from service, or transferred upon a resolution by the High Judicial Council and in cases set up in the law (principle of immovability). Accordingly, a magistrate as a rule may be transferred to another district and/or entrusted with different functions exclusively with his/her consent upon a resolution by the High Judicial Council.
61. Career advancement is the same for judges and prosecutors. The work of all magistrates is subject to regular evaluation on the basis of objective and uniform criteria and standards stipulated by the law and detailed in the High Judicial Council's circulars. Judges and prosecutors undergo appraisal every four years, until they pass their seventh professional appraisal, after 28 years of employment.
62. Regarding termination of judicial office, a magistrate is dismissed in the following cases: in case of a double negative appraisal; when the disciplinary sanction of dismissal is imposed; when they are not able to properly perform judicial duties due to health reasons. Magistrates retire at the age of 70 years
63. The justice system in Italy is largely self-managed with the existence of the High Judicial Council and the local Judicial Councils responsible, at different stages, for the careers and promotions of magistrates. Moreover, the chairpersons of judicial offices exert general supervision and appraisal responsibility as regards the conduct and the work of individual magistrates and have the duty to report to the Minister of Justice and the General Prosecutor at the Court of Cassation any disciplinary offence.

## **DISCIPLINARY OFFENCES**

### **1. What are the grounds for disciplinary liability and what are the disciplinary offences foreseen for public prosecutors in your legal system? Where are they regulated?**

64. Disciplinary liability of judges and prosecutors is regulated by legislative decree n.109 of 23 February 2006 (hereinafter "Decree No. 109")<sup>32</sup>.

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<sup>32</sup> Text of the legislative decree available (in Italian) at: <https://www.csm.it/documents/21768/112811/Decreto+legislativo+23+febbraio+2006+n.109/1724c63d-7b66-400e-b69a-097fdb188439>

65. 13. Decree No. 109 identifies a general clause for disciplinary responsibility and further lists two subsets of disciplinary violations: violations committed in the performance of duties and violations committed out of office. In total the number of disciplinary offences listed in Decree n. 109 is forty-two.

66. Article 1 of Legislative Decree No. 109 of 23 February 2006 on Duties of Members of the Judiciary provides that

- (i) judges and public prosecutors perform their duties impartially, correctly, diligently, industriously, discretely and with equanimity, and shall respect personal dignity while exercising their duties, and that
- (ii) even when not performing their duties, judges and public prosecutors do not engage in conduct which, even though legal, may compromise their credibility, prestige and decency or the reputation of the judiciary as a whole.

67. Decree No.109 specifies that the violation of the above-mentioned duties gives rise to disciplinary responsibility when specific violations are committed.

68. Disciplinary offences committed in the exercise of duties include

- violations that cause unfair damage or undue advantage to one of the parties;
- failure to communicate situations of incompatibility (including family relationships with lawyers, other magistrates, officials, or members of the police within the same district);
- the failure to recuse from case when such duty is established by law;
- behaviours that are regularly or gravely unfair in respect of any of the parties, colleagues, or collaborators;
- the unjustified interference in the work of other magistrates;
- failure to communicate to the chief of office of attempts of unjustified interference they have been subject to;
- grave violations of the law committed due to ignorance or inexcusable negligence;
- misrepresentation of facts due to inexcusable negligence;
- pursuit of improper/illegitimate goals;
- adoption of unmotivated measures or measures where the only motivation is the existence of legal grounds without mentioning the relevant facts (when a motivation is required by law);
- adoption of measures not foreseen by law due to grave or inexcusable negligence which affected individuals' personal rights or, to a considerable extent, their economic/patrimonial rights;
- repeated or gave violations of regulations on judiciary adopted by the competent authorities;
- the undue transfer to others of activities/tasks that are competence of the magistrate;
- failure to reside in the district of the court/prosecutorial office without authorisation if this has negatively affected the diligent and efficient performance of duties;
- the repeated, serious, and unjustified delay in the performance of functions (delays that do not exceed three times the length of the deadlines established by law, are considered as non-serious unless otherwise proven);

- habitual and unjustified omission of duties;
- for chiefs of office, the failure to assign to oneself tasks and to issue relevant measures;
- violation of the duty to be on call when foreseen by law or other lawful order of the competent body;
- disclosure, including due to negligence, of confidential information when such disclosure is suitable to violate individuals' rights;
- making public statements or giving interviews in violation of criteria of balance and appropriateness;
- intentional adoption of measures where there is a clear conflict between the motivation and the decision showing clear logical contradictions;
- failure by the chief of office to report to the competent bodies of known facts that may amount to disciplinary violation by a magistrate within his office;
- failure by the chief of office to communicate to the High Judicial Council of causes of incompatibility;
- adoption of measures not foreseen by procedural law or on the basis of grave errors or negligence as well as the adoption of decisions that are competence of legislative or administrative bodies;
- the adoption of restraint measures outside of the instances foreseen by law due to grave and inexcusable negligence.

69. Disciplinary offences committed out of office include the following:

- the use of title to pursue unjust advantages for oneself or others;
- frequenting or having joint financial interests with individuals under investigation, or who have been convicted to at least three years of deprivation of liberty or who are notorious criminals;
- the performance of extra-judicial activities without authorisation by the High Judicial Council<sup>33</sup>;
- the performance of activities that are incompatible with the performance of judicial duties or other activities that undermine/prejudice the performance of duties;
- receiving, directly or indirectly loans by individuals under investigation within the district, their lawyers as well as by other parties to proceedings;

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<sup>33</sup> A number of laws, bylaws and circulary letters of the High Judicial Council have distinguished between extra judicial activities that are prohibited, others that are allowed and do not require authorization and other activities that are allowed but require authorization by the High Judicial Council. For example, while magistrates are allowed to engage in teaching in universities, they are prohibited from creating, managing or teaching in private training centers to prepare for exams to enter in the judiciary, legal profession and public office. As for authorized teaching activities in universities (but also participation in seminars, conferences and for consultancies in international organizations, including the Council of Europe), the regulations foresee a regime of authorization and a number of requirements such as a maximum length of the teaching engagement of 50 hours per year and a maximum compensation of 7.500 Euro per year. Participation without compensation in seminars, workshops and similar activities is allowed without authorization. Scientific activities, including through publications, and artistic activities are not subject to authorization. Link to the regulations are available at: <https://www.csm.it/documents/21768/87346/Nuova+circolare+sugli+incarichi+extragiudiziari+%28P+22851+del+2015+aggiornata+al+12+aprile+2017%29/e613dde2-54e4-4286-b2fb-baf1e6c7ada9>

- public expression of agreement or disapproval in respect of pending proceedings when the magistrate due to his position or the way he formulated such opinion is capable of affecting the adoption of decisions within such proceedings;
- participation in secret societies or requiring loyalties/obligations that are incompatible with the performance of judicial functions;
- membership and participation in political parties as well as the involvement in the activities of political or financial “power centers” which may influence the performance of judicial duties or undermine the reputation of the magistrate;
- use of title when due to the position covered or the way such title is used, may interfere with the performance of functions regulated by the constitution;
- any other behaviour that may undermine the independence, neutrality and impartiality of the magistrate including the appearance thereof.

70. The law also foresees specific disciplinary liabilities connected to the commission of crimes such as:

71. When a magistrate has been convicted with decision entered into legal force

- for intentional or non-intentional crimes (delitto doloso o preterintenzionale) when the law foresees the application of deprivation of liberty
- for culpable crimes (delitto colposo) when the magistrate has been convicted to deprivation of liberty and when the modality of commission or the consequences of the crime were of a particular gravity

72. When the magistrate has committed any crime that may damage the reputation of the magistrate even if criminal liability is not possible for any reason.

## **2. Is the acting in cases of conflicts of interest contemplated as a specific disciplinary offence?**

73. Yes. While prosecutors cannot be recused and pursuant to Article 52 of the Code of Criminal Proceedings, they have the faculty to withdraw from the case when serious reasons of opportunity arise, substitution is mandatory if the prosecutor has interest in the proceeding or if one of the private parties is a debtor or creditor towards him/her, his/her spouse or his/her children; if he/she is tutor or employer of one of the parties in the proceeding or his/her spouse or close relative is a party's defendant or tutor or employer; serious enmity occurs between the prosecutor or his/her close relatives and one of the private parties in the proceedings; and the prosecutor's spouse or close relative is a victim or is damaged by the criminal offence or is a private party (Article 36, letters a),b),d) and e), Code of Criminal Proceedings).

74. While recusal has been excluded for prosecutors to prevent misuse of recusal requests to slow down the investigation, prosecutors are obliged to disclose every potential conflict of interest, as they are to perform their functions according to the principles

of independence and impartiality. Failure to declare an interest in a case and, consequently, to withdraw, is a disciplinary offence.

**3. Are the conducts that entail disciplinary liability sufficiently defined? Low performance or undue delays are considered as a disciplinary offence?**

75. Comparatively speaking, yes. Decree No. 109 foresees 43 specific instances of disciplinary violations that make disciplinary accountability of magistrates fairly foreseeable. There is also a vast disciplinary case law that further strengthens the foreseeability of disciplinary sanctions. Every year the High Judicial Council publishes a summary of key disciplinary decisions.
76. Low performance or undue delays are considered a disciplinary offence only in case of repeated serious and unjustified delays that exceed three times the length of statutory time limits for the performance of some act.
77. There have been some initiatives by the Ministry of Justice between 2019 and 2020 to further regulate disciplinary liabilities for delays however the National Association of Magistrates has been extremely critical of the proposed reforms as it considered that it would unduly hold magistrates personally responsible for inefficiencies that should instead be addressed through structural reforms.<sup>34</sup>

**4. Is there any disciplinary offence regulated for “breach of oath”, for “unethical behaviour” or for improper private conduct? How do you deal with ethical issues that do not amount to disciplinary offences?**

78. Pursuant to Article 54 of the Constitution, citizens entrusted with public functions have the duty to fulfil such functions with discipline and honour, taking an oath in those cases established by law. While there is no specific disciplinary sanction for breach of oath, Article 1 of Decree No. 109 states that (i) judges and public prosecutors perform their duties impartially, correctly, diligently, industriously, discretely and with equanimity, and shall respect personal dignity while exercising their duties, and that (ii) even when not performing their duties, judges and public prosecutors do not engage in conduct which, even though legal, may compromise their credibility, prestige and decency or the reputation of the judiciary as a whole.
79. Decree No. 109 foresees a specific set of disciplinary offences committed out of office.
80. A code of ethics was adopted by the Italian Association of Magistrates in 1994 and is the oldest in Europe. Violations of the code of ethics do not give rise to disciplinary liability as the code is not an instrument adopted by official bodies within the judiciary. The Code is a self-regulatory and non-binding instrument generated by the judiciary itself. As 90% of magistrates are members of the Italian Association of

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<sup>34</sup> Riforma della Giustizia, l'ANM non va da Bonafede: no alle sanzioni disciplinari per i magistrati che non rispettano i tempi, available at: <https://www.ilfattoquotidiano.it/2020/02/20/riforma-della-giustizia-lanm-non-va-da-bonafede-no-a-sanzioni-disciplinari-per-i-magistrati-che-non-rispettano-i-tempi/5711848/>

Magistrates, its subjective scope of application is fairly wide. A special committee (Proviviri Committee) within the Association of magistrates is responsible for exerting disciplinary powers over associated magistrates when their acts contravene the general purposes of the Association and might discredit the judiciary (Article 9, Statute of the association). Disciplinary sanctions entail censure, suspension of social rights for up to one year, and expulsion from the association. The sanctions are decided by the Central Directive Committee of the Association upon proposal of the Proviviri Committee.

81. Since its creation, there have been relatively few cases of sanctions against magistrates and, as reported by GRECO in its IV Evaluation Round, often magistrates leave the association before any sanction may be imposed on them. A notable exception was the recent expulsion of Luca Palamara, a senior prosecutor who was president of the Association of Magistrates and also a member of the High Judicial Council, following the discovery of meetings with politicians to influence the appointment of prosecutors to key prosecution offices. In unprecedented decisions, in 2020 both the Association of Magistrates and the High Judicial Council expelled Palamara from the Association and the High Judicial Council respectively. Criminal proceedings for trafficking in influence against him are currently on-going.
82. As Decree No. 109 is fairly detailed, it appears that there is no need to integrate it with further provisions of the code of ethics. In its Evaluation report GRECO acknowledged that the code of ethics and disciplinary rules fulfil different purposes and did not express any need or opportunity for the Italian legal system to introduce in disciplinary law, for example, a clause that would create disciplinary liability for serious violations of the code of ethics.

**5. In the case that judges in your legal system have to make a declaration of assets for taking office, is it a disciplinary offence not presenting such declaration, or presenting incomplete or erroneous data?**

83. Law No. 441 of 5 July 1982 on Provisions on making public the financial situation of elected officials and public officials in management positions applies to ordinary magistrates by virtue of Article 17, paragraph 22 of Law No. 127/1997. Consequently, magistrates are required to submit to the High Judicial Council declarations of assets. However, failure to lodge a financial situation statement is not included in the catalogue of disciplinary offences.
84. The High Judicial Council is merely responsible for granting public access to the forms but has no control powers on the content of the information submitted by the individual magistrates, nor can it sanction the non-submission of the required forms. While the Italian authorities noted that cases of financial corruption have been rare and rules on declarations of interests and prohibition of secondary activities provide sufficient guarantees of integrity, GRECO, in its IV Evaluation Round, recommended the introduction of in depth screening of these violations and the application of sanctions for identified violations. Eventually on 22 October 2019 the High Judicial Council issued a regulation(circular) where it introduced the power for the Council to carry out randomized checks on magistrates' asset declarations.



However, no disciplinary sanctions are foreseen for failure to submit declarations or for inconsistencies between assets and declared income.<sup>35</sup>

## SANCTIONS

### 6. What are the sanctions foreseen for the disciplinary offences of PPs? Are they gradual and proportional?

85. Applicable sanctions range from : (i)reprimand,(ii) censure,(iii) loss of seniority, up to two years, (iv) temporary incapacity to hold managerial or semi-managerial positions in judicial offices, from six months up to two years,(v) suspension from judicial functions and salary,(vi) dismissal from office. The accessory sanction of transfer may be applied if a more severe sanction than a warning is imposed, as provided by law.
86. Decree No. 109 states that in case of commission of more disciplinary offences, the applicable disciplinary sanction will be the most severe foreseen from among the applicable ones.
87. Sanctions are proportional to the gravity of the offense and specific types of sanctions are tied to specific type of disciplinary violations and their gravity. In several cases sanctions are only applicable if a given violation was committed as a consequence of inexcusable negligence or due to serious fault. Other violations require repeated and grave violations of obligations to be qualified as disciplinary offences. Law 269/2006 has also excluded disciplinary liability in case of violations of negligible relevance (*scarsa rilevanza del fatto*).
88. The disciplinary case law has further identified circumstances that may reduce or exclude disciplinary responsibility in specific circumstances such as absence of public resonance for violations; lack of negative impact on the functioning of the judiciary or lack of complaint filed by the individual allegedly damaged by a given violation, etc.
89. Art. 12 of Decree No. 109 specifies the type of sanctions applicable depending on the gravity of the disciplinary offense.
90. For example censure and more severe sanctions are applicable in a specific list of cases such as violations that caused an unfair damage or advantage to one of the parties, failure to withdraw when foreseen by law; failure to declare to the High Judicial Council of existing incompatibilities; violations of the duty of impartiality in respect of parties to proceedings due to relationships with the parties on interferences in their independence; **grave and repeated unfair behaviour** towards the parties; interference in the activities of another magistrate; failure to communicate to the chief of office attempts to interfere a magistrate has been target of; the pursuance of illegitimate goals, **repeated or grave delays, habitual poor performance; grave or habitual violation of rules on confidentiality**; the use of

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<sup>35</sup> [http://www.procuragenerale.cagliari.it/documentazione/D\\_7793.pdf](http://www.procuragenerale.cagliari.it/documentazione/D_7793.pdf).

title to obtain undue advantages; the performance of extrajudicial activities without authorisation when such violation is not particularly serious.

91. Loss of seniority and more severe sanctions are applicable to violations that caused a serious unfair damage or advantage to one of the parties; **the habitual use of title to obtain an undue advantage if serious**; frequentation or commercial relationships with notorious criminals, convicted criminals and individuals under investigation.
92. The sanction of temporary incapacity to hold managerial or semi-managerial positions in judicial offices applies to chiefs of office in case of interferences in the **activity of another magistrate if they are repeated or serious**.
93. The sanction or suspension (or more severe sanctions) apply in case of performance of activities that are incompatible with judicial office or without authorisation if, given the extent and nature of such activity, the violation is serious.
94. Dismissal is foreseen for the receipt or acceptance of loans or other benefits from parties to proceedings or individuals under investigation within the same district, as well as from their lawyers and other parties to proceedings in case of criminal conviction to at least one-year deprivation of liberty.

#### **7. Is there a higher sanction in case of recidivism or repeated infringements?**

95. Sanctions can be graver in respect of certain disciplinary offences when they are repeated and/or grave. In bold, above, I have indicated when such repeated infringements lead to the automatic application of more serious sanctions.

#### **8. Can you provide statistics on the number/type of sanctions imposed and the grounds that led to the sanction?**

96. Every year, the High Judicial Council publishes a summary of disciplinary decisions adopted in respect of magistrates. Other statistics are published by the Prosecutor General attached to the Cassation Court that is responsible for the initiation of disciplinary proceedings. These statistics usually do not differentiate between judges and prosecutors. However according to another report of the Prosecutor General on disciplinary statistics, while prosecutors represent 25% of magistrates, they are subject to disciplinary proceedings in about 50% of all cases. Thus, they are sanctioned twice as often as judges. Male magistrates commit disciplinary violations three times(!) as much as female magistrates.<sup>36</sup> There is also a higher incidence of disciplinary violations in southern Italy and Sicily in particular.
97. For the period 2015-2019 out of 773 disciplinary proceedings conducted before the High Judicial Council, 222 have led to the application of disciplinary sanctions. For example, in 2019, 24 disciplinary sanctions were applied over a total of 106 disciplinary proceedings while in 2018 66 disciplinary sanctions were applied out of a total of 192 disciplinary proceedings opened before the High Judicial Council. For

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<sup>36</sup> [https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/Estratto\\_disciplinare-statistiche.pdf](https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/Estratto_disciplinare-statistiche.pdf)

the year 2019, the sanction of censure has been applied in 9 cases, loss of seniority in 4 cases, suspension in 2 cases and dismissal in 5 cases. There has been a progressive increase of reports of disciplinary violations over the years, from 1300 in 2012 to almost 1900 in 2019<sup>37</sup>. Further statistics on the period 2015-2019 are available in a 50 pages report of the prosecutor General attached to the Court of Cassation at the following link: [https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/Estratto\\_disciplinare-statistiche.pdf](https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/Estratto_disciplinare-statistiche.pdf) Statistics for the period 2007-2010 are available here: [https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione\\_statistica\\_proc\\_gen.pdf](https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_statistica_proc_gen.pdf).

98. A large number of disciplinary sanctions are applied for grave delays in adopting decisions (deposito dei provvedimenti): about 33% of all sanctions in the period 2010-2013, while subsequently such percentage has decreased to about 10% in the following years. As for other types of violations, typical sanctions are applied in case of violations of procedural rules or for defamation, insults, and commission of similar crimes. The majority of disciplinary proceedings against magistrates running in parallel to criminal proceedings, for the period 2011-2016, concern defamation cases. Regarding corruption-related cases, there was one case in 2011, one case in 2012, two cases in 2013, five cases in 2014, three cases in 2015, and two cases in 2016, respectively.<sup>38</sup>

<b>Type of disciplinary Violation</b>	2010	2011	2012	2013	2014	2015	2016	2017
Delays in depositing decisions	62	45	42	64	4	36	32	24
Insults, defamation and other crimes	39	23	20	22	29	23	18	31
Gravely irregular decisions (provvedimenti abnormi) or containing inexcusable mistakes	4	9	16	19	36	10	7	2
Delays and omissions in performance of office	7	16	15	13	12	11	11	10

<sup>37</sup> [https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/Estratto\\_disciplinare-statistiche.pdf](https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/Estratto_disciplinare-statistiche.pdf).

<sup>38</sup> Report on 10 years since the adoption of decree n.109 on disciplinary liability of magistrates, [https://www.questionegiustizia.it/rivista/articolo/un-bilancio-del-sistema-disciplinare-a-10-anni-dalla-riforma\\_501.php](https://www.questionegiustizia.it/rivista/articolo/un-bilancio-del-sistema-disciplinare-a-10-anni-dalla-riforma_501.php).

Delayed or failure to release from pre-trial detention	N.A.	6	12	29	23	16	7	10
Violations of procedural rules (civil and criminal)	26	26	10	6	12	25	43	41
Abuse of title	3	9	8	7	18	8	10	9
Relationships with other magistrates of the same or other offices	13	8	10	5	11	6	0	2
Non-performance or omission of due acts	7	2	6	4	12	12	14	13
Incorrect/unfair behaviour (scorrettezza)	N.A.	N.A.	N.A.	N.A.	N.A.	16	39	36
Failure to abide by rules regulating judicial service	N.A.	N.A.	N.A.	N.A.	N.A.	9	24	16
Behaviours that prejudice or damage others	N.A.	N.A.	N.A.	N.A.	N.A.	15	22	21
Interferences in the judicial/prosecutorial functions	N.A.	N.A.	N.A.	N.A.	N.A.	1	10	6
Other	25	25	23	24	57	23	31	25
Total	186	169	191	193	253	211	268	246

**9. Is the imposition of a sanction registered in the personal record of the relevant PP? In such case, for how long? What are the consequences of having the register of the sanction in such record not cancelled?**

99. No information retrieved.

**DISCIPLINARY BODY**

**10. What are the bodies in charge of disciplinary proceedings against PPs? Are there different bodies depending on the gravity of the infringement?**

100. The disciplinary board of the **High Judicial Council** is the body competent to examine all disciplinary proceedings and to impose disciplinary sanctions
101. Disciplinary proceedings can be opened upon initiative of the Prosecutor General at the **Court of Cassation or the Ministry of Justice**. The Prosecutor General carries out the disciplinary investigation. Inquiries (administrative inquiries) can also be carried out by the **Inspectorate General at the Ministry of Justice** that is composed of seconded magistrates.
102. On the basis of the findings of the Inspectorate the Ministry of Justice can ask the Prosecutor General to open disciplinary proceedings.

**11. Who appoints the relevant disciplinary body and what is their composition? What are the requirements to be member of a disciplinary body? Is the disciplinary body independent?**

103. The disciplinary board is composed of six members of the High Judicial Council: it is chaired by the vice president of the High Judicial Council and five council members (one chosen from among council-members elected by parliament, one from among prosecutor-members from the court of cassation and three prosecutor-members from the first instance and appeal courts). There are also 14 substitute members. A decree of the president of the High Judicial Council establishes the criteria for the appointment and selection of substitute members.
104. As for the election of the members of the High Judicial Council itself, from among which members of the disciplinary board are selected, the Italian High Judicial Council is composed of 27 members in total. Three of its members are appointed ex officio: The President of the Republic, the President of the Court of Cassation, and the Prosecutor General at the Court of Cassation. The other 24 members are elected. Of the 24 elected members two third (16) are judges and prosecutors elected by all magistrates from among various categories and levels of jurisdiction. The law does not specify the number of prosecutors, which is probably due to the circumstance that judge can become prosecutors and vice versa as there is no separation between the two careers (with few exceptions). The eight lay members are elected by joint sessions of the two chambers of parliament from among law professors and lawyers with at least 15 years of experience. The President of the Republic is, ex officio, president of the Council while the plenary elects the vice president from among lay members by secret ballot.
105. The members of the disciplinary board are appointed by the president of the High Judicial Council. The membership lasts up to one year. Concerning the specific selection procedure to the disciplinary board from among members of the High Judicial Council, recently, the Ministry of Justice has submitted a proposal to select the members of the various commissions, including the disciplinary board, by drawing in order to avoid that appointments are determined by backdoor agreements among various political factions within the High Judicial Council<sup>39</sup>.
106. In July 2021 the High Judicial Council amended the internal regulation on the election and composition of the members of the disciplinary board by extending the

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<sup>39</sup> La proposta di riforma del Consiglio Superiore della magistratura, [ilpost.it](https://www.ilpost.it/2020/08/08/csm-riforma-bonafede/), available at: <https://www.ilpost.it/2020/08/08/csm-riforma-bonafede/>

number of substitute members to the board from 10 to 14. The reason behind such measure was the circumstance that as disciplinary proceedings had been opened against various members, including the prosecutor Luca Palamara for trafficking in influence with politicians to influence the appointment to key prosecutorial offices, too many members of the board were affected by conflicts of interests and thus the disciplinary board could not effectively function and decide in those proceedings<sup>40</sup>.

107. The internal regulation of the High Judicial Council states that the members of the council have the right to access disciplinary files and other documents transmitted to the disciplinary board.

## **12. Does the disciplinary body have other competences apart from carrying out the disciplinary proceedings?**

108. The disciplinary board performs exclusively disciplinary functions. The High Judicial Council is in fact composed of several commissions, each with specific functions. Besides the disciplinary board there are nine commissions, all composed by members of the High Judicial Council. Each commission consists of six council members (four magistrates and two lay members) and is competent for specific matters. Each member is appointed for one year. Currently there are nine commissions: (1) for incompatibilities and conflicts of interests; (2) for internal regulations, (3) for recruitment and transfers, (4) for the evaluation; (5) for the appointment of chiefs of office; (6) for research and analysis; (7) for the organisation and efficiency of the judiciary; (8) for honorary magistrates and (9) for international relationships. Decisions are usually adopted by the plenary of the Council, while preparatory works are carried out by specialised commissions.

### **12.a What are the capacities and staff of the disciplinary bodies?**

109. The disciplinary section is composed of 6 members and 14 substitute members. The High Judicial Council is also composed of a secretariat composed of magistrates who, among the others, attend the hearing of the section and supervise the drafting of minutes and reports of the sessions and hearing of the disciplinary board. They also perform research functions and draft summaries of the case law<sup>41</sup>.

110. The secretariat of the High Judicial Council is also composed by officials who assist the disciplinary board and draft the minutes of the hearings and sessions.

111. The budget of the High Judicial Council is published every year and according to the last published budget for 2020, the High Judicial Council has a total budget of 36

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<sup>40</sup> PALAMARA, IL CSM “POTENZIA” LA COMMISSIONE DISCIPLINARE IN VISTA DEL “PROCESSO INTERNO” ALLE TOGHE COINVOLTE NEL CASO NOMINE  
[HTTPS://WWW.ILFATTOQUOTIDIANO.IT/2020/07/08/PALAMARA-IL-CSM-POTENZIA-LA-COMMISSIONE-DISCIPLINARE-IN-VISTA-DEL-PROCESSO-INTERNO-ALLE-TOGHE-COINVOLTE-NEL-CASO-NOMINE/5861279/](https://www.ilfattoquotidiano.it/2020/07/08/palamara-il-csm-potenzia-la-commissione-disciplinare-in-vista-del-processo-interno-alle-toghe-coinvolte-nel-caso-nomine/5861279/)

<sup>41</sup> Internal regulation of the High Judicial Council:  
<https://www.csm.it/documents/21768/131570/Regolamento+interno+del+CSM/c8d18823-0176-425f-a87c-1161d8b1d6bd>

million euro<sup>42</sup>. The High Judicial Council as a whole is composed of about 250 individuals between members, magistrates, and other administrative staff.

**13. Is there an inspection service for PPs in your country? In such a case, what is the relationship between such inspection service and the disciplinary body? Do they share competences?**

112. Yes, a General Inspectorate of Justice is attached to the Ministry of Justice and is composed of seconded magistrates. The Ministry of Justice is one of two bodies, besides the prosecutor General attached to the Court of Cassation that can initiate disciplinary proceedings.
113. The General Inspectorate of Justice, besides carrying out ordinary regular inspections on the functioning of courts and prosecutors' offices, can carry out administrative enquiries into allegations of disciplinary violations upon request of the Ministry of Justice. Upon completion of the administrative enquiry the inspectorate drafts and submits a report to the Ministry of Justice who will then decide whether to seek the initiation of disciplinary proceedings before the High Judicial Council. Notably often disciplinary violations are discovered by the inspectorate in the framework of ordinary inspections on the functioning of courts and prosecutorial offices (rather than in administrative inquiries that tend to take place comparatively rarely).
114. A key difference between the initiation of disciplinary proceedings upon initiative of the Ministry of Justice and the Prosecutor General is that the decision to initiate disciplinary proceedings by the Ministry of Justice is discretionary while it is mandatory for the Prosecutor General.
115. Besides this, the powers of inquiry of the General Inspectorate of Justice are limited as compared of the investigative powers of the Prosecutor General. Magistrates have a duty to cooperate with the Inspectors but, in order to prevent undue interference of the executive in the independence of the judiciary and its functioning, they can refuse the provision of information or access to documents if, for example, such access may undermine an on-going investigation. The extent of this duty of collaboration, and grounds for refusal, with Inspectors have been regulated by a number of Circulars adopted over the years by the High Judicial Council in responses to inquiries that were deemed as "fishing expeditions" to target magistrates that were investigating members of the government and parliament (especially during the early 90s in connection with the "clean hands investigation").
116. Thus there is a clear distinction between the inquiry bodies who carry out a disciplinary investigation and the disciplinary board of the High Judicial Council that is competent over the decision of disciplinary proceedings. On the other hand, there is a partial overlap between the inquiry functions of the General Inspectorate at the Ministry of Justice and the investigative functions of the Prosecutor General at the Court of cassation.

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<sup>42</sup> Annual budget of the judicial council: <https://www.csm.it/web/csm-internet/csm/bilancio>

## DISCIPLINARY PROCEEDINGS

### **14. Who is entitled to file a disciplinary complaint against a PP? What are the means for filing it (written, online, signature of lawyer, statute of limitations)? What kind of requirements are to be met (formal and substantive)?**

117. Two bodies are competent to initiate disciplinary proceedings: the Prosecutor General before the Court of Cassation and the Ministry of Justice (pursuant to Art. 107 of the Constitution). Both can act upon complaints submitted by individuals but also on the basis of any information, including from the press, of alleged disciplinary violations committed by magistrates. However, there is no specific regulation of individual complaints or of procedural rights of complainants.
118. The Ministry of Justice can initiate disciplinary proceedings by requesting the Prosecutor General to carry out an inquiry and can also ask the prosecutor general to extend the investigation to other possible violations. The prosecutor general can also extend the investigation to new facts in the course of the disciplinary investigation.
119. According to Article 6 of Legislative Decree No. 106/2006, General Prosecutors at the Courts of Appeal exercise supervisory powers over the activity of district prosecution offices. To fulfil this task they collect data and information aimed at verifying: a) the uniformity, effectiveness and swiftness of the prosecutorial action; b) the respect for the principles of a fair trial; c) the correct exercise by chief public prosecutors of organisational, supervisory and control powers over the office. At least once a year, prosecutors at the Courts of Appeal send a report to the General Prosecutor at the Court of Cassation. Furthermore, the General Prosecutor at the Court of Cassation can exercise control over the activity of chief prosecutors, avoid and prevent conflicts between prosecution offices and guarantee respect for the principles of a fair and equitable trial.
120. The High Judicial Council, councils for the judiciary<sup>43</sup> and chiefs of office are obliged to report to the Ministry of Justice and the Prosecutor General of any fact that is relevant for disciplinary proceedings.

### **15. Are anonymous/confidential reporting of misconducts admitted in your system?**

121. The matter does not appear to be regulated however in its yearly report, the Inspectorate General of the Ministry of Justice mentions various sources for the initiation of disciplinary proceedings including anonymous reports<sup>44</sup>. As a

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<sup>43</sup> Councils of the judiciary are local self-governing bodies established in each judicial district and composed of magistrates and representative of bar associations; they draft opinions and proposals concerning the organisation of courts and the career of magistrates, such as professional appraisals, opinions for promotions, change of functions etc. The Councils of the judiciary also carry out the preparatory activities related to proceedings concerning lay magistrates and exert supervisory functions over the activity of judicial offices within the districts. The Councils of the judiciary's opinions and proposals are submitted to the High Judicial Council which is ultimately responsible for the final decision

<sup>44</sup> [https://www.giustizia.it/resources/cms/documents/anno\\_giudiziario\\_2020\\_ispettorato.pdf](https://www.giustizia.it/resources/cms/documents/anno_giudiziario_2020_ispettorato.pdf)



comparison, Art. 11 of legislative decree n. 160/2006 concerning performance evaluation of judges and prosecutors, expressly excludes from the sources and evidence used in performance evaluation anonymous sources or rumours. This prohibition aims at protecting the objectivity of the evaluation and procedural rights of the evaluated magistrate.

### **15. a Can a PP report about misconducts of their superior PP?**

122. Yes. A specific obligation regulated under disciplinary law is for prosecutors to report attempts and episodes of undue influence by their chiefs of office. Failure to report such episodes is in itself a disciplinary violation.

### **16. Statute of limitations and formal and substantive requirements**

123. Disciplinary action should be promoted within one year from the discovery of relevant facts (on the basis of a preliminary inquiry, the filing of sufficiently detailed complaints (*denuncia circostanziata*)<sup>45</sup>, or the request of the Ministry of Justice). In order to affect the running of the statute of limitation a complaint must contain sufficient elements to establish a disciplinary violation.

124. The prosecutor general must file the disciplinary indictment within one year from the opening of the disciplinary investigation and the decision of the High Judicial Council must be adopted within one year from the indictment. The prosecutor must be notified of the opening of proceedings against him or her within thirty days. In case of failure to inform the affected prosecutor, the investigative measures adopted within disciplinary investigation are null and void.

125. The running of the statute of limitations is suspended in case of pending criminal proceedings or when the prosecutor is in pretrial detention and starts running again after the entry into legal force of the criminal sentence. The running of the statute of limitations is also suspended in case a preclusive issue (*questione pregiudiziale*) is being decided before the Constitutional Court or in case of impediment of the prosecutor or his legal representative.

### **17. What are the investigative measures and means of proof that are available to the disciplinary body when dealing with a complaint against a PP? Do they differ from other administrative proceedings?**

### **18. Does the disciplinary body get appropriate cooperation from private/public entities in order to carry out the disciplinary proceedings? Are there**

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<sup>45</sup> For example, in a number of decisions, the High Judicial Council has clarified that a “*denuncia circostanziata*” of a disciplinary offence amounting to the violation of the law must indicate the alleged mistake, the provision of the law that has been violated and the inconsistency of the alleged act or conduct with existing case law interpreting the relevant provision; a complaint containing a general criticism of a judicial decision cannot give rise to a verification by the Prosecutor General attached to the Court of Cassation of the overall activity of a magistrate; the request to assess whether the allocation of a case of a prosecutor was opportune, is hypothetical in nature and in the absence of any other indication of possible violations, cannot be considered as sufficient to trigger a disciplinary inquiry (summaries of relevant disciplinary case law available at: [https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/Massime\\_file\\_unico\\_09-2020.pdf](https://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/Massime_file_unico_09-2020.pdf)).

### **specific powers to compel witnesses to attend or evidence to be submitted by third parties?**

126. The code of criminal proceedings applies to the disciplinary investigation insofar as compatible with the nature of the disciplinary proceedings. Thus, for example coercive powers are not applicable in respect of the affected prosecutor, witnesses, or experts.
127. The Prosecutor General can also access information on pending investigations that are protected by confidentiality rules. However, the affected prosecutor can obtain a delay of disclosure and suspension of the disciplinary proceedings in case such disclosure may undermine the investigation. The request for delay must be motivated. It does not appear that the Prosecutor General can reject a motivated request.

### **Disciplinary indictment**

128. Upon completion of the disciplinary investigation, the Prosecutor General, can file the disciplinary indictment with the High Judicial Council and requests that a date for the hearing is set by the disciplinary board. In case the Prosecutor General believes that there are no grounds for disciplinary sanctions, he/she asks the High Judicial Council to dismiss the case.
129. The Prosecutor General also informs the prosecutor who can get acquainted with the disciplinary investigation file and make copies of the documents therein. The Prosecutor General also informs the Ministry of Justice in case the disciplinary proceedings were initiated upon the latter's request. The Ministry has a number of procedural rights such as getting acquainted with the disciplinary case file and file the indictment and request that a disciplinary hearing is held. It can also attend the disciplinary hearing through an Inspector of the Inspectorate General.

### **The disciplinary hearing**

130. In the disciplinary hearings a member of the disciplinary board of the High Judicial Council acts as rapporteur while the Prosecutor General performs the function of prosecutor. The representative of the Ministry of Justice can submit evidence, examine documents and experts, and can question the indicted prosecutor.
131. The disciplinary hearing is public but they can be held behind closed doors upon request of the parties if it is necessary to protect the credibility of the judiciary "having regards to the relevant facts and the position of the prosecutor" or third parties rights.
132. The disciplinary board can also gather further evidence ex officio. The hearings follow the rules of the code of criminal proceedings with the exclusion of coercive powers. Criminal sanctions are applicable to witnesses and experts in case of false testimony.
133. Upon completion of the hearings the disciplinary board decides over the application of a disciplinary sanction or by acquitting the prosecutor. The decision must be motivated, and copy is sent to the Ministry of Justice in case the proceedings were initiated upon the latter's initiative.

**19. What are the procedural guarantees in the course of the proceedings? (hearing, remedies, access to evidence, access to lawyer, etc.)**

134. The prosecutors under disciplinary proceedings can appoint a lawyer or colleague to represent him and can also appoint an expert, if needed. He/she has the right to be notified of the opening of disciplinary proceeding within 30 days and failure to notify entails the nullity of all investigative measures so far adopted. He/she has also the right to get acquainted with the disciplinary case file and make copies and has the same rights as an accused in criminal proceedings as the provisions of the Code of Criminal Proceedings apply insofar as compatible.

**Appeal and other remedies against disciplinary sanctions**

135. The affected prosecutor, the Ministry of Justice and the Prosecutor General can appeal the disciplinary rulings as well as the decision to suspend the prosecutor from his functions, before the Court of Cassation. The appeal does not suspend the application of the sanction or suspension from functions. The Court of Cassation decides on the appeal within six months.

136. Disciplinary sentences are also subject to supervisory review (revision) if the facts at the basis of the disciplinary sentence contradict the findings of facts in criminal proceedings (entered into legal force); if new facts are discovered proving that the violation has not been committed; if the disciplinary sentence has been adopted on the basis of false statements or other crime ascertained with a sentence entered into legal force.

137. The request for revision is admissible only if the relevant facts at its basis would be sufficient to secure an acquittal or the imposition of a different sanction if the prosecutor has been dismissed or transferred to another office.

138. The request for revision can be submitted by affected prosecutor, the Ministry of Justice and the Prosecutor General but also by a relative of the (deceased) prosecutor if they have an interest in the revision, even if nonpecuniary (interesse morale)

139. The decision of inadmissibility of a request for revision can be appealed before the criminal section of the Court of Cassation.

140. If following a revision procedure, a prosecutor is acquitted, he has the right to receive all lost salary and the adoption of adequate measure to be reintegrated in his profession/career (diritto all'integrale ricostruzione della carriera).

**20. How are criminal and disciplinary proceedings coordinated with criminal and/or administrative proceedings? Are the criminal investigations suspending the disciplinary proceedings and what happens in cases of dismissal of criminal proceedings and, respectively, in cases of conviction?**

141. As a general rule, disciplinary proceedings are independent from proceedings for civil claims for damages or from criminal proceedings. A number of exceptions and provision to coordinate the two proceedings are described above and below.

### **Suspension of disciplinary proceedings pending criminal proceedings**

142. In case of pending criminal proceedings the disciplinary board can decide to suspend the prosecutor from his functions and also suspends the payment of salary. The prosecutor however receives payments to cover basic expenses (assegno alimentare).
143. The suspension is **mandatory** in case of criminal proceedings where pre-trial detention or similar measures of restraint have been adopted. The suspension lasts until the entry into legal force of the decision to terminate criminal proceedings or the acquittal. It can also be revoked if the pre-trial detention or similar measure is revoked due to the absence of sufficient evidence of a crime while the revocation is facultative in case pre-trial detention is revoked for other reasons. In case of acquittal the prosecutor has the right to be compensated for the loss of salary.
144. The suspension of the prosecutor is **facultative** in other cases such as pending criminal proceedings that can lead to imprisonment or when the prosecutor is charged with violations that amount to grave disciplinary violations that are incompatible with the performance of the prosecutorial function. In these cases, the disciplinary board must hear the prosecutor before a decision is adopted. The suspension can be revoked anytime.
145. Upon revocation of the suspension, for example due to acquittal, the prosecutor has the right to return to his functions or to functions that are at least higher or, if not possible, of the same level as the position formerly occupied. If the position formerly covered is not available, he will have the right to choose from among available positions and within one year to be assigned to a similar position to the one previously chosen with priority over other candidates.

### **Impact of decisions adopted in criminal proceedings on disciplinary proceedings**

146. The criminal sentence has preclusive effects on disciplinary proceedings in respect of the following findings: that a fact has taken place, that it constitutes a crime and that the prosecutor has committed it. Conversely an acquittal in criminal proceedings has preclusive effects in respect of the following findings: that a fact has not taken place or that the prosecutor has not committed it.

### **21. Are there salient differences in the disciplinary proceedings of judges and public prosecutors?**

147. No. The procedure and guarantees are identical for judges and prosecutors.

GENERAL PART<sup>47</sup>

**Brief introduction on the constitutional and legal framework concerning the public prosecution service.**

**1. Constitutional principles, basic features and functions, their position *vis à vis* judges/judiciary and the executive power.**

148. Constitution of the Republic of Slovenia (Constitution)<sup>48</sup> is rather scarce with provisions regarding the state prosecution service and provides only general guidance for further regulation of the service by law. The organisation and powers of state prosecutor offices (SPO) must be regulated by law. The Constitution also regulates the incompatibility of prosecutors' profession – being a state prosecutor (SP) is not compatible with office in other state bodies, in local self-government bodies, and in bodies of political parties, and with other offices and activities as provided by law.

149. The Constitutional Court of the Republic of Slovenia passed several rulings regarding the SPO and the SPs. As far as the organisation of the SPO goes, the Constitution gives the legislative branch a power to determine organisation and powers of it. In its opinion the Constitutional Court wrote that the SPO is a system of independent state bodies, within which state prosecutors perform their functions. The Constitution stipulates the principle of functional independence of state prosecutors when performing prosecutorial duties.<sup>49</sup>

150. The law, regulating the prosecution service, is the State Prosecutors Office Act (SPOA),<sup>50</sup> that came into force in November 2011. The SPs perform their duties at the SPO to which they have been appointed, transferred, or seconded. Main duties and rights of state prosecutors are defined in the Criminal Procedure Act (CPA).<sup>51</sup> Apart from their duties in (pre)criminal procedure, the SPs have some competences in civil and other courts and administrative procedures and in some non-litigious civil procedures.

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<sup>46</sup> Prepared by Gaja Štovičej.

<sup>47</sup> This part is very shortened and updated text of the introductory chapter in the Study on the workload of the public prosecutors in Slovenia, prepared by the author for the Council of Europe on June 2020 for the Comparative study of the workload of public prosecutors. The study is available at: <https://rm.coe.int/comparative-study-workload-eng/16809f0001>.

<sup>48</sup> Official Gazette of the Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, and 75/16.

<sup>49</sup> The Constitutional Court decision No. U-I-42/12-15 of 7. 2. 2013.

<sup>50</sup> Official Gazette of the Republic of Slovenia No. 58/2011 and next.

<sup>51</sup> Official Gazette of the Republic of Slovenia No 63/94 with further amendments.

## **2 Status of the public prosecutors, selection, appointment, evaluation, and promotion**

151. The state prosecutors are not so called “employees of the state” and do not have a status of the civil servant. They are, like judges, ministers and members of the parliament, carriers of specific function. The SPs have the same standing as judges in view of rights and obligations arising from their status, unless otherwise stipulated by SPOA. The provisions of the law governing the judicial service apply *mutatis mutandis* to the promotion of SPs, the criteria for selection and promotion and the evaluation of the work of SPs.
152. The rights of a prosecutor are, for example, the right to promotion, education and professional training, salary, and bonuses, pension, disability, health, and social insurance. The office of the state prosecutor is permanent. The mandatory retirement age for the state prosecutor is 70 years.
153. The SPOA regulates in detail the procedures and competences of different authorities regarding the appointment and election of state prosecutors. The call for vacant position of SP is published in the Official Gazette of Slovenia by the Ministry of Justice (MoJ). The proposal to publish the vacancy is submitted by the head of the SPO in which there is the vacancy upon the preliminary approval of the SPG. The head of the SPO with the vacancy performs interviews with candidates and formulates reasoned opinions about the suitability of each candidate. The Prosecutorial Council also conducts interviews and forms final opinion that is sent to the Minister of Justice. The Minister may request that the Prosecutorial Council also obtains and takes into consideration additional data.<sup>52</sup> During the repeated deliberation the Prosecutorial Council decides again and if they support the candidate by a two-thirds majority vote of all members, the Minister must propose that candidate to the Government for appointment. Acts on appointments are published in the Official Gazette of the Republic of Slovenia.
154. Evaluation of work of SP is conducted every 3 years according to criteria adopted by the State Prosecutorial Council (every year during beginner years as the SP). The Prosecutorial Council is, among others, responsible for evaluating and promoting, transferring, assigning of SPs, and participating in the process of appointing SPs and assessing the efficiency and effectiveness of the SPO.
155. Promotion can be in salary grades, to a higher title of the state prosecutor, to a higher position of the state prosecutor and to the position of the councillor which is decided by the Prosecutorial Council. The Government decides on the promotion to the title of the Supreme State Prosecutor on the proposal of the Prosecutorial Council.
156. The decision on promotion follows the procedure of assessment of work in which the performance, quality, and professionalism of work of the SP is evaluated.

## **3 Which body is responsible for defining the criminal policy?**

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<sup>52</sup> This does not happen often. A minister can, for example, demand the Prosecutorial Council to consider and deliberate on something that was written in the press about the candidate.

157. The State Prosecutor General (SPG) is authorised to adopt the Prosecution Policy. The Prosecutorial Council previously to adoption of the Policy prepares a reasoned opinion on the proposed Prosecution Policy. When preparing the Prosecution Policy, the SPG must consider the established criminality policy and penal policy of courts and possible need for their change, development, and changes in case law. The situation and specifics in individual social areas and areas of jurisdiction are also considered in its preparation.

#### **4 Are there current reforms under way?**

158. The Criminal Procedure Act as well as the SPOA were in the process of changing over the recent years, mainly because of necessary adoptions to facilitate the beginning of functioning of the European Public Prosecutor this year. The proposed changes of SPOA that are still in the preparation focus mostly on provisions that proved not to be very effective in practice.

#### **5 Total number of public prosecutors, distribution per courts; rate per inhabitant; total number of criminal cases.**

159. According to the European Commission for the Efficiency of Justice (CEPEJ) study,<sup>53</sup> presented in the 2020, based on the 2018 data, there were 10,2 state prosecutors per 100.000 inhabitants in Slovenia, total number of prosecutors then was 212. According to the same CEPEJ report there were 41,7 judges per 100.000 inhabitants in Slovenia (total number of judges was 867).

160. The data from the Combined report on the work of the state prosecution offices in Slovenia in 2019<sup>54</sup> that was published in April 2020,<sup>55</sup> shows that there were 208 state prosecutors in Slovenia as of 31.12.2019.

161. The combined report shows, among others, the clearance rate at the prosecution offices. Number of cases that were filed against the known offenders is slowly rising over the past years:

	2016	2017	2018	2019
Incoming cases	27647	27985	28232	28495
Resolved cases	30011	28638	29025	29043

<sup>53</sup> [https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Explorerv2020\\_1\\_0EN/Tables](https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Explorerv2020_1_0EN/Tables).

<sup>54</sup> Available only in Slovene at: <https://www.dts.si/files/documents/Letno%20poroc%CC%8Cilo%20DT%20za%20leto%202019.pdf>

<sup>55</sup> The Annual report for the year 2020 is not published yet.

## DISCIPLINARY LIABILITY AND DISCIPLINARY PROCEEDINGS AGAINST PUBLIC PROSECUTORS

### Disciplinary offences

**22. What are the grounds for disciplinary liability and what are the disciplinary offences foreseen for public prosecutors in your legal system? Where are they regulated?**

162. The disciplinary offences that can be committed by the SPs are all listed in the SPOA. It is a closed list and no other conduct can serve as a ground for disciplinary liability. The SP cannot be disciplinary liable for an opinion given during the performance of prosecutorial service. The disciplinary sanctions are possible only if the SP intentionally violated his/ her duties of a state prosecutor or because of negligence.

163. Article 80 of the SPOA lists the violations of the SP's duties which are the following:

1. an act containing statutory elements of a criminal offence committed during the performance of a prosecutorial function;
2. non-fulfilment or refusal to perform the SP's duties without statutory grounds;
3. reckless, untimely, inappropriate, or negligent performance of the prosecutorial service;
4. acting in conflict with the general instructions issued under the provisions of the SPOA;
5. illegitimate or uneconomical use of financial or material assets;
6. releasing of official or other secret determined by the law or the State Prosecutorial Rules;
7. abuse of prosecutorial position or transgression of the official authorities;
8. abuse of the right to absence from work;
9. failure to attain the expected working performance results in terms of quantity, quality, efficiency, and timeliness for more than three months in a row, without a justifiable reason;
10. violation of the sequence and/or priority sequence of case consideration as established by the law and the State Prosecutorial Rules;
11. failure to report about the exceeded expected time for solving the case as determined by quality criteria on the SP's performance or failure to apply an acceleratory legal remedy or failure to report about the use of an acceleratory legal remedy to the head of the SPO;
12. failure to report on the cases involving particularly serious crime, on the cases of the broader public interest that particularly resonated in public or on demanding legal issues that are relevant for the state prosecutorial and court case-law, on the state of such cases and the measures planned, and failure to report and submit the files of the case that has reasonable



grounds to be allocated to a Specialised State Prosecutor's Office<sup>56</sup> or Specialised Department;<sup>57</sup>

13. the performance of functions, work or activity which are incompatible with a state prosecutorial function under the Constitution or this law;
14. violation of provisions on a restriction of a right to a strike;
15. failure to inform the head of a SPO on acceptance of work which is subject to the assessment of incompatibility with the SPO;
16. failure to report on the existing statutory reasons for exclusion of a prosecutor from work in a case where a reason for exclusion exists or continuing the work on the case where reasons for exclusion exist;
17. the public expression of opinion about the case in which the SPO and/or the court has not yet issued a final decision and/or in which an extraordinary legal remedy has been lodged, in violation of rules about informing the public;
18. conduct or acting of SP which is in conflict with the self-dependence of a state prosecutor or SPO or which disrepute a state prosecutor's profession;
19. improper, indecent, or offensive conduct or expression towards individuals, state bodies and legal entities in connection with the performance of the state prosecutorial service or outside of it;
20. obstruction of the functioning of a SPO in order to exercise one's own rights;
21. accepting gifts or other benefits in connection with the SP service, abuse of the post or reputation of the SPO for asserting rights or benefits;
22. failure to submit or untimely submission of data on the assets owned;
23. neglecting or failure to perform mentorship tasks;
24. disrespect of issued decisions on the transfer or secondment of a state prosecutor;
25. disabling or hindering implementation of provisions of the SPOA regarding professional supervision of work, supervision of the Ministry of Justice and supervisory complaints;<sup>58</sup>
26. performing duties in relation to other state entities, parties and their counsellors and other persons contrary to the binding provisions of the SPOA or the State Prosecutorial Rules;
27. disregard of the measures for regular and effective performance of tasks of the SPO;
28. violation or failure to implement measures under special programmes for resolving cases;
29. failure to comply with the obligation of continuous training and education;

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<sup>56</sup> Specialised State Prosecutor's Office (Specialised SPO) is a special prosecutor's office that deals only with most serious crimes in certain fields, like commercial crimes, terrorism, corruption.

<sup>57</sup> Special department is a specialised unit within the Specialised SPO, responsible for investigating and prosecuting criminal offences, committed by the policemen or other officials, employed in the public entities with investigative powers (e.g. military police in pre-criminal procedure).

<sup>58</sup> Supervisory complaint is an institute established by the SPOA that grants to any participant that has a legal interest in the case in the proceedings conducted by the PP the possibility to file a supervisory complaint. That is possible only regarding the time in which the case is handled. If the participant considers that the SPO has unjustifiably protracted the case or unreasonably delayed procedure and thus prevents the effective exercise of the right to a trial without undue delay, the supervisory complaint can be submitted.

- 30. violation of regulations on safety and health at work and on prevention from fire and explosion or measures for ensuring security at the SPO in accordance with the State Prosecutorial Rules and other bylaws;
  - 31. violation of provisions of bylaw on the use of the prosecutorial suit.
164. Some of the disciplinary violations can be considered as “more serious”<sup>59</sup> by the SPOA.

**23. Is the acting in cases of conflicts of interest contemplated as a specific disciplinary offence?**

165. The incompatibility of the function of the SP is included in the Constitution (article 136) – “The function of the SP is not compatible with functions in other state bodies, in local self-government bodies and in the bodies of political parties, as well as with other functions and activities for which this is determined by law.” This provision is identical to the one for judges. The SPOA does not name the specific incompatibilities of the SP, but again aligns the rules with judges: “The SP must not perform any functions that are incompatible with the function of the SP according to the provisions of the Constitution, nor may he perform activities or accept employment or work that may not be performed or accepted by a judge according to the provisions of the Constitution and law.” If the SP wants to accept some work and there is a possibility of conflict of interest, the State Prosecutor’s Council decides on the incompatibility of the function, activity, acceptance of employment or work with the function of the SP. In the explanations of the Ethical Code for the SPs, adopted by the Ethics Committee, the main purpose of the institute of incompatibility is to prevent conflicts of interest and thus ensure that the SP will perform his/her functions impartially.
166. According to the Criminal Procedure Act judges (and SPs) must not participate in cases, if they are in any of positions in that law (for example if they were victim of the criminal offence in the case, if they have family ties with parties in the case or judges etc.).
167. The same as judges, the SP may perform pedagogical, scientific, publishing, research, or other similar work in the legal profession, provided that this does not impede the performance of the prosecutorial service.
168. There are two disciplinary offences connected with the conflict of interest. If the SP performs functions, work or activity that is under the Constitution or law incompatible with the prosecutorial function that is considered a more serious disciplinary offence (offence No. 13). If the SP fails to inform the head of the SPO that he has accepted the work and thus makes it impossible to assess whether this work is incompatible with the function of the SP, that is a regular offence, not a more serious one (No. 15).

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<sup>59</sup> “more serious” offences are in points 1, 2, 3, 4, 6, 7, 9, 13, 14, 16, 17, 21, 22, 24, 25, 27 and 28, and the act referred to in point 5 only if it involves the illegal use of financial or material assets, and the act referred to in point 12 only if it results in the failure of the head of the SPO to undertake the measures necessary in terms of the importance of the matter.

**3 Are the conducts that entail disciplinary liability sufficiently defined? Low performance or undue delays are considered as a disciplinary offence?**

169. All of the disciplinary offences are based on the obligations or duties of the SP that are set forth in the SPOA or other law. For example, paragraph 2 of Article 7 of the SPOA says that in performing prosecutorial service, the SP must act with impartiality and protect constitutionality and legality, uphold the principles of the rule of law and human rights and fundamental freedoms. Failure to act in accordance with that can be a disciplinary offence.
170. But some of the descriptions of the disciplinary offences are not clear enough to meet the standard of predictability as to what is punishable and what is not under certain disciplinary offence. For example – when is behaviours so “reckless” or “inappropriate” or “negligent” that it is the disciplinary offence and not a question of work ethics?
171. Low performance and undue delays can be a disciplinary offence but only in case that the SP performed purely and/or below the expected standards either intentionally or out of negligence. There are quite some offences connected with the performance of the function – for example not using the accelerating remedies, not following the obligatory general instructions, failing to fulfil quality and quality criteria and/or poor efficiency.
172. In practice, low performance and delays would not be dealt with in the scope of the disciplinary procedure but within the expert supervision. The work of every SP is monitored on regular basis by expert inspection/supervision of his work, performed by higher ranking SP under the known procedural rules. The work on cases is evaluated as well as performance of other duties within the prosecutorial service. In case the SP does not fulfil the criteria he/she can be dismissed from the prosecutorial service on the ground of his performance indicating that he is unsuitable for the state prosecutorial service.
173. The Judicial Council, to which the disciplinary bodies involved in the disciplinary procedure against judges are affiliated, recently raised some questions regarding the disciplinary procedures for judges. The Judicial Council made the proposal for several changes to the law, regulating the disciplinary procedures and rules regarding judges, for example to reduce the number of disciplinary offences, to delete a recording of the disciplinary measure after a certain period of time has passed.

**4 Is there any disciplinary offence regulated for “breach of oath”, for “unethical behaviour” or for improper private conduct? How do you deal with ethical issues that do not amount to disciplinary offences?**

174. Slovenian SPs assume prosecutorial service on the day they take the following oath before the Prime Minister (in practice, the Prime Minister authorises the Minister of Justice for swearing the prosecutors in): “I swear that I will perform the state prosecutorial service with diligence, independently and in accordance with the Constitution and the law.”

175. The State Prosecutor General assumes his function with taking the oath before the President of the National Assembly, and the heads of SPO take the oath before the President of the Prosecutorial Council.
176. Given the wording of the oath – respect for legality, independence, and diligence at work, basically all of the disciplinary offences can be derived from it. The same goes for professional ethics – basically every offence is in its core also a breach of ethics. The ethical point is most evident in the actions when the SP misuses the position to gain benefits for himself or accepts gifts or other benefits.
177. The unappropriated behaviour that can disrepute either the SP or the prosecution service can be committed while performing the duties or outside them. The SPs should at all times uphold high moral standards and restrain themselves from unappropriated behaviours. This includes excessive drinking or misuse of forbidden drugs, for example.
178. The Prosecutorial Council adopted the Code of Public Prosecutor’s Ethics (Ethical Code) as it is obliged to do by the SPOA. The Ethical Code contains rules for the official and private conduct and behaviour of the SPs. The intent is to protect the independence, impartiality and fairness of the SPs and the reputation of the SPOs. The SPs must comply with the Ethical Code at work and outside it.
179. The independent working body within the Prosecutorial Council is the Commission for Ethics and Integrity in which only the SPs are members (3 persons). The tasks of this commission are to adopt general opinions regarding actions that constitute a violation of the Ethical Code and to issue recommendations for compliance with the rules of ethics and integrity in the Ethical Code. The ethics commission also adopts guidelines in the field of public prosecutor’s ethics and integrity in accordance with the Ethical Code and provides education and training for public prosecutors in the field of public prosecutor’s ethics and integrity.
180. The Commission for Ethics has the authority to consider or reject the initiative that was submitted to it by authorised persons – which is any person. But the Commission is obliged to consider and issue in case the initiative comes from the member of the Commission for Ethics, Minister of Justice, member of the Prosecutorial Council or the SPG. After taking the case under consideration the Commission for Ethics decides about the type of decision which can be the general opinion, recommendation, or guideline.

**5 In the case that prosecutors in your legal system have to make a declaration of assets for taking office, is it a disciplinary offence not presenting such declaration, or presenting incomplete or erroneous data?**

181. The SP, as everyone taking the function in Slovenia and even some civil servants in higher positions, must declare their assets to the Commission for the Prevention of Corruption. They must report when swearing in as SP as well as in case of changes of their assets and at the end of their function. This provision is currently in the process of changing. One of the proposed changes of the SPOA, prepared by the Ministry of Justice, suggests removing the failure to report to the Commission for the Prevention of Corruption as a disciplinary offence, since this is already a

misdemeanour under the Integrity and Prevention of Corruption Act. All that goes also for submitting the erroneous data.

## **Sanctions**

### **6 What are the sanctions foreseen for the disciplinary offences of PPs? Are they gradual and proportional?**

182. All disciplinary sanctions are regulated in the SPOA and there are 5 different sanction in place. They are the following: written warning, reduction of salary, ban on promotion, transfer to another SPO and dismissal from service.
183. All of the sanctions can be issued as main sanction, but the reduction of salary can also be a secondary sanction, imposed with some other. Disciplinary sanctions must be issued in proportion to the severity of the committed disciplinary violation.
184. A written warning is a formal reproof for disciplinary violation that is evaluated as less severe and is issued in particular when a disciplinary sanction has not yet been issued to the SP. A salary may be reduced to up to 20% and for the period of up to one year in particular for the violations which had harmful consequences for the state prosecutor's office.
185. The promotion may be suspended for a period of maximum of 3 years in particular for violations related to the performance of state prosecutorial service. A transfer to another SPO while keeping the rang of the SP achieved beforehand may be issued for a period from 6 months to 3 years. This sanction is used in particular when the consequences of the violations hinder the work of the SPO. This sanction cannot be issued to the SP who has the rank of the supreme state prosecutor.
186. The dismissal is the final sanction and can only be issued if the SP is no longer suitable for the performance of prosecutorial service, for example because he has committed a criminal offence connected with prosecutorial duties.

### **7 Can you provide statistics on the number/type of sanctions imposed and the grounds that led to the sanction?**

187. There are no publicly available detailed statistics on disciplinary sanctions and procedures against SPs that would show annual number of cases, the disciplinary offences for which they were initiated and their outcome. Part of the reason for that is probably the fact that the disciplinary procedures against SPs are closed for the public, unless the SP who is involved in the disciplinary procedure explicitly demands otherwise. The decisions of disciplinary bodies are kept in the personal records of the SPs and those records are classified. This data can only be used for the purposes of fulfilling the provision of the SPOA (for example promotion or transfer) and is not available to any authority or person other than those with such rights under the SPOA.
188. Some statistics are available by CEPEJ:<sup>60</sup> in 2018 in Slovenia 1 disciplinary procedure was initiated, in 2016 there were 2 and in 2014 the number of initiated

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<sup>60</sup> [https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Explorerv2020\\_1\\_0EN/Tables](https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Explorerv2020_1_0EN/Tables).

procedures was 0. The reported reason for all 3 initiated procedures was “professional inadequacy”.

**8 Is there a higher sanction in case of recidivism or repeated infringements?**

189. As mentioned above, the sanctions are of different severity and have a range from minimum to maximum extend in which they can be used. The decision on the severity of the punishment is the sole right of the disciplinary court. The disciplinary court is not bonded by any specific rules to consider recidivism when deciding on the punishment for disciplinary offence, except the provision in the SPOA that the written warning is appropriate sanction especially in case when the SP had no previous disciplinary sanctions imposed.

**9 Is the imposition of a sanction registered in the personal record of the relevant SP? In such case, for how long? What are the consequences of having the register of the sanction in such record not cancelled?**

190. The information on legally established disciplinary liability and decisions of disciplinary bodies are recorded in personal record of the SP and in the central human resources records. There is no statute of limitations for that entry, meaning the information about disciplinary decisions stays recorded for the whole time the SP holds the office.

191. The use of data kept in personal record and central human resources record is limited by the SPOA and can only be used for purposes, specified by the SPOA. The data about the imposed disciplinary sanction is enclosed to the application of the SP if he applies for some other, usually higher – ranking prosecutorial position.

192. In its recent proposal for changes in disciplinary procedure for judges, mentioned above, the Judicial Council has recognised absence of rules on removal of disciplinary record from personal file of a judge after a certain period of time as problematic and suggested to change the law. Their proposal is to determine the deadline after which the imposed disciplinary sanction must be deleted from the disciplinary evidence, from the personal file of the judge and from the central human resources record. According to the proposal this data would be deleted 4 years after the disciplinary decisions was final.

193. Since the regulation of the disciplinary liability of the SPs mostly follows the regulation for judges, it is safe to assume that in case the change are adopted regarding the judges, the rules for SPs would be changed.

**Disciplinary body**

**10 What are the bodies in charge of disciplinary proceedings against PPs? Are there different bodies depending on the gravity of the infringement?**

194. The bodies involved in the disciplinary procedure are disciplinary prosecutor and his deputy, disciplinary court of the first instance and the disciplinary court of the second instance. There is no difference in the composition of the disciplinary bodies, nor they are different depending the gravity of the infringement.
195. Given the nature and gravity of the disciplinary offence the SPG can temporarily order the removal of the SP from the prosecutorial service, but that removal can only last till the final decision of the competent authority in the disciplinary procedure is reached.

**11 Who appoints the relevant disciplinary body and what is their composition? What are the requirements to be member of a disciplinary body? Is the disciplinary body independent?**

196. The disciplinary prosecutor and his deputy can only be the state prosecutor who hold a position of a supreme state prosecutor. Disciplinary prosecutor and the deputy disciplinary prosecutor are appointed on the proposal of the SPG by the Prosecutorial Council if they give their consent for the appointment.
197. Disciplinary court of the first instance has 9 members: 6 of them are state prosecutors (of different ranks<sup>61</sup>), appointed with their consent on the proposal of the SPG by the Prosecutorial Council, and 3 of them are judges, appointed upon their consent on the proposal of the Judicial Council by the Prosecutorial Council.
198. The disciplinary court of the first instance decides on a matter before it in the senate of 3 members. The president of the senate is the president of the disciplinary court or his deputy; one of the members must be a judge and the other the SP. Composition of the senate is determined by the president of the disciplinary court.
199. Disciplinary court of second instance has 6 members: the president and his deputy can only be the supreme judges and another 2 of the members are judges of different positions, appointed with their consent on the proposal of the Judicial Council by the Prosecutorial Council. The remaining 2 members of the disciplinary court of the second instance are supreme state prosecutors, appointed upon their consent on the proposal of the SPG by the Prosecutorial Council.
200. The disciplinary court of the second instance decides in the senate of 3 members. President of the senate is the president of the disciplinary court or his deputy, one member is a judge and the other one is a supreme state prosecutor.
201. All disciplinary bodies are appointed for 2 years with the possibility of reappointment.
202. The conditions for the members of the disciplinary court are that the member must be either a judge or a state prosecutor, most of them very experienced and holding a rank “supreme”. Conditions for the supreme judges and state prosecutors are

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<sup>61</sup> We have local, district, higher and supreme state prosecutors, and each of those ranks also has a position of councillor (i. e. local state prosecutor councillor, district state prosecutor councillor etc.).

basically the same – apart from general conditions to be elected for a judge or appointed for a state prosecutor, one must hold a position of a judge/state prosecutor for at least 15 years or must have at least 20 years of work experience in legal field. A university law professor with at least the title of “associate professor” also qualifies.

**12 Does the disciplinary body have other competences apart from carrying out the disciplinary proceedings? What are the capacities and staff of the disciplinary bodies?**

203. The disciplinary bodies do not have any competences outside the disciplinary procedure. Disciplinary prosecutor and both disciplinary courts are officially situated with the Supreme State Prosecutor’s Office, that provides the financial means for its functioning, expert and administrative support and other conditions for their work. In practice this means that administrative work and the note taking at hearings or other sessions is done by the civil servant employed at the Supreme SPO. The Supreme SPO also renders its available premises for the use of disciplinary bodies.

**13 Is there an inspection service for SPs in your country? In such a case, what is the relationship between such inspection service and the disciplinary body? Do they share competences?**

204. It is not exactly the inspection service *stricto sensu*, but there is a service that monitors the work of prosecutors and the functioning of state prosecutor’s offices. That is the responsibility of the Training and Expert Supervision Department that is a department within the Supreme SPO.

205. Expert supervision can be a general, partial, or individual expert review of the work of the SPOs, the SPs and even the prosecutorial personnel and it is done by reviewing the files of cases, records, and other documents. Only the supreme and higher SP are authorised to inspect the case files. The purpose of the expert supervision is to determine the timeliness of work, the proper use of procedural powers and the regularity of prosecutorial decisions, the fulfilment of the established prosecution policy and following the issued general instructions.

206. A general expert inspection is done at least once every three years and involves the examination of the work of the whole SPO. A partial expert inspection is done to evaluate the performance of a particular SP or to evaluate the quality of work and prosecution performance in particular types of cases or for the analysis of implementation of laws and bylaws and/or for drafting new or amended acts and other regulations. Expert inspection is done in a particular case if this is required for deciding on a supervisory complaint,<sup>62</sup> for reporting and for informing the public and/or implementation of other competences under this Act.

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<sup>62</sup> This can be submitted by any person with legal interest in the procedure regarding the timeliness of prosecutor’s work. See also the footnote no. 48.



207. Everyone whose work had been inspected/reviewed has the right to comment and reply to the findings. The report on the general expert inspection is forwarded also to the Prosecutorial Council and to the Ministry of Justice. Findings of the expert inspections are used also for preparation and execution of training for SPs and staff to avoid detected irregularities in the future.

### **Disciplinary proceedings**

**14 Who is entitled to file a disciplinary complaint against a SP? What are the means for filing it (written, online, signature of lawyer, statute of limitations)? What kind of requirements are to be met (formal and substantive)?**

208. The disciplinary procedure must be initiated within 2 years from the day of disciplinary violation, except when the disciplinary procedure is the consequence of conviction of the SP for a crime, when the disciplinary procedure may start in 3 months from the conviction becoming final. In case that the SP commits another disciplinary offence during 2 years period, the statute of limitation is interrupted. In any case, the disciplinary procedure is no longer possible after 4 years from the day of disciplinary offence.

209. According to provisions of the SPOA, the right to **propose** a disciplinary procedure against a certain SP have: i) the head of the SPO where the SP holds the position, ii) the State Prosecutor General, iii) the Prosecutorial Council and iv) the Minister of Justice. All those mentioned, apart from the head of the SPO, also have the right to **demand** the introduction of the disciplinary procedure.

210. The proposal and the demand are filed with the disciplinary prosecutor, who can decide not to act upon the *proposal*. In case the person/body that *proposed* the disciplinary procedure insists on the proposal given, the disciplinary prosecutor is obliged to present the case to the disciplinary court which then decides whether to initiate a disciplinary procedure or not. The disciplinary prosecutor must initiate disciplinary procedure before the disciplinary court if he received the *demand*.

211. The disciplinary procedure is formally initiated when the disciplinary prosecutor files either the demand to perform a certain investigative act or submits a reasoned motion to issue the disciplinary sanction to the disciplinary court.

**15 Are anonymous/confidential reporting of misconducts admitted in your system? Can a PP report about misconducts of their superior PP?**

212. There is not a special system in place to limit or specify who can lodge a complaint against the SP or report the suspected misconduct. The police, judges, persons involved in the procedures in which the SP participates – anyone can inform the SPO about their observations and the alleged misconduct of a certain SP. Even the reporting of the media can be the source of information. There is no obstacle for the SP to report the superior SP if he finds his behaviour or acting in breach of prosecutorial duties and responsibilities.

213. But not every complaint or allegation is automatically transferred to the disciplinary prosecutor. After receiving the information that indicates the possibility of disciplinary offence, it is up to the head/SPG/Minister/ Prosecutorial Council to decide if the doubt is sufficient to file a proposal or demand to initiate a disciplinary procedure. In practice, most often the disciplinary procedure starts upon the proposal of the head of the SPO, after he is notified of the behaviour that disrepute the SPO. The findings of the expert supervision of work can also be the grounds for authorised person to submit the motion for the disciplinary procedure.

#### **16 Who decides on the admissibility of the complaint?**

214. As explained above – the first “triage” is done by the persons, entitled to file the proposal or demand to initiate a disciplinary procedure. But the final decision is adopted either by the disciplinary prosecutor or by the disciplinary court.

#### **17 What are the investigative measures and means of proof that are available to the disciplinary body when dealing with a complaint against a PP? Do they differ from other administrative proceedings?**

215. The SPOA has some provisions regarding the disciplinary liability of prosecutors and the process but it further refers to the rules that regulate the disciplinary procedure against judges. The disciplinary liability of judges and the disciplinary sanctions against judges are regulated by the Judicial Service Act, whilst the disciplinary bodies and the disciplinary procedure is regulated by the Judicial Council Act.

216. Once the disciplinary procedure officially starts, the rules of Criminal Procedure Act for shortened criminal procedure apply for procedural issues that are not regulated in the SPOA or Judicial Council Act. The final decision of disciplinary prosecutor or disciplinary court is considered an administrative act.

217. The investigative measures are the same as in criminal procedure, therefore, assuring the same procedural rights and guaranties to the SP involved in the disciplinary procedure as are those of the suspected/accused in criminal procedure.

#### **18 Does the disciplinary body get appropriate cooperation from private/public entities in order to carry out the disciplinary proceedings? Are there specific powers to compel witnesses to attend or evidence to be submitted by third parties?**

218. The disciplinary court can use all powers that the (regular) court has in criminal proceeding. E.g. it can demand the cooperation from other public bodies and entities to provide available data relevant to the case. The disciplinary court has the authority to assure the presence of the SP that is accused of the disciplinary offence even by force with the assistance of the police. Everyone that is called to court as a witness must respond or the police is ordered to bring them against their will.

**19 What are the procedural guarantees in the course of the proceedings? (hearing, remedies, access to evidence, access to lawyer, etc.)**

219. The SP who is accused of the disciplinary offence must be given the sufficient time to prepare for the case, can have a legal representative/help (also at the main hearing), has the right to propose witnesses or other evidence in his favour and similar. It is the right and the obligation of the SP to be interrogated before the disciplinary court. If the SP does not appear at the main hearing even though he has been duly summoned, the main hearing can only continue in his absence if his presence is not necessary and he has been heard before.
220. The SP has the right to contest the decision of the disciplinary court of the first instance with the appeal lodged with the disciplinary court of the second instance. Against the decision of the disciplinary court the SP has the right to legal remedy in court. The lawsuit against the disciplinary court decision is filed before the administrative court using the procedural rules for administrative disputes, since the disciplinary court decision is considered an administrative act.

**20 How are criminal and disciplinary proceedings coordinated with criminal and/or administrative proceedings? Are the criminal investigations suspending the disciplinary proceedings and what happens in cases of dismissal of criminal proceedings and, respectively, in cases of conviction?**

221. As mentioned before – given the nature and gravity of the disciplinary offence the SPG can temporarily order the removal of the SP from the prosecutorial service that can only last till the final decision of the competent authority in the disciplinary procedure is reached.
222. Criminal liability and liability for a misdemeanour do not exclude the disciplinary liability of the public prosecutor. In some cases, the criminal procedure is the ground for temporary suspension of the SP from the service. In some cases, conviction for criminal offence is the reason for dismissal from the prosecutorial service.
223. In case the criminal procedure was started against the SP ex officio because of the criminal offence committed by the abuse of his prosecutorial function, the SPG must order the suspensions of this SP. If the criminal act was not committed by the abuse of prosecutorial function, the suspension is not obligatory and the SPG can only issue it after obtaining the opinion from the Prosecutorial Council. The Government of Slovenia decides about suspending the SPG in situations mentioned above upon the proposal of the Minister of Justice upon the opinion on the matter from the Prosecutorial Council.
224. After the criminal conviction the SPOA differs between the obligatory and possible dismissal from prosecutorial service. The SP is obligatory dismissed from the office if he has been convicted for an offense committed through abuse of office, or for intentional criminal offense punishable by imprisonment of more than six months.
225. The SP may be dismissed from prosecutorial service if he has been convicted for an intentional or unintentional criminal offense to a term of imprisonment up to six

months or to another sentence or with suspended sentence or for an unintentional criminal offense punishable by imprisonment of more than six months and if he is, as a result of this conviction, personally unfit to perform the function of public prosecutor. In one month after receiving the judgement, the Prosecutorial Council and the SPG must submit their opinion on the personal suitability or unsuitability of the convicted SP to remain in the prosecutorial service to the Ministry of Justice.

226. When the prosecutor must be dismissed and in cases when he is no longer suitable for the service, the government decides on the dismissal on the proposal of the Minister of Justice. If the Minister of Justice proposes to the government the dismissal of the state prosecutor due to a final conviction for a criminal offense, but the government does not dismiss him, the Minister must submit the request for the initiation of disciplinary proceedings to disciplinary prosecutor.

## **21 Are there salient differences in the disciplinary proceedings of judges and public prosecutors?**

227. There are some differences in the disciplinary proceeding of judges and state prosecutors, but the author would not say they are salient. The disciplinary offence of both are basically the same, in the procedure both professions are guaranteed the same procedural rights, the disciplinary sanctions are the same.

228. There are minor differences in procedure. Since the transfer of disciplinary bodies from the Supreme Court to the Judicial Council in 2017, the disciplinary procedure for the judges is only in 1 instance. However, the proposal of the Judicial Council that the author has mentioned before to change the procedure for judges, includes the proposal to re-introduce the disciplinary court of the second instance for judges.

## INTRODUCTION

229. This study shall provide detailed information on the national legal framework and practice of the disciplinary sanctions and proceedings against public prosecutors in Spain. This study is aimed to provide detailed information to be used in a more comprehensive comparative study that should support the Ukrainian authorities in aligning the public prosecution service with the standards applied in other European democracies, precisely to ensure respect to the principles of accountability and independence of public prosecutors.
230. The present study follows a previously defined structure, and questionnaire. Answers to the questionnaire will be provided according to the legal framework, and also completed with information available in national and international reports, CEPEJ, national jurisprudence and academic literature. Where necessary interviews with the relevant public prosecutor's unit will be carried out. Statistical information collected by the Spanish General Prosecutor's Office (*Fiscalía General del Estado*, hereinafter FGE or Spanish GPPO), will be reflected.<sup>64</sup> Although being aware of the importance of following the indicated scheme and answering the questionnaire in the order provided, in case there should be any reasons to depart from it because there are issues not contemplated, which are considered of relevance to be mentioned, they will be pointed out.
231. This national study has been prepared upon the request of the CoE Project "Human Rights Compliant Criminal Justice System in Ukraine" by Prof. Dr. Lorena Bachmaier. The consultant has carried out the needed desk research on the general principles governing the public prosecution systems, and specifically the principles and standards on accountability and disciplinary proceedings against members of the public prosecution in the Spanish legal system.
232. I hereby declare that in preparing this study I adhere to the general methodological principles of impartiality, objectivity, and confidentiality, and I commit to provide truthful and accurate information, preserve the confidentiality of the data and make a declaration of non-conflict of interest, according to the international general standards.<sup>65</sup>

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<sup>63</sup> Prepared Prof. Dr. Lorena Bachmaier Winter.

<sup>64</sup> As requested, this study will include: 1) information on the applicable legal and regulatory framework; 2) Statistical information generated by domestic institutions on disciplinary proceedings (who initiated, infringement investigated/sanctioned, type of sanctions imposed, effects of the sanction, etc.); and 3) Consultations with public prosecutors to obtain practical information, based on qualitative selection of persons to be interviewed.

<sup>65</sup> Basic principles on human rights monitoring, available at: <https://www.ohchr.org/Documents/Publications/Chapter02-MHRM.pdf>.

## GENERAL PART

### I. General overview of the constitutional and legal framework of the Spanish public prosecution

233. The main rules on the Public Prosecution are found in the Law on the Public Prosecution 50/1981, of December 30 (*Estatuto Orgánico del Ministerio Fiscal*, hereinafter PPL, as amended on 11.3.2010)<sup>66</sup> and in the Criminal Procedure Code. In accordance with Article 124.1 of the Spanish Constitution, the PPL sets out the main principles:<sup>67</sup> The Public Prosecution exercises its functions in conformity with the principles of unity of action and hierarchical dependence, and subject, in all cases, also to the principles of legality and impartiality (also in Article 1 PPL, and again under Article 48 PPL when listing the duties of the PPs).<sup>68</sup> Article 2 of the PPL states that the Public Prosecution is an institution “of constitutional relevance”, the PPO has legal personality and is governed by the following fundamental principles: the principle of legality, since the actions of the Public Prosecutor are always subject to the law; the principle of impartiality, since the Public Prosecution shall act with objectivity and independence.

234. Article 124 of the SC also lists the main functions of the Public Prosecution, which are “to promote the action of justice in defence of the legality, the rights of citizens and the public interest protected by law, seeking the satisfaction of the general interest of society before the courts”. According to the Constitution, the institution of the Public Prosecution is integrated into the judicial power, although the PPO acts through its own bodies (organic autonomy) and is independent from the General Council of the Judiciary (functional autonomy) (Article 2 of the PPL). It is granted autonomy from the executive power, so that the government can only request the Public Prosecution to take actions aimed at the protection of the public interest (Article 4 of the PPL). In such cases, it is the General Public Prosecutor (*Fiscal General del Estado*) who, after convening the Board of Senior Public Prosecutors (*Junta de Fiscales de Sala*), is competent to decide about the viability or legality of such actions.

235. Article 3 of the PPL lists in detail the functions of the Public Prosecution, which are:

- a) to ensure that the jurisdictional function is performed effectively, in accordance with the law and within the terms fixed therein, exercising actions, and filing appeals;
- b) to exercise whatever functions the law assigns to it, in defence of the judicial independence;
- c) to ensure respect for the constitutional institutions and fundamental rights and liberties;

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<sup>66</sup> Spanish Law on the Public Prosecution is available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1982-837>.

<sup>67</sup> This part is a revised, abridged, and updated text of the introductory chapter on the Spanish PP prepared for the Comparative Study on the workload of PPs, prepared for the Council of Europe on June 2020.

<sup>68</sup> The same principles are reiterated in Article 541.1 of the Organic Law of the Judiciary (*Ley Orgánica del Poder Judicial*, LOPJ).

- d) to exercise criminal and civil actions arising from crimes and offenses, or to oppose the same type of actions if exercised by others, when appropriate;
- e) to act in the criminal procedure requesting the judicial authority to adopt the appropriate precautionary and investigative measures during the pre-trial investigation; in the criminal proceedings against minors, it will be the public prosecutor who is directly in charge of the pre-trial investigative stage according to the provisions of the Organic Law that regulates the criminal liability of minors;
- f) to act in defence of the legality and the public social interest in proceedings related to civil status, and others as provided in the law;
- g) to act in civil proceedings when there is a social interest at stake or when the interests of minors, persons with disabilities or vulnerable persons are affected;
- h) to ensure respect to the rules on jurisdiction and competence of judges and courts by promoting, when appropriate, conflicts of jurisdiction and questions of competence;
- i) to ensure compliance with courts' decisions;
- j) to ensure the procedural protection of victims as well as the protection of witnesses and experts;
- k) to participate in the constitutional appeal for protection (*amparo*), as well as in questions of unconstitutionality ( *cuestiones de inconstitucionalidad*);
- l) to file appeal for constitutional protection (*amparo*) and intervene in proceedings before the Constitutional Court, in defence of the legality;
- m) to exercise the functions entrusted to it by law in matters concerning the criminal liability of minors;
- n) to participate in the proceedings before the Court of Auditors (*Tribunal de Cuentas*) in the cases and in the manner established by law, as well as to defend the legality in administrative and labour proceedings, when its involvement is foreseen by law;
- o) to provide international judicial assistance, in accordance with the provisions of international law, treaties and conventions;
- p) to exercise any other functions assigned to it by State laws.

236. The pre-trial investigation in the Spanish criminal procedure is still directed by an Investigating Judge, who acts in coordination and under the supervision of the PP. As of December 2020, a new draft law on the Criminal Procedure Code has been presented, which –if finally adopted– will change the model of criminal procedure entrusting the direction of the pre-trial investigations to the PPO. The legislative process of the proposed reform of the CPC is currently ongoing.

237. Pursuant to Article 105 of the Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*, CPC), the PP has the obligation to carry out any action aimed at investigating and prosecuting crimes, irrespective of whether there is or not a private accuser in the case. There is a single exception to this rule: the so-called private crimes, where the Penal Code states that they can only be prosecuted upon the accusation of the private victim. At present this applies only to certain types of defamation.

238. According to the statistics for 2019, there were 2.116.741 criminal cases registered, which end up in approximately 290.000 “real” criminal cases handled by the prosecution during 2019, out of them around 27.000 requests to classify the case

as complex case. From the moment of registering a case until the formal indictment was filed, the average time was 218 days, ranging from an average of 375 for ordinary proceedings, to 30 days for fast-track criminal proceedings. 67% of the cases ended up with a plea agreement.<sup>69</sup>

## II. Organization of the public prosecution: hierarchical, territorial, specialisation

239. In 2015 the headcount of the Spanish PPO (as approved by Royal Decree 62/2015) was 2.473 Public Prosecutors. RD 255/2019 increased the headcount making at present 2.553 PPs, and currently serving 2.464 PPs (data of 2019).<sup>70</sup> Out of them, 882 males and 1582 females. There are three categories of the PPs, which correspond to those in the judiciary and are: PP of the Supreme Court (*Fiscales del Tribunal Supremo*) (in 2019 there were 26 PPs of the SC), who have the same category as Justices of the Supreme Court; the second level is of Prosecutors, equated with Senior Judges (*Magistrados*) (in 2019 there were 1.890 PPs); and First level Prosecutors (in 2019, 637 PPs), which equals to the first category of Judges (*Jueces*) (art. 34 of the PPL).

240. The rate of PPs in 2018 was 4.92, per 100. 000 inhabitants, and this rate is more or less the same in 2019 (the data are classified by provinces).

241. The PPO is organised hierarchically (as set out in the Constitution) and distributed in territorial units, which are also divided by specialisation criteria. The Chief Prosecutor in a province is subject to the superior, which is the Chief Prosecutor of the Autonomous Region (art. 22.7 PPL), who is integrated in the Board of Prosecutors of the Region. The GPP can give general and particular instructions to any member of the PPO (art. 25 PPL), although the lower PP can refuse to follow such orders if he/she considers they are unlawful or inappropriate (art. 27 of the PPL). In such case, he/she will inform his/her immediate superior.

242. As to the criminal policy, the PPO can set certain priorities, but in the Spanish system there is still a strict adherence to the principle of mandatory prosecution: indications, suspicions, report of a possible crime leads necessarily to the opening of a criminal investigation –unless manifestly ungrounded or it is a minor offence against property with unknown perpetrator–. The public prosecution has no discretionary powers in deciding which cases shall be investigated/prosecuted or not. In that sense, the PPO has no power to define the criminal policy.

### a) Institutional structure

243. The bodies of the Public Prosecutor's Office (arts. 12 ff. PPL) are:

244. The General Public Prosecutor's Office (GPPO, *Fiscalía General del Estado*). The head of the GPPO is the General Public Prosecutor (GPP), who, in accordance with article 124 of the SC, is appointed by the King at the proposal of the government.

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<sup>69</sup> See [https://www.fiscal.es/memorias/memoria2020/FISCALIA\\_SITE/index.html](https://www.fiscal.es/memorias/memoria2020/FISCALIA_SITE/index.html)

<sup>70</sup> Available at [https://www.hacienda.gob.es/CDI/Empleo\\_Publico/Boletin\\_rcp/bol\\_semestral\\_201901\\_completo.pdf](https://www.hacienda.gob.es/CDI/Empleo_Publico/Boletin_rcp/bol_semestral_201901_completo.pdf), p.34



The removal of the GPP shall only occur upon the grounds specified in the law by decision of the Council of Ministers (art. 31 of the PPL). The time of his/her term is the same as the government's.

245. Article 29 of the PPL provides that the General Public Prosecutor must be appointed among Spanish jurists of recognized prestige, with more than fifteen years of experience in the legal profession. The GPP is appointed for a term of four years, which is not renewable, except in case he/she has actually held the position for less than two years.
246. The GPPO is made by following units: Prosecution Inspectorate (*Inspección Fiscal*), with monitoring, inspection and disciplinary functions with regard to prosecutors under its authority; a Technical Secretariat (*Secretaría Técnica*) to give support in the drafting of instructions, and in the elaboration of studies and reports; the Chamber of Senior Prosecutors (*Junta de Fiscales de Sala*).
247. Within the GPPO there is the Support Unit (*Unidad de Apoyo*), whose function is to assist the GPPO in matters of representation and relations with public authorities, communication and relations with the media, management of the office for the citizens, analysis and evaluation of legislative proposals, and others alike. It is also in charge of the analysis and reports regarding the organization and functioning of the PPO in statistics, IT support, staff and human resources, material resources, information, and documentation matters (art. 13 PPL)
248. The Public Prosecutor's Council (PPC, *Consejo Fiscal*). The PPC is the self-governing body of the PPO. It is chaired by the GPP and composed of the Deputy Prosecutor of the Supreme Court, the Chief Prosecutor Inspector, and nine Prosecutors of any category elected for a term of four years by all the Prosecutors in active service. The PPC is competent to elaborate general criteria to ensure a homogeneous action of the Fiscal Ministry, to advise the GPP in all matters submitted to it, to inform proposals for the appointment of various positions, to prepare reports, to decide on disciplinary proceedings, prepare opinions on draft laws or regulations concerning the structure, organisation and functions of the PPO.
249. Other bodies within the PPO are: the Board of Chamber Prosecutors (*Junta de Fiscales de Sala*); the Board of Superior Prosecutors of the Autonomous Communities (*Junta de Fiscales Superiores de las Comunidades Autónomas*); the Prosecutor's Office of the Supreme Court (*Fiscalía del Tribunal Supremo*); the Prosecutor's Office before the Constitutional Court (*Fiscalía ante el Tribunal Constitucional*); the Military Prosecutor's Office (*Fiscalía Jurídico Militar*); the Prosecutor's Office of the Court of Auditors (*Fiscalía del Tribunal de Cuentas*); the Prosecutor's Office of the National Court (*Fiscalía de la Audiencia Nacional*); and the Specialized Prosecutor's Offices (*Fiscalías especiales*).
250. There are specialized public prosecution offices in the following areas, which as a rule integrated within the provincial PPO: 1) International cooperation; 2) Environmental crime; 3) Road safety; 4) Cybercrime; 5) Minors; 6) Accidents at work; 7) Hate offenses and discrimination; 8) Persons with disabilities; 9) Penitentiary; 10) Economic crime; 11) Protection of the rights of the elderly people; 12) Violence against women; 13) Foreigners and migrants; 14) Protection of victims.

### *b) Territorial structure*

251. The PPO is organized throughout the Spanish territory in three levels: 1) Public Prosecutor's Offices of the Autonomous Regions (*Fiscalías de las Comunidades Autónomas*); there are as many territorial prosecutor's offices as there are Autonomous Communities (that, is, 17; the two autonomous cities of Ceuta and Melilla are, to these effects, included in the Region of Andalusia). 2) Provincial Prosecutor's Offices (50); 3) Area Prosecutor's Offices (*Fiscalías de Área*), which exercise their functions in an area smaller than a province, and are only set up if, taking into account the number of cases and the number of courts in the province (art. 18 of the PPL), it is considered necessary.

### **III. Status of the public prosecutors, selection, appointment, evaluation, and promotion**

252. Public Prosecutors are highly respected in Spain, because of their professionalism and the objectivity and high requirements in the selection process. The exam to enter the Judiciary and the Public Prosecution Office is the same and taken at the same time. Candidates who pass the exams must choose between one or the other career. Those who chose the PPO must go through a training course at the Centre for Legal Studies (*Centro de Estudios Jurídicos*). They enjoy tenure and, equally to judges, they are civil servants. Their payment is also the same as the one provided for judges. Retirement age is fixed by the law at the age of 65 (ordinary retirement), although they can also opt to continue working until 70.

253. Promotion takes place in an almost automatic way, based mainly upon seniority, very similar to the system applied for judges. The decision is taken by the Council of Prosecutors. There is not a periodical individual evaluation system and control on the performance is carried out by the immediate superior chief prosecutor, who can also trigger disciplinary proceedings. There is a system of incentives based on performance indicators (art. 52 of the PPL). The prosecution activities are regularly monitored, attending the number of incoming cases, pending cases, length of proceedings, and also a comparative assessment of the productivity of the different territorial public prosecution offices. The acquittal rate in criminal cases is approximately 30%.

### **DISCIPLINARY LIABILITY AND DISCIPLINARY PROCEEDINGS AGAINST PUBLIC PROSECUTORS**

254. The legal framework on the disciplinary system for PPs is regulated in the PPL which refers greatly to the rules envisaged in Organic Law 6/1985, 1st July, on the Judicial Power and some bylaws and instructions.

255. Before listing the disciplinary offences, it is important to point out the strict system of incompatibilities every PP is subject to. Pursuant to Article 57 of the PPL the functions of the PP are incompatible with: 1) holding a position as a judge; 2) develop any jurisdictional task, including arbitration proceedings; 3) any public position upon election or appointment; 4) any job paid with public funds; 5) any job,

except research or lecturing in the legal field, or artistic, scientific or cultural production, previously authorised by the superior PP, in accordance with the general rules on incompatibilities applicable to any public officer and civil servant; 6) acting as lawyer, except for own personal cases; 7) exercising any business activity; 8) position in any corporation, public or private.

256. In addition to these professional incompatibilities, there are also restrictions to work as PP in the same district where the spouse, partner or close relatives are working as PPs (if there is hierarchical dependence between them), as lawyers (in cities with less than 500.000 inhabitants); or has a business that might conflict with the impartial development of the functions of the PP (Article 58 of the PPL).

## I. Disciplinary offences

### **1. What are the grounds for disciplinary liability and what are the disciplinary offences foreseen for public prosecutors in your legal system? Where are they regulated?**

257. Disciplinary liability of PPs is regulated in Articles 61 to 70 of the PPL and are classified into three categories: very serious, serious, and minor disciplinary offences (Article 61 of the PPL). The disciplinary offences are established as “*numerus clausus*” preventing from considering as a ground for disciplinary liability any other kind of behaviour.

258. **Very serious disciplinary offences** are listed in Article 62 PPL:

*1. Knowingly violate the duty of fidelity to the Constitution established in Article 45 of this Law, when such breach is determined in a final judgment.<sup>71</sup>*

*2. Failure to comply with the particular orders and personal requirements addressed in writing in the manner established in this law, when such behaviour has caused damage to the proceeding or a significant disruption in the internal functioning of the Prosecutor's Office.*

*3. Affiliation to political parties or unions, or the performance of jobs or positions at their service.*

*4. Causing repeatedly serious confrontations with the authorities of the district in which the Prosecutor holds the position, for reasons unrelated to the exercise of his functions.*

*5. Actions and omissions within the exercise of its functions that have resulted in a final judgment holding the PP civilly liable due to intent or gross negligence in accordance with Article 60 of this Law.*

*6. The exercise of any of the activities incompatible with the position of Public Prosecutor, established in Article 57 of this Law, except those that may constitute a serious misconduct in accordance with the provisions of Article 63 of the PPL.*

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<sup>71</sup> When taking office every PP takes the oath to serve the Constitution, respect the laws and exercise their functions and duties faithfully and with loyalty to the Crown (Article 45 of the PPL).

7. *Allowing to be appointed for a Prosecutor's Office, when any of the situations of incompatibility or prohibition provided for in Article 58 of this Law apply or, keeping the position in said bodies without informing the General Prosecutor's Office of those circumstances that would trigger the transfer to another PP office, as of Article 39.3 of the PPL.*<sup>72</sup>

8. *Failure to comply with the duty of self-recusal, when aware that a ground for abstaining as foreseen in the law exists.*

9. *Inattention or unjustified and repeated delays in the dispatch of matters or in the exercise of any other function entrusted to it.*

10. *The abandonment of the service or the unjustified and continued absence for seven calendar days or more from the headquarters of the Prosecutor's Office in which s/he holds position.*

11. *Failing to be truthful in applying for permits, authorizations, compatibility statements, allowances, and financial aid.*

12. *The disclosure by the Prosecutor of facts or data known in the exercise of his function or on the occasion of it, when any damage is caused to the proceedings or to any person.*

13. *Abuse of the status of Prosecutor to obtain favourable and unjustified treatment from authorities, officials, or professionals.*

14. *The commission of a serious disciplinary offence in those cases where the same Prosecutor has previously been sanctioned by two other serious disciplinary offences, which are final and have not been cancelled in accordance with Article 69 of this Law.*

15. *Inexcusable ignorance in the fulfilment of his duties.*

16. *The absolute and manifest lack of reasoning in the reports and opinions that require it in accordance with the Guidelines of the General Public Prosecutor's Office.*

259. **Serious disciplinary offences**, pursuant to Article 63 of the PPL are:

1. *Lack of respect for superiors in the hierarchical order, in their presence, in writing that is addressed to them or with publicity.*

2. *Failure to comply with the orders or requirements received in the manner established in this Law.*

3. *The abuse of authority, or serious disregard towards citizens, institutions, judges, prosecutors, secretaries, forensic doctors, judicial officials, lawyers and officers of the judicial police and other staff of the Administration of Justice or who provide services at the PPO.*

4. *Not acting before conducts that entail disciplinary liability of subordinate auxiliary staff, when a serious breach of their duties is known or should be known to them.*

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<sup>72</sup> Article 39 of the PPL provides as a ground for mandatory transfer, the existence of any of the incompatibilities foreseen under Article 58 of the PPL (close relatives in the same province exercising certain professional activities), as described earlier.

5. *Revealing facts or data known to the Prosecutor in the exercise of his/her function, when it does not constitute a very serious offense under Article 62.12 of this Law.*
6. *The unjustified and continued absence for more than three calendar days and less than seven from the offices where the PP serves.*
7. *The unjustified nonappearance to public hearings when the PP has been summoned in the legally established manner, and it does not constitute a very serious offense.*
8. *The unjustified delay in the dispatch of the matters known to the Prosecutor in the exercise of his function if it does not constitute a very serious offense.*
9. *The exercise of any compatible activity without obtaining the required authorization or having obtained it upon untrue allegations.*
10. *The commission of a minor offence in those cases where the same Prosecutor has previously been sanctioned by two other serious disciplinary offences, which are final and have not been cancelled in accordance with this Law.*
11. *Infringing other duties inherent to the position of prosecutor, as established in this Law, when taking into account the intent, its importance for the Administration of Justice and the damage caused to the dignity of the institution, it can be considered as a serious offence.*
12. *Addressing any authority, public officials or corporations, messages expressing approval or disapproval for their actions, invoking the position of prosecutor, or using that condition. In case such messages had been expressed by the Board of Prosecutors, only those members who took part in the voting will be held responsible.*

260. Finally, Article 64 PPL regulates the **minor disciplinary offences**:

1. *Lack of respect for hierarchical superiors when the circumstances that would qualify the conduct as a serious disciplinary offence are not met.*
2. *Inattention or disregard with equals or inferiors in the hierarchical order, with citizens, institutions, judges, prosecutors, secretaries, forensic doctors, judicial officials, lawyers, officers of the judicial police and other staff of the Administration of Justice or who serve at the PP office, when due to the circumstances it does not constitute a serious offence.*
3. *Unjustified or unexplained breach of the legally established deadlines in the dispatch of the matters entrusted to it.*
4. *The unjustified and continued absence of 1 to 3 calendar days from the office where the PP serves.*
5. *Making a simple recommendation related to any case or act which is pending before the courts.*
6. *Not following the orders, instructions or verbal observations received from their superiors, unless it constitutes a serious or very serious offence, in accordance with the provisions of the two previous articles.*
7. *Disregard towards citizens, institutions, judges, for not using the co-official language when requested to do so, and the PP accredited having adequate and sufficient knowledge of such language when applying to the position.*

**2. Is the acting in cases of conflicts of interest contemplated as a specific disciplinary offence?**

261. Yes, as described above, the Spanish PPL provides for a long list of incompatibilities for PPs (arts. 57 and 58 of the PPL). The strict rules on incompatibilities are aimed at preventing any conflicts of interest. In addition, in case of concurring any other type of conflict of interest or lack of objective impartiality, the PP shall file his/her self-recusal. Performing any of these functions, professions, or activities which are incompatible with the position of the PP, entails a disciplinary offence, precisely a very serious disciplinary offence under Article 62 paras. 6 and 7 of the PPL. Under Article 62.8 of the PPL not filing the self-recusal when there is a ground for it and the ground is known to the PP, is also a very serious disciplinary offence. Further, even the exercise of a compatible activity, when the required permit is not been requested, constitutes a serious offence under Article 63.9 and breach of other duties of the PP, also under 63.11 of the PPL.

**3. Are the conducts that entail disciplinary liability sufficiently defined? Low performance or undue delays are considered as a disciplinary offence?**

262. The Spanish PPL has strived to describe in a very detailed way which are those conducts that can lead to disciplinary liability of a PP. This is the reason why Articles 62, 63 and 64 of the PPL contain such long lists of disciplinary offences, to provide legal certainty on the offences. The general criminal law principles apply to any administrative sanction, and therefore the principle of legality (*nullum crimen sine lege certa*), has to be respected in the field of the administrative sanctioning system. In this context it has to be recalled that disciplinary sanctions fall within the category of punitive administrative measures, and thus, fall under the category of “criminal charge” for the aims of Article 6.1 of the ECHR. The so-called Engel criteria and the safeguards linked to any punitive administrative sanctioning system, is to be applied here.

263. Low performance *per se*, does not lead automatically to disciplinary liability. However, as mentioned earlier, under Article 62.9 of the PPL “*unjustified and repeated delays in the dispatch of matters or in the exercise of any other function entrusted*” to the PP, can be a very serious disciplinary offence. And under Article 63.8 of the PPL “*The unjustified delay in the dispatch of the matters known to the Prosecutor in the exercise of his function, if it does not constitute a very serious offense*”, makes a serious disciplinary offence. And finally, a minor offence under Article 64.3 of the PPL.

264. It goes without saying that only “unjustified” delays would cause disciplinary liability. If delays occur because of excessive workload, the inspectorate will act in order to analyse what are the grounds and reasons for such delays and provide solutions and additional staff to handle with the excessive workload. Moreover, in order to prevent that any PP could be put under an excessive workload, that would necessarily lead to these delays or a potential burnout of the individual PP, and thus undermine the safeguards of independence and objectivity of the PPs actions, the rules on distribution of cases are public and transparent and agreed within each territorial office. Equal distribution of caseload is ensured, precisely to avoid

personal conflicts as well as to prevent excessive workload upon single members of the PP. The criteria of distribution of cases are also public and based on objective criteria.

265. In sum, the answer to the present question is **yes**. The low performance of a PP, when it is completely unjustified, repeated and not explained and leads to delays, is a very serious or a serious disciplinary offence.

**4. Is there any disciplinary offence regulated for “breach of oath”, for “unethical behaviour” or for improper private conduct? How do you deal with ethical issues that do not amount to disciplinary offences?**

266. No, the Spanish PPL does not contemplate a breach of oath or a breach of the code of ethics as a disciplinary offence. Ethics relates to a desideratum of professional excellence. Codes of ethics describe the most desirable values of professional performance: integrity, independence, prudence, reserve, diligence, politeness in the relationships with colleagues, judges, lawyers and citizens, permanent openness to training and professional improvement. The system must be draught with the scope of promoting and encouraging this horizon of excellence and equally discouraging ethical breaches. Certainly, specific serious breaches could be defined as disciplinary infringements, but breaches subject to disciplinary sanction, as explained earlier, have to be clearly identified and strictly defined by the law.

267. Violation of the Code of Ethics is not contemplated as such as a disciplinary infringement. As said, there is no doubt that “serious violations of the Code of Ethics” can and must be defined as disciplinary infringements. However, violation of certain professional duties and standards is considered a disciplinary offence under Article 63.11 of the PPL, which resembles to a breach of ethical behaviour. This disciplinary offence seems to be too broadly drafted, although in practice it has not led to problematic situations or abuses, as it has been always interpreted in a very restrictive way.

268. Nevertheless, for granting legal certainty, a so broad legal expression defining “the violation of the duties inherent to the PPs position” as disciplinary infringement should not be seen as appropriate: any conduct subject to sanction, including those more closely related to the code of ethics, have to be clearly identified and strictly defined by the law.

**5. In the case that PPs in your legal system have to make a declaration of assets for taking office, is it a disciplinary offence not presenting such declaration, or presenting incomplete or erroneous data?**

269. In Spain neither the judges nor the public prosecutors have to make a declaration of assets for taking office or while serving in their positions. Any income which has its origins from other professional sources that is not related to the exercise of the functions of the PPs, is prohibited under the rules of incompatibilities. And any illegal enrichment by any PP, as any other civil servant and ordinary citizens, would be detected by the Tax Agency, and lead to a tax inspection. As long as the Tax Agency works efficiently and in a very objective way, any illegal assets would be

detected through this way. Fortunately, so far, the institution of the public prosecutor has enjoyed a high respect in Spain, and problems related to corruption are almost non-existent in the Spanish prosecution system, as well as in the judiciary.

270. Providing erroneous data on incompatibilities or even on compatible activities outside the PPO, entails a disciplinary offence under Article 63.9 of the PPL.

## **II. Sanctions**

### **6. What are the sanctions foreseen for the disciplinary offences of PPs? Are they gradual and proportional?**

271. Sanctions that can be imposed on prosecutors for offences committed in the exercise of their duties are (Article 66 of the PPL):

- a) Warning.*
- b) A fine of up to 3.000 Euros.*
- c) Forced transfer to another PP office unit, at least one hundred km away from the one where he/she was serving.*
- d) Suspension up to three years.*
- e) Dismissal.*

272. As to additional consequences of these sanctions, Article 66 of the PPL states that the prosecutor sanctioned with forced transfer will not be able to be promoted within a period of 1 to 3 years. And a Chief Prosecutor sanctioned with a serious or a very serious disciplinary offence may be removed from the administrative position, at the proposal of the GPP, after hearing at the Council of Prosecutors.

273. According to Article 66.2 of the PPL minor offences may only be punished with a warning or a fine of up to 300 euros or both; serious offences, with a fine of 300 euros to 3.000 euros; and the very serious ones, with suspension, forced transfer or dismissal.

274. Specifically, Article 66.3 of the PPL refers to the principle of proportionality of the sanctions, and states that when imposing any sanction, “the principle of proportionality and adequate severity of the sanction will be respected; sanctions shall be aggravated or attenuated according to the circumstances of the commission of the act and those of the alleged offender.

### **7. Can you provide statistics on the number/type of sanctions imposed and the grounds that led to the sanction?**

275. In the Annual Report of the Spanish Public Prosecution Office, published in September 2020 (analysing data of 2019), the following statistics on disciplinary proceedings against PPs is reflected:

276. Preliminary information upon complaints for possible malfunction of the PPO or disciplinary offences was requested by the Inspectorate in 40 cases, and upon this



information 9 preliminary investigations were opened, which led to opening 6 disciplinary proceedings against PPs. The grounds for these disciplinary proceedings were: disrespectful behaviour; very serious neglect of duties; unjustified delay in the handling of cases; abuse of the status of prosecutor; not applying for self-recusal when there was a personal interest in the outcome of the proceedings; inexcusable ignorance in the performance of duties, and slight disregard to the citizens. Very serious or serious offences were sanctioned with suspension or a pecuniary fine (the exact time of the suspension or amount of the fine imposed are not reflected in the Annual report, but as stated earlier, they range from 300 to 3.000 euros).

#### **8. Is there a higher sanction in case of recidivism or repeated infringements?**

277. Yes, as mentioned above when describing the different disciplinary offences provided in the PPL. But rather than establishing a higher sanction in case of recidivism, the law classifies such behaviour as a more serious disciplinary offence (and consequently also a higher sanction can be imposed). This is foreseen under the following rules:

*Article 62.14 of the PPL: “The commission of a serious disciplinary offence in those cases where the same Prosecutor has previously been sanctioned by two other serious disciplinary offences, which are final and have not been cancelled in accordance with Article 69 of this Law.”*

and

*Article 63.10 of the PPL: “The commission of a minor offence in those cases where the same Prosecutor has previously been sanctioned by two other serious disciplinary offences, which are final and have not been cancelled in accordance with this Law.”*

#### **9. Is the imposition of a sanction registered in the personal record of the relevant PP? In such case, for how long? What are the consequences of having the register of the sanction in such record not cancelled?**

278. Yes, once they are final, the sanctions are registered in the personal record of any civil servant, and also in the personal record of the PP, as specifically regulated under Article 69 of the PPL. Responsible for the registering of the sanction will be the same authority that imposed it.

279. The sanctions registered will be cancelled once the penalty has been served after six months (minor offences), two years (serious offences) or four years (very serious offences), under the condition that during such period the sanctioned PP does not commit another disciplinary offence. Penalties imposed for minor offences will be cancelled automatically, while the rest only upon request of the relevant party after hearing the PP’s Council. Cancellation will make the sanction/offence disappear for all purposes, including for recidivism or reiteration.

280. Pursuant to Article 66.4 of the PPL the statute of limitations for the imposition of sanctions are: 2 years for very serious offences; 1 year for serious offences; and 6 months for minor offences.

281. The time limit for the disciplinary offences pursuant to Article 65.1 of the PPL are as follows: very serious offences shall prescribe after two years, serious, after 1 year, and minor offences, within 6 months. The statute of limitations will start to run the date the offence was committed. However, in the case provided for in article 62.5 of the PPL, the statute of limitations will start from the date of the final judgment establishing the civil liability of the prosecutor. It will be interrupted on the date of notification of the decision to initiate disciplinary proceedings or, where appropriate, on the date the prosecutor is informed about the disciplinary proceedings.

### **III. DISCIPLINARY BODY AND IV. DISCIPLINARY PROCEEDINGS**

#### **10. What are the bodies in charge of disciplinary proceedings against PPs? Are there different bodies depending on the gravity of the infringement?**

282. Depending on the type of the offence and sanction, the competent body for imposing the sanction differs. As provided under Article 67 PPL these are:

1. The respective Chief Prosecutor for issuing a warning.
2. For the sanction of suspension, the GPP.
3. Dismissal, only by the Minister of Justice, at the proposal of the GPP, upon the positive report by the PPs Council.

Decisions of the Chief prosecutor can be appealed to the GPP, those by the GPP to the Minister of Justice, and decisions of the Minister of Justice can be challenged before the administrative courts.

#### **11. Who appoints the relevant disciplinary body and what is their composition? What are the requirements to be member of a disciplinary body? Is the disciplinary body independent? 12. Does the disciplinary body have other competences apart from carrying out the disciplinary proceedings? What are the capacities and staff of the disciplinary bodies?**

283. As seen earlier, the body competent for taking the decision on imposing a sanction is not a special body, thus the issues addressed under the present questions will explain which are the bodies in charge of dealing with the disciplinary proceedings. In the case of a warning, the sanction can be imposed without previous disciplinary proceedings by the relevant territorial chief prosecutor. The only requirement is that the chief prosecutor needs to hear previously the PP to be warned. For all other sanctions, the legally disciplinary proceedings need to be carried out.

284. When a complaint against a PP is lodged either by a citizen or ex officio (any person can file a complaint), the chief prosecutor has to start preliminary investigation to find out whether a disciplinary offence might have been committed. In case of a minor offence, as already explained, the chief prosecutor will hear the relevant PP and upon listening to his/her explanation, issue the warning or not.

285. If the complaint filed against a PP could be seen as a serious or very serious disciplinary offence, the chief prosecutor has to submit the file with the preliminary

information to the Prosecutor's Inspectorate, the body which is competent for the disciplinary proceedings. The Inspectorate is a unit within the GPPO (article 13.1 of the PPL), and is directed by the Chief Inspector, who acts by delegation of the GPP. He/she is assisted by a deputy and a number of inspectors (who are also public prosecutors), as determined by the law (at present 8 inspectors). Chief Inspector is appointed for a period of time of 5 years, appointment which is renewable for another 5 years.

286. If Prosecutor's Inspectorate after having carried out the necessary investigative acts decides that there is a possible disciplinary offence, it has to propose to the General Prosecutor to open a disciplinary proceeding.
287. In case of complaints directly lodged before the Prosecutor's Inspectorate, preliminary investigation is also needed. The outcome of this investigation can be a decision of dismissal, of sending the file to the respective chief prosecutor -only if it could be sanctioned with a warning- or sending it to the GPP with the proposal for opening a formal disciplinary proceeding.
288. Disciplinary proceedings against PPs are not regulated in the PPL, but the PPL (Additional Disposition 1 PPL) refers to the rules applicable to judges as contained in the Law on the Judiciary (Organic Law 6/1985 on the Judicial Power (LOPJ), Articles 422, 423 and 425 LOPJ).
289. The Disciplinary unit of the Inspectorate carries out the preliminary investigation on the facts alleged in the complaints and makes a preliminary assessment on those facts and, if it shows that a serious or very serious disciplinary offence might have been committed, they will file the request for formal opening to the GPP. The Inspectorate can interrogate the PP against whom a complaint has been filed.
290. Every PP is obliged to cooperate with the investigation of the Inspectorate,<sup>73</sup> and the Inspectorate can order “all necessary acts and evidence that are needed for the establishment of the facts” (Article 424 LOPJ) can be carried out. In practice, the Inspectorate interrogates the PP against whom the complaint has been filed, it can interrogate witnesses, request statistics, request more information from the chief PP, request the indictments or reports drafted by the PP, and request information from other public or private authorities. If after carrying out this preliminary inquiry it is confirmed that the facts do not constitute a disciplinary offence, the Inspectorate will close the proceedings.
291. Disciplinary proceedings shall respect all procedural safeguards of the “investigated or accused” and have to comply with the principle of impartiality and the due process safeguards, as required in the landmark judgment of the ECtHR in the *Volkov* case (although addressing a case of a disciplinary proceeding against a judge).<sup>74</sup>

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<sup>73</sup> Article 607.4 LOPJ: “Judges and Magistrates are obliged to cooperate with the Promoter for Disciplinary Action. The Promoter has powers to request the presence of the Judge or Magistrate against whom the case has been brought.” This rule is subsidiarily applicable to the PPs, as of Additional Disposition 1 of the PPL.

<sup>74</sup> See *Oleksandr Volkov v. Ukraine*, of 9 January 2013, Appl. no. 21722/11.

292. This means that the PPs under investigation are informed about every stage of the proceedings, and if they are members of a professional association, this association is enabled to take part in the proceedings as a sort of observer to ensure the fairness of the proceedings. The PP has the right to be assisted by a lawyer, to an adversarial procedure, to be heard, to produce evidence and to appeal the decision taken.
293. The proceedings are the same as for judges as provided in the Law on the Judiciary (LOPJ). According to the applicable rules, the Inspectorate shall press written charges and notify the relevant “indicted” PP.
294. Once the PP has received the indictment, he/she can file an answer within 8 days, making allegations, presenting evidence and/or requesting evidence to be gathered (Article 425 of the LOPJ). After hearing the public prosecutor, the Inspectorate will make a proposal on the applicable sanction to the GPP or the Ministry of Justice (depending on the type of sanction requested). Within 8 days, the indicted PP can make allegations against the proposed decision. Once these 8 days have lapsed, the whole file is sent to the deciding body.

**13. Is there an Inspection service for PPs in your country? In such a case, what is the relationship between such inspection service and the disciplinary body? Do they share competences?**

295. As has been explained, the Inspectorate is the body in charge of the monitoring of the PP service, controlling the functioning of the territorial offices, establishing the needs to carry out the correct functioning of the tasks of the PP offices, and also acts as the body responsible for preliminary investigations on disciplinary complaints, and also for organizing the disciplinary proceedings. The decision to open formal disciplinary proceedings lies with the GPP, as the Inspectorate can only make a proposal. Once the disciplinary proceedings have been carried out, the Inspectorate only makes a proposal for sanction to the relevant adjudicating body, which is the GPP or the Ministry of Justice.
296. As can be seen, while the procedural rules are very similar as the ones provided for judges, the decisions on disciplinary proceedings are strongly controlled by the GPP, who has the “key” to decide if disciplinary proceedings are to be opened, who appoints the Chief Inspector and who is also competent to impose the sanctions (save for those who are competence of the Ministry of Justice).

**14. Who is entitled to file a disciplinary complaint against a PP? What are the means for filing it (written, online, signature of lawyer, statute of limitations)? What kind of requirements are to be met (formal and substantive)?**

297. The Spanish “Administration of Justice” has established the so-called “*Unit for support of the citizen*” (*Unidad de atención ciudadana*), which receives all the complaints regarding the functioning of the justice system and the courts. The aim of this unit is to seek improvement of the public service and special attention has been given to make it very accessible to every citizen. Citizens can file complaints on-line, by registering a complaint at the General Council of the Judiciary, by the GPP or directly to the Inspectorate of the PP. There is a specific complain form, which is

accessible on-line, but the use of such forms is not mandatory. In practice the most frequently used way is the on-line complaint.

298. Upon receipt of a complaint, the unit shall acknowledge receipt within 48 hours (if the complainant is identified). Time to respond to the complaint is a maximum of two months. The main goal is to address problems detected by citizens and to work in creating trust in the justice system. Complaints related to the content of the judicial decisions are rejected. Those that refer to the conduct of a judge or a PP, are forwarded to the relevant disciplinary body, which in case of the PPs it is within the Inspectorate.
299. The unit for support of the citizens acts as the first entry for the complaints, and does the essential classification of the complaints, sending those that relate to judges to the Disciplinary Commission of the GCJ, and the rest to the relevant inspection or other disciplinary bodies if the complaints are directed towards non-judicial staff within courts or PP offices. The Unit for citizen's support is directed by a judge, who is appointed by the Plenary of the General Council of the Judiciary after open competition among judges. This unit receives annually around 10.000 complaints (all of them enter into the electronic data base). Anonymous complaints if not manifestly ill-founded are also sent to the relevant body, to decide if further preliminary investigation should be carried out or not.<sup>75</sup>

**15. Are anonymous/confidential reporting of misconducts admitted in your system? Can a PP report about misconducts of their superior PP?**

300. This has been answered above. Yes. Yes.

**20. How are criminal and disciplinary proceedings coordinated with criminal and/or administrative proceedings? Are the criminal investigations suspending the disciplinary proceedings and what happens in cases of dismissal of criminal proceedings and, respectively, in cases of conviction?**

301. If there is a suspicion of a criminal offence committed by a prosecutor either in the course of his/her official duties, or in private, this will lead to the opening of a criminal investigation, as in Spain the principle on mandatory prosecution for any criminal offence still applies. The prosecution and trial of any judicial officer, including thus PPs is conducted according to the Code for Criminal Procedure and is the same as for all citizens. There is only a specific rule on jurisdiction: the competence for trying criminal cases against judges and public prosecutors committed in the exercise of their position as judge or prosecutor, is attributed to a superior court (depending on the category of the relevant public prosecutor, instead of a First Instance Criminal Court, the case will be decided by the Regional Superior Court or the Supreme Court, arts. 57 and 73.2 LOPJ)
302. The interaction between disciplinary proceedings and criminal proceedings for the same facts risks violating the principle of *ne bis in idem*. In order to avoid it, the

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<sup>75</sup> We have not been able to find out how many of these 10.000 complaints refer to judges, to PPs or to administrative staff.

Spanish system provides that the opening of criminal proceedings causes the stay of disciplinary proceedings until the final decision about criminal liability is rendered by the criminal court. As a rule, both proceedings will not run in parallel, however the disciplinary liability will not be time barred while the criminal procedure is being carried out.

303. The outcome of the criminal proceedings must be necessarily taken into account in the disciplinary field, if not exclude it.
304. There are a number of conducts/facts that can entail both criminal and disciplinary liability for PPs can be held criminally liable for offences committed in the exercise of their functions, as for example, conducts under Article 62.1 PPL (violation of loyalty to the Constitution, for example, presenting false witnesses, art. 461 CC, or for example, causing the suspension of a hearing willingly, art. 463 CC), Article 62.5 PPL (gross negligence leading to an unjust judicial decision causing damages), Article 62.12 PPL and 63.5 PPL (disclosure of confidential information, art. 442 CC), or Article 63.3 PPL (abuse of authority). In particular, knowingly not prosecuting a crime when obliged to do it (Article 408 CC, although this provision theoretically could be applied to PPs, in practice it has only led to judgments against law enforcement agents) constitutes a criminal offence, under the Spanish Criminal Code.
305. For finding disciplinary liability, intent does not need to be proved in any case, whilst for the criminal offence only the intentional wrongdoing will constitute a criminal offence. In any event, when a criminal offence for facts committed in the exercise of their duties is established, there are also elements for the disciplinary liability. The other way round not.
306. Pending a criminal procedure for any of the mentioned criminal offences, the disciplinary proceedings will be halted, although they may advance, but no decision will be taken until the criminal procedure is concluded. The facts established as proofed in the criminal procedure, are binding for the subsequent disciplinary proceedings, if these are not excluded. Disciplinary liability can be imposed after a criminal sanction only upon another legal ground (Article 415 LOPJ).
307. There are no statistics on the number of criminal judgments where a PP has been found guilty of a criminal offence committed in the exercise of his/her duties.

## **21. Are there salient differences in the disciplinary proceedings of judges and public prosecutors?**

308. Apart from the diverse regulation of the grounds that constitute a disciplinary offence, that are justified on the stricter protection of the independence of judges (e.g. interfering in the independence of another judge, by recommending or advising to render a certain judgment), or directly linked to the activity of the judges (e.g. motivation of the judgments, using inappropriate expressions in their rulings), most of the disciplinary offences for PPs are very similar to those of the judges (delays, neglect conduct of the cases, unjustified absence from office, disrespectful conduct towards staff or any other citizen, etc.).

309. In practice, the number of disciplinary proceedings against PPs and disciplinary sanctions is lower than compared to those against judges, which might be explained that the PPs act in team and not individually, so they are always under the supervision of the other PPs and the Chief PP of their office. But there is no precise information on this.
310. One of the most salient differences could be found in the body deciding on the disciplinary proceedings and the disciplinary offence: whilst the decision to open a disciplinary procedure against a judge, lies within the office of the promoter of the disciplinary proceedings (unit appointed by the General Council of the Judiciary), the opening of disciplinary proceedings against a PP lies at the end with the GPP. The same can be affirmed with regard to the sanction: while in the proceedings against a judge, it is the General Council of the Judiciary the body who decides on the imposition of a disciplinary sanction (except warnings), upon the proposal of the disciplinary commission, the sanction against a PP will be proposed by the Inspectorate (closely linked to the GPP), and the decision on the sanction will be taken by the GPP or, in case of dismissal, by the Ministry of Justice. As can be seen, the disciplinary sanctioning system of the PPs has much more features of a hierarchical structure, where the GPP is accorded with concentrated powers. The separation from the executive is not strict, as the Ministry of Justice is competent for dismissals (upon proposal of the Inspectorate, not upon its own decision). In practice this last point has not caused problems, as serious infringements committed by PPs in Spain, are extremely rare.

## General part

### a. Introduction

311. There are three different criminal justice systems within the United Kingdom, each served by separate public prosecuting authorities.
312. In England & Wales there are two principal public prosecuting agencies, namely the Crown Prosecution Service (CPS) and the Serious Fraud Office (SFO). There are many smaller prosecuting agencies e.g. Her Majesty's Revenue & Customs, Health & Safety Executive, the Service Prosecuting Authority etc.
313. Scotland's prosecuting agency is the Crown Office and Procurator Fiscal Service of Scotland (COPFS), which dates back to the 15th century.
314. Northern Ireland has the Public Prosecution Service Northern Ireland (PPSNI).
315. The CPS and SFO are non-ministerial Directorates and are under the superintendence of the Law Officers, namely the Attorney-General and Solicitor-General, who are appointed by the governing political party and accountable to Parliament. The Law Officers are responsible for safeguarding the independence of the prosecutors.
316. The CPS, headed by the Director of Public Prosecutions, was established by statute in 1985 and prosecutes all criminal cases in England and Wales that are investigated by the police and other agencies, other than those that fall within the competence of the SFO. Crown Prosecutors give advice to the investigating authorities, authorise charges and prepare and prosecute criminal cases in England & Wales. The CPS is divided into a Headquarters with the specialist units, and 14 Areas each headed by a Chief Crown Prosecutor. Prosecutors are managed by more senior prosecutors, with those line managers at the higher levels not undertaking case work or advocacy but undertaking management responsibilities full time.
317. The SFO was established by statute in 1987, and it investigates and prosecutes the most serious and complex cases of fraud as well as offences of bribery, corruption, and corporate overseas' tax evasion. It is unusual in that unlike the other prosecuting agencies, the SFO investigates and prosecutes its own cases.
318. The COPFS is a Ministerial Department of the Scottish Executive, headed by the Lord Advocate, who has responsibility for its work, but who is also the legal adviser to the Scottish government; this dual role has been criticised as there is no separation of the prosecutorial and ministerial roles. The COPFS advises and prosecutes criminal cases, directs the investigations into all sudden, accidental, suspicious, or unexplained deaths and allegations of misconduct against the police.
319. The Public Prosecution Service for Northern Ireland is a Department of the Northern Ireland Executive. It was established by statute in 2002. The Director of

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<sup>76</sup> Prepared by Ian Welch.



Public Prosecutions for Northern Ireland is its head, who is appointed by the Attorney-General for Northern Ireland (the legal adviser to the Executive). Its function is to advise the investigating agencies, authorise the charging of defendants and to review, prepare and prosecute criminal cases.

**b. Status, selection, appointment, evaluation, and promotion:**

- 320. All prosecutors are independent civil servants appointed through open selection and Interview. They are independent of both the Executive and the Judiciary.
- 321. Selection, appointment, and promotion is by application to advertised posts, where the applicant has to satisfy the competencies and criteria required of the particular post applied for.
- 322. A prosecutor's performance is evaluated annually by way of a formal appraisal report conducted by the line manager. During the appraisal, the prosecutor's performance over the preceding year is examined against agreed objectives.

**2. Criminal policy and reform**

- 323. Each of the prosecuting agencies has its own Policy Unit and develops its own policies. The head of the policy unit would discuss a new policy with the head of the prosecuting agency, who is responsible for ensuring that their policies and guidance are consistent with, and give effect to, government policies. They also issue guidance as regards the conduct of casework.
- 324. The prosecuting agencies have an in-put into Government policy in relation to legislation and criminal justice reforms, and prosecuting agencies will be asked for their opinion on proposed reforms.
- 325. No current reforms of the prosecuting systems are being undertaken.

**3. Statistical information**

- 326. The following statistics have been obtained from the Annual reports of the agencies and from open source material. Total number of prosecutors: as at January 2020, there were 2,200 prosecutors employed by the CPS, 522 prosecutors employed by COPFS and 130 employed by the PPSNI. The SFO has a total of c. 400 employees consisting of investigators, accountants, case workers and case managers, many of whom are lawyers.
- 327. Distribution per court: Prosecutors covering general crime cases are assigned to geographical areas, with numbers varying according to the workload. They usually cover more than one court. For example, the CPS has 14 geographical areas, and prosecutors in advocacy units within each of those areas would be expected to prosecute in several courts within their area.
- 328. All of the prosecuting agencies in the United Kingdom have specialist units (for example specialist fraud, organised crime etc) that either cover regions or the whole

of their part of the United Kingdom, and their cases would be prosecuted at the court nearest to where the crimes took place, or, in the case of terrorist cases, at specialist court centres.

329. Ratio of prosecutors to the population: Based upon the latest available population statistics, the ratio of prosecutors to population is approximately 1:30,000 in England & Wales, 1:10,000 in Scotland and 1:14,000 in Northern Ireland.
330. Number of cases prosecuted: Approximately 500,000 cases are prosecuted annually in England & Wales, 80,000 in Scotland and 40,000 in Northern Ireland.

## **I. Disciplinary liability and disciplinary proceedings against public prosecutors**

331. To simplify the submission, only the Crown Prosecution Service's disciplinary process will be analysed. The Public Prosecution Service of Northern Ireland and the Crown Office Procurator Fiscal Service of Scotland have similar disciplinary policies and their prosecutors are also subject to the Civil Service Code.

### **Disciplinary offences**

#### **1. What are the grounds for disciplinary liability and what are the disciplinary offences foreseen for public prosecutors in your legal system? Where are they regulated?**

332. Conviction for a criminal offence, significant loss of public money or property, being under the influence of drugs or alcohol whilst on duty, conduct liable to bring the CPS into disrepute, unauthorised disclosure of information, poor timekeeping, unauthorised absence, bullying, harassment, discrimination, offensive behaviour, misuse of the internet, breaching confidentiality, failure to follow the reasonable instruction of a manager, making a vexatious or malicious complaint and professional negligence are examples of misconduct that can trigger disciplinary action.
333. The Crown Prosecution Service's Code of Conduct<sup>77</sup> incorporates the principles of the Civil Service Code<sup>78</sup> and sets out the standards expected from all civil servants. It requires a prosecutor to behave with integrity, honesty, to be objective and to be impartial (including political impartiality). Failure to comply with these standards can result in disciplinary action.
334. The Crown Prosecution Service Disciplinary Policy<sup>79</sup> provides the framework and sets out the procedures to be used when a prosecutor breaches the Code of Conduct. It lists examples of behaviours that amount to misconduct and gross misconduct.
335. As qualified prosecutors are lawyers (solicitors or barristers), they are additionally subject to their professional codes of conduct and ethics. A breach of these codes can

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<sup>77</sup> <https://www.cps.gov.uk/publication/cps-code-conduct>.

<sup>78</sup> <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>.

<sup>79</sup> [https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/annex18\\_disciplinary\\_policy.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/annex18_disciplinary_policy.pdf).

result in regulatory action by the body supervising the profession, which could result in being struck off the professional register and no longer able to practice as a lawyer.

336. Prosecutors are also subject to the criminal law like any other citizen.

**2. Is the acting in cases of conflicts of interest contemplated as a specific disciplinary offence?**

337. This is not a specific disciplinary offence, but such conduct could breach the prosecutor's Code of Conduct by bringing the CPS into disrepute and it would also be a breach of the prosecutor's professional code of conduct. A conflict of interest may arise from other misconduct such as misuse of the internet, breaching confidentiality etc.

**3. Are the conducts that entail disciplinary liability sufficiently defined? Are low performance or undue delays considered disciplinary offences?**

338. The Disciplinary Policy provides examples of minor and serious misconduct and emphasises that these examples are not exclusive or exhaustive. Nevertheless, when read with the Crown Prosecution Service's Code of Conduct, the criminal law, and the professional codes of conduct, it provides a comprehensive definition of conduct that could result in disciplinary action.

339. Poor performance is addressed through the appraisal system and performance management, but it could also lead to disciplinary procedure. Causing undue delay in progressing cases could also lead to such procedure, as undoubtedly a line manager would have instructed the prosecutor to expedite matters, and a failure to do so would amount to a failure to follow the reasonable instruction of the line manager.

**4. Is there any disciplinary offence regulated for "breach of oath", for "unethical behaviour" or for improper private conduct? How do you deal with ethical issues that do not amount to disciplinary offences?**

340. A prosecutor in England & Wales does not take an oath upon appointment, but unethical behaviour or improper private conduct could lead to disciplinary action, where such actions bring the CPS into disrepute. E.g. misuse of the internet, or a relationship with a witness or a criminal would result in disciplinary action (See Question 1 above).

341. Ethical issues that do not amount to a disciplinary offence would be raised and dealt with informally with line management.

**5. In the case that prosecutors in your legal system have to make a declaration of assets for taking office, is it a disciplinary offence not presenting such declaration, or presenting incomplete or erroneous data?**

342. Prosecutors do not have to submit a declaration of assets upon appointment. Prosecutors who deal with sensitive cases must undergo security clearance, which would include an investigation into their financial affairs.

### **Sanctions**

#### **6. What are the sanctions foreseen for the disciplinary offences of PPs? Are they gradual and proportional?**

343. It is possible for informal action to be taken outside of the disciplinary process. After an investigation, the following is the range of potential outcomes from a disciplinary investigation: no warning, written warning, final written warning, action short of dismissal (demotion, which would involve a reduction in salary, a ban on promotion for up to 3 years), dismissal. A prosecutor will not be dismissed for a first offence, unless the conduct amounts to gross misconduct.
344. Where a prosecutor has been charged with a criminal offence, an internal investigation and disciplinary action can take place before, or at the conclusion of the criminal proceedings.
345. The sanctions are gradual and proportionate, but where there has been gross misconduct (defined as conduct that is so serious that the prosecutor/CPS relationship is destroyed) then a dismissal without notice and without pay in lieu of notice, even for a first breach, will be the sanction.

#### **7. Can you provide statistics on the number/type of sanctions imposed and the grounds that led to the sanction?**

346. These statistics are not available.

#### **8. Is there a higher sanction in case of recidivism or repeated infringements?**

347. Where a written warning has been given for a disciplinary breach and a prosecutor commits a further breach, then a final written warning could be given, dependent upon the seriousness of the misconduct.
348. Where the second breach is a minor one, a further written warning can be given, but where a final written warning is still valid, a further breach of the Disciplinary Code could lead to dismissal without notice.
349. Where the sanction is action short of dismissal, the letter informing the prosecutor of the reasons for the action will state that this is a final warning and that further misconduct whilst the sanction is valid will result in dismissal.

#### **9. Is the imposition of a sanction registered in the personal record of the relevant PP? In such case, for how long? What are the consequences of having the register of the sanction in such record not cancelled?**

350. When a prosecutor receives a written warning or final written warning, a copy of the warning is placed on the prosecutor's personal file and is valid for 12 months.
351. It is a line manager's responsibility to inform the prosecutor when the formal warning has expired and instruct the Human Resources' Directorate to remove the warning from the file. The Human Resources' Directorate will inform the prosecutor when the warning has been expunged from the record.
352. Where the sanction is action short of dismissal, there can be a permanent downgrading of rank or a ban on promotion for a period of up to 3 years. The disciplinary finding will be recorded on the prosecutor's personal file.
353. Where the sanction has not been cancelled from the record upon its expiry, the prosecutor can raise a grievance with the management, or seek action under the Data Protection Act to ensure the removal of the finding from the record.

### **Disciplinary body**

#### **10. What are the bodies in charge of disciplinary proceedings against PPs? Are there different bodies depending upon the gravity of the infringement?**

354. The prosecuting agencies undertake the disciplinary procedures internally. The line manager of the prosecutor subject to the disciplinary complaint is the person responsible for carrying out an initial inquiry and to gather facts.
355. Where the line manager decides that there has been a minor breach of conduct, the matter can be resolved informally by a discussion with the prosecutor and/or a reminder in writing of the conduct expected of a prosecutor. The letter should also state that a failure to act properly could result in formal action.
356. Should the line manager decide that a full investigation is required, then, in consultation with the Human Resources Directorate, another manager, the Investigating Officer, will be appointed to carry out the investigation.
357. A prosecutor of a higher rank than that of the prosecutor subject of the complaint is required to take disciplinary action.
358. Where an investigation establishes that the prosecutor may have committed a criminal offence, the matter will be referred to the Chief Crown Prosecutor of the Area, who will report the matter to the police.

#### **11. Who appoints the relevant disciplinary body and what is their composition? What are the requirements to be member of a disciplinary body? Is the disciplinary body independent?**

359. The line manager of the prosecutor is the person responsible for initiating the process, which, as stated above, may be resolved by an informal discussion. Where, after an initial fact gathering inquiry, the line manager decides that formal action is

necessary, then, in consultation with the Human Resources Directorate, the manager will appoint another experienced manager as the Investigating Officer. This manager will be someone, who is not involved in the case, who has no conflict of interest in the matter and who is sufficiently experienced to carry out the full investigation.

360. The Investigating Officer will submit a report to the line manager of the prosecutor concerned, or, if that manager is inexperienced, to a senior manager. The report will contain a summary of the findings and, where there is a case to answer, will detail what allegations should be put to the prosecutor. The line manager, or a more senior manager, will then be responsible for conducting the disciplinary hearing.

361. There is a right of appeal. The appeal is conducted by a different more senior manager, unconnected to the case, who will review the investigation. This senior manager will consider whether there were any procedural flaws and whether they affected the merits of the case, whether the decision was perverse and not supported by the evidence and can consider new information that has come to light since the original Disciplinary Hearing.

362. Where the sanction imposed is dismissal, there is a further right of appeal to the Civil Service Appeal Board.

**12. Does the disciplinary body have other competences apart from carrying out the disciplinary proceedings? What are the capacities and staff of the disciplinary bodies?**

363. The line managers involved also have their day-to-day responsibilities for prosecuting and managing, as well as being responsible for the disciplinary process.

**13. Is there an inspection service for PPs in your country? In such a case, what is the relationship between such inspection service and the disciplinary body? Do they share competences?**

364. Her Majesty's Crown Prosecution Service Inspectorate has a statutory duty to inspect the work of both the Crown Prosecution Service and the Serious Fraud Office. Its aim is to independently assess the prosecution agencies to drive improvement and to improve public confidence. It has no competence in relation to disciplinary matters.

**Disciplinary proceedings**

365. Appendix I, attached to this paper, is a flow chart showing the procedure. All of the managers involved in the procedure are expected to implement the policy and procedure consistently and in line with current legislation and best practice, to make reasonable decisions on the basis of the facts in front of them and to ensure that action taken is under the appropriate procedure.

366. The following procedure applied to all employees of the Crown Prosecution Service, not just to prosecutors.

### *Initial actions*

367. Once a complaint has been received by the prosecuting agency, it will be passed to the appropriate line manager. This manager will consider it and should discuss it as soon as possible with the prosecutor.
368. It may be necessary for the manager to send the prosecutor home, transfer the prosecutor to other duties and possibly to a different office, or, where the allegation of misconduct is serious, suspend the prosecutor. This latter course of action may need to be taken by a more senior manager.
369. Where there is sufficient evidence available, the manager will make an assessment as to whether a formal investigation is required. A discussion with the prosecutor may suffice, or possibly a reminder in writing to state the standard of conduct expected from a prosecutor, the reasons for this and the consequences should there be a further breach.
370. Where the manager decides that a more in-depth investigation is required, the prosecutor will be informed of this fact in writing, and the Human Resources Directorate and Area Business Manager informed. Where the prosecutor is a trade union representative, the trade union will be notified. The line manager will consult with the Human Resources Directorate and another manager will be appointed as the Investigating Officer.
371. The prosecutor will be informed in writing of the name of the Investigating Officer, and may, within 1 working day of being notified of the name of the investigator, make written representations to the Human Resources Directorate as to why that person is unsuitable.

### *Investigation of an allegation of misconduct*

372. The Investigating Officer must act reasonably and without bias throughout the investigation and is expected to complete the investigation within 15 working days. A full investigation is not a disciplinary action: the evidence obtained can only be used in a formal disciplinary hearing when the decision is that formal action must be taken.
373. The Investigating Officer will gather evidence including documentary evidence such as e-mails, telephone conversations, policies, as well as statements of witnesses from any other individuals involved.
374. The Investigating Officer will send a letter inviting the prosecutor to an interview. The prosecutor will be informed of the substance of the allegations and relevant events and dates and be asked to come to the interview with any information, documentation etc. that may have a bearing upon the matter.
375. The prosecutor may be accompanied by a representative, who could be a workplace colleague or a trade union official, with whom he/she can confer.
376. At the interview, the Investigating Officer will outline the procedure to be followed and ensure that the prosecutor understands what will happen. The Investigating Officer will summarise the issues, and a record of the interview will be

sent to the prosecutor within 2 days after the conclusion of the interview. Where there is disagreement as to the content of the record of the interview, a separate note will be drawn up.

377. Once the investigation has collected all the necessary evidence, the Investigating Officer will write a report, which sets out the reason for the inquiry and details the evidence that has been obtained. A conclusion will be made as to whether the prosecutor has a case to answer on the allegation(s).

378. The report is sent to the prosecutor's line manager, who has to decide whether no further action will be taken, whether some form of informal action will be taken or whether a formal disciplinary procedure will be invoked. The line manager will inform the prosecutor of the decision in writing and must also notify the Human Resources Directorate and Area Business Manager of the decision.

379. Where the line manager decides that a formal disciplinary procedure is required, a disciplinary hearing will take place. The prosecutor will be notified in writing of the date of the hearing and given at least 5 working days' notice of that date.

#### *Disciplinary Hearing*

380. The nature of the allegations will be provided together with the relevant evidence gathered during the investigation. The prosecutor must be informed whether the misconduct is being treated as possible gross misconduct. The prosecutor will also be reminded of the right to have a representative present at the hearing.

381. The manager will be advised by an adviser from the Human Resources Directorate and a note taker will attend the hearing. The manager will explain the purpose of the hearing and then go through the allegations and evidence.

382. The prosecutor or representative can ask questions about the case and respond to the allegations by putting forward their case, including any mitigating circumstances.

383. The manager can put questions to the prosecutor to clarify issues. The manager will then summarise the case and can adjourn the hearing to obtain further information or adjourn to consider the decision.

384. The hearing can take place in the absence of the prosecutor, for instance where the prosecutor does not attend the hearing or is ill, or it can be postponed.

385. The manager will decide on the balance of probabilities: in other words, whether it is more likely than not that the prosecutor has committed the misconduct alleged. Where the misconduct has been proved, the line manager has to assess the seriousness of the misconduct and decide what sanction should be imposed (written warning, final written warning, action short of dismissal or dismissal).

386. The decision may be made at the conclusion of the hearing or within 5 working days. The decision is confirmed by letter within 5 working days of the hearing and will state the basis for the decision, the consequences of any further misconduct, what improvements, if any, are required and notify the prosecutor of the right of appeal.



387. A copy of the notes taken during the hearing will be sent to the prosecutor within 2 working days of the conclusion of the hearing. Where the decision is to dismiss, the prosecutor will be advised in writing as to the reason(s) for the dismissal, the date it will take effect and the right of appeal.

#### *Appeal hearing*

388. The prosecutor has 5 working days to appeal from being notified of the decision. The notice of appeal must be in writing and set out the grounds of appeal. The appeal will be heard by a more senior manager, who has no previous involvement in the matter. The senior manager will review the investigation report and the documents from the Disciplinary Hearing.

389. The prosecutor will be given the opportunity to explain the reasons for the appeal and put forward any new evidence that has come to light since the original disciplinary hearing.

390. The senior manager will ask any appropriate questions, summarise the submissions and may adjourn to consider the decision or to obtain further evidence. The senior manager will consider whether there were any procedural errors in the Disciplinary Hearing and if there were, whether they affected the decision; whether the decision was perverse and not supported by the available evidence and whether there is any new information that was not available at the original Disciplinary Hearing.

391. The manager will decide whether decision stands, in which case the sanction will take effect, or whether the appeal is upheld in full or in part. The prosecutor must be informed of the decision in writing within 5 working days of the appeal hearing. The letter will provide the basis of the decision and state that the decision is final. There is no further right of appeal, except in the case of a decision to dismiss the prosecutor, when there is a right of appeal to the Civil Service Appeal Board.

392. Where a prosecutor is dismissed, there is still the possibility of civil action before an Employment Tribunal.

#### **14. Who is entitled to file a disciplinary complaint against a PP? What are the means for filing it (written, online, signature of lawyer, statute of limitations)? What kind of requirements are to be met (formal and substantive)?**

393. Anyone could make a complaint against a prosecutor, including other prosecutors and staff, lawyers, as well as members of the public. The complaint can be submitted by post or e-mail.

394. There is no prescribed format to the contents of a complaint, but the more detail that is included, the better to enable a decision to be made by the line manager as to what action should be taken.

#### **15. Are anonymous/confidential reporting of misconducts admitted in your system? Can a PP report about misconducts of their superior PP?**

395. Misconduct can be reported in confidence, and an anonymous complaint could be lodged. A public prosecutor can lodge a complaint against a superior.

**16. Who decides on the admissibility of the complaint?**

396. The line manager of the prosecutor subject of the complaint would be responsible for the initial consideration of an allegation of misconduct. The line manager would decide whether to progress the matter or not. Where an Investigating Officer has been appointed, that person will decide whether there is a case to answer or not.

**17. What are the investigative measures and means of proof that are available to the disciplinary body when dealing with a complaint against a PP? Do they differ from other administrative proceedings?**

397. The Investigating Officer will be able to access, for instance, the e-mails on the works' computer and mobile telephone of the prosecutor subject of the complaint and will interview witnesses and the prosecutor and seek to obtain any relevant documentation. A report will be written and submitted to the line manager.

**18. Does the disciplinary body get appropriate co-operation from private/public entities in order to carry out the disciplinary proceedings? Are there specific powers to compel witnesses to attend or evidence to be submitted by third parties?**

398. The line manager or Investigating Officer may need the co-operation of third parties, but they cannot compel witnesses to attend or provide evidence.

**19. What are the procedural guarantees in the course of the proceedings? (hearing, remedies, access to evidence, access to lawyer, etc.)**

399. The manager will send a written request to the prosecutor to attend a formal meeting. The request will state the nature of the allegations, whether the conduct is being treated as gross misconduct, and relevant evidence obtained during the investigation will be provided. A person subject to disciplinary proceedings has a legal right to have a representative, who may be a work colleague or from the prosecutor's trade union, present at the Disciplinary Hearing.

**20. How are criminal and disciplinary proceedings coordinated with criminal and/or administrative proceedings? Are the criminal investigations suspending the disciplinary proceedings and what happens in cases of dismissal of criminal proceedings and, respectively, in cases of conviction?**

400. Disciplinary proceedings can take place whilst there are concurrent criminal proceedings.

401. Where the prosecutor has been charged with a criminal offence, an investigation will take place and formal disciplinary action can take place either before the conclusion of the criminal case or await the verdict of the court. There are different burdens of proof, in that at a criminal trial the burden of proof is “beyond all reasonable doubt”, whereas to be guilty of misconduct the burden of proof is on “a balance of probabilities”. A prosecutor may be acquitted by a criminal court, but still be found guilty of misconduct at a Disciplinary Hearing.

**21. Are there salient differences in the disciplinary proceedings of judges and public prosecutors?**

402. The disciplinary proceedings for members of the judiciary are different to those of the prosecutors.

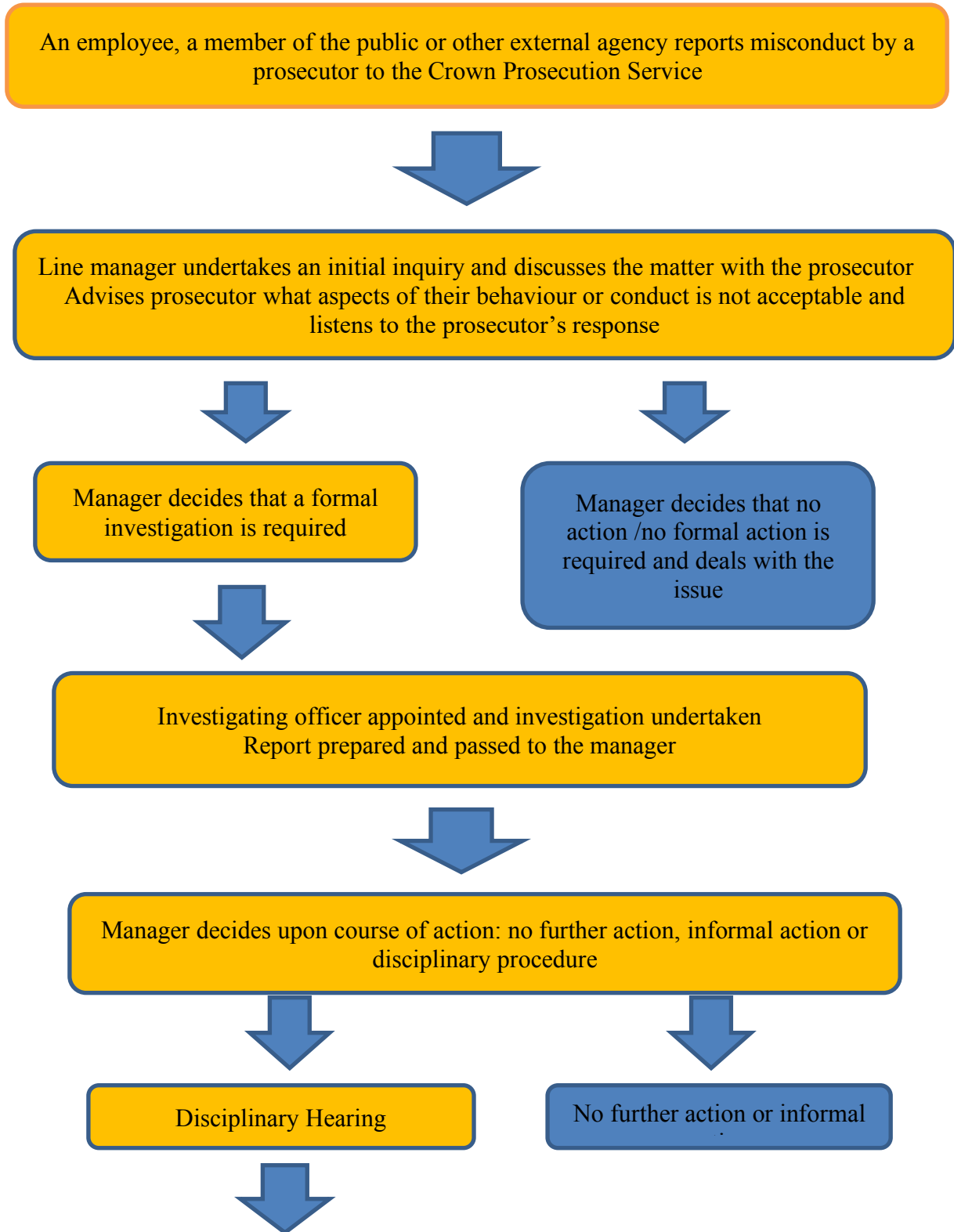
403. Judicial misconduct is investigated by the Judicial Conduct Investigations Office. This is an independent statutory office established in 2013 to support the Lord Chancellor (the Secretary of State for Justice) and the Lord Chief Justice (the head of the Judiciary in England & Wales), who are responsible for judicial discipline.

404. When there is a finding of judicial misconduct the Judicial Conduct Investigations Office issues a disciplinary statement that is valid for a year where the sanction does not involve removal from office. Where the sanction is removal of the judge from a judicial post, the disciplinary statement remains valid for five years.

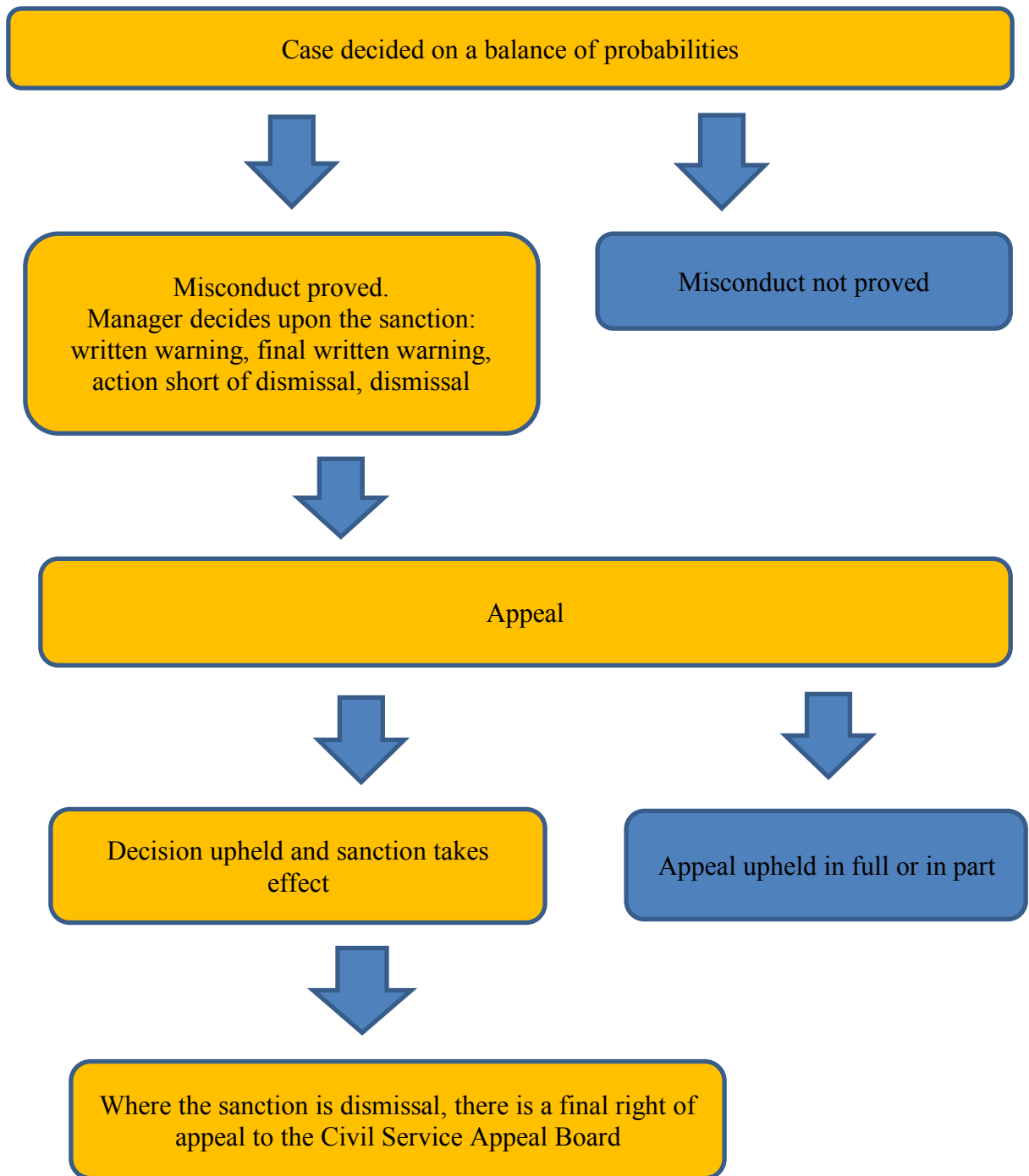
405. In Scotland, the equivalent body that deals with allegations of judicial misconduct is the Judicial Complaints Reviewer.

## APPENDIX I

### DISCIPLINARY PROCEEDINGS FOR CROWN PROSECUTORS



APPENDIX I



## GENERAL PART

### Introduction

406. There are three different criminal justice systems within the United Kingdom, each served by separate public prosecuting authorities.
407. Scotland's prosecuting agency is the Crown Office and Procurator Fiscal Service of Scotland (COPFS), which dates back to the 15th century.
408. The COPFS is a Ministerial Department of the Scottish Executive, headed by the Lord Advocate, who has responsibility for its work, but who is also the legal adviser to the Scottish government; this dual role has been criticised as there is no separation of the prosecutorial and ministerial roles. The COPFS advises and prosecutes criminal cases, directs the investigations into all sudden, accidental, suspicious or unexplained deaths and allegations of misconduct against the police.

### Status, selection, appointment, evaluation, and promotion:

409. All prosecutors are independent civil servants appointed through open selection and interview. They are independent of both the Executive and the Judiciary.
410. Selection, appointment, and promotion is by application to advertised posts, where the applicant has to satisfy the competencies and criteria required of the particular post applied for.
411. A prosecutor's performance is evaluated annually by way of a formal appraisal report conducted by the line manager. During the appraisal, the prosecutor's performance over the preceding year is examined against agreed objectives.

### Criminal policy and reform

412. Each of the prosecuting agencies develops its own policies, with the heads of the various prosecuting agencies being responsible for ensuring that their policies and guidance are consistent with, and give effect to, government policies. They also issue guidance as regards the conduct of casework.
413. The prosecuting agencies have an in-put into Government policy in relation to legislation and criminal justice reforms, and prosecuting agencies will be asked for their opinion on proposed reforms.
414. No current reforms of the prosecuting systems are being undertaken.

### Statistical information

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<sup>80</sup> Prepared by Ian Welch.

415. Total number of prosecutors: As at January 2020 522 prosecutors were employed by COPFS.
416. Distribution per court: Prosecutors covering general crime cases are assigned to geographical areas, with numbers varying according to the workload. They usually cover more than one court. For example, the CPS has 14 geographical areas, and prosecutors in advocacy units within each of those areas would be expected to prosecute in several courts within their area. All of the prosecuting agencies in the United Kingdom have specialist units (for example specialist fraud, organised crime etc) that either cover regions or the whole of their part of the United Kingdom, and their cases would be prosecuted at the court nearest to where the crimes took place, or, in the case of terrorist cases, at specialist court centres.
417. Ratio of prosecutors to the population: Based upon the latest available population statistics, the ratio of prosecutors to population is approximately 1:10,000 in Scotland.
418. Number of cases prosecuted: Approximately 80,000 cases are prosecuted annually in Scotland.

## **DISCIPLINARY LIABILITY AND DISCIPLINARY PROCEEDINGS AGAINST PUBLIC PROSECUTORS**

### **Disciplinary offences**

**What are the grounds for disciplinary liability and what are the disciplinary offences foreseen for public prosecutors in your legal system? Where are they regulated?**

419. The Civil Service Code, the Crown Office Procurator Fiscal Service Standards & Conduct statement and the Disciplinary Policy & Procedure document of 2019 provide the framework for the expected behaviours of a prosecutor and the disciplinary procedure.
420. The Disciplinary Policy & Procedure contains examples of potential misconduct. See Appendix I below.

#### **1. Is the acting in cases of conflicts of interest contemplated as a specific disciplinary offence?**

421. It is not a specific disciplinary offence, but a conflict of interest would bring the COPFS into disrepute and amount to misconduct.

#### **2. Are the conducts that entail disciplinary liability sufficiently defined? Low performance or undue delays are considered as a disciplinary offence?**

422. As stated in Question 1, an appendix lists examples of misconduct, but is not an exhaustive list.

423. Low performance would be covered by the appraisal system and poor performance policy; undue delays could amount to professional negligence and possibly a refusal to follow reasonable instructions, as a line manager should advise a prosecutor where there are performance issues.

**3. Is there any disciplinary offence regulated for “breach of oath”, for “unethical behaviour” or for improper private conduct? How do you deal with ethical issues that do not amount to disciplinary offences?**

424. There is no specific disciplinary offence for a breach of oath; improper private conduct could embarrass or bring the COPFS into disrepute.

425. Any ethical issue should be reported via line management to the COPFS Professional Standards’ Committee.

**4. In the case that judges in your legal system have to make a declaration of assets for taking office, is it a disciplinary offence not presenting such declaration, or presenting incomplete or erroneous data?**

426. Judges do not have to make a declaration of assets upon taking office.

### **Sanctions**

**5. What are the sanctions foreseen for the disciplinary offences of PPs? Are they gradual and proportional?**

427. Misconduct not resulting in dismissal results in a first or final written warning, with the prosecutor being advised that repeated misconduct will result in a more severe sanction and possible dismissal. Where the misconduct amounts to gross misconduct or the line manager considers the conduct sufficiently serious, the prosecutor can be dismissed. Freezing of pay, removal from flexible working system, payment of restitution for any loss incurred by the prosecutor to COPFS, downgrading or transfer are other penalties available.

428. Sanctions are appropriate to the level of misconduct and are gradual.

**6. Can you provide statistics on the number/type of sanctions imposed and the grounds that led to the sanction?**

429. No statistics are available.

**7. Is there a higher sanction in case of recidivism or repeated infringements?**



430. After a first warning, the next sanction will be a final written warning or summary dismissal; after a final written warning dismissal will be the next sanction. Prosecutors subject to an active sanction are not eligible for promotion or transfer.

**8. Is the imposition of a sanction registered in the personal record of the relevant PP? In such case, for how long? What are the consequences of having the register of the sanction in such record not cancelled?**

431. A first written warning is active for 6 months and a final written warning is active for 12 months. These time limits can be extended where further misconduct occurs within the 6 or the 12-month period.

432. The record is kept on the prosecutor's personnel file for the relevant period and then deleted.

**Disciplinary body**

**9. What are the bodies in charge of disciplinary proceedings against PPs? Are there different bodies depending on the gravity of the infringement?**

433. Minor misconduct is dealt with by reporting officers (line managers), but where formal disciplinary action is required, the Human Resources' department will be contacted, and an Investigating Officer will be appointed. A Deciding Manager will hold a disciplinary hearing if required. The same process is used irrespective of the gravity of the conduct.

**10. Who appoints the relevant disciplinary body and what is their composition? What are the requirements to be member of a disciplinary body? Is the disciplinary body independent?**

434. The Human Resources' department will arrange for COPFS to appoint an Investigating Officer and the Deciding Manager. These people will not be connected to the person subject of the proceedings. The Deciding Manager is not involved in the investigation.

**11. Does the disciplinary body have other competences apart from carrying out the disciplinary proceedings? What are the capacities and staff of the disciplinary bodies?**

435. The Investigating Officer and Deciding Manager will be prosecutors of a more senior grade than the prosecutor under investigation.

**12. Is there an inspection service for PPs in your country? In such a case, what is the relationship between such inspection service and the disciplinary body? Do they share competences?**

436. Her Majesty's Inspectorate of Prosecution in Scotland is responsible for inspecting the prosecution service but has no competence in relation to disciplinary proceedings.

### **Disciplinary proceedings**

**13. Who is entitled to file a disciplinary complaint against a PP? What are the means for filing it (written, online, signature of lawyer, statute of limitations)? What kind of requirements are to be met (formal and substantive)?**

437. Complaints can be made by members of the public or co-workers. The complaint can be made in writing or on-line to COPFS. There is no proforma complaint form.

**14. Are anonymous/confidential reporting of misconducts admitted in your system? Can a PP report about misconducts of their superior PP?**

438. Anonymous complaints can be submitted. All complaints are treated confidentially.

439. A prosecutor can submit a complaint concerning the conduct of a more senior prosecutor.

**15. Who decides on the admissibility of the complaint?**

440. Initially the Reporting Officer considers a complaint of misconduct. An Investigating Officer will be appointed where a formal process is initiated, and a Deciding Manager will consider the Investigating Officer's report and make a decision as to whether a Disciplinary Hearing is required. The Deciding Manager will make the final decision.

**16. What are the investigative measures and means of proof that are available to the disciplinary body when dealing with a complaint against a PP? Do they differ from other administrative proceedings?**

441. The Deciding Manager is required to decide whether there are reasonable grounds to uphold the allegation(s) of misconduct. The Human Resources' department sets out the terms of reference for the Investigating Officer, who will investigate in accordance with that framework. All relevant written records and reports will be investigated.

**17. Does the disciplinary body get appropriate cooperation from private/public entities in order to carry out the disciplinary proceedings? Are there specific powers to compel witnesses to attend or evidence to be submitted by third parties?**

442. The Investigating Officer can request assistance from other entities, but there are no specific powers to compel someone/an organisation to provide evidence.

**18. What are the procedural guarantees in the course of the proceedings? (hearing, remedies, access to evidence, access to lawyer, etc.)**

443. There is no statutory right for a prosecutor to be accompanied during the investigatory meeting, but there is a right to be accompanied by a Trade Union official or a co-worker during the Disciplinary Hearing.

**19. How are criminal and disciplinary proceedings coordinated with criminal and/or administrative proceedings? Are the criminal investigations suspending the disciplinary proceedings and what happens in cases of dismissal of criminal proceedings and, respectively, in cases of conviction?**

444. A strict approach is taken where a prosecutor is charged with a criminal offence: the line manager must be notified. The prosecutor should keep the Reporting Officer informed and further consideration will then be given as to whether disciplinary action is appropriate. In deciding whether action is appropriate, line management will take into account whether the crime has a negative impact on the business and/or reputation of COPFS and whether it would make it inappropriate or impossible for the prosecutor to remain employed by the COPFS.

445. COPFS has established a Professional Standards Committee comprising the Deputy Crown Agent Operational Support, the Human Resources' Director and the Departmental Security Officer, which will decide whether disciplinary action should be taken.

446. Even if the prosecutor is acquitted, the Disciplinary Procedure can still be invoked.

**20. Are there salient differences in the disciplinary proceedings of judges and public prosecutors?**

447. There is a separate scheme of Judicial Conduct and Discipline in Scotland introduced by the Judiciary and Courts (Scotland) Act in 2008.

## APPENDIX I

### Examples of Potential Misconduct

The following lists of examples are not exhaustive and only give an indication of the types of offence that may be considered misconduct, serious misconduct, or gross misconduct. The nature of the allegation will depend on the individual circumstances of each case.

#### **Misconduct:**

- Failure to follow reasonable instructions
- Minor breaches of COPFS policies and/or the Civil Service Code
- Negligence
- Poor timekeeping
- Minor misuse of any flexible working hours system
- Minor breaches of Health and Safety procedures
- Rudeness or discourtesy to colleagues, the public or other COPFS customers
- Minor security breaches, for example not locking cabinets or PCs
- Anti-social behaviour.

#### **Serious Misconduct:**

- Creating a hostile environment
- Misuse of official information or position
- Negligence leading to minor loss, damage or injury to COPFS, its employees or customers
- Refusing to follow reasonable instructions
- Serious breaches of COPFS policy and/or the Civil Service Code
- Being under the influence of alcohol or drugs while on official duty in contravention of the Drug and Alcohol Policy
- Unauthorised absence
- Breaches of Health & Safety procedures
- Failure to report bankruptcy or insolvency to COPFS Management
- Repeated instances of misconduct (not necessarily related)
- Conduct liable to bring COPFS into disrepute
- Significant loss of public money or property or injury to people for which the employee is responsible
- Unauthorised discussion of official matters with external parties.

#### **Gross Misconduct:**

- Major breaches of COPFS policy and/or the Civil Service Code
- Theft
- Fraud
- Fighting or assault
- Bribery (giving and receiving)
- Unauthorised entry to computer records or deliberate falsification of records, including the abuse of any IT system
- Bringing COPFS into disrepute
- Malicious whistle-blowing
- Deliberate or reckless damage to COPFS' property, including equipment, computer systems or buildings

Inability to perform job duties through being under the influence of alcohol or drugs, or the unauthorised consumption of alcohol or drugs whilst on duty (see the Drug and Alcohol Policy for more details)

Serious breach of COPFS Health and Safety rules or a single error due to negligence which causes or could have caused significant loss, damage, or injury to COPFS, its employees or customers

Conviction of a criminal offence, whether on official duty or not, that makes the employee unsuitable or unable to carry out their duties

Actions which destroy or damage the relationship of trust and confidence between the employee and COPFS

Serious act of insubordination

Bullying, harassment, or discrimination

Serious breach of trust or confidentiality

Misuse of procurement cards

Breach of the Official Secrets Act 1989

Unauthorised use or disclosure of official information acquired in the course of duty

Repeated serious misconduct

Having a complaint of professional negligence or misconduct upheld by the relevant body

Deliberate leaking of official information to an external party.

## CONCLUSIONS

448. The Prosecution service is a key institution to ensure the rule of law. Some of the important European standards regarding the public prosecution service are in the documents prepared by the Committee of Ministers, the Parliamentary Assembly of the CoE and of the Consultative Council of European Prosecutors (CCPE).
449. CoE documents are important because the standards adopted in them outline the importance of autonomy and independence of the prosecution service and its independence from the political influence or interference. Apart from the functional independence of state prosecutors, the institutional independence of the prosecutorial service is crucial for proper functioning of the criminal justice and hence for upholding the rule of law.
450. The independence of the prosecutors working on a case must not be misused to try to hide unproper, undiligent or imprudent work. This means that control must be conducted over the work of PPs, and in case of breaches of duties, the disciplinary responsibility takes place. CCPE Opinion No. 13(2018), “As a means to ensure the independence of prosecutors, clear mechanisms with regard to instituting prosecution or disciplinary proceedings against prosecutors should also be established.”
451. The disciplinary proceeding in Spain, Slovenia and Italy are very precisely determined in different laws. It is clear which conduct or behaviour constitute the disciplinary offence and which bodies are involved in disciplinary procedure.
452. The proceedings in all countries are transparent, informing of the prosecutor subject to the procedure is obligatory, the investigations are conducted under known conditions. The prosecutors involved in disciplinary procedure in Italy, Spain and Slovenia have the same procedural rights as an investigated or accused person in criminal proceedings. In case of sanctions being imposed, an appeal before court is possible, in the United Kingdom at least for the dismissal from service.
453. The Minister of Justice has a certain role in all of the disciplinary proceedings, but not to the extent that would hinder the independence of prosecutors from the executive branch. In Spain the MoJ decides on dismissal of the prosecutor from the service but only on the proposal of the GPP, upon the positive report by the PPs Council. In Slovenia the MoJ is authorised to give proposal or place a demand to start a disciplinary procedure against the PP but is not included in process of deciding and determining the responsibility and posing a sanction. Also, in Italy the MoJ is authorised to initiate the disciplinary proceeding by requesting the GPP to carry out an inquiry.
454. The system in the United Kingdom is different in this part, given that the Crown Prosecution Service is a non-ministerial directorate under the superintendence of the Law Officers, appointed by the governing political party and accountable to the Parliament.
455. The disciplinary sanctions that can be imposed enable the deciding body to use a sanction appropriate for the disciplinary offence. In all systems compared, the disciplinary authority has a possibility to issue only a warning with no pecuniary effect. In worst cases the prosecutors are dismissed from the service. Temporary cut

in salary or time-limited degradation or ban on promotion are also possible. In Spain the disciplinary sanction is a fine limited on the top end.

ANNEX 1 – COMPARATIVE TABLE

	Italy	Slovenia	Spain	United Kingdom	Scotland
PP per 100.000 inhabitants* in 2018	3,7	10,2	5,2	4,1	no data
Number of disciplinary procedures **	64	1	3	25	no data
Bodies involved in disciplinary procedure	Disciplinary board of the High Judicial Council; inspectorate: prosecutor general	Disciplinary prosecutor, disciplinary court of 1 <sup>st</sup> and 2 <sup>nd</sup> instance	depends on sanction: Chief Prosecutor or GPP or MoJ - inspectorate	Line manager, investigative officer, Civil Service Appeal Board	Line manager, investigative officer, Deciding Manager
Where is disciplinary liability regulated	Legislative decree No. 109	State Prosecutor's Office Act	Public Prosecution Act	The Crown Prosecution Service's Code of Conduct, Civil Service code	Civil Service Code, Disciplinary Policy and Procedure document
Is acting in case of conflict of interest a disciplinary offence	yes	yes	yes	Not a specific disciplinary offence, can lead to liability	Not a specific disciplinary offence, can lead to liability
Is failing to declare the assets a disciplinary offence	no	yes	No obligation to declare assets	No obligation to declare assets	no data
Disciplinary sanctions	- Reprimand, - censure, - loss of seniority, -temporary incapacity to hold (semi)managerial positions, - suspension from function - dismissal from office	- Written warning, - reduction of salary, - ban on promotion, - transfer to another SPO - dismissal	- Warning - A fine - transfer to another PPO, - Suspension -Dismissal	- written warning, -final written warning, - action short of dismissal - reduction in salary, - ban on promotion for, - dismissal	- first or final written warning, - freezing of pay, - removal from flexible working system, - payment of restitution for any loss incurred by the prosecutor, - downgrading - transfer



					- dismissal
Registration of disciplinary sanction in the personal record	No data available	yes	yes	yes	yes
Are there differences in disciplinary proceedings of judges and PPs	no	Different body deciding	Different body deciding	Different body deciding	Different body deciding

\* and \*\*: CEPEJ 2020, data for 2018<sup>81</sup>

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<sup>81</sup> [https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Explorerv2020\\_1\\_0EN/Tables](https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Explorerv2020_1_0EN/Tables).