

COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS CONCERNING PROSECUTORS



European Commission for Democracy through Law
(Venice Commission)



COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

COMPILATION OF VENICE COMMISSION REPORTS AND OPINIONS CONCERNING PROSECUTORS¹

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THE VENICE COMMISSION

OVERVIEW

The European Commission for Democracy through Law, better known as the Venice Commission, is a Council of Europe independent consultative body on issues of constitutional law, including the functioning of democratic institutions and fundamental rights, electoral law and constitutional justice. Its members are independent experts. Set up in 1990 under a partial agreement between 18 Council of Europe member states, it has subsequently played a decisive role in the adoption and implementation of constitutions in-keeping with Europe's constitutional heritage.¹ The Commission holds four plenary sessions a year in Venice. In 2002, once all Council of Europe member states had joined, the Commission became an enlarged agreement, opening its doors to non-European states, which could then become full members. In 2022, it had 61 full members plus other entities formally associated with its work. The Commission is financed by its member states on a proportional basis, which follows the same criteria as applied to the Council of Europe as a whole. This system guarantees the Commission's independence *vis-à-vis* those states which request its assistance.

1. Assistance to member-states in constitutional and legislative reforms

The Commission's prime function is to provide constitutional assistance to States, mainly (but not exclusively) to those which participate in its activities.² This assistance comes in the form of opinions, prepared by the Commission at the request of States and of organs of the Council of Europe, more specifically the Parliamentary Assembly, the Committee of Ministers, the Congress of Local and Regional Authorities and the Secretary General, as well as of other international organisations or bodies which participate in its activities. These

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1. On the concept of the constitutional heritage of Europe, see *inter alia* "The Constitutional Heritage of Europe", proceedings of the UniDem seminar organised jointly by the Commission and the Centre d'Etudes et de Recherches Comparatives Constitutionnelles et Politiques (CERCOP), Montpellier, 22 and 23 November 1996, "Science and technique of democracy", No.18.
 2. Article 3, paragraph 3, of the Statute of the Commission specifies that any State which is not a member of the agreement may benefit from the activities of the Commission by making a request to the Committee of Ministers of the Council of Europe.

opinions relate to draft constitutions or constitutional amendments, or to other draft legislation in the field of constitutional law. The Commission has made crucial contributions to the development of constitutional law, mainly, although not exclusively, in the new democracies of Central and Eastern Europe.

The aim of the assistance given by the Venice Commission is to provide a complete, precise, detailed and objective analysis of the compatibility of laws and constitutional provisions with European and international standards, but also of the practicality and viability of the solutions envisaged by the states concerned. The Commission's recommendations and suggestions are largely based on a common European experience in this sphere.

As concerns the working methods, the Commission's opinions are prepared by a working group composed of members of the Commission, sometimes with the assistance of external experts. It is common practice for the working group to travel to the country concerned in order to hold meetings and discussions on the issue(s) concerned with the national authorities, other relevant bodies and civil society. The opinions contain an assessment of the conformity of the national legal text (preferably in its draft state) with European and international legal and democratic standards, and on proposals for improvement on the basis of the relevant specific experience gained by the members of the Commission in similar situations. Draft opinions are discussed and adopted by the Commission at one of its plenary sessions, usually in the presence of representatives of the country concerned. Following their adoption, the opinions are transmitted to the state or the body which requested it and come into the public domain.

The Commission's approach to advising states is based on dialogue with the authorities: the Commission does not attempt to impose solutions or abstract models; it prefers to acquire an understanding of the aims pursued by the legal text in question, the surrounding political and legal context and the issues involved. It then assesses, on the one hand, the compatibility of the text with the applicable standards and, on the other hand, its viability and its prospects to function successfully. In doing so, the Commission takes into account the specific features and needs of the relevant country.

Although the Commission's opinions are not binding, they are generally reflected in the law of the countries to which they relate, thanks to the approach taken and to the Commission's reputation of independence and objectivity. Furthermore, even after an opinion has been adopted, the Commission remains

at the disposal of the state concerned, and often continues to provide its assistance until the constitution or law in question has been adopted.

The Commission has also played, and continues to play, an important role in the interpretation and development of constitutional law in countries which have experienced, are experiencing or run the risk of ethnic/political conflicts. In this role, it provides technical assistance relating to the legal dimension of the search for political agreement. The Commission has done so in particular at the request of the European Union.

The Venice Commission opinions on specific countries cover a wide range of topics. The Commission is often invited to examine the system of checks and balances, and the relations amongst different branches of power, and the territorial organisation of the States. In the past years it gave advice on comprehensive constitutional reforms in several countries, which changed the way how democratic institutions are formed and function. Some of its opinions touch upon matters of public international law. Another area where the advice of the Venice Commission is sought are constitutional and legal provisions on fundamental rights and freedoms, in particular the freedom of speech, the freedom of assembly and the freedom of religion. The Commission is often confronted with the legislation on national minorities and minority languages, on anti-discrimination, on the powers of law-enforcement and security services. In addition to examining substantive provisions governing fundamental rights issue, the Commission also deals with regulatory bodies in this field, their composition, powers and procedures. Organisation of the bodies of the constitutional justice and their functioning is at the heart of some of the opinions of the Commission. Ordinary courts and the prosecution system have become subjects of growing importance for the Commission. The latter is increasingly asked to give an opinion on constitutional aspects of legislation relating to those courts or to the governance of the judiciary and the prosecution systems. In this area, it frequently co-operates with other Council of Europe departments, to ensure that the constitutional law viewpoint is supplemented by other aspects. The Commission also co-operates with ombudspersons. The Commission promotes relations between ombudspersons and constitutional courts with the aim of furthering human rights protection in member countries. In 2019 the Commission adopted the Principles on the protection and promotion of the ombudsman institutions – the so-called “the Venice Principles” which were endorsed by all three Statutory organs of the Council of Europe.

2. Constitutional justice

After assisting States in adopting democratic constitutions, the Commission pursues its action aimed at achieving the rule of law by focussing on their implementation. This is why constitutional justice is one of the main fields of activity of the Commission, which has developed close co-operation with the key players in this field, i.e. constitutional courts, constitutional councils and supreme courts, which exercise constitutional jurisdiction. As early as in 1991, the Commission set up the Centre on Constitutional Justice, the main task of which is to collect and disseminate constitutional case-law. The Commission's activities in this field are supervised by the Joint Council on Constitutional Justice. This body is made up of members of the Commission and liaison officers appointed by participating courts in the Commission's member, associate and observer states, by the European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights.

Since 1996, the Commission has established co-operation with a number of regional or language based groups of constitutional courts, in particular the Conference of European Constitutional Courts, the Association of Francophone Constitutional Courts, the Southern African Chief Justices' Forum, the Eurasian Association of Constitutional Review Bodies, the Association of Asian Constitutional Courts and Equivalent Institutions, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice, the Conference of Constitutional Courts of Countries of Portuguese Language and the Conference of Constitutional Jurisdictions of Africa.

In January 2009, the Commission organised, together with the Constitutional Court of South Africa, a World Conference on Constitutional Justice, which for the first time gathered regional groups and language-based groups.

This Conference decided to establish an association, assisted by the Venice Commission and open to all participating courts, with the purpose of promoting co-operation within the groups, but also between themselves on a global scale. In co-operation with the Federal Supreme Court of Brazil, the Venice Commission organised a Second Congress of the World Conference (16-18 January 2011, Rio de Janeiro) during which a Statute of the World Conference was discussed.

This Statute was adopted by the Bureau, composed of representatives of the regional and language-based groups in Bucharest on 23 May 2011 and entered into force on 24 September 2011. The Venice Commission acts as the secretariat for the World Conference. At the Third Congress, which was co-organised with the Constitutional Court of Republic of Korea in Seoul on 28 September – 1 October 2014, around 90 Courts discussed the challenges of social integration for constitutional justice. At the Fourth Congress, which was co-organised with the Constitutional Court of Lithuania in Vilnius on 11-14 September 2017, the topic of “The Rule of Law and Constitutional Justice in the Modern World” was discussed by 91 Courts.

At the end of 2021, 118 constitutional courts and equivalent bodies had joined the World Conference as full members.

Since 1993, the Commission’s constitutional justice activities have also included the publication of the Bulletin on Constitutional Case-Law, which has now become electronic, the e-Bulletin, and contains summaries in French and English of the most significant decisions over a four-month period. It also has a counterpart, the CODICES database, which contains more than 10,000 decisions rendered by over 100 participating courts together with constitutions and descriptions of many courts and the laws governing them.³ These publications have played a vital “cross-fertilisation” role in constitutional case-law.

At the request of a constitutional court and the European Court of Human Rights, the Commission may also provide *amicus curiae* Briefs, not on the constitutionality of the act concerned, but on comparative constitutional and international law issues.

One final area of activity in the constitutional justice sphere is the support provided by the Commission to constitutional and equivalent courts when they come under undue pressure by other State authorities. The Commission has, on several occasions, been able to help courts threatened with dissolution to remain in existence. It should also be pointed out that, in general, by facilitating access to foreign case-law, the e-Bulletin and the CODICES database also help strengthen judicial authority.

Lastly, the Commission holds seminars and conferences in co-operation with constitutional and equivalent courts, and makes an Internet forum available exclusively to them – the “Classic Venice Forum” – through which they can speedily exchange information relating to pending cases.

3. CODICES is available on line (<http://www.CODICES.coe.int>).

3. Elections and referendums

Elections and referendums which meet international standards are of the utmost importance in any democratic society. This is the third of the Commission's main areas of activity, in which the Commission has, since it was set up, been the most active Council of Europe body, leaving aside election observation operations.

The activities of the Venice Commission also relate to political parties, without which elections in keeping with Europe's electoral heritage are unthinkable.

In 2002, the Council for Democratic Elections was set up at the Parliamentary Assembly's request. This is a subordinate body of the Venice Commission comprising members of the Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe. The Council for Democratic Elections also includes an observer from the OSCE/ODIHR. In order to give electoral laws certain stability and to further the construction of a European electoral heritage, the Venice Commission and the Council for Democratic Elections developed the principles of the European electoral heritage, in particular by drafting the Code of Good Practice in Electoral Matters (2002), which is the Council of Europe's reference document in this field, and the Code of Good Practice for Referendums (2007),⁴ Guidelines on the international status of elections observers (2009) and, in the field of political parties, the Code of Good Practice in the field of Political parties (2008). The other general documents concern such matters as recurrent challenges and problematic issues of electoral law and electoral administration, electoral law and national minorities, electoral systems, including thresholds, women's representation in political systems, preventing the misuse of administrative resources during electoral campaigns as well as digital technologies and elections. In the field of political parties, the Venice Commission has also drafted joint guidelines on political party regulation with the OSCE/ODIHR, and addressed the prohibition, dissolution and financing of political parties, as well the method of nomination of candidates in political parties. The Commission has adopted more than sixty studies or guidelines of a general nature in the field of elections, referendums and political parties.

4. These two texts were approved by the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe, and the subject of a solemn declaration by the Committee of Ministers encouraging their application.

The Commission has drafted more than 130 opinions on national laws and practices relating to elections, referendums and political parties, and these have had a significant impact on electoral legislation in the states concerned.

The Council for Democratic Elections has developed regular co-operation with election authorities in Europe and on other continents. It organises annually the European Conference of Electoral Management Bodies (the 16th edition took place in 2019 in Bratislava), and is also in very close contact with other international organisations or bodies which work in the election field, such as ACEEEO (Association of European Election Officials), IFES (International Foundation for Electoral Systems) and, in particular, the OSCE (Organisation for Security and Co-operation in Europe). Thus, in principle, opinions on electoral matters are drafted jointly with the OSCE/ODIHR, with which there is regular co-operation.

The Commission also holds scientific seminars. In particular, it co-organises with the Permanent Electoral Authority of Romania the Scientific Electoral Experts Debates; the first edition in 2016 dealt with “Electoral Law and New Technologies”, while the second one in 2018 addressed “Equal suffrage”. It is responsible for training sessions for Central Electoral Commissions and judges on electoral disputes and other legal issues, as well as for long-term assistance to these Commissions. The Commission also provides legal assistance to PACE delegations observing elections.

The Council for Democratic Elections has created the VOTA⁵ database containing, inter alia, member States' electoral legislation. It now manages this database jointly with the Electoral Tribunal of the Judicial Power of the Mexican Federation (Tribunal electoral del poder judicial de la Federación, TEPJF). The database was fully updated in 2018.

4. Studies and reports on subjects of general interest

While most of its work concerns specific countries, the Venice Commission also draws up studies and reports on subjects of general interest. Just a few examples demonstrating the variety, complexity and importance of the matters dealt with by the Commission are its reports on a possible convention on the rights of minorities, on “kin minorities”, on independence of the judiciary, on individual access to constitutional justice, on the status of detainees

5. VOTA is accessible on line: <http://www.venice.coe.int/VOTA>.

at Guantanamo Bay, on counter-terrorist measures and human rights, on democratic control of security services and armed forces, on the relationship between freedom of expression and freedom of religion as well as the adoption of codes of good practice in electoral matters, on referendums and in the field of political parties. With its Report on the independence of the judicial system (Part I - Independence of judges and Part II - Prosecution Service), the Commission produced a reference text, which it uses in its opinions on specific countries.

The Commission has also elaborated a comprehensive Rule of Law Checklist as a tool for assessing the degree of respect for this major standard in any country. Another example of a general report are the Parameters on the relationship between the parliamentary majority and the opposition. The Committee of Ministers has endorsed these documents and has called on member States to use and widely disseminate them.

These studies may, where appropriate, lead to the preparation of guidelines and even proposals for international agreements. Previously, they took the form of scientific conferences under the Universities for Democracy (UniDem) programme, the proceedings of which were subsequently published in the "Science and technique of democracy" series.

5. Neighbourhood policy

The Commission is a unique international body which facilitates dialogue between countries on different continents. Created in 1990 as a Partial Agreement the Commission was transformed into an Enlarged Agreement in 2002. Since this date several non-European countries became full members of the Commission. The new statute and the financial support provided by the European Union and several Council of Europe member states, made it possible to develop full-scale co-operation programmes with Central Asia, Southern Mediterranean and Latin America.

The Venice Commission has been working in Central Asia for over 10 years. This co-operation was possible in the framework of several bilateral and regional projects with funding provided by the European Union. The national institutions of Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan were assisted in order to build their capacity to carry out reforms of their legal systems in line with European and international human rights standards, including the European Convention on Human Rights and the case-law of the European Court of Human

Rights. In the framework of these projects, the Venice Commission co-operated with the authorities of Central Asian States on topics such as constitutional justice, reform of the electoral legislation and practice and access to justice. All the countries of the Central Asian region are engaged in a constructive dialogue and the impact of concrete actions undertaken by the Commission has been constantly increasing since 2007. In the absence of joint projects aimed at the Central Asian region in 2019, the Venice Commission continued its exchanges with higher judicial bodies of the five countries of the region which show continuous interest in the assistance of the Venice Commission. At the end of 2016 the Commission signed a co-operation Agreement with the European Union for the implementation of a new project in the electoral field in Kyrgyzstan. This project provided an opportunity to organise exchanges on draft legislation in the electoral field in 2019. In 2020 the Commission will start the implementation of a new regional project in the region which will give an opportunity to intensify co-operation in several areas with its partners in Central Asia.

The Commission actively co-operates with countries of the Southern Mediterranean region. It established good contacts with Arab countries after it became an enlarged agreement and this farsightedness proved very useful. After the Arab spring the Commission established a very good co-operation with Morocco and Tunisia. Successful projects in these countries helped to establish and to develop a dialogue with other countries of the region such as Algeria, Egypt, Jordan, Lebanon and Libya. In this respect 2013 was a crucial year since it provided the basis for exploring new possibilities for the Venice Commission's assistance to the countries of the Maghreb and the Middle East. In 2015 the Commission launched the UniDem-Med programme and assisted in the establishment of the Conference of Arab Election Management Bodies. Since 2019 the Commission is actively involved in the projects of assistance to Tunisia focusing on independent bodies and the reform of the judiciary. The Authorities of Algeria, Egypt, Lebanon and Palestine⁶ actively participated in different multilateral activities organised by the Venice Commission.

Latin American countries have always been interested in sharing experiences and best practices with Europe, in such fields as democratic transition, constitution-building, constitutional justice and electoral legislation and practice. The Venice Commission became crucial for making such dialogue

6. This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of Council of Europe member States on this issue

possible. In recent years the Commission with its partners in Argentina, Brazil, Chile, Mexico and Peru prepared and successfully carried out activities and projects in the above-mentioned fields. Supported by the EU the Commission also successfully completed a project focussed on the implementation of the new constitution in Bolivia in 2011 - 2012. The Commission created a specific Sub-Commission on Latin America which further developed dialogue on a number of issues in particular concerning fundamental rights, constitutional law, constitutional justice and elections. The Commission enjoys particularly fruitful co-operation with the Electoral Tribunal of the Judicial Power of the Mexican Federation (Tribunal electoral del poder judicial de la Federación, TEPJF) and the Mexican National Electoral Institute (INE). Since 2017 the Venice Commission has been actively co-operating with the Organization of American States (OAS). In 2019 the Commission co-organised activities in the electoral field in Argentina and Mexico and prepared an opinion on the question of confidence upon request from the Peruvian authorities.

INTRODUCTION

This document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning prosecutors – their status, functions, guarantees of independence, their accountability, internal organisation of the prosecution service, its relation to other branches of the government, etc. This compilation does not concern fair trials guarantees and impartiality of the courts. Its aim is to provide an overview of the doctrine of the Venice Commission on this topic.

The compilation is intended to serve as a source of reference for drafters of constitutions and of legislation on the prosecution service, researchers, as well as for the Venice Commission's members, who are requested to prepare opinions and reports concerning legislation dealing with such issues. When referring to elements contained in this compilation, please cite the original document but not the compilation as such.

The compilation is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the opinions from which extracts are cited in the compilation relate to individual countries and take into account the specific situation there. The citations will therefore not necessarily be applicable in other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

Venice Commission reports and studies quoted in this compilation seek to present general standards for all member and observer States of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Each citation in the compilation has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to gain a full understanding of the Commission's position on a particular issue, it is useful to read the complete chapter in the Compilation on the relevant theme you are interested in. Most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this compilation (venice@coe.int).

I. INDEPENDENCE v. AUTONOMY OF THE PROSECUTION SERVICE

40. [...] While judges should be independent, this concept is not fully applicable to the prosecutors; it is more accurate to speak of “autonomy” rather than full-fledged “independence” of the prosecution service. Certain asymmetry of institutions and procedures applicable to the two branches of the judiciary is inevitable.

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, § 40

[...] While the Constitution should confer independence on the system as well as on the general prosecutor care will have to be taken to maintain a balance between, on the one hand, the protection of subordinate prosecutors from interference by the Government, Parliament, the police or the public and, on the other hand the authority and responsibility of the general prosecutor for ensuring that they carry out their functions properly.

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

The fundamental principle which should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have confidence in the system which is essential in any healthy society.

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

20. There are no international standards that require the independence of the prosecution service. But, at the same time, it is clear that there is a general tendency towards introducing the independence of the prosecution service. [...] At the same time it is important to avoid that the prosecutors' independence becomes a threat to the judges' independence.

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 20

26. [...] The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. [...]

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 26; see also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, § 84

16. Yet, certain more detailed standards and recommendations do exist. Thus, the Committee of Ministers of the Council of Europe requires member States to ensure that public prosecutors are free from 'unjustified interference' with their professional activities. The Rome Charter, adopted by the CCPE in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE encourages the general tendency towards greater independence of the prosecution system. In many member states of the Council of Europe, a tendency of giving more independence to the prosecution service may be seen, particularly as regards decisions reached by the prosecution in criminal cases. [...] The Venice Commission further notes that in many countries "subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases". That being said, a general tendency of giving more independence to the prosecution service has not yet transformed itself into a binding rule that is uniformly applied across Europe.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, § 16

II. LEVEL OF REGULATION: CONSTITUTION, LEGISLATION, DECREES, SELF-REGULATION

II.A - RULES ON THE PROSECUTION SERVICE IN GENERAL

It is not necessary for much organisational detail [on the prosecution service] to be included in the Constitution; an ordinary law of Parliament should be sufficient and would be more flexible. [...]

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution [...].

It would not be essential to set out in the Constitution detailed provisions regarding public prosecution. All that would be required would be:

- A guarantee of the independence of the general prosecutor of the Republic in the performance of his functions;
- The method of his appointment;
- The method of his removal from office.

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

[...] Less fundamental matters can be fixed by laws passed by the Parliament such as the term of office, age of retirement, remuneration and pension of the general prosecutor, and the organisation of the prosecution service and the conditions of employment of its staff. This would be preferable to fixing these matters by regulations or decrees of the government, if public confidence in the independence of the system from the government is to be maintained. [...]

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

18. [...] When, not only the fundamental principles but also very specific and 'detailed rules' on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk. This also increases the risk, for the future adoption of eventual necessary reforms, of long-lasting political conflict and undue pressure and cost for society.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 18

21. [...] [A]ny functions conferred on the prosecutor should be referred to in [the law dealing with the prosecutor's office] and should not be contained elsewhere.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 21

38. [...] Even if there is an express provision in the new Constitution and some provisions in the draft Law that can also be interpreted in a way that Parliament may elect the Prosecutor General only upon nomination by the Prosecutorial Council – in order to avoid any misunderstanding, this should be provided expressly in Article 16(3).

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, § 38

28. [...] [I]n the case at hand it is the draft law itself which directly provides for the removal of the [Special State Prosecutor] from his position. In this part the draft law is a non-normative, ad hominem piece of legislation. The Venice Commission is concerned with such abuse of the legislative powers: it undermines legal certainty (because normally the removal of a prosecutor should be based on the grounds provided by a law in advance) and is contrary to the nature of the legislative activity, which is to define general rules of behavior, not to take executive action in respect of specific individuals or situations.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, § 28

83. [...] The criteria for the assessment are to be determined by the HJPC. Since the performance is one of the criteria in the appointment and, since, moreover, negligence or carelessness in the performance constitutes a disciplinary offence, it would be important to have at least the basic criteria of the assessment stated expressly in the draft Law.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 83

35. [...] The grounds for dismissal should be stated in the Constitution, e.g. stated misbehaviour or incapacity. [...]

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7; see also CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 35

66. [...] [F]rom the rule of law perspective, entrusting the SCP with a virtually unlimited power to define the material conditions in which the PG can be dismissed is a highly contestable approach. Such rules need to have the highest possible level of legitimacy. In the previous paragraphs the Venice Commission has already argued that the lack of constitutional entrenchment may be prejudicial to the stability of the prosecution system, and certain matters should be regulated not by an ordinary law but by an organic law adopted by a qualified majority or even in the Constitution itself. This approach applies *a fortiori* to the essence of the evaluation process. It may be necessary to keep certain rules flexible, and it is perfectly acceptable if the SCP develops substantive and procedural rules contained in the law. However, to give the SCP a carte blanche in devising such rules seems to be excessive.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, § 66

32. [...] The fact that the threshold for the appointment to the top prosecutorial positions kept changing from almost zero to 15 years shows that the Government did not conduct any serious impact or feasibility study. Or, what would be worse, it implies that the threshold was chosen to ensure eligibility (or non-eligibility) of certain persons. This is yet another illustration of dangers associated with the process

of legislation through emergency ordinances [issued by the Government by virtue of a general clause of the Constitution allowing it to legislate by ordinances]. [...].

CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, § 32

II.B - RULES ON THE PROSECUTORIAL COUNCIL

24. [...] BiH is not the only country in which a judicial council has been created by ordinary legislation; this is also the case in, for instance, Denmark and Hungary. Yet, an explicit constitutional basis would facilitate the role of the HJPC as the guarantor of the independence of the judiciary.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 24

35. [...] [In] the past years the composition of the SCP has been changed twice - in September 2019 and in August 2021. In 2019, the number of members was increased from 12 to 15, and in 2021 it was reduced back to 12. Such frequent changes may give the impression that each respective parliamentary majority has tried to change the balance of power in the SCP in its favour.

36. The Venice Commission notes that the Constitution of Moldova does not define the composition of the SCP. It only provides that the prosecutors should represent a substantive part of its members. The law on the prosecution service was adopted as an organic one, which, in the Moldovan system, means that it needs the support of the majority of all the MPs and adoption in two readings (contrary to ordinary laws which can be adopted in one reading by the majority of the MPs present). In the context of the Republic of Moldova it might be more appropriate to regulate those questions in the Constitution, in order to avoid that each new parliamentary majority can “reshuffle” the SCP to increase its influence there.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 35-36

53. [...] The cases when a member of a prosecutor's council can be dismissed should be specified in the Act. Such a provision of course deserves having the status of cardinal act.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 53

41. Also, according to this system, all 18 judicial and prosecutorial members of the HJPC – as well as its president and two vice-presidents – shall be elected by the Parliamentary Assembly of BiH in a procedure which *is to be determined by a separate regulation* adopted by the Parliamentary Assembly. By leaving the definition of the election procedure to a separate regulation to be adopted by the Parliamentary Assembly in the future, the draft Law makes it difficult to assess the extent to which the requirement of transparency of the procedure has been met. It remains undetermined whether, for instance, the elections will require a qualified majority - as would be strongly recommended in order to avoid political appointments and to promote the election of persons with a high reputation acceptable to a wide majority - or whether members of the civil society will have the possibility of participating or overseeing the procedure.

42. This election procedure should be developed in the law and, as stated in Recommendation CM/Rec(2010)12: 'Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions'.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§ 41 and 42

27. That does not mean that the law cannot regulate procedures and make institutional arrangements within the boundaries set by the Constitution. In the Republic of Moldova, the Constitution does not regulate in detail the organisation and the functioning of the SCP (see Article 125 § 4). This means that the Law on the Prosecutors' Office may in principle leave space for other bodies, panels, committees, etc. which contribute to the work of the SCP or to which the SCP may delegate a part of its powers. A special body involved in the process of selection of candidates to the prosecutorial positions can be

constitutional if it does not usurp the substantive decision-making power of the SCP. As regards the process of removal of the PG from office, the issue of “dilution” of the constitutional powers of the SPC appears very relevant here as well, and broadly the same principles apply to the analysis of constitutionality of this procedure.

CDL-AD(2019)034, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor’s Office, § 27

43. [...] In the 2015 Opinion the Venice Commission also suggested that the requirement to have a qualified majority for the election of lay members may be introduced in the law, and this recommendation remains valid. The Montenegrin legislator should consider introducing one of the alternative ways of ensuring depoliticization, such as those mentioned above. However, any legal mechanism will only function if it is coupled with political will. A future Parliament, dominated by a different majority, may be tempted to try to gain control over the lay members, and, through them, over the Prosecutorial Council. Consequently, it is highly recommendable to find a more sustainable solution and describe the composition of the Prosecutorial Council and the method of election of its members in the Constitution itself – as it is done in respect of the Judicial Council.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor’s Office for organised crime and corruption, § 43

25. In a 2015 Opinion on North Macedonia, the Venice Commission examined a similar situation – a new body was created at the legislative level which assumed a part of the functions of the Judicial Council in the disciplinary field. Again, the Commission suggested that such redistribution of powers may need a constitutional amendment.

CDL-AD(2019)034, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor’s Office, § 25

40. If a legislative amendment was adopted in order to prevent the SCP from nominating a particular candidate, or in order to ensure that certain specific persons may or may not participate in the new competition, or for any improper reasons, this could impinge on the constitutional “division of labour” between the legislator (whose main task is to adopt rules of general application) and the SCP (whose main task, in this context, is to select appropriate candidates for the prosecutorial positions). This would come close to *ad hominem* legislation previously criticised by the Venice Commission.

41. The Venice Commission acknowledges, at the same time, that a legislator may have good reasons to intervene in a pending recruitment procedure which is grossly unfair, inefficient, discriminatory etc. By redefining eligibility criteria and redesigning procedural rules the new legislation may exclude certain candidates from the competition or open the way to new ones who otherwise were not eligible or raise/reduce their chances of success. So, the question whether such legislative intervention into a pending procedure is constitutionally permissible does not have a simple and categorical answer. Most likely, to answer this question the Constitutional Court of the Republic of Moldova will have to decide whether the legislative intervention was justified by weighty considerations of public interest or pursued ulterior reasons.

CDL-AD(2019)034, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor’s Office, § 40-41

33. [...] It also notes that the consequences of the conflicts of interest described in draft Article 10a(1)(b) are not stipulated in the Draft Law and are left to be regulated by the Book of Rules of the Council. It would be preferable to have the regulation contained in the Draft Law rather than in a mere internal instrument of the HJPC.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 33

48. Draft Article 86b(5) provides that for the purpose of verification of declarations, the HJPC shall adopt and regularly revise the risk criteria [...]. While it seems reasonable for the HJPC to have competence on the adoption

of some regulations concerning risk criteria, it appears questionable to give it full discretion on the matter. The Venice Commission recommends that basic rules be framed by the law, while the HJPC may elaborate them further within the limits drawn by the law. [...].

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 48

36. [...] Even if inclusion [of the rules on the budgetary autonomy of the high prosecutorial council] at the constitutional level seems the preferable option with a view to strengthen the appearance of independence, a regulation at the legislative level would also be acceptable.

37. This recommendation [“the working methods of both the HJC and the HPC should appear in an ordinary law and not at the constitutional level”] regarding the working methods of both HJC and HPC has been followed by changing the titles and content of draft Amendments XV and XXVII. As explained by the Speaker, all aspects of the working methods will be regulated in ordinary law. The Commission finds that this is an important matter which will require adequate attention.

CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, §§ 36-37

III. FUNCTIONS AND POWERS OF THE PROSECUTION SERVICE

III.A - POWERS IN THE CRIMINAL FIELD

III.A.1 Investigation and prosecution of crimes on behalf of the State in criminal cases

28. The *Recommendation (2000)19 of the Committee of Ministers on the Role of public prosecution in the criminal justice system* allows for a plurality of models of the Prosecution Service. [...]

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 28

15. [...] [M]ost systems provide for a monopoly on criminal prosecutions by the state or an organ of the state.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 15

7. Systems of criminal justice vary throughout Europe and the World. The different systems are rooted in different legal cultures and there is no uniform model for all states. There are, for example, important differences between systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. There are systems where prosecution is mandatory (the legality principle) and others where the prosecutor has discretion not to prosecute where the public interest does not demand it (the opportunity principle). In some systems there is lay participation in the fact-finding and/or law-applying process through the participation of jurors, assessors or lay judges, with consequences for the rules of criminal procedure and evidence. Some systems allow for private prosecution while others do not do so or recognise the possibility of private prosecution only on a limited basis. Some systems recognise the interests of a victim in the outcome of criminal proceedings as a '*partie civile*' where others recognise only a contest between the prosecutor representing the public or the state and the individual accused.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II the Prosecution Service, § 7

54. Following the British model, in Malta, the major part of prosecutions is carried out under the authority of the Police. It is the Police who investigate crimes and who then press the charges in court. Only for the most serious crimes, the office of the Attorney General (AG) prosecutes directly. In complex cases, the Police seek advice from the Attorney General, but they are not obliged to follow this advice (it seems that usually this advice is being followed in practice). The task of the prosecution is, therefore, split between the Police and the AG. This ambiguous system is problematic from the viewpoint of the separation of powers, notably taking into account the roles of the AG and the Police Commissioner, which makes it open to criticism when considering politically controversial or sensitive prosecutions.

CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, § 54

As regards the basic models referred to in the Concept, one could suggest that the function of the general prosecutor and the other public prosecutors should be confined to the prosecution of crime, through the criminal courts, and should not be extended to the protection of the public interest in civil matters and administrative causes. [...]

CDL(1995)073, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

76. [...] The direction in which the Venice Commission would recommend to go has been clearly formulated in Recommendation 1604 (2003) of the Parliamentary Assembly, which states: *'the power and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal-justice system, with separate, appropriately located and effective bodies established to discharge any other function.'*

CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, § 76

11. It is particularly positive that the Draft Law proposes a significant reduction of the number of tasks of the Prosecution Service by specifying that provisions not related to the prosecution service's core role, such as its participation in civil cases and the supervision of the compliance with the law, will expire within three years

from the entry into force of the Draft Law, thereby providing sufficient time to draft legislation which will transfer these responsibilities to other bodies. This will also allow the Prosecution Service to focus on its core task of criminal prosecution. [...]

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 11

14. In the case of Montenegro, the fact that the Constitution prescribes, in its Article 134, that there is a 'unique' State Prosecution Service inevitably tended to favour the choice which has been made to establish the special public prosecutor within the framework of the existing prosecution service. Otherwise, the authorities would have been compelled to embark on the difficult process of attempting to amend the Constitution. At the same time, if a special public prosecutor's office is to serve a useful purpose, a degree of autonomy within the framework of the existing prosecution service is necessary.

CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, § 14

15. The Venice Commission acknowledges that the role of prosecutors in criminal investigations varies from one system to another. Thus, in civil law countries the investigator is often subordinated to the prosecutor, but the extent to which day-to-day control is exercised by prosecutors varies considerably and especially in routine cases may in practice be very slight. In certain Scandinavian countries there is an integration between the police service and the prosecutor. In common law countries following the English tradition the office of public prosecutor was a late development and in some jurisdictions the police not only have a monopoly over investigation but may even retain a power to prosecute, particularly in minor cases.

18. [...] [I]n the absence of a uniform European approach, the change from a system where the investigators are answerable to and under the authority of the prosecutor, to a system with the investigators acting independently is perfectly legitimate (as would be a decision to retain the present system). [...]

CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, §§ 15 and 18

30. [...] [T]he prosecutor's office should have access to the electronic information system which, in turn, should contain sufficient information about the case and the major developments in it, and should be able to examine physical files, if necessary. It would be useful to introduce a system of automatic notifications of the prosecutor about certain types of decisions taken by the investigators, or of the expiry of the dead-lines for taking such decisions, etc.

CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, § 30

50. “[...] [I]n most European countries the prosecutor is perceived as an “officer of the court” whose main task is to uphold substantive and procedural law. The principle of adversarial proceedings is important, but it should not be interpreted as requiring that the prosecutors should have no duty to the court itself, or to serve the interests of justice, but should rather seek to ensure a guilty verdict by all means, and that the success of the prosecution should be measured only by the number of convictions obtained. The prosecutor has a dual responsibility for supporting the accusation and, at the same time, for ensuring that weak cases or cases based on illegally obtained evidence do not reach the court. The fact that a criminal judge will eventually assess all evidence at the trial does not absolve the prosecutor from making an assessment of the quality of the evidence that he or she presents to the court. [...]”

CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, § 50

71. The Venice Commission is of the opinion that investigation of crime is a task of the State. While the rights of victims are indeed very important under the rule of law, the victim should not be able to choose an avenue of criminal investigation. The establishment of a DPP [Director of Public Prosecutions] should also absorb the function of the inquest.

CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, § 71

133. The Powers of the Police to investigate should be subject to review by the AG's [(Attorney General's)] Office or a future office of an independent DPP [(Director of Public Prosecutions)], if the two offices are to be separated. The Police would act under the instruction of the DPP.

CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, § 133

56. Article 127 of the Constitution lists the powers of the prosecution: directing the investigations, indicting perpetrators of criminal offences, supporting accusation in courts, etc. Article 126 (2) of the Constitution proclaims that the PG "exercises supervision as to legality" of the work of all prosecutors. It may be arguably deduced that the prosecutors have a monopoly over all criminal investigations, and that all of the prosecutors should be submitted to the authority of the PG who supervises the legality of their actions. If the Constitution is construed in this manner, the figure of an "independent" prosecutor becomes impossible without some constitutional amendments.

57. However, a more flexible approach to the interpretation of the "prosecutorial monopoly" is also possible. First of all, the CPC provides for the judicial review of legality of certain actions of the prosecution, which seemingly does not perturb the "monopoly" and does not raise any constitutional question. Second, and more importantly, the Constitution must be interpreted in the light of generally accepted principles, one of them being *nemo iudex in causa sua*, no one can be a judge in his own case. It is difficult to imagine that the Bulgarian constitutional order does not accommodate this principle somehow, even if it is not formulated in the Constitution.

58. Saying that the PG has the exclusive right to prosecute everyone in the country, including him- or herself, or supervise such prosecution, effectively means that this office holder cannot be held legally accountable for his/her criminal acts. Indeed, some constitutional bodies (like Parliament, the Constitutional Court, or the monarch in some countries) are often subject to political accountability, rather than legal accountability. However, it is questionable whether the PG in Bulgaria belongs to this special category of office holders, and, in any event, the Kolevi judgement speaks of the legal accountability of the PG.

59. There is no doubt that the constitutional mandate of the PG and of the prosecution service must be respected. It should be impossible to create a parallel institution which would assume an important part of the prosecutorial functions which now belong to the prosecution service headed by the PG. Such a reform would certainly need a constitutional amendment – even, possibly, an amendment by the Grand National Assembly. However, in the opinion of the Venice Commission, the Constitution may be interpreted as leaving space for some ad hoc mechanism, applicable in those rare and marginal cases where there will be a need to bring the PG or somebody closely associated to the PG to criminal liability. Withdrawing that category of cases from the jurisdiction of the PG does not impair the essence of his/her constitutional mandate.

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, §§ 56 - 59

III.A.2 Specific powers of the prosecution related to criminal investigations

III.A.2.a Decision to prosecute or not to prosecute

91. [...] *In conformity with the principle of legality, the public prosecution service must act only on the basis of, and in accordance with, the law. This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle).*

CDL-AD(2016)007, Rule of Law Checklist, § 91

106. [...] it is important to clarify, in the law, whether individual prosecutors shall act on the basis of the principle of legality (meaning prosecution of all cases fulfilling the elements of a crime) or the principle of opportunity (which allows for prosecutorial discretion as to the decision of whether or not to prosecute). [...]

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 106

24. Articles 7-12 relate to the conducting and carrying out of criminal investigation. These provisions seem appropriate to ensure that the prosecutors control of the investigative powers is secured. Article 10 empowers the prosecutor to decide on the exemption from criminal liability of a person 'for opportunity reasons' and it would appear that at least to this extent the Moldovan prosecution authorities are to operate the opportunity principle. It is obviously desirable that a prosecutor should have these powers so as, for example, to give immunity to a witness in return for testimony against a more important participant in crime. However, it is necessary that criteria for the exercise of this power should be set out.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 24

32. Although Article 34.1.d, which mentions the prosecutor's discretion in decision-making, seems to confirm that the opportunity principle applies, this fundamental distinction should be more clearly specified, and, if the principle of opportunity is to be applied, the rights of victims, including remedies for decisions not to prosecute, should be provided for.

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 32

45. The fact that so much of the prosecutor's work is subject to scrutiny by courts of law also provides a form of accountability. In systems where the prosecutor does not control the investigation, the relationship between the prosecutor and the investigator necessarily creates a degree of accountability. The biggest problems of accountability (or rather a lack of accountability) arise when the prosecutors decide not to prosecute. If there is no legal remedy - for instance by individuals as victims of criminal acts - then there is a high risk of non-accountability.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 45

56. In most cases the decision to prosecute will be made simply on the basis of whether there is sufficient evidence to prosecute. In some cases, there may be matters unrelated to the weight of evidence tending to suggest that a prosecution may be undesirable. These may relate to the circumstances of the offender or the victim, or to the damage a prosecution might cause to the interests of a third party. Exceptionally, there may be cases where a prosecution

would risk causing damage to wider interests, social, economic or relating to questions of security. Where such public interest questions arise, care should be taken not to violate the rule of law, and while the prosecutor may think it wise to consult with persons having a special expertise, he or she should retain the power to decide whether a prosecution is in fact in the public interest. If the prosecutor can be subject to an instruction in such a case, then that instruction should be reasoned and where possible open to public scrutiny.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 56

37. [...] [J]udicial review (*ex ante* or, in urgent cases, *ex post*) is, in principle, a sufficient safeguard against possible abuses, at least from the standpoint of a suspect (or any other person targeted by the investigative measures). That being said, a different logic applies if we look at the situation through the prism of efficiency of the criminal justice system or from the standpoint of a victim of a crime. The court will only be able to review actions of the investigator, but not his/her inaction. The court will not be in a position to advise the investigator what to do in particular case, and how to do it in order to build up a strong case. By contrast, the prosecution may give such an advice.

38. The Venice Commission recalls that in many European countries the prosecutors play a pro-active role in the police investigations, and that from the very beginning of the process. This model has a strong rationale. Ultimately, investigators and prosecutors pursue the same goal: to bring the culprit to trial, to obtain a judgment on the merits. The prosecutors are lawyers who know what happens in the courtroom, what makes the evidence inadmissible, etc. If the prosecutors do not have any influence on the investigation from the start, a certain number of “promising” cases may be rejected due to errors committed in the first hours or days of the investigation.[...].

41. [...] [T]here is a risk that the quality of criminal investigations may deteriorate, since prosecutors will be unable to indicate to the investigators at an early stage what is needed in order to secure a conviction, and that less convictions (in bona fide cases, of course) can be secured [...].

CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, §§ 37-38 and 41

17. The prosecutor must act fairly and impartially. Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner. It is not the prosecutor's function to secure a conviction at all costs. The prosecutor must put all the credible evidence available before a court and cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case. Where evidence tending to favour the accused cannot be disclosed (for example, because to do so would compromise the safety of another person) it may be the duty of the prosecutor to discontinue the prosecution.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 17

107. Furthermore, paragraphs 24-36 of Recommendation Rec(2000)19 provide for a number of important duties of the public prosecutor towards individuals. Quite a number of these are not referred to at all in the draft Law, such as the duty not to initiate or continue prosecution when an impartial investigation shows the charge to be unfounded, not to present evidence that they know or believe on reasonable grounds was obtained illegally, and to disclose to the other parties (meaning primarily the accused) 'any information which they possess that may affect the justice of the proceedings'.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 107

32 " [...] normally, the police should be capable of distinguishing between clearly unmeritorious complaints and more serious cases which warrant investigation. However, in certain situations this may be not so clear (for example, where the allegations of ill-treatment in custody, or of domestic violence are concerned). In practical terms, such "unreported" cases, if the decision not to open an investigation happens to be mistaken, may cause great damage to reputation of the whole system, and the same is true about the cases where the investigation has been started and then discontinued.

33. The Venice Commission considers that the authorities should consider (if it is not already the case) the creation of a system of registration of *all* complaints (including those which did not result in the opening of the investigation), to which the prosecutors would have access. At the very least, the investigators

should remain entitled to consult the prosecutor if he/she feels the need to do so in such borderline cases. In addition, the prosecutors should keep the power – at least in certain category of cases, and at the initial stages of the reform – to overrule the decision of the investigator/chief of the investigative department not to open an investigation/terminate it, and to transfer it to another investigator/investigative authority for re-consideration.

CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, §§ 32-33

28. Any powers to start, stop and discontinue criminal proceedings, which are not subject to judicial review, do not comply with modern notions of the rule of law. Already now, non-prosecution can be challenged in court. It has been said that Maltese court consistently held that any ouster clauses in the Constitution excluding judicial review do not affect the power of the courts to determine whether the actions of any authority are in breach of fundamental human rights. The powers of the new DPP should be subject to judicial review, notably as concerns non-prosecution, upon request by the victims.

CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, § 67

64. [...] [The Commission welcomes in particular that the Bill attributes the Ombudsman, the Commissioner for Standards in Public Life, the Auditor General and the PCAC the status of injured party which enables them to directly report corruption cases to the Attorney General and to appeal against non-prosecution.]

CDL-AD(2020)019, Malta - Opinion on ten Acts and bills implementing legislative proposals subject of Opinion CDL-AD(2020)006, § 64

51.[...] At present, refusals to open a criminal case are appealable only to a higher prosecutor, but not to the court (contrary to the decisions to terminate criminal proceedings which are subject to the judicial review at the request of the victim). An external control by a judge – not subordinated to the PG and thus independent from him/her – may ensure that arbitrary refusals to open an investigation are overturned. However, it does not guarantee the effective

conduct of such investigations. The courts have no power or resources to do the work of the investigative bodies and to perform investigative actions themselves. Judicial control of such decisions will be limited to the questions of legality, or to the most basic reasonableness analysis. Furthermore, introducing judicial review of the decisions not to open a case may put a strain on the judicial system, so the cost of this measure should be carefully assessed and an efficient mechanism of quick dismissal of manifestly ill-founded appeals should be put in place.

52. That being said, providing for a judicial avenue in serious cases where the investigation has not been opened may be a useful addition to the current system. [...]

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, §§ 51-52

III.A.2.b Supervision of the investigation by the prosecutors and the courts

73. [...] In any case, prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges. In some countries a 'prosecutorial bias' seems to lead to a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 73

104. [...] [T]here is a need to clarify that the power given by paragraph 1.2 to conduct an 'interview' with a detained person is limited to the purpose of the role of supervision established by this provision. Insofar as there is no such limitation, this paragraph should be amended to establish that it is so restricted.

105. Moreover, there is a need to clarify the scope of the power of a public prosecutor under paragraphs 3 and 4 to release someone held under someone else's purported authority as it appears to cover not only detention

by an administrative decision but also one that is a consequence of ‘a judicial judgment’. Insofar as these provisions do extend to detention pursuant to a judicial judgment rather than just making reference to a particular category of establishment in which persons can be held, it would be necessary to make it clear that they concern situations when a person is held in such establishments without a valid judicial judgment or beyond the term specified in it.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, §§104 and 105

62. Article 23 contains a provision allowing a judge to issue a decision on the application of a special prosecutor obliging a bank to monitor payment operations and to report them to the special prosecutor. It is recommended that clear criteria for the grant of an order to this effect be set out in the law, especially considering that sanctions are provided for the cases of failure to execute the decision [...].

63. It is welcomed that an appeal is provided against such decisions [...].

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor’s Office of Montenegro, §§ 62 and 63

67. It would be important to include a provision to the effect that data containing relevant information helpful to an accused person cannot be withheld from that person [by the prosecutor’s office] in the event of a prosecution being brought.

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor’s Office of Montenegro, § 67

21. Article 6 sets out the obligation to co-operate with the Public Prosecutor’s Office by making those who refuse to do so criminally responsible. It should be remembered that the Public Prosecutor’s Office’s activities may jeopardise certain fundamental rights such as privacy, the confidentiality of communications, right to the protection of personal data etc. A proper balance between the different rights must be established by appropriate judicial control.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor’s Office of Bolivia, § 21

18. The fourth paragraph of Article 5 should make it clear that orders given to the police and investigative bodies by prosecutors should be subject to judicial control. This paragraph corresponds to Article 102 of the draft Law, which mentions that police and investigative body operations must be subject to judicial control, not just control by prosecutors.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §18

45. [...] [T]he prosecutor should not be in a position of being obliged to present evidence to the court which he or she believes to be unlawfully obtained or weak in substance. Furthermore, the prosecutor should have the right to ask the trial court to rule against the admissibility of evidence. [...]

46. [...] In the absence of an express obligation on the investigator to provide the prosecutor with all evidence in his or her possession the proposal will undermine the principle of equality of arms since the prosecutor will not be in a position to disclose evidence to the defense of which he or she may be unaware. [...]

CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, §§ 45 and 46

84. [...] Leaving the choice of the court to the accusing party is a serious violation of the adversarial principle and gives an unfair advantage to the prosecution. The possibility to select the court should be withdrawn from the Prosecutor General.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 84

21. [...] [To] the extent that the CPC and other legislation provides for the involvement of a judge for the *ex ante* or *ex post* control of such intrusive measures (in the latter case without delay) [as searches of premises, seizures of

documents and objects, wiretappings, accessing private correspondence and computer files, etc/], the presence of the prosecutor is not mandatory.

CDL-AD(2019)006, Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, § 21

III.A.3 Specialized prosecutors

48. [...] [T]he Draft Law does not provide for specialisation within the Public Prosecutor's Office, for example on anti-corruption, organized crime or juvenile justice. Such a possibility could be authorised together with procedural guarantees ensuring that the same level of protection of individual's rights applies as for ordinary prosecutors.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 48

17. [...] [A]lthough not proposing or advocating in favour of a unique or universal model of anti-corruption agency, the above [international] instruments clearly define an international obligation for states to ensure institutional specialisation in the sphere of corruption, i.e to establish specialised bodies, departments or persons (within existing institutions) in charge of fighting corruption through law enforcement.

18. Key requirements for a proper and effective exercise of such bodies' functions, as they result from the above instruments, include:

- independence/autonomy (an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence);
- accountability and transparency;
- specialised and trained personnel;
- adequate resources and powers.

23. The use of special prosecutors in such cases [(corruption, money laundering, trade of influence etc.)] has been successfully employed in many countries. The offences in question are specialised and can better be investigated and prosecuted by specialised staff. In addition, the investigation of such offences

very often requires persons with special expertise in very particular areas. Provided that the special prosecutor is subject to appropriate judicial control, there are many benefits to and no general objections to such a system. The decision whether such a system would be useful and appropriate in the current circumstances of Montenegro is essentially a policy choice for the relevant authorities in that country.

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§ 17, 18 and 23

46. The international instruments which define the duties of prosecutors lay a particular emphasis on the duty of prosecutors to deal with crimes committed by public officials. Specialised offices to investigate such cases have become quite common in the recent years. The Venice Commission in its opinions has been supportive of the establishment of specialised anti-corruption investigation/prosecution units enjoying a certain autonomy from the general prosecution system.

47. The model for such offices varies. In some cases the special prosecutor's office remains formally part of the general prosecution structure but as an autonomous unit, so that it cannot be instructed by other, more senior, prosecutors or by the government. In other cases a completely independent office has been established.

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §§ 46 and 47

55. [...] [The OECD Report on Specialised Anti-Corruption Institutions] suggests that special anti-corruption departments or units within the police or the prosecution service could be subject to separate hierarchical rules and appointment procedures or that police officers dealing with corruption cases, although institutionally placed within the police, report in individual cases only and directly to the competent prosecutor.

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, § 55

89. Article 53 (adding Article 148/c) proposes to establish a new Prosecutor's Office of the Special Anti-corruption Structure (SAS). Creation of such special

structure may have a positive effect on the fight against corruption; it is important that the special prosecutors enjoy at least the same independent status as ordinary prosecutors. [...]

CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, § 89

53. In the opinion of the Venice Commission, the ECtHR's concerns in the *Kolevi* judgement will be addressed if cases implicating the PG are withdrawn from the jurisdiction of ordinary investigators and prosecutors, subordinated to the PG, and if they are entrusted to a body or an official who does not receive instructions from the PG, who does not owe his/her appointment to the PG, and whose further career does not depend, even in the long run, on the PG (like end-of-career or even retired prosecutors or judges). However, this whole discussion will be futile if the figure of an "independent investigator", not subordinated to the PG, is constitutionally impossible, at least as the Constitution stands now.

63. The last model discussed at the meetings in Sofia consisted of creating a position of a special *ad hoc* prosecutor – or even a reserve list of *ad hoc* prosecutors – who could step in and assume prosecutorial functions in cases where the PG may be implicated. The list of such *ad hoc* prosecutors may be approved by the SCM from the number of retired (or end-of-career) prosecutors, investigators, and judges, and then drawn by lot when the time comes and the SCM receives information about the case involving the PG. Other models of nominating *ad hoc* prosecutors are possible. In that event, it is important to ensure that the prosecutorial members of the SCM do not play a decisive role in their appointment. The Commission reiterates in that regard its previous recommendation concerning the current composition of the Prosecutorial Chamber of the SCM [...]. In addition, it would be important to ensure that after the termination of their mandate such *ad hoc* prosecutors do not need to return to the prosecution system and to become subordinate to the PG. Again, introducing this model at the legislative level would require a more flexible interpretation of the monopoly of "prosecutors", as discussed above.

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, §§ 53 and 63

33. The establishment of a special Section for the investigation of criminal offences in the judiciary (hereinafter – the Section) with an exclusive competence for the prosecution of criminal offences committed by judges and prosecutors, was examined in §§ 80 to 90 of the October opinion. The opinion stressed the fact that “the organization and structure of the Public Prosecution Service is a matter for the competent national authorities to decide” (§ 85). At the same time, the opinion expressed doubts as to the underlying rationale for introducing such a new Section. The creation of the Section would require rerouting of a large number of high-profile cases of corruption from the Anti-Corruption Directorate (the DNA) to the newly established Section, with all the disruption such massive transfer may cause for the cases currently dealt with by the DNA (§ 83), as well as some other directorates (like the Directorate for Investigating Organised Crime and Terrorism, the DIICOT). The competency of the Section was defined very broadly, covering all cases where a judge or a prosecutor may be allegedly involved (§ 80). Creation of the Section may undermine the population’s trust in the judiciary (§ 84). There was a risk of conflict of competence between prosecutorial offices, to be resolved by the Prosecutor General (§ 80).

CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, § 33

40. [...] [T]he creation of the new Section [for the investigation of crimes committed by the judges and prosecutors] raises difficult legal questions. First of all, as already noted in the October opinion, the jurisdiction of the new Section is defined very broadly. It includes all cases where a magistrate may be implicated, even in a secondary role. Complex cases involving organized crime and corruption sometimes involve dishonest magistrates. Participants in the criminal proceedings may be tempted to obtain the transferal of the case to the Section by accusing a magistrate of some misbehaviour. Such files will then be transferred to the Section, even if the evidence against the magistrate is weak at least, until the accusations are verified and more evidence is obtained. Article 88-1 (5) allows the Prosecutor General to solve the conflict of jurisdiction between the Section and other departments, but it remains to be seen whether this safeguard will be efficient, and whether the Prosecutor General will have sufficient time and resources to study all borderline cases. In practice, the creation of the new Section may lead to the withdrawal of a number of “big” cases, involving high-level corruption and organized crime, from the jurisdiction of the DIT and the DIICOT and their transferal to the Section, which

is problematic in itself and also because the new Section is not yet equipped to deal effectively with such an influx of complicated high-level corruption and organised crime cases.

41. The overall direction of those changes is alarming. It is likely that the Section will receive (or already received) complex and high-profile cases related to corruption or organized crime. Prosecutors of the Section will be able to review the decisions taken by their predecessors in those cases. It is unclear to what extent the prosecutors of the Section and its Chief Prosecutor are subject to the hierarchical control of the Prosecutor General. It may reinforce the belief held by some that the real reason behind the institutional reform is to change the course of criminal investigations in some high-profile cases.

CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, § 40-41

III.B - OTHER FUNCTIONS OF THE PROSECUTION SERVICE

16. In the opinion of Consultative Council of European Prosecutors the constitutional history and legal tradition of a given country may thus justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with Council of Europe values. The only historical model existing in Ukraine is the Soviet (and czarist) model of “prokuratura”. This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards.

CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, § 16

56. [...] [T]he Commission would support a very different approach to the powers of the prosecutor’s office which results from a text adopted by the Parliamentary Assembly. While it is not binding on Member States, the Parliamentary Assembly of the Council of Europe, in Recommendation 1604 (2003) on the role of the public prosecutor’s office in a democratic society governed by the rule of law, having recited (at paragraph 6) that the various

non-penal law responsibilities of public prosecutors 'give rise to concern as to their compatibility with the Council of Europe's basic principles' went on to declare its opinion (at paragraph 7):

'it is essential... that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function.'

CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, § 56

13. [...] It is therefore necessary to be guided by the general democratic principles of a law-governed state. Foremost amongst them is the principle of separation of powers and its consequent principle: the autonomy of individual branches of authority and the principle of balance (equilibrium) of powers. That means prosecution organs should not overstep the bounds of areas reserved for legislative authority, executive power and an independent judiciary. It is therefore necessary to do away with those functions of the prosecutor's office that do not conform to those principles and may actually constitute a threat to their implementation.

CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, § 13

63. Under Article 2 of the Act, the public prosecutor's office has two main tasks: prosecuting crimes on the one hand, maintaining law and order on the other. The Venice Commission is of the opinion that the formula "maintaining law and order" is too broad and in a wide interpretation, may even be understood as encompassing the old Soviet *prokuratura* model of general supervision powers. Even if the task of "maintaining law and order" has to be read in conjunction with the list of functions of the prosecution service listed under Article 3§1, Article 2 gives the power of maintaining law and order to the prosecution office without any conditions as to its interpretation and implementation.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, § 63

III.B.1 Participation in civil proceedings in the interests of private individuals or State entities

24. Under Article 39 the representation of citizens' interests in court is still a function of the prosecutor. The Venice Commission has in the past observed that this function should only be conferred on prosecutors in cases where citizens are unable to act on their own behalf by reason of disability or some other such cause, and in no case should it be conferred on prosecutors to the exclusion of the right of a citizen to seize the court directly.

CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, § 24

29. [...] The role of the prosecutor should be limited to make an appeal in cases where he or she is a party to the proceedings. [...]

30. [...] The prosecutor may also initiate civil proceedings to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings. [...] [I]t is important that this should only be subsidiary [...]. [...] [T]he main task of the prosecutor is to represent the interest of the state and general interest, it may also be questioned whether the prosecutor is necessarily the most appropriate person to undertake this function, or whether it might not be more appropriately exercised by a body such as an ombudsman.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §§ 29-30, see also CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, §§ 65-59

35. Section 27.1.b and 27.4 APS give the prosecutor wide powers to interfere in relations between private parties ('prosecutors ... may use their powers to take action in lawsuits between other parties', 'prosecutors shall have the right to seek redress even if they were not party to the proceedings'). While they may be required in some specific cases (e.g. urgent action on behalf of a fugitive to safeguard his or her rights) such wide controlling powers should be narrowly defined in the APS.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General,

Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §35

82. However, there is also a need to clarify that the ability of public prosecutors to act on behalf of minors and others subject to legal incapacity does not allow them unilaterally to override the capacity of parents, of legal representatives or of others already authorized to act on their behalf and, if this is not the case, to amend the provision to ensure that this protection exists. This concern does not, of course, apply where a court has already removed the capacity of the parents, etc. for reasons specified in the relevant legislation. Furthermore, there ought to be an opportunity for the person said to be incapable of independently protecting his or her rights/exercising procedural competences to be able to challenge such an alleged incapacity. The role of the prosecutor in representing the individual should be only subsidiary and both the individual and any person entitled to represent the individual should be able to challenge this representation in court.

85. Although it might be implied, Article 24.2 should explicitly provide that a public prosecutor can represent the interests of an individual only after having presented justification for his or her intervention and after the acceptance of these grounds by the court.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§ 82 and 85

18. The Venice Commission remarks very positively that the competence of the State Prosecutor in property law matters have been dropped and were not implemented in the new Constitution; [...].

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §18

89. As there is no mention in paragraph 3 of Article 24 of the role of public prosecutors to represent state interests being excluded in the case of state companies, this provision might be interpreting as permitting them to act on behalf of those companies which would be entirely inappropriate given the role entrusted to their management. [...]

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 89

87. [...] [The prosecutors] should not intervene where other governmental entities have that role, this limitation is qualified by the specification that public prosecutors can act where the protection of state interests is not 'duly carried out', which could leave considerable leeway to public prosecutors as to the assessment made by these other governmental entities as to the need to bring proceedings in court and indeed allow the former to override the latter's judgment. This does not seem appropriate and this paragraph should be amended to restrict the power of representation simply to situations in which no other governmental entity has the capacity to provide representation. In analogy to the procedure provided for in Article 24.2, the prosecutor should be allowed to take over the representation of state interests from other state bodies under Article 24.3 only after the approval by a court.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 87

III.B.2 Right to initiate extraordinary review proceedings

40. Section 30.6 APS appears to override the *res iudicata* effect of final court decisions: 'Prosecutors may seek a legal remedy against final court decisions'. This competence is 'subject to a separate act with reference to reasons and in the cases defined by law'. However, it seems that these 'final' court decisions are first and second instance decisions, which are still open to cassation by the Curia.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 40

99. Article 25.5 provides that the Prosecutor General and his/her deputies as well as heads of regional public prosecutor's offices can file a claim for revision of a judgment by the Supreme Court against judgments passed in civil, administrative and economic matters. Contrary to the provisions of Article 25.4 and 24.6, Article 25.5 does not require the presence of any new circumstances for the claim. This may be unintended or be an error of translation. If however indeed a power were conferred upon the prosecutor to claim the revision of a final judgment in the absence of any new circumstances, this would be

a violation of the *res judicata* principle as well as Article 6 of the European Convention and should be changed.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 99

93. Without a court warrant, the powers in Article 24.5, especially the free access to premises and access to databases are inappropriate where a representative role is being played by public prosecutors and when they are only needed to establish the grounds for representation. However, the objectives implied in these powers could still be attained by resort to preliminary or interim judicial rulings, i.e. the normal means that exist in civil procedure.

95. Once the grounds for the representation of the interests of individuals or the state are established, Article 24.6 gives the prosecutor a number of powers, including initiating reviews of court decisions initiated by other persons. Article 24.6 should clearly state that in representing individual or state interests, the prosecutor only benefits from the procedural rights of the party which he or she represents.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§ 93 and 95

26. Under Article 17 of the present Law, it remains a task for the State Prosecutor's Office to 'apply legal remedies for the purpose of protection of constitutionality and legality'. The Delegation was informed that this task is similar to the institute of cassation in the interest of law, which exists also in other countries. It is available only in the field of criminal and administrative law and results in a request for re-opening of a final case by the Chief State Prosecutor to the Supreme Court for the benefit of human rights protection. In these circumstances there is no objection to such a possibility, which is quite distinct from the general supervisory powers over courts, which the prosecutor enjoyed, for example, in the Soviet Union [...].

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §26

III.B.3 General supervision of “legality” of actions of other State bodies, private individuals and entities. Other powers of the prosecution in non-criminal field

98. The revised Article 104 par 1 retains the quite extensive supervisory powers of the Office of the Prosecutor. Such a “supervisory” prosecution model is in fact reminiscent of the old Soviet *prokuratura* model. At the same time, over the last decades, many post-communist democracies have sought to deprive their prosecution services of extensive powers in the area of general supervision, by transferring such prerogatives to other bodies, including national human rights institutions (such as an Ombudsperson). The rationale for such reforms was to abolish what was considered to be an over-powerful and largely unaccountable prosecution service. Maintaining the prosecution service as it is in the Constitution could mean retaining a system where vast powers are vested in only one institution, which may pose a serious threat to the separation of powers and to the rights and freedoms of individuals. The maintenance of such wide prosecutorial supervisory powers has been repeatedly criticized by international and regional organizations, among them OSCE/ODIHR and the Venice Commission. In numerous opinions on this topic, including specifically on the legal framework regulating the prosecution service in the Kyrgyz Republic, the OSCE/ODIHR and the Venice Commission have recommended, for the above-mentioned reasons, that the supervisory role of prosecutors be abandoned and that their competences be restricted to the criminal sphere. [...]

CDL-AD(2016)025, Endorsed joint opinion on the draft law “on Introduction of amendments and changes to the Constitution” in the Kyrgyz Republic, § 98

42. In its 2012 *Opinion on the Draft Law on the Public Prosecutors Office of Ukraine*, the Commission once more emphasized, as a central issue in the context of judicial reforms in ex-Soviet countries, the necessity to remove powers outside of the criminal law field from the prosecutor’s competences. It also found problematic, *inter alia* in light of Article 6 of the ECHR, the prosecutor’s ability to represent the interests of citizens. The Commission acknowledged that, in the past, such competences might have been justified as a way to address the failure of the responsible institutions to ensure the proper application of laws and observance of human rights. In the Commission’s view, a modern and efficient European prosecution service

should concentrate on the criminal law sphere, which should represent its main, if not only, area of concern. Powers relating to the general supervision of legality should be taken over by courts and human rights protection by ombudsperson institutions. Maintaining such far-reaching competences and related powers would result in the prosecution service remaining an unduly powerful institution, posing a serious threat to the separation of powers in the state and to the rights and freedoms of individuals.

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

49. [...] The ability to represent the interests of citizens is, however, problematic as prosecutors are also mandated to act in pursuit of the state interest, which could clearly run counter to the interests of any individual being represented. There are other bodies - such as the ombudsperson - that would be better suited to defend the interests of the individual against the state.

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 42, 43 and 49

37. As regards the powers of senior prosecutors set out in Article 30, the second paragraph should not be used to disregard final judgments, and appeals for extraordinary retrial should be subject to strict conditions. [...] As regards 'subject prosecutors', Article 31 indicates as one of their chief functions, in addition to criminal actions, the bringing of 'popular actions'. [...] As provided by Article 97 of the Law on the Constitutional Court, not only any party but also the Public Prosecutor's Office has the legal capacity to bring such an action. The scope of this action and the risk of creating a judicial

overload by exercising it make it inadvisable to grant legal capacity to several levels of the Public Prosecutor's Office as this needs to be used consistently and in a coherent and centralised fashion.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 37

38. [...] There are no objections to limited powers of prosecutors, for example as regards the status of persons or in disciplinary proceedings against the legal profession. Moreover it is also possible to entrust the prosecutor's office with the task of defending the state interest in court proceedings outside the field of criminal law. However, a general supervisory power of the prosecutor both over the state administration and the court system is not in line with the principles of separation and the division of powers which are found in democratic constitutions.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §38

22. Article 6 refers to various powers which are conferred on the prosecution service. Some of these are very far reaching. They include the power to demand from legal entities, irrespective of their type of ownership, as well as from individuals, documents, materials, data and other information. There is also power to summon any official person or citizen and demand verbal or written explanations. This power can be exercised for the purpose of carrying out criminal prosecution but may also be exercised in relation to any infringements of fundamental human rights and freedoms or violations of legal order. This seems to go much further than a power exercised only for the purpose of criminal prosecution and again appears to be redolent of a *prokuratura* as a 'fourth power' operating outside of the constraints of a court of law and carrying out its own system of justice. There is also a power to 'freely enter the offices of state institutions, enterprises, irrespective of their type of property, as well as of other legal entities'. This presumably includes private companies. In addition to the power of entry there is a power to have access to all documents and materials. Again, what is striking about Article 6 is that all of these powers appear to be exercisable by the prosecutor without reference to a court

of law, without the necessity to obtain a warrant or to have the approval of a judge. The exercise of many of these powers should indeed be made dependent on a court warrant.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 22

22. The extensive powers which are conferred on the prosecutor's office to act without the authority of a court and which were criticised in previous Venice Commission opinions are all retained. For example, under Article 9 orders of the Public Prosecutor are binding upon all public authorities, and all citizens can be required to appear before the public prosecutor upon his or her summons and to provide explanations. In the case of non-appearance without a valid excuse an official or a citizen may be brought before the prosecutor by the militia. Officials and citizens are liable under law for failure to carry out the lawful orders of the public prosecutor.

23. Article 56 gives the public prosecutor power to enter premises of public authorities and local authorities, citizens' associations, enterprises, institutions, organisations whatever their ownership and to have access to documents and materials, and to require their production. The prosecutor can request that decisions, instructions, orders and other acts and documents be produced for verification and obtain information on the status of legality and measures to ensure it. These powers can be exercised when carrying out supervision of the observance and application of laws. Given the comprehensive nature of the power to supervise the observance of laws, these powers are very far reaching indeed.

CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, §§ 22-23

23. According to Section 4.3 APS, business entities and other organisations have to provide data and documents to the prosecutor, performing duties in his or her official capacity, within a deadline set by the prosecutor. Such a general statement certainly goes too far and should be better defined. In the field of criminal law, Section 4.3 limits these powers through the Code of Criminal Procedure. It seems however that no such limitation exists in non-penal matters, even if there are no sanctions against the refusal to provide such data and documents.

24. Section 4.4 APS gives prosecutors the power to enter various premises and rooms simply by presenting their identity cards. It seems that these powers extend even to private persons ('premises or rooms at the disposal of the organ or person affected by the procedure'). [...] Such powers should be restricted to public institutions and entry into private premises (and of course searches) against the will of the owner of the premises should be possible only on the basis of a court warrant.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§ 23-24

41. In Bulgaria, [...] the prosecution is also in charge of the "general supervision of legality" (see Article 127 §§ 5 and 6 of the Constitution; Article 136 § 5 of the JSA). This is a loosely defined competency to intervene in the name of the State in administrative (non-criminal) cases and even in private disputes, conduct checks and issue binding orders even where there is no case to answer under the Criminal Code.

42. [...] In particular, Article 145 of the JSA allows prosecutors to "require documents, explanations, other materials", "conduct checks in person", summon individuals for questioning, and issue binding orders "within the competence" of the prosecution service. Since this "competency" (related to the general oversight of legality) is described very vaguely, coercive powers listed in Article 145 have no clear limits. In addition, Article 145 § 4 imposes on private individuals and companies the obligation to cooperate with the prosecutors, in particular by "letting them [i.e. the prosecutors] access to the premises and places concerned". Again, this provision appears to give the prosecution almost an unfettered power to enter private premises, whenever the "interests of the legality" call for it.

43. In the opinion of the Venice Commission, coercive powers of the prosecution service outside of the criminal law sphere should be seriously restricted, if not totally suppressed. The JSA should describe, with sufficient precision, in which cases (falling outside of the scope of the Criminal Procedure Code) the prosecutors may seize documents, summon people for questioning, enter private premises, issue binding orders, etc. If such actions interfere with privacy, secrecy of correspondence, etc., they should be accompanied by appropriate

procedural safeguards (such as the requirement of a “reasonable cause”, the need to obtain prior judicial authorisation, etc.).

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §§ 41-43

10. It is unclear what is meant by representing the general interests of society and defending the legal order, whether this is to be interpreted as requiring the prosecution service to exercise functions of general supervision over and above criminal prosecution, or whether this is merely to be understood as qualifying the way in which criminal prosecution was to be conducted.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors’ service of Moldova, § 10

36. Section 28.4 APS empowers prosecutors to ‘dissolve or wind up’ a legal entity if it is in ‘contravention’ of the ‘Fundamental Law and any other legal regulation’. There are many violations of a law, which do not warrant a dissolution of a legal entity (e.g. minor infringements of tax legislation). A dissolution of an entity in such a case is likely to violate the freedom of association. The law should specify which violations of law justify dissolution.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 36

17. [...] The Prosecutor General should not have the function of coordinating and taking an active part in actions of civil society and private bodies. Civil society requires freedom from the state and should not work under state control; the exercise by the Prosecutor General of preventive-style oversight of civil society action, even if it were only consultative in nature, can deter civil society from its activities.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor’s Office of Bolivia, § 17

III.B.4 Right of legislative initiative

24. [...] It would, however, be undesirable that a Prosecutor-General should have power to initiate legislation or participate in parliamentary debates. Similarly, the nature of participation in the plenary sessions of courts should be defined so as to make it clear that the Prosecutor-General is not exercising any judicial function, assuming this is in fact the case.

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, § 24

25. [...] [T]he draft law provides that where the prosecutor considers it expedient, he or she shall participate in meetings of any commissions, committees and other collective bodies established by the bodies of executive power, representative bodies, local self-government bodies or the President [...]. Such rights serve to build the prosecutor's power vis-à-vis other state organs and create a sort of super-authority within the state which is very dangerous to the development of a democratic, law-abiding state.

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, § 25

62. [...] The prosecutor may, of course, hand down an opinion on a legal act within his scope of interest being dealt with by parliament. Upon a motion of the legislative authorities, he may take part in committee work on the appropriate draft law. He should not, however, be endowed with the formal right of legislative initiative. He may enjoy the right to submit a motion or a request to parliament or the government, which have the right to initiate legislation. His participation in parliamentary sittings should be possible only at the invitation of parliament or a parliamentary committee. That is required by the rules of the balance of power. [...]

CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, § 62

IV. STATUS OF THE PROSECUTORS

IV.A - THE POSITION OF THE PROSECUTION SERVICE

IV.A.1 Relations with other State bodies

7. While the independence of judges and the judiciary in general have their origin in the fundamental right for persons to a fair trial [...] the independence of prosecutors and the prosecution system does not have such a common standard.

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §7

26. Under Council of Europe standards, the public prosecutor's office may either be subordinate to the executive or independent. However, adequate safeguards must be in place to ensure the transparency of any exercise by the Government of prosecution powers. Paragraph 13 of the Committee of Ministers of the Council of Europe's Recommendation Rec (2000) 19 sets out certain conditions which should be met where the prosecutor's office is part of or subordinate to the executive. [...]"

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, § 26

19. [...] The rule of law requires independence of decision making, but not necessarily full institutional independence [...]

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, § 19

25. [...] The whole question of parliamentary accountability of prosecutors raises a delicate and difficult question. It is certainly reasonable that a prosecutor should be answerable for public expenditure and the efficiency of the office, but there is an obvious danger in making a prosecutor answerable for the decisions in relation to individual prosecutions. Not only is there a risk of populist pressure being taken into account in relation to particular cases

raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature. It would therefore be important to clarify the extent to which the prosecutor is to be accountable to Parliament and for what matters.

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of “the former Yugoslav Republic of Macedonia”, § 25

91. None of the applicable European standards anticipate a situation in which the Public Prosecutor General is not only subordinated to the Minister of Justice, but the Public Prosecutor General is indeed the Minister of Justice. [...]

95. [...] [T]he problems related to the merger of the positions of the Public Prosecutor General and of the Minister of Justice are exacerbated by the entry into force of the Act on the Organisation of Common Courts, which gives the Minister of Justice the right to dismiss and replace the court presidents/ [...]

99. If the current system of merger of offices were maintained, then any competence of the Public Prosecutor General (i.e. the Minister of Justice) to intervene in individual cases should be excluded and his/her competences should be limited to giving general regulations and guidelines to the subordinate prosecutors in order to prevent any risk of political manipulation by an active politician of individual cases.”

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor’s office, as amended, §§ 91, 95 and 99

55. Article 91 of the Constitution establishes an AG [Attorney General] who is appointed by the President acting in accordance with the advice of the Prime Minister. The AG must be qualified for appointment as a judge of the Superior Courts. The AG is independent in the exercise of his or her powers to institute, undertake and discontinue criminal proceedings. However, the AG is also the Legal Adviser to the Government and s/he represents the interests of the State in judicial proceedings and s/he helps in drafting laws and agreements.

56. In addition, the AG chairs the Financial Intelligence Analysis Unit (FIAU), which produces reports that potentially lead to criminal prosecutions. The authorities point out that the Board of Governors of the FIAU which the AG chairs, is not involved in the FIAU's operational matters such as particular financial investigations. Nonetheless, attributing the chair of such a body to the AG, who has a key role in prosecution, seems problematic and even any appearance of incompatibility should be avoided.

57. Article 91(3) of the Constitution provides that the decisions of the AG shall not be reviewed by any other person or authority (thus including the courts) in the exercise of his or her powers to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him or her by any law in terms which authorise him or her to exercise that power in his or her individual judgment. This is problematic in particular as concerns decisions not to prosecute.

58. The multiple roles of the AG derive from British rule (it still exists in Cyprus, for instance). The concentration of the powers of adviser to the Government and prosecutor in one institution makes the office very powerful. This is problematic from the viewpoint of the principle of democratic checks and balances and the separation of powers. In the UK, the two offices were separated in 1983 with the creation of the office of the Director of Public Prosecutions (DPP) as a result of the recommendations of the Phillips Royal Commission on Criminal Procedure in 1981.

59. No such reform was undertaken in Malta. However, the Venice Commission's delegation has the impression that a separation of the roles of the AG is now widely accepted in Malta following the 2013 Report of the Commission for a Holistic Reform of the Justice System.

61. [...] [T]he Venice Commission nonetheless recommends that in order to avoid the double role of the Attorney General, an office of an independent Director of Public Prosecutions or Prosecutor General or Public Prosecutor should be established in Malta. This would avoid the appearance of any possible conflict. This DPP should take over the prosecuting powers from the AG, who could remain the legal advisor of the Government with functions normally exercised by an AG in jurisdictions where an independent DPP is also in place. In order to ensure the independence of the DPP his or her security of tenure in line with accepted international practice is essential.

64. [...] [T]he Venice Commission recommends to go further and to merge the staff of this new department of prosecuting police officers with the existing prosecuting department of the AG in order to form the personnel of the new Director of Public Prosecutions. This would unite all prosecutors (from the Police and the AG) under one roof. [...]

CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, §§ 55 – 59, 61 and 64

82. According to Draft art. 65(3), the Prosecutor's Office shall be accountable to the Parliament. Like any state authority, the prosecutor's office needs to be accountable to the public and in many systems, there is accountability to Parliament. However, in such a situation the risk of politicisation should be avoided. [...] [A]ccountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out. In case the accountability leads to a dismissal procedure, a fair hearing should be guaranteed.

CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, § 82

28. [...] [T]he independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Prosecutorial systems where the public prosecution is part of or subordinated to the government are in line with European standards, provided that effective measures to guarantee the independence and autonomy of the prosecution office and safeguards against in particular government intervention in individual cases are in place. [...]

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 28

16. [...] [T]he major reference texts allow for systems where the prosecution service is not independent from the executive. Nonetheless, where such systems are in place, guarantees must be provided at the level of the individual case to ensure that there is transparency concerning instructions that may be given.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 16

27. [...] The Commission further noted that there was a widespread tendency to allow for a more independent prosecutor's office rather than one subordinated or linked to the executive [...]

42. [...] Even if there are a few systems where the Minister of Justice can give instructions [to the Prosecutor General], the Polish system stands out because of the competence of the Public prosecutor General to act personally in each individual case of prosecution [...]. The Venice Commission is of the opinion that the [problems identified in the opinion] are a direct result of the amalgamation of both offices, which are of a fundamentally different character, political and prosecutorial. [...]

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, §§ 27 and 42

30. [...] The main element of such 'external' independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 30

6. It should be noted that the Constitution defines the prosecution system as part of the 'Judicial Authority' (Chapter IX of the Constitution). This has important consequences for the independence of the prosecution from other state bodies including the courts. Recommendation 2000 (19) of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution makes a clear distinction between the prosecution and judicial functions. The explanatory memorandum states that while the task of both public prosecutors and judges is to apply the law or to see that it is applied, judges do this reactively, in response to cases brought before them, whereas the public prosecutor pro-actively, acts in order to the application of the law. The independence of the prosecutors from the Judiciary should be made explicit.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 6

11. As the prosecutor acts on behalf of society as a whole and because of the serious consequences of a criminal conviction, the prosecutor must act fairly, impartially and to a high standard. Even in systems where the prosecutor is not part of the judiciary, the prosecutor is expected to act in a judicial manner.

12. It is therefore important that the qualities required for prosecutors be similar to those of a judge and that suitable procedures for appointment and promotion are in place. [...]

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§11 and 12; see also CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 17

23. The ambiguity of the draft with respect to the independence of the procuracy is however not the prime concern with respect to the model of prosecution developed in the draft law. The principle of independence alone is no guarantee of a democratic prosecution model. Indeed, it can lead to the creation of an all-powerful prosecutor's office which is a threat to the democratic functioning of other state organs, including courts of law. It was precisely in communist states that the prosecutor's office became a tool of repression as a result of such separation, its broad scope of authority and its exemption from all supervision. [...]

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, § 23

13. [...] It is, of course, legitimate to site the prosecution service either in the judiciary or the executive, and if it is sited in the judiciary then a clear distinction has to be drawn between courts of law and the branch of the judiciary exercising the prosecution power (see in particular paragraphs 17 – 20 of Recommendation Rec 2000 (19) on the Role of Public Prosecution in the Criminal Justice System which deals with the relationship between public prosecutors and court judges).

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 13

The independent status of the general prosecutor and the public prosecution service does not necessarily preclude the possibility of an annual report to Parliament describing in general terms his work but without commenting on individual cases. However, it does mean that a decision by him to prosecute in a particular case, or not to prosecute, cannot be appealed against, or overturned by any executive or parliamentary authority. [...]

CDL(1995)073rev., Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

55. The deletion of Article 104 on special reports to be provided upon the request by Parliament and by Government is to be welcomed because it removes a possibility to exert political pressure on the Chief State Prosecutor in individual cases.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 55

25. [...] [I]t should be made clear that the prosecutor should not have an obligation to report to the National Assembly on the details of individual cases.

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 25

33. As noted by the CCPE, “the assignment and the re-assignment of cases should meet requirements of impartiality”. Similarly, the reorganisation of the inner structure of the prosecution service resulting in the re-dispatching of prosecutors to other divisions, units or branches of the service should not be used to undermine their independence. [...] [T]he process of reorganisation would take months to complete. The most probable result of this reorganisation will be an administrative chaos which would lead to unjustified delays in both prosecution offices for many months. Pending reorganisation, the work should continue.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor’s Office for organised crime and corruption, § 33

56. Article 147 of the revised draft provides that the PG and the Special State Prosecutor, in addition to the annual reports, have to provide the Parliament with “special” reports. The PG and the Special State Prosecutor also have to participate in the sessions of the Parliament and of the appropriate committees, including inquiry committees. The “manner” and “deadlines” for such special reports are to be established by the “competent working bodies of the Parliament on the issue of judiciary, corruption, security and immunity”. If the PG or the SPP fail to submit a report in the manner and within the deadlines decided by parliament or by the “competent working bodies”, the latter may submit “opinions, assessments, suggestions and recommendations” to the PC and the Minister of Justice.

57. The Venice Commission notes with approval that the previous proposal that parliament could adopt, by simple majority, a motion for dismissal of the PG or the SSP after the presentation of their reports has been abandoned, as recommended in its March 2021 opinion. Now the dismissal of the PG or the SSP may only be decided by the PC on the basis of the grounds exhaustively provided by law, and with a procedure which ensures due process, and with the right to appeal to the Supreme Court. The Commission commends the Montenegrin Authorities for following this key recommendation.

58. The new provisions should not be considered as problematic if they do not aim at obliging the PG or the Special State Prosecutor to report on specific cases. Sound considerations may justify that the PG or the SSP refuse to disclose information on pending and even terminated cases. The law should therefore make it clear that the reports of the PG and SSP to parliament should not relate to individual – pending or terminated - cases. Further, the law should provide for the possibility to give a reasonable justification to parliament for failure to report or to appear before.

CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, §§ 56-58

37. Generally speaking, changes in the prosecutorial service within the judiciary, introduced as a result of a reorganisation in the judiciary, could be carried out in such a manner as to not cause any problems with respect to the administration of justice and the treatment of prosecutors, who were initially in charge. [...]

CDL-AD(2021)019, Romania - Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary, § 37

IV.A.2. Financial independence of the prosecution service

69. [...] [An] own budget [for the prosecutor's service] which is to be approved by the Parliament [...] is an appropriate provision and [it] is a good guarantee for the independence of the prosecutor's service.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 69

59. [...] The financial independence of the Public Prosecutor's Office must be ensured without resorting to funds involving the carrying out of certain actions or donations from private or foreign sectors.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 59

72. As stated by Article 32 of the draft law, financial resources for the Special Office are to be provided from the general budget of the State Prosecutor's Office. Additional indications on the criteria or indicators taken as a basis for the budget proposal, its author (by the Chief Special Prosecutor?) and the deciding authority (is it the Parliament, upon adoption of the general budget or by subsequent decision of the Supreme Prosecutor?) would be recommended.

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, § 72

60. [...] In terms of independence, there is no international standard that requires budgetary autonomy for courts, but the views of the judiciary should be taken into account when deciding the budget. The process of approval of the draft budget by the Judicial Council/Prosecutorial Council (or the Plenary SJC in the current system), following a proposal of the Minister, is in line with this recommendation. In order to ensure that the position of the judiciary in budgetary matters is made known to the NA, the Constitution could require that the views of the Judicial Council/Prosecutorial Council on the budget proposal be made public and included as an attachment to the Government's proposal for the State budget.

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 60

IV.A.3. Prosecutors and the media

72. The idea of organising the relationship between prosecution and media is not itself a bad idea. However, the transmission of information should always be handled in a very cautious and restrained manner in order not to infringe upon the basic rights of privacy of individuals and their right to presumption of innocence. It is true that Article 6§2 of the European Convention on Human Rights cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary, if the presumption of innocence is to be respected.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, § 72

28. [...] [T]he draft law, which deals with the independence of the Prosecutor, prohibits 'any interference of the [...] media [...] with the prosecutor's activity'. This is a potentially dangerous provision. There exists a justified fear that such a formulation encroaches on media freedom. Care must be taken to protect the media's right to criticize the prosecutor; where this oversteps what is lawful by, for example, causing prejudice to a forthcoming trial, it should be dealt with only by way of a judicial decision.

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, § 28

80. [Under the Polish law] the information [about the ongoing cases] may be transmitted to public authorities and to other persons 'in duly justified cases' (paragraph 1) and to the media "out of consideration for an important public interest" (paragraph 2). The Venice Commission is of the opinion that in such an important matter as the transmission of information about the on-going prosecutions, which may jeopardize different rights including the right to presumption of innocence, the relevant provision should avoid using open wording which may be subjected to a large interpretation. The provision should clearly determine the persons to whom the information may be transmitted and under which conditions and such transmission should be subject to judicial control.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 80

127. [...] in general, both judges and prosecutors have a duty of restraint, as part of the standards of conduct applying to them.⁴⁷ As stated in the Opinion No. 3 on ethics and responsibility of judges of the Consultative Council of European Judges (CCJE),⁴⁸ “[a] reasonable balance [...] needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties.” The European judges’ body further specifies that, while necessary criticism of another state power or of a particular member of it must be permitted, “the judiciary must never encourage disobedience and disrespect towards the executive and the legislature” [...]

129. [...] [T]he new obligation imposed on Romanian judges and prosecutors appears to be unnecessary at best and dangerous at worst. It is obvious that judges should not make defamatory statements with respect to anyone, not only with respect to state powers. It seems unnecessary to specify this by law.

130. On the contrary, it seems dangerous to do so, especially as the notion of defamation is not clearly defined and this obligation relates specifically to other state powers. This opens the way for subjective interpretation: what is meant by “defamatory manifestation or speech” for a member of the judiciary “in the exercise of their duties”? What are the criteria to assess such conduct? What is, for the purpose of this prohibition, the meaning of the notion of “power”? Does it refer to persons or to public institutions? What is the impact of the new obligation on the SCM task of defending judges and prosecutors, by publicly expressed statements, against undue pressure by other state bodies?

[CDL-AD\(2018\)017](#), Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, §§ 127, 129 and 130

IV.B - PROSECUTOR GENERAL

IV.B.1 Appointment of the Prosecutor General

33. [...] The method of appointment of the Public Prosecutor General should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. [...]

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 33

19. The Venice Commission, when assessing different models of appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the requirement of *democratic legitimacy* of such appointments, on the one hand, and the requirement of *depoliticisation*, on the other. Thus, an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicisation of the prosecution office.

20. The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. [...]

27. [...] [T]he nomination of the candidate should be based on his/her objective legal qualifications and experience, following clear criteria laid down in the Draft Law. It is not sufficient for a candidate for such a high office to be subjected to the general qualification requirements that exist for any other prosecutorial position; the powers of the Chief Prosecutor require special competencies and experience. [...]

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 19, 20 and 27

83. According to Article 65(2) of the draft revised Constitution, the Prosecutor General is elected for a six years term by a majority of the total members of the Parliament. The requirement of a qualified majority in Parliament for the election of the Prosecutor General is recommended.

CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, § 83

35. No single, categorical principle can be formulated as to who - the president or Parliament - should appoint the Prosecutor General in a situation when he is not subordinated to the Government.[...] Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.

36. In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. [...]

37. [...] A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office. [...]

38. If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment [...].

40. In any case, the Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§ 35-38 and 40; see also CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 34

50. Under the Constitution of Montenegro, the PG is elected by a qualified majority in Parliament, on the proposal of the PC. In 2019, when the term of mandate of the outgoing PG came to an end, the Parliament failed to elect a new one. The Constitution of Montenegro does not provide for an anti-deadlock mechanism for such cases. As a result, the outgoing PG has been performing his functions ad interim, on the basis of a decision of the PC, since 2019.

51. The original draft amendments provided that the PC would elect an interim PG for a period of six months, extendable for one more period of six months. The interim PG would not need to be a prosecutor but would need to satisfy some ineligibility criteria. The revised draft repeats those provisions.

52. In the March opinion, the Venice Commission noted that while the very idea of an interim PG is not directly contrary to the Constitution, such a temporary solution should not last too long, “otherwise the constitutional provisions giving the power to elect the PG to Parliament and fixing a limited term of the PG’s mandate would be deprived of any meaning.” The Venice Commission however observed that an outgoing PG has at least some “residual legitimacy”, so the interim functions should be carried out by him until the election of a new, permanent PG.

53. It was reported that in May 2021 the outgoing (interim) PG would reach the retirement age and would have to vacate his position definitely. If no political agreement on the election of the new PG (or on a constitutional amendment introducing an anti-deadlock mechanism or another method of appointment of the PG), is reached by this time, the prosecution service will remain without leadership. This is a constitutional impasse, and while any solution to this problem proposed in a law adopted by a simple majority would be constitutionally questionable, a constitutionally compatible solution needs to be found, even if it is based on the Law of Necessity.

54. Since under the Constitution the Parliament elects the PG on the proposal of the PC, it is reasonable to assume that the PC should appoint an interim PG once the outgoing PG retires. There is a strong argument for selecting an interim PG from the ranks of existing top prosecutors, and not to put an outsider in this position, as might be the case under the revised draft. The appointment of an existing prosecutor might better ensure the continuity and legitimacy of the office and, in addition, it might create an incentive for the ruling majority to seek a compromise with the opposition about the election of the (permanent) PG (or a possible amendment of the Constitution). As against

this, the appointment of an appropriately qualified outsider might be seen as signalling a fresh start and reducing the risk of corporatism.

55. The Commission wishes to stress that these transitional arrangements do not represent a solution to the serious issue of the need to find a broad political agreement on the next Prosecutor General. It is a sign of maturity and responsibility on the part of the political class, both in government and in opposition, to be able to find consensus or agreements, including and in particular as to appointments of independent institutions and top political appointees. Broad political agreements are necessary in order for the state institutions to function in a democratic manner. The Venice Commission reiterates that the Constitution should contain an anti-deadlock mechanism which would motivate parliament to reach the qualified majority for the appointment of the Prosecutor General.

CDL-AD(2021)030, Montenegro - urgent opinion on the revised draft amendments to the law on the state prosecution service, §§ 51-55.

[...] [P]rofessional, non-political expertise should be involved in the selection process. However, it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, *carte blanche* in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the government. It might consist of the occupants for the time being of some or all of the following positions:

- The President of each of the courts or of each of the superior courts.
- The Attorney General of the Republic.
- The President of the Faculty of Advocates.
- The civil service head of the state legal service.
- The civil service Secretary to the Government.
- The Deans of the University Law Schools.

A public announcement would be made inviting written applications for the position of general prosecutor and stating the qualifications required for the position; it is suggested that these should be not less than those required for appointment to high judicial office. The Commission would examine

the applications and submit to the government (or to Parliament if that is preferred) not more than, say, three names all of whom the Commission considered to be suitable for appointment. The government (or Parliament, as the case might be) would be free to make the selection from those names. In order to emphasise the importance of the position of general prosecutor he might be appointed by the President of the Republic on the nomination of the government (or Parliament) although the President would have no power to reject the nomination. A possible variation of the above proposal is that the selection of nominee that is made by the government should be approved by Parliament before submission to the President. Not all the matters set out need to be stated in the Constitution which might merely say 'the general prosecutor of the Republic shall be appointed by the President of the Republic on the nomination of the (government) (with the approval of Parliament) (Parliament)'. The other matters would be set out in a law of Parliament.

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, pp. 6 – 7

42. [...] It is necessary that some committee of technically qualified persons should examine whether candidates for this position [as Prosecutor General] have the appropriate qualifications and meet the relevant criteria. [...] There are a number of options which could include the Superior Council simply giving an opinion on the suitability of all the candidates or alternatively ranking them in order of preference. [...]

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 42

118. Article 41 deals with the appointment of the Prosecutor General and the eligibility conditions are not generally inappropriate. However, the requirement in paragraph 2.3 that eligibility for appointment as Prosecutor General of Ukraine is dependent upon holding one of the positions listed in Article 15 - all of which are Higher Public Prosecutor positions - means that it will not be possible to appoint persons from outside the public prosecution service but a documented professional background in the prosecution system, notwithstanding the potential desirability of drawing on such outside experience, which could be especially valuable where a significant change in the role of public prosecutors is being effected by the provisions of the

Draft Law. There is a need for further consideration of the appropriateness of restricting eligibility for appointment to this post in this way.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 118

21. The Venice Commission has consistently recommended that excessive politicisation of the nomination of the PG should be avoided through provision for a professional and non-political input as to the assessment of the professional qualifications of the candidate. In the Republic of Moldova, such input is provided in principle by the SCP. The mere involvement of an expert body such as the MoJ Committee before the SCP does not necessarily bring an unacceptable element of politicisation.

CDL-AD(2019)034, Republic of Moldova: amicus curiae brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor's Office, § 21

26. Revised Article 158, paragraph 2, now reads: "The High Prosecutorial Council shall propose one candidate for the Supreme Public prosecutor to the National Assembly". The Commission's key recommendation in this respect has therefore been implemented.

CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, §26

34. It is to be welcomed that [...] the Prosecutorial Council will elect the Chief Special prosecutor from among those having applied to the public advertisement and based on the evaluation of their expert knowledge and competence to discharge the function of Chief Special Prosecutor, including by the way of interviews conducted by the Prosecutorial Council with the candidates meeting the requirements set out by the draft law [...].

36. It is also to be welcomed that the conditions for the election of the Chief Special Prosecutor and special prosecutors have been broadened [...] to enable the access not only of prosecutors, but also of persons having at least 12 years (for the Chief Special Prosecutor) or 10 years (for special prosecutors) of work experience as a judge or attorney, to such positions. In addition, persons "*whose previous work shows that he/she has special knowledge and*

competences to work on the cases falling under the jurisdiction of the Special Public Prosecutor's Office" will be eligible for such positions (see Articles 12 and 13 of the revised Draft Law). This should reduce the risk of the Special Prosecutor's Office being too inward looking and may help to foster a more independent outlook. [...]

CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §§ 34 and 36

55. Under Section 22.2.a ASPGPOPEPC the Prosecutor General will, after the expiry of his or her mandate, continue to exercise his powers until the beginning of the mandate of the new Prosecutor General.

57. There is, however, a transition problem when the mandate of the Prosecutor General expires. Section 22.2.a ASPGPOPEPC means that 1/3 plus one member of Parliament can effectively keep him or her in office by blocking the election of a new Prosecutor General and they could thus extend his or her mandate indefinitely. It is not clear to what extent this question was considered in detail when the Fundamental Law and the ASPGPOPEPC were passed. However, the Fundamental Law lays down a long mandate of nine years of service for the Prosecutor General and it would seem unacceptable that a minority of the members of Parliament can in fact keep him or her in office indefinitely by creating a deadlock in the election of a successor.

59. There may be various solutions. One possibility may be to prescribe a deadline - in the Fundamental Law or the ASPGPOPEPC - within which Parliament must have elected a new Prosecutor General. Another solution might be simply to repeal Section 22.2.a ASPGPOPEPC, so that the mandate of the Prosecutor General automatically expires after the termination of his or her mandate. Both solutions of course create the problem that there may be a period without a formally elected Prosecutor General but this may put the necessary pressure on Parliament to elect the successor. What needs to be avoided as well is that the same blocking 1/3 minority can indefinitely extend an interim period under the Deputy Prosecutor General, who was appointed by the outgoing Prosecutor General.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§ 55, 57, and 59

21. The revised Draft Amendments provide for the positions of the High Justice Inspector (HJI) and Prosecutor General (PG). These office-holders cannot be elected through a proportionate system. There is no single model for their election; at the same time, it seems desirable that such important appointments should attract a high degree of consensus, and (if this is attainable) without compromising on the qualities of the successful candidate. However, it is difficult to see a principled argument for requiring a 2/3rds majority rather than a 3/5^{ths} – again, this is more a political than a legal question.

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, § 21

40. Numerous welcomed references are made throughout the draft Law to respect the principle of non-discrimination. However, certain questions should be avoided. For example, the second paragraph, relating to the procedure for electing the Deputy Prosecutor General, proposes in Article 43 that where the holder of the post is a man, the woman who received the most votes will be the Deputy and vice versa. The necessary respect for the principle of equality and non-discrimination must be combined, however, with the need for respect for and legitimacy of the person occupying the post. The number of votes should therefore be the chief criterion, not just being of one or the other gender. Situations should be avoided where a person having received fewer votes gets the post for simply being a man or a woman, since doing so could undermine the confidence placed by society in such an important post. It is therefore recommended gender balanced lists be drawn up and that the Prosecutor General and his/her Deputy be elected from the list which has received the most votes.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 40

38. Legislation which interferes with ongoing judicial proceedings, for example by changing the law in a way which determines the outcome of that litigation, may be in breach of the right of access to court for the determination of civil rights and obligations guaranteed by Article 6 of the European Convention on Human Rights. However, that is clearly not this case, since no judicial proceedings were engaged. Legislation which pre-empts an ongoing selection procedure for a public appointment does not seem to determine anyone's civil rights and Article 6 of the ECHR is therefore not applicable. Looking at the situation from a broader human rights perspective, it is difficult to identify which human right

of the participants (guaranteed at the national, European or international level) was affected by the interruption of the competition. Until the process is finished the candidates are not elected. If the whole process is stopped mid-way for good reasons, it can be unpleasant for the participants, but it is difficult to conclude that the participants had a legitimate expectation (amounting to a “right”) to see the process carried through, or, a fortiori, to be selected (primarily because of the uncertainties associated with this process). Probably, the participants of the competition may ask to be reimbursed for the expense and inconvenience of making an application which is later overtaken by a legislative intervention, but their entitlement should certainly not go beyond that.

39. From an institutional perspective, there do not seem to exist clear international standards which would help answering this question. From the national perspective, the answer is not evident either. On the one hand, Article 125 (1) § 4 of the Constitution entitles Parliament to define, in a law, general procedures to be followed by the SCP. The duty of the SCP is to follow those procedures. On the other hand, the SCP also has a role under the Constitution which should not be usurped by Parliament – this is the role of composing a list and selecting one candidate, to be proposed to the President of the Republic for appointment. The SCP should follow the law, and the legislator should not exceed its law-making power to prevent the SCP from exercising its constitutional mandate.

40. If a legislative amendment was adopted in order to prevent the SCP from nominating a particular candidate, or in order to ensure that certain specific persons may or may not participate in the new competition, or for any improper reasons, this could impinge on the constitutional “division of labour” between the legislator (whose main task is to adopt rules of general application) and the SCP (whose main task, in this context, is to select appropriate candidates for the prosecutorial positions). This would come close to *ad hominem* legislation previously criticised by the Venice Commission.

41. The Venice Commission acknowledges, at the same time, that a legislator may have good reasons to intervene in a pending recruitment procedure which is grossly unfair, inefficient, discriminatory etc. By redefining eligibility criteria and redesigning procedural rules the new legislation may exclude certain candidates from the competition or open the way to new ones who otherwise were not eligible or raise/reduce their chances of success. So, the question whether such legislative intervention into a pending procedure is constitutionally permissible does

not have a simple and categorical answer. Most likely, to answer this question the Constitutional Court of the Republic of Moldova will have to decide whether the legislative intervention was justified by weighty considerations of public interest or pursued ulterior reasons.

CDL-AD(2019)034, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor's Office, §§ 38-41

38. [...] Having the Council make another recommendation if the candidate does not get elected by Parliament goes some way to avoiding a deadlock and provides transparency on the manner in which the various bodies are expected to proceed.

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, § 38

52. The new system, allowing the President to refuse an appointment [of the PG] only once, makes the role of the Minister of Justice in such appointments decisive and weakens, rather than ensures, checks and balances. The current system, by involving two political organs, allows the balancing of various political influences. This is important since the President, contrary to the Minister of Justice, does not necessarily belong to the majority.

53. Moreover, the current system gives a real role to the SCM by enabling the President to take an informed decision on the basis of the opinion of this body. On the contrary if, as it results from the amending proposal, the President is bound to appoint the second candidate proposed by the Minister of Justice even in case of a negative opinion by the SCM, the opinion of this body loses most of its relevance. For the second proposal this is evident. As regards the first proposal, the Minister of Justice has less incentive to propose a candidate who would appear suitable to the SCM, since the Minister will anyway be able to impose his or her second candidate.

54. This new rule can therefore only be considered as a step backwards, reducing the independence of the leading prosecutors. This is particularly worrying in the context of the current tensions between prosecutors and some politicians,

due to the fight against corruption. If the leading prosecutors depend for their appointment and dismissal on a Minister, there is a serious risk that they will not fight in an energetic manner against corruption among the political allies of this Minister.

CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, §§ 52 - 54

28. [The law] provided for the web broadcasting of interviews conducted by the Minister of Justice with the prospective candidates to the top positions in the prosecution system [...]. Broadcasting of interviews adds transparency, but it does not remove the inherently political nature of the process of appointment and cannot replace the examination of the merits of the candidates by an expert body.

CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, § 28

38. [...] In a 2015 opinion on the prosecution service of Georgia, the Venice Commission welcomed giving the Prosecutorial Council a key role in the process of appointment of a chief prosecutor, along with the Minister and the legislature, as diminishing the risk of politicization of the prosecution office. In the Romanian context the Government and Parliament went in the opposite direction. They decided to weaken the prosecutorial wing of the SCM (as regards the appointments of the top prosecutors to the Section) and to strengthen the influence of the Minister of Justice (as regards the general appointment scheme), while removing other external checks (such as the President's power to disagree with the Minister's proposal). As a result, the prosecutors have lost most of their influence as regards the appointments of top prosecutors to the Section under the transitional scheme both in relation to the Minister or to the judicial wing of the SCM. The Venice Commission is not persuaded that this is the right answer to the abuses allegedly committed by some prosecutors in the past. The Venice Commission reiterates its earlier recommendation to reconsider the need for the establishment of the Section. In any event, it is a fortiori ill-advised to appoint to the Section top prosecutors who do not enjoy confidence of their colleagues from the Prosecutors' Section of the SCM (which does not exclude, at the same time, that the judges may also be involved

in the process of selection of candidates). It is recommended to develop an appointment scheme which would give the Prosecutors' Section of the SCM a key and pro-active role in the process of the appointment of candidates to any top positions in the prosecution service, in the Section or elsewhere.

CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, § 38

IV.B.2 Term of office of the Prosecutor General

117. [...] Article 122 of the Constitution should be amended to provide for a longer mandate than the current five years and should exclude re-election in order to protect persons appointed as Prosecutor General from political influence.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 117

89. [...] [T]he proposed seven year term of the Prosecutor General rather than the current five years is to be welcomed as this is both a sufficiently long period that goes beyond the term of any one government or of the President, and it also removes a significant threat to independence by excluding re-appointment. This gives effect to the Venice Commission's general recommendation concerning the term of office for a Prosecutor General.

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 89

41. [...] *[F]or the institution to be in line with Council of Europe standards, the Prosecutor General should be appointed for a single term, either considerably longer than five years or until retirement. The grounds for dismissal (serious violations of the law) should be laid down in the constitution, or at the very least the constitution should refer to a law setting out these grounds.*

CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, § 41

37. It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office. That would ensure the greater stability of the prosecutor and make him or her independent of current political change.

38. If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment so that again no question of attempting to curry favour with politicians arises. On the other hand, there should be no general ban on the Prosecutor General's possibilities of applying for other public offices during or after his term of office.

CDL-AD(2010)040, European Standards as regards the independence of the judicial system: Part II - the Prosecution Service, §§ 37-38; see also CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 35

100. The law should also specify whether the same person can be reappointed again as an interim PG (or even as a permanent one), and what sort of procedure needs to be followed in case of re-appointment. The possibility of re-appointment affects the independence of the officeholder: previously the Venice Commission recommended that the Prosecutor General should not be eligible for re-appointment but enjoys a sufficiently long tenure. A scenario in which the prosecution system is governed by an interim PG, for a prolonged period of time, and where this interim PG has to seek and obtain re-appointments at regular intervals is very dangerous for the independence of the prosecutors. It would be more appropriate for one of the Deputies, selected by the SCP, to temporarily perform the duties of the PG (with the exclusions highlighted above), for the period of time necessary to complete a criminal investigation against the suspended PG or to fill the vacancy.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, § 100

28. The draft law itself which directly provides for the removal of the SSP from his position. In this part the draft law is a non-normative, ad hominem piece of legislation. The Venice Commission is concerned with such abuse of the legislative powers: it undermines legal certainty (because normally the removal of a prosecutor should be based on the grounds provided by a law in advance) and is contrary to the nature of the legislative activity.

CDL-AD(2021)019, Romania - opinion on the draft law for dismantling the section for the investigation of offences committed within the judiciary, § 28

29. In certain exceptional situations, a law may have a direct effect on the mandate of an officeholder. For example, it is conceivable that if the whole institution is terminated, the security of tenure of its head cannot be guaranteed. However, minor changes to an institution do not justify the replacement of its head. [...]

30. [...] If every new parliamentary majority in Parliament were entitled to do this, that would be contrary to the very idea of the “tenure” and to the stability of mandate of the officeholders, and the “independent” – i.e. apolitical – nature of those bodies.

58. [...] The security of tenure of the current officeholder should be respected. If the current SSP is guilty of any misbehaviour, he should face disciplinary or criminal liability, and not be replaced under the pretext of a legislative reform.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor’s Office for organised crime and corruption, §§ 29. 30 and 58

50. [...] Admittedly, even if the Constitution is silent on this point, the law may provide for some transitional arrangements which permit the [State Prosecutor’s Office] to function normally pending the election of a new PG – as the current Article 48 does. Extending the mandate of the outgoing PG as an acting one is the most evident solution in such cases, on the basis of the law of necessity and since the outgoing PG has at least some residual legitimacy (because he or she has been originally appointed by Parliament following a constitutionally prescribed procedure). However, such temporary arrangement should not be prolonged ad infinitum – otherwise the constitutional provisions

giving the power to elect the PG to Parliament and fixing a limited term of the PG's mandate would be deprived of any meaning. And, sooner or later, the acting PG will reach a retirement age, or decide to resign, and Parliament will have to assume its constitutional role and appoint a new one.

51. It follows that it is unacceptable that a non-elected prosecutor should perform interim functions indefinitely. In the absence of an appropriate anti-deadlock mechanism provided for in the Constitution, the interim functions should be carried out by the outgoing PG until the election of a new one. This solution is also likely to motivate Parliament to find a compromise as to the choice of the new PG.

52. Once an effective anti-deadlock mechanism is provided, an ad interim PG could be nominated. However, the duration of such interim appointment would have to be necessarily limited to the operation of the anti-deadlock mechanism. Two consecutive six-months' terms, as currently foreseen in the draft law, is definitely too long, and would amount to circumventing the qualified majority requirement of the Constitution, which is unacceptable.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, §§ 50-52

53. It was reported that in May 2021 the outgoing (interim) PG would reach the retirement age and would have to vacate his position definitely. If no political agreement on the election of the new PG (or on a constitutional amendment introducing an anti-deadlock mechanism or another method of appointment of the PG), is reached by this time, the prosecution service will remain without leadership. This is a constitutional impasse, and while any solution to this problem proposed in a law adopted by a simple majority would be constitutionally questionable, a constitutionally compatible solution needs to be found, even if it is based on the Law of Necessity.

54. Since under the Constitution the Parliament elects the PG on the proposal of the PC, it is reasonable to assume that the PC should appoint an interim PG once the outgoing PG retires. There is a strong argument for selecting an interim PG from the ranks of existing top prosecutors, and not to put an outsider in this position, as might be the case under the revised draft. The appointment of an existing prosecutor might better ensure the continuity and legitimacy of the office and, in addition, it might create an incentive for the

ruling majority to seek a compromise with the opposition about the election of the (permanent) PG (or a possible amendment of the Constitution). As against this, the appointment of an appropriately qualified outsider might be seen as signalling a fresh start and reducing the risk of corporatism.

55. The Commission wishes to stress that these transitional arrangements do not represent a solution to the serious issue of the need to find a broad political agreement on the next Prosecutor General. It is a sign of maturity and responsibility on the part of the political class, both in government and in opposition, to be able to find consensus or agreements, including and in particular as to appointments of independent institutions and top political appointees. Broad political agreements are necessary in order for the state institutions to function in a democratic manner. The Venice Commission reiterates that the Constitution should contain an anti-deadlock mechanism which would motivate parliament to reach the qualified majority for the appointment of the Prosecutor General.

CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, §§ 53-55

31. [...] [T]he influence of the Minister of Justice over the prosecution service is exacerbated by a very short duration of the mandate of top prosecutors (3 years, with a possibility of reappointment). The Venice Commission considers that not only the new rules of appointment should be reviewed, in order to give the SCM and in particular its Prosecutorial Section the key role in this process, but also the duration of the mandate of the top prosecutors should be significantly increased.

CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, § 31

IV.B.3 Early removal of the Prosecutor General or his/her suspension¹

35. [...] [T]he Law should clearly define the conditions of the Prosecutor General's pre-term dismissal. [...]

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 35

1. See also the chapter on disciplinary liability of prosecutors below

26. [...] As a minimum, a public prosecutor should be protected against arbitrary removal, even by law, which means that the law should specify grounds for early termination of his/her mandate.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, § 26

42. In many systems there is accountability to Parliament. In countries where the prosecutor general is elected by Parliament, it often also has the power to dismiss him or her. In such a case, a fair hearing is required. [...] [A]ccountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 42

37. [...] [It] seems inappropriate for a Prosecutor General removed from that position on a vote of no confidence – which would presumably turn on improper performance of duties – to continue in post as a public prosecutor.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §125; see also CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 37]

12. It is proposed to remove the competence of the Verkhovna Rada to declare no confidence in the Prosecutor General, thus forcing him or her to resign. This is a very welcome proposal, which has been strongly recommended by the Venice Commission in its past opinions on the ground that the Verkhovna Rada should not have the right to express a motion of no confidence (which is a purely political instrument) in the Prosecutor General who is not a member of the Government. The removal of this competence is therefore strongly supported by the Venice Commission [...].

CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, § 12

61. In Section 23.2 ASPGPOEPC it is set forth that, based on the recommendation of the President of Republic, Parliament may exempt (dismiss) the Prosecutor General from office if the Prosecutor General is unable to fulfil his or her duties arising from the mandate for reasons beyond his/her control. Similarly, as per Section 23.7 ASPGPOEPC, based on the recommendation of the President of Republic, Parliament shall pronounce the Prosecutor General's forfeiture of office in a decision if the Prosecutor General fails to fulfil his/her duties arising from his/her mandate for reasons falling within his/her control or commits a crime established in a final and absolute judgment or otherwise becomes unworthy of his/her office. The Prosecutor General should have a right to be heard before exemption or forfeiture from office.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 61

58. No procedures are set forth as to how the Parliament should arrive at their decision. There are no provisions, for example, entitling the Public Prosecutor [...] to make a defence, to call evidence or address the Parliament, nor are the procedures to be adopted by the Parliament on the occasion of such a vote set out.

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", § 58

83. [Despite the flaws of the performance evaluation procedure identified above], the Venice Commission admits that there may be a need for some regular external evaluation of the PG's work. As demonstrated above, the new mechanism of *ad hoc* performance evaluations has many flaws, so the legislator might consider alternatives. For example, it should be possible to reinforce the mechanism of annual reports of the PG to the Parliament, provided by Article 11 (3) of the law, by describing the requirements to the content of such reports, the procedure of their discussion in the Parliament, and the legal consequences of the disapproval of such reports by the Parliament.

84. The Ministry of Justice, in their written comments, indicated that the legal effect of such hearings before the Parliament would be limited, since the

decision on the career of the PG is in the hands of the SCP, under the Constitution. Indeed, only the SCP may propose the removal of the PG “for objective reasons” and “based on a transparent procedure” (see Article 125 (2) of the Constitution). The Venice Commission admits that the term “objective reasons” may be construed broadly. It is not excluded that, in addition to the dismissal of the PG for a crime or a disciplinary offence, the mandate of the PG may be terminated in cases of evidently poor performance – similarly to the mandate of the lower prosecutors. However, the mechanism of performance of evaluation proposed by the amendments has too many flaws to satisfy the constitutional precept of “objective” evaluation based on the “transparent procedure”. This mechanism should be reviewed: most importantly, the law should provide for more specific indicators of underperformance, the EC should include prosecutorial members, and the report of the EC should be clearly of an advisory nature.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 83 and 84

120. [...] Article 106.11 of the Constitution should be amended to provide that the President can dismiss the Prosecutor General only for specific grounds and that the Prosecutor General should benefit from a fair hearing. Furthermore, Article 122 of the Constitution should be amended to remove the no confidence vote against the Prosecutor General. [...]

121. It is noted in this connection that Article 52.3 provides that the Prosecutor General should be dismissed from office by the President for inability to perform duties for health reasons, violation of compatibility requirements, administrative liability for corruption offences, a criminal conviction, loss of Ukrainian citizenship, recognition as missing or dead and voluntary resignation. It is positive that Article 52.3 establishes grounds for dismissal. Most of these grounds require an independent assessment by a court before they can be relied upon and it does not, therefore, seem inconsistent with the Constitution to provide for some independent assessment of the appropriateness of removing the Prosecutor General.

122. [...] [A] preliminary procedure before the High Qualifications and Disciplinary Commission of Prosecutors should be introduced in order to advise the President or the Verkhovna Rada on possible violations of professional responsibilities of the Prosecutor General. Of course, such a procedure would not be binding upon the President or the Verkhovna Rada. Such a procedure

would make it clear that such a step should be exceptional and thus protect the Public Prosecution Service from improper influence.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§ 120, 121, and 122

31. [...] The competence to select the candidate for the Prosecutor General's position alone cannot be considered to be a tool that will allow the Prosecutorial Council to ensure the independence of the Prosecutor's Office, when taking into consideration that the Prosecutorial Council has no say in the procedure of the removal from office of the Prosecutor General.

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, § 31

63. [...] The] mechanism of *ad hoc* evaluations of the performance of the PG by a specially created commission, introduced by the amendments, appears to be quite uncommon in Europe. During the online meetings the authorities mentioned that they had been inspired by the Romanian experience of removal of top prosecutors; the Commission however recalls that the Romanian reforms of the prosecution service and their practical implementation were quite controversial, and were criticised both by the European Court of Human Rights (the ECtHR) and by the Venice Commission itself. In any event, the mechanism of "performance evaluations", as provided by the amendments, is open to criticism for a number of reasons.

64. The law does not establish any indicator of "good" or "bad" performance. Those indicators –hence the possible grounds for the removal of the PG – are defined not in the law itself but in a regulation to be adopted by the SCP [...].

66. [...] [F]rom the rule of law perspective, entrusting the SCP with a virtually unlimited power to define the material conditions in which the PG can be dismissed is a highly contestable approach. Such rules need to have the highest possible level of legitimacy. In the previous paragraphs the Venice Commission has already argued that the lack of constitutional entrenchment may be prejudicial to the stability of the prosecution system, and certain matters should be regulated not by an ordinary law but by an organic law

adopted by a qualified majority or even in the Constitution itself. This approach applies *a fortiori* to the essence of the evaluation process. It may be necessary to keep certain rules flexible, and it is perfectly acceptable if the SCP develops substantive and procedural rules contained in the law. However, to give the SCP a *carte blanche* in devising such rules seems to be excessive.

67. The second point of criticism is related to the first one: it is difficult to understand how the performance evaluation under the amendments is different from the disciplinary liability. [...]

68. The third, and maybe most important point of criticism relates to the application of this new procedure to the suspended PG, Mr Stoianoglo. Not only has the procedure already started without the evaluation indicators having been approved by the SCP, but, in all evidence, the proposal aims at applying those indicators retroactively. In an opinion on Turkey the Venice Commission observed that “disciplinary liability, or any other similar measure [italics added] should be foreseeable; a public servant should understand that he/she is doing something incompatible with his/her status, in order to be disciplined for it”. In principle, newly established performance indicators can only be applied to the future underperformance.

69. That being said, disciplinary liability should be distinguished from a more general assessment of integrity or professional competency of an officeholder, which can sometimes be demonstrated with the reference to the past behaviour.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 63, 63, and 66-69.

113. [...] [C]riminal prosecution against the Prosecutor General can now only be initiated by a prosecutor appointed by the SCP [the Superior Council of Prosecutors] (Article 35. 5), and not, as in the current Law, by the Parliament at the proposal of the Speaker. This is a welcome stipulation intended to enhance the independence of the Prosecutor General. However, since the Prosecution Service is a hierarchically organized and centralized body, it may be difficult for prosecutors to investigate criminal cases against other prosecutors (especially against the Prosecutor General). The Draft Law should clarify how investigations into possible criminal conduct of prosecutors are to be undertaken, and ensure that a mechanism exists whereby independence from the hierarchy of the Prosecution Service is guaranteed to those in charge of such investigations.

Consideration may be given to assigning this task to an existing independent body or creating a separate independent body for this purpose.

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

128. In view of the above comments, it is recommended to include in the Draft Law a specific mechanism for the dismissal of the Prosecutor General, distinct from the provisions regulating dismissal of other prosecutors and based on clear conditions and criteria [...]

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 113, 127 and 128

29. In certain exceptional situations, a law may have a direct effect on the mandate of an officeholder. For example, it is conceivable that if the whole institution is terminated, the security of tenure of its head cannot be guaranteed. However, minor changes to an institution do not justify the replacement of its head. In addition, institutional reforms should not be launched with the sole purpose of replacing individuals in key positions.

30. It is legitimate to replace ministers or other holders of political offices following elections. But if in the domestic system an institution enjoys some sort of autonomy or, a fortiori, is defined as "independent", replacing key office holders in such an institution on account of the change in the political majority and under the pretext of a legislative reform appears to run counter to the Constitution and the Rule of Law. If every new parliamentary majority in Parliament were entitled to do this, that would be contrary to the very idea of the "tenure" and to the stability of mandate of the officeholders, and the "independent" – i.e. apolitical – nature of those bodies. It would also frustrate provisions on the disciplinary liability. Disciplinary liability is imposed for specific misbehaviour by a disciplinary body, which, in the case of judicial and prosecutorial councils, enjoys independence or at least a high degree of autonomy. Since the parliamentary majority does not have control of those

procedures, it may be tempted to use legislative amendment in order to circumvent the disciplinary liability provisions.

31. If the ruling coalition, as transpires from the meetings with the rapporteurs, is disappointed by the allegedly unprofessional or politically biased actions of the SSP, then he must be checked for disciplinary liability for specific misbehaviour, and not removed under the pretext of the change of his title, and/or of the name of the institution he runs. [...]

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, §§ 29, 30 and 31

20. [...] The Venice Commission does not see why a fixed-term mandate should prevent a temporary suspension of an official. Judges in Bulgaria enjoy tenure until retirement (see Article 129 (2) of the Constitution), but can be suspended under Article 230 of the JSA, which is in principle was not contrary to the Constitution. A temporary suspension, ordered by the same body which decides on the selection and on the definite removal of the official in question, and based on objective and serious grounds, does not seem to run counter the very essence of the mandate of this official, even if this mandate is guaranteed at the constitutional level. This mandate is guaranteed under the premise of its proper exercise. The suspensive measure is an instrument saved for exceptional circumstances, i.e. in the face of serious grounds or allegations for acts that transcend the constitutional boundaries of the mandate. Additionally, the existence of several deputies to the PG – as explained to the rapporteurs up to five – presupposes both the possibility that the functions could be exercised at least on an interim basis by a Deputy (e.g., during vacations in ordinary circumstances) and that no institutional vacuum will be created out of the temporary absence of the PG. [...]

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, § 20

93. The Ministry of Justice, in their written comments, pointed out that it would be damaging for the prestige of the prosecution service and for the independence of the investigation to maintain a PG in office while there is a pending criminal investigation against him or her. This is a valid argument: the

Venice Commission is not against the suspension of the PG at the moment of the opening of the criminal case, provided that the SCP is duly involved and may guarantee that the accusations against the PG are not frivolous, politically motivated, or too weak, and that the temporary suspension of the PG is necessary to protect the prestige of the prosecution service and the independence of any future investigation. No automatic suspension of the PG is admissible, and a meaningful involvement of the SCP is required to decide on the suspension.

94. As follows from the new wording of Article 18, in case of suspension of the PG pending a criminal investigation or his/her dismissal, the mandates of all the PG Deputies are also terminated. As explained to the rapporteurs, since the Deputies are appointed by the PG (with the consent of the SCP), they would remain loyal to him even after his/her dismissal or suspension, and could therefore interfere with any criminal investigation or other procedures targeting the PG.

95. Even if this risk is real, it does not necessarily warrant the simultaneous removal of all Deputies. Such dramatic measure may impact the effective functioning of the prosecutorial system which in this situation would remain virtually “beheaded”. The collective dismissal of the Deputies, which is not related to their performance or to any fault that they may have committed, sends a wrong message to the prosecution service, namely that the position of a Deputy is totally dependent on personal loyalty to the PG. Such mass dismissal may also have a chilling effect on the prosecutors.

96. If need be, the law might provide that the Deputies who were appointed by the suspended or dismissed PG cannot intervene in any case which may potentially target the PG, or in any case which is dealt with by the prosecutor appointed by the SCP to investigate allegations against the PG. And, indeed, the appointment of the new PG, if this position becomes vacant, should not be delayed. If those conditions are met, the Deputies may remain in place until the appointment of the new PG. In any event, the suspension of the PG may only justify the suspension of his or her Deputies, and not their definite dismissal, as currently provided by the law.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 93 - 96

22. One of the ideas behind [the mechanism of the temporary suspension of the PG] is to exclude undue influence of the PG on any such investigations by

temporarily suspending him. On the face of it, this is a reasonable approach, which permits to temporarily remove the PG from the “chain of command”. However, from a practical point of view, efficiency of this mechanism is open to doubt, and this for three reasons. First, triggering the suspension procedure will mostly depend on the prosecutors subordinated to the PG. Second, it is unlikely that the Plenary SCM will agree to the suspension and to the opening of the proceedings. Third, even if the suspension is granted, there is no guarantee that the PG will be convicted and permanently removed from office, which will have a chilling effect on any investigator/prosecutor dealing with the case.”

25. The alternative is that the three members of the SCM [(the Supreme Council of Magistracy which is also composed by the prosecutors)] will trigger the suspension procedure following a communication from an investigator/prosecutor, accompanied by some materials of an existing investigation. But this means that the investigator/prosecutor should be ready to make such a communication, and will not fear reprisals from his or her superiors in case the SCM does not grant the permission, or the investigation does not result in a conviction of the PG. Furthermore, this act of the investigator/lower prosecutor will be subject to review as any other similar act, including by the PG him/herself, so, even if the request is made, it can be revoked.

26. Probably, it is unavoidable that in the initial phase of some urgent investigations the case implicating the PG will be for some time in hands of the “ordinary” investigators/prosecutors subordinated to the PG. The sooner the case is withdrawn from the “ordinary” investigators/prosecutors and transmitted to the investigators/prosecutors who are independent from the PG the better. In the proposed draft, independence of the investigators/prosecutors is achieved through the suspension of the PG. Another possible solution (discussed below) would consist of entrusting the investigation to an official independent of the PG. Whatever model is chosen, in order to reduce, if not to exclude, the risk of undue influence by the PG at those initial stages, it may be necessary to include in the CPC and the JSA an obligation of the investigators to immediately “flag” those cases to the SCM (with a corresponding sanction for not doing it), and another provision requiring the PG to withdraw from the supervision over such cases and from giving any instructions which may be reasonably interpreted as relating to those investigators.

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, §§ 22, 25 and 26.

31. Even assuming that [the Supreme Council of Magistracy suspends the PG] the prospect of bringing the PG to criminal liability remain slender.

32. Under the draft, the Plenary SCM may only “allow” the prosecutor to start a case in respect of the PG. Afterwards the file will return to the prosecutor, who will have the discretion to indict the PG and transmit the case to the court, or to drop charges. Since the outcome of the criminal proceedings can never be guaranteed, it is possible that the PG will be acquitted, even if the case is transmitted to a court. The prospect of the PG returning to his/her position after acquittal (or after the expiry of the maximum term of the suspension, which is another possibility) will certainly have a chilling effect on any investigator/prosecutor dealing with the case.

33. Finally, while the PG is suspended from office, prosecutors will remain answerable to the Deputies, who were appointed at the proposal of the PG by the Prosecutorial Chamber of the SCM (See Article 30 § 5 and Article 38 § 1-4). The NIS investigators will be subordinated to the heads of the departments in the NIS appointed by the PG (Article 153 (1)), and – indirectly – to the Director of the NIS, who may own his/her appointment to the PG (see Article 174 (1)). The regional investigating magistrates are subordinated to the heads of regional offices who are subordinated to the PG. In essence, even if the PG is suspended, the case against him/her will be in the hands of his/her close collaborators, who may remain loyal towards the PG.

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, §§ 31-33

39. [...] [T]he rationale behind suspending a judge and suspending the PG are different [...]. Suspending the PG is needed not only in order to protect the authority of the prosecutor’s office, but essentially because the PG may effectively hold back any investigation which targets him or her. As the Venice Commission noted in 2017, in Bulgaria “the PG personifies the prosecution system with all its considerable powers” (§ 32). This makes investigating a case implicating a PG particularly difficult. By contrast, any investigator/prosecutor may open an investigation into a crime allegedly perpetrated by a top judge, and to bring this judge before the court for trial, without that prosecutor risking reprisals or obstruction by this top judge.

40. Indeed, some of the decisions of the investigator/prosecutor are subject to judicial review. And, ultimately, it will be for the court to decide on the merits of the accusations. However, in Bulgaria judges are independent, and the President of the Supreme Court of Cassation and the President of the Supreme Administrative Court are not hierarchically superior to their colleagues from the lower courts. They cannot give them binding instructions, transfer cases at will, or take decisions in their place. In contrast, prosecutors in Bulgaria are organised into a hierarchical pyramid with the PG on the top.

41. Thus, in the context of criminal investigations it is wrong to put the PG and the two chief judges on the same footing. While it is legitimate to have a vertically structured prosecution system, the PG represents a more serious danger for the independence of any investigation. Perfect symmetry in these matters is not required, nor desirable.

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, §§ 39-41

58. [...] To sum up, the decision [of the Constitutional Court] gives the Minister of Justice the crucial power in removing high-ranking prosecutors, while confining the President in a rather ceremonial role, limited to certifying the legality of the relevant procedure. The weight of SCM (under the system which is currently proposed, its Prosecutors' Section) is also considerably weakened, taken into account the increased power of the Minister of Justice and the limited scope of the influence that it may have on the President's position (only on legality issues).

61. The judgment leads to a clear strengthening of the powers of the Minister of Justice with respect to the prosecution service, while on the contrary it would be important, in particular in the current context, to strengthen the independence of prosecutors and maintain and increase the role of the institutions, such as the President or the SCM, able to balance the influence of the Minister. [...]

CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, §§ 58 and 61

32. Finally, [...] a 15-years' seniority was introduced as a pre-condition for the appointment to the top prosecutorial positions. [The law...] provides for the early termination of the mandate of a prosecutor in case he or she "no longer fulfil[s] one of the conditions required for appointment to the management position". [The law...] stipulates that prosecutors in the DIT and DIICOT "shall remain in these structures only if they meet the conditions provided for by Law no. 303/2004 [...] with subsequent amendments". It appears the new eligibility criteria are applicable to those prosecutors who were already occupying top positions in the system. Such retroactive application of new eligibility criteria is highly objectionable. First, it jeopardizes the security of tenure of the currently serving prosecutors. Second, the reasons for choosing a particular seniority threshold are not clear. The fact that the threshold for the appointment to the top prosecutorial positions kept changing from almost zero to 15 years shows that the Government did not conduct any serious impact or feasibility study. Or, what would be worse, it implies that the threshold was chosen to ensure eligibility (or non-eligibility) of certain persons. This is yet another illustration of dangers associated with the process of legislation through emergency ordinances. The Venice Commission urges the Romanian authorities not to apply the new eligibility criteria to those prosecutors who were already in place when the respective amendments were made.

CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, § 32

IV.C - OTHER PROSECUTORS: APPOINTMENT, TENURE, SUBORDINATION, TRANSFERS

IV.C.1 Appointment of the lower prosecutors

IV.C.1.a Appointing body

12. All prosecutors [...] are appointed and dismissed by parliament with no qualified majority. The prosecutorial system [...] is therefore totally under the control of the ruling party or parties: [t]his is not in conformity with European standards.

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §104; see also CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 12

80. [...] [I]n a system that is as fragmented as Bosnia and Herzegovina, it would be very unhelpful and not recommended that the appointment competence be moved from the State level (the HJPC) to the Entity level (the parliaments). This would increase the risk of politicisation and should be avoided.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 80

29. [...] [T]he Deputies are appointed and removed by the Prosecutorial Council directly whereas the competence to appoint and remove the Prosecutors remains with Parliament (at the proposal of the Prosecutorial Council). This seems to indicate a distinction between the deputies, seen as civil servants, and prosecutors who would have some kind of political mandate. Such a logic might be appropriate for the Chief State Prosecutor but not for the high state prosecutors and even less so for basic state prosecutors.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 29

108. [...] [T]he system of subjecting the prosecution to political control is not in contrast with European standards. [...] [T]he appointment of the Supreme State Prosecutor by parliament can be deemed acceptable, but it would have been necessary to require a qualified majority. [...]

109. It is instead not acceptable to have entrusted the Parliament with the power to appoint all the other state prosecutors. Presumably, these are lawyers who must be selected in view of their technical expertise, and who perform their tasks under the direction of the Supreme State Prosecutor. In fact, they are civil servants, who do not need to be elected and who need to perform their duties without a fixed term.

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §§ 108-109

81. [...] It seems [the] appointments [of deputy prosecutors] are entirely in the hands of the Chief Prosecutor. In a hierarchical system such as that of BiH, giving so much power over appointments to a single individual especially without any requirement to consult with anybody else, could be a recipe

for the Chief Prosecutor to select deputies chosen for their compliance and lacking the necessary independence of thought necessary in a good prosecutor.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 81

19. [...] [T]he recommendation for appointment [of inferior prosecutors] should come from the Prosecutor General with the Superior Council having the right to refuse to appoint a person but only for good reason. [...]

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 44

32. [...] [T]he ambition should be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutorial Council rather than the Parliament since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters. [...]

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 32

74. It is welcome that state prosecutors and heads of state prosecution offices will be appointed (for five years, as stipulated by the Constitution) by the Prosecutorial Council.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 74

48. [...] In order to prepare the appointment of qualified prosecutors expert input will be useful. This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 48

47. It seems that in relation to appointments an expert body, not an elected body, which would assess candidates performance at examinations and interviews is a necessary part of any system in which appointments based on merit are made. [...]

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of “the former Yugoslav Republic of Macedonia”, § 47

78. As mentioned in Article 57, the written examination to be conducted for persons applying for election as state prosecutors for the first time is to be set and corrected by a commission established within the Prosecutorial Council. It is questionable whether the use of elected representatives is appropriate for such a task. On the other hand, to guarantee impartiality and fairness in the procedure for electing state prosecutors, some outside input would be desirable.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 78

48. If the Prosecutor General is to override such advice [from an advisory expert body] it should be on the basis of a reasoned decision and the fact that advice is being overridden should be disclosed. There are other possible means by which safeguards could be built into the system without unreasonably fettering the Prosecutor General’s power to run his office effectively. For example, some jurisdictions have introduced the concept of an Inspectorate which carries out an examination of the way in which an office has been run and decisions taken and certifies that these decisions were properly made or alternatively makes recommendations for what should happen in the future.

50.. The Venice Commission thus in principle accepts ‘external’ as well as ‘internal’ advisory bodies. The choice of model should depend on an overall assessment of the nature of the relevant prosecution system. The Prosecutor General should have an advisory board, possibly consisting of some of his own senior officials and with appropriate outside participation, to whom he would report and from whom he could seek advice, without at the end of the day putting him in a situation where he cannot reject that advice where appropriate.

51. The advantage of establishing a body with a mixed composition would be that it allows prosecutors to receive regular feedback from society about their work. Such a body could also provide valuable external advice or input to Parliament. It would therefore seem prudent to arrange for a prosecutors' council with at least some external representation, for example in relation to appointment of prosecutors above a certain level. This would (and should) not compromise the power of the Prosecutor General to make the final decision in appointment matters.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§ 48, 50, and 51

78. [...] [T]he written examination to be conducted for persons applying for election as state prosecutors for the first time is to be set and corrected by a commission established within the Prosecutorial Council. It is questionable whether the use of elected representatives is appropriate for such a task. On the other hand, to guarantee impartiality and fairness in the procedure for electing state prosecutors, some outside input would be desirable.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 78

84. If the current system in Poland where the Public Prosecutor General has the right to make the final decision on the appointments, were maintained, then it is recommended that the Act be amended so as to introduce at least the obligation for the Public Prosecutor General to provide a reasoned decision to override such advice from the advisory expert body and the fact that the advice was overridden should be disclosed.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 84

69. [...] [T]he Venice Commission welcomes draft Article 44 inasmuch as it provides that a “Decision on appointment constitutes a final administrative act [...] and an administrative dispute may be initiated against it, by filing a lawsuit before the Court of Bosnia and Herzegovina” [...]. Yet, the Commission assumes and suggests making explicit that the judicial review should assess the conformity with the law and the respect of procedural rules for decision making, i.e. that the decisions are reasoned in a way which shows that decisions were based on objective criteria and upon considering all reasons for the proper decision, while preserving the discretion right of the HJPC on the merit of the evaluation of candidates and the choice to appoint a certain candidate.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 69

IV.C.1.b Qualification requirements

34. [...] [I]t is mandatory to ensure that appointments of prosecutors and deputy prosecutors are made on the basis of objective criteria. These criteria in turn must be established in advance by law or in conformity with the procedure provided by law, on the basis of a transparent procedure and that decisions must be reasoned.

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 34

73. The draft Law [...] sets out general requirements that persons wishing to be appointed as [...] prosecutors need to satisfy, as well as requirements for the appointments to the different [...] prosecutor's offices. General requirements include citizenship of BiH, a good medical record, professional competence, the bar exam and the absence of any criminal proceedings. These appear to be appropriate and in line with European standards.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 73

26. Among the qualifications for becoming a prosecutor in Article 11, the requirement to be a professional lawyer (third paragraph) should be clarified to show whether this means all law graduates or only those who have been advocates and are registered with the bar. The profession of prosecutor should be open to all those who have followed law studies satisfactorily, have passed the necessary prosecutor examinations and had the necessary training.

27. The fourth paragraph of Article 11 stipulates the requirement to 'speak at least two official languages' without specifying the level of knowledge required. Prosecutors already working as such should be allowed time to learn the second language. In addition, the second language concerned may not always be used in a specific case, because another language than that learned may be required. It seems therefore difficult to guarantee the right to use local languages, as set out in Article 32.23 or Article 63 of the preliminary draft Law.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §§ 26-27

40. The new draft opens positions in the Prosecutor's Office to judges as well as prosecutors, and takes account of experience in other legal matters when calculating whether candidates have the necessary experience. In the opinion of the Venice Commission, such a broadening of the opportunity to work in the Prosecutor's Office can only be to the advantage of prosecutors themselves and to the functioning of the Office, provided it is implemented in such a way as to ensure fairness of competition between persons whose experience will not always be directly comparable, and that experienced prosecutors are given comparable opportunities to apply for positions within the judiciary.

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 40

31. Chapter 2 deals with recruitment of [...] prosecutors and Section 1 deals with the traineeship period. Article 8 sets out the qualifications of trainees. Among the qualities required of a trainee [...] prosecutor is the following (Article 8(g)):

'Not to have physical or mental health problems or disabilities which will prevent to perform the profession of [...] prosecutorship throughout the country, or not to have handicaps such as unusual difficulties for speaking or controlling movement of organs that may be regarded as odd by other people.'

This provision is far too broad and would not be regarded as generally acceptable according to European standards in its approach to how to deal with persons under a physical or mental disability. The test of something appearing odd to other people seems an inappropriate one.

32. Article 8(h) disqualifies persons who have been convicted of an intentionally committed crime and punished by imprisonment of more than six months. It seems inappropriate that any person who has committed an intentional offence serious enough to be punished by imprisonment of any duration should be regarded as suitable for appointment as a [...] prosecutor. [...]

35. [...] []]t seems extraordinary that physical appearance should be a valid criterion for suitability for appointment as a judge or prosecutor. So far as concerns behaviour and reactions it needs to be clarified what is meant by these and what type of behaviour or reaction would disqualify a candidate.

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§ 31-32 and 35

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

103. Similarly, there is a need to clarify the way in which the health check required under Article 24 for appointment and after every five years of service is to be implemented, with a view to ensuring that the information gathered thereby is not disclosed or stored in a manner incompatible with the right to respect for private life. If needed, appropriate arrangements should be made to safeguard the right in a manner consistent with Article 8 ECHR. Moreover, it would be useful to specify which criteria will be of relevance in the

'psychological and psychiatric assessment of candidates for prosecutor's office and of prosecutors in office'.

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 102 and 103

110. Article 33 provides for background checks on candidate public prosecutors who have passed the proficiency test and is, in principle, appropriate. [...]

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 110

32. However, the provision then goes on to say that in making the list, 'care shall be taken of the national composition of the population, adequate representation of members of national minorities, as well as knowledge of professional legal terminology in national minority languages using court'. It is unclear what this means in practice. What happens if the original list based on professional competence, etc., does not contain anyone from a particular national minority or with the necessary language skills? Is the list to be supplemented? Presumably, if it can be supplemented with persons who did not have the necessary professional skills to make it on to the original list, they must at least reach some acceptable minimum standard. Is a quota to be fixed? These matters need to be clarified in the text of the Law, as the practical implications of the current provision are very vague. [...]

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 32

IV.C.1.c Appointment procedure

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

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 100

45. [...] Normally one would expect that appointments would be made only of persons who had succeeded in the competitive examination and that they would be made in the order in which the candidates had been successful unless there was very good reason to the contrary.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 45; see also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 77

52. As regards the system for entering on a prosecutor's career, implementing regulations should clearly indicate the existence of objective proof such as written papers in the competitive examination concerned.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 52

76. The appointment process starts with a public announcement of vacancies that must be well-publicised. The announcement is followed by nominations of candidates by special departments set up by the judicial or prosecutorial sub-councils of the HJPC for nominations for vacancies in the different courts and prosecutors' offices consisting of four or five judges or prosecutors. This suggests that candidates cannot apply for a certain position directly, but only through the sub-councils. Such a practice could be seen as problematic, as it could undermine the transparency and openness of the process.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 76

31. This Article, which regulates the nomination and election of candidates for public prosecutor's office, is rephrased and seems not to have introduced any major changes, except for the introduction of the obligation to publish the list of candidates on the Internet site of the State Prosecutorial Council. The obligation to publish the list of candidates is to be welcomed.

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 31

78. [...] [T]he HJPC is both the body making the decision [on appointment] and hearing the appeal. There does not appear to be any provision for an appeal to a court of law, which should be added.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 78

17. The Venice Commission has in the past welcomed systems where the process of appointing prosecutors 'avoids unilateral political nominations', and where several State authorities and bodies participate in the appointment process and seek consensus on candidates. While the right to nominate candidates should be clearly defined, advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society. [...]

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, § 17

IV.C.2 Term of office and the early termination of office not for prosecutor's fault

50. Prosecutors should be appointed until retirement. [...]

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 50

34. [...] Since it is obvious that prosecutors (as is also the case in Montenegro) may of course be removed under disciplinary proceedings, fixed term appointments in combination with a possibility of reappointment cast doubt on the independence of the prosecution service. This is, of course, emphasised in systems such as that in Montenegro where there is considerable political influence on appointment decisions.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 34

114. "It would be desirable to state explicitly that an appointment as a public prosecutor is, subject to the provisions on dismissal, until the retirement age specified in Article 63."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 114

[...] The general prosecutor's period of office should not be co-terminus with that of the government since this would tend to lead to the assumption in the public mind of his political allegiance.

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

31. It is to be welcomed that, as provided by Article 48, a person may only be elected as Supreme Public Prosecutor for a maximum of two terms.

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 31

123. Article 95.3 sets out that 'when a judge or a prosecutor reaches the mandatory retirement age, his/her term shall automatically cease'. It is recommended to provide more flexibility by allowing a judge to finish considering/deliberating a case or else retirement could disrupt the work of the court, which may result in the re-hearing of a case.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 123

149. [...] [D]ismissal under Article 52.1.10 and Article 61 in the case of the liquidation or reorganisation of the public prosecutor's office employing him or her appears to lack any safeguards against this being used to undermine the guarantees of independence in Articles 16 and 17. There is a need to introduce the possibility to challenge the reorganisation decision in court.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 149

155. In the absence of an impact assessment concerning the personnel structure of courts and prosecutor's offices and existing and future needs in the system, the fact that some of the above changes originate in proposals made by magistrates cannot be a sufficient justification for the new scheme. It is strongly recommended, as a guarantee for the efficient, professional and independent operation of the Romanian judiciary, to conduct, before the entry into force of the proposed 'human resources' measures [(involving mass early retirement of senior prosecutors)], the necessary impact studies. The proposed early retirement scheme should be abandoned unless it can be ascertained that it will have no adverse impact on the functioning of the system.

CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, § 155

IV.C.3 Remuneration of the prosecutors, staffing of the prosecutor's offices

69. Like for judges, remuneration in line with the importance of the tasks performed is essential for an efficient and just criminal justice system. A sufficient remuneration is also necessary to reduce the danger of corruption of prosecutors.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 69

179. [...] The possibility to provide individual bonuses and housing can lead to corruption or to undermine the independence of the prosecutor as distribution or allocation of these benefits will include an element of discretion. Only bonuses, for which completely objective criteria are defined, can avoid this problem.

180. Furthermore, the sort of material support envisaged by Article 88 seems inappropriate. The needs addressed should be adequately met out of the salaries of public prosecutors. [...]

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§ 179 and 180

68. [...] It would be useful to set out in the law at least criteria for establishing the minimum number of positions that guarantee the effectiveness of the Office and how this number can be changed. [...]

71. Finally and most importantly, in view of its potential impact on the capacity, efficiency and quality of work of the Office, and its autonomy, the recruitment procedure applicable to the above categories [of support staff] should also be adequately regulated by the law. The absence, in the current draft, of any such information - whether recruitment may be organised through competition or other modalities - is a source of concern.

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§ 68 and 71

24. [...] Additional guarantees likely to increase the autonomy and the efficiency of the Special Office may include, for instance, establishing the Chief Special Prosecutor's capacity as budget administrator.

CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, § 24

94. *Here again, sufficient remuneration is an important element of autonomy and a safeguard against corruption.*

CDL-AD(2016)007, Rule of Law Checklist, § 94

IV.C.4 Internal independence and the hierarchical organization of the prosecutorial system

28. [...] [T]he independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.

31. The independence of the prosecution service as such has to be distinguished from any 'internal independence' of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. [...]

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§ 28, and 31

15. The hierarchical model is an acceptable model although it is perhaps more common where prosecution services are sited within the judiciary for the individual prosecutor to be independent. The hierarchical model is more commonly found where the prosecution service is regarded as a part of the executive. A hierarchical system will lead to unifying proceedings, nationally and regionally and can thus bring about legal certainty. [...] What is more a matter of concern is the obvious contradiction between the principle of the autonomy of the individual prosecutor referred to in Article 2(4) and the principle of hierarchical control referred to in Article 2(5).

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 15

92. Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

95. [...] Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular on behalf of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias.

CDL-AD(2016)007, Rule of Law Checklist, §§ 92 and 95

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

107. [...] [A]ctions, inactions and acts of prosecutors may be challenged with the superior prosecutor and the decision taken by the latter can be challenged further in court (Article 34.4). While this provision, especially as regards the availability of judicial supervision, is in principle to be welcomed, it raises several issues.

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

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 75, 107 and 108

14. [The provision] sets out the principles upon which the activity of the prosecution service is organised. These are duties to carry out activities in accordance with the law, the duty of transparency, the principle of

independence, the principle of the autonomy of the individual prosecutor *'which allows them to take decisions by their own with regard to files and cases under their examination'* and the principle of internal hierarchical control and judicial control. [...]

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors service of Moldova, § 14

The Law on the organisation and procedure of the Office of Procurator should define the procuracy as a system of relatively independent authorities preferably organised in correspondence to the court system. It would be for the higher authority to control the level immediately below. However, the highest authority should not directly control the lowest one. In this way, the system of prosecution would be protected against direct political intervention or influence.

CDL-INF(1996)006, Opinion on the Draft Constitution of Ukraine, Section VII, p.14

37. It is because of questions of this sort that it is important to specify exactly what is meant by describing the system as hierarchical. The important thing is to specify what exactly is the power of instruction given to anybody within the system, to whom exactly this power is given, what precisely is the scope of authority of individual prosecutors, when they may make decisions on their own initiative, which decisions require to be approved by a more senior prosecutor, which decisions may be reviewed or set aside, and by whom and on what grounds. [...]

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors service of Moldova, § 37; see also CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 36 and 38

28. Article 38 [...] deals with the establishment of the number of public prosecutors. This number is to be related to performance benchmarks. The earlier provision allowed for the determination of that number by the [Prosecutorial] Council on the proposal of the Minister of Justice, on the initiative of the Supreme Public Prosecutor. The involvement of the Minister of Justice in this decision is absent in the new text. This change reinforces the

autonomy of the Prosecutor's Office and aims at providing an objective basis for the decision concerning numbers and should be welcomed. [...]

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 28

43. It is important to be clear about what aspects of the prosecutor's work do or do not require to be carried out independently. The crucial element seems to be that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy (for example giving priority to certain types of cases, time limits, closer cooperation with other agencies etc.) seems to be an issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role.

45. [...] The biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy - for instance by individuals as victims of criminal acts - then there is a high risk of non-accountability.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§ 43 and 45

17. [...] [R]elationships within the prosecution system between the different layers of the hierarchy should be governed by clear, unambiguous and well-balanced regulations (Principle XIV of the Rome Charter). [...]

90. The internal functional autonomy of prosecutors should likewise be reinforced. Thus, it would be appropriate to make it clear in the law that decisions regarding the pursuance and treatment of criminal cases are carried out without undue interference from the Government. [...]

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 17 and 90

16. [...] It needs to be made very clear in what circumstances the prosecutor's autonomy can be overridden by a senior prosecutor. [...] [I]f the prosecutor's decision is incorrect or illegal [...] a superior prosecutor can override it. But what is meant by incorrect? Is it enough for a senior prosecutor to decide that he or she would have made a different decision or must the junior prosecutor have acted outside the scope of his or her authority? The latter alternative is clearly to be preferred [...].

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 16

34. [...] If the Supreme State Prosecutor can take all acts directly, even without giving an instruction to the prosecutor in charge of the case, any control of illegal instruction could easily be avoided by directly ordering such acts.

108. [...] [D]irect exercise of authority by the Supreme State Prosecutor must not be used to circumvent guarantees against illegal instructions.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§ 34 and 108

67. The possibility to make a request to commit an instruction [from a higher prosecutor] in writing and the suspension of the instruction until the instruction is written is welcomed [...]

69. According to paragraph 5, 'if the prosecutor finds the instruction incompatible with a rule of law or his/her legal conviction, he/she may request exemption from the administration of the given affair in writing with a view to his/her legal position. Any such request may not be refused; in this case, the administration of the given affair shall be entrusted to another prosecutor or the superior prosecutor may withdraw the given affair within his/her own competence.' This regulation is fully in line with Recommendation Rec(2000)19. Nonetheless, the Venice Commission is of the opinion that '[a]n allegation that an instruction is illegal is very serious and should not simply result in removing the case from the prosecutor who has complained. Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation

that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction’.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§ 67 and 69; see also CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 59; CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor’s office, § 58; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 106

42. [...] Article 18 on the mandatory instructions of a higher-ranking public prosecutor to a lower-ranking public prosecutor - should be revisited in order to cover the situation of a prosecutor dealing with an instruction that runs counter to his/her conscience; an appeal to an independent prosecutorial body against alleged illegal instructions should be introduced; [...].

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 42

32. Section 13.1 APS provides that superior prosecutors may take over cases from subordinate prosecutors or assign cases to other subordinate prosecutors. However, the Act does not provide any criteria under which cases can be removed from subordinate prosecutors. Without such criteria, the removal of cases can be arbitrary. Subordinate prosecutors are not independent but they perform their activity under the authority of the Prosecutor General. Nonetheless, the removal of cases from a prosecutor without criteria could be abused to assign a case to another prosecutor who is more willing to follow an illegal instruction. Of course this will not happen in normal practice but the law should provide guarantees even against mere possibilities of abuse. There should be criteria for taking away cases from subordinate prosecutors.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 32

19. [...] [T]he power to give instructions [to a junior prosecutor] extended only to general instructions but not to giving instructions how to deal with particular cases. [...] Such a limitation should be clearly spelled out in the Law.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 19

58. Consequently, where a prosecutor other than the prosecutor general is given an instruction he or she has a right to have the instruction put in writing but Recommendation 2000 (19) does not prevent the allegedly illegal instruction from being given nonetheless. The prosecutor is also entitled to initiate a procedure to allow for his or her replacement by another prosecutor where an instruction is believed to be illegal or contrary to his or her conscience.[...]

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 58

61. [...] It is recommended to stipulate that all specific orders by a superior prosecutor must always be made in writing and that verbal orders must either be confirmed in writing, or withdrawn. The lower-ranking prosecutor should also be entitled to request further reasoning for the instruction, which should also be provided in writing. In addition, as underlined by the Venice Commission, '*[i]n case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction*'.

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 72; see also CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 61

25. Article 12 refers to the prosecutor taking measures envisaged by the law in order to restore citizens' legitimate rights that were infringed through the illegal actions of criminal investigation bodies. It is assumed that in exercising such powers the prosecutor remains at all times subordinate to any court of law which may have seisin of a case and if that is not the case the law should be amended to ensure this. However, since the investigation bodies are subject to

the prosecutor's control in the case of an obvious illegality it seems correct that the prosecutor should have power to require the investigation bodies to put right anything that was incorrectly done.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 25

32. In order to avoid undue instructions, it is essential to develop a catalogue of such guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. Such guarantees should cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 32

35. [...] According to earlier opinions of the Venice Commission on the matter, the two principles mentioned - procedural independence and procedural hierarchy - are not mutually exclusive in their application, but have to be applied in a concerted and harmonious way. [...] [T]he Draft Law does not provide sufficiently clear guidance on how these two principles should be harmonized in practice [...].

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 35

34. Under Article 28(3) the Prosecutor General is entitled to issue written orders, resolutions, and mandatory instructions and is also entitled to revoke, suspend or cancel acts issued by prosecutors if they run counter to the law. Articles 32(5) and (6) appear to enable any person within the hierarchy of the prosecution service to issue mandatory instructions to more junior persons. The prosecutor general's power to suspend or cancel acts is confined to acts issued by prosecutors which run counter to the law. It would seem from this that the prosecutor general may not override the decision to prosecute or not to prosecute merely because he disagrees with a decision if in fact that decision was taken in accordance with the law

but as already stated the scope of senior prosecutors' powers to override the decisions of their juniors requires clarification.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 34

58. Article 57 § 3 which confers to the Public Prosecutor General the power to request the carrying out of operational activities directly linked to on-going preparatory proceedings (e.g. operations such as control of the content of correspondence or mail, telephone wiretaps) and to get acquainted with materials collected in the course of such activities, does not provide for any requirement regarding the permissibility of such actions to be initiated directly by the Public Prosecutor General. Such powers in the hands of an active politician performing the office of the Minister of Justice pose a real risk for abuse. The provision should clearly set out the limited circumstances under which any such powers can be used by the Public Prosecutor General. In any case, such acts should be recorded in the case file and be available to the parties."

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 58

18. The text is careful to make it clear that in addition to the possibility of a senior prosecutor overruling a junior one, a court of law may also be used to contest a prosecutor's decisions and actions of a procedural character. Again, it is not clear how far this extends. Can a court of law compel a prosecutor to institute a prosecution? Can a court of law restrain a prosecutor from prosecuting? These issues are of course linked to the question whether the prosecution service of Moldova is to operate the opportunity principle or the legality principle. This is a matter which ought to be specified in an article which deals with the principles upon which the activity of the service is based.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 18

36. Is there any provision whereby a review of a prosecutorial decision may be sought? If that is the case, it is important to ensure that the system could not be paralysed. Clearly any system would be unworkable where a person affected by a decision could appeal in succession to superior prosecutors all the way up the system to the prosecutor general.

39. [...] [I]f every single instruction or decision of any prosecutor can be appealed right up the line to the prosecutor general such that the decision of a territorial prosecutorial can be overridden by the decision of a prosecutor of the level of the court of appeal, which in turn can be overridden by a prosecutor in the general prosecutor's office which in turn can be overridden by the head of a subdivision of the general prosecutor's office, which in turn can be overridden by the deputy of the prosecutor general, which in turn can be overridden by the first deputy of the prosecutor general and which can finally be overridden by the prosecutor general, the system would appear to be highly cumbersome, slow and inefficient.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §§ 36 and 39

113. Articles 157-160 provide for inspection supervision in state prosecution offices by the Ministry of Justice through the use of Judicial Inspectors. It is not clear how this can be in line with the independence of the prosecution service (as guaranteed by article 134 of the Constitution) or with other systems of control, for example by the Prosecutorial Council and by the Ethics Commission. At the very least there appears to be a high degree of duplication which is undesirable. In the opinion of the Venice Commission, the Ministry of Justice should not have a function of day-to-day control of the prosecution office although an input into overall general policy questions would be reasonable. [...]

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 113

60. [...] The Law should indicate clear criteria on when superior prosecutors may assume the handling of a case and any such act should be recorded in the case file and this information should be available to the parties.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 60

59. [...] [I]t is recommended to ensure that all general instructions and policy guidelines issued to special prosecutors should be published, including in the annual report submitted by the Special Office to the Prosecutorial Council (and the Parliament).

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 59

65. These provisions have been amended and the overall tenor is to make it clear that the Ministry of Justice's supervision relates only to the organisation of work and the application of the rule book in relation to the administration, especially in relation to matters such as filing, keeping official records and proper work and operation of administration and not to prosecutorial decision making. Article 159 as it now stands seems to make this clear. More generally, it is important that the inspection supervision (control) be conducted in such a way so as to ensure effective respect of independence of the prosecutorial activity of individual public prosecutors and their functional immunity. It is recommended that this important requirement be explicitly stated by the Draft law.

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 65

56. [...] [T]he parties to the case should in any case, without infringing the secrecy of preliminary proceedings, have access to the instructions given by a superior public prosecutor for the sake of transparency and fair trial. [...]

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, § 56

30. "Article 11 [...] introduces an obligation, for the new Office [of the special public anti-corruption prosecutor], to prepare a regular (six-month) activity report, to be submitted to the Supreme Public Prosecutor, as part of the institutional supervision of the latter over the Special Office. It is welcomed that, as recommended by the Venice Commission, the Office shall also submit an annual activity report to the Prosecutorial Council and make it available to the public by publishing it on its website. Additional ad-hoc reports may be prepared at the request of the Supreme Public Prosecutor or of the Prosecutorial Council. [...]"

CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, § 30

IV.C.5 Promotions, transfers, secondments, etc.

85. [...] [No] competition is foreseen for promotions. This method is not the best as the procedure for promotion is not less important than the first appointment in order to ensure the independence of prosecutors.

56. In their Remarks, the Polish authorities point out that the competitions provided for in the previous Act resulted in vacancies being unfilled for many months and that the applicants waited sometimes several years to assume office. The Venice Commission thinks that such a state of affairs would call for a more efficient organisation of competitions, possibly including the establishment of reserve lists from where applicants could be recruited, rather than abandoning competitive selections.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, §§ 85-86

45. The issue of secondment always bears in it on the one side the necessity to overcome functional problems by allocating human resources efficiently – sometimes against the will of the concerned persons – in order to insure the fulfillment of the tasks required [...] and, on the other side, the legitimate interest of the persons involved and the avoidance of potential abuse. [...] [F]orced secondment is something to be looked at with care, because it can endanger the independence of the office holder.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 45

80. [...] The principle of irremovability applies to judges and not to prosecutors. Nonetheless, prosecutors should have a possibility to appeal against compulsory transfers.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 80

48. [...] One of the provisions [...], allows [...] prosecutors, who have been found unsuccessful in one region, to be transferred to another region. Again, one can see the possible potential for using this as a means of exerting pressure on the individual [...] prosecutor. It would be important that the procedural safeguards for any [...] prosecutor who is to be transferred under compulsion should be set out in the law and the criteria for such transfer clearly stated together with the possibility for the [...] prosecutor affected to answer any case which is made against him or her and to have a right of appeal to a court of law against any decision to transfer.

49. Article 36 provides for [...] prosecutors to change from one branch to the other which does not give rise to objection in principle, but see paragraph 47 above. Article 37 deals with the appointment of [...] prosecutors to the Ministry of Justice and these appointments are made by the Minister. This latter procedure seems to give scope for the executive to exercise influence and control over the judiciary and at the very least to have potential to interfere with the independence of individual judges. [...]

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§ 48-49

49. Article 40 is concerned with the administrative positions in the office of public prosecutors. The term of office prescribed for administrative positions, other than that of the Prosecutor General, is five years and, as this seems to be renewable, it has already been noted that there is a need to strengthen the arrangements to ensure that the possibility of such reappointment does not lead to the holders of these positions compromising their independence.

116. [...] However, this role of the Prosecutors' Council of Ukraine in relation to appointments [of prosecutors to administrative positions] is only one of making recommendations and, while the grounds for dismissal are elaborated in the Draft Law, there are no provisions specifying the criteria for appointment, and (perhaps even more importantly given the risk of improper influence) for reappointment, to administrative positions. There is thus a need for the inclusion in the Draft Law - possibly in Article 40 - both of the criteria required for such appointments (essentially ones relating to experience, integrity, judgment and management) and the process whereby this is to be assessed. Furthermore, it would also be appropriate for the Draft Law to require a reasoned decision for refusing to follow the recommendations of the Prosecutors' Council of Ukraine.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§ 49 and 116

48. In introducing secondment against the will of a prosecutor, the potential risks should be balanced by safeguards. While a full appeal with suspensive effect against a secondment order might lead to an inability to deal with urgent situations of staff shortages, the prosecutor who is being seconded could be allowed to file a protest to the Prosecutorial Council, which would at

least allow for an *ex post* review of the contended secondment. This would also allow some scrutiny of the rather vague term ‘other justified reasons’.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 48

46. Article 84 specifically deals with the secondment/transfer of a prosecutor to another Prosecutor’s Office without his or her consent (emphasis added), in cases of reorganization of the Public Prosecutor’s Office leading to the lowering the number of positions of public prosecutors involving the termination of certain such position. While the secondment under Articles 81 and 82 appears to be temporary (for a period ‘up to one year’), no such mention is made under Article 84, which seems to mean that, in this case, the secondment/transfer is not only compulsory but also permanent. Here again, it is essential to ensure that a possibility to appeal against such a measure is provided.

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 46

IV.D - IMMUNITIES, CIVIL AND CRIMINAL LIABILITY OF PROSECUTORS

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

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

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

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 110-112

17. A prosecutor, like a judge, [...] may be subject to certain restrictions aiming to safeguard his or her impartiality and integrity.

19. [...] It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone.

22. Therefore, the Commission focuses on methods to limit the risk of improper interference, which range from conferring independence on a prosecutor, subject to such powers of review, inspecting or auditing decisions as may be appropriate, to the prohibition of instructions in individual cases, to procedures requiring any such instructions to be given in writing and made public. In this connection the existence of appropriate mechanisms to ensure the consistency and transparency of decision making are of particular importance.

61. Prosecutors should not benefit from a general immunity, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.

62. There are various standards on the acceptability of involvement of civil servants in political matters. A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges. Prosecutors should avoid public activities that would conflict with the principle of their impartiality.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution

Service, §§ 17, 19, 22, 61-62; see also CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§ 33 and 34

27. [...] While some protection of prosecutors from arbitrary or abusive process emanating from another organ such as the police might be desirable, it would be preferable if any limitation on the power to commence a criminal process was subject to judicial control. [...]

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, § 27

60. In addition, any inviolability, as a rule, must be rooted in the Constitution because the inviolability of a specific group of people violates the principle of equality. The amendments proposed give the impression that the introduction of a new type of inviolability combined with the abolition of the SIOJ could serve as a kind of protection (safeguard) against liability for acts of corruption. This is obviously not the aim to be achieved and the Venice Commission is highly critical of such immunity, as inviolability hinders the fight against corruption.

62. [...] The Venice Commission observed a trend in many countries of Central and Eastern Europe, which make great use of inviolability (with the adverse effect on the fight against corruption) and observed the opposite trend in a number of Western European countries where inviolability has been reduced (Austria, Belgium, France and Italy). This use of inviolability may be caused by various factors, and one is uncertainty and lack of stability of the legal system and framework – which needs to be tackled, urgently.

65. [...] In sum, the Venice Commission would like to reiterate that a clear separation needs to be drawn between functional immunity that applies to judges and prosecutors in the exercise of their functions and the inviolability proposed in the Amendments by the Chamber of Deputies, which provides an immunity that goes beyond that of functional immunity and is akin to the immunity afforded to Members of Parliament under the Constitution. As such, this type of immunity is not transferable to judges and prosecutors and therefore should not be pursued.

CDL-AD(2021)019, Romania: opinion on the draft law for dismantling the section for the investigation of offences committed within the judiciary, §§ 60, 62, and 65

115. As regards the proposed amendments, one may indeed conclude that the main requirements for a better definition of the notion of judicial error seem to have been reached. It is not possible to define judicial error without recourse to general notions, which have to be interpreted by the courts. In order to remove concerns that this new definition could block judges or prosecutors in making decisions, it would, however, be advisable to add a clause in new Article 96 stating explicitly that, in the absence of bad faith and/or gross negligence, magistrates enjoy functional immunity and are not liable for a solution which could be disputed by another court.

CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, § 115

94. Article 91 deals with the liability of the prosecutor for damage caused to an injured party 'in the proceedings by the state prosecutor as a result of his/her performing of the duties of his/her prosecutorial office unlawfully, unprofessionally or unconscientiously'. This article makes a reasonable distinction between wider liability of the State towards the victim (arg. 'unlawfully, unprofessionally or unconscientiously') and more narrow liability of the prosecutor towards the State which already compensated the victim (arg. 'deliberately'). This means that the victim has a wider claim against the State and the State can recover the compensation paid only when the prosecutor caused the damage deliberately.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 94

21. Section 3.5-7 APS provide the Prosecutor General and prosecutors with the same level of immunity as members of Parliament. Such wide immunity clearly goes too far. [...]

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 21

83. [...] Under the new provision, criminal investigations as to whether [...] prosecutors have committed criminal offences in connection or in the course of their duties or in relation to conduct considered incompatible with the requirements of their status and duties, are to be carried out through the HSYK's own inspectors with the approval of the HSYK. As an alternative, an investigation may be carried out through a [...] prosecutor more senior than the one who is to be investigated. [...]

84. Nevertheless, under Article 82, which is in line with Article 159 of the Constitution, permission of the Minister for Justice (as the Council's President) is still needed, even if a proposal by the relevant Chamber of the HSYK is first required. Therefore, consideration might be given to transferring the competences from the Minister to the HSYK and its inspectors [...].

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§ 83-84

93. [...] Procedural immunity has to be lifted by the Prosecutorial Council unless there are strong indications that false accusations are levelled against the prosecutor in order to exert pressure.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 93

88. Article 88 provides that [...] prosecutors alleged to have committed an offence cannot be arrested, searched, or interrogated nor can their houses be searched except in cases where an offender is found committing an offence *flagrante delicto*. In previous opinions, the Venice Commission has criticised the exclusion of [...] prosecutors from provisions relating to arrest, search or interrogation, except in cases where such arrests or other procedures would interfere directly with the operation of a court of law.

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 88

13. [...] Article 2.II states that the Chamber of Deputies of the Plurinational Legislative Assembly will be able to bring charges against, among others, judges of the highest courts, including the Constitutional Court, the State Prosecutor General and the Deputy Prosecutor General, for offences committed

in the exercise of their functions. This provision creates a direct threat of politicisation of the system by leaving the charge in the hands of the Chamber of Deputies which, despite having great political legitimacy, is not a judicial body and may decide not to proceed with a trial for purely political reasons. Clearly, the State Prosecutor General, the Deputy Prosecutor General and the judges of higher courts must be publicly accountable for their actions, but a decision to bring or not to bring charges should lie with the Public Prosecutor's Office and not with the Executive or Legislative. If the charge were brought by the Public Prosecutor's Office, the Chamber of Deputies might exercise a veto corresponding to its political function and in that case society would be informed about the whole debate.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 13

20. [...] [T]here would appear to be no inherent objection to certain categories of persons being tried by a specially constituted court, since the use of military tribunals to try persons in the military or of a country's cassation court to try government ministers has never been suggested by the European Court of Human Rights to be contrary to the right to be tried by an independent and impartial tribunal established by law, although it has found their use to try civilians to be generally unacceptable [...].

CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, § 20

66. The Draft Law introduces the institution of a Special Prosecutor whose role is to examine allegations of crimes committed by the Chief Prosecutor and make recommendations to the Prosecutorial Council concerning the possible dismissal of the Chief Prosecutor. [...]

67. The idea of creating a Special Prosecutor who obtains his/her temporary mandate from the Prosecutorial Council and may carry out investigations into the alleged misbehaviour of the Chief Prosecutor is laudable. However, the status of the Special Prosecutor, as well as his/her powers, is not entirely clear in the Draft Law, and the terminology used may be somewhat misleading.

72. [...] On this point, the Venice Commission, OSCE/ODIHR and the CCPE/DGI consider that the Special Prosecutor should not be a part of the hierarchical system of the prosecutors' offices, and should be answerable to the Prosecutorial Council only; otherwise his/her independence would be compromised. At the same time, the Special Prosecutor should have certain powers which ordinary prosecutors do have, and enjoy similar privileges.

74. [...] Finally, the Draft Law must explain clearly the nature of the decisions taken as a result of the 'investigation'. In particular, what happens if the report of the Special Prosecutor establishes the existence of a 'probable cause' to believe that the Chief Prosecutor has committed a crime (Article 9² par 10), but the recommendation contained in the report is not followed by the Prosecution Council or by the Parliament and the Chief Prosecutor is thus not dismissed? Does this mean that the Chief Prosecutor may not be prosecuted anymore in relation to the facts which led to the opening of the 'investigation'? If such decision means that the Chief Prosecutor would be 'acquitted', this may imply that the 'investigation' conducted by the Special Prosecutor is in essence a criminal investigation and must comply with all guarantees of fair trial enshrined in Article 6 of the European Convention of Human Rights. Furthermore, the Draft Law should specify that once the report is adopted by the Parliament, a criminal investigation may be initiated against the Chief Prosecutor; if this leads to the raising of criminal charges, this is to be dealt with by criminal courts and the Chief Prosecutor should then be treated as any other citizen. [...]

75. In any event, whatever the nature of the "investigation", this procedure should be subjected to specific safeguards, including, amongst other things, the rights of the defence. The Chief Prosecutor should be entitled to appear before the body taking the decision, present his/her arguments and benefit from other procedural guarantees which are appropriate for this kind of procedure and commensurate with the gravity of the potential sanction. [...] If, following his/her dismissal, the Chief Prosecutor is brought to trial, he/she should enjoy all guarantees of the right to a fair trial provided by Article 6 of the European Convention of Human Rights, and should benefit from the presumption of innocence.

81. [...] First of all, it would not be reasonable to require that the procedure of appointment of the Special Prosecutor should be triggered by the majority of the members of the Council – a smaller number of members should suffice. Ideally, each member of Prosecutorial Council should be able to initiate a discussion within the Prosecutorial Council on the appointment of a Special Prosecutor.

82. Second, as regards the second phase - the appointment of the Special Prosecutor – it should be possible to have this decision taken by a *simple majority* of the members of the Prosecutorial Council. One should bear in mind that members of the Prosecutorial Council are supposed to be eminent persons appointed specifically to oversee the actions of the Chief Prosecutor. If five of them consider that there is a need for an investigation and agree on the person who should be the Special Prosecutor, such an investigation should be opened. After all, the opening of an investigation does not amount to the definite dismissal of the Chief Prosecutor. Furthermore, the discontinuation of the investigation should not be decided by the Special Prosecutor alone; whatever his/her findings are, they should be presented to the Prosecutorial Council which should then decide whether or not these constitute sufficient grounds for dismissing the Chief Prosecutor.

83. Third, it would be important for the public to be able to scrutinise the process whereby the Prosecutorial Council and other bodies consider the report of the Special Prosecutor. It is therefore recommended to require the publication of the report of the Special Prosecutor upon its completion, with the proviso that some information which should remain confidential for a legitimate reason, such as whistle-blower protection, may be withheld or redacted by the Special Prosecutor.

84. Finally, the Government should not have the power to block this process: once the Prosecutorial Council, after having heard the report by the Special Prosecutor, decides that there is a 'probable cause' to believe that the Chief Prosecutor has committed a crime, the file should go directly to the Parliament.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 66, 67, 72, 74, 75, 81-84

28. The latest amendments made to the draft Law also affect Article 45(6) on the incompatibility of interests and duties, which now provides that "An employee of the Prosecutor's Office, except for a person employed by a labour agreement, shall be prohibited from participation in gathering, organising or taking part in a strike" (changes in bold). Prosecutors have a duty of loyalty, which may be a good reason to restrict their freedom of expression and

association, but the restrictions need to pursue a legitimate aim and constitute a proportionate response to a pressing need in order to be legitimate. If this is a blanket ban for prosecutors to participate in gatherings, this might not be the best solution, because there is a trend in reducing the traditionally accepted limits to fundamental rights in this respect – especially for blanket bans. A blanket ban should be replaced with appropriate and specific limitations.

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, § 28

58. Article 134(2) of the Constitution of Romania gives the SCM the role of a court of law for the disciplinary liability of judges and prosecutors. However, Article 6 of the Amendments by the Chamber of Deputies also seems to give the SCM control over initiating criminal cases against judges and prosecutors. Such a control mechanism is not compatible with the proper administration of justice in criminal cases, which must be performed by ordinary courts under the rule of law including the application of the principle of equal treatment of parties. The amendment therefore raises concerns because it gives the relevant section of the SCM the exclusive competence to decide on actions in criminal matters against judges and prosecutors.

60. In addition, any inviolability, as a rule, must be rooted in the Constitution because the inviolability of a specific group of people violates the principle of equality. The amendments proposed give the impression that the introduction of a new type of inviolability combined with the abolition of the SIOJ could serve as a kind of protection (safeguard) against liability for acts of corruption. This is obviously not the aim to be achieved and the Venice Commission is highly critical of such immunity, as inviolability hinders the fight against corruption

63. The reason for the introduction of this type of inviolability may come as a result of something that seems to be plaguing Romanian judges (and prosecutors), according to the information received by the Venice Commission delegation during the online meetings. This concerns notably vexatious complaints by private individuals against judges (and prosecutors), which often lead to pointless and unfounded criminal investigations or proceedings. If that is the case, then the Venice Commission would like to suggest that a different solution be found to discourage these sorts of proceedings [...].

65. In sum, the Venice Commission would like to reiterate that a clear separation needs to be drawn between functional immunity that applies to judges and prosecutors in the exercise of their functions and the inviolability proposed in the Amendments by the Chamber of Deputies, which provides an immunity that goes beyond that of functional immunity and is akin to the immunity afforded to Members of Parliament under the Constitution. As such, this type of immunity is not transferable to judges and prosecutors and therefore should not be pursued. In addition, adequate safeguards already exist under the current legislation of Romania (see paragraph 55, above).

66. It is the Venice Commission's view that it is crucial for criminal proceedings, which fall outside the remit of functional immunity, not fall within the competence of the SCM. The SCM is an administrative body which should not have any judicial (which in Romania includes prosecutorial) tasks. It is also an issue of the separation of powers, and as such, a constitutional issue. Such cases should be brought directly before the courts of law without the SCM's prior screening.

67. As regards vexatious complaints (often criminal complaints) by private individuals against judges and prosecutors (e.g. dilatory or frivolous appeals brought following the rendering of a judgment/decision), this is a matter that should be handled by the ordinary prosecutorial service. In the Venice Commission's view, this issue is to be regarded as an urgent matter in need of reform. The huge stock of such complaints seems to be one of the reasons for the failure of the SIOJ.

CDL-AD(2021)019, Romania - Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary, §§ 58, 60, 63, and 65 - 67

IV.E - PERFORMANCE ASSESSMENT, DISCIPLINARY LIABILITY AND DISCIPLINARY PROCEEDINGS

IV.E.1 Performance assessment and promotions

46. Article 43 refers to assessment of the prosecutor. The system requires an assessment examination every five years. This procedure is somewhat doubtful. It seems that if there is to be continuing assessment of prosecutors then it should

take place on an ongoing basis. For example, in Ireland there are twice yearly reviews of every prosecutor by a superior officer and the system is based on a discussion between the employee and the employer who try to reach agreement on how the employee is performing and what training or further development are required. This is intended to ensure that problems are identified at an early stage. It is difficult to justify a system which would allow persons to continue for as long as five years without pointing out that they were not performing satisfactorily and then would confront them with a negative assessment. Of course, in Moldova care has to be taken that a system does not interfere with the proper autonomy of prosecutors. However, it still seems that it would be appropriate that there be an assessment of the performance of prosecutors at intervals much closer than five years and that any deficiencies would be referred to and addressed as soon as they arose rather than waiting for such a long interval.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 46

50. Article 59 deals with promotion. Subject to regulations approved by the Superior Council, promotion is decided by superior officers. There is a need for a greater degree of objective transparency in this process such as recommendation of suitability by an appropriate board. This needs to be spelled out in the Article. It is not clear who is to appraise 'professional and personal achievements' but it should not be left to the sole discretion of an immediate superior.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 50

50. [...] There is a need for [...] objective transparency in [the] process [of promotion of prosecutors] such as recommendation of suitability by an appropriate board. [...] [It] should not be left to the sole discretion of an immediate superior.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 50

41. [...] The concept of 'moral characteristics' as a criterion for promotion has been removed from the list and this is to be welcomed. The new list of criteria includes a number of new matters which include obeying the rules on professional ethics, and the substitution of a revised performance evaluation and development system in place of the earlier appraisal system. The new criteria seem on the

whole to be more appropriate than the old, and in the case of prosecutors go some way to implement paragraph 7 of Recommendation Rec(2000)19.

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 41

83. [...] If the [Prosecutorial] Council is to have a role [in evaluations], it would be preferable that this role be confined to that of oversight with the actual evaluations being carried out by a technical body. [...]

84. In the opinion of the Venice Commission, the evaluation commission should be much more independent of the Council than is proposed. It is difficult to justify why the eminent lawyers should be excluded from this process. The Venice Commission believes, on the contrary, that the input of some 'outsiders' would help to guarantee impartiality and independence. In addition, the possibility of an appeal against the decisions of the evaluation commission should be clearly provided.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§ 83-84

66. [...] [T]here is an appeal to a court against erroneous or untrue assessments [...], which is positive [...].

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 66

76. The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases.

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 76

31. The possible cases of dismissal covered in Article 18 raise a problem in paragraph 6, which provides that dismissal may be the outcome of 'receiving a definitive report of 'unsatisfactory' for the post in question following the performance assessment for public prosecutors'. This is a factor which should be regulated with greater precision to prevent it becoming a route for undue interference and impartiality. The competent authority should be specified, together with the circumstances in which these grounds may be applied. Otherwise the paragraph should be deleted.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 31

127. As an objective basis for disciplinary action, a performance evaluation system should be introduced in the Law. Such a system should provide for objective criteria for evaluation and include necessary guarantees for appeals against negative evaluations.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 127

84. [...]It is not excluded that, in addition to the dismissal of the PG for a crime or a disciplinary offence, the mandate of the PG may be terminated in cases of evidently poor performance – similarly to the mandate of the lower prosecutors. However, the mechanism of performance of evaluation proposed by the amendments has too many flaws to satisfy the constitutional precept of "objective" evaluation based on the "transparent procedure". [...]

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, § 84

86. Some of proposed sub-criteria, in particular the quantitative ones (see Article 77), would need careful consideration, to ensure that measuring quantity of work will not be done merely by counting cases without due regard to their weight. The number of 'convicting' judgments should in no circumstances be a criterion. No prosecutor should have a personal interest in securing a conviction. Certainly, if a prosecutor has an unusually high number of acquittals it is reasonable to ask why this is the case; yet, it is not appropriate to measure this as a criterion either of quality or quantity of work without any further enquiry.

87. Similarly, success on appeal should not be a criterion. While it is reasonable to examine the track record of any prosecutor whose 'results' diverge more than 20% from the average, the evaluator must remain open to considering possible explanations likely to justify these figures.

88. As regards the practice of assessing the quality of work by examining random cases, this seems a reasonable approach, as is the practice of inviting the person evaluated to put forward examples of good work he or she has done.

91. [...] It is recommended however that the provisions of the draft law be reviewed to clearly specify that the case-load of heads of prosecution offices as well as their evaluation criteria should adequately take into account their managerial tasks.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§ 86-88 and 91

84. In addition, since the decision assessing the performance of a judge is to be made by the President of the court, it would be desirable that the President of the court not have the sole decision in this matter. Cases where Presidents of courts abuse their position with regard to ordinary judges are not unknown in many countries. A similar point may be made about the power of the Chief Prosecutor to assess the performance of all the subordinate prosecutors. There is, however, an appeal to the relevant sub-council.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 84

114. [...] The arrangements for providing the incentives listed are not in themselves problematic; however, as regards the awarding of bonuses in particular, the observation in the 2008 Opinion that this should be done *'in a very objective, impartial and transparent manner (...)* [and that there] are doubts about a body which is largely selected by prosecutors exercising such functions' remains relevant. It would be appropriate, therefore, for the provision of incentive measures to be reasoned and to be linked as much as possible to the procedure for performance evaluation. [...]

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 114

55. [...] [U]nder-performance should not be automatically equated with a disciplinary violation. These recommendations, though primarily applicable to judges, are applicable to prosecutors and members of the HJPC as well.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 55

IV.E.2 Grounds for disciplinary liability and sanctions

89. [...] Paragraph 2 of the same provision introduces a rather ambiguous exception to the disciplinary liability of public prosecutors: 'a public prosecutor's action or omission performed exclusively in public interest is not a disciplinary misconduct'. [...] Abuses cannot be excluded since a decision taken exclusively in the public interest, but without any grounds and even in breach of the provisions of the law, would not lead to disciplinary sanctions. This is not an appropriate guarantee to protect human rights and freedoms against infringement. It is recommended that this provision be repealed.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, § 89

53. [...] [T]here should be personal liability on prosecutors only if they have acted in bad faith or in some very improper manner, such, for example, as taking decisions while under the influence of alcohol or drugs.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 53

59. Pursuant to draft Article 56(1)(h), a final conviction of a judge for a criminal offence constitutes a disciplinary offence. While the Venice Commission recognises the seriousness of such a circumstance which should impede the judge to maintain the judicial office and may lead even to the termination of his/her mandate, it contests that the judge can be considered disciplinary liable for that. As a matter of fact, there is no concrete act or omission imputable to the judge, but the fact of being convicted (for a criminal act or omission that cannot be confused with the conviction itself). Therefore, it is not clear, what exactly must be done during the disciplinary procedure, and on which issues

the disciplinary body will deliberate. The Commission recalls, as clarified in the past, that there should be a clear separation between criminal and disciplinary liability.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 59

52. Article 62 deals with disciplinary violations. Some of these provisions are somewhat vague and potentially dangerous and could perhaps be used to undermine a prosecutor or to control him. Criterion (b) referring to unequal interpretation or application of legislation is particularly dangerous. This seems to be capable of being applied in a very subjective manner. There is a need to distinguish between failure to work and the more subjective assessment of the quality of decisions which are made. If the latter is to be second-guessed unless in a severe case where decisions are patently insupportable then there is a problem with the autonomy of the individual concerned.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 52

54. The draft amendments to the Law on the SPS propose to define, as the most severe disciplinary offence (punishable with the dismissal), actions which are "contrary to legally prescribed competences" as well as the failure to "fulfil legally prescribed obligations". This is an overly broad formula. First of all, it is unclear whether it covers acts or omissions in the professional context, or any act or omission. Second, it overlooks the fact that every prosecutor enjoys discretion in taking procedural actions. Clear and knowing abuse of legal powers should be a criminal offence. However, bona fide mistakes or contestable procedural moves should normally be corrected by way of an appeal to a higher prosecutor or to a court. The Law must be clear that, as a matter of principle, a prosecutor cannot be held disciplinary liable for a decision invalidated by a higher prosecutor or a court, and that a disciplinary sanction may only be imposed for a "gross and inexcusable misbehaviour and not to the incorrect application of the law".

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, § 54

48. [...] 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.

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 48

63. Article 64 provides that the cutting of salary relates to unauthorised absence. Condemnation is a written notification indicating a fault and can be imposed for conduct harming respect and trust for the official position, discrediting the service by dressing in an inappropriate manner, using state owned instruments for private purposes, ill-treatment towards colleagues and other persons. The risk of abusing disciplinary power has been reduced by the fact that the final decision on disciplinary sanction is now made by the HSYK, but such a risk still remains. It is therefore highly recommended that the regulations on disciplinary sanctions be revised in order to reduce the reasons for such sanctions, to secure proportionality and to limit disciplinary sanctions to severe violations of the duties of [...] a prosecutor.

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 63

71. It seems that causing a perception of something rather than actually doing it are not appropriate criteria for carrying out a serious sanction on a [...] prosecutor. A perception may be entirely wrong and it should be necessary to prove that the [...] prosecutor has engaged in misconduct rather than that some persons think he or she might have done. This is carried to extremes in Article 68(e) which permits a change of location where a judge is deemed to have:

‘caused a perception that he has been involved in bribery or extortion even though no material evidence is obtained.’

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 71

137. [...] [A]lthough the specificity of the service might warrant dismissal for almost any offence, this would perhaps be disproportionate in the case of minor administrative offences (e.g., with respect to motoring) [...].

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 137

56. In relation to the commission of a criminal offence conviction for an offence followed by imprisonment for at least six months is grounds for dismissal. This is a clear provision and there is no difficulty implementing it. However, there seems to be a somewhat lenient approach to prison sentences. It should be taken into account that in many states normally any kind of prison sentence means that a prosecutor is no longer qualified as a prosecutor. This is quite important to protect the reputation of the whole prosecution service [...].

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", § 56

122. According to the Article 95.1.e, the term of office of a judge or a prosecutor shall cease 'if he/she was sentenced to prison by a final verdict'. Criminal conviction may not necessarily result in a prison sentence, however, the conviction, in most cases, should lead to the termination of office.'

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §122

153. Article 66 is concerned with the suspension of a public prosecutor's powers when on secondment or in the course of a pre-trial investigation or judicial proceedings, pursuant to Articles 155-158 of the Criminal Procedure Code, and is appropriate. However, it would be clearer if the relevant Articles of the Criminal Procedure Code were specifically stated in paragraph 1.2. Furthermore, it should be made clear that the suspension is of the prosecutor's powers but not of his or her salary or material or social support.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 153

79. In Section 87.3 ASPGPOPEPC the prosecutor is entitled to a salary of an amount that is equal to the total of his/her basic salary and regular supplements for the duration of suspension. Fifty per cent of this amount may be withheld until the termination of suspension. There are no criteria when 50 per cent of the salary can be retained. This could be used to put pressure on the prosecutor. Discretion should be removed in this case.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 79

128. Article 44 should explicitly rule out that an acquittal of a person accused by a prosecutor can result in disciplinary proceedings against the prosecutor unless the charges were brought due to gross negligence or maliciously. It seems that because of fear of performance indicators and of disciplinary proceedings prosecutors exert pressure on the judges to avoid acquittals. Currently prosecutors seem to feel obliged to win all cases lest they face disciplinary action. In a democratic system under the rule of law, prosecutors are parties subject to the principle of the equality of arms and necessarily lose cases without this resulting in disciplinary action against them.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 128

137. Article 50 is concerned with the disciplinary sanctions that may be applied against a public prosecutor and these are appropriate. However, paragraph 1 stipulates that these sanctions may not be applied against the Prosecutor General. This may be appropriate given the wide discretion over his or her removal but this stipulation still leaves it unclear as to whether disciplinary proceedings can nonetheless be instituted against the Prosecutor General, albeit without the possibility of imposing any sanctions. This uncertainty arises because the applicability of Articles 44-49 to the Prosecutor General is not explicitly excluded. There is thus a need to clarify the disciplinary liability of the Prosecutor General.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 137

95. [...] The sanction of a 20% cut in salary for a period of three months for a minor disciplinary offence (Article 98) seems disproportionate.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 95

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

118. It is important, in light of their independence, that prosecutors have security of tenure. The terms under which they may be sanctioned (even removed from office) should therefore be phrased clearly and unambiguously. [...]

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

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 117, 118 and 120

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

123. Disciplinary proceedings may also be taken against members of the Superior Council. If any such member appeals a decision against him/herself taken by the Disciplinary Board, the Draft Law should prevent him/her

from hearing the case against him/herself, so as to avoid any threats to the impartiality required of members of the Superior Council. [...]

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 116 and 123

78. The possibility[...] to dismiss the prosecutor appointed within the respective body “in case of improper exercise of position-specific duties” or “in case of disciplinary sanctions” is problematic, as it is formulated in too broad terms and allows the prosecutor’s dismissal for the lightest offenses [...]. Although the endorsement of the dismissal by the SCM Prosecutors’ Section can be seen as a safeguard, it is recommended that the grounds be formulated in a more precise manner.

CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, § 78

55. The Venice Commission itself set out detailed rules regarding the disciplinary liability of judges in its 2015 opinion concerning “the former Yugoslav Republic of Macedonia”. Some recommendations formulated in that opinion are also applicable in the case at hand. They include the following recommendations: a) judges shall not be disciplined for situations which are outside of their control and which may be reasonably explained by the malfunctioning of the judicial system as a whole; b) disciplinary sanctions should not interfere with the judge’s independence in the decision-making and should never extend to differences in legal interpretation of the law or judicial mistakes; c) only deliberate abuse of judicial power or repeated and gross negligence should give rise to a disciplinary violation; d) the disciplinary system should use less drastic sanctions for smaller violations; e) dismissal of a judge should only be ordered in exceptionally serious cases; f) under-performance should not be automatically equated with a disciplinary violation. These recommendations, though primarily applicable to judges, are applicable to prosecutors and members of the HJPC as well.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 55

56. The lists of disciplinary offences for judges and prosecutors have been revised and consolidated. Some grounds, i.e. violations of the duty of impartiality [...], acting with bias and prejudice [...] have been dropped, although the grounds for that are not clear and the Explanatory note does not provide any reasons why this has been the case. These grounds appear to be relevant and should be reintroduced. [...]

57. New grounds have also been added, some of which seem to be drafted in rather vague terms. For instance, “violation of the right to a trial within reasonable time” [...] should be defined in such a way as to make sure, that a judge or a prosecutor is not sanctioned for delays that are beyond his/her control (e.g. those caused by applicants). The Venice Commission realises that this provision may be intended to stem the excessive length of proceedings which might jeopardise the effectiveness and credibility of the administration of justice. Nevertheless, this issue should be dealt with through a comprehensive reform of procedural law, not through the disciplinary process unless the delays are caused by negligence or voluntarily.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 56, 57

62. [...] The problem of excessive backlog and mismanagement of judicial cases should be dealt with primarily through a reform of the procedural codes rather than the disciplinary regulation.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 62

61. [...] [T]he Venice Commission finds the provision reasonable inasmuch as it foresees the disciplinary responsibility only for violations “that compromises the reputation and integrity of the judiciary”. It also considers that the reference to the “reputation and integrity of the judiciary” satisfies the requirement of foreseeability of the law as it is addressed to judges [and prosecutors] that are expected to understand the full meaning of these terms, notably on the basis domestic case-law on the matter.[...].

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 61

IV.E.3 Disciplinary proceedings²

IV.E.3.a. Bodies entitled to examine disciplinary cases

77. [...] [D]isciplinary measures should not be decided by the superior who is thus both accuser and judge, like in an inquisitorial system. Some form of prosecutorial council would be more appropriate for deciding disciplinary cases.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 77

[...] A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified. The body, for example, might be of similar composition to the nominating body [...] or consist of the remaining members of the National Jurisdiction Council. Alternatively the body might consist of three judges appointed by the presidents of their courts. It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of *ex officio* members rather than be appointed *ad hoc*, in order to avoid suggestions that its members have been chosen so as to obtain a particular result. [...]

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

100. [...] [I]t would be preferable that disciplinary decisions be made by a small body none of whose members is also on the Prosecutorial Council, and which would contain an element of independent outside participation. Should the proposed scheme be maintained, it would be advisable to specify, in line with Article 136 of the Constitution (stressing the autonomy of the

2. On this topic see also Chapter VI.B.5 below on the procedures before the prosecutorial council

state prosecution), that the Chair of the Prosecutorial Council entrusted with disciplinary decisions, as well as the Chair of the Disciplinary panel, must be lay members, not state prosecutor members [...]

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 100

51. The Law on the HJPC contains a whole section, Chapter VI, that deals with disciplinary liability of judges and prosecutors. The Draft Law revises this section by, firstly, extending its application to members of the HJPC (in their capacity as members of the HJPC). [...] Firstly, the suggestion fails to take into account the difference between the two positions that members of the HJPC occupy, namely their original position (judge, prosecutor, civil servant, etc.) and their position at the HJPC (members of the HJPC).

53. [...] the Commission finds the potential use of per analogia reasoning in disciplinary proceedings problematic. Laws imposing an obligation the breach of which may result in a penalty must be drafted in a clear and unambiguous way. Thirdly, the suggestion would make different members of the HJPC subject to different disciplinary offences and would also make some of them, namely those who are neither judges nor prosecutors by their original position, immune from disciplinary proceedings.

CDL-AD(2021)015, Bosnia and Herzegovina – opinion on the draft law on amendments to the law on the high judicial and prosecutorial council (HJPC), §§ 51 – 53

53. Articles 152 *et seq.* establish [specific bodies] within the Public Prosecutor's Office to deal with disciplinary proceedings. Due to their complexity, they risk to be over-burdened, something that should be simplified. The right to a fair hearing and access to an independent judge who will supervise the trial must not be infringed. It would therefore be advisable not to establish special courts for this purpose as these may lead to inequitable results both for the victim/private party through possible corporatism and for the prosecutor.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 53

74. [...] [A] performance evaluation commission should be quite independent from the Council and may include some lay members. The input of the outsiders may be useful since it would help to guarantee impartiality and independence of this body. Thus, participation of the non-prosecutorial members in the work of the EC [(the Evaluation Council)] is perfectly acceptable. Similarly, the fact that the procedure of performance evaluation may be initiated by an external actor, not belonging to the prosecution system, is not, as such, objectionable. What is worrisome, however, is that in theory the EC may start functioning and take decisions without any member belonging to the prosecution system.

76. The Venice Commission [...] recalls that in an *amicus curiae* brief for the CCRM it examined the question of the legitimacy of bodies subordinated to the SCP and assisting it in its tasks. The Venice Commission stressed that the creation of such bodies is permissible to the extent that they do not usurp the constitutionally defined role of the SCP. Thus, the composition of the EC is not that important if the EC remains an advisory body, and if the SCP is not bound by the findings of the EC but may come to a different conclusion.

77. That being said, in practice even an advisory body may have a decisive influence in the decision-making process, for example, when it has a better fact-finding capacity or a better expertise in the matter. In this case the role of the SCP may be reduced to a role of an appellate body, and that may be at odds with its constitutional role. [...]

78. Therefore, even if the final word belongs to the SCP, the question of composition of the EC is not irrelevant. The Venice Commission thus recommends providing in the law that the EC cannot function without at least some prosecutorial members being present, so that the composition of the EC mirrors, at least roughly, the composition of the SCP. Alternatively, the law might explicitly provide that the SCP is not bound by the findings of the EC and may entertain a fresh evaluation.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 74, and 76-78

96. [...] [S]ince a [disciplinary] complaint may be initiated by a person who is a member of the Council or represented on the Council, there should be a provision excluding such a person from participating in the ensuing proceedings.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 96

66. [...] If a member of the Superior Council of Prosecutors has initiated the proposal [for disciplinary proceedings] then clearly that person should not vote on the proposal or take part in the decision made by the Superior Council. However, the present text does allow him or her to vote [...] and it seems that this would be the case even for the person accused. It is important to ensure that people who can initiate disciplinary proceedings do not themselves participate in making the decision as it is necessary that such decisions are made by a fair and impartial tribunal even though there is an appeal to the Superior Council and thereafter to the courts.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 66

55. The Venice Commission itself set out detailed rules regarding the disciplinary liability of judges in its 2015 opinion concerning "the former Yugoslav Republic of Macedonia". Some recommendations formulated in that opinion are also applicable in the case at hand. They include the following recommendations: a) judges shall not be disciplined for situations which are outside of their control and which may be reasonably explained by the malfunctioning of the judicial system as a whole; b) disciplinary sanctions should not interfere with the judge's independence in the decision-making and should never extend to differences in legal interpretation of the law or judicial mistakes; c) only deliberate abuse of judicial power or repeated and gross negligence should give rise to a disciplinary violation; d) the disciplinary system should use less drastic sanctions for smaller violations; e) dismissal of a judge should only be ordered in exceptionally serious cases; f) under-performance should not be automatically equated with a disciplinary violation. These recommendations, though primarily applicable to judges, are applicable to prosecutors and members of the HJPC as well.

CDL-AD(2021)015, Bosnia and Herzegovina: opinion on the draft law on amendments to the law on the high judicial and prosecutorial council (HJPC), § 55

91. The right of the Public Prosecutor General, under Article 169, to “inspect the activities of disciplinary courts” and his/her ability to “reprove transgressions found” to “request explanations and remedying the transgression’s effects” is highly problematic as it seriously undermines the independence of these courts and therefore of prosecutors. The members of the disciplinary courts are themselves prosecutors and in the light of the wide powers of the Public Prosecutor General over the career of prosecutors, the last sentence of this provision that “those acts cannot impinge on the sphere in which members of disciplinary courts are independent” does not change this situation.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor’s office, as amended, § 91

95. [...] Article 65.6 of the draft Law sets out that in proceedings against judges, the commissions should be composed of judges, while in proceedings against prosecutors, it shall consist of prosecutors – this solution is to be welcomed. [...]

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 95

99. [...] [S]ince the disciplinary plaintiff is elected after obtaining the opinion of the session of the Supreme State Prosecution Office, among its prosecutors, one may wonder how objective the disciplinary plaintiff is likely to be where the complainant is the Supreme State Prosecutor. An alternative may be, to ensure complete autonomy and independence to the ‘disciplinary plaintiff’, that she/he be not a state prosecutor of the Supreme State Prosecution Office and be not elected ‘after obtaining the opinion of the session of the Supreme State Prosecution Office’.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 99

84. According to many interlocutors of the Venice Commission, there is no reasonable and objective justification for the necessity of creating a separate structure to investigate offences perpetrated within the judiciary since, despite isolated cases, there appears to be no widespread criminality among Romanian magistrates. According to DNA sources, in 2017, out of 997 defendants sent to trial for offences of high-level corruption, or assimilated, only six were acting as magistrates - three judges and three prosecutors. Consequently, questions have

been raised as to the actual purpose of the creation of the new structure, and hence of the choice of applying a different legal treatment, in the framework of a highly sensitive field (criminal prosecution), to magistrates. In addition, singling out judges and prosecutors as the target of a special structure of public prosecution could also be interpreted as acknowledging a phenomenon of widespread corruption and criminality throughout the judiciary; this can only be detrimental to the image of the profession in Romania.

CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, § 84

52. The new proposal in Article 112 is that the Disciplinary Prosecutor should be a judge appointed by the Prosecutorial Council on a proposal of the President of the Supreme Court. While one can see merit in such a solution, it would be desirable to make it clear that the appointee will not act in a judicial capacity while exercising the function of Disciplinary Prosecutor. An alternative, to avoid that disciplinary investigations against public prosecutors be conducted by a judge and that the President of the Supreme Court be involved, would be that the disciplinary prosecutor be appointed by the Prosecutorial Council from among qualified lawyers, with the same requirements of the lay members of the Council. This would give increased autonomy and independence to the disciplinary investigations, which is of particular importance both for the public prosecutors and the general public.

53. As regards the Disciplinary Committee, it is welcome that Article 114 now provides that the president of the Committee must be a lawyer member of the Prosecutorial Council [...]. The new provision enhances the credibility and democratic legitimation of the disciplinary procedure while at the same times minimising the risk that the objectivity of the process is questioned. Under the draft, however, the members of the Committee are appointed on the nomination of the Supreme Public Prosecutor (in the capacity of President of the Council). For the reasons explained above, this remains a problematic solution and should be reconsidered.

54. The new paragraph 3 of Article 114 provides that the Supreme Public Prosecutor shall not be a member of the Disciplinary Committee. [...] [t]his appears to be a desirable provision [...].

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §§ 52- 54

110. [...] Given the power of the disciplinary commissions to dismiss a [...] prosecutor, an appeal to a court of law would be essential, at least for cases where a serious penalty was imposed.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 110

38. This Article provides for the right of the prosecutor, subject to disciplinary sanction, to appeal to the Administrative Court. However, the basis for the exercise of this right is not clear. Is it a right to a rehearing – which is preferable – or is it purely procedural review?

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 38

58. At the same time, the Constitution does not specify whether the decisions on disciplinary matters of the two councils are subject to judicial review. Previously, the Venice Commission noted that there should be a possibility of an appeal to an independent court against decisions of disciplinary bodies, in conformity with the case-law of the ECtHR; however, regarding the scope of such appellate review, the Venice Commission stressed that the appellate body should act with deference to the judicial council. This is a fortiori true if the disciplinary council itself is an independent body, and if the procedure before it offers guarantees of fair trial – in this case the need to have a review by an independent court becomes less relevant.

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 58

IV.E.3.b. Procedure of examining disciplinary cases

61. In the case of prosecutors other than the Public Prosecutor of the Republic decisions on dismissal are taken by the Council of Public Prosecutor. [...] Again, there are no provisions relating to the right of a prosecutor to appear before the council and make a defence or to know in advance the case to be made.

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of “the former Yugoslav Republic of Macedonia”, § 61

84. It is not clear who may initiate the proceedings (only inspectors, or also the presidents of the courts or heads of the prosecutor's offices and the Minister of Justice, every interested person, etc). It is unclear whether the disciplinary proceedings should respect some basic fair trial guarantees. Finally, provisions on the conflict of interest rules, are missing and should be added. If one of the members of the council initiates, in his/her capacity within the judicial or prosecutorial system, a disciplinary case, he or she should not act as both "prosecutor" and "judge" in such matters and sit in the respective council while this case is examined, let alone chair such meetings.

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 84

79. The power of the President of the Republic or of three members of the SCP to trigger the *ad hoc* performance evaluation also gives rise to concern. Most importantly, the President has a lot of influence in the whole process of evaluation: he or she may initiate the evaluation, delegate to the EC [(the evaluation committee)] one of its members, and, finally, the President appoints one of the members of the SCP (even though this member, following the appointment, should act independently). That being said, there may be some factors counter-balancing the possible excessive influence of the President: for example, if the final decision is really taken by the SCP in full independence, and if the decision of the SCP could be appealed against before an administrative court.

80. Moreover, the Venice Commission notes that the law does not contain any threshold requirement for opening a performance evaluation, which means that the President or three members of the EC may trigger the procedure even for very trivial reasons. The law does not provide for the possibility for the EC or the SCP to dismiss such requests as inadmissible, without engaging the full procedure of performance evaluation.

81. The Venice Commission is also concerned by the frequency of the performance evaluations. One evaluation procedure may be initiated every year. That means that the PG may be subjected to seven performance evaluations throughout his or her mandate, whereas ordinary prosecutors are evaluated every four years. In the absence of specific indicators of performance evaluations (see above), it is difficult to say how demanding and burdensome this procedure might be for the PG's office. The risk is that undergoing such evaluations may distract the PG from fulfilling his or her mandate.

82. Furthermore, Article 31-1 (6) entitles the EC to seek and obtain from any person – including the PG him/herself or any subordinated prosecutor – any “data and information” which may be useful to assess the Prosecutor’s performance. This clause may be used to obtain information on specific cases which the prosecution cannot disclose. In the past the PG had been repeatedly requested to provide specific information on pending cases, with reference to his membership in the Security Council (a body advising the President of the Republic on security matters). The Venice Commission finds it necessary to specify in the law that the PG may refuse to provide information on specific cases if its disclosure may jeopardize the success of an ongoing investigation or any other similar vital interest of justice (like the protection of witnesses, for example).

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 79-82

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. [...]

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 52

133. Furthermore, consideration should be given to the inclusion of a power in this provision to suspend a public prosecutor pending the outcome of disciplinary proceedings. This is an important element of international standards on the investigation of serious human rights violations.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, § 133

75. Article 71 [...] provides for the right of a [...] prosecutor to defend himself or herself in disciplinary cases. The Article requires that the [...] prosecutor be informed in a way which includes separately and clearly the actions attributed to him or her, the subject matter of the investigation and the place, time and aspects of the actions which are alleged to have occurred. The [...] prosecutor has the right to require the testimony of the witness and the collection of evidence in his or her favour. They have the right to examine the files in person or through their legal representatives and to receive copies and may also defend themselves orally or in writing before the HSYK or via their

legal representatives. These provisions seem clear and appropriate and the amendment is a considerable improvement to the text. The right of defence will be regulated in a more detailed manner, increasing the protection of the [prosecutor] concerned. Nevertheless, such procedural safeguards in the disciplinary proceeding are not a sufficient substitute for legal remedies against decisions which interfere with subjective rights [of prosecutors] and the absence of any right of appeal to a court of law is a serious defect in the draft Law.

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 75

135. The Draft Law should also be amended to include a provision that allows a challenge to the member of the agency performing disciplinary proceedings and his or her recusal in cases when there are reasons for doubts concerning his or her impartiality.

136. There is also a need to clarify the point of the provision made in paragraph 6 specifying the non-disclosure of any dissenting opinions as these could be important for the exercise of the right of appeal under Article 51. Insofar as a public prosecutor does not have access to them for this purpose, the provision should be amended accordingly.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§ 135 and 136

171. Furthermore there is a need to clarify whether or not the power [of the disciplinary body] to interrogate individuals is governed by the privilege against self-incrimination and, insofar as it is not, the protection afforded by this privilege needs to be extended to any such interrogation.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 171

77. The Venice Commission welcomes the introduction of the right to appeal to the Court of Bosnia and Herzegovina against the decisions related to appointment. Yet, it stresses that the right to appeal should not remain limited to such decisions. As a minimum, the decisions in disciplinary matters and, arguably, decisions on the removal of a member of the HJPC (or on the

termination of mandate) should be subject to the right to appeal as well. For those reasons, these decisions always need to contain justification indicating reasons on the basis of which they have been reached.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 77

V. CONFLICTS OF INTEREST AND INCOMPATIBILITIES

17. A prosecutor, like a judge, may not act in a matter where he or she has a personal interest [...]

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 17

68. [...] [S]ome involvement with the private sector, such as business activities and membership of certain organisations, will also have the potential to be incompatible with the performance of the role of public prosecutor [...].

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 68

52. [The provision] prevents prosecutors from acting as members of Parliament or of local authorities, or being members of political parties or engaging in party political activity or being members of executive or supervision boards of trade associations or other legal associations established in order to gain a benefit. These appear to the writer to be appropriate provisions and not to be in conflict with the provisions of paragraph 6 of Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe.

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", § 52

53. [...] Judges and prosecutors may not be members of political parties and those who become members are deemed to have resigned from the

profession. The question of judges and prosecutors joining political parties is one which is at times controversial and it may be reasonable in the developmental state of Turkey to impose such a condition.

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 53

64. Prosecutors cannot be involved in any political activity and this is clearly regulated by Hungarian law which follows European practice. Section 44.1 ASPGPOEPC states that ‘Prosecutor may not be a member of Parliament, Member of the European Parliament, local municipality board representative, mayor or state leader.’

65. Hungarian law contains also anti-corruption rules which are welcome (financial disclosure rules in Section 44.2 et al. ASPGPOEPC). As per Section 45 ASPGPOEPC, prosecutors may not be the senior officers or members obliged to participate in business associations, cooperation companies and cooperatives, or the members of the supervisory boards (members with unlimited liability) of the above mentioned institutions and the members of individual businesses.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§ 64-65

28. This Article has been amended to permit meetings of professional associations of prosecutors to take place during work time, provided they do not “disturb the process of work”. This appears to be a reasonable provision.

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 28

37. The Venice Commission constantly stresses that the issue of internal independence within the judiciary is no less important than the issue of external independence. (...) While prosecutors may not have the same degree of internal independence as judges, the Venice Commission has consistently emphasised the need for adequate guarantees against improper interference with the work of prosecutors. It is therefore recommended to modify this provision by requiring a simple duty to inform the court president or chief

prosecutor of the activities that the judge or prosecutor intend to undertake.

43. [...]The [compulsory declaration of assets and interests] shall contain information on income “from the core activity for the spouse and children living in the same household”. This provision raises several issues. Firstly, the Venice Commission wonders why only spouses and children are mentioned, excluding, or ignoring civil-law partners, parents and other persons with whom the judge or the prosecutor could share a joint household. Secondly, the fact that these persons are mentioned only in this subparagraph can serve as a basis for interpreting a contrario that judges and prosecutors are not obliged to declare other persons mentioned in paragraph (1) the information required in all other subparagraphs. Thirdly, it is not clear what “the core activity” means and it would be preferable to clarify that the declaration should include the information about all income of these persons. Consequently, the Venice Commission recommends rephrasing this provision in order to make clear that the declaration should include information on all income of all persons mentioned in paragraph (1). [...]

48. Furthermore, the Commission questions the confidentiality of the risk criteria because it can open wide the door for abuses, and it would permit the use of this instrument for putting pressure on inconvenient judges. In addition, the Venice Commission understands the choice of draft Article 86b(7) to provide that the declaration verification procedure shall be closed to the public, but it recommends to expressly mention that the criteria used and the results of the verification will be made public.

CDL-AD(2021)015, Bosnia and Herzegovina - opinion on the draft law on amendments to the law on the high judicial and prosecutorial council (HJPC), §§ 37, 43, and 48

117. Article 90.3 of the draft Law would prohibit the judge and prosecutor from membership of any management or supervisory board of the public or private company or any other legal entity. This seems very broad and would prohibit membership of any charitable or non-profit organisation which had legal personality, possibly including even professional organisations.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 117

178. Furthermore, it seems inconsistent with the essential function of public

prosecutors for any of them to be engaged, as paragraph 4 authorises, in establishing and managing ‘print houses, social welfare companies, healthcare establishments’ and founding print media. Indeed it could put them into situations of potential conflict of interest. It would be more appropriate for these services to be bought in by a regular procurement process and this paragraph should thus be amended accordingly.[...]

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, § 178

95. The situation with regard to remuneration seems to be more complicated. The draft Law should provide general restrictions on the type of remunerated work that is incompatible with a [...] prosecutor’s position. Any offer of remunerated work that may lead to or appear to lead to improper influence, must be declined. However, receiving remuneration should not systematically be linked to disciplinary misconduct. For instance, where a litigant is a student at or involved in work with a university or research institution at which the [...] prosecutor is engaged in academic work, it would be unreasonable to demand from the [...] prosecutor to abandon the academic work altogether. However, this may (and in some cases must) lead to self-recusal and/or a declaration of conflict of interest.

118. Article 92 of the draft Law requires a [...] prosecutor to seek the opinion of the HJPC on whether activities he or she intends to undertake are in conflict with his or her duties under the law. Presumably this should be confined to cases where the [...] prosecutor has reason to have at least a doubt about the issue.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§ 95 and 118

115. Article 89.3 of the draft Law provides that judges and prosecutors may not be members of any organisation that discriminates on various grounds, including sex and sexual orientation. There are various churches and religions which do so discriminate and it is perhaps not intended to prevent judges and prosecutors being adherents of or practising such religions.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 115

120. Article 93 of the draft Law requires judges and prosecutors to provide an annual financial report concerning their activities outside their duty as a judge or as a prosecutor. However, the provision falls short of requiring a judge to declare all of his or her assets. It should be noted that full asset disclosure has proved a valuable weapon in combating corruption in other countries.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 120

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

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 83

40. [...] [T]he Venice Commission notes that, as it held in one of its previous opinions, “in the implementation of a code of ethics, the possibility for judges to seek advice from a body within their organisation(s) should be included”. Draft Article 85 makes it possible for a judge or prosecutor to request an opinion of the HJPC on the compatibility of his/her activity with his/her functions and the Law on the HJPC. This opinion, as specified in draft Article 85(4) shall be binding. The Venice Commission assumes that the binding effect shields the judge or prosecutor from the risk of disciplinary proceedings for the offence foreseen in draft Articles 56(1) (p) and 57(1)(r). It would seem appropriate to indicate this explicitly.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 40

41. [...] [T]he Venice Commission welcomes the introduction of detailed rules concerning the compulsory declaration of assets and interests [of the prosecutors] and its availability to the public. This set of provisions seems to respond to GRECO’s recommendation to develop an effective system for reviewing annual financial statements, and to ensure the publication of and easy access to financial information.

42. [...] The Commission reads this provision as requiring the submission of the declaration for the listed relatives, independently from the fact that they live with the declarant, and any other persons with whom the declarant shares a joint household. The Commission deems it may be excessive to require the judge or prosecutor to submit a declaration also for parents and adult children who do not share a joint household with the declarant.

47. [...] [B]y virtue of Article 86a(6), the public availability of the declaration should be limited to the time period of one year for judges and prosecutors whose mandate comes to an end. [...] The reasons for the choice of this “minimalist” approach do not seem altogether clear. In addition, the declaration for the first year after the expiry of their mandate, which former judges or prosecutors are obliged to submit in conformity with draft Article 86 paragraph (9), will never become public. In order to solve this problem and to avoid the risk of compromising the transparency of the declarations, the Venice Commission recommends providing a longer period for the public availability of the declaration for all declarants. The authorities might also consider the possibility of introducing a filtering system which would ensure the respect for private life.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, §§ 41-42, and 47

VI. PROSECUTORIAL COUNCIL

13. While a number of countries have established prosecutorial councils, there is no uniform standard binding on all European states for such councils.

14. The Venice Commission believes that these councils, where they exist, are an appropriate structure to ensure the transparency and protection of lower-ranked prosecutors, by providing valuable input in the appointment and disciplinary processes.

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§13 and 14; see also CDL-AD(2019)034, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor’s Office, § 34

37. Very little work has been done to lay down international standards in relation to Prosecutorial Councils, unlike the situation with regard to Judicial Councils. While it is tempting to apply the standards relating to the latter to Prosecutorial Councils, there are some differences between the judiciary and the prosecution which are significant for the organisation of their respective councils.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 37

87. [...] In different countries there are different models which permit to the management of appointments and disciplinary liability of prosecutors, and the creation of a separate Prosecutorial Council is one of them. Another avenue is to have a joint Judicial and Prosecutorial Council (with separate chambers, if necessary). That being said, creation of two separate councils is definitely a legitimate option, and may even be preferable in countries with a strong prosecution service and weak judiciary, since the presence of the prosecutors in the joint Council may be perceived as a threat to the independence of judges. Therefore, the Venice Commission considers that the choice made by the drafters – to have two separate councils – is acceptable.

CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, § 87

13. [...] the HJPC should be provided with an explicit constitutional basis.

CDL-AD(2021)015, Bosnia and Herzegovina: opinion on the draft law on amendments to the law on the high judicial and prosecutorial council (HJPC), § 13

59. The envisaged new composition of the Prosecutorial Council (which would have a slight majority of lay members) is not as such directly contrary to the European standards and could be explained by the need to avoid corporatism. However, in the current setting – where all lay members are elected at the same time by a simple majority of votes in Parliament – this reform may lead to the increased politicisation of the Prosecutorial Council. To avoid it, the authorities have a choice of options. For example, lay members may be elected by a qualified majority. But in this case an effective anti-deadlock mechanism should be in place. Another option would be to

elect the lay members on the basis of a proportional system (so that they represent different political forces) or to provide for their nomination or even direct appointment by external non- governmental actors (such as universities, the Bar, the Judiciary etc.). Ideally, the composition and the method of election of lay members should be entrenched in the Constitution.

CDL-AD(2021)012, Montenegro - opinion on the draft amendments to the law on the state prosecution service and the draft law on the prosecutor's office for organised crime and corruption, § 59

VI.A - FUNCTIONS AND POWERS OF THE PROSECUTORIAL COUNCIL

VI.A.1 Main mandate of the prosecutorial council

110. [The function of t]he Prosecutorial Council is [...] 'to ensure the independence of state prosecutorial service and state prosecutors'. Its function should also be to oversee that prosecutorial activity be performed according to the principle of legality.

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, § 110

32. [...] [T]he ambition should be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutorial Council rather than the Parliament since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters. [...]

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 32

39. The Commission has also understood that under the law the KPC and the PG have some overlapping functions in the management of the prosecution system. Currently such overlapping does not give rise to any tensions. This is partly explained by the fact that the PG, due to his position in the prosecutorial hierarchy, is the most influential member of the KPC, and may resolve such conflicts internally. However, if the PG leaves the KPC, and the composition of the KPC is redefined as planned, such conflicts may start arising. It is therefore

important to delineate in the law more clearly the respective spheres of competency of the PG and of the KPC. [...]

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 39

44. Article 74 regulates the functions of the National Council for the Public Prosecutor's Office, but none of them allow it to issue compulsory decisions (in this draft Law, the Council appears to be a simple consultative body on prosecution policy and does not possess any competence for appointing or for disciplinary measures). In this way, the institution is deprived of the ability to prevent both internal and external influences from affecting sensitive subjects such as access to and performance of the prosecutorial function.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 44, see also CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, §§ 102-103

107. [...] The purely advisory role of the National Council should be changed and direct effect of the decisions of this Council, at least in some matters, should be recognised [...]

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, § 107

38. [...] In order to achieve a balance between the hierarchical control over and the independence of prosecutors, shared competences of the Prosecutor General and Prosecutorial Council should be provided regarding the careers of the prosecutors (e.g. proposals for promotion by the Prosecutorial Council).

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, § 38

161. Article 75 deals with the status of the Qualifications and Disciplinary Commissions. However, its structure suggests that these Commissions are regarded as something merely auxiliary to the Public Prosecution Service

rather than the key element in its regulation and self-governance. In this connection, it is particularly surprising that these Commissions - unlike, for example, the National Prosecution Academy of Ukraine - do not have the status and other attributes of a legal entity. Moreover, no separate budgetary arrangements have been made for the Qualifications and Disciplinary Commission and the absence of these will necessarily undermine their independence. It would, therefore, be appropriate to amend this provision to rectify these omissions and thereby underline the importance of the role that is to be played by these Commissions.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 161

71. The work of the HJPC should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.

72. In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly 'may remove the Presidency or a member of the Presidency from the Council.' This provision should be deleted. On the other hand, it should be a right, not a duty of the President of the HJPC to attend the Parliamentary Assembly's session and/or engage in the discussion of the report.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§ 71-72

61. As to the role played by the two councils in the "matters related to the organisation of the operation of the respective system" (Article 140 (10)), the Venice Commission previously warned the legislators in other countries against overburdening the councils with administrative powers. With regard to the elected component of judges and prosecutors the qualities which make for a good judge or prosecutor and, moreover, a judge or prosecutor who earns sufficient respect and popularity to be elected by his or her colleagues, are not necessarily the qualities which make a good manager or administrator. It is a

truism that managers and administrators often have to make unpopular or difficult decisions and elected bodies are not always in the best position to do so. This does not exclude that instead of decision-making powers the councils should have an advisory role and a right to be consulted.

62. On the other hand, it is important to ensure that the administrative support functions (distribution of offices, financial resources, allocation of assistants, etc.) are not abused to put pressure on judges. So, it would also be wrong to concentrate those powers exclusively in the hands of a Minister of Justice or another government official. A mechanism of “shared responsibility”, involving the two judicial councils but not overburdening them with everyday administrative management of the courts and prosecution offices, may be devised. As regards the power to manage the immovable property of the judiciary (see Article 142 (2) of the Draft), it should be ensured that the Minister’s competence only concerns real estate management and that a court or a public prosecutor’s office is not relocated to a less representative or less centrally located building, or at least not without their approval.

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, §§ 61 – 62

63. [...] The separation of powers requires that the supreme courts should not be answerable to the parliamentarians. By contrast, a governance body like the Judicial Council or the Prosecutorial Council may be required to submit general reports on the functioning of the respective systems (which in any event should exclude any reporting on the specific cases sub judice).

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 63

VI.A.2. Prosecutorial council, its subordinated bodies and other bodies managing the prosecution system

83. [...] There is no proposal [in the draft Constitution] for a disciplinary council or committee, so it may appear that every decision in disciplinary matters should be taken by a full council. This may be difficult in practice.

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 83

26. [...]Any redistribution of decision-making powers which substantially affects the constitutional mandate of a [Supreme Council of Prosecutors] requires a constitutional amendment. Otherwise the purpose of creating such a body at the constitutional level would be compromised.

27. That does not mean that the law cannot regulate procedures and make institutional arrangements within the boundaries set by the Constitution. In the Republic of Moldova, the Constitution does not regulate in detail the organisation and the functioning of the SCP [...]. This means that the Law on the Prosecutors' Office may in principle leave space for other bodies, panels, committees, etc. which contribute to the work of the SCP or to which the SCP may delegate a part of its powers. A special body involved in the process of selection of candidates to the prosecutorial positions can be constitutional if it does not usurp the substantive decision-making power of the SCP. As regards the process of removal of the PG from office, the issue of "dilution" of the constitutional powers of the SPC appears very relevant here as well, and broadly the same principles apply to the analysis of constitutionality of this procedure.

28. If an external body had an advisory role or, for example, carried out some screening of the candidates based on their professional qualifications to ensure the transparency and the integrity of the recruitment process, it would not interfere substantially with the constitutional mandate of the SCP.

CDL-AD(2019)034, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor's Office, §§ 26-28

78. The 2017 Opinion examined the functions of the Inspectorate very closely: "Even if the formal decision-making power remains with the [SCM, now – one of the two councils], entrusting the Inspectorate with so many new functions (which are often overlapping with the functions of the [SCM ...]) may result in shifting the real power from the [SJC] to the Inspectorate". It is important to note that the Inspectorates operate "under" these two councils [...]. Thus, the law must ensure that the Inspectorates, combining all those important powers, but elected by the NA alone, do not become more powerful than the two councils. [...] Reviews or evaluations by the inspectors should not have a determinative effect on the judges' and

prosecutors' careers, and the criteria for evaluation should be established by the councils [(Judicial and Prosecutorial)]. [...]"

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 78

49. [...] The Venice Commission welcomes the establishment of an Integrity Unit. It understands that the reasons for which this Unit has been established as a part of the HJPC Secretariat is primarily linked to the territorial scope the Transfer Agreement grants to the HJPC and any internal organ established within it. However, the Commission highlights the important role the Integrity Unit will have in assessing the declaration of assets and interests, and it therefore points to the need for ensuring the independence of this Unit and the necessity to set up safeguards to shield it from possible interference by the HJPC itself, including the Secretariat management. In this respect, the Venice Commission recommends that more precise rules on the composition, operation of the Unit, including *ex ante* integrity and background checks of its members, alongside effective safeguards should be explicitly provided, including possible external monitoring of the recruitment process.

50. The Commission welcomes draft Article 86f(2), which requires the HJPC to engage experts with an advisory role for the purpose of monitoring the work of the Integrity Unit with regard to the functioning and enforcement of the asset declaration system. Nevertheless, the Commission notes that neither the Draft Law nor the Explanatory note elaborates on the role of these experts. It therefore encourages the BiH authorities to explicitly stipulate in the Draft Law their capacities, which should include at least the ability to access all asset declarations and supporting documents, in line with confidentiality safeguards, to make individual recommendations on how to handle/assess the declarations, to allow follow-up actions if recommendations are not taken into account by the Integrity Unit without due justification (as experts do not have executive but only advisory function), and to publicly report on the overall functioning and enforcement of an asset-declaration system. In light of the above, the Venice Commission recommends that more precise rules on the functional independence, composition and operation of the Unit, and role of the experts engaged in monitoring should be provided in the Draft Law itself and not be left to the regulation by sub-legal acts.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, §§ 49-50

VI.B - COMPOSITION OF THE PROSECUTORIAL COUNCIL AND THE STATUS OF ITS MEMBERS

VI.B.1 Composition of the prosecutorial council

VI.B.1.a A joint council with the judges or a separate prosecutorial council?

36. The Venice Commission recalls that the SCM has two sections – one for judges and one for prosecutors, which is also a part of the constitutional design of this body (see Article 133 (2) (a)). The existence of two separate “wings” in the common judicial-prosecutorial council implies at least some symmetry in their functions. It does not mean that the subsequent procedure of appointment of judges and prosecutors should be necessarily the same. Once the Prosecutors’ Section of the SCM expressed an opinion on a candidate to a position of top prosecutor, it is reasonable for the Minister of Justice to step in and have a say. However, at the level of the decision-making within the SCM, it is reasonable to expect that the functions of the Prosecutors’ Section in respect of the prosecutors will mirror the functions of the Judges’ Section in respect of judges (except those functions which are entrusted to the Plenary as a whole).

37. The Plenary of the SCM has already a robust relative majority of judges (there are nine judges and only five prosecutors). It is unclear why this judicial domination is reinforced even further in the context of appointments to the Section, where the opinion of the Prosecutors’ Section on a candidate is substituted by the opinion of judges – i.e. the “selection board” dominated by judicial members. This cannot be explained otherwise than by a strong mistrust of the Government towards the current prosecutorial members of the SCM and its wish to reduce their role. This is, however, not a legitimate aim: the Government should not be able to influence the balance among the members of a constitutional body which has as its main function to protect the independence of judges and prosecutors from the executive. The proposed appointment scheme does not sit well with the institutional design of the SCM, as described in the Constitution.

CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, §§ 36-37

13. [...] The Venice Commission stressed the need to ensure that the two main groups represented in the HJPC, judges and prosecutors, would not be in the position to outvote each other (especially with respect to appointments and disciplinary proceedings)

CDL-AD(2021)015, Bosnia and Herzegovina: opinion on the draft law on amendments to the law on the high judicial and prosecutorial council (HJPC), § 13

45. [...] As to the inner logic of the constitutional design of the SCM, the Venice Commission agrees that the symmetry of two separate “wings” in the common judicial-prosecutorial council may imply some symmetry in their functions. For example, it may concern the procedure for selecting candidates for judicial/prosecutorial positions. However, as noted above, in the context of ensuring independence of criminal investigations against the PG, the PG and the top judges are not in the same position. Hence, it is justified to develop special procedures concerning the PG, but not the two other top magistrates.

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, § 45

51. In the proposed system, the questions of elections/removal of the PG will be decided by the Prosecutorial Council. On the one hand, as noted above, the creation of two separate councils removes the prosecutors from the judicial governance, and this is positive. On the other hand, the separate Prosecutorial Council will be even more than before consolidated around the PG, who is the former and potentially the future hierarchical superior of nearly all of its members.

52. As noted in the 2019 opinion, “in the current composition of the Prosecutorial Chamber of the SJC all of the lay members are former prosecutors or investigators”. These former prosecutors are entitled to return to the prosecution service (immediately) after serving as lay members. In these conditions, the Prosecutorial Council is unlikely to protect the career of individual prosecutors or appoint senior prosecutors against the will of the PG.

53. The Commission therefore reiterates that it is very important that lay members of the Prosecutorial Council do not have any present or future hierarchical (or *de facto*) subordination links to the Prosecutor General and represent other legal professions. This has already been recommended in the 2017 opinion. Achieving the above outcomes would require in addition an evolution of professional ethos and political culture,⁴⁸ as well as closer examination of institutional and procedural rules so as to reduce to a certain extent the PG's institutional or *de facto* leverage [...] over other prosecutors or members of the Prosecutorial Council.

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, §§ 51-53

13. [...] The third [recommendation], with respect to the HJPC structure, recommended the creation, within the HJPC, of two sub-councils, one for judges and one for prosecutors. It did so on the understanding that the existence of a common council for judges and prosecutors was agreed upon in the Transfer Agreement and is therefore not open to change without the re-negotiation of this Agreement. [...]

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 13

31. Unlike the current composition of the [High Judicial and Prosecutorial Council], the draft Law provides that the HJPC shall not include members of the professional legal community (currently elected by the Bar Associations). The Venice Commission has [...] questioned the wisdom of having judges, prosecutors, and legal professionals present in the HJPC, an institution which both determines the criteria for the appointment of judges and prosecutors and then carries out this appointment itself. However, instead of excluding legal professionals altogether, consideration might be given to adding members on behalf of the professional community, which would not excessively broaden the size of the HJPC, while ensuring the representation of the users of the judicial system.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 31

VI.B.1.b Balance between prosecutorial and lay members

25. [...] In the newly composed KPC, prosecutors “elected by their peers” will be in a slight minority (three out of seven members). Four members are elected by the Assembly. One of them should be a prosecutor, but since he or she owes the mandate to the Assembly, in the opinion of the Venice Commission this member should rather be counted as a “lay member” (contrary to the “prosecutorial” members elected by their peers).

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 25

39. Before the amendments seven members out of 15 were prosecutors (five were elected by their peers and two were members *ex officio*). After the amendments five members out of 12 represent the prosecution system (all elected by their peers). Thus, the overall proportion of the prosecutors has been slightly reduced. However, it is difficult to disagree with the CCRM that the prosecutors elected by their peers still represent a “substantive part” of the SCP. This is in line with the Venice Commission’s own approach in this respect. [...]

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, § 39

26. [...] [T]here is an important difference between standards regarding judicial and prosecutorial councils. While prosecutors should be protected from political interference, and while a prosecutorial council may offer such protection, there is no requirement that such council should necessarily be dominated by the prosecutors. The Venice Commission has consistently advocated for prosecutorial councils where prosecutors elected by their peers represent a “substantive part”, yet not necessarily a majority of members.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 26

33. [...] [I]t is very important that the Prosecutorial Council is conceived as a *pluralistic body*, which includes MPs, prosecutors, members of civil society and a Government official. [...]

35. If the Chief Prosecutor is elected and removed by a simple majority of votes in Parliament (see Article 9¹ par 4 and Article 9² par 12), it becomes all the more important for the Prosecutorial Council to have a *sufficient non-political component*, to prevent the parliamentary majority from imposing its will upon this body.

38. It is welcome that a significant number of members of the Council are prosecutors elected by their peers (four out of nine), and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. [...]

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 33, 35 and 36

43. [...] There is no European standard to the effect that members of a prosecutorial council cannot be elected by parliament. [...]

44. This position has not prevented the Venice Commission from subsequently questioning legislation providing parliament with very significant powers as to electing members of a prosecutorial council. [...]

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§ 43 and 44

38. [...] The balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers also seems appropriate. It is also welcome that the power to appoint half of the members of the Prosecutorial Council be given to different bodies: it helps to avoid a corporatist management of the prosecution service and can provide a democratic legitimacy to it. Furthermore, it is wise that the Minister of Justice should not him- or herself be a member but it is reasonable that an official of that Ministry should participate. One may wonder however whether ten members, in addition to the president, are not too many, since there are reportedly only 140 state prosecutors in Montenegro.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 38

44. [...] [I]n the particular context of BiH, involving the legislative power in the election of the members of the HJPC will lead to a highly politicised process where the merits of the individual nominees are unlikely to have any significant effect on the outcome.”

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 44

55. [...] [A]s soon as new lay members are elected by the Assembly, the mandate of the current members will be terminated. [...]

57. These transitional provisions raise two major concerns. First of all, the “reduced KPC” will be composed exclusively of lay members, elected by a simple majority in the Assembly. [...] Most importantly, it may decide on the election of the new PG, which is to take place in the beginning of 2022. Furthermore, the “reduced KPC” may replace the head of the Secretariat of the KPC and thus ensure full control of the EC, which oversees the process of election of the prosecutorial members.

58. In the opinion of the Venice Commission, the proposed amendments run counter international and European standards: they effectively remove prosecutors from the governance of the system at the most critical moment when both the PG and the prosecutorial members are to be elected.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, §§ 57 - 58

45. It is recommended that a substantial element or a majority of the members of the HJPC be *elected* by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. [...]

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 45

36. What is important is that the Prosecutorial Council escapes two dangers: corporatism and politicisation. Now the lay members are in a minority, which may lead to the dominance of the prosecutors and thus to the corporatist governance. This danger is stronger in the prosecutorial councils than in the

judicial councils due to the hierarchical organisation of the prosecutorial systems and the culture of subordination which results in prosecutorial members of such councils voting as a block together with the PG. On the other hand, the increase in the quota of lay members may lead to the politicisation and lack of independence, given that all of the lay members are elected at the same time (therefore by the same Parliament), and by a simple majority.

37. There are several possible ways to avert or at least reduce the risk of politicisation. [...] In theory, the qualified majority requirement should help to elect a candidate who enjoys the trust of different political forces and is therefore politically neutral. However, the qualified majority solution may present disadvantages. First of all, it may lead to political *quid pro quo*, when the votes given by the opposition in support of a majority candidate can be exchanged against some other concessions. If this is so, the qualified majority requirement will not necessarily reach its objective to ensure the election of a politically neutral figure. In addition, as the experience of Montenegro shows, it may be practically difficult to reach a political agreement. Thus, a qualified majority requirement should be associated with an effective anti-deadlock mechanism.

38. The Venice Commission has previously examined several such mechanisms. The Commission has expressed preference for a system where if no political agreement on a neutral figure can be reached (possibly in more than one round of voting), the right to appoint a candidate should pass to a neutral body outside Parliament. The Venice Commission recalls its recommendation in the two previous opinions on Montenegro that in the absence of a consensual figure elected by Parliament with a qualified majority, the right to appoint a member (or several members) of the Prosecutorial Council may pass to “university faculties and lawyers’ representatives” (or, rather, to their representative bodies). The main problem with this solution is to find such an independent outside body, especially in a small country like Montenegro.

39. For collegiate bodies the risk of politicisation may be reduced, for example, by the introduction of a proportionate representation of different political parties, through the system of a single transferrable vote or otherwise, for example by allocating to the parliamentary opposition a certain number of seats. One of the possible models would be that each side nominates a fixed number of candidates greater than the number to be elected and all the MPs vote for both components, which would in principle lead to the choice of more neutral candidates, acceptable to both parties.

40. Another possible solution is to provide for the nomination of candidates to those positions by the civil society and/or the legal community, the Supreme Court, or the Judicial Council. If Parliament has to choose amongst candidates who have the support of some non-governmental or independent institutions, that may somewhat reduce the risk of politicisation (albeit not remove it completely, since there is always a risk of manipulation of the nomination process, and there is a risk that NGOs participating in this process are not entirely politically neutral or not sufficiently representative of the civil society as a whole and thus not legitimate to play this role).

41. External bodies may not only be given the power to nominate candidate for the positions of lay member for their future election by Parliament, but even the power to appoint a certain number of lay members directly, in order to make the composition of the Prosecutorial Council more pluralistic.

42. As previously stressed by the Venice Commission, in respect of the anti-deadlock mechanisms, “each state has to devise its own formula” which should lead to the creation of a pluralistic Prosecutorial Council were politically affiliated members have no clear majority.

43. The Constitution of Montenegro does not define the composition of the Prosecutorial Council and the method of election of its members but leaves these questions to an ordinary law. The Venice Commission has previously recommended that the composition and core competences of the Prosecutorial Council be entrenched in the Constitution. Unfortunately, this recommendation has not been followed in Montenegro. In the 2015 Opinion the Venice Commission also suggested that the requirement to have a qualified majority for the election of lay members may be introduced in the law, and this recommendation remains valid. The Montenegrin legislator should consider introducing one of the alternative ways of ensuring depoliticisation, such as those mentioned above. However, any legal mechanism will only function if it is coupled with political will. A future Parliament, dominated by a different majority, may be tempted to try to gain control over the lay members, and, through them, over the Prosecutorial Council. Consequently, it is highly recommendable to find a more sustainable solution and describe the composition of the Prosecutorial Council and the method of election of its members in the Constitution itself – as it is done in respect of the Judicial Council.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, §§ 36- 43

33. [...] The Prosecutorial Council is composed of a majority of prosecutors elected by their peers. This achieves professional representation and expertise, but does not sufficiently enhance public credibility of independence. Such a composition was appropriate before the Council received the new constitutional role given to it by Article 65(3) of the new Constitution. The vertical nature of authority within the Prosecutor's Office and the professional subordination, as recognised by Article 5(d), undermines the independence of the prosecution service. This gap is not sufficiently filled by the other components of the Council's membership, each of which may be valuable, but the overall design is not sufficient to achieve independence. The Georgian authorities should consider an enhanced representation from civil society.

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, § 33

11. The revised draft proposes the following composition of the KPC: out of its 7 members three will be prosecutors elected by their peers (two from the lower prosecution offices and one from the Appellate and the Special Prosecution Offices), three will be lay members (one appointed by the Ombudsman and two elected by Assembly by a simple majority of votes), and the PG will be a member *ex officio*. Thus, in the future KPC prosecutors will regain a (slight) majority, together with the PG, which is not against standards.

12. [...] The revised draft returns to a model where the KPC is dominated by the prosecutors. In addition, the revised draft provides that one of the lay members is to be appointed directly by the Ombudsman. The Venice Commission assumes that the institution of the Ombudsman can be seen as an independent body in the Kosovo legal order. [...] In this set-up, the fact that the remaining two lay members are elected by a simple majority in the Assembly reduces the risk of politicisation of the KPC."

CDL-AD(2022)006, Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council, § 11

111. [...] [A]ll members of the prosecutorial council [are] elected and dismissed by the parliament. No qualified majority is required. This [...] leaves the Council in the hands of the parliament majority; this, coupled with the appointment

and dismissal of all prosecutors by parliament with no qualified majority, makes the prosecutorial system [...] too vulnerable to political pressure and jeopardises the possibility for the prosecutorial functions to be carried out in an independent manner according to the principle of legality.

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, § 111

107. [...] The composition of the Council should include prosecutors from all levels, but also other external actors, such as lawyers, legal academics or civil society representatives [...]

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, § 107

41. [...] [The] prosecutorial council [...] cannot be an instrument of pure self-government but [should derive] its own democratic legitimacy from the election of at least a part of its members by Parliament.

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 41

58. [...] The 2004 Law created the HJPC as a single and uniform body. Although this is not entirely unusual, ideally the two professions – judges and prosecutors – should be represented by separate bodies. For this reason the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils.

59. However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. [...]

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§ 58-59

42. [...] The composition of the National Council for the Public Prosecutor's Office, which is regulated in Article 72, also presents problems. It is currently composed exclusively of prosecutors. The President is the State Prosecutor General, followed by the departmental prosecutors and subject prosecutors; the only non-prosecutor member is the Director of the Disciplinary Proceedings.

43. The Venice Commission has compared many systems and has always considered that where such a type of council exists – its establishment is not an obligation - it should be composed not only of prosecutors but also of other actors such as lawyers or legal academics from appropriate branches of law. The composition of the National Council for the Public Prosecutor's Office should not grant unduly large internal powers to the public prosecutors, which would prevent them from being publicly accountable and their actions should be transparent.

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §§ 42-43

27. The next question is whether it is likely that the SCM will start a procedure and order a suspension of the PG. Out of 25 members of the Plenary SCM, in addition to the PG him/herself, there are four prosecutors and one investigator elected by their peers. This raises legitimate doubts about their independence from the PG: even if formally they do not receive orders from the PG in their capacity as members, they will become his/her subordinates once they return to their duties. Moreover, some of the "lay members", elected by the National Assembly, are former prosecutors and investigators and may also return to the work in the prosecution service at the end of their mandate [...]. Actually, in the current composition of the Prosecutorial Chamber of the SCM all of the lay members are former prosecutors or investigators. This is not desirable – the presence of lay members should ensure pluralistic composition of this body, whereas in Bulgaria it only represents the prosecutorial corporation. In addition, the PG may have "a certain de facto leverage over some other members of the [SCM], even those who are not professionally linked with the prosecution system" [...]. The Venice Commission therefore recommends to the Bulgarian authorities to modify the law in order to ensure that lay members sitting in the Prosecutorial Chamber represent other professions, and that prosecutors and investigators (who are already represented there by 5 members) cannot be appointed as "lay members".

28. Under the draft, the motion for suspension of the PG is to be lodged by at least three members of the Prosecutorial Chamber. Given that five members of the Chamber are affiliated with the PG, and some of the remaining five lay members may be affiliated (see above), it might in practice be difficult to find three members willing to lodge a motion.

29. As to the vote by the Plenary, [...] it is virtually impossible to obtain the 17 votes needed to request the President to dismiss the PG. It will be similarly very difficult to obtain 17 votes for a temporary suspension of the PG. It will require, in most cases, a near-unanimity amongst judges, members elected by the National Assembly, and *ex officio* members, which will be very difficult to achieve.

30. In sum, the Venice Commission considers that, given the rapport de force within the SCM, the possibility of suspending the PG pending criminal investigation remains purely theoretical. To improve chances of suspension, the law might provide that the three members launching the motion in respect of the PG may be from any of the two chambers of the SCM, and that the PG may be suspended with a lower majority of votes in the Plenary SCM (with the PG, naturally, not voting). Arguably, a lower majority would be needed for a more lenient measure, such as a temporary suspension, than for a more serious action such as the dismissal.

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, §§ 27 – 30

VI.B.1.c Eligibility requirements for members

53. [...] Under this provision, practicing defence lawyers cannot be members of the Prosecutorial Council elected by Parliament within the “civil society quota” (Article 8¹ par 2 (d)). [...] [G]iven the limited powers of the Prosecutorial Council and the fact that under normal circumstances, it sits only twice a year and deals only with matters related to the appointment and removal of the Chief Prosecutor, it is not clear why a defence lawyer should not be able to serve on this body. [...] With regard to the conflict of interest argument, this risk may be reduced by more specific and narrowly formulated conflict of interest rules. In any event, in the proposed setup the Prosecutorial Council does not have any say in the appointment or dismissal of lower prosecutors who participate in criminal trials. The Venice Commission has in the past emphasized the importance of including, in the appointment process of prosecutorial councils or similar bodies, legal professionals with non-political expertise, and has expressly mentioned members of the Bar among them. It is of course for the Georgian authorities to decide whether it is justified to retain this prohibition in the Draft Law.

54. However, the Venice Commission, OSCE/ODIHR and the CCPE/DGI note that it would be unwise to automatically exclude a whole class of independent legal professionals, who might have necessary expertise in matters debated in the Council, from being represented on the Prosecutorial Council; if some restrictions are necessary, they should be formulated as narrowly as possible.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 53 and 54

28. The first proposal is to introduce new ineligibility criteria for the lay members: not to have been elected officials or members of the Government in the past five years; not to have been members of political parties with leading roles; excluding close relatives, spouses, and partners of politicians; not to have been former prosecutors.

29. [...] In the opinion of the Venice Commission, the new ineligibility criteria create some "safety distance" between lay members and party politics, which could make the PC more politically neutral and avoid conflict of interest, even though it may be difficult to completely insulate lay members from any political influence. The criterion of not having been a prosecutor aims at avoiding additional, though indirect, corporatism. It does so, however, at the expense of excluding persons who might have highly relevant expertise, but this may be a necessary price to pay to reduce the risk of corporatism."

CDL-AD(2021)030, Montenegro – urgent opinion on the revised draft amendments to the law on the state prosecution service, §§ 28-29

38. This amendment introduces specific criteria concerning professional knowledge etc. for the appointment of prosecutors and their deputies. Even more detailed criteria shall be laid down by the Prosecutorial Council.

39. The amendment should be welcomed especially in the light of the strong political influence on appointments of prosecutors [...]. Thus, the amendment underlines that the criteria must be linked strictly to professional knowledge

and qualifications. Furthermore, the wording appears to be sufficiently broad in order not to preclude any relevant criteria.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §§ 38-39

32. [...] The draft Law indicates that the composition of the HJPC needs to reflect the ethnical composition of BiH, with at least six members of each of the Constituent Peoples and an appropriate number of members from among Others. Equal gender representation should also be ensured. These requirements were already present in the 2004 Law, but at the time, no numbers were given, the Law simply spoke of 'general representativeness' (Article 4.4). The need to have at least six representatives of each Constituent People, together with the requirement of the gender equality, may make the selection of appropriate members very difficult and inflexible [...]. In addition, the Venice Commission has already stated in its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the powers of the High Representative (CDL-AD(2005)004), that the judiciary should not be organised along ethnic lines.

35. In addition, in a country of the size of BiH, using a requirement for a certain ethnic composition for the HJPC will make it very difficult in practice to also meet the requirement of ensuring an equal representation of the sexes. The Venice Commission strongly supports policies aimed to ensure gender balance in public institutions and believes they should be welcomed and that all efforts in this direction should be praised. However, an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence - taking the country's size and population into account - may undermine the effective functioning of the system.

36. Article IX.3 of the Constitution of Bosnia and Herzegovina, which stipulates that 'Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina', does not refer to exact quotas, but refers instead to a general representation of the peoples of Bosnia and Herzegovina. The same wording appeared in the previous version of the draft Law and, in the given circumstances, it would be preferable to revert back to that version.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§ 32, 35 and 36

28. The first proposal is to introduce new ineligibility criteria for the lay members: not to have been elected officials or members of the Government in the past five years; not to have been members of political parties with leading roles; excluding close relatives, spouses, and partners of politicians; not to have been former prosecutors. Ineligibility criteria are proposed also for prosecutorial members of the PC [...]

29. In the opinion of the Venice Commission, the new ineligibility criteria create some "safety distance" between lay members and party politics, which could make the PC more politically neutral and avoid conflict of interest, even though it may be difficult to completely insulate lay members from any political influence. The criterion of not having been a prosecutor aims at avoiding additional, though indirect, corporatism. It does so, however, at the expense of excluding persons who might have highly relevant expertise, but this may be a necessary price to pay to reduce the risk of corporatism. The Venice Commission therefore welcomes the introduction of ineligibility criteria (for both lay members and prosecutor members) in the law on the State Prosecution Service of Montenegro.

30. The ineligibility criteria should continue to apply throughout the mandate; as some of them may materialise after the election (marriage to an MP for example). The law should provide for a continuing procedure of revisiting verification during the mandate, possibly leading to its loss.

31. The Venice Commission is of the view that it is necessary to increase the detachment of the lay members not only from politics but also from big business interests. Prosecutorial Council members are considered as civil servants and as such they need to submit their asset declaration to the Anti-corruption Agency; these asset declarations are made public. The Commission thinks that false declarations could be a separate ground for their removal from the PC. Article 120 of the Law on the State Prosecution Service could be amended to the effect of allowing external requests of recusal of a member of the PC on the ground of conflict of interest revealed by the publication of the asset declaration, in response to which an official, reasoned decision would have to be made.

[CDL-AD\(2021\)030](#), Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, §§ 28 – 31; see also [CDL-AD\(2021\)051](#), Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 34

52. As noted in the 2019 opinion, “in the current composition of the Prosecutorial Chamber of the SJC all of the lay members are former prosecutors or investigators”. These former prosecutors are entitled to return to the prosecution service (immediately) after serving as lay members. In these conditions, the Prosecutorial Council is unlikely to protect the career of individual prosecutors or appoint senior prosecutors against the will of the PG.

53. The Commission therefore reiterates that it is very important that lay members of the Prosecutorial Council do not have any present or future hierarchical (or de facto) subordination links to the Prosecutor General and represent other legal professions. This has already been recommended in the 2017 opinion. Achieving the above outcomes would require in addition an evolution of professional ethos and political culture,⁴⁸ as well as closer examination of institutional and procedural rules so as to reduce to a certain extent the PG’s institutional or de facto leverage [...] over other prosecutors or members of the Prosecutorial Council.

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, §§ 52-53

50. [...] Insofar as the formal eligibility criteria are concerned, in theory all prosecutors who are entitled to exercise prosecutorial functions should also be entitled to stand for the elections to the KPC (though the law might provide for additional criteria related to seniority or an impeccable professional record).

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 50

VI.B.1.d *Ex officio* members or members delegated by independent institutions

32. [...] [A] certain number of seats in a prosecutorial council could be reserved to representatives of external independent institutions (such as the Bar, the conference of the law faculties, the Ombudsperson, etc.) or to civil society. In this model it is necessary to ensure that the institution delegating lay members is genuinely neutral (which may be difficult to achieve in a small and very

politically polarised society), and/or that the members delegated by the NGOs are truly representatives of the civil society.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 32

46. As regards the Ombudsperson, it is quite unusual for a defender of rights to participate in the governance of the prosecution system. It is questionable whether the functions of a member of the SCP are compatible with the Ombudsperson's mandate. Reportedly, in the Moldovan context, the Ombudsperson himself refused to participate in the work of the SCP. That being said, the Ombudsperson, as a politically neutral figure, may serve as an arbiter between the prosecutorial members and lay members affiliated with the Government, so his or her participation in a prosecutorial council may help avoiding deadlocks.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, § 46

37. [...] [In] a hierarchically organised prosecution service it is understandable that the PG should participate in decisions about the appointments, career, and discipline of the prosecutors, to influence budgetary and organisational policies, and to take part in the development of professional standards and procedures.

38. Admittedly, the PG should not be able to take decisions alone – this is why the prosecutorial councils are created. However, completely excluding the PG from the KPC is objectionable, if the proposed balance between prosecutorial and lay members is to be maintained.

The Venice Commission observes that in an opinion on Serbia it recommended to exclude the Prosecutor General from the prosecutorial council as an *ex officio* member. However, this recommendation should be seen in the light of the composition of the prosecutorial council *in Serbia* where prosecutors, under the amendments in question, would represent 5 out of 11 members. Since the Prosecutor General was the hierarchical superior of all five prosecutorial members, that made the figure of the Prosecutor General too powerful and warranted his/her removal from the council.

In general, participation of the Prosecutor General in a prosecutorial council should be evaluated not in abstracto, but in the light of several factors specific to each particular country, in particular:

- the composition of the council (whether the council is dominated by the prosecutorial or lay members);
- the organisation of the prosecutorial system (whether it is a hierarchical system with the Prosecutor General at the top, or a decentralised system where prosecutors are attached to the courts and not subordinated to the Prosecutor General from the procedural and administrative perspective);
- the competencies of the council (whether it decides on issues related to the discipline, career of prosecutor; budgetary and organisational matters, etc. or those powers belong to other bodies);
- the powers of the Prosecutor General in the decision-making within the council (participation with the right to vote or in an advisory capacity only), and whether there are sufficient safeguards in the way the council operates in order to counterbalance any excessive influence of the prosecutor general within the hierarchy, etc.

Turning to the situation in Kosovo, participation of the PG in the KPC is not objectionable if the PG has no voting rights or if the prosecutorial members in the reformed KPC remain in the minority, even together with the PG. If the PG remains in the composition of the KPC as an *ex officio* member with voting rights, that may require a revision of the composition of the KPC in order to preserve the balance between different groups of members. In a nutshell, it is important is to avoid a situation where the PG, using his or her position vis-à-vis prosecutorial members (and even some lay members)²⁰ may dictate his/her will to the KPC. Similarly, the executive or the President should not be in a position to dominate the KPC – it should remain a self-governing body not subordinated to any branches of the government. Thus, if the PG participates in the KPC without voting rights, the Minister of Justice may also participate there without the right to vote, in order to balance the influence of the executive and the influence of the prosecutorial community within this body.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, §§ 37 – 38; see also CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 47 et seq.

13. [...] Under the revised draft, the PG remains in the composition of the KPC. The overlap in functions between the PG and the KPC is organisationally unsound and a source of conflict and confusion; however, legislation on the KPC is probably not the right place to address this problem. The fact that the PG remains in the KPC as an *ex officio* member may arguably solve the problem of partly overlapping spheres of competency of the PG and the KPC2 – even if the respective competencies are not so clearly defined.

14. That being said, the Venice Commission acknowledged the risk of the PG becoming an overly powerful figure in a KPC dominated by the prosecutors. The December opinion proposed to counter this risk by providing that the PG has no voting rights in certain areas, such as discipline. Under Article 12 of the revised draft disciplinary decisions have to be adopted by a qualified majority of 5 members, including two votes of lay members. That is a useful addition which reduces the influence of the PG in the disciplinary sphere. If the PG has a role in a disciplinary matter in the exercise of his or her functions as PG, he/she should not be involved in the deliberations of the KPC on disciplinary matters at all. The ordinary principles concerning conflicts of interest should apply. Moreover, to reduce the excessive influence of the PG in other areas the law might provide that the prosecutorial members of the KPC sit in this body in their individual capacity and that they are not subordinated to the PG insofar as their work in the KPC is concerned, and that the PG cannot use his/her hierarchical powers to influence their voting, both directly and indirectly.

CDL-AD(2022)006, Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council, §§ 13-14

31. [...] Another question is whether the SCP, in this new composition, will be able to be the “guarantor of the independence and impartiality” of the prosecutors, as defined by Article 125(1) § 1. The addition of three new members to the SCP (the President of the Bar Association, the Ombudsman and a member of the civil society proposed by the Government) does not seem to threaten the independence of the prosecutors, because the composition of the SCP remains sufficiently pluralistic, the prosecutors still representing a relative majority there. The same concerns the presence of the Minister of Justice as an *ex officio* member of the SCP.

36. [...] No strict European standards against the direct involvement of the Minister of Justice as a member of the SCP exists. Previously, the Venice Commission observed that as long as the role of the executive representative

is not decisive, his/her presence in a prosecutorial council would not be inconsistent with best practices; it may even “facilitate dialogue among the various actors in the system” [...]. That being said, the Venice Commission recommended replacing the MoJ with a representative of the Ministry, or not giving the right to vote to the Minister in questions related to the transfer of judges and disciplinary measures against judges. It is worth noting that the SCP in the Republic of Moldova does not take decisions concerning judges.

CDL-AD(2019)034, Republic of Moldova - amicus curiae brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor’s Office, §§ 31, 36

131. [...] The self-governing nature of the SCP might be questioned given the *ex officio* membership of the Minister of Justice and of the President of the Superior Council of Magistracy. It is suggested to consider their membership being one without voting rights.

132. Regarding the civil society members of the SCP, it could be useful to specify, in the light of their relevance to the functioning of the criminal justice system, the most relevant sectors that they should come from (the bar, human rights NGOs etc.) and their suitable legal training/experience. In addition, their appointment by the Parliament seems problematic if the goal is really to have a Council free of political influence. If this system is maintained, one option could be to establish a committee within Parliament, on which all parties are represented equally, to deal, according to a transparent procedure, with the issue of appointment of civil society members. Another solution could be to provide for their appointment by representatives of their profession - Lawyers’ Union, assembly of university senates, etc.

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

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 131-133

36. [...] It is worth noting that the SCP in the Republic of Moldova does not take decisions concerning judges. The Minister of Justice is only one of 15 members of the Council. Only one other member of the SCP owes their membership of the Council to the Government: the one of the four civil society representatives who is elected by the Government under the September 2019 amendments. The MoJ's participation would therefore not put the SCP under the control of the Government. In such circumstances, the presence of the MoJ in the SCP would not seem objectionable.

CDL-AD(2019)034, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor's Office, § 36

31. The Venice Commission has so far been cautious in requiring the removal of the Minister of Justice from High Prosecutorial Councils [...], while the Group of States against corruption (GRECO) has taken a stricter position in this regard [...]. Regardless of the position of principle as to whether the participation of the Minister of Justice is to be considered as problematic of itself, with regard specifically to the Serbian High Prosecutorial Council the Commission has noted that the presence of the Minister of Justice and of the Supreme Prosecutor General on the HPC alters the balance between prosecutors elected by their peers and political nominees. For this reason, the Commission concluded that "ideally" the *ex officio* membership of the Minister of Justice and of the Supreme Prosecutor General should be abolished and replaced by two additional prosecutors elected by their peers.

32. However, the Venice Commission acknowledges that, if the *ex officio* membership of the Minister of Justice is maintained, it is indeed welcome to stipulate that the Minister may not vote in a procedure for determining disciplinary responsibility of a public prosecutor. [...]

CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, §§ 31-32

45. [...] [U]nder the Draft Law the politicisation of the Council is somehow reduced by the fact that two out of the four members elected by the Parliament come from civil society and not from the ranks of MPs. However, these candidates still have to obtain the approval of the governing majority (see Article 8¹ par 2 (d)) which may predetermine their position for the entire period of their service. In order to make those persons less dependent on the

will of the ruling majority, it is necessary to put in place additional guarantees, applied both at the stages of *nomination* and of *election* of candidates.

46. First of all, the nomination of members of civil society and academia (Article 8¹ par 2 (d)) should be done in a transparent manner, with the selection process following clear rules and criteria, which should be set out in the Draft Law. A range of options could be considered here. One possibility (the simplest option) is for certain office holders to gain membership of the Council automatically, e.g. the head of a law faculty, or the President of the Bar Association may become *ex officio* members of the Prosecutorial Council without being elected by Parliament.

47. Additionally, a possible option would be to appoint one or more members of the judiciary to the Prosecutorial Council. Judges could bring their own practical expertise in the criminal justice system to the work of the Council, and would also help enhance the independence of this body, and thereby the public's trust in the Council's work. A range of possible judges could be considered for this position, including chairpersons of certain courts (e.g. the Supreme Court, the Tbilisi city court and/or regional courts).

48. An alternative solution, which is closer to the scheme proposed by the Draft Law, would be to give the nominating power to one or several independent bodies outside of the Ministry of Justice or the Prosecutorial Council, such as the High Council of Justice, the Bar Association, or a body representing law universities and academic institutions. In this process, consideration should be given to the need to achieve proper gender balance amongst the candidates. The nominating power may also be given to certain well-established NGOs, which will increase transparency of the Prosecutorial Council and public trust in its autonomy. In cases where the power to nominate candidate would belong to external actors, the Parliament should still retain the power to approve or not approve them.

49. At the same time, if there are too many nominating bodies, and, as a result, too many candidates, it might be useful to establish a parliamentary committee composed of an equal number of representatives of all parties represented in Parliament. The role of such committee would be to pre-select a certain number of candidates and propose them to the Parliament for elections. It is important to ensure the plurality of candidates at this stage: the Parliament should have at least two or ideally three candidates for each vacant position to choose from.

50. At the stage of elections by the Parliament it is important to ensure that the resulting composition of the four Council members elected by the Parliament is not politically monolithic. To achieve this, two alternative solutions may be considered: election by a qualified majority or the introduction of quotas for the opposition.

51. The most radical solution would be to require that at least two out of the four members elected by Parliament are elected by *qualified majority* (one member representing the Parliament, and one member representing civil society). This would ensure that at least two members of the Council are elected as the result of a compromise, which would somehow counterbalance those two members whose election depends more on the support of the ruling majority, and the fact that the Minister of Justice sits on the Council *ex officio*.

52. Since such a qualified majority may be hard to achieve in the current political context in Georgia, an alternative solution is also possible: the Draft Law might introduce *quotas for members appointed by opposition parties*. This means that opposition parties should have the right to appoint at least one member of the Council, regardless of their number of seats in Parliament. Given the current relative strength of the opposition in the Georgian Parliament, the opposition might even be given two seats out of four: one for an MP and one for a representative of civil society whom the opposition wishes to nominate. Whichever solution is chosen, the parliamentary majority would still control more seats in the Prosecutorial Council, due to the participation of the Minister of Justice, but its decisive influence within the Council would be reduced and the Council would become more politically balanced; in order to pass important decisions or to block them, candidates chosen by the parliamentary majority would need to obtain support of those elected by qualified majority or appointed by the opposition, or those members which are elected by the Conference of Prosecutors.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 45-52

32. Under the revised draft, one of the lay members would be nominated by some selected NGOs. This solution echoes the recommendation of the Venice Commission to give the nomination power to external non-governmental actors, such as NGOs, universities, the Bar, the Judiciary, etc.

34. The Venice Commission understands that under the revised draft the Parliament would simply endorse the candidate who obtained the maximum number of nominations.[...] The candidate proposed by civil society should not be part of the vote on the candidate lay members. Parliament should separately decide to endorse such candidate and should be permitted to decline to do so only for a stated reason. The draft should be clarified on these points.

35. The Venice Commission finds that while the proposal to have one lay member chosen by civil society is a step forward, there are several questions that remain to be addressed. Most importantly, it is unclear whether this candidate would be really representative of civil society. Legal professionals are represented by the Bar, academics may be represented by their universities, but who may claim to represent the non-governmental organisations?

36. The authors of the revised draft have devised a system which attempts to address this difficulty. Thus, to be eligible to submit a nomination, a non-governmental organisation must have existed for more than three years, work in the field of the rule of law, and implement projects in this area with a budget of more than EUR 20,000 per year. Those criteria aim at excluding NGOs which may have been created specifically for the purpose of participating in the nomination process. In the Commission's view, it is positive that the revised draft introduces some objective criteria and thresholds, but it is difficult to say whether these are realistic and whether they may ensure the representative character of the process in the medium and long term.

37. In addition, all NGOs are put on an equal footing, and every NGO may nominate one candidate. This means that well-known NGOs having many years of experience and numerous successful projects in their portfolio would have the same weight as much junior, smaller and less experienced NGOs. In this context, the result would be more representative if there was no formal equality amongst all the NGOs satisfying the minimal criteria. The selection of the candidate to be endorsed by parliament should

therefore not be based simply on the nomination by the “largest number” of NGOs: qualitative criteria should be developed to identify the NGOs whose nomination carries more weight.

38. Finally, it is unclear what would happen if no candidate receives more nominations than the others. As the decision as to who is the candidate of the NGOs should stay with the NGOs, the selection mechanism should be developed; the decision should not be left to the discretion of parliament. In developing the selection mechanism, the legislator should take care not to infringe the necessary independence of NGOs.

43. In addition, the Commission finds that, besides one member appointed by the NGOs, one or more lay members may additionally be appointed by the legal community (represented by the Bar) and by the academic community (represented by the conference of university deans).

44. It would be worth considering that Parliament choose all five candidates from a list composed on the basis of nominations made by the NGOs. But in this case, as recommended by the Venice Commission in an opinion on Georgia, (a) “it might be useful to establish a parliamentary committee composed of an equal number of representatives of all parties represented in Parliament” to compose such list, and (b) the election in Parliament should be done with a qualified majority of votes or on the basis of a proportional system.

CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, §§ 32, 34- 38, and 43-44.

VI.B.2 Election/appointment of the members of the prosecutorial council

VI.B.2.a Election/appointment of lay members; anti-deadlock mechanisms

65. [...] [I]t is necessary to ensure that the Prosecutorial Council should not be politicized. The Commission does not consider that election by parliament by simple majority is conducive to political neutrality or at least pluralism.

When qualified majority or proportional voting systems do not appear as an acceptable solution, as a transitional solution simple majority may be accepted only if it is coupled with additional solid guarantees and safeguards.

CDL-AD(2021)030, Montenegro: urgent opinion on the revised draft amendments to the law on the state prosecution service, § 65; see also CDL-AD(2007)047, Opinion on the Constitution of Montenegro, § 104; see also CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 13

13. The second main recommendation was about the envisaged new composition of the PC, with the lay members elected by parliament by simple majority outnumbering the prosecutors elected by their peers (5 to 4). The majority of lay members over prosecutors was not as such contrary to the European standards and could be justified in order to avoid corporatism. However, since all lay members would be elected by parliament by a simple majority at the same time, hence by the same political majority, the serious risk existed that the PC would be politicised even further. To avoid such risk, the Venice Commission proposed several alternatives:

- election of the lay members by parliament by a qualified majority (with an effective anti- deadlock mechanism);
- election of the lay members by parliament on the basis of a proportional system (so that lay members represent different political forces);
- nomination or even direct appointment by external nongovernmental actors (such as universities, the Bar, the judiciary, etc.).

CDL-AD(2021)030, Montenegro - urgent opinion on the revised draft amendments to the law on the state prosecution service, § 13

15. The authorities argue that as this anti-deadlock commission should act as a substitute for the competence of the National Assembly, [in the case of a deadlock]. [...]

16. The Venice Commission [...] finds that it is positive that the “prominent lawyers” in the HJC should be appointed by key figures in the Serbian judiciary, such as the President of the Constitutional Court, the President of

the Supreme Court and the Supreme Public Prosecutor. It has no objection to the participation of the Ombudsman either; the participation of the Speaker of the National Assembly appears equally understandable, given the fact that the anti-deadlock mechanism supersedes a power of the National Assembly.

17. However, as four out of the five members of this commission are currently elected by the National Assembly (and not all with a qualified majority), for the Commission it is not impossible that the proposed antideadlock mechanism might “lead to politicized appointments”, at least until such time as these constitutional amendments enter into force and produce their effects (for example, the President of the Supreme Court will no longer be elected by parliament, and the Prosecutor General will be elected with a qualified majority and will enjoy other guarantees of independence [...]) and the composition of parliament will be more pluralistic.

18. The Commission acknowledges that there is no prescriptive or detailed standard as to the composition of such an antideadlock mechanism, and therefore cannot conclude that the proposed mechanism is not in line with international standards and must be changed.

19. Nonetheless, the Commission encourages the Serbian authorities to explore the possibilities for an alternative antideadlock mechanism which may alleviate the concern that it may not be, or may be perceived not to be, politically neutral.

CDL-AD(2021)048, Serbia - Urgent opinion on the revised draft constitutional amendments on the judiciary, §§ 15-19

49. In addition, an anti-deadlock mechanism should be foreseen for the election of the eminent lawyers, e.g. a three-fifth majority for subsequent voting, as provided for in Article 91 of the Constitution for the election of the lay members of the Judicial Council, or the proposal of a higher number of candidates and the election with the absolute majority of the components of the Parliament, or the election by Parliament using a proportional system, or to transfer of the power to elect to university faculties and lawyers’ representatives.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 49; see also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 23

41. [...] The two selection commissions wield a very significant power: they can reject candidates [to the positions in the prosecutorial council] not only on the basis of formal criteria (like the minimal work experience or absence of convictions, for example), but also with reference to a vaguely formulated concept of “high moral integrity” and/or on the basis of “additional qualification criteria which demonstrate [the candidate’s] managerial skills”. In essence, the role of those two commissions is at least as important as the role the Assembly and of the prosecutorial community. It is therefore necessary to ensure that those two commissions are appropriately composed and follow a transparent and fair procedure.

42. As stressed above, since at least some if not all (the Constitution does not indicate how many) lay members in the KPC are elected by a simple majority of votes in the Assembly, there is a risk of politicisation of the former. In principle, a properly organised selection procedure might offset this risk, but only on three conditions. First, it is necessary that any selection body is truly pluralistic, i.e. not dominated by the ruling majority or members affiliated with it. Second, the decision-making process within such a body should ensure that the candidates nominated for the election by the Assembly have support across the broad political spectrum (i.e. at least some members not affiliated with the political majority should have voted for them). Third, the majority in the Assembly should not be able to circumvent or sabotage the selection procedure.

43. As to the composition of the parliamentary selection commission (the ASC), it is comprised of several representatives from each parliamentary group plus seven members who either sit there *ex officio* or who are delegated to the ASC by external institutions. [...] [On] the whole, the ASC does not appear to be dominated by the members affiliated with the ruling majority. This is certainly positive.

44. However, the decision-making process in the ASC is unclear. Thus, the ASC decides by a simple majority of votes (Article 10 (9)) but has to propose two candidates for each position, by attributing them “evaluation points”. The draft law does not describe how those points are attributed, and on the basis of which criteria. [...]

45. Most importantly, it is unclear whether both candidates should receive the support of the majority of the ASC. If a candidate can be included in the shortlist with the votes of the members of the ASC affiliated with the majority only, that would offset the positive effect of the pluralistic composition of the selection ASC, since such a “minority candidate” would be, in all evidence, chosen by the Assembly by a simple majority of votes.

48. Finally, the Assembly is not bound by the choice of the ASC. If neither of the candidates received an absolute majority of votes in the first or second round of voting, the procedure would have to restart. So, ultimately, the ruling majority in the Assembly will retain at least the power to outvote any candidate they do not want to be elected.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, §§ 41 – 45 and 48

55. The Draft does not describe the process of nomination or filtering of candidates to the lay members' positions. There is a risk that the lay members will be persons with strong political connections. To avoid that, it is important to provide a system of pre-selection or nomination of candidates which ensures that the lay component of both councils consists of experienced persons who have no personal interest in the outcome of the decisions they make and who are not permeable to political influence. Where lay members of the judicial councils are to be elected by Parliament, it is common to find a provision that they are selected from amongst persons nominated by expert bodies such as the law faculties of the universities and the professional associations of lawyers⁵¹ and perhaps from some other categories such as retired judges. These matters, however, may be left to the legislator [...].

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, § 55

24. [...] [The] Committee of the Assembly would also have the power to assess the candidates' "integrity, vision and managerial skills" and, following an interview, shortlist two candidates for each position of a lay member.

25. The Venice Commission is not against the idea of some form of shortlisting of candidates to the positions of lay members. However, the candidates should not be rejected because of their "vision" – i.e. ideas, because that may politicise the pre-selection process. This criterion should be excluded. As to other criteria used by the Committee (managerial experience, competency, and integrity), the interview process should be as objective as possible. Thus, it would be useful if the Committee would rely on the opinion of acknowledged experts in this field, that the interviews are open and the decision of the ranking of candidates are reasoned. Indeed, the final say in the matter of appointment of those two members will belong to the Assembly.

26. It will also be necessary to describe the decision-making process within the Committee more clearly. Article 10 (8) provides that each Committee member would attribute a certain number of points to the candidates in relation to each criterion of assessment, but it is unclear how these points would be reflected in the final score of the two remaining candidates. The authors of the revised draft claimed that such procedure is known in the Kosovo legal order, but for the Venice Commission it is difficult to understand, on the basis of the text of the revised draft alone, how the “points system” would function. This should be clarified. It would also be useful not to limit the pool of candidates to only two, but to give the Assembly more names to choose from (rejecting only those candidates who do not obtain some minimal support of the Committee members).

27. Another option would be to consider alternative voting procedures in the Committee, for example a preferential system, with a single ballot paper where candidates are numbered in order of preference by the each member of the Committee, with successive counts in each of which the lowest candidate is eliminated and the vote transferred to the next-highest preference until one candidate has a majority or with successive rounds of voting where the bottom candidate is excluded each time until a result is reached.

CDL-AD(2022)006, Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council, §§ 24-27

VI.B.2.b Election/appointment of prosecutorial members

21. Article 18 still provides that, out of the five public prosecutor members elected by the Prosecutorial Conference, only one is elected from among basic Public Prosecutor’s Offices, while four are elected from among public prosecutors belonging to the Supreme, Special and High Public Prosecutor’s Offices. To ensure a proportional and fair representation of all levels of the prosecution service, at least two members should be elected from among Basic Public Prosecutor’s Offices, taking also into account that the Supreme Public Prosecutor is *ex officio* the President of the Prosecutorial Council.[...]

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 21

53. [...] [T]he right to appoint a member of the [Prosecutorial] Council should remain with the Protector of Human Rights [i.e. the ombudsman] or at least the President of Montenegro should be obliged to consult with the Protector before making his or her proposal. As for qualifications, relevant human rights experience should be a criterion.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 53

66. Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's appointment and disciplinary proceedings [...]. [...]

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 66

58. To ensure geographical diversity, the Draft Law may further provide that no more than one vacancy on the Prosecutorial Council should be filled by a representative of a particular region or the city of Tbilisi (including the Chief Prosecutor's Office and district Prosecutor's Offices of the city of Tbilisi). Regarding the need to achieve proper gender balance in the composition of the Prosecutorial Council, it is noted that in accordance with the 1995 UN Beijing Platform of Action, States should establish the goal, if necessary through positive action, of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary. It is recommended include a similar requirement of gender balanced representation in the Draft Law."

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, § 58

60. So far as concerns the election of the other members, the two members from the General Prosecutor's office and the six members from the territorial and specialized prosecutors' offices, it is not stipulated whether these are elected separately by their own offices or all together in a general meeting of

prosecutors. Presumably, however, the latter would not work since the larger offices would be in a position to outvote the smaller.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 60

51. The composition of the Electoral Commission (the EC) [which pre-selects candidates to the position of a prosecutorial member of the council] is a source of concern. Out of three members only one may arguably be seen as a representative of the prosecutors – a member appointed by the PG. Thus, the EC is dominated by the non-prosecutorial members. As with the ASC, the EC wields an important “negative power” since it may reject candidates who do not meet conditions set out in the law. Most importantly, the EC may reject candidates with reference to their “moral integrity” and “managerial skills”.

52. In essence, the participation of the EC in the selection process seriously curtails the right of the Kosovo prosecutors to select their representatives in the KPC. The proposed model is therefore hardly compatible with the requirement that prosecutors elected by their peers should be sufficiently represented in a prosecutorial council. Even if some sort of a filtering body is necessary, it should be composed of the prosecutors, or at least of a majority of prosecutors.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 51

63. Such revision of the composition of the KPC could also be supported by the fact that the future system would eliminate a certain disparity of representation of the lower prosecution offices in the KPC, which is a feature of the current system. Currently, every lower office delegates one candidate to the KPC, which means that smaller offices are over-represented, while larger offices are under-represented in the KPC. The revised system would restore the balance, by providing that each prosecutor has one vote.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 63

21. The only element of the procedure which still needs to be addressed is the fact that in the election process each prosecutor would cast one vote [...]. Since the prosecutors have three candidates to elect from their ranks, and since they

may have quite a large number of candidates to those positions, it is unclear how this “one prosecutor – one vote” principle would work. If the prosecutors are to vote for any candidate from the general list, that may lead to a situation where all votes would be concentrated in one very popular candidate, and the second and even more so the third candidate would have much less support amongst his/her colleagues. If each candidate on the list is to be voted separately by the prosecutorial community, that may result in more candidates than needed. Thus, the voting provision should be clarified. A possible solution would be to invite the prosecutors to mark three names on the general list of the candidates (or less, if less than 3 vacancies are to be filled). Details of the voting process may be regulated by the KPC itself.

CDL-AD(2022)006, Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council, § 21

VI.B.3 Term of office of the members of the prosecutorial Council and their early removal

VI.B.3. a Duration of the mandate and the possibility of reelection

49. [...] [I]n most countries, members of judicial councils are elected for a rather short period of time (three years in the Netherlands, six years in ‘the former Yugoslav Republic of Macedonia’ etc.). In some countries, members of the judicial council have life tenure (Canada, Cyprus etc.) or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 49

40. It is envisaged in Article 18 that there should be a four year term of office for the Council. This is a reasonable period. Members can be re-elected provided that at least four years have expired since their previous term of office (Article 25). This seems a reasonable provision as it would be undesirable for persons to remain on the Council for too long a period.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 40

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

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

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§ 134 and 135

VI.B.3.b Early termination of the mandate: dismissal, retirement, reorganisation of the council

54. The Venice Commission reiterates that the early termination of the mandate of a member of a council (where it is not due to the voluntary resignation, abolition of the whole institution, or to other similar reasons) should always be related to an identifiable wrongdoing or the failure to perform his or her duty. Members of the KPC should not be “impeached” simply because the parliamentary majority or their colleagues disapprove of the decisions they take.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 54; see also CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§ 27, 28 and 38

105. According to Article 42§6 (4) the mandate of an elected member of the National Council of Public Prosecutors expires before the end of the term of office - in case of “dismissal by the body who elected the member”. The

provision does not require any justification for the dismissal, which is left to total discretion of the electing body. This situation undermines the independence of the members of the Council and does not provide for conditions enabling them to efficiently exercise their mandates.

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, § 105; see also CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 54

82. [...] [T]he Draft Law provides for a distinction between the termination of the mandate of a member of the HJPC by operation of the law, in cases provided in amended Article 6, and dismissal by a motion or *ex officio*, through a decision adopted by the HJPC, in cases provided by draft Article 6a. For the sake of clarity as to the exact day of the termination of the mandate, the Venice Commission suggests to explicitly mention that even in cases of the termination of the mandate by operation of the law, the Council shall adopt an act, in which to take note of the termination of the mandate, with the indication of the day of the termination.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 82

52. A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the SPC, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

53. A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of 'lack of confidence'. Article 41 clearly defines the reasons that can lead to a dismissal of the SPC members. The disciplinary procedure must therefore only focus on the question whether the SPC member failed to perform his or her duties '*in compliance with the constitution and law*'. This question must not be confused with the question whether said member still enjoys the confidence of the public prosecutors and deputy public prosecutors who participated in his or her election. The disciplinary procedure has to guarantee the SPC member a fair trial. While a reference to a fair trial is made under Article 46a, details on related guarantees should be provided.

54. In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, for instance, an 'impeachment' of a member is allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. In fact, the draft Law lacks specific provisions on disciplinary issues in respect of SPC members and merely focuses on dismissal. An appeal to a court of law should also be provided.

56. [...] Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced.

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§ 52-54 and 56

53. Article 28 deals with dismissal from the Council. Members are to be dismissed if they discharge their duties '*unconscientiously and unprofessionally*' or are convicted of an offence making them '*unworthy of discharging the duties of a Prosecutorial Council member*'. It is strongly recommended to define these dismissal grounds more closely. For example, it is not clear what sort of offence would make one 'unworthy' to be a member of the Council. Prosecutor members are also dismissed if a disciplinary sanction is imposed. However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure. In addition, the law should also provide for unjustified failure to perform duties as a ground for dismissal.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 53

51. [...] [I]t seems [...] that a person can be removed from the HJPC for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.

52. Disqualification may be linked to a criminal or a disciplinary offense. Membership may also be suspended where the member's status as a judge or prosecutor is suspended, for instance due to an on-going criminal investigation or for other reasons under the law.

53. In addition, the decision on cessation has been transferred from the HJPC to the Parliamentary Assembly. This decision does not seem to require a qualified majority. When taken together with the very vague drafting of certain of the situations (if a member fails to perform duties in a proper, effective or impartial manner; when the member commits an act due to which he or she no longer merits to perform the duties on the Council; etc.), this may lead to politicisation – or the impression of politicisation – of the activities of the HJPC, whose members depend on the Parliamentary Assembly not only for their election, but also when exercising their mandate.

55. The inability of the HJPC member to perform functions should indeed result in dismissal, even if this was caused by objective reasons. However, the period of time he or she is absent should be taken into account: a minimum period of time must be clearly defined after which the dismissal of the member may be sought.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§ 51-53 and 55

55. In addition, Article 28 should ensure a fair hearing for the person to be dismissed and that the decision can be appealed to a court. Dismissal should be decided upon by the other members of the Council, with a qualified majority, without the member concerned.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 55

26. [...] The Commission reiterates its recommendation that the provision on remission of the dismissal decision to the electing body - an external, and sometime political body - be deleted and that the dismissal be decided upon by the other members of the Council, with a qualified majority, without the member concerned.

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 26

53. The exemption (dismissal) of members of the prosecutors' council without any criteria is problematic. As per Section 9.2 ASPGPOPEPC more than one half of the valid votes cast shall be required for exemption from membership. The council can dismiss one of its members by simple majority. The cases when a member of a prosecutor's council can be dismissed should be specified in the Act. Such a provision of course deserves having the status of cardinal act.

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 53

45. The draft amendments to the Law on the SPS provide that, after their adoption, the members of the Prosecutorial Council will have to be re-elected, according to the new rules.

46. The above analysis on the replacement of the SSP is also applicable to the replacement of the members of the Prosecutorial Council. The Prosecutorial Council continues to exist, and the slight alteration in its composition neither extinguishes the organ nor modifies drastically its competences, nature, or functions. Furthermore, the mandate of the current members of the Prosecutorial Council expires within less than a year. The Venice Commission does not see the need for replacing the existing members of the Prosecutorial Council, not least for the sake of respecting their security of tenure.

47. The Venice Commission refers to a previous opinion concerning the renewal of the composition of a judicial council following a legislative reform. The functions of the judicial council and of the prosecutorial council in the system of checks and balances are very similar, so the Commission's findings are applicable to the case at hand as well:

"The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council.

Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could

terminate its existence early and replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. [...]"

48. One may argue that the political goal of the reform – to change the balance between lay members and prosecutorial members in the future Council – would not be achieved if the current members are allowed to serve until the end of their original mandate. This goal, however, may be achieved without the immediate re-election of all lay members. To achieve this new balance it would be sufficient to elect one additional lay member, and remove one prosecutorial member (for example, by drawing lots, or by removing a member representing the [Special Prosecutor's Office]), or to add two lay members and not remove prosecutorial members at all, as a transitional solution. If, for whatever reason, it is difficult to designate one prosecutorial member to be removed, it should be possible re-elect all of them, eventually, under the new rules. In this scenario the prosecutorial and lay members would end their mandate at different times. The majority of the lay members, elected by the previous Parliament and until the end of their mandate, would not be perceived as political appointees of the current majority, and the risk of total politicisation of the Council (due to the arrival of the new members appointed by the current majority) would be at least temporarily diminished. In any event, the Venice Commission does not recommend the immediate removal of the lay and prosecutorial members and considers that they should be allowed to finish their mandate.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, §§ 45 – 48

46. The revised draft maintains the provision for the immediate replacement of all currently sitting members of the PC upon the entry into force of the law, that is before the end of their mandate (which expires on 22 January 2022). In the March opinion, the Venice Commission expressed the view that the members of the current PC should be allowed to terminate their mandate. The Commission has previously stated in respect of judicial councils that as one of their important functions is to shield judges from political influence, "it would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections." [...] While using its legislative power to design the future organisation and functioning of the judiciary, Parliament

should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council [and the independence of the Judiciary (judges and prosecutors)]. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council, which amounts to an infringement of its independence. The Venice Commission found on the other hand that the renewal of the members could be justified on condition that the manner of appointment changed from simple to qualified majority as this it would lessen the risk of politicisation of the Council.

CDL-AD(2021)030 Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, § 46

55. [... As] such, providing for a retirement age for a public official is not contrary to any international standard or principle. As noted by the CCRM [...] the idea of an age limit is not incompatible with the constitutional right to work. Such matters can be regulated by the legislature to ensure that certain office holders have the mental and physical capacity to perform their duties.

56. That being said, an age limit should not be introduced with the effect to terminate mandates of specific individuals, elected under the previously existing rules. The Venice Commission criticised such measures in an opinion on Poland, and repeats this in the context of the Republic of Moldova. [...]

59. The Ministry of Justice, in their written comments, noted that the rule providing for the retirement of the prosecutorial members upon reaching the age of 65 existed under the previous rules. The August 2021 amendments only extended this rule to lay members, thus restoring the equal treatment of all members of the SCP, irrespective of their “pedigree”. Thus, those amendments were not ad hominem and did not target specific individuals.

60. The Venice Commission is ready to accept this argument. What is problematic, however, is that the lay members appointed under the old rules (which did not provide for any age-limit) were removed (or would be removed) prematurely, due to the application of the new rule. It is true that the security of tenure of members of the SCP is not guaranteed by the Constitution (which is silent on the duration of their mandate, age-limit, etc.). However, the

appointment as a member of a constitutional body – which, according to the Constitution, is the main guarantor of the independence of the prosecutorial system, creates at least some legitimate expectation that the mandate will not be interrupted mid-term without a very good reason. The question is whether the declared goal of this amendment – putting all members of the Council on an equal footing as regards their retirement age – hampers the independence of this body and is a sufficiently strong reason for a premature termination of the mandate of some of its members. This is another argument in favour of entrenching the basic requirements to the members of the SCP and the conditions of early termination of the mandate in the Constitution.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 55, 56, 59 and 60

53. The Venice Commission finds this suggestion problematic. Firstly, the suggestion fails to take into account the difference between the two positions that members of the HJPC occupy, namely their original position (judge, prosecutor, civil servant, etc.) and their position at the HJPC (members of the HJPC). These two positions entail different tasks and different responsibilities and it is thus questionable to what extent disciplinary offences related to the former position may be applied to persons acting in the latter position. For instance, would the disciplinary offence of the disclosure of confidential information obtained in the course of performing judicial or prosecutorial duties (draft Articles 56(1)(a) and 57(1)(a)) also apply to the disclosure of confidential information obtained in the course of performing the tasks of a member of the HJPC? Secondly, linked to that, the Commission finds the potential use of per analogia reasoning in disciplinary proceedings problematic. Laws imposing an obligation the breach of which may result in a penalty must be drafted in a clear and unambiguous way. Thirdly, the suggestion would make different members of the HJPC subject to different disciplinary offences and would also make some of them, namely those who are neither judges nor prosecutors by their original position, immune from disciplinary proceedings. The Venice Commission thus recommends that a new provision, listing the specific disciplinary offences of HJPC members, be added to the Draft Law.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 53

83. Draft Article 6a sets out four grounds for the removal of HJPC members. The Venice Commission welcomes in principle these four grounds, which clearly react to certain long-standing problems that the HJPC has been confronted with. These grounds are the following: a) the member is not performing his or her duty in accordance with the Law and HJPC Rules of Procedure; b) in a case of incompatibility of functions; c) the member commits any misconduct that seriously undermines the reputation of the Council; d) absence from duty of a member of the Council for a period longer than three months continually, or longer than six months continually if the absence is caused by sickness.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 83

48. [...] [The] Commission does not consider that the termination of mandate of all the current members of the Prosecutorial Council would be justified.

49. However, the Commission considers that the ineligibility criteria introduced by the draft are an adequate means to create the conditions to strengthen independence in an environment which presents risks of improper political influence. The relevant general interest in setting such standards can be considered as proportionate and justify their immediate application on a case-by-case basis, to the current members of the PC, without affecting the principle of trust in the integrity of the mandates. A procedure could therefore be devised for assessing the possible ineligibility of the current members of the PC in the light of these criteria. Should this exercise lead to loss of mandates, the balance of lay members and prosecutor members may be reassessed to see if adjustments are necessary prior to the regular expiry of the mandate on 22 January 2022. In general, in the Commission's view, as long as the election is carried out by simple majority it would be preferable if lay members were elected at different moments (possibly by different parliaments).

CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, §§ 48 and 49

59. The second objection relates to the early termination of the mandates of the currently sitting members of the KPC. The Constitution does not fix the term of office of the members of the KPC but authorises it to be determined by law. However, it does not mean that the legislature may reduce the duration

of a mandate or interrupt it at will. The security of tenure should be respected. In an opinion on Montenegro the Venice Commission formulated a general rule that even when the prosecutorial council is reformed, its current members should normally be allowed to terminate their mandate. It would be incorrect to allow for a complete renewal of the composition of a prosecutorial council following each parliamentary election, when the ruling majority changes.

60. That being said, the principle of security of tenure is not absolute; early termination of mandates may sometimes be justified. Thus, in the same opinion on Montenegro the Venice Commission admitted that the renewal of the composition of a prosecutorial council may be necessary when the manner of the appointment of lay members changed from simple to qualified majority, as this would lessen the risk of politicisation of the council. Similarly, the introduction of some new ineligibility criteria which would strengthen the independence and political detachment of members may arguably justify replacement of those members who do not correspond to those criteria. In simple words, the early termination of the mandates of some members may be justified if it leads to a significant improvement of the overall system.

61. The Ministry of Justice, in their comments, argued that the main goal of the proposed reform is to combat corporatism within the KPC, by increasing representation of lay members therein. In theory, this goal may be achieved by adding to the current composition of the KPC a certain number of additional lay members. That would allow the current prosecutorial members to remain in the KPC until the expiry of their mandates. However, in this case the KPC would become too big (with more than 20 members), considering the relatively small number of prosecutors in Kosovo. And this solution would be certainly very expensive, given that the amendments also provide for the full-time employment of all members of the KPC.

62. The Commission considered whether, instead of the simultaneous termination of mandates of all prosecutorial members, some alternative models of the renewal of the composition of the KPC might be explored. For example, three of the prosecutorial members, selected by lot, might remain on the KPC. This would at least respect their security of tenure and, at the same time, permit the KPC to start functioning with the new composition immediately.

63. Such revision of the composition of the KPC could also be supported by the fact that the future system would eliminate a certain disparity of representation

of the lower prosecution offices in the KPC, which is a feature of the current system. Currently, every lower office delegates one candidate to the KPC, which means that smaller offices are over-represented, while larger offices are under-represented in the KPC. The revised system would restore the balance, by providing that each prosecutor has one vote.

64. In conclusion, [...] currently sitting prosecutorial members should be allowed to finish their mandates. They can be removed prematurely only if the Governments demonstrates convincingly that their replacement serves a vital public interest and leads to the overall improvement in the system.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, §§ 59-64

30. In the revised draft the idea of the automatic termination of mandates of all members of the current KPC is abandoned. The revised draft proposes to retain three currently sitting prosecutorial members by selecting them by lot, which follows the suggestion made in the December opinion. The revised draft also abandons the idea of a “reduced KPC” operating only or essentially with the newly elected lay members. Article 18 of the revised draft – amending Article 36 of the Law – provides for the following procedure of the renewal of the Council: first the new lay members are to be elected by the Assembly/appointed by the Ombudsman; next, a drawing by lot is organized, which would define three members who would remain until the end of their mandates, and, finally, once they are selected, “the Council shall begin its work with the new composition in accordance with this Law” (see Article 36 (8)).

31. Even though, as a rule, the Venice Commission is not in favour of an automatic early termination of mandates of members of a prosecutorial council due to an institutional reform,⁷ the new transitional provisions are more respectful of the security of tenure of the members of the existing KPC than the previous model.

CDL-AD(2022)006, Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council, §§ 24-27

VI.B.4 Election/appointment/dismissal of the President of the prosecutorial council. Other bodies of the council

62. The election of the chairman by of the Council by its members is welcomed (Article 85).

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 62

31. [...] [T]here are no common European standards on who should preside a prosecutorial council [...].

32. However, the introduction of an election-based system may be seen as a step towards improving the autonomy (guaranteed by Article 164 of the Constitution) and the legitimacy of the SPC [...].

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§ 31 and 32

40. Even if the Minister is a member of the Prosecutorial Council *ex officio*, having him/her chair the Council may raise doubts as to the independence of this body. It would be advisable to have the Chairperson elected by the members of the Prosecutorial Council from their ranks (with the Minister him/herself ideally being excluded as a possible nominee). The Council shall be given opportunity and time (e.g., one month from the date when all members have been appointed and it is fully functional), to elect its own Chair by simple majority. Should it fail to do so, the Minister of Justice may still be entitled to assume the Chairperson's position *ex officio*.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, § 40

38. [...] [T]he hierarchical nature of the prosecution service and the obligation on the Supreme State Prosecutor to manage the prosecution service makes it appropriate that that person should also chair the Prosecutorial Council. [...]

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 38

101. [...] First, the task of ensuring the internal and external independence of the prosecutors can hardly be achieved in a situation where the National Council is presided over by the Public Prosecutor General who is, in the current Law, the Minister of Justice [...]

CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, § 101

47. Article 8 of the draft Law provides that the Parliamentary Assembly is to elect a President and two Vice Presidents of the HJPC who are to rotate their offices every 16 months during the four-year term of the HJPC. Essentially, they are supposed to act as a *troika*. These three officers cannot be from the same Constituent People or from among Others. For the same reason as under Section D above (election of the members of the HJPC) with respect to the composition of the HJPC, it is not appropriate for the President and the Vice Presidents of the HJPC to be chosen along ethnic lines and the decision on their election should not be left to the Parliamentary Assembly. In addition, this system of rotating presidents weakens the HJPC.

48. [...] [I]t is important that the draft Law provide restrictive grounds for which the Parliamentary Assembly may decide to dismiss the president and vice-president. It is hard to imagine the reasons (except resignation), which may result in a decision being made by the Parliamentary Assembly to end the term of office of the president and vice-president, but retaining membership in the HJPC. There should be input from an expert body before Parliament takes a decision. In addition, unlike the election process where there is a prior selection limiting the choice of the Parliamentary Assembly, in the decision on dismissal, the Parliamentary Assembly is not limited and acts on its own. This is inappropriate and needs to be reconsidered.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§ 47 and 48

173. In addition, although there is provision in paragraph 1 of Article 82 for secretariats to be 'in place' to provide organisational support to the Qualifications and Disciplinary Commissions, there is no provision made in the Draft Law for the selection criterion or procedure for appointing those who will work in these secretariats. It is not clear whether they will be drawn from public prosecutors, although there is a reference in paragraph 2 to their salary, welfare

support and social protection being governed by the Draft Law - strangely referring to its title rather to 'the present law' or provisions in it - and the Law on Public Service. There is, however, no specific mention of secretariat members in the later provisions of the Draft Law dealing with issues of salary, welfare support and social protection. It is clearly important that secretariat members have substantial experience in order to undertake their important task and their disciplinary record should also be unblemished. Appropriate selection criteria, as well as an appointment procedure, should thus be added to this provision. Furthermore, appropriate arrangements to secure the independence of those working for the Commissions are needed and Article 82 should be amended accordingly.

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 173

VI.B.5 Procedures before the prosecutorial council³

39. This Article sets out that the sessions of the SPC are open to the public, if the SPC does not decide to work in closed session, in accordance with its rules of procedure. [...]

40. This amendment should be welcomed and will contribute to the transparency of the SPC's activity. However, the majority of the SPC's procedures are of a personal nature (election, dismissal) and the persons involved (candidates to positions of prosecutors or prosecutors in office) are not political actors, they are therefore not expected to reveal their personal data to the public. Security or other reasons related to the protection of personal data might also require closed sessions.

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§ 39 and 40

57. The HJPC is empowered to set up commissions which can make decisions and perform tasks on its behalf (Article 17 of the draft Law). This is a valuable provision given the wide range of functions proposed to be assigned to the HJPC. However, decisions on appointments of judges and prosecutors cannot be delegated to commissions. The election of judges and prosecutors is by

3. On this topic see also Chapter V.F.3.b on disciplinary proceedings

a majority vote of all members, but for the election of judges the decision must be supported by at least seven judges, and likewise for prosecutors. This prevents either judges or prosecutors from imposing their will on the other profession.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 57

61. The Venice Commission therefore welcomes the establishment [...] of two sub-councils: one for judges and one for prosecutors. It seems to be a balanced solution which, on the one hand, prevents excessive interference of one of the legal professions into the work of the other while, on the other hand, making it possible to maintain the current structure of the HJPC as a common organ of/for judges and prosecutors.

62. Each sub-council shall have 11 members – nine members elected from among judges or prosecutors and two members elected on behalf of the legislative and executive powers. The sub-councils nominate judges and prosecutors, assess their performance, and decide on the status of individual judges and prosecutors (temporary assignment, disciplinary proceedings, termination of the terms of office, etc.). Neither judges nor prosecutors should have any influence over each other's disciplinary issues or appointments. Although all members of the HJPC have a vote, and therefore the non-judge members are in a position to influence the vote, the requirement that a candidate for judicial office be supported by seven of the nine judge members makes it impossible for a candidate to succeed without the judges' support and unlikely that a candidate with the necessary judicial support will be defeated.

64. [...] Even though the Venice Commission has repeatedly expressed concerns about systems with such mixed councils, it is of the opinion that - in the particular context of BiH - such a system is appropriate, provided that the two sub-councils in the HJPC are afforded a maximum amount of autonomy.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§ 61, 62 and 64

64. Another Commission shall be established [within the Prosecutorial Council], as part of the Council's tasks under the draft law, to evaluate the

performance of prosecutors. In addition to the fact that this is likely to lead to a considerable concentration of power for the Council, one may wonder whether this would not be better handled by a specialised inspectorate rather than the Council.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 64

111. Article 71.4 of the draft Law provides for random assignment of cases in a manner pre-selected by an HJPC decision. It needs to be made clear that this has to be subject to the obligation to provide a commission which does not contain persons from the same court or prosecution office as the accused and which contains persons of appropriate rank. The mechanics of achieving this are not clear.

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 111

65. [...] It is envisaged that in matters such as conducting examinations to determine appointments, or in dealing with the disciplinary matters, the Council would operate through small commissions consisting normally of three members. Such a model is open to a number of criticisms.

66. Firstly, the conferring of such important powers on a small body which will exercise them directly creates a very powerful body which may be susceptible to corruption. There is an argument that the powers in relation to appointments, promotions and discipline should not all be exercised by the same small group of people.

67. Secondly, the Council will not merely make decisions of principle but will be involved in the operational day-to-day work. In that case, one may wonder whether the electoral method of choosing a council, while appropriate for a body intended to be representative and to exercise a general supervisory role, is the best way to select persons who will have a very technical role. For example, one of the functions of a Commission composed of members of the Council dealing with examinations will be to set and correct examination questions (see Article 57). This is hardly a function one would normally confer on an elected body whose function should rather be to oversee and guarantee the integrity of the process

rather than to be involved in its technical aspects. It is also envisaged that the Council will itself conduct interviews for positions in the prosecution service (Article 58).

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§ 65-67

37. Under the present Article 32(4), the decision of the Prosecutorial Council on a complaint is final and cannot be challenged in court. The amendment introduces an appeal to an administrative court against a decision of the Prosecutorial Council. This is an improvement, which is in line with the practice in many European countries.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 37

64. Article 98 provides for appeals against decisions of the Superior Court Council of Prosecutors to a court of law. It is not clear whether this appeal is by way of a full re-hearing on the merits or whether it is merely a procedural appeal on grounds of excess of jurisdiction, failure to observe proper procedures or the like.

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 64

68. [...] Many of the decisions of the Prosecutorial Council are indeed of sufficient importance that an appeal to a court of law should be provided as well as the possibility of procedural review. [...]

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 68

40. The new article 36b [...] provides that a candidate shall be entitled to have an insight into documentation of *other candidates*, the results of written tests, assessments of the *other candidates* and opinions on *other candidates* and to deliver a written statement thereon. [...] [T]his provision can open the door to nasty business and false allegations between candidates. Such a provision can bring much unnecessary and undeserved damage to the candidates. The question is also, if this provision is not conflicting with the right on privacy. In

general one has to be very careful with the outcome of assessments, because the objective and impartial quality of that outcome can be controversial.

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, § 40

138. Article 81 rightly foresees non-participation of SCP members on matters where doubts about their objectivity may exist. It may be useful to be more explicit at least in two clear-cut cases: first, to specify that members of the SCP should not hear cases brought against themselves, and second, that they should not hear cases they themselves have initiated [...].

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 138

29. As to the vote by the Plenary, as noted in the 2017 Opinion (see § 36) it is virtually impossible to obtain the 17 votes needed to request the President to dismiss the PG. It will be similarly very difficult to obtain 17 votes for a temporary suspension of the PG. It will require, in most cases, a near-unanimity amongst judges, members elected by the National Assembly, and *ex officio* members, which will be very difficult to achieve.

30. In sum, the Venice Commission considers that, given the rapport de force within the SCM, the possibility of suspending the PG pending criminal investigation remains purely theoretical. To improve chances of suspension, the law might provide that the three members launching the motion in respect of the PG may be from any of the two chambers of the SCM, and that the PG may be suspended with a lower majority of votes in the Plenary SCM (with the PG, naturally, not voting). Arguably, a lower majority would be needed for a more lenient measure, such as a temporary suspension, than for a more serious action such as the dismissal.

CDL-AD(2019)031, Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, §§ 29-30

15. Article 12 of the revised draft (amending Article 15 2a of the existing law and establishing a “special majority” requirement) calls for another important remark. While it does not allow the prosecutorial members to govern alone

(which is positive), at the same time, the mechanism of a “special majority” contains an inherent risk of blockages, if the Assembly-appointed members vote together and block certain decisions, including the decision to select a new Prosecutor General. Thus, it would be advisable to provide for an anti-deadlock mechanism for such cases, which would permit the KPC to take such decisions if the prosecutorial and lay members cannot find a compromise. The specific parameters of such an anti-deadlock mechanism could be identified by the legislator in dialogue with the international partners and main stakeholders.

CDL-AD(2022)006, Kosovo - Opinion on the revised draft amendments to the Law on the Prosecutorial Council, § 15

VI.B.6 Other questions related to the status of members of the prosecutorial council

60. The Draft Law should include provisions that describe the status of the members of the Prosecutorial Council; this is essential to guarantee both the independence and the stability of this body.

61. First, the Draft Law should specify that members of the Prosecutorial Council participate in the work of this body in their personal capacity, and may not receive instructions from individuals or bodies outside the Council in the exercise of their functions as members of the Prosecutorial Council.

62. [...] it should not be easy to remove a member of the Council from his/her position. While early removal should always be possible in cases of gross misconduct or incompatibility, such decisions should at all times be based on specific grounds enumerated in the Draft Law, and should be confirmed by the majority of the members of the Council itself.

63. There is only one provision which deals with the early termination of office of members of the Council: Article 8¹ par 3 appears to suggest that if a prosecutor elected to the Council is dismissed from service, his/her membership in the Prosecutorial Council shall also be terminated before the expiry of the usual four-year term. This may create a dangerous situation, as under the current law, the dismissal of an ordinary prosecutor is the prerogative of the Chief Prosecutor. It means that the Chief Prosecutor, using his disciplinary powers, would be able to remove from the Council those prosecutors who voted for the

opening of the investigation against him/her. Again, since the prosecutorial members of the Council sit there in their personal capacity, it should be for the Council itself to decide whether or not one of its members should leave the Council.

64. At the same time, the grounds for early removal may be different for those members of the Council who sit there in their personal capacity and those members who sit in the Council *ex officio*. If a member of the Prosecutorial Council have been elected in his/her personal capacity, he/she should not automatically be removed from the Council if his/her title or job changes during the term of service.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 60-64

58. It is noted that the Prosecutorial Council is to fix the amount of its members' emoluments for their work on the Council. In the opinion of the Commission, it is not wise for a body of the State to set its own emoluments.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 58

52. [...] [I]n view of the wide powers of members of the Prosecutorial Council, no member should be entitled, while serving on the Council, to be promoted within the service. [...]

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 52; see also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, § 24

32. [...] [T]he Venice Commission welcomes the provision that prohibits HJPC members from applying or being elected to vacant positions in the judiciary during the mandate and for a year after the end thereof. As clarified in the Explanatory note, the provision aims to reduce the risk of conflict of interest and abuse of office for obtaining a promotion. However, it seems that this

option also excludes the possibility of applying to vacant positions in lower courts, which does not seem justified. In addition, the draft prohibits applying to vacant positions of “senior civil servants” in the Office of Disciplinary Counsel or the HJPC Secretariat, a notion which is not clearly defined.

CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, § 32

66. Other proposals are potentially problematic. Thus, the prohibition for the members of the KPC to be promoted during two years after the end of their mandate may help avoiding conflicts of interests, but, at the same time, such prohibition will certainly deter prosecutors from joining the KPC, and unduly penalise those prosecutors who are already members of the KPC. Article 28 (6) provides for the power to the PG to transfer the prosecutors to another place “in exceptional cases” and “in accordance with the relevant legislation”, without explaining what those “exceptional cases” are.

67. A more flexible rule could be considered in this context, which would prevent the members of the KPC from using those promotion opportunities which have been created by the decisions in which they have participated.

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, §§ 66 - 67

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Belarus (1994)²

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PARTICIPATING INTERNATIONAL ORGANISATIONS:

European Union, OSCE/ODIHR

STATES WITH SPECIAL CO-OPERATION STATUS:

Palestinian National Authority (2008), South Africa (1993)

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1. Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe - (Adopted by the Committee of Ministers on 16 March 2022 at the 1428^{ter} meeting of the Ministers' Deputies) and Resolution CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe (Adopted by the Committee of Ministers on 23 March 2022 at the 1429^{bis} meeting of the Ministers' Deputies)
 2. This status was suspended by the Committee of Ministers of the Council of Europe by decision CM/Del/Dec(2022)1428^{ter}/2.3, 17 March 2022.

FOR MORE INFORMATION PLEASE CONTACT:

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