



Action against Corruption in the Republic of Moldova

**TECHNICAL PAPER**

REVIEW OF THE COMPOSITION AND OPERATION OF THE SUPERIOR COUNCIL OF  
PROSECUTORS OF THE REPUBLIC OF MOLDOVA

*Prepared by:*  
**JAMES HAMILTON**  
**MJRIANA VISENTIN**  
Council of Europe Experts

The project “Action against corruption in the Republic of Moldova” aims to address key priorities and needs in the Republic of Moldova which are closely interlinked with the reform processes initiated by the government and their obligations towards implementing international standards against corruption and the related monitoring recommendations. More specifically the Action is designed to deliver assistance in the legislative, policy and institutional reforms by addressing pending recommendations from the Fourth Evaluation Round of the Council of Europe’s Group of States against Corruption (GRECO).

The project is funded by the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the US Department of State and implemented by the Council of Europe.

#### Disclaimer

This Technical Paper has been prepared within the framework of the project “Action against corruption in the Republic of Moldova,” financed by the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the US Department of State and implemented by the Council of Europe.

The views and opinions presented herein are those of the main author and should not be taken as to reflect the official position of the Council of Europe and/or the US Department of State.



**For further information please contact:**

Economic Crime and Cooperation Division  
Action against Crime Department  
Directorate General Human Rights and Rule of Law  
Council of Europe  
67075 Strasbourg CEDEX France  
E-mail: [contact.econcrime@coe.int](mailto:contact.econcrime@coe.int)  
[www.coe.int/econcrime](http://www.coe.int/econcrime)

**Contact persons****Headquarters in Strasbourg**

Ms Zahra Ahmadova  
Programme Coordinator  
Email: [Zahra.Ahmadova@coe.int](mailto:Zahra.Ahmadova@coe.int)  
Tel: +33(0)390212844

**Council of Europe Office in Chisinau**

Ms Nadejda Plamadeala  
Senior Project Officer  
Email: [Nadejda.Plamadeala@coe.int](mailto:Nadejda.Plamadeala@coe.int)  
Tel: +373 022 888909



## TABLE OF CONTENTS

<b>1</b>	<b>EXECUTIVE SUMMARY .....</b>	<b>7</b>
<b>2</b>	<b>INTRODUCTION .....</b>	<b>8</b>
	2.1 Scope of the report .....	8
	2.2 Methodology.....	8
<b>3</b>	<b>THE LEGAL FRAMEWORK GOVERNING THE ACTIVITY OF THE SUPERIOR COUNCIL OF PROSECUTORS .</b>	<b>9</b>
	3.1 Constitution of the Republic of Moldova .....	9
	3.2 The Law on the Public Prosecution Service .....	10
	3.3 The Regulation of the Superior Council of Prosecutors .....	12
<b>4</b>	<b>RELEVANT INTERNATIONAL STANDARDS AND RECOMMENDATIONS .....</b>	<b>13</b>
<b>5</b>	<b>COMPARATIVE OVERVIEW OF PROSECUTORIAL COUNCILS (AND JOINT COUNCILS OF JUDGES AND PROSECUTORS) IN COUNCIL OF EUROPE MEMBER STATES .....</b>	<b>16</b>
	5.1 Prosecutorial councils viewed against a background of differing prosecution systems 16	
	5.2 Membership.....	17
	5.2.1 Membership of prosecutorial councils .....	17
	5.2.2 Membership in joint councils for judges and prosecutors .....	18
	5.2.3 Ex-officio members.....	18
	5.2.4 Length of mandate .....	19
	5.2.5 Appointment of the President of the Council.....	19
	5.3 Election criteria.....	20
	5.3.1 Members elected from among prosecutors.....	20
	5.3.2 Members who are not practicing prosecutors .....	22
	5.3.3 Challenging the election procedure .....	24
	5.4 Status of members .....	24
	5.4.1 Rights, obligations and disciplinary liability of members .....	24
	5.4.2 Recusals and conflicts of interests.....	25
	5.4.3 Asset declarations and declarations of interests.....	25
	5.4.4 Full time or part time .....	25
	5.4.5 Return to office following expiry of term of office/completion of mandate.....	26
	5.4.6 Suspension, dismissal or termination of mandate.....	27
	5.5 Functioning of Prosecutorial Councils.....	28
	5.5.1 Ordinary and extraordinary sessions .....	28
	5.5.2 Electronic/virtual Sessions .....	28
	5.5.3 Participation of external bodies/non-members .....	28
	5.5.4 Publicity of sessions .....	28
	5.5.5 Decisions of the councils .....	29
	5.5.6 Minutes, session's reports and transparency .....	29
	5.5.7 Appeal against decisions of the Council .....	30
	5.5.8 Specialised commissions .....	31
<b>6</b>	<b>THE COMPOSITION AND OPERATION OF THE SCP IN THE REPUBLIC OF MOLDOVA.....</b>	<b>34</b>
	6.1 The ex-officio members .....	35
	6.1.1 The General Prosecutor .....	36
	6.1.2 The Minister of Justice.....	36
	6.1.3 The Chief Prosecutor of ATU Gagauzia .....	36
	6.1.4 The President of the SCM .....	37
	6.1.5 The President of the Union of Lawyers .....	37
	6.1.6 The Ombudsman.....	37



6.1.7	Conclusions concerning the ex-officio members.....	37
6.2	The method of election and selection.....	38
6.2.1	Members elected among prosecutors.....	38
6.2.1.1	Requirements for candidacy.....	39
6.2.1.2	Election Procedure for prosecutors.....	40
6.2.2	Members elected from among civil society.....	40
6.2.2.1	Requirements for candidacy.....	40
6.2.2.2	Election procedure of lay members.....	41
6.3	Full-time and part-time secondment.....	42
6.4	The length of the mandate.....	43
6.5	Status and conditions of service of SCP members.....	43
6.5.1	Remuneration.....	43
6.5.2	Status and incompatibilities.....	43
6.5.3	Termination of the mandate.....	44
6.5.4	Expiry of the mandate.....	45
6.6	Functioning of the SCP.....	45
6.6.1	SCP Plenary Sessions.....	45
6.6.2	Recusal and abstention.....	46
6.6.3	Appeal against the decisions of the SCP.....	46
6.6.4	The relationship between the SCP and the General Prosecutor.....	47
6.6.5	Suspension of Prosecutors.....	47
6.6.6	Function of guaranteeing the prosecutor's independence.....	48
6.6.7	The colleges of the SCP.....	48
<b>7</b>	<b>CONCLUSIONS.....</b>	<b>54</b>
<b>8</b>	<b>RECOMMENDATIONS.....</b>	<b>55</b>



## ABBREVIATIONS

ATU	Autonomous Territorial Unit
CCPE	Consultative Council of European Prosecutors
ECHR	European Convention on Human Rights and Fundamental Freedoms
GPO	General Prosecutor's Office
GRECO	Group of States against Corruption
GET	GRECO Evaluation Team
GONGO	Government organized "non-Governmental" Organization
IAP	International Association of Prosecutors
Law on PPS	Law on the Public Prosecution Service
MoJ	Ministry of Justice
NIA	National Integrity Authority
NIJ	National Institute of Justice
SCP	Superior Council of Prosecutors
SCM	Superior Council of Magistracy



## 1 EXECUTIVE SUMMARY

The goal of this report is to contribute to an assessment of the legislative and regulatory framework governing the composition and operation of the Superior Council of Prosecutors of the Republic of Moldova, with the objective of advising on necessary amendments to ensure its alignment with GRECO recommendations (GRECO IV round evaluation – R15). The Technical Paper is divided into five sections.

Section 1 describes the legal framework for the operation of the Superior Council of Prosecutors, including the applicable constitutional, statutory and regulatory provisions.

Section 2 describes and discusses the relevant international and European standards applicable to the functioning of prosecutorial councils, including the United Nations Havana Guidelines, the International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, the Council of Europe's Recommendation REC(2000) 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, the Venice Commission Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution Service, the European Guidelines on Ethics and Conduct for Public Prosecutors (The Budapest Guidelines), the Opinions of the Consultative Council of European Prosecutors (CCPE), in particular, Opinion No.9 (2014) on European norms and principles concerning prosecutors (The Rome Charter) and Opinion No. 13(2018) on the Independence, accountability and ethics of prosecutors, as well as the GRECO reports referred to in the terms of reference for this paper and various country specific opinions of the Venice Commission.

Section 3 is a comparative overview of prosecutorial councils (including some joint councils of judges and prosecutors) in 9 member states of the Council of Europe, namely Italy, Spain, Portugal, France, Belgium, Croatia, Serbia, Slovakia and Ukraine. The paper aims to draw on good practice in other countries in arriving at its recommendations.

Section 4 deals with the composition and functioning of the Superior Council of Prosecutors in the Republic of Moldova, including, but not confined to, the problems identified in the GRECO 4th Round Evaluation Report and the two subsequent Compliance Reports and makes a number of recommendations for improvement.

Section 5 discusses the operations of the three Colleges of the Superior Council of Prosecutors and contains further recommendations.

Finally, all **44 recommendations** are listed together at the end of the Technical Paper.



## 2 INTRODUCTION

### 2.1 Scope of the report

The Action against Corruption in the Republic of Moldova is a country specific intervention funded by the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the US Department of State and implemented by the Council of Europe, and is designed to deliver assistance in the legislative, policy and institutional reforms by addressing pending recommendations from the Fourth Evaluation Round of the Council of Europe's Group of States against Corruption (GRECO).

Its purpose is to enhance capacities of the institutions to implement GRECO recommendations. The project actions should provide direct support to the authorities to address the shortcomings identified in the GRECO 4<sup>th</sup> round evaluation, thus aligning the measures of the Moldovan authorities with the international standards and good practices for prevention and fight against corruption.

This report relates to the "Intermediate Outcome 1: Corruption prevention in respect of judges and prosecutors improved", more specifically in its outcome 1.3 – "The legislative/regulatory framework regulating the composition of the Superior Council of Prosecutors reviewed and advise on necessary amendments to ensure its alignment with GRECO recommendations provided (GRECO IV round evaluation – R15)".

### 2.2 Methodology

To that end a team of two international consultants was engaged to prepare a Technical Paper containing:

- (a) A review, analysis and assessment of the legislative and institutional frameworks related to the functioning and composition of the Superior Council of Prosecutors (SCP) of the Republic of Moldova vis-a-vis relevant international standards and recommendations;
- (b) An analysis of European comparative practices related to the composition and operation of prosecutorial councils (including the mandate of council members and the appeal mechanism for council's decisions);
- (c) Recommendations to implement appropriate measures to ensure that the composition and operation of the Superior Council of Prosecutors is subject to appropriate guarantees of objectivity, impartiality and transparency according to GRECO recommendations from the Fourth Evaluation Round (including recommendations on changes to the legislative and operational framework).

As part of the assessment, the consultants carried out remote meetings on 12 and 13 November 2020 with the Superior Council of Prosecutors, the General Prosecutor's Office and the Ministry of Justice of the Republic of Moldova to discuss the operation and composition of the Superior Council of Prosecutors and changes needed to the relevant legislative/institutional framework in order to improve its operation.





### 3 THE LEGAL FRAMEWORK GOVERNING THE ACTIVITY OF THE SUPERIOR COUNCIL OF PROSECUTORS

#### 3.1 Constitution of the Republic of Moldova

Chapter IX of the Constitution of Moldova deals with the Judiciary. It is divided into three Sections: Section 1 (Articles 114-121) on Courts of Law; Section 2 (Articles 122 and 123) on the Superior Council of Magistrates, and Section 3 (Articles 124, 125 and 125<sup>1</sup>) on Public Prosecution. The three Articles from Section 3 on the Public Prosecution are set out below.

##### **Article 124. The Office of the Prosecutor**

*(1) The Office of the Prosecutor is an autonomous public institution within the judicial authority, which contributes to the achievement of justice, the protection of the rights, liberties and legitimate interests of the person, society and the state through criminal proceedings and other procedures provided by law.*

*(2) Prosecution powers are exercised by prosecutors.*

*(3) The competencies, organization and functioning of the Prosecutor's Office shall be established by law.*

##### **Article 125. The Prosecutor**

*The Prosecutor General is appointed by the President of the Republic of Moldova, at the proposal of the Superior Council of Prosecutors, for a 7-year term, which cannot be renewed.*

*(2) The Prosecutor General is dismissed by the President of the Republic of Moldova, at the proposal of the Superior Council of Prosecutors, according to the law, for objective reasons and under a transparent procedure.*

*(3) Appointment, transfer, promotion and dismissal of hierarchically inferior prosecutors is carried out by the Prosecutor General at the proposal of the Superior Council of Prosecutors.*

##### **Article 125<sup>1</sup>. Superior Council of Prosecutors**

*(1) The Superior Council of Prosecutors is the guarantor of the prosecutors' independence and impartiality.*

*(2) The Superior Council of Prosecutors is constituted, under the law, by elected prosecutors from prosecutors at all levels and representatives of other authorities, public institutions or civil society. Prosecutors within the Superior Council of Prosecutors represent an important part.*

*(3) The Superior Council of Prosecutors ensures the appointment, transfer, promotion and application of disciplinary measures to prosecutors.*

*(4) The way of organization and functioning of the Superior Council of Prosecutors shall be established by law.<sup>1</sup>*

The effect of the amendments to the Constitution introduced in 2016 is to anchor the SCP in the Constitution. The primary function of the SCP is declared to be that of guarantor of the prosecutors' independence and impartiality. It is not clear whether this guarantee is to the institution as a whole or extends to every individual prosecutor. In a review of these provision (art. 125<sup>1</sup>) when it was introduced as an amendment to the Constitution, the Constitutional Court of the Republic of Moldova stated that "the draft law proposes constitutional amendments by establishing that the Superior Council of Prosecutors is an independent body with the status of legal person, formed in order to participate in the process of establishment, operation and ensuring the self-administration of the prosecutorial system." It emphasized that "the proposed

<sup>1</sup> *Constitution of the Republic of Moldova, No. 01 as of 29.07.1994.* Articles 124, 125 were amended and Article 125<sup>1</sup> was introduced through Law No. 256 from 25.11.2016.



additions are aimed at strengthening the mechanisms for the protection of the fundamental rights and freedoms of persons.”

The text states that the SCP is, under the law, to be composed of two elements: “elected prosecutors from all levels, and representatives of other authorities, public institutions or civil society”. So far as the latter is concerned it is unclear whether all three categories must be present or whether these three are mentioned as examples of persons other than elected prosecutors whom it might be considered appropriate to have as members of the SCP. There is nothing in the provision to suggest that either the Prosecutor General or the Minister for Justice must be members.

As to the statement in the Constitution that prosecutors are an important part of the SCP it falls short of requiring that they constitute a majority but could probably be interpreted to support the view that they should at least be a significant element.

So far as concerns the functions of the SCP apart from the general functions already referred to above there are a number of specific functions mentioned. The first is to make proposals concerning the appointment and dismissal of the Prosecutor General. Dismissal must be according to the law, for objective reasons and following a transparent procedure.

The SCP is also responsible to ensure the appointment, transfer, promotion, and application of disciplinary measures against prosecutors. It is suggested that this does not necessarily mean that the members of the SCP are required personally to make every element of every decision to appoint, transfer, promote or discipline a prosecutor, but they are responsible to ensure the proper, fair and efficient operation of the system. In fact, the applicable law and regulations do provide for the SCP and its Colleges to carry out these tasks themselves and not merely to supervise them. Since the formal appointments, transfers, appointments and dismissals are carried out by the Prosecutor General at their proposal they clearly must satisfy themselves that every proposal is a proper one which they can stand over. It is notable that the Constitution does not state that the Prosecutor General has any power to vary or reject the SCP’s proposals.

Finally, the Constitution leaves the organisation and functioning of the SCP to the law.

### **3.2 The Law on the Public Prosecution Service<sup>2</sup>**

The legal provisions concerning the SCP are found in Chapter XI (Articles 68-89) of the Law on the Public Prosecution Service (Law on PPS). The following is a brief summary of its main provisions.

*Article 69* provides for the membership of the SCP. There are 15 members, 6 *ex-officio*, 5 elected prosecutors and 4 representatives of civil society.

The *ex-officio* members are the General Prosecutor, the chief prosecutor of ATU Gagauzia, the President of the SCM, the Minister of Justice, the President of the Union of Lawyers and the Ombudsman.

The 5 elected prosecutors are elected by the General Assembly of Prosecutors from among active prosecutors, one from the GPO and 4 from territorial and specialised offices. The elected prosecutors are detached from their main function for the duration of their mandate.

The remaining 4 members representing civil society are in fact appointed, one each by the President of the Republic, the Parliament, the Government and the Academy of Sciences of the Republic of Moldova. They must have law degrees and at least three years of legal experience.

Members of the Council, other than the *ex-officio* members, work full-time in that role.

*Article 70* confers various powers on the SCP, some of them advisory but including also substantial executive powers, including the making of regulations on its own activity and that of

---

<sup>2</sup> *Republic of Moldova, Law on Public Prosecution Service, No. 3 as of 25.02.2016.*



its Colleges, the selection and promotion of prosecutors and the regulation of the General Assembly of Prosecutors, the organisation of competitions for the selection of the candidate for General Prosecutor, considering appeals against decisions of the Colleges, making proposals to the General Prosecutor regarding appointment, transfer, promotion, detachment, suspension and dismissal, fixing the number of prosecutors in each office, approving the training strategy, making proposals regarding the rules for entry to the NIJ, its teaching programmes and the applications for teaching vacancies, establishing the number of places for prosecutors at the NIJ, developing a Code of Ethics, participating in the development of the budget of the prosecutor's office and approving the draft annual priorities developed by the General Prosecutor.

*Article 71* provides that the President is elected from among the prosecutor members by secret ballot for a four-year term.

*Article 73* provides for a four-year mandate. Members cannot be elected for a second consecutive term.

*Article 75* provides for certain obligations and restrictions on the members of the SCP. They are to ensure the protection of rights and freedoms of prosecutors and of their honour and dignity within the law. They are to promote the principle of the independence of prosecutors. They must protect the confidentiality of personal data and other confidential information.

During their mandate and for a period of six months afterwards the elected members may not participate in competitions for appointment or promotion to prosecutor's positions.

According to *Article 76* a person who is appointed a member of one of the Colleges ceases to be a member of the SCP.

Meetings of the SCP take place at least once a month. They are held in public except when there is a need to preserve confidentiality. The quorum is at least two-thirds, i.e. 11 members if the total number of members is 15 as at present. Decisions are adopted in public session by open vote. They must be reasoned and signed by all members present at the meeting. They are required to be published within 10 working days on the website. Meetings should be recording by video or audio devices (*Article 77*).

Members of the SCP are required to recuse themselves if circumstances exist excluding their participation or raising doubts regarding their objectivity. The recusal must be reasoned (*Article 78*).

Three Colleges are subordinated to the SCP. These are the College for the prosecutors' selection and career, the College for the assessment of the prosecutors' performance and the College of discipline and ethics.

Each consists of 7 members, of which 5 are elected by the General Assembly from among the prosecutors, and two are elected by the SCP via public bidding from among the civil society representatives. In the exercise of their powers the colleges have the right to request all documents and information they need from prosecutors, public authorities and the public legal entities (*Article 83(13)*). The quorum of the Colleges is at least 5 members. As with the SCP itself all meetings are to be recorded by video or audio devices, and decisions are to be in a written form and reasoned.

According to *Article 87* the College for prosecutors' selection and career is required to organise and conduct interviews with applicants, to carry out the marking/scoring and to adopt reasoned decisions regarding the applications. Similarly, according to *Article 88* the College for the assessment of prosecutors' performance is required to examine the files of prosecutors subject to evaluation and interview them. The College of discipline and ethics is required to examine disciplinary cases and apply sanctions, but the Law does not enter into any detail as to how this should be done (*Article 89*).



### 3.3 The Regulation of the Superior Council of Prosecutors<sup>3</sup>

Much of what is in the Law on PPS is included in the Regulation and will not be repeated here. The Regulation, as one would expect, is very detailed and only its main features will be described here.

Among the list of powers of the SPC is that of coordinating the order of the Minister of Health on the requirements concerning the health of prosecutors, including the list of diseases prohibiting the exercise of the prosecutor's duties (Regulation 4.1.I.(k)). The idea of listing particular diseases in such a context seems rather unusual. A more justifiable test might be whether an illness prevented a person from carrying out the duties of his or her employment. Any other test would seem to be a discrimination on grounds of disability. The international consultants recommend that this provision be amended accordingly.

So far as concerns the prosecutor's career candidates for prosecutors' positions are obliged to undergo a polygraph test. This is a requirement of national policy over which the SCP has no control but it results in candidates for prosecutors' positions being subjected to a procedure which can be very intrusive, even abusive, and is deeply resented by many of those subjected to it. This procedure has no proven scientific basis and is not in accordance with practice in most of Europe (Regulation 4 II (b), 8.6 and 8.9).

Among the functions of the SCP is that of "taking action, *ex officio* or upon a report, if it considers that a prosecutor's independence, impartiality or professional reputation has been affected in any way". If it takes action by virtue of its position, the council "shall previously consult the prosecutor concerned" (Regulation 4.VI (f)). This provision is a welcome amplification of the general duty imposed on the SCP to act as the guarantor of the independence and impartiality of prosecutors and is a recognition that independence and impartiality should operate on the individual as well as the collective level.

Two useful provisions in the section dealing with the Council meetings are those which permit participation in meetings by teleconferencing and which permit its decisions to be made in urgent cases via email (Regulation 6.7 and 6.8).

Meetings of the Council are required to take place in public. There is a provision allowing for meetings or parts of meetings to take place *in camera*. However, the provision makes it clear that information on the activity, career and assets of the prosecutor or candidate for the position of prosecutor shall not be deemed to be restricted or privacy-related information, except for the information deemed to be a state secret (Regulation 6.9). Health information is also confidential (Regulations 8.7 and 8.8). These are welcome provisions and it is important that they be implemented in practice.

There is a very clear provision in the Regulation requiring a Council member to recuse him or herself if there are circumstances that would raise doubts regarding that member's objectivity (Regulation 6.15). It is important that this provision be strictly observed.

Council meetings are required to be recorded using video or audio media. Videos from the meeting are required to be broadcast live on the official website of the council and to be stored on the official webpage of the council. It is important that this provision be strictly observed (Regulation 6.20).

The council decisions are to be based on the open vote of the members (Regulation 7.1 and 7.5). Decisions are required to be reasoned (Regulation 7.7).

Section 11 of the Regulation deals with the election by the SCP of the two full members and one alternate member of each of the Colleges from civil society. According to Regulation 11.3 and Article 20 (a)–(c) and of Article 69(6)–(7) of the Law on the Public Prosecution Service applicants

---

<sup>3</sup> *Regulation on the activity of the Superior Council of Prosecutors, Decision No. 12-225/16 as of 14 September 2016.*



must be citizens of the Republic of Moldova, know the state language, be of full legal capacity, have an impeccable reputation and enjoy a recognised authority in their field of activity. Those who cannot apply are prosecutors against whom disciplinary sanctions are applied or persons found guilty of committing a crime. Also excluded by virtue of Regulation 11.4 are persons who are members of any political party or force, who perform or participate in political activities, and in the exercise of their authority, express or manifest the political beliefs in any way. The latter two prohibitions are borrowed from the prohibitions on political behaviour by prosecutors in Article 15(2) (a), (c) and (e) of the Law on PPS. These, however, are prohibitions on serving prosecutors behaving in this way rather than prohibitions on persons applying for office.

The international consultants consider that it goes much too far to prohibit a person from applying for a job because he or she has ever expressed or manifested his or her political beliefs in any way as distinct from saying that once appointed one is not to do so. Arguably such an overbroad prohibition is interference with freedom of expression and freedom to take part in political life. In addition there is a prohibition on a person applying for this position if he or she participates in the investigation or examination of cases which might be subject to an objection (recusal), or is an investigation officer, including undercover, informer or employee of the body carrying out special investigation activity. While these are undoubtedly activities which active prosecutors should not engage in it is difficult to see why they should disqualify a person from applying for a position in one of the SCP Colleges.

Overall, the Regulation is a comprehensive one regulating every aspect of the SCP's work. If there are problems, they lie in large part in the implementation of the Regulation rather than its content. Some other detailed problems are, however, identified by the international consultants in the section of this Technical Paper which deals with the operations of the SCP.

#### **4 RELEVANT INTERNATIONAL STANDARDS AND RECOMMENDATIONS**

##### **(a) General International Instruments relating to prosecutors:**

- i. United Nations Guidelines on the Role of Prosecutors (The Havana Guidelines);
- ii. Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (The IAP Standards).

##### **(b) General European Instruments relating to Prosecutors:**

- i. Recommendation REC(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System;
- ii. Venice Commission Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution Service <sup>4</sup>(The Venice Commission Report);
- iii. European Guidelines on Ethics and Conduct for Public Prosecutors (The Budapest Guidelines);
- iv. Opinions of the Consultative Council of European Prosecutors (CCPE), in particular, Opinion No.9 (2014) on European norms and principles concerning prosecutors (The Rome Charter) and Opinion No. 13(2018) of the CCPE: on Independence, accountability and ethics of prosecutors, especially paragraphs 24-26 and Recommendation iii.

##### **(c) Reports with specific references to Prosecutorial Councils**

- i. The Venice Commission Report referred to at heading 2(b)(ii) above as well as numerous country-specific Venice Commission opinions;
- ii. Venice Commission CDL-PI(2018)001 Compilation of Venice Commission Opinions and Reports Concerning Prosecutors;

---

<sup>4</sup> *CDL-AD(2010)04: Report on European Standards as regards the Independence of the Judicial System: Part II the Prosecution Service - Adopted by the Venice Commission - at its 85th plenary session (Venice, 17-18 December 2010).*



- iii. Venice Commission amicus curiae brief for the Constitutional Court of the Republic of Moldova on the amendments to the law on the Prosecutor's office adopted in December 2019;<sup>5</sup>
- iv. Various country-specific GRECO reports especially from the Fourth Round Evaluation.

### Commentary on the international standards

The instruments listed above are in the realm of “soft law”, that is to say recommendatory rather than legally binding texts which nonetheless carry great weight as representing the unanimous will expressed by the United Nations, all of the prosecution services of Europe, and the body representing the overwhelming majority of prosecution services and prosecutors' associations in every part of the world.

Neither the Havana Guidelines, adopted in 1990, nor the IAP Standards, adopted in 1999, make any express reference to prosecutorial councils. Neither does the Council of Europe's Recommendation REC(2000)19. All these instruments, however, have a great deal to say about the issues with which prosecutorial councils are chiefly concerned, namely, the fundamental rights and duties of prosecutors, the ethical principles which bind them and the practical issues involved in the selection, appointment, promotion, disciplining and dismissal of prosecutors, their terms and conditions of work and their relations with the other actors in the criminal justice system.

In the Venice Commission Report<sup>6</sup> the Commission expressed the following opinion concerning the composition of prosecutorial councils:

*64. A Prosecutorial Council is becoming increasingly widespread in the political systems of individual states. A number of countries have established prosecutorial councils but there is no standard to do so.*

*65. If they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors.*

*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.*

The CCPE, on the other hand, in Opinion No. 13(2018) of the CCPE on Independence, accountability and ethics of prosecutors<sup>7</sup>, states as follows:

*23. The mission of prosecutor is demanding and difficult: it requires professionalism, character, courage, balance and determination. The possession of these qualities must be a determining criterion in the recruitment of prosecutors and throughout their career. The process of legal education, selecting candidates and in-training should seek to ensure respect for such criteria. However, these personal requirements are not sufficient to ensure the independence of prosecutors. The status and independence of prosecutors should be clearly established and guaranteed by law.*

<sup>5</sup> *Opinion 972/2019 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, adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019).*

<sup>6</sup> See footnote 2 above

<sup>7</sup> *CCPE, Opinion No. 13(2018) on Independence, accountability and ethics of prosecutors*



24. *In this regard, it is particularly desirable that, while ensuring respect for gender balance, the process of appointment, transfer, promotion and discipline of prosecutors be clearly set out in written form and be as close as possible to that of judges, particularly in member States which uphold the principle of the unity of the judiciary and which have links between the functions of judges and prosecutors throughout their careers. In such cases, provisions should preferably be established by law and applied under the control of an independent professional authority (for instance, composed of a majority of judges and prosecutors elected by their peers) such as a Council for the judiciary or for prosecutors, competent for the appointment, promotion and discipline of prosecutors. This is particularly relevant if prosecutors are to be recognised as judicial authorities within the meaning of Article 5 of the ECHR or to be given an indisputable role and authority in matters of individual rights and freedoms, in particular in new areas, such as the protection of personal data.*

25. *As a means to ensure the independence of prosecutors, clear mechanisms with regard to instituting prosecution or disciplinary proceedings against prosecutors should also be established. For instance, there is a special procedure established by law in some member States which enables the initiation of proceedings for administrative and/or criminal offences allegedly committed by prosecutors.*

26. *These provisions should also aim at preventing and resolving possible or real conflicts of interests and enabling prosecutors to ensure that the law is properly applied, without being exposed to pressure or measures contrary to their mission.*

27. *More generally, independence of prosecutors implies that they have sufficient means and also the authority, competence and powers necessary for the proper performance of their tasks. They should in particular be consulted on the determination of the resources necessary for their mission.*

28. *Appropriate training of prosecutors on the administration of their service and management of their resources should be provided, otherwise their independence could be significantly hampered.*

29. *Means of subsistence, comparable to those of judges, including proper remuneration, ensuring their material independence and their protection, as well as that of the members of their families, should be guaranteed to prosecutors. Such protection should include legal and physical protection of their life, health and property, as well as honour and reputation, against any violence, attack or pressure, and provide for corresponding state insurance.*

30. *The legal status of prosecutors on which their activities are based is too often unknown to the public and therefore misunderstood. Relevant information should therefore be made publicly available to avoid any misinterpretation of their role. The prosecution service should be involved in this process.*

The international standards referred to above have a great deal to say about the activities which prosecutorial councils occupy themselves with, as well as the procedures which they follow, but not much about whether to have such bodies at all or how they should be structured. On these issues a variety of matters will determine what is the best approach to follow. These include the circumstances of the country concerned, its legal culture and systems, and the functions which have been conferred on the council if one exists.

In its Fourth Round Reports which dealt, among other matters, with corruption risks in prosecution services, GRECO has frequently made recommendations to individual member states concerning the organisation and functioning of prosecutorial councils, and GRECO's 4th round evaluation Report on the Republic of Moldova and following compliance reports contain a number of such recommendations which are not yet implemented at all or are not implemented in full. These recommendations concern the procedures to be followed when instructions are given to hierarchically subordinated prosecutors, the need to ensure that the composition and operation of the SCP are subject to appropriate guarantees of objectivity, impartiality and



transparency, the need for effective communication, guidance and training of all prosecutors concerning the Code of Ethics and Conduct, and the need to strengthen the objectivity, efficiency and transparency of the legal and operational framework for the disciplinary liability of prosecutors. All of these are matters for which the SCP has responsibility and competence.

Finally, it should not be overlooked that several of the provisions of the European Convention on Human Rights (ECHR) as well as the corresponding provisions of the International Covenant on Civil and Political Rights (ICCPR), may be particularly relevant to the activities of prosecutorial councils. Unlike the provisions in the other international instruments which are in the realm of “soft law”, these are legally binding obligations. A prosecutor facing serious disciplinary charges is, for example, legally entitled to the guarantee of a fair hearing contained in Article 6 ECHR and it is also possible that the rights of accused persons facing trial could be infringed, for example, if there were to be prejudicial publicity in advance of a criminal trial. Activities carried out by a prosecutorial council may also risk infringing Article 8 if care is not taken to respect privacy rights. An instructive example of how a body of judicial self-government invested with disciplinary powers should not behave and how its activities may involve multiple breaches of ECHR obligations is provided by the case of *Oleksandr Volkov v. Ukraine* (Application no. 21722/11), Judgment 9 January 2013.

## **5 COMPARATIVE OVERVIEW OF PROSECUTORIAL COUNCILS (AND JOINT COUNCILS OF JUDGES AND PROSECUTORS) IN COUNCIL OF EUROPE MEMBER STATES**

### **5.1 Prosecutorial councils viewed against a background of differing prosecution systems**

The widespread establishment of prosecutorial councils in many parts of Europe is a relatively recent phenomenon. Some of the earlier models were judicial councils which were also competent for prosecutors, as is still the case in France, Italy and Turkey. These models first developed in judicial systems where prosecutors were part of the judicial power and hence not only did the prosecution as a whole have an institutional independence but each individual prosecutor, as a judicial officer, had individual independence. In such systems the prosecutorial council, whether or not it is part of a larger judicial council, typically serves two principal functions, firstly, to provide a representative body for prosecutors, to defend their independence, their status and their culture and ethos, and secondly, to provide a management structure in which functions such as recruitment, appointments and promotions, as well as disciplinary control, can be handled by the prosecutorial profession itself. Typically, in judicial systems the prosecutor attached to the highest court would have been regarded as *primus inter pares* in relation to his or her colleagues but without any hierarchical control over junior colleagues.

This model whereby prosecutors are regarded as a part of the judicial branch is not, however, the only prosecution model existing in Europe. Another common model is the hierarchical one in which prosecutors' decisions may be overruled by more senior prosecutors with the ultimate control resting with the prosecutor general. Typically, management functions as well as prosecutorial decisions are exercised according to a hierarchical principle. In this model the prosecutors are usually considered to be part of the executive and in some countries, including Germany, may be answerable to the Minister for Justice.

To complicate matters further there are not only these two models but quite a variety of hybrids in between. There are judicial models which despite that character have an element of hierarchical control - Bulgaria is one example. There are prosecution services which although considered part of the executive are nonetheless independent of government, Ireland being one example. Apart from the distinction between judicial and executive systems there are other ways in which prosecution systems may differ from each other. In some states the prosecution can be regarded as a “fourth power” separate from all of the three traditional branches of government, as was the case in the former Soviet Union and still is today in some countries.

The way in which the criminal justice system is organised can also have a fundamental effect on the prosecution service. Whether the system is adversarial or inquisitorial has an important effect





on the functioning of the prosecution service, as has the question whether the system applies the opportunity principle under which prosecutors have a discretion whether to prosecute or the legality principle where they do not. Other important questions which impact on the organisation of prosecution services are whether prosecutors control and direct the investigation or whether the investigators are independent of the prosecutors, and whether the prosecutors perform functions other than criminal prosecution and, if so, whether such functions are peripheral or central to their role or perhaps are seen as even more important than the function of criminal prosecution. The function of general supervision of legality was a central feature of the Soviet “prokuratura” model and in some countries, despite reforms, elements of that system, as well as of the way of thinking and the behaviour associated with it, may still persist.

This variety of prosecution systems is reflected in the varied ways in which prosecutorial councils function. In the western parts of Europe prosecutorial councils tend to be found mainly in countries where the prosecutorial model is that of a judicial service comprising individually independent prosecutors. Those states with an hierarchical prosecution forming part of the executive or subordinated to the executive power have been less ready to establish prosecutorial councils. But in central and Eastern Europe prosecutorial councils have been adopted in many states which had a history of a strongly hierarchical system with centralised power. In at least some cases the councils would appear to be intended to provide a balance to what might otherwise be seen as an over-powerful general prosecutor.

The comparative overview presented below is based on the analysis of the regulations and functioning of the prosecutorial councils (and including judicial councils) in nine state members: Italy, Spain, Portugal, France, Belgium, Croatia, Serbia, Slovakia and Ukraine.

Joint councils for judges and prosecutors have been established in Italy, France, Belgium, Bulgaria and Romania. Separate prosecutorial councils have been established in Portugal, Spain, Serbia, Croatia, Montenegro, Slovenia, Slovakia, Ukraine, and Macedonia.

Usually joint councils tend to enjoy stronger powers and guarantees as they tend to be established mainly where prosecutors are considered as part of the judiciary and benefit from the regime and guarantees applicable to judges. Variations in the distribution of powers between prosecutorial councils also depend on the role of the Prosecutor General. Countries historically characterised by the dominant role of the Prosecutor General tend to have councils with limited powers.

For ease of reference, the term “Council” is used to refer to both prosecutorial councils and joint councils of judges and prosecutors unless otherwise specified.

## 5.2 Membership

The total number of members usually depends on the size of the national judiciary and on whether there are joint or separate councils for judges and prosecutors. At the same time, it should be noted that countries such as France, Italy and Ireland as well as the majority of northern European countries have a low number of prosecutors as compared to the total population (around 3 for 100.000 inhabitants) while numbers of more than 15 prosecutors per 100.000 inhabitants can be found mainly in more eastern areas (Bulgaria, Hungary, Latvia, Lithuania, Republic of Moldova, Montenegro, the Russian Federation, the Slovak Republic and Ukraine).<sup>8</sup>

### 5.2.1 Membership of prosecutorial councils

In Croatia the Prosecutorial Council is composed of 11 members: seven prosecutors, two law professors and two members of Parliament, one of whom must be a member of the opposition.

---

<sup>8</sup> CEPEJ, “European Judicial Systems, Efficiency and quality of Justice”, CEPEJ studies No 26. 2018 Edition.

The report also noted that many countries in Central and Eastern Europe have a significant number of prosecutors (over 10 or over 20 prosecutors per 100 000 inhabitants) for a relatively small number of cases received (less than 3 cases per 100 inhabitants), even if their jurisdiction is wide.



In Ukraine the Prosecutorial Council is composed of 13 members: nine prosecutors and two “scientists” elected by the Congress of representatives of legal higher education institutions and scientific institutions.

In Serbia the prosecutorial Council is composed of 11 members: three ex officio members and eight members elected by parliament (six prosecutors and two eminent jurists).

In Spain, the Prosecutorial Council is composed of 12 members: three ex officio members (the Prosecutor General, the deputy chief prosecutor at the Supreme Court, the chief inspector) and nine elected prosecutors.

In Portugal the Council is composed of 19 members: five ex officio members (the prosecutor general and four regional prosecutors general), seven elected prosecutors, seven lay members of which five are elected by the parliament and two selected by the ministry of justice.

In Slovakia regional prosecutorial councils are composed of an odd number of prosecutors but not higher than 11. Their members are elected by regional assemblies of prosecutors. The chiefs of the regional councils appoint the members of General Council of Prosecutors.

### **5.2.2 Membership in joint councils for judges and prosecutors**

In countries with joint councils for judges and prosecutors such as Belgium, Italy and France, the total number of members is correspondingly higher. However, the number of the members of the sections for prosecutors tends to be similar.

In Belgium the Council for the Judiciary is composed of 44 members, divided into two language sections (Dutch and French). Each section is composed of 22 members of whom 11 members are selected from among judges and prosecutors. The other 11 are laypersons, including four lawyers, four representatives of civil society and three university professors. The magistrate-members are elected by direct secret ballot from the ranks of serving career magistrates while the Senate elects the lay members by a two-third majority.

In France the section for prosecutors of the High Council of Magistrates (Conseil Supérieur de la Magistrature - CSM) is composed of 15 members: the Prosecutor General attached to the Court of Cassation, five prosecutors, a judge, a representative of the Council of State, a lawyer and six lay members. Following a 2008 reform, former ex officio members - the President of the Republic and the Minister of Justice - were removed. Currently, the Minister of Justice can attend the meetings of the Council with the exception of disciplinary proceedings.

The Italian Council is composed of 27 members in total. Three of its members are appointed ex officio: the President of the Republic, the President of the Court of Cassation, and the Prosecutor General at the Court of Cassation. The other 24 members are elected. Of the 24 elected members two third (16) are judges and prosecutors elected by all magistrates from among various categories and levels of jurisdiction. The law does not specify the number of prosecutors, which is probably due to the circumstance that judge can become prosecutors and vice versa as there is no separation between the two careers. The eight lay members are elected by joint sessions of the two chambers of parliament from among law professors and lawyers with at least 15 years of experience.

### **5.2.3 Ex-officio members**

In Croatia, Ukraine and Belgium there are no ex officio members as all members are elected.

In France the Prosecutor General is an ex officio member while various bodies elect all the other members. As mentioned above the President of the Republic and the Minister of Justice who were formerly ex officio members have been removed.

In Serbia the three ex officio members include the Republican Public Prosecutor, the Minister of Justice and the chairperson of the competent committee of the National Assembly (parliament).



In Spain three ex officio members include the Prosecutor General, the Deputy Chief Prosecutor at the Supreme Court and the Chief Inspector.

In Italy the three ex officio members include the President of the Republic<sup>9</sup>, the President of the Court of Cassation, and the Prosecutor General at the Court of Cassation.

In Portugal the five ex officio members include the Prosecutor General and four regional prosecutors general.

#### **5.2.4 Length of mandate**

In Croatia and Belgium members of Councils are elected for a period of four years and are renewable once. In France, Spain and Italy members are also elected for a period of four years but their mandate is not immediately renewable. In Ukraine and Slovakia members of the Council are appointed for a period of five years, non-renewable.

In Portugal the length of the mandate of members elected from among prosecutors is three years, renewable once. Lay members elected by the parliament and Ministry of Justice cease from their functions following the election of a new parliament or appointment of a new Minister of Justice respectively. In these cases, the sitting members can be either confirmed or a new election will take place.

Usually, the mandate of ex officio members lasts as long as they hold the position entitling them to membership in the Council and cannot renounce membership.

In the majority of countries reviewed, in case of termination or removal of a member before the expiration of the term of office, a substitute will be appointed until the expiration of the term of office of the Council.

#### **5.2.5 Appointment of the President of the Council**

In the majority of cases the President of the Council is elected by members of the Council upon taking up office. The decision is adopted by majority vote.

In Slovakia the members of the Council elect the President from among themselves by secret ballot.

In Croatia the President is elected by secret ballot and must be selected from among the members who are deputy chief state prosecutors (the highest rank).

In Ukraine the session for the election of the president is usually public but can be held behind closed doors by decision of the majority of its members. Each member can cast one vote but has also the right to abstain.

In Belgium the president of the Council is appointed for a period of one year through a rotation system: each year one member is selected from either the French or Dutch section, also alternating between lay members and professional members.

In Italy the President of the republic is, ex officio, president of the Council while the plenary elects the vice president from among lay members by secret ballot.

In Serbia the republican public prosecutor, who is an ex officio member, is also the president of the Council.

In Spain the prosecutor general is ex officio president of the Council.

---

<sup>9</sup> GRECO, 4<sup>th</sup> evaluation round in regard to Italy, October 2016, para (104).

GRECO considered the ex officio presidency of the CSM by the President of the Republic in line with international standards requiring that of judiciary councils should not be active politicians, members of parliament, the executive or the administration as in Italy the President of the Republic has only formal or ceremonial powers and his/her term and conditions of tenure are independent from political parties.



## 5.3 Election criteria

### 5.3.1 Members elected from among prosecutors

#### Gender representation

In the majority of the Councils surveyed there are no specific rules to secure a gender balance in the representation of prosecutors. A draft law has been recently submitted in Italy to secure gender balance in the election and membership of the Council. In France there is a requirement of gender representativeness and the current composition of the Council reflects a gender balance even though it appears that there are no specific rules.

In Belgium, fair representation of women and men in the Council is a statutory requirement. Prosecutors who vote for their colleagues must cast least three votes of which at least one must be for a candidate of each gender. Thus, a vote for three male or three female candidates is null and void.

In Spain the number of candidates of each gender, may not be less than 40% of the total number of persons included each list of candidates. In case of lists of candidates composed of three members it will be sufficient that at least one candidate is of the other gender. The nine candidates who obtain the highest number of votes are elected. In the event of a tie, the most senior candidate will be preferred and, if of equal seniority, the oldest. However, if the tie concerns candidates of different gender, and those of the same gender have not reached 40% of candidates elected in the global count, the tie will be resolved in favour of the candidate belonging to that gender.

Additionally, in Spain, an *equality commission* operates within the Prosecutorial Council. Its task is to analyse equality standards in career development within the Prosecution Service. The commission is composed of members designated by the Plenary of the Council and is presided by the eldest among its members. The mandate of its members is two years. Members are re-eligible.

#### Territorial representation

Rules to secure geographical representativeness have been adopted in the majority of the reviewed councils.

In Portugal ex officio members include four district general prosecutors from the four regions (Lisbon, Porto, Coimbra and Evora). Besides these ex officio members, six-elected prosecutors are elected from among their peers organized in four districts. Thus, the district of Lisbon and Porto elect two members, while the District of Evora and Coimbra elect one member each.

In Serbia at least one member from among the elected prosecutors must be from the territory of autonomous provinces. In Croatia regional representation is also secured for candidates from among deputy municipal and deputy county offices, which are grouped in three geographical areas.

In Belgium the Council is composed of two separate sections, one for the French speaking and one of the Dutch speaking territories and members are selected in order to secure representation of all regions.

#### Representation of different ranks

The majority of national regulations also establish a distribution of elected members so that they are representative of different ranks. In Serbia two members are selected from among prosecutors at the basic prosecutor's office, one from higher offices, one from the appellate office or from the Office for Organised crime or the Office for war crimes, and one from the General Prosecutor office (Republican Public Prosecutor Office).

In Croatia, of the seven elected prosecutors three must be deputy chief state prosecutors; two are selected at county level and two from among deputy municipal prosecutors. From among deputy chief state prosecutors, one candidate must be selected from the criminal department and one from the civil-administrative department.



In Ukraine, of the nine member-prosecutors, two are elected from the general prosecutor office, four from regional offices and five from local offices.

In Belgium members are selected from among the various ranks. Similarly in France the assembly of prosecutors general attached to appeal courts elect a member from among their peers, the assembly of prosecutors general attached to the court of cassation elect one member from among their peers, and the assembly of republican prosecutors also elect a member. The general assembly of prosecutors elect the remaining two prosecutors and one judge.

In Italy, the eight elected magistrates include two magistrates attached to the Court of Cassation (judges and/or public prosecutors), four public prosecutors and ten judges from/attached to courts deciding on the merits (i.e. first or second instance courts).

In Portugal elected prosecutors include one Deputy Prosecutor General elected from among his/her peers. Six prosecutors are elected from among their peers.

### **Requirements for candidates**

In all countries surveyed, prosecutorial candidates must be acting career prosecutors. In Serbia candidates must have permanent tenure of office.

In Croatia and France candidates from among prosecutors must have at least five years of professional experience. In Italy candidates must have at least four years of experience within the judiciary.

### **Ineligibility and incompatibilities**

In all countries reviewed candidates who have been convicted for a criminal offence are ineligible. In Belgium the law specifies that the rule also apply to suspended sentences and to judgements adopted by a foreign court. It further specifies that the judgment must have entered into legal force.

In Croatia ineligibility is also foreseen for prosecutors who have received disciplinary sanctions in the previous four years. In Italy magistrates who have been suspended cannot vote and cannot be elected.

A number of ineligibility grounds are connected to the incompatibility with certain positions.

Usually members of the electoral commission in charge of managing the election of prosecutors are not eligible. In Spain the members of the electoral board (three ex officio members of the Prosecutorial Council and two other prosecutors attached to the Superior Court of Justice in Madrid) are ineligible unless they resign.

In Ukraine prosecutors who hold administrative positions or are members of the Qualification and Disciplinary Commission are ineligible (the Qualification and Disciplinary commission is a body separate from the Council).

In Croatia chiefs of office are ineligible (similar provisions are also adopted in respect of the Judicial Council where court presidents are ineligible).

In Italy, magistrates who hold leading positions in professional associations, at the School of Magistrates or who are members of Judicial Councils as well as magistrates who are seconded to other bodies (such as the Ministry of Justice) cannot run for a position in the Council until after termination of such mandates.<sup>10</sup>

In Spain ex officio members, members of the inspectorate, of the technical secretariat and support unit of the prosecutor general office are ineligible. Current members of the Prosecutorial Council (in consideration of the rule on single mandate) cannot be elected unless they were appointed as

---

<sup>10</sup> [Webpage of the National Association of Magistrates in Italy](#)



substitutes/replacements and performed their duties within the Council for less than a year from the date of their election.

In France, for the duration of their mandate, members of the Council cannot exercise public or elected functions, be appointed to any independent administrative agency or other functions such as the Ombudsman or lawyer (with the exception of lay members that, by law must be selected from among lawyers). During these period, members, in particular prosecutors and judges, cannot benefit from any promotion or career advancement either. Similarly, in Italy throughout the duration of their mandate, members cannot be registered in professional boards or be members of parliament or of regional elected bodies.

In Slovakia the Attorney General, the Deputy Attorney General, the Special Prosecutor, the Deputy Special Prosecutor, the Regional Prosecutor, the Deputy Regional Prosecutor, the District Prosecutor and the Deputy District Prosecutor are incompatible with membership in the Prosecutor's councils. This incompatibility does not prejudice their right to vote in the elections of members of the councils. This approach aims at reducing a duplication of hierarchical roles within the councils.

### **Election procedure**

In the majority of cases prosecutor-members are elected by direct, secret personal vote by their own colleagues (Croatia, Ukraine, Portugal, Belgium, Portugal). In Belgium voting is mandatory. In Portugal the law specifies that the right to vote belongs to prosecutors who are on active duty, which exclude prosecutors who have been removed following the application of disciplinary sanctions and prosecutors who are on leave without remuneration.

In Belgium, to secure equal representation, each voter must submit at least three votes, of which at least one for a judge, one for a prosecutor and one for each gender.

In Spain, the assembly of prosecutors composed of all active prosecutors elects members-prosecutors from a single list. A valid candidacy must be supported/advanced either by a professional association of prosecutors, or by no less than 45 prosecutors of the Public Prosecutor's Office (these prosecutors must have the right to vote and must not belong to any of the professional associations that presented a candidacy). The vote is equal, personal, direct and secret. Votes can also be expressed by post.

In Portugal, prosecutors are elected by their peers using the D'Hondt method<sup>11</sup> through their inclusion in lists proposed by at least 15 prosecutors in each of the four electoral districts. The Prosecution Service, on an equal basis, provides a platform, for example through its website, to allow candidates to run their electoral campaign. Candidates have the right to obtain leave from service to conduct their electoral campaign insofar as this does not entail a serious interference in the functioning of the Prosecution Service. In case two or more candidates receive the same number of votes, a new election round is called between among these prosecutors (only).

A notable exception to the direct election from among their peers is Serbia, where members are elected by the National Assembly. Prosecutors can vote for candidates whose candidatures are advanced by at least 15 prosecutors. The elected prosecutors are then (mandatorily) nominated by the Council to the National Assembly following their examination and election. The National Assembly discusses and votes for the proposed candidates. Members of the National Assembly can also present a motivated objection to the election of a proposed candidate. The assembly elects the candidates by majority vote of the attending members of parliament.

### **5.3.2 Members who are not practicing prosecutors**

In Croatia two members of the Prosecutorial Council are selected from among Members of Parliament nominated by the Parliament's Committee for the Judiciary and elected by Parliament

---

<sup>11</sup> *Short description of the DHondt method.*



by majority vote. One of them must be a member of the opposition. There is no qualification requirement for such candidates. Two other lay members are elected from among law professors by all professors of law faculties by secret ballot. Faculty councils draft the list of candidates while the deans of law faculties adopt regulations for the candidacy and elections.

In Ukraine the two scientist elected by the Congress of representatives of legal higher educational institutions and scientific institutions must have higher legal education and have at least ten years of experience. They are selected on the basis of secret ballot by majority vote of the members of the Congress. They cannot be members of parliament, of the government, heads or deputy heads of the training centre for prosecutors, judges, prosecutors performing administrative functions, law enforcement officers, nor can more than one scientist be selected from the same academic institution.

In Serbia the National Bar association can nominate the candidate to be selected from among lawyers while the joint session of the deans of law faculties can nominate law professors. In both cases the National Assembly decides on their appointment. Lawyers candidates must have at least 15 years of experience, have performed functions in the bodies of the Bar association, must have not been object of disciplinary sanctions over the previous 10 years or have been convicted for criminal offences that would make them unfit to practice the law. They should not be a member of a political party.

Candidates selected for nomination to the national assembly are selected on the basis of a procedure that involves the proposal of candidatures by the regional bar chambers and the selection of the person to be nominated by the majority of the members of the steering board of the Serbian bar association. The vote is secret.

In Belgium lay members (11 for each linguistic section of the council) must have at least ten years of professional experience and are selected by the Senate with a two third majority. Candidatures can be submitted individually or by any Bar Association and any University. Candidates must be below 66 years old. Individuals who perform elected or political functions are ineligible.

In France two lay members include a state councillor, who is elected by the general assembly of the Council of State, and a lawyer who is appointed by the president of the National Bar association following opinion of the general assembly of the regional bar associations. Two other lay members are selected by the President of the Republic, two by the president of the Parliament and two by the president of the Senate. The lay members selected by the President of the Republic and by the Presidents of the Parliament and Senate are appointed on the basis of the (published) opinion of two specialised committees of the Parliament and of the Senate. As to the professional profile of lay members, they are almost exclusively selected from among law professors although this is not a mandatory requirement.

In Italy eight lay members, elected by the joint chambers of parliament, are selected from among law professors and lawyers with at least 15 years of professional experience. The lay members are elected by joint sessions of the two chambers of parliament by a majority of 3/5 of the members. Such majority is required for the first two voting rounds after which, in case the deadlock persists, in subsequent voting rounds a majority of three-fifths of the voting members will be sufficient. The Council has recently submitted to the parliament a draft law that would exclude the eligibility of individuals who in previous two years held public offices (*incarichi di governo*) both at national and local level as well as leaders of political parties. Another proposal that is still being discussed would further extend ineligibility to current Members of Parliament.<sup>12</sup> These proposals aim at reducing the politicization of the council.

---

<sup>12</sup> Superior Council of Magistracy, Italy, *Legislative proposal to extend the ineligibility of Members of the Parliament in the SCM Council*



### **5.3.3 Challenging the election procedure**

Complaints lodged in respect of the election procedure are usually decided by an electoral commission or by the Council itself.

In Belgium, candidates who have been included in the electoral lists but have not been selected as members can challenge the election procedure by email. The complaint is sent to the President of the Council and can concern the regularity of the election, vote counting, the assessment of the merits of a candidate or the appointment of a candidate to the council. The candidate who submits a complaint must have a legitimate interest and can submit evidence to support the complaint. After the complaint is declared admissible (by the Council's secretariat), it is communicated to other candidates who have the right to submit observations to the President of the Council. The Council's Secretariat designates a member whose appointment has not been challenged to examine the relevant evidence, carry out an inquiry and hear interested parties. In case the complaint concerned the regularity of the vote, the ballots can be examined only in the presence of at least two members (judges or prosecutors) whose election has not been contested. The decision on the complaint is adopted by the plenary with the exclusion of the members-magistrates involved in the procedure.

In Italy magistrates who voted in the election of magistrate members have the right to attend the examination/counting of the ballots and can also challenge the validity of the votes. The Council decides on complaints lodged by magistrates in the framework of the election.

In Portugal, the election procedure is managed by an electoral commission composed by the prosecutor general, the regional prosecutors general, and a representative of each competing list participating in the competition. The electoral commission decides on complaints. Complaints can be lodged both by candidates and prosecutor-voters. Its decisions can be appealed before the Supreme Administrative Court.

## **5.4 Status of members**

### **5.4.1 Rights, obligations and disciplinary liability of members**

As a general rule, members of the councils are bound by the duty of confidentiality. In France this duty is expressly extended to anyone who participates in the sessions of the Council. In Italy members have a duty of confidentiality vis-a-vis closed hearings of the Council and of the commissions. Confidentiality does not apply, with the exception of security needs (*esigenze di sicurezza*) to resolutions adopted by the Council, the text of the proposals elaborated by the various Commissions, voting results and the vote expressed by each component of the Council.

Members are usually required to act impartially and independently and to avoid any conflict of interests. Procedures have been introduced in a number of countries for reviewing and sanctioning violations.

In Portugal, in case of allegations of violation of the duty of independence and impartiality, the president or at least six members of the Council can refer the matter to the plenary, which will decide by majority. The plenary can, depending on the gravity of the violation, issue a warning or remove/dismiss the member.

In Belgium, members of the Council are required to perform their functions independently and have the right to publicly express their position on matters that have been dealt with by the Council in the respect of existing rules on confidentiality. They also have a duty to report to the competent authority of any criminal offence they have discovered in the performance of their duties.

They are obliged to attend meetings and perform their duties in a timely manner. The violation of rules on independence and impartiality and of attendance may, taking in consideration the functions performed and the repeated nature of the violation, be considered as grave violations leading to the removal of the member. The Council can report violations committed by its various





bodies, working groups, commissions to the deontological commission (cellule de deontologie) which is composed by members of the Council itself. In case of violation leading to the removal of a member, the deontological commission of the Council carries out an inquiry, hears witnesses, the relevant member and submits a report to the plenary of the council. The members of the deontological commission who have carried out the inquiry cannot participate in the plenary discussions or vote.

In case of other violations committed by a judge or prosecutor member, the Council can refer the case to the disciplinary tribunal for the adoption of the appropriate sanctions. The Council can also inform the Senate of disciplinary violations committed by lay members. The Council must also be informed by the competent disciplinary body of any disciplinary proceedings initiated against any of its members.

#### **5.4.2 Recusals and conflicts of interests**

In the majority of councils surveyed members are subject to rules on incompatibility and conflicts of interests. As a general rule, members cannot participate in the discussion and voting on matters where circumstances cast doubts about their impartiality. In Croatia the Council adopts the decision on recusal by majority vote.

In France members who are elected from among lawyers are subject to specific rules on recusal as they cannot participate in the adoption of opinions or decisions concerning a magistrate who deals with a case that the lawyer-member pleaded nor can the lawyer-member participate in the proceedings for the appointment of magistrates in the same jurisdictions of his Bar chamber.

In Belgium members cannot participate in the hearings and voting on matters where they, their close relatives or cohabitants have a personal and direct interest or where they have, at any title, been parties in the performance of their functions. Members who have a conflict of interest cannot access the relevant file of the case examined and cannot participate in the examination and decision of the Council on the matter. The existence of a conflict of interest affecting one of its members must be mentioned in the report of the session.

In Portugal, members from among the district deputy prosecutors and the elected prosecutors cannot participate in decisions concerning prosecutors who were their immediate hierarchical superiors or subordinates. In case such recusal leads to the inability to reach the quorum, a substitute member replaces the relevant member. Lay members are subject to the same guarantees, rights and duties as prosecutors insofar as applicable. Additionally, lay members cannot participate in the evaluation or disciplinary proceedings in respect of prosecutors who have intervened in a process in which they were parties nor can they participate and decide in any matter in which they had intervened as parties.

#### **5.4.3 Asset declarations and declarations of interests**

In Portugal and France members are also required to submit their declarations of assets and interests to the council. In France the declarations are accessible to the other members. The asset declaration is also submitted to the competent independent oversight authority (HATVP - the high authority for the transparency of public life), which keeps the declarations until after five years following the termination of the mandate. These provisions besides strengthening the independence of the judiciary facilitate the monitoring of conflicts of interests and recusal in decision making by the councils.

#### **5.4.4 Full time or part time**

Policies as to whether members of the Council are employed full time or carry out their mandate in addition to their original functions tend to vary. Usually members of Councils characterised by limited mandates continue performing their original functions.



In Spain members of the Prosecutorial Council continue exercising their original functions as prosecutors. They attend the session of the Prosecutorial Council of which they inform their hierarchical superiors (without however the need to require permission). The performance of functions within the Prosecutorial Council is not remunerated, although members have the right to receive attendance and travel allowances.

In Serbia elected members of the Council (prosecutors, lawyer and law professors) receive a separate allowance for their participation in the works of the council.

In France, upon their request, members can be seconded or can be partially discharged from their original functions. Members receive an indemnity for participation in the work of the Council.

In Portugal, the Council decides in which cases a membership needs to be performed on a full-time basis. Full time members within the high Council receive a remuneration that is equal to the highest remuneration within the prosecution service. Members elected from among prosecutors can continue performing their original functions with a corresponding reduction of their workload. Members receive a per diem for their participation in the sessions of the Council as well as compensation for travel expenses if they come from outside the Lisbon area. The budget of the Council also covers legal assistance in judicial proceedings against members for acts and decisions adopted in the exercise of their functions within the Council.

In Croatia and Ukraine, throughout the duration of their mandate, members are seconded from their institution/office of origin and are relieved from their duties while they preserve their salary for the time necessary for the preparation and participation in the meetings of the Council and for the performance of their duties as members. In Italy, while ex officio members of the CSM continue exercising their original functions, elected members are seconded to the CSM. The remuneration of Council members is fairly high as is the budget of the council.<sup>13</sup>

#### ***5.4.5 Return to office following expiry of term of office/completion of mandate***

A number of guarantees and rules have been introduced for those councils with full time members who were seconded from their office of origin.

In Croatia prosecutor members are on leave from the office of origin for the duration of their mandate but can be reassigned to their office upon expiry of the mandate.

In Italy, upon completion of their mandate, former members of the CSM who were seconded to the Council return to their offices and positions of origin regardless of whether there are no vacancies (anche in sovrannumero) in the office. For the first year following the termination of their mandate, former members of the Council cannot run for appointment as chiefs of office (they can however return to managing positions, including chiefs of office, that they held before the appointment to the council).

The recently amended Code of Conduct of the National Association of Magistrates has extended this obligation not to run for managerial positions/positions as chief of office to a period of two years after the completion of their mandate at the council. Additionally, former members of the Council are prohibited from submitting applications to positions within the executive (usually the Ministry of Justice)<sup>14</sup> for two years following completion of their mandate. These provisions were prompted by the need to curb trading in influence and undue political influence on members of the Council. Notably, disciplinary and criminal investigations are currently ongoing in respect of former members of the Council on allegations that they had engaged in negotiations with representative of political parties to influence the appointment of judges and prosecutors to key positions (including to offices dealing with investigations against politicians and economic crimes in the capital).

---

<sup>13</sup> According to press article of 2013, there were a total of 243 employees and members at the CSM with a budget of 35 million euro

<sup>14</sup> *National Association of Magistracy, Italy, Amednments to the Ethics Code*



#### **5.4.6 Suspension, dismissal or termination of mandate**

Some councils regulate the grounds for suspension of members. In Portugal members can be suspended in case of indictment for intentional offences committed in the exercise of functions or punishable by imprisonment for more than three years. They can also be suspended in case of the opening of disciplinary proceedings.

Members can ask for the temporary suspension of their mandate in case of illness or paternity or maternity leave for a period of up to 180 days.

Besides termination due to expiry of the mandate, voluntary resignation, retirement, disability, permanent or lengthy illnesses that makes the performance of duties impossible over a considerable period of time, appointment to offices and positions incompatible with the status of members within the council, members will usually be removed on a number of additional grounds connected to grave violations of their duties and commission of disciplinary and criminal offences.

In Ukraine, the issue of non-compliance or improper compliance of the duties as member of the Council can be raised before the general assembly of prosecutors upon initiative of the Council's president or a third of its members. In Spain members can be removed due to serious breach of their duties as members of the Council but also following the imposition of the disciplinary sanction of suspension for up to three years.

In Portugal failure to attend three consecutive meetings or a total of five meetings and the imposition of a disciplinary sanction entailing the removal from office or loss of status (such as loss of status as prosecutor, revocation of license as a lawyer etc.) will also lead to the revocation of the mandate in the Council.

In Belgium a member can be removed for grave reasons upon decision of at least two third of the members of each linguistic section. Grave reasons include failure to attend sessions of the Council and violations of their duties of independence and impartiality. Such decision cannot be appealed. The dismissal of members must respect fundamental due process guarantees including hearing the member and securing that all evidence is gathered. The member must be informed in advance of the charges, the intention to put an end to his mandate, the time and location of the hearing, the right to be assisted by a person of his choosing, the right to have witnesses summoned and to access the file with all the evidence. Minutes of the hearing for the removal are taken.

In Serbia any member of the Council can initiate the procedure for dismissal of a member. In case of lay members, the initiative belongs also to the body that nominated them. The relevant member must be heard before the Council adopts the decision.

In Spain while the President of the Council must accept the resignation, termination due to incapacity or non-compliance with the duties as member of the Council must be agreed by the Plenary of the Council by a majority of two-thirds of its members, after a procedure respecting due process guarantees. The termination due to disciplinary sanction can be adopted only when the sanction is final.

In Croatia the decision to remove a member of the Council is adopted by the president of the council. In case the decision concerns the president, the deputy president is competent to adopt the decision. With regards to members elected from among deputy state prosecutors, the Prosecutor General submits a proposal for removal to the Council which decides over the matter. Lay members elected by parliament or the law faculties can be removed by decision of the respective electing body.

In Slovakia the Council may remove the president and the vice president of the Council upon proposal of at least five members. The vote is adopted by secret ballot.



## **5.5 Functioning of Prosecutorial Councils**

### **5.5.1 Ordinary and extraordinary sessions**

In Belgium the plenary of the Council, which includes both linguistic sections, is convened at least twice per year while each linguistic section convenes once per month to approve or ratify the decisions of its various commissions.

In Slovakia, the sessions of the Council are convened four times per year. The President of the Council, the General Prosecutor or an absolute majority of the members of the Prosecutor's Board may request that the Council is convened; in such case, the President of the Council is obliged to convene the session within ten days of receiving the request. The Council may also be convened if it is urgent for the proper and timely performance of its functions under the law or necessary to protect the rights and legitimate interests of prosecutors. In case a matter is urgent and does not require a discussion at the extraordinary meeting of the Council, the President of the Council may request members of the Board to vote by telephone, telegraph or by other electronic means.

In Portugal the Plenary Council convenes once per month. Extraordinary sessions can be convened upon initiative of the prosecutor general or upon request of at least seven members.

### **5.5.2 Electronic/virtual Sessions**

In Croatia sessions of the Council can be held electronically, provided that at least six members have confirmed receipt of the invitations to hold the session electronically. Matters that cannot be decided by electronic virtual sessions include recruitment, dismissal, performance evaluation and disciplinary proceedings.

### **5.5.3 Participation of external bodies/non-members**

In Slovakia professional associations are granted a number of rights connected to the participation in the sessions of the council. In particular, the information on upcoming meetings of the Council is notified by the President to professional associations. In certain circumstances the professional associations can be invited to submit opinions on matters under discussion. A representative of professional associations can propose the inclusion of matters in the agenda and has the right to participate in the meetings of the Council in an advisory capacity. For the whole or part of the deliberations, the Council may also invite the General Prosecutor or a prosecutor whose rights and legitimate interests are affected.

In France, following a 2008 reform, the President of the Republic and the Minister of Justice were removed from among the ex officio members. Currently the Minister of Justice can be invited to attend the meetings of the Council with the exception of disciplinary proceedings.

In Portugal, the Minister of Justice can attend the sessions of the Council upon invitation or when he considers it necessary to provide information or clarifications.

In Ukraine, the president of the Council and the Council can invite to attend the hearings a plurality of authorities including the prosecutor general, regional and local chiefs of prosecutors' offices, prosecutors, representatives of the press and of governmental organisations.

### **5.5.4 Publicity of sessions**

In France all disciplinary proceedings are open to the public and the time and location of the sessions are published in advance on the website of the Council. So far it appears that, with few exceptions, the majority of disciplinary proceedings have been held in public.

In Italy hearings/sessions of the Council are public. Exceptions can be made for reasons of public security, protection of the private life of a magistrate or third parties or of the confidentiality of the investigation. The proposal to hold a session behind closed doors must be submitted either by a Commission or at least three members of the Council. The decision on the publicity of the



session is adopted by majority of at least two third (of the votes expressed). The sessions/meeting of the Council's Commissions are not public but exceptionally, each Commission can decide to hold the session in public. On the other hand, the meetings of the Commission in charge of discussing appointments of chiefs of office can be open to the public upon request of one third of the members.

In Slovakia resolutions of the Council can be decided by secret ballot, by public vote but also by mail or similar means. The Council shall vote by secret ballot in cases foreseen by law or if decided by more than half of the members before the motion for a resolution is tabled.

In Serbia sessions are usually open to the public and can be attended by interested persons and media representatives insofar as the capacity of the room where the session takes place allows. Sessions can be held behind closed doors in the interest of public order, data protection, national security, morals and the interests of minors, privacy of prosecutors or other persons involved if they make a request that the session is held behind closed doors. Disciplinary proceedings and proceedings for dismissal are held behind closed doors.

In Croatia sessions concerning general matters are open to the public. Hearing in disciplinary proceedings, proceedings for the dismissals of prosecutors, for deciding on objections to performance evaluation are held behind closed doors. However, such procedures can be open to the public upon request of the concerned prosecutor. Interviews for the appointment and transfer of prosecutors may be recorded by audio-visual devices and published on the website of the Council.

#### **5.5.5 Decisions of the councils**

In the majority of cases, councils decide by majority of the attending members. Each member has a vote but occasionally, in case of tie, the president can have a casting vote.

In Italy decisions are validly adopted by the plenary of the Council if at least 15 (out of a total of 27) members are present, at least ten of which must be magistrates and five lay members elected by the parliament. The council's resolutions are adopted by majority of the votes. In the event of a tie, the vote of the President shall prevail.

In Belgium decisions of the plenary and the various commissions can be validly adopted if the majority of the members is present. Decisions are adopted by majority of the votes expressed.

In Portugal decisions of the plenary can be validly adopted if at least 13 members (out of 19) are present. Decisions are taken by majority vote, the Prosecutor General having the casting vote.

In Spain the plenary is considered as validly constituted if at least 8 (out of 12) members are present (of which at least six elected members). Decisions are adopted by simple majority. In case of tie, the vote of the Prosecutor general is determinant.

#### **5.5.6 Minutes, session's reports and transparency**

Minutes of the sessions are recorded in virtually all reviewed countries. They usually contain information on the agenda, attending members, proposals presented and discussed, the result of the voting. Members of the Council usually have the right to inspect the minutes and present remarks and request for corrections which must be approved by the council. Access can be provided to other individuals who have a legitimate interest in reviewing the minutes.

In Slovakia it is possible to make a visual, audio or other recording of the sessions. The written agenda of the Council, including documents received and sent, are held in a special file kept by the President of the council. Every member of the Council and a representative of professional associations is entitled to inspect this file during working hours without any restriction and to make extracts or copies of it.

In Italy, in case of public hearings/sessions, the Council publishes a summary report summarizing the matters discussed, key points of the members' interventions and the votes expressed. When



sessions are held behind closed door, the summary report is limited to the mention of the decision adopted and the votes expressed by the members of the council. Confidentiality does not apply, with the exception of security needs (*esigenze di sicurezza*) to resolutions adopted by the council, the text of the proposals elaborated by the various Commissions, voting results and the vote expressed by each member. Thus, decisions adopted are always published and the votes cast by the members are usually public. However, votes can be cast in secret upon request of at least six members. Such proposal can be challenged by at least three members of the council, in which case the Council will decide by majority.

Any individual can ask for access to or request a copy of the reports of the public sessions of the Council and its Commissions. Information that cannot be made available includes: confidential documents (as regulated by law), documents concerning public order, police activities and criminal investigations, documents concerning the personal security of magistrates, documents concerning the health and private life of individuals, files of the disciplinary proceedings (with the exception of documents used in the disciplinary hearings before the council). However, such exceptions do not apply in case the requesting individuals need such documents/information for the protection of their rights and interests.

All private and public subjects, including those representing collective interests, who have a direct and concrete interest can ask to access or obtain copies of the minutes of the Commissions, as well as acts and documents drafted or gathered during the proceedings decided by the Council. The requests are authorized by a committee attached to the president, after consulting the relevant Commission. Authorization can be denied with motivated decision. The refusal to authorise access, even partial, can be appealed before the Council that decides within thirty days.

In all reviewed countries Councils publish information on their past and upcoming sessions on their websites. In France time and location of the disciplinary hearing held before the Council are published in advance on its website as they are open to the public.

### ***5.5.7 Appeal against decisions of the Council***

In Portugal all Council decisions can be appealed before the administrative courts.

In Croatia decisions of the Council can be usually appealed before a judicial instance. No appeal is allowed against preliminary decisions such as the decision to initiate disciplinary proceedings.

The decision to suspend a prosecutor in the framework of disciplinary proceedings can also be appealed before the Supreme Court, which decides in a single judge formation. Disciplinary sanctions adopted against Deputy State prosecutors can be appealed before the Supreme Court, which decides in a three-judge formation. The appeal suspends the application of the sanction. Decisions of the Council concerning transfer or recruitment can be appealed before the administrative court.

Similarly, in Serbia decisions of the Council can be usually appealed before an administrative court while decisions on dismissal can be appealed before the Constitutional Court.

In Belgium decisions of the Council can be appealed before the Council of State (the supreme administrative jurisdiction). The type of decisions that can be appealed however is limited to decisions adopted in procurement procedures, recruitment, appointments and other decisions concerning the staff of the Council.

Similarly, in France the decisions of the Council can be appealed before the Council of State. Over the years, the Council of State has developed a case law identifying decisions of the Council that are amenable to judicial review. For example, the Council of State is not competent to review acts of a preliminary nature such as the Council's proposal to the President of the Republic to appoint a magistrate to a judicial position. In this case it is the decision of the President to appoint that is subjected to judicial review. On the other hand, the Council of State is competent to review decisions of the Council in recruitment and disciplinary matters. The review encompasses



whether the decision was legally rendered, on the basis of the submitted documents. Insofar as the choice of sanction is within the discretionary powers of the council, the Council of State can still review whether the sanction adopted was proportionate.

The right to appeal the decisions of the Council does not only belong to the concerned magistrate but also any magistrate whose interests have been negatively affected by a decision. One example is the possibility for candidates to a judicial position to challenge the Council's decision to appoint another candidate. Professional associations of magistrates can also lodge appeals before the Council of State against decisions that affect collective interests of magistrates that they represent such as, for example, decisions affecting the working conditions of magistrates.

In Italy, decisions of the Council can be appealed before the Regional administrative tribunal (which is the first instance court in administrative proceedings). The decisions of the regional administrative tribunal can be appealed before the Council of State. Decisions adopted in disciplinary proceedings by the disciplinary board can be appealed before the chamber for civil proceedings of the court of cassation.

### 5.5.8 Specialised commissions

#### *Commissions deciding on specific matters*

As to the functioning of specialised commissions, there are wide variations among the national councils surveyed. A number of councils operate through commissions that function as working groups within the councils themselves and are composed by members of the councils (Italy, France, Belgium). In some cases, commissions adopt decisions on matters within their competence and the councils act as appeal bodies (Portugal). In other cases, the commissions' work is of a preparatory nature<sup>15</sup> and decisions are directly adopted by the council (Italy). In others, commission are separate bodies and councils appoint their members (Slovakia) while in other cases commissions and bodies competent to decide on recruitment, evaluation and disciplinary proceedings are completely separate and independent of the councils (Ukraine).

#### *Commissions attached to the councils and composed of council members*

In Belgium each linguistic section of the council appoints two commissions: *one commission for careers and appointment* composed of seven lay members and seven professional members (judges and prosecutors) and *a commission on advice and inquiries* composed of four lay members and four professional members. Decisions of the commission for career can be validly adopted only if at least ten members are present while the commission on advice and inquiries can validly decide if at least six members are present. Functions that are not expressly attributed to the commissions are exclusive competence of the Councils' plenary. Notably neither the Council nor the commissions are competent for disciplinary proceedings which are decided by other authorities such as chiefs of office.

In France, the section for prosecutors of the council decides directly on disciplinary matters in a composition of 16 members, which includes besides all the members of the section of the council for prosecutors, also the prosecutor who is appointed as member of the Council's section for judges. Thus, the disciplinary board is composed of eight prosecutors and eight lay members. In order to deliberate validly, the proceedings must be attended by the president and at least seven members. Decisions are adopted by majority. Upon request of any of the board's member the vote can be cast by secret ballot. While the disciplinary section for judges issues final decisions, the section for prosecutors is competent to issue an opinion on the applicable sanction to the Minister of Justice who can adopt even stricter sanctions. The opinion is adopted following an inquiry carried out by the judicial inspectorate unless the council can directly review the matter.

---

<sup>15</sup> In Spain besides specific functions delegated by the plenary, a permanent Commission performs a number of statutory functions such as preparing reports for promotions of prosecutors, informing the Prosecutor General about the advisability of ordering one or more Prosecutors to be temporarily detached to a specific office. However, the council itself has limited decision powers.



Since 2010 individuals can submit complaints against magistrates directly to the Council. Complaints are filtered by a filtering commission (composed of two magistrates and two lay members, appointed each year by the president of the council). The filtering commission validly deliberates if at least three members are attending. It decides on the admissibility of complaints by majority. Members of the filtering committee cannot sit in disciplinary proceedings if they have decided on the admissibility of the case being considered.

In Italy, decisions are usually adopted by the plenary of the Council, while preparatory works are carried out by specialised commissions. Each commission consists of six council members (four magistrates and two lay members) and is competent for specific matters. Each member is appointed for one year. Currently there are nine commissions: (1) for incompatibilities and conflicts of interests; (2) for internal regulations, (3) for recruitment and transfers, (4) for the evaluation; (5) for the appointment of chiefs of office; (6) for research and analysis; (7) for the organisation and efficiency of the judiciary; (8) for honorary magistrates and (9) for international relationships.

In addition to the nine commissions, a disciplinary board is chaired by the vice president and five council members (one chosen from among council-members elected by parliament, one from among prosecutor-members from the court of cassation and three prosecutor-members from first instance and appeal courts). Recently, the Ministry of Justice has submitted a proposal to select the members of the various commissions by drawing in order to avoid that appointments are determined by backdoor agreements among various political factions within the Council.

In Portugal the Council comprises three commissions. A commission for evaluation, a commission for disciplinary matters and a permanent commission. Membership in the evaluation commission is incompatible with membership in the disciplinary commission.

The permanent commission performs functions delegated by the plenary that are not within the competence of the evaluation and disciplinary commission. The permanent commission is composed by the prosecutor general and four members designated by the plenary of the Council. Its composition must secure equal representation of members from among prosecutors and lay members. The members are appointed for a period of three years, renewable once.

The disciplinary commission is composed by 11 members of the Council including the Prosecutor General, five elected prosecutors (with proportional representation of the prosecutors elected by the general assembly and the district general/deputy prosecutors), the deputy prosecutor general, three from among the lay members elected by parliament (for a period of 18 months) and one from the lay members elected by the Ministry of Justice (who is elected by ballot for a period of 18 months).

A rapporteur, who is selected by drawing from among the members of the commission prepares a report with a draft proposal, which is to be adopted by majority vote. The Prosecutor General has the casting vote. Decisions are validly adopted with the attendance of seven members. All decisions taken by the Disciplinary commission can be appealed before the Council's plenary and, ultimately, to the Supreme Administrative Court.

### ***Councils proposing members to external commissions***

In Slovakia candidates to the disciplinary commissions and to the selection committee are proposed by the regional councils to the national council. The national council then proposes the appointment of candidates to the Prosecutor General who appoints them for a period of three years.

Disciplinary Commissions are set up at the Prosecutor General's Office and decide in disciplinary proceedings. Currently there are five Disciplinary Commissions and two Disciplinary Appeals Commissions. Each disciplinary commission is composed of a chair and three members. Each disciplinary appeal commission is composed of five members. Cases are assigned to the commission by drawing.





Only prosecutors with at least five years of service and with a clean disciplinary record and against whom there are no pending disciplinary proceedings are eligible to be members of the Disciplinary commissions. Also, ineligible are the prosecutor general, other chief prosecutors and members of the Council<sup>16</sup>. A member of the commission cannot participate in the subsequent decision of the appeal commission.

Members of the commissions are also subject to recusal in case of conflict of interests. As soon as a member becomes aware of a conflict of interest, at any stage of the procedure, he must immediately notify the Prosecutor General. The prosecutor object of pending disciplinary proceedings has the right to comment on the circumstances of the recusal and is obliged to notify the Prosecutor General on any circumstance relevant for recusal of the member of the disciplinary commission. The Prosecutor General decides on the removal of the member of the Disciplinary Commission.

Disciplinary proceedings can be initiated by chiefs of office, the prosecutor general and the Ombudsman (if he considers that the relevant prosecutor in the performance of his duties has violated the fundamental rights and freedom of a petitioner seeking legal protection from the Ombudsman). In so far as the Prosecutor General is concerned, disciplinary proceedings against him/her are conducted by the Constitutional Court.

### ***Ethics commissions***

Ethics commissions, usually created within Councils of the Judiciary, have been tasked in several CoE state members with the provision of advice to prosecutors.

Ethics commissions have been usually established as separate bodies from disciplinary commissions within Councils (France, Slovakia, Croatia, Serbia, Montenegro). The rationale behind this approach is securing a distinction between the preventive function of the ethics commission and the enforcement role of disciplinary bodies. This is also reflected in rules on incompatibility between membership in the ethics commission and in the disciplinary bodies. At the same time rules have been adopted to coordinate the functioning of the two bodies for example on whether decisions and opinions by ethics commissions can be used as evidence in disciplinary proceedings.

Ethics commissions are usually composed of prosecutors both active and retired, but also by lawyers, professors and academics specialized in ethics (and more recently behavioral sciences). In some cases, members are appointed by higher authorities. For example, in France they are appointed by the assembly of magistrates, the high judicial council and the Council of State. In other state members, members of ethics commissions are directly elected by all members of the judiciary.

In Slovakia the ethics committee is in charge of adopting opinions on ethics matters. The opinions are binding on the requesting prosecutor but not on the Disciplinary Commission. The Ethics Committee has nine members elected by direct universal suffrage and by secret ballot. Only a prosecutor can be a member of the ethics committee.

In Serbia the Ethics Commission is an ad hoc body composed by five members who are selected for a period of three years. One member is selected among elected members of the Council, three members are prosecutors and one member is an individual “who has publicly affirmed himself in the defense of ethical values”. It acts upon initiative of a plurality of state bodies including individual prosecutors but also citizens. It has a number of competences including issuing an opinion as to whether a given conduct is in accordance with the code of ethics; issuing written instructions and practical guidelines on ethical issues, performing confidential consultations with

---

<sup>16</sup> The law specifies the following categories of prosecutors that are ineligible: the prosecutor general, and deputy Prosecutor General, the special (and deputy) prosecutor, the regional (and deputy) prosecutor, district (and deputy) prosecutor and any member of the Prosecutorial Council.



the holders of the public prosecutor's office and securing the implementation of the Code of Ethics.

## 6 THE COMPOSITION AND OPERATION OF THE SCP IN THE REPUBLIC OF MOLDOVA

The Action plan for the implementation of the Strategy for ensuring the independence and integrity of the justice sector for 2021-2024 in the Republic of Moldova (hereinafter “the Strategy”) has included among its objectives strengthening the capacities of the Superior Council of Prosecutors by, *inter alia*, amending/reviewing its composition, term of office, reducing the term of office of its President and introducing the principle of rotation of this position between members selected from among prosecutors and lay members. The plan also mentions establishing a mechanism for challenging the decisions of the SCP at the Supreme Court of Justice by removing double degree of jurisdiction. The Strategy for ensuring the independence and integrity of the justice sector for the same period sets as its priorities securing the independence of the prosecution service, strengthening the capacities of the SCP and its Boards as well as revising its composition, in particular of its lay members, in line with GRECO recommendations.

Article 69 of the Law on PPS provides for the membership of the SCP. There are 15 members, 6 ex-officio, 5 elected prosecutors and 4 representatives of civil society. The ***ex-officio members*** are the following:

- The General Prosecutor,
- The chief prosecutor of ATU Gagauzia,
- The President of the SCM,
- The Minister of Justice,
- The President of the Union of Lawyers and
- The Ombudsman.

The 5 elected prosecutors are elected by the General Assembly of Prosecutors from among active prosecutors, one from the GPO and 4 from territorial and specialised offices. The elected prosecutors are detached from their main function for the duration of their mandate.

The remaining 4 members representing civil society are in fact appointed, one each by the President of the Republic, the Parliament, the Government and the Academy of Sciences of Moldova. They must have law degrees and at least three years legal experience.

Members of the SCP, other than the ex-officio members, work full-time in that role.

The number of members of the SCP, 15, is not out of line with European norms for a country of Moldova’s size and population. During the consultations, the representative of the Prosecutor General office expressed a preference for a reduction of the number of members from 15 to 11 and to have an odd number to avoid deadlocks in decision making.

The number of prosecutors elected by their peers among SCP members is five. Together with two ex-officio prosecutorial members (i.e. the Prosecutor General and the Head Prosecutor of the Autonomous Region of Gagauzia) there are now seven prosecutors and eight non-prosecutors in the composition of the SCP.

Regarding the composition of the Council, the CCPE has consistently argued for a majority of prosecutors elected by their peers.

The Venice Commission, on the other hand, has taken a different approach. In its amicus curiae brief for the Constitutional Court of the Republic of Moldova adopted in December 2019 “On the amendments to the law on the Prosecutor’s office”<sup>17</sup>, the Venice Commission noted that the newly

---

<sup>17</sup> See footnote 3 above.



regulated composition of the SCP which added three more lay members (the Ombudsman, the President of the Bar Association and a member from civil society proposed by Government) and where seven out of fifteen members were either ex officio or elected prosecutors “did not seem to threaten the independence of prosecutors because the composition of the SCP remains sufficiently pluralistic, the prosecutors still representing a relative majority there”. How the Venice Commission concluded that seven out of fifteen can constitute a majority, whether relative or otherwise, is not explained. Presumably what they meant was that the prosecutors as a group were larger than any other single group. The point appears to be that in the case of prosecutors the Venice Commission considers that it is sufficient for prosecutors to form a substantial part, if not a majority, of a prosecutorial council, a point which has been made consistently in a number of their opinions.

### **GRECO Recommendation No. XV, 4th Evaluation Round on the Republic of Moldova.**

GRECO appears more favourable towards the idea of a majority of prosecutors than is the Venice Commission. In its Recommendations to the Republic of Moldova adopted in the framework of the 4th Evaluation Round (Prevention of corruption in respect of members of parliament, judges and prosecutors), GRECO recommended “that appropriate measures be taken to ensure that the composition and operation of the Superior Council of Prosecutors be subject to appropriate guarantees of objectivity, impartiality and transparency, including by abolishing the ex officio participation of the Minister of Justice and the President of the Superior Council of Magistracy (§148).

In its Second Compliance report, reviewing the recent Constitutional and legislative amendments, GRECO noted that “the amended legislation provides for an increase in members of the SCP, by adding two ex officio members (the Ombudsman and the President of the Bar), and one member appointed by the Government. The number of non-prosecutors increases to eight and the number of prosecutors elected by their peers is five. At the same time, the Minister of Justice remains an ex officio member as does the President of the Superior Council of Magistracy, contrary to what is required by the present GRECO recommendation”.

#### **6.1 The ex-officio members**

The *ex-officio* members of the SCP are the General Prosecutor, the chief prosecutor of ATU Gagauzia, the President of the SCM, the Minister of Justice, the President of the Union of Lawyers and the Ombudsman.

According to statements of the Moldovan authorities (referred to in GRECO’s First Compliance Report and subsequent statements) the ex officio members such as the President of the Superior Council of Magistracy, the Ombudsman and the Minister of Justice in practice do not attend the sessions of the SPC.

In its opinion submitted to the Ministry of Justice “regarding the needs for amending the Law No3/2016 on the Prosecution Service” the SPC has proposed the exclusion from the members of the SCP of the Minister of Justice, the President of the SCM and the Ombudsman.

The SPC noted that membership of the Ombudsman in the SCP would put at risk the requirement of organisational, operational and financial independence from any public authority regardless of its legal form. The participation of the Ombudsman would also be incompatible with the Venice Commission Principles on the work of the Ombudsman institution requiring it to avoid engaging in political, administrative or professional activities incompatible with its independence or impartiality.

This position is shared by the Ministry of Justice whose representative has confirmed, during the consultations with the international consultants that its priority is its own exclusion from the membership of the SCP.



Similarly, the representative from the Prosecutor General office agreed with the need to exclude the Minister of Justice who, in any case, has so far attended the sessions of the SCP only a limited number of times.

Notably sessions where the Minister of Justice and the President of the SCM have attended concerned crucial disciplinary matters or involved the Prosecutor General or heads of specialised prosecutor's offices.

### 6.1.1 *The General Prosecutor*

With regard to the participation of the General Prosecutor there is no standard European practice. In some countries the General Prosecutor is a member of the council and in others not. There are both advantages and disadvantages to the General Prosecutor being a member. One advantage is that it may be more likely that decisions of the council will be implemented in practice. The main disadvantage is that the General Prosecutor may be in a position to exercise undue control over the other members thereby undermining the council's function of providing democratic self-governance. If the general prosecutor is to remain a member it will be important to safeguard the independence of the elected prosecutor members, for example by ensuring that at the end of their mandate they have a right to resume their previous function.

### 6.1.2 *The Minister of Justice*

Regarding the membership of the Minister of Justice in the SCP, the Venice Commission in its *amicus curiae* brief for the Constitutional Court noted the absence of a strict European standard. It considered that as long as the role of the executive representative is not decisive, such presence may even facilitate dialogue among various members of the system. The Venice Commission further noted that the Minister only appoints one of the other members of the SPC, a representative of civil society, and concluded that the Minister's participation would not put the SPC under the control of the government. In such circumstances "the presence of the Minister would not seem objectionable".

However, if one asks the question whether the membership of the Minister of Justice is desirable rather than whether it is objectionable as amounting to a form of control by the Government a different answer may be possible. The Office of the Prosecutor is, according to the Constitution, an autonomous institution within the judicial authority. The Minister of Justice has, therefore, no function in relation to the prosecution. It is difficult to see what value is added by the Minister's presence on the SCP. It may create a perception that the prosecutor's office is subservient to the executive power. The Venice Commission has consistently opposed the presence of Ministers of Justice on judicial councils. It is difficult to see a clear justification to apply a different standard to a prosecutorial council especially in a country where the prosecution is considered part of the judicial power.

Notably in **France** the Ministry of Justice, who was previously an ex officio member of the Council, has been removed on the basis of reforms aimed at strengthening the independence of the judiciary.

Furthermore, it seems that in practice the Minister of Justice does not attend the meetings of the SCP. The current minister informed the mission experts that he was not in favour of retaining a position on the SCP. The international consultants therefore recommend that the Minister should no longer be an ex officio member of the SCP.

### 6.1.3 *The Chief Prosecutor of ATU Gagauzia*

It appears that the reason for this provision is to ensure representation of the Gagauz, an ethnic minority of Turkish origin who are Russian speakers. It is important in the Moldovan context to ensure Gagauz representation. It might be more logical if the prosecutors of AUT Gagauzia elected one of their own number rather than appointing the Chief Prosecutor ex officio.



#### 6.1.4 *The President of the SCM*

It is difficult to see the justification for the president of the SCM being an *ex officio* member. This is not a reciprocal arrangement between the two councils. There may be occasions where there is a case for cooperation between the two councils, for example, where a proposal impinges on both judges and prosecutors such, for example, as a proposal to change court districts, but having the president of one of the councils as an *ex officio* member of the other is not really the solution as to how to deal with such cases. In none of the countries reviewed the President of the SCM is a member of the Prosecutorial Council<sup>18</sup>. The international consultants therefore recommend that the President of the SCM should no longer be an *ex officio* member of the SCP.

#### 6.1.5 *The President of the Union of Lawyers*

It is undoubtedly useful to have independent members of a prosecutorial Council who have a knowledge of the legal system. It is questionable whether appointing the President of the Union of Lawyers *ex officio* is the best solution as this person is likely to be rather busy and may not give the business of the council the attention it needs. The representative of the Prosecutor General's office, during the consultations, expressed favour for the election of a member from among the lawyers by the Council of the Union of Lawyers. A further advantage of this solution is that such a member could work on a full-time basis which could reduce the risks of conflicts of interests.

In **Belgium** for example any lawyer or Bar association can propose a candidate to the Council while in France the lawyer-member is appointed by the president of the National Bar Association on the basis of the opinion of the general assembly of the regional Bar associations.

The international consultants therefore support the idea that the Union of Lawyers or its Council would elect or nominate one of its members to the SCP.

#### 6.1.6 *The Ombudsman*

As already noted, the Ombudsman, had the view that his participation in the SCP would not be compatible with the duties of his office for the reasons already stated.

As a comparison, in **France** the law expressly states the incompatibility between membership in the Council and the office of the Ombudsman while in Slovakia the Ombudsman has the right to seek the initiation of disciplinary proceedings against prosecutors for violations of constitutional rights and liberties. Such right appears to be more consistent with the nature of the Ombudsman institution than membership in the Council.

The international consultants therefore recommend that the law should be amended to remove the Ombudsman from the list of *ex officio* members.

#### 6.1.7 *Conclusions concerning the ex-officio members*

The international consultants therefore recommend that the Minister of Justice, the President of the SCM, the Ombudsman and the President of the Union of Lawyers should no longer be *ex officio* members of the SCP, but that the members or the Council of the Union of Lawyers should elect one member to the SCP.

---

<sup>18</sup> The only exception being Italy where however there is a joint Council for judges and prosecutors and thus *ex officio* membership is granted to both the president of the Court of Cassation and the Prosecutor General at the Court of Cassation.



## 6.2 The method of election and selection

The elected members of the SCP are nine: five from among prosecutors and four from among civil society.

There are at present no special provisions intended to ensure gender balance. With regard to **gender balance**, the international consultants recommend that the election procedure both in respect of prosecutors and lay member should secure a gender balance in the composition of the SCP for example by introducing a statutory requirement of fair gender representation in the SCP, such as by requiring that at least 40% of candidates belong to each gender or that each elector cast three votes, which must include at least one candidate of a different gender to the other two. Additionally, in case of a tie between candidates of different gender, the candidate who belongs to the underrepresented gender may be elected. Similar solutions have been introduced in **Spain and Belgium**.

### 6.2.1 Members elected among prosecutors

Five members of the Superior Council of Prosecutors are elected by the General Assembly of Prosecutors from among the active prosecutors by direct, secret and freely expressed vote. These consist of one member from among prosecutors of the General Prosecutor's Office and four members from among the prosecutors of the territorial prosecutor's offices and the specialized ones.

The international consultants were informed during the consultations that given the relatively small size of Republic of Moldova the attendance of prosecutors to the General Assembly does not appear to pose a problem. For example, out of a total of 720 prosecutors, 550 attended the most recent General Assembly.

Due to the Coronavirus crisis, the next General Assembly has, however, been postponed until 2021 as the existing regulations on the functioning of the SCP and on the Prosecutor's office do not provide for electronic voting or voting by correspondence. The international consultants recommend that the law be amended to provide for postal or electronic voting where a General Assembly cannot take place due to an emergency.

The 4th Evaluation Report of GRECO was critical of the procedures used to elect members of the SCP. The Report (at paragraph 148) states as follows:

*"However, the concerns expressed with respect to the Superior Council of Magistracy in the chapter on judges apply mutatis mutandis to the SCP and the GET refers to its comments made in that context (see paragraphs 148, 91-93), in particular as regards ... the rushed election procedure of the members of the Superior Council of Magistracy. It is important to ensure that prosecutorial and lay members of the SCP are elected according to fair and transparent procedures, which enable voters to get sufficiently acquainted with candidates' qualifications and programmes."*

The statement concerning elections to the SCM was as follows:

*"The GET has further concerns as to the selection process of the members of the SCM, which does not ensure that sufficient information is available to the voters and the public on candidates. The Judicial members of the SCM are elected by the General Assembly of Judges, but the GET was told that the time between the announcement of candidates and their election is too short, which gives little opportunity for voters to get acquainted with candidates' backgrounds and ideas. Lay members, for their part, are elected by Parliament. In order to dispel impressions that they may be elected according to political criteria, amendments to the Law on the SCM introduced a requirement that candidates be selected by the Standing Legal Committee for Appointments and Immunities following a public competition. This procedure was implemented for the first time in December 2013 in a rather rushed manner: a competition was announced in December 2013, a hearing held on*



*19 December and the candidates were selected by the commission immediately following this hearing, with no explanation given of the selection criteria.”*

The international consultants therefore recommend an amendment to the SCP Regulation to provide a system which ensures that nominations must be made well in advance of the General Assembly and that steps are taken by the SCP to allow each candidate to provide a written programme for distribution to every elector by the SCP in advance of the General Assembly of Prosecutors.

Additionally, as in **Portugal**, the Prosecutorial Council could provide candidates with a platform, for example through its website, enabling them to run their electoral campaign and secure that, insofar as possible, candidates are granted leave from service to conduct their electoral campaign.

### **6.2.1.1 Requirements for candidacy**

According to the Regulation on the functioning of the SCP (hereinafter “the Regulation”), the requirements for persons seeking to be SCP members are that they should have an impeccable reputation and enjoy a recognized authority in their field of activity. Prosecutors found guilty of committing a crime cannot become members of the Superior Council of Prosecutors. Candidates from among prosecutors must have also not been sanctioned under disciplinary proceedings during the year preceding the General Assembly of Prosecutors.

The regulations do not mention what happens in case of pending proceedings. It seems that a prosecutor may submit his or her candidature if there are ongoing proceedings.

The requirement ignores the possible existence of several or severe disciplinary sanctions throughout the career of a prosecutor. By contrast, the draft constitutional amendments on the CSM require the absence of disciplinary sanctions for the previous three years.

Additionally, in its Report on Moldova in the framework of the 4th Evaluation Round GRECO, stressed that in the face of numerous cases of misconduct by prosecutors reported in the media the prosecution service was considered as not sufficiently proactive and transparent in addressing them. Legal provisions on accountability were said not to be enforced in full and sanctions appeared lenient. GRECO recommended that measures be taken in order to strengthen the objectivity, efficiency and transparency of the legal and operational framework for the disciplinary liability of prosecutors. These recommendations remain non implemented. Thus, the reliability of disciplinary case law for securing the integrity of candidates to the SCP may be limited.

Besides disqualifying grounds such as a disciplinary and criminal liabilities, **there is no express mention of integrity requirements** unless impeccable reputation covers/entirely absorbs the notion of integrity. Reference to impeccable reputation may fill the gaps left open by the (so far) limited disciplinary enforcement. Additionally, this requirement would enable to screen the integrity of candidates from civil society in respect of whom rules on the absence of disciplinary liabilities may not be applicable. The Venice Commission has already stated that criteria such as personal qualities or a faultless reputation should be set out clearly and exhaustively in the primary legislation and not left to regulations to be used by the evaluation body. For this purpose, **it would also be necessary to identify criteria based on which the integrity and reputation of a candidate could be assessed**<sup>19</sup>.

The Joint Interim Opinion of the Venice Commission and the Directorate of Human Rights (DHR) and Rule of Law (DGI) of the Council of Europe on the draft law on the reform of the Supreme



Court of Justice and the Prosecutor's Office (CDL-AD(2019)020)<sup>20</sup> found that the MOJ considered the need to establish an evaluation committee for the vetting of key judges' and prosecutors' positions in the Republic of Moldova (§18). The Commission approved the proposals subject to a number of changes. It would appear to the international consultants to be appropriate that, if and once introduced, such vetting procedures be also applied to candidates for election to the SCP and SCM.

The international consultants recommend that the provisions for eligibility for election to the SCP and its Colleges should disqualify candidates who have been subject to disciplinary sanctions within the previous three years in line with the SCM requirements. Where a candidate is facing disciplinary proceedings at the time of an election, if he or she is elected his or her membership should be suspended pending the outcome of those proceedings and if disciplinary sanctions are imposed his or her position on the SCP or its College should be vacated and filled by the candidate who was next placed in the election.

The international consultants also recommend that the provisions for eligibility for election to the SCP should impose more strict integrity requirements and procedures to verify their integrity. It should be necessary that candidates have made proper and accurate asset declarations. Each candidate's asset declarations should be screened and failure to submit an asset declaration or the submission of an incorrect declaration should be considered as disqualifying grounds.

Additionally, members of the SCP should submit asset declarations and declarations of interests to the Council itself (and not only to the National Integrity Authority) so that the Council can more easily monitor not only the integrity of its members but also manage recusal procedures.

Further grounds for ineligibility may be considered to exclude the candidature of prosecutors who are seconded to administrative positions within the executive, who hold leading positions in professional associations and even chiefs of office. Such rules would reduce the risks of undue political influence, of trading in influence within the prosecution service and of a duplication of hierarchical roles within the councils.

#### **6.2.1.2 Election Procedure for prosecutors**

Prosecutors who have accumulated the highest number of votes at the General Assembly of Prosecutors are considered elected members of the Superior Council of Prosecutors. The next following prosecutors on the list of candidates, who accumulated the highest number of votes, shall fill in the vacancies in the Council, depending on the number of accumulated votes.

#### **6.2.2 Members elected from among civil society**

Four members of the Superior Council of Prosecutors are elected through competition from among civil society, as follows: one by the President of the Republic, one by the Parliament, one by the Government and one by the Academy of Sciences of Moldova.

##### **6.2.2.1 Requirements for candidacy**

The candidates for the position of member of the SCP elected from civil society must have higher law education and experience in the domain of law of at least 3 years. They must be recognised authorities in their fields of activity, enjoy outstanding reputation and not have been declared guilty of having committed a criminal offence.

The constitutional amendments reforming the CSM and positively assessed by the Constitutional Court expressly include among the requirement not only an outstanding professional reputation but also personal integrity and not being politically affiliated.

---

<sup>20</sup> *Joint Interim Opinion of the Venice Commission and the Directorate of Human Rights (DHR) and Rule of Law (DGI) of the Council of Europe on the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office (October 2019)*





In the Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending and supplementing the constitution with respect to the Superior Council of Magistracy, adopted by the Venice Commission on 20 March 2020 (CDL-AD(2020)001), the Venice Commission stressed that “politically affiliated” should not be understood as conducting advocacy activities and recommended to use the expression “should not be members of political parties” instead. A similar provision may be appropriate also in respect of lay members of the SCP as the SCP acts as appeal body for decisions adopted by the three Colleges (discipline, recruitment and career, performance evaluation).

The same opinion recommended against requiring specialisation in law of candidates for the SCM as it may exclude persons with valuable experience in other disciplines or from civil society with no experience in the area of law. Such exclusion would also go against the trend of other states to include persons with experience in other relevant areas of expertise. The same considerations should apply also to the SCP lay members.

The same opinion of the Venice Commission also stated that “It is crucial that the organic law provides for a detailed and solid mechanism to check the integrity and professional reputation of lay members, failing which the constitutional provision which requires that the lay members are “persons who enjoy a high professional reputation and integrity, with experience in the area of law (...)” might remain declaratory without real impact.”

This recommendation should also apply to candidates to the SCP and the Venice Commission Opinion on the introduction of special evaluation mechanisms for vetting key judicial and prosecutorial positions is directly in point. The international consultants refer to integrity requirements and verification mechanisms mentioned above in chapter 4.1.1.1 insofar as applicable.

### **6.2.2.2 Election procedure of lay members**

There appear to be no formal procedures laid down for these appointments. This appears to be a very unsatisfactory situation.

With regard to the identification of possible suitable lay members we found no information concerning any procedures that may be in place. There appears to be no formal procedure to request expressions of interest and it appears to be up to the appointing authorities themselves to decide how to proceed.

The draft constitutional amendments on the SCM mention a transparent procedure based on merit. Lay Members of the SCM must be elected with 3/5 of votes of elected deputies. A similar procedure would be appropriate for the candidate to the SCP elected by Parliament.

The Venice Commission in its opinion of 20 March 2020 ((CDL-AD(2020)001)) criticised the absence of provisions in the Constitution on the procedure to elect lay members to the SCM. It considered that in the Moldovan context it was necessary to avoid the risk that lay members would be a coherent and likeminded group in line with the wishes of the government. Similar considerations apply to the election procedure of lay members to the SCP.

The representative of the Prosecutor General’s Office, proposed during the consultations that the Parliament should elect two lay members, regulate eligibility requirement and organise the election. Such members could be selected by a specialised parliamentary committee rather than by the parliament as this would reduce the risk of politicization.

The international consultants note that a similar solution is adopted in **France** where the lay members appointed by Parliament and by the President of the Republic are selected on the basis of an opinion of specialized parliamentary committees.



The GPO representative further suggested that one further member from civil society could be elected by the representative of the Academy of Science and that the Government should not be involved in the election of members as it already decides on the budget. The President of the Republic could select one member and the Council of Universities could select one member from among tenured professors. It is not clear why the Government should elect a member of the SCP and might be preferable that the Parliament should instead elect a second member. The international consultants share this view also in light of the lack of transparency of an appointment procedure by the Government and the higher risks of politicisation.

The Venice Commission consistently recommends that if a member must be elected by Parliament, a qualified majority, usually of at least 3/5, and with an anti-deadlock mechanism, should be required in order to avoid politicization. In theory, this should lead to the election of more neutral figures, who have no strong political affiliation. However, such procedures do not always result in depolitisation of candidates as it is not unknown for political parties to share out such appointments behind closed doors.

The international consultants recommend a greater transparency in the selection of suitable candidates for election as lay members of the SCP and in the procedures for their election.

For example, two lay members could be elected by Parliament by a qualified majority, say 3/5 of the members. Such majority should be required for the first two voting rounds, after which in case a deadlock persists an alternative method of filling the vacancies should be adopted such as by a vote of the absolute majority of the members of the nominating bodies. Serving prosecutors and politicians should be excluded. The voting procedure should be preceded by a sufficient period during which candidatures are published.

There should be no bar to the presentation of suitably qualified candidatures. Some knowledge or experience of law or possibly involvement in civil society would seem to be desirable. The publication of candidatures and the curricula vitae of candidates would also offer the opportunity for civil society at large to scrutinize their qualification and integrity. Candidates should be examined during open sessions of the Parliament where civil society can also submit questions (through members of Parliament).

As for the member appointed by the Academy of Sciences, faculty councils or representatives of legal higher educational institutions and other scientific institutions could be involved in the preliminary selection procedure on the basis of secret ballot by majority vote.

Additionally, qualifications of candidates could be strengthened by increasing the professional experience requirement from three to five years. The law could introduce additional ineligibility grounds to exclude representatives of civil society who, in the previous three or five years, have held public office both at national and local level.

### 6.3 Full-time and part-time secondment

At present the elected prosecutors and civil society members are all full-time members whereas the ex-officio members are part time. Previously prosecutor members continued to exercise their functions in their office of origin. This often led to work overtime during the weekend to attend the sessions of the SCP. The full-time mandate has the advantage of reducing the risk of conflicts of interest. There is, however, a disadvantage in the case of elected prosecutors who tend to lose touch with their electors as time goes on.

The international consultants recommend that, following the example of **Portugal**, a flexible approach is adopted by allowing the Council to determine, on a needs basis, in which cases a membership is exercised on a full time basis. Otherwise, one could consider if prosecutor-members should normally be able to continue performing their original functions with a corresponding reduction of their workload



## 6.4 The length of the mandate

The term of office of the elected members of the SCP is four years. The same person cannot hold the membership mandate of the Superior Council of Prosecutors for two consecutive terms. It seems it is possible for a person to have a second mandate provided it is not consecutive. The elected members of the Superior Council of Prosecutors hold office until the election of new members.

In its opinion to the Minister of Justice, the SCP has proposed to extend the mandate to six years (taking into consideration the duration of the mandate of the Prosecutor General of 7 years also to avoid an overlap between the two terms).

A six-year mandate is longer than in most countries whereas a four-year mandate is quite common. A drawback of lengthening the mandate is that inevitably the SCP would become more out of touch with serving prosecutors for more of the time. Part of the rationale for prosecutorial councils is to ensure representation of the prosecutors. Lengthening the mandate would also over time increase the proportion of young prosecutors who had never voted for members of the council. With a four-year mandate at any given time every prosecutor who has four years of experience will have had the opportunity to vote in an SCP election. With the longer mandate there will be prosecutors with up to six years of experience who will never have had a chance to vote in an SCP election. These are substantial arguments against an increase in the mandate.

The international consultants therefore recommend the retention of the four-year mandate.

## 6.5 Status and conditions of service of SCP members

### 6.5.1 Remuneration

Currently, the remuneration of the members of the SCP from among prosecutors, (pursuant to the Law on the unitary salary system in the budgetary sector no.270 dated 23 November 2018), is established on the basis of their seniority and salary classes of the prosecutor's offices from which they were seconded. Thus, there may be significant variation in remuneration among the various members of the SCP.

In its Opinion to the MoJ, the SCP has proposed a unification of the remuneration of prosecutor members based on the salaries of prosecutors working at the General Prosecutor's Office adjusted for their seniority rather than on the basis of each member's original position. The MoJ held that such reform would increase the motivation of prosecutors to run for a position within the SCP.

The representative of the Prosecutor General mentioned that all members are remunerated on a full-time basis on a salary scale similar to the one for the Prosecutor General. However, this does not seem to be the case, based on the opinion of the SCP above.

The international consultants consider that there should be a unification of the remuneration of prosecutor members based on the salaries of prosecutors working at the General Prosecutor's Office adjusted for their seniority rather than on the basis of each member's original position as proposed by the SCP. In case prosecutor-members continue performing their original functions they should be compensated for travel and accommodation expenses (if necessary) and receive a per diem for the attendance of the SCP sessions.

### 6.5.2 Status and incompatibilities

Members of the Superior Council of Prosecutors, except *ex-officio* members, cannot exercise any other remunerated activity, except didactic, creative, scientific activities, sport activities or within an NGO.

Members are also required to respect confidentiality and the data protection regime in respect of information acquired in the exercise of their mandate.



Members of the SCP from among prosecutors are subject to the obligation to declare their assets and interests to the National Integrity Authority pursuant to law No 133 of 17 June 2016 on the declaration of assets and personal interests. Law No 133 also provides that members of the SCP from among lecturers/academics are required to submit declarations of assets and interests<sup>21</sup>.

The President of the SCP must inform immediately the National Integrity Authority on any real conflict of interest in which he may find himself. The members of the SCP report potential or real conflicts of interests to the President of the SCP who will decide or, in case of doubt, inform and seek guidance from the National Integrity Agency. In the opinion of the international consultants this must be absolutely strictly applied **and there should be an effective procedure to ensure that failure or refusal to comply, or any declaration which is incorrect in any significant particular should result in removal from the SCP and disqualification from SCP membership.**

### 6.5.3 Termination of the mandate

Membership in the SCP terminates upon renunciation, appointment to one of the boards, termination of the mandate within the SCP, suspension or dismissal from the prosecutorial function, “a final ascertaining act on his/her incompatibility”, violation of the provisions on conflict of interest established by a final decision, the impossibility to exercise the mandate for a period exceeding four months, the existence of circumstances impeding the election or appointment to the SCP and death.

There seems to be no mention of a requirement that members of the SCP be impartial and independent (although the primary function of the SCP is to guarantee the independence of the Prosecutor’s Office). Considering the SCP’s complex membership (including lay members, some of whom are appointed by Government) and their involvement in procedures where Article 6 ECHR applies<sup>22</sup> (disciplinary proceedings) **it is imperative that requirements of independence and impartiality of the members of the SCP be guaranteed in the law and respected in practice.**

Grave violations leading to the termination of membership within the SCP should include, besides the violation of the requirement of independence and impartiality, also the failure to attend a specified number of sessions of the SCP. For example, in Portugal, unjustified absence from three consecutive sessions or five sessions in total leads to loss of membership.

The procedure for suspension and removal of members should also be regulated in detail in the Law on the SPC. The international consultants recommend that any decision for the removal of members of the SCP, including removal for irregularities in the declarations of their assets or interests or failure to submit such declarations, should be adopted by the plenary of the SCP upon the initiative of the President or a specified number of members. The number of proposers required should be high enough to discourage vexatious proposals but not so high as to discourage cases where removal is worthy of serious consideration.

For example, **in Ukraine** one third of the members may make such a proposal; this number seems rather high. In Serbia any member of the Council may make such a proposal which is the lowest possible threshold. **In Slovakia** at least five members may propose removal. There

<sup>21</sup> Interests are defined in the law as “personal interest – any material or immaterial interest of the subject of the declaration resulting from his/her activities as a private person, from his/her relations with those close to him/her or with legal entities, regardless of the property type, from his/her relations or affiliations with non-commercial organisations or international organisations, as well as those resulting from the person’s preferences or commitments.”

<sup>22</sup> In *Olujić v. Croatia*, no. 22330/05, 5 February 2009, the applicant was President of the Supreme Court when the National Judicial Council (NJC) brought disciplinary proceedings against him and removed him from office. The Court went on to find that there had been a violation of Article 6 § 1 of the Convention on account of four factors, namely, the lack of impartiality of the President and two other members of the National Judicial Council, the exclusion of the public from the disciplinary proceedings against the applicant, a violation of the principle of equality of arms and the length of proceedings.



should be full respect for due process guarantees. A requirement for a proposal to be put forward by one fifth of the members would seem to be a reasonable threshold.

Suspension of membership should be provided for in the case of initiation of disciplinary proceedings or indictment for criminal offences punishable with imprisonment.

#### **6.5.4 Expiry of the mandate**

As prosecutors elected as members of the SCP work full time, they are detached from their main function for the duration of their mandate.

According to paragraph 2.21 of the Regulation, upon the expiry of the period for which the prosecutor was seconded, he or she shall carry further his or her functions in any vacancy as a prosecutor, at his choice, except for the position of chief prosecutor for a period of six months.

The SCP in its Opinion to the MoJ expressed serious concerns regarding the position in which the member will return at the end of his/her mandate and in particular the impossibility to participate in competitions for a management position for a period of six months. The problem arises because of the operation of paragraph 2.10 of the Regulation which provides that the prosecutor elected to the council who holds a management position within the Public Prosecution Service on the election date shall lose this position on the date of his/her secondment to the Council and this position shall become vacant. The SCP Opinion mentioned that in fact the “offer of any vacant position available within the prosecutor office” (with the exception of chief prosecutor) is effectively left to the discretion of the Prosecutor General thus putting members of the SCP at risk of undue influence in the exercise of their mandate. In the opinion of the members of the SCP consulted by the International consultants, the stage following the expiry of their mandate at the SCP represents the highest risk for their independence in consideration of possibility of retaliation by the Prosecutor General, not only with respect to the assignment to new functions but also due to the wide discretionary powers exercised by the Prosecutor General in respect of several aspects of prosecutors’ career. Thus, there is a risk of retaliation that should be addressed.

The SPC opinion proposed to amend the law so that the position or office of prosecutors elected to the SCP may be declared as temporarily vacant so that they are able to return to their original position upon expiry of their mandate.

The international consultants support the SCP’s proposal that where prosecutors held management positions at the time of their election those positions should only be temporarily vacant so that prosecutors elected to the SCP can automatically resume the post at the end of their mandate.

Temporary limitations on the possibility of former SCP members participating in competitions for chief of office positions exist in other European States and apply for even longer terms. In the opinion of the international consultants the requirement for a six-month cooling off period is justified and even necessary in the interests of maintaining public confidence in the integrity of the SCP.

## **6.6 Functioning of the SCP**

### **6.6.1 SCP Plenary Sessions**

The SCP convenes at least once per month. The meetings can be held in person or by teleconferencing and decisions can be made via email when necessary.

The meetings are public with the exception of cases when confidentiality or privacy considerations arise. In these cases, the SCP decides by a resolution to hold the meeting or any part of it behind closed doors. It is worth noting that information on the activity, career, assets of the prosecutor or candidate for the position of prosecutor are not deemed to be restricted or privacy related information, except for information deemed a state secret.



The representative from the civil society, during the consultations, mentioned that in practice sessions of the SCP and of the Colleges are held behind closed doors without any motivation. There is often lack of clarity about decisions adopted upon the request of the Prosecutor General and concerning questions posed to the SCP.

The international consultants recommend that consideration should be given to further specifying conditions for holding meetings behind closed doors and to introducing a system for lodging objections to holding particular meetings behind closed doors.

The agenda is published no later than two working days before the meeting. This seemed to the international consultants to be a rather short notice period except for cases of unusual urgency.

The meeting of the SCP is deliberative provided that at least 2/3 of the members attend it. Decisions are adopted in public session by open vote, expressed by the majority of members present. Any member of the SPC is entitled to express a separate opinion. Article 7.8 and 7.9 of the Regulations on the functioning of the SCP do not specify whether the separate opinions are also published. The international consultants recommend that the Regulation should be amended to provide that separate opinions are to be published along with the decision adopted by the SCP.

The decisions of the SCP are required to be reasoned and signed by all members present at the meeting and subsequently shall be published, within 10 working days from the date of their issue, on the website of the SCP. Decisions that were adopted in camera in order to protect privacy, are required to be published on the webpage of the SCP with any privacy related information removed.

A person affected by a matter subject to review by the SCP shall not be obliged to participate in the meeting. However, the SCP may decide to invite or hear such persons if they “appear at the Council meeting”. If the meeting concerns an appeal lodged against decisions of the Colleges, the SCP apparatus must notify the person concerned. However, their absence does not prevent the objection from being reviewed. It is mandatory to hear the persons who lodged an objection against the decisions of the Boards and who are present at the meeting.

The international consultants consider that a person affected by a matter subject to review by the SCP who was invited to the hearing should have the right to ask for an adjournment for good reason in order to be able to attend.

### **6.6.2 *Recusal and abstention***

A member of the Superior Council of Prosecutors shall not participate to the examination of an agenda issue if circumstances exist excluding his or her participation to the examination or raising doubts regarding his or her objectivity. Where such circumstances exist, the member of the SCP shall be obliged to declare his/her abstention or can be recused. The recusal application and the abstention declaration must be reasoned. It is not possible to recuse the entire composition of the SCP.

It appears from Article 78 of the Law on the Public Prosecution Service that only members of the SCP attending the meeting can recuse a member and then only when the relevant topic in the agenda is reached. The international consultants consider that other bodies or individuals besides the members of the SCP should be allowed to initiate a procedure for recusal of a member.

### **6.6.3 *Appeal against the decisions of the SCP***

According to Article 79 of the Law on the Public Prosecution Service any individual whose right was affected can appeal to the Supreme Court of Justice against the decisions of the SCP. It appears, therefore, that the right to appeal decisions of the SCP is wider in its personal scope than only to the persons who can lodge appeals before the SCP against decisions of the Colleges. This provision mentions “any person whose rights are affected” while the rules on appeal against decisions of the Colleges list a specific number of individuals who can appeal their decisions before the SCP. The international consultants recommend that consideration be given to



permitting representative associations of prosecutors to challenge decisions of the SCP and its Colleges as the strong hierarchical structure of the prosecution service may discourage individuals from challenging decisions, especially to those concerning senior prosecutors. Such a right exists in other European states and is, for example, expressly regulated in France.

#### **6.6.4 *The relationship between the SCP and the General Prosecutor***

The General Prosecutor appoints prosecutors upon the proposal of the SCP and establishes with the SPC's written agreement the internal structure of the prosecutor's offices.

During the consultations, the international consultants heard some suggestions that the General Prosecutor exerts excessive and undue influence in the procedure for appointment of prosecutors. It is difficult for the consultants to judge the extent of this influence. What is clear is that according to the Law the General Prosecutor has no authority to appoint prosecutors other than on the proposal of the SCP. The SCP organises the competition for the position of General Prosecutor, reviews candidates and proposes the candidate for appointment by the President of the Republic.

The General Prosecutor asks the permission of the SCP to initiate criminal investigations in regard to prosecutors (or initiates the criminal investigation in the cases regulated by the law) and notifies the SCP for the initiation of disciplinary proceedings. The SCP also appoints a prosecutor in case of criminal investigation against the General Prosecutor.

#### **6.6.5 *Suspension of Prosecutors***

A prosecutor in relation to whom criminal investigations are initiated may be provisionally suspended from office by the General Prosecutor, with the consent of the SCP.

In extraordinary situations that cannot be postponed, the General Prosecutor may suspend the prosecutor from office without the consent of the Superior Council of Prosecutors, until the next meeting of the Superior Council of Prosecutors.

It is important to bear in mind that Article 6 of the ECHR applies to hearings concerning the dismissal and suspension of prosecutors. It is therefore necessary to ensure that the full range of procedural rights required by Article 6 are provided to the prosecutor concerned. These require, for example, as a minimum, that the affected prosecutor is first heard before the decision is taken, and that a certain evidentiary threshold should be reached for such suspension. See for example the findings of the ECtHR in the case *Paluda v Slovakia*<sup>23</sup> where the Court found a violation of Article 6 due to the lack of remedies to challenge the decision of the Council to suspend a judge. The ECtHR stated that Article 6 applied to suspension proceedings.

It is particularly important that a clear distinction be made between the party or parties making or investigating the accusation and the tribunal making the decision to suspend or dismiss, as otherwise the tribunal will not meet the criteria for it to be considered independent and impartial within the meaning of Article 6 ECHR. It is therefore important that if the General Prosecutor has had any dealings with the investigation he or she should not take part in any hearing. Since it is likely that the General Prosecutor will be involved in most such cases it is the safer course to exclude the General Prosecutor from such decisions altogether.

---

<sup>23</sup>In *Paluda v Slovakia*, no. 33392/12, 23 May 2017, disciplinary proceedings were brought against the applicant, who was a Supreme Court Judge, by the Judicial Council and he was temporarily suspended from his duties with immediate effect. The decision to suspend him entailed a 50% reduction in his salary for the duration of the disciplinary proceedings, which could last up to two years. The applicant made several appeals against the suspension, but all were unsuccessful, so he made a complaint under Article 6 citing his inability to access court to challenge the suspension decision. The Court found that there had been a violation. Specifically, the applicant did not have access to proceedings before a tribunal within the meaning of Article 6 §1 (as the Judicial Council was not a body of judicial character and did not provide the institutional and procedural guarantees required by Article 6 §1. The Government had not provided any conclusive reason for depriving the applicant of such judicial protection.



A further and related problem is the risk of abuse of the power of suspension to remove prosecutors from investigations in sensitive cases<sup>24</sup>.

### 6.6.6 Function of guaranteeing the prosecutor's independence

Article 125(1) of the Constitution expressly acknowledges the role of the SCP in protecting the independence of prosecutors. For this purpose, the Law on the Public Prosecution Service in the chapter on guaranteeing the prosecutor's independence states that "the prosecutor's independence is guaranteed by a strict determination by law of a prosecutor's status, competences and delimitation of functions, the procedure for appointment, suspension and dismissal, his inviolability, discretion in decision making, establishment in the law of prohibitions as to interferences by other persons or authorities with his activities, allocation of sufficient resources, material and social insurance and other measures stipulated by law".

Additionally, the Regulation on the functioning of the SPC at chapter 4 (on powers of the SCP, Regulation VI (f)) states that the SPC is also competent to take action, *ex officio* or upon a report, if it considers that a prosecutor's independence, impartiality or professional reputation has been affected in any way.

**The international consultants are not aware of any case in which this provision has been invoked and it does not appear that this mechanism is operated in practice. It would be advisable to define, identify and regulate in more detail examples of undue influence and interference on the work of prosecutors.** For instance, in Serbia surveys among prosecutors were carried out by CoE experts asking them whether certain scenarios amounted to undue influence or interferences and in many instances the replies were split among respondents. Most of the respondents were unclear which instructions were permitted and which were illegitimate<sup>25</sup>.

Given that corruption among prosecutors is perceived by the Moldovan public to be widespread, even though many Moldovan prosecutors claim that this is a matter of perception rather than the reality, the SCP needs to be particularly vigilant both in taking steps to combat corruption as well as defending prosecutors against false allegations where these occur. The work of combatting corruption in the prosecution service should be an important aspect of the SCP's role in relation to ethics, discipline and training as well as the SCP's duty to protect the independence of prosecutors. The international consultants recommend that the SCP play a much more active role in promoting anti-corruption.

### 6.6.7 The colleges of the SCP

#### General comments

---

<sup>24</sup> There was for example one such case in Spain where Manuel Moix, the then head of the anti-corruption prosecution office, requested the opening of a criminal investigation against two prosecutors on the basis of a complaint lodged by a Catalan entrepreneur, who alleged that the two had threatened him with criminal prosecution if he did not provide incriminating statements concerning cash transfers to Andorra involving local politicians who were close to the political party that had supported the appointment of Moix. Moix personally questioned the entrepreneur and referred the case to the Prosecutor General without informing the two prosecutors. On the grounds of the pending investigation against them, he also sought to have the two prosecutors removed from the investigation.

In this case, the Prosecutor General "froze" the decision of Moix to remove the two prosecutors until the investigation into the allegations against them was completed. A few months later, the investigation was terminated due to lack of evidence. Press reports mentioned that this case led to a subsequent wave of unsubstantiated allegations against prosecutors as a tool to interfere in investigations by defendants and their lawyers. Following Moix' interventions, two key witnesses (testigos protegidos) also decided to withdraw their statements and collaboration with the investigation which were considered as key evidence for the prosecution of Artur Mas, a Catalan politician who was suspected of bribe taking (cobro de comisiones) while he was president of the Catalan government.

<sup>25</sup> EU/CoE Project on: "Strengthening Legal Guarantees for Independent and Impartial Tribunals". Council of Europe; Horizontal facility for the Western Balkans and Turkey (surveys and surveys results on file with the author)





Three Colleges operate under the SCP, namely the College for the prosecutors' selection and career, the College for the assessment of the prosecutors' performance and the College of discipline and ethics.

The international consultants recommend separating the ethics function from that of discipline as the two functions are distinct. A separate College of ethics could operate with part-time members. The College of ethics would be in charge of reviewing and interpreting the Code of Ethics, issuing guidelines on questions concerning ethics, ensuring the training of prosecutors concerning questions of ethics, and issuing opinions and advising prosecutors upon their request on the compatibility of particular conduct with the Code and generally concerning questions of ethics.

The international consultants note that the SCP has not issued guidelines yet on the Code of Conduct as recommended by GRECO but it is currently working on such guidelines. That function could be delegated to the College of ethics. This should be a priority for the SCP and the guidelines should be published and communicated to all prosecutors as soon as possible.

The regulations should include the coordination between the College of discipline and the College of ethics, for example how to handle cases that are already submitted to one of the Colleges and whether the opinion of the College of ethics could be taken into account in disciplinary proceedings. The separation between the prevention and enforcement function has already been recommended by GRECO.

All three existing Colleges consist of seven members, five being elected by the General Assembly from among prosecutors and two being elected by the SCP following an open competition from among civil society representatives. Members are elected for a period of four years.

The Colleges meet on a need basis. In exercising their powers, the Colleges have the right to request all documents and information they need from prosecutors, public authorities and the public legal entities.

Each College submits annually to the SCP a report on its activity during the reference year, which shall be published on the official website of the Superior Council of Prosecutors.

**The Annual Reports of the Colleges are very limited in content, as for example the Report of the College for Discipline and Ethics only contains brief statistical data on the number of proceedings and the type and number of sanctions applied without mentioning the type of violations reviewed.** The reports of the College for the assessment of the prosecutors' performance are slightly more detailed.

### *Appointment of members of the Colleges*

#### *Election procedure*

##### Election procedure of Prosecutors

The top five prosecutors (who have accumulated the largest number of votes at the General Assembly of Prosecutors) shall be considered elected members of the College. The next following prosecutors from the list of candidates who accumulated the biggest number of votes shall fill in the vacancies.

##### Election procedure of Lay members

The selection of the two lay members takes place in two stages: a pre-selection and an interview stage.

Candidates should have an impeccable reputation and enjoy a recognised authority in their field of activity. They must have no criminal convictions and receive the approval of the leadership of the organisation they work for<sup>26</sup>. This provision needs some adjustment to allow for the position

---

<sup>26</sup> SCP Regulation, point. 11.7, j).



of self-employed persons who perhaps should require the approval of their professional association.

During the pre-selection stage, candidatures for the Colleges are published and interested parties can submit in writing information about a candidate's professional activity. It is not clear what is the reason for this limitation on what information may be submitted and if it is permitted to submit any other information. For example, could candidates submit information concerning asset declarations and other integrity matters?

In the interview stage the SCP will review the ethics and integrity of candidates, their motivation, their capacity for clear and logical expression, critical thinking, social awareness and commitment, besides professional experience, professionalism and knowledge of provisions governing the functioning of the College. It is not, however, clear how these qualities and requirements are assessed. The Venice Commission has regularly been critical of the vagueness of criteria such as integrity without a supporting methodology. Besides this, as a minimum, candidates should be required to submit declarations of assets and interests.

### *Remuneration of the Colleges' members*

Members of the Colleges from civil society receive a monthly allowance worth 50% of the salary of the members of the SCP elected from among the prosecutors. Members of the College elected from among the prosecutors shall have a reduced workload during their mandate.

### *The College for the prosecutors' selection and career*

The functions of the College include examining candidatures in the framework of recruitment and promotion procedures, interviewing candidates, scoring them and adopting reasoned decisions regarding the results of the competition.

SCP proposes to the Prosecutor General the appointment of candidates nominated as a result of the contest. The SCP may refuse the proposal for appointment if it finds that the candidate is incompatible with the office of the prosecutor.

The Law on Prosecutors does not state whether the SCP will have to follow the result of the assessment of candidates by the selection board. GRECO recommended that in case the SCP deviates from these results, **its decisions should be justified in a clear, complete and convincing manner**. The international consultants support this recommendation and further recommend that where the SPC disagrees with the recommendations of the College for the prosecutors' selection and career, **the reasons for its disagreement and for its own opinion should be justified in a clear, complete and convincing manner**.

The transfer of the prosecutor to a position at the same or a lower level, except for the position of chief-prosecutor and deputy chief-prosecutor, shall be made by the decision of the SCP, on the proposal of the Prosecutor General. The transfer procedure shall be established by a regulation approved by the SCP.

The system of having the recruitment, appointment and promotion of prosecutors largely in the hands of elected prosecutors is relatively new. Many aspects of how it is supposed to operate are rather unclear. For example it is not clear what training will members of the College have in interviewing or how will prosecutor members of the College, some of whom may be very junior, assess the suitability of senior colleagues for appointment to the top positions in the Prosecutor's Office. It would be advisable to consider the possibility of having on an interview panel, persons with experience of doing the job which is being filled.

It is recommended that additional thought be given to the possibility of the College to have the power to hire in experts to assist in the recruitment process. The international experts consider that the practical operation of the process will need to be monitored very closely and adjustments made if it turns out that they are needed. If necessary, the College for the prosecutors' selection



and career may need to be given the authority to engage suitably qualified persons to assist in the selection process of candidates.

### *The College for the assessment of the prosecutors' performance*

The College assesses the activity, the level of professional knowledge and skills of prosecutors, their compliance with the position held, as well as for improvement of professional skills and enhancing the effectiveness of the work of prosecutors.

For this purpose, it shall establish the schedule of the prosecutors' activity evaluation; examine relevant files and documents, organise and conduct interviews with prosecutors subject to evaluation; and adopt decisions regarding prosecutors subject to evaluation.

During the consultations, the representative of the Prosecutor General's office proposed joining the College for the prosecutors' selection and career with the College for the assessment of the prosecutors' performance as this would provide a more thorough view of the merits of a prosecutor.

As with the College for the prosecutors' selection and career this College could face a major problem if it is envisaged, as appears to be the case, that its members will carry out all the assessments themselves. How is a senior and experienced prosecutor going to react to being assessed by somebody much junior to him or her? It is advisable that qualified and experienced persons be hired in to do this work and to train up evaluators. The international evaluators recommend that the practical operation of this College be kept under close monitoring and the scheme amended or modified if necessary. If necessary, the College for the assessment of the prosecutors' performance may need to be given the authority to engage suitably qualified persons to assist in the evaluation process of candidates.

### *The College of discipline and ethics.*

The College of discipline and ethics is competent for the examination of disciplinary cases and the application of disciplinary sanctions.

Its procedure may be initiated by a) any interested person; b) members of the SCP; c) the College for assessment of the prosecutors' performance and d) the Inspection of Prosecutors.

It is, of course, possible that in the course of an assessment the College for assessment of the prosecutors' performance will become aware of misbehaviour amounting to a disciplinary offence. **But the two Colleges should be aware of and respect the distinction between poor performance resulting from incompetence or negligence and deliberate wrongdoing or misbehaviour giving rise to disciplinary liability. The College of discipline and ethics should have no involvement with poor performance simpliciter.**

A decision is taken by majority vote, but if the procedure was initiated by a member of the Disciplinary College, that member cannot take part in the vote.

Considering that the General Prosecutor can ask the Inspection to initiate an inquiry and can order the referral of the case to the College of discipline and ethics, the participation of the General Prosecutor at any stage of the proceedings would be problematic and give rise to a conflict of interest. It is insufficient that the General Prosecutor or a member of the College or the SCP who initiated the proceedings should not vote; he or she should not sit as a part of the SCP at any stage during the hearing.

One such incident took place in 2017 when a prosecutor asked for the recusal of the General Prosecutor on account of the fact that he had initiated disciplinary proceedings. Eventually, as in the meantime a new General Prosecutor was appointed, the question of recusal became moot.

The General Prosecutor should be excluded from the SCP hearing in appeals against the decisions of the College for discipline and ethics.



GRECO noted that nothing in the existing law prevents a member of the SCP from being involved in several stages of disciplinary proceedings against a prosecutor, by initiating a disciplinary procedure, appealing against a decision of the College for discipline and ethics and voting on this appeal as a member of the SCP.

The College is required to examine the disciplinary cases regarding prosecutors, as received from the prosecutors' Inspection, and apply, as the case may be, disciplinary sanctions or adopt recommendations on the prevention of disciplinary violations.

After examination of the disciplinary case, the College of discipline and ethics may make an additional recommendation to the SCP for an extraordinary assessment of the prosecutor's performance, if the case circumstances and materials demonstrate the need to assess his/her performance. **It would seem to be more appropriate that in such cases the matter be referred to the College for assessment of the prosecutors' performance rather than the SCP. This provision is indicative of a certain tendency to confuse poor performance with misbehaviour.**

The decision on sanctioning via relegation in office (demotion) and the decision on sanctioning via dismissal from prosecutor position shall be sent to the SCP to forward the appropriate proposal to the General Prosecutor. The proposal shall be submitted after the expiry of the appeal period.

### *The decisions of the Colleges*

Colleges' decisions are required to be adopted by open vote of the majority of the elected College members, except in cases when this law provides another way of adoption of decisions. The College decisions shall be in a written form, reasoned<sup>27</sup> and subsequently published, within 10 working days from the date of their issuance, on the official website of the SCP.

According to Article 85(1) of the Law on the Public Prosecution Service decisions regarding a prosecutor's evaluation shall not be published, but the evaluation results are made public.<sup>28</sup>

The webpages of the College for discipline and ethics and of the College for prosecutors' performance assessment, however, do not contain any decision although a dedicated section ("decisions") is available on the website (last accessed in December 2020).

With specific regard to the disciplinary decisions the lack of publication may be explained by the need to find a means to publish the necessary information without infringing data protection rules. It will be necessary to anonymise certain information. The matter is urgently in need of resolution and needs to be prioritised by the SCP.

For this purpose, the SCP has requested the assistance of the national data protection authority to elaborate a methodology for the publication of decisions of the College of Discipline and Ethics, striking the correct balance between transparency and respect for privacy.

GRECO recommended that disciplinary cases should be given sufficient publicity. It is necessary to ensure that decisions are properly motivated as required by law, that decisions not to prosecute are adequately explained, that the details about sanctions are published, but anonymised, and that statistical information is given. In severe cases leading to removal from office, reports will need to name the individual concerned, the behaviour involved and the outcome.<sup>29</sup>

---

<sup>27</sup> The decision on the disciplinary case shall be motivated and consist of an introductory statement, presentation of the facts, reasoning and enacting part. The form and content of the decision shall be approved through a Regulation by the Superior Council of Prosecutors.

<sup>28</sup> The decisions with the results of the Board for the recruitment and career of prosecutors are available on the [SCP website](#).

<sup>29</sup> GRECO 4<sup>th</sup> Evaluation on Moldova, second compliance report §104



A review of the **French CSM** disciplinary case law involving prosecutors shows that the following data are regularly omitted: the name of the affected prosecutor, his/her address, the name of his/her lawyer and his bar chamber, the name/location of the office where he performs his duties (thus only the function is mentioned)<sup>30</sup>, the court/place where the event took place, the name of the witnesses (in case witnesses are other prosecutors or judges, their functions are mentioned but the name and location of the office or courts where they perform their functions are omitted). The examination of the French disciplinary case law also shows how in the majority of cases disciplinary hearings are held in public and requests for hearing by a prosecutor to be held behind closed doors are rarely granted.

**The international consultants recommend that the SCP seek a solution to the problem of publication without compromising privacy interests along similar lines.**

### *Appeal against the decisions of the Boards before the SCP*

College decisions can be appealed to the SCP within 5 working days from the date of their issue. The appeal may be filed by the prosecutor referred to in the appealed decision and the candidate for the prosecutor's position.

It is unclear whether prosecutors who were not selected to a certain position upon competition can challenge the appointment of another prosecutor instead.

In case of disciplinary procedure, an appeal can be lodged also by the person who filed the complaint and by the Prosecutors' Inspection.

Consideration might be given to allowing the right to lodge an appeal to any individual who is affected by a disciplinary decision. This is the broader formulation for appealing against the decisions of the SCP itself. Professional associations of prosecutors might also be expressly granted the right to appeal decisions, as is the case, for example, in France.

College decisions must be submitted to the SCP on the next day after the expiry of the appeal, following which the Superior Council of Prosecutors shall decide whether to maintain the appealed decision or to quash the decision appealed against and to adopt a new decision to solve the case. The decisions of the SCP can be appealed in second instance before the Supreme Court of Justice.

---

<sup>30</sup>See for example the following decisions (1) concerning the conduct of prosecutors in the framework of criminal investigation (adopted following an open hearing): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p058>; (2) the decision (adopted following a public hearing) of dismissal of a prosecutors who repeatedly showed up at work intoxicated <http://www.conseil-superieur-magistrature.fr/missions/discipline/p051>; (3) decision concerning the theft by a prosecutor of a credit card and its fraudulent use in a nightclub (where the CSM rejected the prosecutor's request for a disciplinary hearing before closed doors on account of the circumstance that pending criminal proceedings for theft of items at his office did not concern the same facts), decision concerning the failure of an investigator to carry out an effective investigation into the disappearance of several young disabled women. The proceedings were initiated after judicial review led to the reopening of the investigation that had been closed several years earlier by the prosecutor (disciplinary hearings held in public) (<http://www.conseil-superieur-magistrature.fr/missions/discipline/p044>); (4) homophobic statements made by a prosecutor in court and reported by the press (disciplinary hearings were public): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p042>; (5) disciplinary proceedings following tax evasion by a prosecutor (public disciplinary hearings): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p036>; (6) decision concerning unjustified and repeated delays in the conduct of criminal proceedings and inappropriate relationship with a colleague (public hearing): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p031>; (7) disciplinary decision to transfer a prosecutor for derogatory statements on a colleague for the way he was conducting an investigation and repeated interferences in the case that had been transferred from him to his colleague: <http://www.conseil-superieur-magistrature.fr/missions/discipline/p018>; (8) failure of a prosecutor to declare to her hierarchical superiors the existence of large debts and relevant proceedings initiated against her (hearings held behind closed doors): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p086>; (9) episodes of sexual harassment committed by a prosecutor before recruitment (public hearing): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p062>; (10) divulgation of confidential information on ongoing criminal investigation in exchange of money and other advantages (hearing behind closed doors, only mention the initiation of criminal proceedings for the same facts and the violation of the secret of investigation): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p059>; (11) repeated delays in the conduct of criminal proceedings (public hearing): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p053>; (12) repeated undue interventions by a prosecutors in ongoing criminal investigations carried out by a colleague against a friend of his daughter (hearings behind closed doors): <http://www.conseil-superieur-magistrature.fr/missions/discipline/p014>. In a number of occasions the CSM has expressly rejected the request of a magistrate to hold the disciplinary hearings behind closed doors: (a) proceedings concerning the abuse of function to obtain access to information on ongoing criminal proceedings against close persons and the use of such information to their benefit. The CSM considered that the request based on the risk that the magistrate may end up divulging information on his private life during the hearing was not considered as sufficiently justified: <http://www.conseil-superieur-magistrature.fr/missions/discipline/s198>.



## 7 CONCLUSIONS

In view of the undertaken analysis we may conclude that the legislative framework of the Superior Council of Prosecutors is rather positive as well as new steps are being undertaken by the SCP and relevant authorities to improve the existing system and bring it in line with GRECO recommendations and international good standards.

In its 2<sup>nd</sup> compliance report on the Republic of Moldova GRECO emphasized the need to ensure that the composition and operation of the SCP is subject to appropriate guarantees of objectivity, impartiality and transparency, including by abolishing the ex-officio participation of the Minister of Justice and the President of the Superior Council of Magistracy. In addition to this, GRECO also underlined the importance of developing written guidelines on the Code of Conduct and Ethics for all prosecutors and establishing a system of confidential council. GRECO also mention the need to strengthen the disciplinary liability of prosecutors and set clear rules that verbal instructions given to hierarchically subordinate prosecutors are not binding.

In order to ensure a full compliance with GRECO's recommendations the SCP should undertake prompt actions to update several internal practices as well as promote additional amendments to the legislative and regulatory framework, as presented and analysed by the team of experts in this report. We recommend that SCP considers as a priority needed reforms and improvements in regard to the following main aspects:

- major focus to placed on the regulatory part of integrity and asset verifications during the selection of members of the council as well as of its specialized boards. The SCP should also define and regulate in more detail examples of undue influence and interference in the work of prosecutors;
- the publication of information on the disciplinary procedures should be accomplished as soon as possible with needed safeguards to protect the confidentiality of personal data;
- the ethics function of the College of Discipline and Ethics should be consolidated (including by analysing the possibility of separating this function from the college);
- the Minister of Justice, the President of the Superior Council of Magistracy and the Ombudsman should no longer be ex-officio members;
- the procedure for suspension and removal of SCP members should be regulated in detail;
- find means to engage qualified persons to assist the professional colleges during selection and assessment procedures.

The team of experts have presented a detailed analysis of the composition and main attributions of the SCP supported by relevant recommendations for improvement. A wide range of examples related to the composition and organizations of prosecutorial councils in other Council of Europe member states was also included in this report.



## 8 RECOMMENDATIONS

Following the assessment undertaken by the team of experts and based on explanations provided in the analysis part of this TP, the following **recommendations** can be retained:

1. The Law on the Public Prosecution Service should expressly provide that members of the SCP must be impartial and independent in the performance of their functions. Considering the SCP's complex membership (including lay members, some of whom are appointed by the President, Parliament or Government) and their involvement in procedures where Article 6 ECHR applies (disciplinary proceedings) it is imperative that requirements of independence and impartiality of the members of the SCP be guaranteed in the law and respected in practice.
2. Grave violations leading to the termination of membership within the SCP should include, besides the violation of the requirement of independence and impartiality, also the failure to attend a specified number of sessions of the SCP.
3. To secure the predictability and clarity of the accountability regime specifically applicable to its members, the SCP should adopt a Code of Conduct governing its own activities. The SCP has not issued guidelines yet on the Code of Conduct for prosecutors as recommended by GRECO but it is currently working on such guidelines. This should be a priority for the SCP and the guidelines should be published and communicated to all prosecutors as soon as possible.
4. The procedure for suspension and removal of members should be regulated in detail in the SCP Regulation. Decisions for the removal of members of the SCP, including removal for irregularities in the declarations of their assets or interests or failure to submit such declarations, should be adopted by the plenary of the SCP upon the initiative of the President or a specified number of members. The number of proposers required should be high enough to discourage vexatious proposals but not so high as to discourage cases where removal is worthy of serious consideration.
5. Suspension of membership of the SCP should be provided for in the case of initiation of disciplinary proceedings or indictment for criminal offences punishable with imprisonment.
6. Among the list of powers of the SPC provided in the SCP Regulation (point 4.1.I.(k)) is to coordinate the order of the Minister of Health on the requirements concerning the health of prosecutors, including the list of diseases prohibiting the exercise of the prosecutor's duties. The idea of listing particular diseases in such a context seems rather unusual. A more justifiable test might be whether an illness prevented a person from carrying out the duties of his or her employment. Any other test would seem to be a discrimination on grounds of disability. The international consultants recommend that this provision be amended accordingly.
7. The SCP Regulation should provide for a system which ensures that nominations for election to the SCP must be made well in advance of the General Assembly and that steps are taken by the SCP to allow each candidate to provide a written programme for distribution to every elector by the SCP in advance of the General Assembly of Prosecutors. Additionally, the Prosecutorial Council could provide candidates with a platform, for example through its website, enabling them to run their electoral campaign and secure that, insofar as possible, candidates are granted leave from service to conduct their electoral campaign.



8. The prohibitions on certain applicants for membership of the SCP's Colleges from civil society in SCP Regulation (point 11.4) are too extensive. It may be reasonable to provide that if they are elected as members of the Colleges they must not be members of any political party or force, or perform or participate in political activities, or in the exercise of their authority, express or manifest their political beliefs in any way, but to exclude as applicants any person who has ever done any of these acts goes too far.
9. The prohibition on a person applying for a position on the Colleges if he or she participates in the investigation or examination of cases which might be subject to an objection, or is an investigation officer, including undercover, informer or employee of the body carrying out special investigation activity in SCP Regulation (point 11.4) is not justified. Of course, if elected a person could not continue such activity and would be subject to conflict of interest rules in respect of previous activity.
10. The Minister of Justice should no longer be an *ex officio* member of the SCP.
11. The President of the SCM should no longer be an *ex officio* member of the SCP.
12. Consideration might be given to providing for the prosecutors of AUT Gagauzia to elect one of their own number to the SCP rather than the present system of appointing the Chief Prosecutor of AUT Gagauzia *ex officio*.
13. The Union of Lawyers or its Council should elect or nominate one of its members to the SCP rather than have its President as an *ex officio* member.
14. The Ombudsman should no longer be an *ex officio* member of the SCP.
15. The law should be amended to provide for postal or electronic voting where a General Assembly of Prosecutors cannot take place due to an emergency.
16. With regard to gender balance among the elected members of the SCP, the international consultants recommend that the election procedure both in respect of prosecutors and lay member secure a gender balance in the composition of the SCP for example by introducing a statutory requirement of fair gender representation in the SCP and requiring that at least 40% of candidates belong to each gender or that each elector cast three votes, one of which must be of a different gender to the other two. Additionally, in case of tie between candidates of different gender, the candidate who belongs to the underrepresented gender may be elected.
17. The provisions for eligibility for election to the SCP members should disqualify candidates who have been subject to disciplinary sanctions within the previous three years in line with the SCM requirements. Where a candidate is facing disciplinary proceedings at the time of an election, if he or she is elected his or her membership should be suspended pending the outcome of those proceedings and if disciplinary sanctions are imposed his or her position on the SCP should be vacated and filled by the candidate who was next placed in the election.
18. The provisions for eligibility for election to the SCP **should impose more strict integrity requirements and procedures** to verify the integrity of candidates for election to the Council. It should be necessary that candidates have made proper and accurate asset declarations and do not have unexplained wealth. Each candidate's asset declarations should be checked and failure to submit an asset declaration or the submission of an incorrect declaration should be considered as disqualifying grounds. Additionally, **the law should be amended to provide that members of the SCP should submit asset**





**declarations and declarations of interests to the Council itself (and not only to the National Integrity Authority) so that the Council can more easily monitor not only the integrity of its members but also manage recusal procedures.** The international consultants refer to integrity requirements and verification mechanisms mentioned above in chapter 4.1.1.1 insofar as applicable.

19. Following election to the SCP provisions requiring the declaration of assets and interests must be absolutely strictly applied to members of the Council and there should be an effective procedure to ensure that failure or refusal to comply with the legal provisions, including the making of any declaration which is incorrect in any significant particular should result in removal from the SCP and disqualification from SCP membership. However, in line with the opinions of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe<sup>31</sup> any prohibition on members of the SCP and its Colleges carrying on political activity should be confined to membership of political parties and should not prevent the conduct of advocacy activities. Specialisation in law should not necessarily be a requirement for membership as it may exclude persons with valuable experience in other disciplines or from civil society with no experience in the area of law.
20. Further grounds for ineligibility to be elected or appointed as a member of the SCP should be considered to exclude the candidature of prosecutors who are seconded to administrative positions within the executive, who hold leading positions in professional associations or who are chiefs of office. Such rules would reduce the risks of undue political influence, of trading in influence within the prosecution service and of a duplication of hierarchical roles within the councils.
21. There should be a greater transparency in the selection of suitable candidates for election as lay members of the SCP and in the procedures for their election. Candidates for election by Parliament or the President should be chosen by appropriate nominating bodies. There should be no bar to the presentation of suitably qualified candidatures. Some knowledge or experience of law or possibly involvement in civil society would seem to be advantageous but there should be room for candidates with other valuable experience as referred to above. The publication of candidatures and the curricula vitae of candidates would also offer the opportunity for civil society at large to scrutinize their qualification and integrity. Candidates should be examined during open sessions of the Parliament where civil society can also submit questions (through members of Parliament). Lay members elected by Parliament should be chosen by a qualified majority of 3/5 or 2/3 of the membership to reduce the risk of politicisation. Such majority should be required for the first two voting rounds, after which in case a deadlock persists an alternative method of filling the vacancies should be adopted such as by a vote of the total membership of the nominating bodies. Serving prosecutors and politicians should be excluded. The voting procedure should be preceded by a sufficient period during which candidatures are published.
22. Regarding the member appointed by the Academy of Sciences, the faculty councils or representatives of legal higher educational institutions and other scientific institutions should be involved in the preliminary selection procedure on the basis of secret ballot by majority vote.

---

<sup>31</sup> See the Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending and supplementing the constitution with respect to the Superior Council of Magistracy, adopted by the Venice Commission on 20 March 2020 (CDL-AD(2020)001). While this opinion relates to membership of the SCM it is suggested that similar provisions should apply to members of the SCP and its Colleges.



23. Additionally, qualifications of candidates could be strengthened by increasing the professional experience requirement from three to five years. The law could introduce additional ineligibility grounds to exclude representatives of civil society who, in the previous three or five years, have held public office both at national and local level.
24. The four-year mandate for membership of the SCP and the Colleges should be retained.
25. The international consultants recommend that a flexible approach be adopted by allowing the Council to determine, on a needs basis, in which cases a membership is exercised on a full time basis.<sup>32</sup> Consideration should be given to the possibility of prosecutor-members being able to continue performing their original functions with a corresponding reduction of their workload.
26. There should be a unification of the remuneration of prosecutor members based on the salaries of prosecutors working at the General Prosecutor's Office adjusted for their seniority rather than on the basis of each member's original position. In case prosecutor members continue performing their original functions they should be compensated for travel and accommodation expenses (if necessary) and receive a *per diem* for their attendance at SCP sessions which are held outside normal working hours.
27. The requirement for a six month cooling off period for retiring members of the SCP during which they may not be promoted or appointed to any position within the Public Prosecution Service is justified and even necessary in the interests of maintaining public confidence in the integrity of the Council.
28. The law should be amended to provide that where prosecutors elected to the SCP hold management positions these may be declared as temporarily vacant so that they are able to return to their original position upon expiry of their mandate.
29. Consideration should be given to further specifying conditions for holding meetings *in camera* and to introducing a system for lodging objections to doing so where this is not necessary or justified.
30. The SCP Regulation should be amended to provide that separate opinions are to be published along with the decision adopted by the SCP.
31. A person affected by a matter subject to review by the SCP who was invited to the hearing should have the right to ask for an adjournment for good reason in order to be able to attend.
32. Consideration should be given to permitting representative associations of prosecutors to challenge decisions of the SCP and its Colleges as the strong hierarchical structure of the prosecution service may discourage individuals from challenging decisions, especially to those concerning senior prosecutors.
33. The President of the SCP must inform immediately the National Integrity Authority on any real conflict of interest in which he may find himself. The members of the SCP and its Colleges must report potential or real conflicts of interests to the President of the SCP who, in case the person concerned has not already been recused, will decide the matter. In case of doubt the President may inform and seek guidance from the National Integrity Agency. These rules must be strictly applied and there should be an effective procedure

---

<sup>32</sup> This is the practice in Portugal.



to ensure that failure or refusal to comply, or any declaration which is incorrect in any significant particular should result in removal from the SCP and disqualification from SCP membership.

34. It is important to bear in mind that Article 6 of the ECHR applies to hearings concerning the dismissal and suspension of prosecutors. It is therefore necessary to ensure that the full range of procedural rights required by Article 6 are provided to the prosecutor concerned. These require, for example, as a minimum, that the affected prosecutor is first heard before the decision is taken, and that a certain evidentiary threshold should be reached for such suspension.
35. The system of disciplinary hearings must ensure that a clear distinction be made between the party or parties making or investigating an accusation and the body making the decision to suspend or dismiss, as otherwise the body making the decision will not meet the criteria for it to be considered independent and impartial within the meaning of Article 6 ECHR. To that end, if the General Prosecutor has had any dealings with the investigation he or she should not take part in any hearing. The safer course to exclude the General Prosecutor from such decisions altogether.
36. The SCP should be very proactive in ensuring that clear rules are in place and are observed in practice concerning the question of giving **verbal instructions** and the need for clear rules as to when and in what circumstances any instructions may be given by senior prosecutors as raised by GRECO in its 4th Round Evaluation and recommendations. It would be advisable **to define, identify and regulate in more detail examples of undue influence and interference on the work of prosecutors**. In its 2nd Compliance Report GRECO welcomed the issuing by the Prosecutor General of a written notification which clarified that verbal instructions are not binding anymore unless confirmed in writing. GRECO therefore found that this part of the recommendation had been addressed properly. The SCP should further monitor if and how this aspect is applied in practice.
37. The ethics function of the College of discipline and ethics should be separated from that of discipline as the two are distinct. A separate College of ethics could operate with part-time members. The College of ethics would be in charge of reviewing and interpreting the Code of Ethics, issuing guidelines on questions concerning ethics, ensuring the training of prosecutors concerning questions of ethics, and issuing opinions and advising prosecutors upon their request on the compatibility of particular conduct with the Code and generally concerning questions of ethics.
38. Candidates for the positions as lay members of the Colleges, if self-employed, should require to be in good standing with their professional association. Interested parties should be permitted to submit any relevant information concerning their candidacies and not merely information about their professional activities.
39. Where the SCP disagrees with the recommendations of the College for the prosecutors' selection and career, the reasons for its disagreement and for its own opinion should be justified in a clear, complete and convincing manner.
40. The practical operation of the process of recruitment, appointment and promotion will need to be monitored very closely and adjustments made if it turns out that they are needed. If necessary, the College for the prosecutors' selection and career may need to be given the authority to engage suitably qualified persons to assist in the selection process of candidates.



41. Likewise, the practical operation of the College for the assessment of the prosecutors' performance will need to be kept under close monitoring and the scheme amended or modified if necessary. The College for the assessment of the prosecutors' performance may need to be given the authority to engage suitably qualified persons to assist in the assessment of prosecutors.
42. The College of discipline and ethics should have no involvement with poor performance not amounting to deliberate wrongdoing or misbehaviour and distinction between the two should be maintained and respected.
43. The General Prosecutor should be excluded from the SCP hearing in appeals against the decisions of the College for discipline and ethics.
44. The SCP needs to give its urgent attention to the need to find a means to publish essential information concerning disciplinary decisions without infringing data protection rules. It is necessary to ensure that decisions are properly motivated as required by law, that decisions not to prosecute are adequately explained, that the details about sanctions are published, but anonymised, and that statistical information is given. In severe cases leading to removal from office, reports will need to name the individual concerned, the behaviour involved and the outcome.

