Action against Corruption in the Republic of Moldova

TECHNICAL PAPER

REVIEW OF THE NATIONAL FRAMEWORK GOVERNING THE DISCIPLINARY LIABILITY OF PROSECUTORS IN THE REPUBLIC OF MOLDOVA

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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).

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Abbreviations

Action Plan	Action Plan for the implementation of the Strategy
Bordeaux Declaration	CCPE Opinion No. 4 on "Judges and Prosecutors In A Democratic Society"
Budapest Guidelines	European Guidelines on Ethics and Conduct for Public Prosecutors adopted by the Conference of Prosecutor Generals of Europe
CCPE	Consultative Council of European Prosecutors
CCPE Opinion No. 13(2018)	CCPE Opinion No. 13(2018) "Independence, accountability and ethics of prosecutors"
Code of Ethics	Code of Ethics for Prosecutors adopted by the General Assembly of Prosecutors
College	College of Discipline and Ethics
College Regulation	Regulation on the organisation and activity of the Discipline and Ethics College
Constitution	Constitution of the Republic of Moldova
CR	Compliance Report from 7 December 2018
CR2	Second Compliance Report from 25 September 2020
da Vinci Guidelines	Guidelines for Initial Training of Judges and Prosecutors
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ER	4th Round Evaluation Report on the Republic of Moldova
GET	GRECO evaluation team
GPO	General Prosecutor's Office of Moldova
GRECO	Group of States against Corruption
IAP Standards	Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors
Inspection	Inspection of prosecutors
Inspection Regulation	Regulation on the organisation, competence and functioning of the Inspection of Prosecutors
Joint Opinion, Moldova	Joint opinion on the Draft Law on the Prosecution Service of the Republic of Moldova adopted by the Venice Commission at its 102nd plenary session, CDL-AD(2015)005
Joint Opinion, Ukraine	Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, CDL-AD(2013)025
NIJ	National Institute of Justice
PG	Prosecutor General
PPS Law	Law on the Public Prosecution Service
prosecutor concerned	prosecutor against whom the notification was lodged

The Prosecution System	Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System (Study No. 494/2008, CDL-AD(2010)040, 3 January 2011
Recommendation Rec(2000)19	Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system
Referral Regulation	Regulation on the content and procedure for submitting a referral on a disciplinary offence committed by a prosecutor
Rome Charter	CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors
SCP	Supreme Council of Prosecutors
The Strategy	Strategy for Ensuring the Independence and Integrity of Justice Sector for 2021- 2024
UN Guidelines	UN Guidelines on the Role of Prosecutors of 1990
UNODC/IAP Guide	United Nations Office on Drugs and Crime, *The Status and Role of Prosecutors*
Venice Commission	European Commission for Democracy through Law

1 Executive Summary

This paper is concerned with the standards to be observed by prosecutors in the Republic of Moldova, the potential for compliance with them to be facilitated by the introduction of arrangements for confidential counselling and the disciplinary procedures and sanctions applicable where it is alleged that they have not been observed. It has been prepared in the light of recommendations made in the 4th Round Evaluation Report on the Republic of Moldova from 1 July 2016 by the Group of States against Corruption ("GRECO"), made public on 5 July 2016, with respect to the Public Prosecution Service's disciplinary liability system.

The paper first sets out the findings and recommendations made in the Evaluation Report, the conclusions in two subsequent Compliance Reports, certain subsequent developments and the terms of reference for this paper. It then reviews the existing European and international standards on disciplinary liability. This is followed by an examination of the current law and practice in the Republic of Moldova with respect to the disciplinary liability system applicable to prosecutors, with a view to identifying what is problematic with respect to the fulfilment of European and international standards and how that fits in with GRECO's recommendation on the disciplinary system.

Thereafter, the paper goes on to review the developing requirement for confidential counselling, as recommended by GRECO, why this is desirable and what it entails, before considering pathways to compliance with all the recommendations made by GRECO, as well as with others made in the paper.

The paper endorses GRECO's Recommendations as regards the establishment of arrangements for confidential counselling and changes to the disciplinary mechanism. In addition, it recommends a number of other changes relating to the basis for imposing disciplinary liability on prosecutors, the conduct of the proceedings and the analysis of those proceedings and the outcome of them.

It is also suggested that the Superior Council of Prosecutors cease to determine appeals in disciplinary cases and that these be determined solely by the courts. This would contribute to simplifying the system and meet concerns as to the autonomy of the Inspection of prosecutors being threatened by the recommendation to locate it in the Superior Council of Prosecutors instead of the General Prosecutor's Office.

The paper considers that the implementation of the changes being proposed should lead to greater compliance with the ethical standards applicable to prosecutors and a disciplinary system that is simpler, more effective and more transparent, as well as one that is much more likely to command the confidence not just of prosecutors but of the public at large.

Implementation will require some amendments to the Law on the Public Prosecution Service and the associated regulations and administrative organisation. In addition, there will be a need to revise the budgetary allocation for the Superior Council of Prosecutors, both to accommodate the transfer to it of the Inspection of prosecutors and to establish the arrangements for confidential counselling.

It is suggested that the arrangements for confidential counselling should be introduced gradually so that account can be taken of the developing workload and of any adjustments required in the light of the initial experience of its operation.

The paper emphasises the importance of fulfilling existing obligations to publish the decisions in disciplinary cases, as well as of enhancing the analysis in annual reporting on the handling of disciplinary proceedings. It also suggests that a further study should be made of the limited use made of ex officio notifications and the approach to the imposition of sanctions.

2 Introduction

1. This paper is concerned with the standards to be observed by prosecutors in the Republic of Moldova, the potential for compliance with them to be facilitated by the introduction of arrangements for confidential counselling and the disciplinary procedures and sanctions applicable where it is alleged that they have not been observed.

2. It has been prepared in the light of recommendations made in the 4th Round Evaluation Report on the Republic of Moldova from 1 July 2016 ("ER") by the Group of States against Corruption ("GRECO"), made public on 5 July 2016, with respect to the Public Prosecution Service's disciplinary liability system.

3. The authors are respectively Judge, at the Court of Appeal of Targu Mures, Romania and barrister, Monckton Chambers, London. Their background includes extensive work on the operation and reform of criminal justice systems in general and the prosecution service in particular in many Council of Europe member States.

4. The preparation of the paper has benefited from online meetings in November 2020 with the Deputy Prosecutor General, members of the SCP, the Ministry of Justice and the Legal Resources Centre from Moldova.

5. The paper first sets out the findings and recommendations made in the ER, the conclusions in two subsequent Compliance Reports, certain subsequent developments and the terms of reference for this paper.

6. It then reviews the existing European and international standards on disciplinary liability.

7. This is followed by an examination of the current law and practice in the Republic of Moldova with respect to the disciplinary liability system applicable to prosecutors, with a view to identifying what is problematic with respect to the fulfilment of European and international standards and how that fits in with a recommendation by GRECO.

8. This examination takes account of discussions referred to above regarding the operation of the disciplinary system, as well as of an analysis of selected disciplinary cases and the limited statistical information available. It also makes some further recommendations regarding the arrangements for disciplinary proceedings and the grounds for liability.

9. Thereafter, the paper goes on to review the developing requirement for confidential counselling, as recommended by GRECO, why this is desirable and what it entails, before considering pathways to compliance with all the recommendations made by GRECO, as well as with others made in the paper.

10. It concludes with a summary of its conclusions and the follow-up required, as well as a list of the specific recommendations made.

3 BACKGROUND AND TERMS OF REFERENCE

3.1 Background

3.1.1 Disciplinary liability system

11. In its ER, the GRECO evaluation team ("GET") had summarized its findings as to the disciplinary liability system in respect of the Public Prosecution Service as follows):

> *186. As is the case for judges, numerous cases of misconduct by prosecutors have been reported in the media and several of the GET's interlocutors expressed the view that the prosecution service has so far not been very proactive and transparent in addressing such cases. Legal provisions on accountability were said not to be enforced in full and sanctions appeared lenient. Against this background, the capacity of the disciplinary bodies to deal with misconduct of prosecutors in a determined and effective manner is crucial, especially given the negative image of the prosecution service. As with other aspects of the reform, much will depend on how the new system will be implemented in practice. Three specific issues, however, deserve mention at this stage. The GET notes that according to the new LP, the Inspection of Prosecutors will be a subdivision of the General Prosecutor's Office, under the direct supervision of the General Prosecutor. A sufficient number of adequately trained inspectors will be instrumental to its efficiency. The GET is concerned that the Inspection's statutory and budgetary dependence on the Prosecutor General may lead to self-censorship in sensitive cases. The GET also notes that nothing 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 Discipline and Ethics Board and voting on this appeal as a member of the SCP. Finally, transparency is a key element of a successful accountability policy. Along the same lines as the measures recommended in the chapter on judges, disciplinary cases need to 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, and that details about sanctions are published, both anonymised overall figures and, in severe cases, leading to removal from office, reports that name the individuals concerned, the behaviour involved and the outcome.* ***GRECO recommends that additional measures be taken in order to strengthen the objectivity, efficiency and transparency of the legal and operational framework for the disciplinary liability of prosecutors.***

12. In its Compliance Report from 7 December 2018 ("CR"), made public on 24 July 2019, GRECO has made the following statement as to the Moldovan authorities' compliance with Recommendation xviii:

> *105. The authorities report that, pursuant to the Law on the Public Prosecutor's Office, the SCP shall have an apparatus responsible for organising the activity of the Council and its Boards, including the Disciplinary and Ethics Board. The budget for the SCP is available starting from 1 January 2018. Reportedly, the new SCP became operational at the beginning of 2018 after the election/appointment of its members. The SCP has launched the recruitment of its Secretariat among civil servants and technical staff. Finally, the authorities indicate that the Disciplinary and Ethics Board has gathered regularly and has considered cases of disciplinary liability of prosecutors, initiated by the Inspection of Prosecutors or on appeals lodged against decisions rendered by the Inspection on terminating disciplinary proceedings against prosecutors.*
>
> *106. GRECO takes note of the information concerning the new SCP and the Disciplinary and Ethics Board under the SCP. It recalls that the reason for the current recommendation was the lack independence, impartiality, means and transparency of relevant bodies: including the statutory and budgetary dependence of the Inspection of Prosecutors on the General Prosecutor, the possibility for a SCP member to be involved in several stages of disciplinary proceedings against a prosecutor; the lack of motivation of the decisions in disciplinary matters and the lack of adequate publicity for disciplinary cases. Nothing to this end has been reported. GRECO encourages the authorities to take the necessary measures in order to make the disciplinary liability system objective, effective and transparent in line with requirements of the present recommendation. The steps taken so far do not render this recommendation complied with, even partly.*
>
> *107. GRECO concludes that recommendation xviii has not been implemented.*

13. In its Second Compliance Report from 25 September 2020 ("CR2"), made public on 13 October 2020, GRECO has made the following statement as to the Moldovan authorities' compliance with Recommendation xviii:

> *103. It is recalled that this recommendation was not implemented in the Compliance Report. The reason for the current recommendation was the lack independence, impartiality, means and transparency of relevant bodies, including the statutory and budgetary dependence of the Inspection of Prosecutors, the possibility for a SCP member to be involved in several stages of disciplinary proceedings against a prosecutor, the lack of justification of the decisions in disciplinary matters and the lack of adequate publicity for disciplinary cases. Nothing to this end was reported.*
>
> *104. The authorities now report that draft proposals to review the framework for disciplinary liability of prosecutors and to strengthen the independence of the Inspection of Prosecutors are under elaboration. These draft proposals are foreseen within the Government Action Plan for 2019 – 2020 (Rule of Law component) and the draft Strategy for the development of justice sector for 2019-2022. The SCP has requested assistance of the national data protection authority to elaborate a methodology for the publication of decisions of the Disciplinary and Ethics Board, striking the balance between transparency and the respect of privacy.*
>
> *105. Finally, the authorities have submitted statistics regarding disciplinary measures against prosecutors taken in 2018 and in 2019, indicating that the Inspection of Prosecutors examined 102 (in 2018) and 204 (in 2019) complaints against 133 (in 2018) and 260 (in 2019) prosecutors and identified grounds for disciplinary liability in 27 (in 2018) and 47 (in 2019) cases. The Disciplinary and Ethics Board registered 25 (in 2018) and 51 (in 2019) disciplinary proceedings against 22 (in 2018) and 44 (in 2019) prosecutors and sanctioned 15 (in 2018) and 24 (in 2019) prosecutors.*
>
> *106. GRECO takes note of the information provided, in particular, the intention of the authorities to review the framework for disciplinary liability of prosecutors and to publish the decisions of the Disciplinary and Ethics Board. The authorities have provided some figures showing that the system is operational. In the absence of consistent progress in reviewing the legal and operational disciplinary framework for prosecutors, GRECO concludes that recommendation xviii remains not implemented.*

14. The Strategy for Ensuring the Independence and Integrity of Justice Sector for 2021 - 2024 ("the Strategy"), approved by the Parliament in November 2020, states in relation to Objective 1.1 (Strengthening the independence and administration of the judiciary and the prosecutor's office) that:

> *Priorities continue to be given to ensuring the independence of the prosecutor's body and strengthening the capacities of the Superior Council of Prosecutors and the activity of its Boards, as well as reviewing the composition of the SCP, especially law members, in line with GRECO recommendations. The Superior Council of Prosecutors as the guarantor of prosecutors' independence and impartiality of prosecutors shall the plethora of tools needed to accomplish its tasks. For this purpose, the concept on the functioning of certain mechanisms should be revised, which currently are not a structural part of Superior Council of Prosecutors (i.e.: Prosecutor's Inspection, method for preparing and storing cases). In the section on prosecutors' independence, the Consultative Council of European Prosecutors (CCPE) in its Opinion no 9 stated that "the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary" and that "the general trend to enhance the independence and effective autonomy of prosecution services should be encouraged".*

15. Furthermore, in relation to Objective 1.2 (Strengthening integrity and accountability in the justice sector), it states that:

> *Ensuring the integrity of justice sector stakeholders and their accountability has been declared a national objective through various international commitments and national documents. Despite several measures taken, until now, the integrity standards as well as moral and ethical standards have not become an important part of the professionals' activities in the justice sector. The deficiencies detected in maintaining these standards have a deep impact on the litigants' trust in the rendered decisions. Judges and prosecutors cannot abuse the powers granted to them, and the guarantee of independence provided for by law for the performance of their official duties is to be correlated with the accountability and not impunity. In order to achieve this, it is necessary to ensure an effective verification of all judges and prosecutors, in terms of their professionalism, integrity and*

interests. At the same time, following the analysis of the new legal framework and practices, measures are required to improve the mechanism of disciplinary liability of judges and prosecutors.

16. Moreover, in the Action Plan for the implementation of the Strategy ("the Action Plan"), the actions envisaged for Objective 1.1 are:

- *Remove the Prosecutor's Inspection from its subordination to the Prosecutor General's Office by granting it the status of specialized autonomous body of the Superior Council of Prosecutors*
- *Clear delineation between the Superior Council of Prosecutors' authority to represent prosecutors and as guardian of their independence and the competences of the Prosecutor General's Office (procedures, administration, statements and implementation of state criminal policies)*

and those for Objective 1.2 are:

- *Amend the legal framework regarding the activity of the Judicial Inspection in the part related to the rights, obligations, safeguards of judges -inspectors, removal from office/revocation of mandate and other aspects aiming at strengthening capacities*
- *Amend the internal rules of the Superior Council of Magistracy regarding the activity of the Judicial Inspection*
- *Amend the legal framework regarding the disciplinary liability of judges in the part related to ensuring the clarity and predictability of criteria, which fall under disciplinary offences, the examination procedure, expand the opportunities for substitute members to attend the Disciplinary Board hearings, and other deficient issues found following the review of practices*
- *Independent evaluation of the practices of the Prosecutors' Inspection and the Disciplinary and Ethics Board of Prosecutors for reviewing facts which constitute a disciplinary offense*

3.1.2 Confidential counselling

17. In its ER, the GET drew attention to the need for guidance and training on ethical questions and confidential counselling for all prosecutors as follows:

> *164. The GET welcomes the new Code of Ethics and Conduct, which takes into account international and GRECO standards. That said, information gathered by the GET clearly suggests that more needs to be done to raise prosecutors' awareness of ethical dilemmas they may encounter in their professional life, of the existing standards, and to provide practical guidance on how principles apply in daily practice and help in solving concrete dilemmas – through further written guidance, confidential counselling within the prosecution service and dedicated training. The GET refers in this connection to its comments made with respect to judges above (see paragraph 115). It would appear that some of the above-mentioned measures will probably be taken on board by the future Disciplinary and Ethics Board which has been given the task of providing interpretative guidance, as well as by the future Prosecutorial Inspection. The precise articulation of roles between these two bodies remains to be seen, but the GET wishes to stress that the function of providing confidential counselling in concrete cases ought to be given to dedicated practitioners who have specific expertise in the field and are distinct from disciplinary bodies.* ***GRECO recommends (i) that the Code of Ethics and Conduct be communicated effectively to all prosecutors and complemented by further written guidance on ethical questions – including explanations, interpretative guidance and practical examples – and regularly updated; (ii) that dedicated training of a practice-oriented nature and confidential counselling within the prosecution service be provided for all prosecutors.***

18. In its CR, GRECO has made the following statement as to the Moldovan authorities' compliance with the second part of Recommendation xvii:

> *102. GRECO takes note of the information provided. (…) As regards the second part of the recommendation, GRECO appreciates that training on ethics and corruption prevention has been included in the annual training curriculum of the NIJ and that a series of training events on these matters have been organised. GRECO notes that the Disciplinary and Ethics Board is empowered with the task of providing interpretative guidance. This was already the case at the time of the adoption of the Evaluation Report, which emphasised that "the function of providing confidential counselling in concrete cases ought to be given to dedicated practitioners who have specific expertise in the field and are distinct from disciplinary bodies". Such counselling has not been put in place. It follows that also the second part of the recommendation has been partly implemented.*

103. GRECO concludes that recommendation xvii has been partly implemented.

19. In its CR2, GRECO has made the following statement as to the Moldovan authorities' compliance with the second part of Recommendation xvii:

> *100. As regards the second part of the recommendation, GRECO appreciates that the NIJ continues to provide regular dedicated training on ethics to prosecutors, as part of its annual training curriculum. Moreover, GRECO notes that the new amendments to the Code of Ethics foresee the setting up of a system of confidential counselling for prosecutors by Ethics Advisers. Advice is expected to be provided confidentially and, as it appears, distinct from disciplinary bodies. These developments also go in the right direction, but the system of confidential counselling remains to be set up and made operational. It follows that also the second part of the recommendation remains partly implemented.*
>
> *101. GRECO concludes that recommendation xvii remains partly implemented.*

3.2 Terms of reference

20. The terms of reference for this paper are to:

- Review, analyse and assess the current legislative and operational framework governing the disciplinary liability of prosecutors *vis-a-vis* relevant international standards, relevant GRECO recommendations and good practices;
- Identify possible ways to enhance the effectiveness of the disciplinary liability framework for prosecutors and the functional independence of the Prosecutorial Inspection, including by assessing the possibility of transferring Prosecutorial Inspection from the General Prosecution Office to the Superior Council of Prosecutors and presenting a critical assessment of effects of such a transfer; and
- Make practical recommendations for setting-up a system of confidential counselling within the Superior Council of Prosecutors ("SCP").

4 European and International Standards

4.1 Introduction

21. The standards applicable to the imposition of disciplinary liability on prosecutors are derived, firstly, from the rights and freedoms in the European Convention on Human Rights ("the ECHR"), as elaborated in the case law of the European Court of Human Rights ("the ECtHR") and, secondly, from the requirements set out in a number of soft law instruments.

22. The soft law instruments comprise: the Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system ("Recommendation Rec(2000)19");[1] various opinions and a study of the European Commission for Democracy through Law ("the Venice Commission");[2] several opinions of the Consultative Council of European Prosecutors ("the CCPE");[3] recommendations made by GRECO;[4] the UN Guidelines on the Role of Prosecutors of 1990 ("the UN Guidelines");[5] the European Guidelines on Ethics and Conduct for Public Prosecutors adopted by the Conference of Prosecutor Generals of

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[1] https://rm.coe.int/16804be55a, Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies.

[2] To be found in the *Compilation of Venice Commission Opinions and Reports Concerning Prosecutors* (https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2018)001-e), (CDL-PI(2018)001) and the *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution System* (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e) (Study No. 494/2008, CDL-AD(2010)040, 3 January 2011 ("*The Prosecution System*").

[3] In particular, Opinion Nos. 4 on "Judges And Prosecutors In A Democratic Society", ("the Bordeaux Declaration") (https://rm.coe.int/1680747391), 9 (2014) on European norms and principles concerning prosecutors ("the Rome Charter") (https://rm.coe.int/168074738b) and 13(2018) "Independence, accountability and ethics of prosecutors" ("CCPE Opinion No. 13(2018)) (https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d).

[4] In its 4th Evaluation Round, which was concerned with issues relating to the prevention of corruption in respect of members of parliament, judges and prosecutors ("ER").

[5] https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Europe ("the Budapest Guidelines");[6] the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors in 1999 ("the IAP Standards");[7] a guide produced in 2014 by the latter association together with the UN Office on Drugs and Crime on the Status and Role of Prosecutors ("the UNODC/IAP Guide");[8] and the Guidelines for Initial Training of Judges and Prosecutors ("the da Vinci Guidelines")[9].

23. This review of the standards first addresses some general considerations regarding disciplinary schemes for prosecutors and then deals, in turn, with the grounds on which liability can be imposed, the conduct of proceedings against prosecutors and the sanction which can be imposed where it is established that a disciplinary offence has been committed.

4.2 Some general considerations

24. The general considerations regarding disciplinary proceedings against prosecutors concern: their legitimacy; limitations on their applicability; the applicability of Article 6(1) of the ECHR; the relevance of case law not involving prosecutors; the relationship to criminal liability; disciplinary action against the head of a prosecution service; and quasi-disciplinary action.

4.2.1 Legitimacy

25. The possibility of subjecting prosecutors to disciplinary proceedings is a necessary consequence of the requirements expected of them in the performance of their functions.[10]

26. In particular, they are expected to act with integrity[11] and impartiality[12]. Furthermore, prosecutors are expected to act autonomously,[13] to preserve professional confidentiality[14] and to respect human rights in the conduct of criminal proceedings[15].

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[6] https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5, Conference of Prosecutors General of Europe, 6th session, CPGE(2005)05, 31 May 2005.

[7] https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx, 23 April 1999. These were endorsed by the United Nations Commission on Crime Prevention and Criminal Justice (Resolution 17/2, 14-18 April 2008).

[8] United Nations Office on Drugs and Crime, *The Status and Role of Prosecutors* (2014) (https://www.unodc.org/documents/justice-and-prison-reform/HB_role_and_status_prosecutors_14-05222_Ebook.pdf).

[9] Prepared pursuant to a Leonardo da Vinci Partnership Project; https://www.pdffiller.com/jsfiller-desk14/?requestHash=fb37ec54ee8b74effe3492c7bc693eeef56b5352bc7f085195bdb65c33fd12f2&projectId=612464497#f9c2ac4ac46f72d1c6d7c66f17de2fb0.

[10] This is explicitly recognised in para. 47 of CCPE Opinion No. 13(2018).

[11] See, para. 1 of the United Nations Guidelines, para. 18 of *The Prosecution System*, Title II of the Budapest Guidelines, para. 55 of CCPE Opinion No. 13(2018), Title 1 of the IAP Standards and Title 1, Chapter of the da Vinci Guidelines; 1. European standards concerned with the prevention of corruption and conflicts of interest, addressed in GRECO's 4th Evaluation Reports, also underpin the requirement for prosecutors to act with integrity.

[12] See para. 24 of Recommendation Rec(2000)19, para. 13 of the United Nations Guidelines, paras. 15-18 of *The Prosecution System*, Titles I-IV of the Budapest Guidelines, para. 54 of the Rome Charter, para. 54 of CCPE Opinion No. 13(2018), paras. 21 and 49 of CCPE Opinion No. 14 (2019) "The role of prosecutors in fighting corruption and related economic and financial crimes" ("CCPE Opinion No. 14 (2019)") (https://rm.coe.int/opinion-14-ccpe-en/168099399f), Title 3 of the IAP Standards and the UNODC/IAP Guide, p. 26. The issue of the impartiality of prosecutors has also been the subject of a *Report of the Special Rapporteur on the independence of judges and lawyers*; A/HRC/20/19, 7 June 2012 ((https://undocs.org/A/HRC/20/19).

[13] Autonomy is not always a quality referred to explicitly, but it is implicit in the emphasis placed frequently on the independence of individual prosecutors. See, e.g., paras. 11, 13 and 14 of Recommendation Rec(2000)19, para. 4 of the United Nations Guidelines, para. 31 of *The Prosecution System*, para. 27 of the Bordeaux Declaration, Title V of the Rome Charter, CCPE Opinion No. 13(2018), paras. 49-51 of CCPE Opinion No. 14 (2019), the UNODC/IAP Guide, pp. 7-13 and Title 2 of the IAP Standards.

[14] See, e.g., para. 13 of the United Nations Guidelines, Title II of the Budapest Guidelines and para. 47 of CCPE Opinion No. 13(2018). Furthermore, the ECtHR observed in a case that concerned the dismissal of the Head of the Press Department of the Prosecutor General's Office for having disclosed to a newspaper information concerning the commission of a serious offence by the Deputy Speaker of Parliament, that it is "mindful that employees have a duty of loyalty, reserve and discretion to their employer. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion"; *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, at para. 70. Moreover, it observed in *Kudeshkina v. Russia*, no. 29492/05 that: "Disclosure by civil servants of information obtained in the course of work, even on matters of public interest, should therefore be examined in the light of their duty of loyalty and discretion" (para. 85). Furthermore, in *Di Giovanni v. Italy*, no. 51160/06, 9 July 2013, the ECtHR found no violation of the right to freedom of expression where disciplinary action was taken against a judge for having failed in her duty of respect and discretion *vis-à-vis* members of the National Council of the Judiciary on account of her having given a newspaper interview in which she stated that a member of the examining body for a public competition to recruit judges and public prosecutors had used his influence to help a relative.

[15] See the importance attached by the ECtHR to public prosecutors observing the presumption of innocence and the equality of arms and other rights of the defence in cases such as *Khuzhin and Others v. Russia*, no. 13470/02, 23 October 2008, *Moiseyev v. Russia*, no.

27. Indeed, the CCPE has underlined that:

> prosecutors must earn the trust of the public by demonstrating in all circumstances an exemplary behaviour. They must treat people fairly, equally, respectfully and politely, and they must at all times adhere to the highest professional standards and maintain the honour and dignity of their profession, always conducting themselves with integrity and care.[16]

28. The existence of arrangements for imposing disciplinary liability on prosecutors is thus a necessary consequence of the need for them to be accountable for their actions and thereby secure the trust of the public.[17]

4.2.2 Certain limitations

29. While it is recognised that

> there must be provision for public prosecutors – given the substantial powers they enjoy and the consequences that the exercise of those powers can have on individual liberties - to be made liable at disciplinary, administrative, civil and criminal level for their personal shortcomings,

it has also been emphasised that

> such provision must be within reasonable limits in order not to encumber the system. The emphasis must therefore be on appeal to a higher level or to an ad-hoc committee and on disciplinary procedures, although individual prosecutors must, like any other individuals, be held responsible for any offences they may commit. Clearly, however, in systems where public prosecutors enjoy full independence, they carry greater responsibility.[18]

30. Similarly, although a disciplinary regime is seen as an important component in regulating prosecutorial conduct, it is also considered that such a regime

> should not be used to sanction prosecutors for arbitrary or unfounded reasons.[19]

31. Thus, it has been underlined that

62936/00, 9 October 2008 and *Natunen v. Finland*, no. 212022, 31 March 2009. See also its recognition of the role of prosecutors in ensuring respect for human rights through ensuring the conduct of thorough and effective investigations into various alleged violations in cases such as *Kaya v. Turkey*, no. 22729/93, 19 February 1998. The responsibility of public prosecutors regarding human rights is also underscored in: para. 24 of Recommendation Rec(2000)19; Titles I and III of the Budapest Guidelines; CCPE Opinion No. 11 (2016) on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime (under the heading "Management of cases") (https://rm.coe.int/16807474b9); CCPE Opinion No. 12 (2017) on "The role of prosecutors in relation to the rights of victims and witnesses in criminal proceedings" (https://rm.coe.int/opinion-no-12-on-the-role-of-prosecutors-in-relation-to-the-rights-of-/168076fd32); para. 6 of CCPE Opinion No. 13(2018); and paras. 58-61 of CCPE Opinion No. 14 (2019). Furthermore, it has been observed that: "Prosecutors are the essential agents of the administration of justice, and as such should respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Prosecutors also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary"; *Report of the Special Rapporteur on the independence of judges and lawyers*, (A/HRC/20/19, 7 June 2012)), para. 93. This quality is also seen in the concept of "loyalty" as defined in Title I of the da Vinci Guidelines; "4.4. Loyalty is the value of showing – usually by taking an oath – that one is bound by the rule of law. Loyalty implies two things: on the one hand the duty to exercise the powers entrusted in one and on the other hand the prohibition to exceed them"). In *Brisc v. Romania*, no.26238/10, 11 December 2018, the ECtHR found "nothing in the applicant's statements that would allow the domestic authorities to accuse him of breaching the secrecy of the criminal investigation" (para. 115).

[16] Item II of the Budapest Guidelines, cited by the Bureau of the CCPE, *Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017*, CCPE-BU(2017)6, para. 32 (https://rm.coe.int/ccpe-bu-2017-6e-report-situation-prosecutors-2017/1680786f96).

[17] See further para. 85 of the Explanatory Note to the Rome Charter. See also the *Interim report of the Special Rapporteur on the independence of judges and lawyers*, A/65/274, 10 August 2010 (https://undocs.org/A/65/274); "15. Combating impunity entails bringing the perpetrators of violations to account, whether in criminal, civil, administrative or disciplinary proceedings ... 60. Human rights principles and standards relating to judges, magistrates, lawyers and prosecutors recognize that they have to be accountable in the discharge of their functions and that disciplinary proceeding can be initiated against them". In addition, see the Updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1 (https://undocs.org/E/CN.4/2005/102/Add.1), which defines impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".

[18] Explanatory Memorandum to paragraph 11 of Recommendation Rec(2000)19, which provides that "States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the Public Prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out".

[19] The UNODC/IAP Guide, p. 32.

> disciplinary action and dismissal, should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review[20]

and that

> [t]he disciplinary system should be clear and transparent, with well-defined rules.[21]

32. Moreover, it needs to be kept in mind when considering recourse to disciplinary measures that these should

> rather be an extraordinary measure than a daily management tool.[22]

4.2.3 Article 6(1) of the ECHR

33. So far there have been a few cases before the ECtHR directly concerned with the merits of disciplinary action taken against prosecutors.[23] This is undoubtedly a reflection of the fact that it was only relatively recently that the ECtHR accepted that the right under Article 6(1) of the ECHR to a fair and public hearing in the determination of civil rights was generally applicable to disputes involving the authorities and public servants.[24]

34. However, the ECtHR has since considered that Article 6(1) can be invoked in respect of judges, even if though they are not part of the civil service since they form part of a typical public service.[25]

35. Moreover, it has recently taken the same view as regards prosecutors, whatever their formal status might be under the constitution of a country.[26]

36. Nonetheless, it is possible that Article 6(1) might not be regarded as applicable where the sanctions that are or could be imposed do not have a significant impact on the person concerned, so as to be sufficient for the proceedings concerned to be regarded as involving a dispute over her or his "civil rights".

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[20] Paragraph XII of the Rome Charter, reaffirmed in paragraph 20 of Bureau of the Consultative Council of European Prosecutors (CCPE-BU), *Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017*, CCPE-BU(2017)6. The Explanatory Note states that"52. The appointment and termination of service of prosecutors should be regulated by the law at the highest possible level and by clear and understood processes and procedures. 53. The proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, salaries, discipline and transfer (which must be affected only according to the law or by their consent). For these reasons, it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal".

[21] The UNODC/IAP Guide, p. 32. See also the stipulation in paragraph 8 of the Bordeaux Declaration that among the minimal requirements for an independent status of prosecutors is that their career development and security of tenure – which necessarily relates to matters of discipline - be safeguarded through guarantees provided by the law. Paragraph 8 does not specifically mention discipline, but it is included in paragraph 37 of its Explanatory Note.

[22] *Thematic Directory of the principles for a draft Law on the Public Prosecution Office of Ukraine* (Council of Europe, 2013) (https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802e5666), para. 81.

[23] Notably, *Brisc v. Romania*, no.26238/10, 11 December 2018 and *Kövesi v. Romania*, no. 3594/19, 5 May 2020. Only the latter case has addressed the disciplinary procedure.

[24] In *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007; Article 6(1) will only not be applicable where (a) a State in its national law has expressly excluded access to a court for the post or category of staff in question and (b) the exclusion must be capable of being justified on objective grounds in the State's interest. However, access to a court will not be regarded as having been excluded where there is no appeal to a court against the ruling of a disciplinary body if that body itself fulfils the requirements of Article 6(1); *Kamenos v. Cyprus*, no. 147/07, 31 October 2017, at paras. 82-88.

[25] *Olujić v. Croatia*, no. 22330/05, 5 February 2009, at para. 32.

[26] In *Kövesi v. Romania*, no. 3594/19, 5 May 2020, which concerned the dismissal of the chief prosecutor of the National Anticorruption Directorate. The basis for the finding that Article 6(1) was applicable was not only had national law not expressly excluded access to a court but "even assuming that access to court in the applicant's situation was expressly excluded by national law, applying the Eskelinen test further, the Court considers that the second condition – consisting of the existence of an objective justification for this exclusion in the State's interest – was also not fulfilled in the current case. In a legal framework where the removal from office of the chief prosecutor of the DNA was decided on by the President following a proposal by the Minister of Justice with the endorsement of the CSM, the absence of any judicial control of the legality of the decision of removal cannot be in the interest of the State. Senior members of the judiciary should enjoy – as other citizens – protection from arbitrariness from the executive power and only oversight by an independent judicial body of the legality of such a removal decision is able to render such a right effective" (para. 124).

37. Thus, it is well-established that there would be such a dispute where the disciplinary proceedings could lead to the dismissal of the person concerned[27] or the early termination of her or his term of office[28], where they could result in the loss of a particular post and the transfer to another one[29] and where they could lead to a temporary suspension of the ability to pursue the profession concerned[30].

38. There would also be considered to be such a dispute where the outcome would affect the person's eligibility for a particular office or would have serious financial consequences for her or him.[31]

39. In addition, there is likely to be considered to be a dispute about a person's "civil rights" in the case of a decision to suspend her or him pending the outcome of the disciplinary proceedings insofar as this effectively amounts to their determination.[32] The length of the suspension will not be the decisive basis for reaching such a conclusion;[33] more attention will instead be paid to its actual effect, including the loss of salary and likelihood of considerable delay in a final determination being reached[34].

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[27] See, e.g., *Olujić v. Croatia*, no. 22330/05, 5 February 2009, Vanjak v. Croatia, no. 29889/04, 14 January 2010 and *Kövesi v. Romania*, no. 3594/19, 5 May 2020.

[28] See, e.g., *Sturua v. Georgia*, no. 45729/05, 28 March 2017.

[29] See, e.g., *Stojakovic v. Austria*, no. 30003/02, 9 November 2006, which concerned an applicant who had been recalled from the post as head of an institute and transferred to another post.

[30] See, *W.R. v. Austria*, no. 26602/95, 21 December 1999; "30. Having regard to this recent case-law, the Court observes that in the present case the possible penalties for disciplinary offences under section 12 of the Disciplinary Act 1872 and section 16 of the Disciplinary Act 1990, respectively, included a suspension of the right to practise as a lawyer for up to one year. Thus, the applicant ran the risk of a temporary suspension of his right to practise his profession. Indeed, the Bar Chamber, in the appeal proceedings, requested that a three month suspension be imposed. It follows that the applicant's right to continue to practise as a lawyer was at stake in the disciplinary proceedings against him. Accordingly, Article 6 § 1 is applicable under its civil head". See also *Ramos Nunes de Carvalho E Sá v. Portugal* [GC], no. 55391/13, 6 November 2018, in which a judge had been suspended from her duties for 240 days.

[31] E.g., *Harabin v. Slovakia*, no. 58688/11, 20 November 2012; "122. In the present case the situation is different from that in Olujić, (cited above) in that the disciplinary proceedings did not lead to the applicant's dismissal. The Court has noted, however, that the conclusion that the applicant had committed a serious disciplinary offence may be of particular relevance to his eligibility to hold a judicial office, as under section 116(3)(b) in conjunction with section 117(7) of the Judges and Assessors Act 2000 a serious disciplinary offence committed by a judge who has earlier been sanctioned for a serious disciplinary offence renders that judge ineligible to continue in office. It is further relevant that the Constitutional Court's finding entailed a 70% reduction of the applicant's yearly salary. Those two factors, taken together, justify the conclusion that the disciplinary proceedings complained of gave rise to a dispute over the applicant's "civil rights"". See also, *Tato Marinho dos Santos Costa Alves dos Santos and Figueiredo v. Portugal*, no. 9023/13, 21 June 2016, in which penalties involving the loss of between 25 and 50 days' salary had been imposed on the applicant judges and *Ramos Nunes de Carvalho E Sá v. Portugal* [GC], no. 55391/13, 6 November 2018, in which one of the penalties imposed on a judge had been the loss of 20 days' salary.

[32] A change in the ECtHR's approach to the view taken of such interim measures was effected by its ruling in *Micaleff v. Malta* [GC], no. 17056/06, 15 October 2009; "79. The exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same "civil rights or obligations" and have the same resulting long-lasting or permanent effects. 80. Against this background the Court no longer finds it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor is it convinced that a defect in such proceedings would necessarily be remedied at a later stage, namely, in proceedings on the merits governed by Article 6 since any prejudice suffered in the meantime may by then have become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation"".

[33] This was made clear in *Micaleff v. Malta* [GC], no. 17056/06, 15 October 2009 ("85. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable") and was reaffirmed in Helmut Blum v. Austria, no. 33060/10, 5 April 2016 ("62. As regards the argument raised by the applicant, the Court reiterates that the length of time the interim measure is or was in force is not decisive when examining if Article 6 will be applicable in the given case (see again Micallef v. Malta [GC], cited above, § 85)").

[34] See *Müller-Hartburg v. Austria*, no. 47195/06, 19 February 2013 ("40. In the present case, the disciplinary authorities ordered that the applicant be struck off the register. Moreover, a temporary ban on practising as a lawyer had been imposed on the applicant as an interim measure while the disciplinary proceedings were pending. There can thus be no doubt that the applicant's right to continue to practise as a lawyer was at stake in the disciplinary proceedings. Consequently, Article 6 § 1 applies under its civil head", In this case, the disciplinary proceedings were delayed pending the outcome of criminal proceedings, with the result that they were pending for almost nine years), Helmut Blum v. Austria, no. 33060/10, 5 April 2016 ("63. In the present case, the provisions for interim measures under the Disciplinary Act provided, inter alia, for the withdrawal of the right to act as a representative before certain or all courts or administrative authorities as well as a temporary ban on practising as a lawyer. In the main proceedings, the disciplinary authorities may take measures ranging from a written reprimand to striking off the register (which means a ban on practising as a lawyer for a minimum of three years). The Court considers that in both the main and the injunction proceedings civil rights within the meaning of Article 6 were at stake") and *Paluda v. Slovakia*, no. 33392/12, 23 May 2017 (in which "the suspension entailed the

40. It should also be kept in mind that the applicability of Article 6(1) to disciplinary proceedings is determined not by the particular outcome in a case – which may not involve a particularly heavy penalty - but the possibility of those proceedings leading to one of the serious consequences previously discussed.[35]

4.2.4 Case law not involving prosecutors

41. As has been noted,[36] there have not been many cases before the ECtHR in which disciplinary proceedings involving prosecutors have been directly considered. However, the requirements elaborated by it in respect of the many cases determined by it in respect of disciplinary proceedings involving other professionals are of general application and thus of relevance for those concerning prosecutors.

42. Furthermore, it has been recognised by the CCPE that the proximity and complementary nature of the missions of judges and prosecutors creates similar requirements and guarantees in terms of their status and conditions of service, including those with respect to discipline[37] and thus the greater elaboration so far by the European Court of requirements governing the discipline of judges will be of especial importance for proceedings taken against prosecutors.

4.2.5 Relationship to criminal liability

43. As noted above,[38] the Explanatory Memorandum to Recommendation Rec(2000)19 indicated disciplinary proceedings were preferable to criminal ones in respect of inappropriate conduct on the part of prosecutors but resort to the latter was not excluded.

44. Moreover, there may be instances where the institution of both disciplinary and criminal proceedings is seen as the necessary response to such conduct.

45. This will not, however, entail a violation of the prohibition of double jeopardy in Article 4 of Protocol No. 4 to the ECHR as disciplinary proceedings for which the most severe sanction is dismissal is not considered to amount to a criminal offence.[39] As a result there would not be considered to be any duplication of criminal liability whether the conviction occurred before or following the imposition of a disciplinary sanction in respect of the same matter dealt with in the criminal proceedings concerned.[40]

4.2.6 Action against the head of a prosecution service

46. There does not appear to be any position taken in the standards under consideration as to whether the head of the prosecution service should her or himself be amenable to disciplinary

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applicant's disqualification from the exercise of his office and the withholding of 50% of his salary (see paragraph 10 above), while at the same time he continued to be subject to restrictions such as not being able to engage in gainful activity elsewhere" (para. 50).

[35] *A. v. Finland* (dec.), no. 44998/98, 8 January 2004; "In the present case, the applicant was issued a mere warning. No measure withdrawing or affecting his right to exercise his profession was imposed. Nor was the warning made public or any financial consequences shown to have flowed from the warning. Thus, the concrete outcome of the proceedings was not directly decisive for the applicant's right to continue to exercise his profession. However, it is undisputed that, when the proceedings were started, expulsion from the bar was not impossible. In other words, what was at stake was the applicant's right to continue to exercise his profession as a member of the bar. The Court therefore assumes that Article 6 is applicable".

[36] See para. 33 above.

[37] This similarity was recognised in paragraph 37 of the Explanatory Note to the Bordeaux Declaration.

[38] See para. 29 above.

[39] See, e.g., *Soysever v. Turkey* (dec.), no. 39826/98, 7 November 2000; "The Court notes that the essence of the sanction of discharge imposed to the applicant falls into the field of disciplinary proceedings in the armed forces and addresses itself only to one given group with a particular statute". See also Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013; "93. … in the present case the applicant, possessing a special status, was punished for failure to comply with his professional duties – that is, for an offence falling squarely under the disciplinary law. The sanction imposed on the applicant was a classic disciplinary measure for professional misconduct and, in terms of domestic law, it was contrasted with criminal-law sanctions for the adoption of a knowingly wrongful decision by a judge (see Article 375 of the criminal code above)".

[40] See, e.g., *Luksch v. Austria* (dec.), no. 37075/97, 21 November 2000 and *Müller-Hartburg v. Austria*, no. 47195/06, 19 February 2013 and Biagioli v. San Marino (dec.), no. 64735/14, 13 September 2016 as regards the former situation and Šubinski v. Slovenia (dec.), no. 48298/13, 13 September 2016 as regards the latter one.

proceedings but there is considered that there should be no lack of clarity as to whether the possibility of instituting such proceedings against her or him exists.[41]

4.2.7 Quasi-disciplinary action

47. Finally, any action taken in respect of a prosecutor that is of a comparable nature to a disciplinary measure – even though not so formally described[42] – will need to take place in a manner consistent with the requirements discussed in the following sections.

4.3 Grounds for disciplinary action

48. There are no provisions in the ECHR that specifically address the grounds on which disciplinary action might need to be taken against a prosecutor. Nor is there any real elaboration of such grounds in the soft law standards.[43]

49. Nonetheless, the positive obligations arising under the right to life, prohibition of torture and inhuman and degrading punishment or treatment, the prohibition on slavery and forced labour, the right to liberty and security and the right to respect for private and family life under Articles 2, 3, 4, 5 and 8 of the ECHR could require disciplinary action to be taken against a prosecutor in order to protect the rights concerned.[44]

50. It is also possible that the ECtHR might recognise positive obligations arising from the right to a fair trial under Article 6 that are relevant for a prosecutor's conduct of a case for which compliance would depend upon the action of a prosecutor and thereby require at least disciplinary action in certain cases of non-compliance.[45]

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[41] Thus the Venice Commission has observed that: "Article 50 is concerned with the disciplinary sanctions that may be applied against a public prosecutor and these are appropriate. However, paragraph 1 stipulates that these sanctions may not be applied against the Prosecutor General. This may be appropriate given the wide discretion over his or her removal but this stipulation still leaves it unclear as to whether disciplinary proceedings can nonetheless be instituted against the Prosecutor General, albeit without the possibility of imposing any sanctions. This uncertainty arises because the applicability of Articles 44-49 to the Prosecutor General is not explicitly excluded. There is thus a need to clarify the disciplinary liability of the Prosecutor General"; CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine ("Joint Opinion, Ukraine") (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)025-e), §137. GRECO in its 4th Evaluation Report in respect of the Czech Republic recommended that the Supreme Public Prosecutor and other chief prosecutors only be recalled (i.e., removed) in the context of disciplinary proceedings; para. 191.xi.

[42] The possibility of this occurring has been recognised by both the CCPE ("In introducing transfer or secondment against the will of a prosecutor, either internal or external, the potential risks should be balanced by safeguards provided by law (for example, a transfer which is disguising a disciplinary procedure)" (paragraph 69 of the Explanatory Note to the Rome Charter)) and the Venice Commission ("The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases"; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §76) (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)004-e).

[43] However, in the context of the requirements for the conduct of disciplinary proceedings, CCPE Opinion No. 13(2018) does refer to these taking place "in the event of serious breaches of duty (negligence, breach of the duty of secrecy, anti-corruption rules, etc.)"

[44] E.g., this might be the consequence of: a failure to provide the legally obliged prosecutorial supervision over a search operation in a prison in which there was ill-treatment of the prisoners (as in Karabet and Others v. Ukraine, no. 38906/07, 17 January 2013); and the way in which criminal proceedings were handled (as in M.C. v. Bulgaria, 39272/98, 4 December 2003 in which the prosecutors forwent the possibility of proving the *mens rea* of the alleged perpetrators of a rape by assessing all the surrounding circumstances, such as evidence that they had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, and also by judging the credibility of the versions of the facts proposed by the three men and witnesses called by them, with the result they felt short of the requirements establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse). See also the violation of Article 8 found in *Craxi v. Italy (No.2)*, 25337/94, 17 July 2003 that resulted from the reading out in court by a prosecutor of intercepted telephone conversations and their release to the court's registry, to which the press had access, when this material included private matter not relevant to the proceedings.

[45] E.g., the ECtHR has recognised that a court had an obligation to ensure practical and effective respect for the applicant's right to due process in the context of the inadequate legal representation of a defendant; Czekalla v. Portugal, no. 38830/97, 10 October 2002.A similar view might, e.g.,, ultimately be taken of the unjustified failure of a prosecutor to disclose evidence to the defence or to allow a defendant access to his lawyer during an interrogation. Moreover, it should be borne in mind that remarks by a prosecutor have in a number of instances been found to breach an accused person's presumption of innocence; see, e.g., Khuzin and Others v. Russia, no. 13470/02, 23 October 2002 and *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010)

51. At the same time, the taking of disciplinary action against a prosecutor should not be on grounds that conflict with rights under the ECHR that he or she has, such as to freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association.[46]

52. However, this does not mean that conduct engaging these rights might not in some instances be incompatible with a person's obligations as a prosecutor and thus the taking of disciplinary action in respect of it be viewed by the ECtHR as an admissible restriction on the particular right concerned.[47] Nonetheless, in such cases, it will be seen that the application of a disproportionate penalty pursuant to such action would result in the finding that the right has been violated.[48]

53. The requirements expected of prosecutors in the performance of their functions previously discussed above[49] will inevitably provide the main basis for stipulating the grounds on which disciplinary action may be taken against them.

54. Furthermore, breaches of the criminal law will in many instances be either directly incompatible with those requirements or make it untenable for the person concerned to continue to act as a prosecutor[50], although this will not necessarily lead to a permanent disqualification from being able to do so[51]. However, it has been suggested that it would not be appropriate to take disciplinary action where a prosecutor has been convicted of an offence that is not especially serious in nature.[52]

55. Moreover, it has been emphasised that any basis for imposing liability should not be concerned with action or inaction on the part of a prosecutor that could be regarded as only trivial in nature.[53]

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[46] E.g., as was found to have occurred in *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008 (which concerned the dismissal of the Head of the Press Department of the Prosecutor General's Office for having disclosed to a newspaper information concerning the commission of a serious offence by the Deputy Speaker of Parliament. This was considered by the ECtHR to have violated his right to freedom of expression since the Prosecutor General, although aware of the situation for some six months had shown no sign of having any intention to respond but instead gave the impression that he had succumbed to the pressure that had been imposed on his office and there were no other alternative channels open to the applicant, the disclosure had a bearing on issues such as the separation of powers, improper conduct by a high-ranking politician and the government's attitude towards police brutality which were very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate, the information was genuine, the applicant had no ulterior motive) and *Kayasu v. Turkey (No.1)*, no. 64119/00, 13 November 2008 (in respect of the dismissal of a prosecutor on account of the words used by him in a criminal complaint lodged by him acting as a private citizen against former generals of the army who had been the main instigators of a military coup). See also the finding in *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, Brisc v. Romania, no. 26238/10, 11 December 2018 and *Kövesi v. Romania*, no. 3594/19, 5 May 2020 of violations of the right to freedom of expression as a result of the premature termination of the mandates in the first case of the President of the Supreme Court and in the second and third cases of chief prosecutors on account of views they had expressed publicly in that capacity.

[47] E.g., in *W.R. v. Austria* (dec.), no. 26602/95, 30 June 1997 (which concerned the reprimand and fine imposed on a prosecutor for having insulted a judge by stating that the latter's legal view was ridiculous) and Poyraz v. Turkey, no. 15966/06, 7 December 2010 (which concerned a civil judgment against the applicant for defamation on the basis of a report which he had compiled as chief inspector of the Ministry of Justice and which had been leaked to the press, concerning allegations of professional misconduct on the part of a senior judge).

[48] See paras. 121-126 below.

[49] See paras. 25-27 above.

[50] "Breaches of a country's criminal law by a prosecutor would obviously be viewed as unprofessional conduct, and if the criminal breach were attributed to conduct such as the trading of information on a file for financial gain, the breach would be professional misconduct as well"; UNODC/IAP Guide, p. 34.

[51] E.g., a conviction for driving under the influence of alcohol would undoubtedly undermine the authority that a prosecutor might be expected to command in the short term but the possibility of the rehabilitation of her or his standing in the future could not be excluded.

[52] As has been observed by the Venice Commission: "[…] [A]lthough the specificity of the service might warrant dismissal for almost any offence, this would perhaps be disproportionate in the case of minor administrative offences (e.g., with respect to motoring) […]"; Joint Opinion, Ukraine, §137.

[53] A view expressed by both the Venice Commission ("Article 64 provides that the cutting of salary relates to unauthorised absence. Condemnation is a written notification indicating a fault and can be imposed for conduct harming respect and trust for the official position, discrediting the service by dressing in an inappropriate manner, using state owned instruments for private purposes, ill-treatment towards colleagues and other persons. The risk of abusing disciplinary power has been reduced by the fact that the final decision on disciplinary sanction is now made by the HSYK, but such a risk still remains. It is therefore highly recommended that the regulations on disciplinary sanctions be revised in order to reduce the reasons for such sanctions, to secure proportionality and to limit disciplinary sanctions to severe violations of the duties of […] a prosecutor"; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §63) and the CCPE ("The CCPE Bureau therefore recommends … specifying that only very serious and repetitive incompetence cases established through due disciplinary procedure, with a possibility of judicial appeal, may lead to dismissal"; Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with

56. Furthermore, there is seen to be a need for the grounds for imposing disciplinary liability to relate only to the substantive action or inaction of a prosecutor so that they should not be concerned with mere perceptions as to what he or she may have done or failed to do.[54]

57. In addition, it is well-established that the acquittal of someone against whom a prosecutor has brought proceedings should not of itself be the basis for any disciplinary liability.[55] However, this restriction would not preclude action being taken against a prosecutor where her or his failings in the course of a pre-trial investigation or the prosecution itself clearly led to an acquittal.[56]

58. In prescribing disciplinary offences, there is a need for recognition in their formulation of the existence of circumstances that could afford a valid defence to any action or inaction that is otherwise unacceptable.[57]

59. Although the elaboration of specific disciplinary offences may well reflect aspects of provisions in codes of ethics which have been drawn up for many prosecution services,[58] it should be borne in mind that the general and exhortative nature of some elements in them might make them an inappropriate basis for disciplinary action[59].

60. Also, as regards any link between disciplinary offences and codes of ethics, it is essential that the formulation of any grounds for disciplinary action is never imprecise or vague. [60]

European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3, 25 June 2018, para. 41. In addition, CCPE Opinion No. 13(2018) refers to disciplinary proceedings being taken “in the event of serious breaches of duty”; para. 47).

[54] As has been observed by the Venice Commission: “It seems that causing a perception of something rather than actually doing it are not appropriate criteria for carrying out a serious sanction on a […] prosecutor. A perception may be entirely wrong and it should be necessary to prove that the […] prosecutor has engaged in misconduct rather than that some persons think he or she might have done. This is carried to extremes in Article 68(e) which permits a change of location where a judge is deemed to have: “*caused a perception that he has been involved in bribery or extortion even though no material evidence is obtained*”’; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §71.

[55] See, e.g., the views of the Venice Commission (“Article 44 should explicitly rule out that an acquittal of a person accused by a prosecutor can result in disciplinary proceedings against the prosecutor unless the charges were brought due to gross negligence or maliciously. It seems that because of fear of performance indicators and of disciplinary proceedings prosecutors exert pressure on the judges to avoid acquittals. Currently prosecutors seem to feel obliged to win all cases lest they face disciplinary action. In a democratic system under the rule of law, prosecutors are parties subject to the principle of the equality of arms and necessarily lose cases without this resulting in disciplinary action against them”; Joint Opinion, Ukraine, §128) and of the CCPE (“In a democratic system under the rule of law, an acquittal of an individual should not result in disciplinary proceedings against the prosecutor responsible for the case”; Explanatory Note to the Rome Charter, para. 86).

[56] Such as might occur following the unjustified withholding of evidence from the defence or the unjustified restriction on a suspect’s access to legal advice during interrogation.

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

[58] Thus, in its 4th Evaluation Report in respect of Azerbaijan, GRECO recommended that violations of the Prosecutorial Code of Ethical Behaviour be clearly included within the range of the disciplinary offences under the Prosecutor’s Office Act and the Act on Service in the Prosecutor’s Office; para. 128.xvii.

[59] This was recognised in a point noted in the draft structure for what became CCPE Opinion No. 13(2018): “Relations between conduct and discipline. When there is a disciplinary code, there is a repressive aspect not necessarily to be recommended. Ethics has a broader spectrum that must be considered on a daily basis” (CCPE-GT(2018)1Prov3). This does not mean that clarity in the formulation of codes of ethics for prosecutors should not be sought and indeed this is something that has been repeatedly recommended by GRECO in its 4th Evaluation Reports particularly through the use of explanatory comments and/or practical examples; in respect of Albania (para. 146.x), the Czech Republic (para. 191.xii), Denmark (para. 180.vi), Estonia (para. 202.xv), Finland (para. 195.viii), Georgia (para. 204.xiii), Greece (para. 137.xiv), Italy (para. 198.ix), Lithuania (para. 236.xi), Malta (para. 152.viii), Republic of Moldova (para. 189.xvii), Monaco (para. 198.xii), Norway (para. 207.vii), Romania (para. 155.x), Serbia (para. 221.xi), Slovak Republic (para. 149.xii), Slovenia (para. 233.xiii), Sweden (para. 185.viii), Switzerland (para. 291.x), “the former Yugoslav Republic of Macedonia” (para. 251.xiv), Turkey (para. 241.xxi) and Ukraine (para. 273.xxvii).

[60] See, e.g., the following view of the Venice Commission (“Article 62 deals with disciplinary violations. Some of these provisions are somewhat vague and potentially dangerous and could perhaps be used to undermine a prosecutor or to control him. Criterion (b) referring to unequal interpretation or application of legislation is particularly dangerous. This seems to be capable of being applied in a very subjective manner. There is a need to distinguish between failure to work and the more subjective assessment of the quality of decisions which are made. If the latter is to be second-guessed unless in a severe case where decisions are patently insupportable then there is a problem with the autonomy of the individual concerned” (CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors’ Service of Moldova (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)019-e), §52) and “It is important, in light of their independence, that prosecutors have security of tenure. The terms under which they may be sanctioned (even removed from office) should therefore be phrased clearly and unambiguously. […] ” (*Joint opinion on the Draft Law on the Prosecution Service of the Republic of Moldova adopted by the Venice Commission at its 102nd plenary session*, CDL-AD(2015)005 (“Joint Opinion, Moldova”) (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)005-e), §§117, 118 and 120)) and of

61. However, the ECtHR has acknowledged the difficulty of avoiding general language in formulating disciplinary offences because otherwise it may not be possible to deal with an issue comprehensively and constant updating may be required to deal with new circumstances.[61]

62. As a consequence, it considered that:

> a list of specific behaviours but aimed at general and uncountable application, does not provide a guarantee for addressing properly the matter of the foreseeability of the law.[62]

63. Indeed, it is clear from the case law of the ECtHR that an existing body of case law interpreting and applying a provision can remove any uncertainty as to what a particular provision requires.[63]

64. Moreover, the ECtHR has also indicated that, in determining the certainty of a term used in a provision, it will be more concerned with the manner in which the use of the term is explained by the body applying the provision concerned and the absence both of any evidence of bad faith in so doing and of any conflicting decisions.[64]

65. At the same time, it is also important that the gravity of particular offences is clearly indicated as this is essential for determining both the range of sanctions applicable for them and guiding decisions as to their imposition in particular cases.[65]

66. Insofar as any link might be made between disciplinary action and the outcome of the performance evaluation of a prosecutor[66], this should certainly only occur where the latter actually discloses a prescribed disciplinary offence meeting the all the foregoing requirements. It seems improbable that a mere negative performance evaluation could provide a sufficient basis for disciplinary proceedings as such an evaluation could be attributable to factors that do not involve any misconduct and for which the more appropriate response would be the taking of certain remedial measures, in, particular, training.

67. Finally, there are several issues regarding the extent of the period for which liability in respect of the commission of a disciplinary offence can endure and thus how long before it ceases to be possible to bring proceedings regarding it.

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the CCPE ("As it was already mentioned, the CCPE indicated that the appointment and termination of service of prosecutors should be regulated by law at the highest possible level and by clear and understood processes and procedures.. Incompetent performance as a ground for dismissal seems to be a very broad and vague concept and it may be understood and interpreted in an arbitrary manner, opening the door for politically motivated or otherwise biased dismissals under the pretext of "incompetent performance"; Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3, 25 June 2018, para. 40). In its 4th Evaluation Reports, GRECO recommended that disciplinary offences be defined clearly or more precisely in Georgia (para. 204.xv), Monaco (para. 198.xiv), Portugal (para. 189.xv), "the former Yugoslav Republic of Macedonia" (para. 251.xvi) and Ukraine (para. 273.xxix). It also recommended that the disciplinary arrangements in general be defined more clearly in Luxembourg; para. 159.xiv.

[61] See, e.g., *Galstyan v. Armenia*, no. 26986/03, 15 November 2007, at para. 107 and *Sinkova v. Ukraine*, no. 39496/11, 27 February 2018, at para. 102.

[62] Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013, at para. 178.

[63] See, e.g., *Hachette Filipacchi Associés v. France*, no. 71111/01, 14 June 2007, at para. 33 and *G.S.B. v. Switzerland*, no. 28601/11, 22 December 2015, at para. 78. The need for the publication of case law arising from disciplinary proceedings has also been recommended by GRECO in its 4th Evaluation Reports in respect of Andorra (para. 182.xii), Belgium (para. 175.xv), Montenegro (para. 137.x) and Switzerland (para. 291.xii). See also its recommendation that to create a compendia of rules of conduct be established by Belgium (para. 175.xiii) and Germany (para. 252.viii).

[64] See, e.g., *Birulev and Shishkin v. Russia*, no. 35919/05, 14 June 2016, at paras. 68-71.

[65] Thus, the Venice Commission has observed that: "In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity"; Joint Opinion, Moldova, § 120.

[66] The Venice Commission has observed that: "As an objective basis for disciplinary action, a performance evaluation system should be introduced in the Law. Such a system should provide for objective criteria for evaluation and include necessary guarantees for appeals against negative evaluations"; Joint Opinion, Ukraine, §127.

68. Thus, the Venice Commission has drawn attention to the possibility that – having regard to the circumstances surrounding the commission of disciplinary offences – a short limitation period may be inappropriate.[67] This is also the view of GRECO.[68]

69. Furthermore, it should also be noted in this connection that the ECtHR has considered that a time-bar should not apply to crimes involving torture and inhuman treatment[69] and it is possible that a similar view might be taken of disciplinary liability in respect of such misconduct.

70. However, as regards disciplinary offences not involving such a serious violation of human rights, the position of the ECtHR is clear that legal certainty requires the stipulation of some limitation period.[70]

71. However, so far, there is no guidance in European standards as to whether it ought to be possible – as has been the practice in some countries – for someone to escape the imposition of disciplinary liability entirely through resigning before disciplinary proceedings are instituted or they have reached a conclusion.

4.4 Conduct of disciplinary proceedings

72. The manner in which disciplinary proceedings are conducted is something addressed in some detail in the case law of the ECtHR regarding Article 6(1) of the ECHR, albeit not specifically with regard to prosecutors.

73. However, the conduct of such proceedings is the specific focus of various European and international soft law standards. There is a good deal of coincidence between the requirements emerging from these two sources, but certain points are only found one or other of them.

74. The starting point is that, as has already been seen,[71] disciplinary proceedings will in most instances need to fulfil the requirements of Article 6(1) to a fair hearing and the need for fairness in the conduct of such proceedings is echoed in many soft law standards[72].

75. In elaborating what is entailed by these requirements, this section considers first the aspects relating to the body that conducts the disciplinary proceedings and then the ones dealing with the procedure to be followed.

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[67] Thus, it observed of a provision in a draft law that: "The 3 years extension of disciplinary liability for the violations mentioned under Article 39 (b), (c) and (e) is problematic. Firstly, because of the vagueness of the formulation of the violations concerned (see comments below). Secondly, the focus is on the nature of the violations rather than the reasons for disciplinary action not being taken before the regular time-limit of one year. Such reasons may include deliberate concealment or cases where the facts only come to light in judicial proceedings (especially ones in which a miscarriage of justice is established) at a later date. It is only these latter considerations which should justify a departure from the limitation period; Joint Opinion, Moldova, §§116, 122 and 123.

[68] This was the subject of recommendations in its 4th Round ER in respect of Azerbaijan (para. 128.xxi), Poland (para. 224.xv) and Ukraine (para. 273.xxx). In the case of Poland, the possibility of interrupting or suspending the limitation period in specified circumstances was particularly recommended.

[69] See, e.g., *Abdülsamet Yaman v. Turkey*, 32446/96, 2 November 2004, *Beganović v. Croatia*, no. 46423/06, 25 June 2009 and Valiuliene v. Lithuania, no. 33234/07, 26 March 2013.

[70] See Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013; "137. The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time (see Stubbings and Others v. the United Kingdom, 22 October 1996, § 51, Reports 1996-IV). Limitation periods are a common feature of the domestic legal systems of the Contracting States as regards criminal, disciplinary and other offences. 138. As to the applicant's case, the facts examined by the HCJ in 2010 dated back to 2003 and 2006 (see paragraphs 17-18 above). The applicant was therefore placed in a difficult position, as he had to mount his defence with respect to events, some of which had occurred in the distant past. 139. It appears from the HAC's decision in the applicant's case and the Government's submissions that domestic law does not provide for any time bars on proceedings for dismissal of a judge for "breach of oath". While the Court does not find it appropriate to indicate how long the limitation period should be, it considers that such an open-ended approach to disciplinary cases involving the judiciary poses a serious threat to the principle of legal certainty. 140. In these circumstances, the Court finds that there has been a violation of Article 6 § 1 of the Convention in this respect". It is doubtful that the specific reference to the judiciary in connection with legal certainty was meant to be exclusive as the underlying problem is the difficulty in responding to allegations a long time after the events in question. Previously, in *Luksch v. Austria* (dec.), no. 37075/97, the fact that the relevant disciplinary law for accountants did not contain rules on limitation had not been considered by the ECtHR to disclose any appearance of a violation of Article 6(1).

[71] See paras. 33-38 above.

[72] See para. 5 of Recommendation Rec(2000)19, paras. 21 and 22 of the United Nations Guidelines, paragraphs 72 and 87 of the Explanatory Note to the Rome Charter and Article 6.6 and 6.7 of the IAP Standards.

4.4.1 The disciplinary body

76. It is well-established that conferring on a professional disciplinary body – as opposed to a court – the role of determining whether a disciplinary offence has been committed and then imposing some penalty where one is found to have been committed will not, in itself, be inconsistent with the requirements of Article 6(1).

77. However, the professional disciplinary body must either (a) fulfil the requirements of Article 6(1) itself ("the first approach") or (b) its rulings must then be subject to subsequent review by a judicial body that (i) has full jurisdiction or provides sufficient review over the case that the body has determined and (ii) provides the guarantees which are expected to be observed by this provision of the European Convention ("the second approach").[73]

[73] In the case of Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013 the review provided by the High Administrative Court ("HAC") was found not to be sufficient: "125. Firstly, the question arises whether the HAC could effectively review the decisions of the HCJ and Parliament, given that the HAC had been vested with powers to declare these decisions unlawful without being able to quash them and take any further adequate steps if deemed necessary. Even though no legal consequences generally arise from a decision being declared unlawful, the Court considers that the HAC's inability to formally quash the impugned decisions and the absence of rules as to the further progress of the disciplinary proceedings produces a substantial amount of uncertainty about what the real legal consequences of such judicial declarations are. 126. The judicial practice developed in this area could be indicative in this respect. The Government submitted copies of domestic court decisions in two cases. However, these examples show that after the HAC had declared the judges' dismissal unlawful, the claimants had had to institute separate proceedings for reinstatement. This material does not shed light on how disciplinary proceedings should be conducted (in particular, the steps which should be taken by the authorities involved after the impugned decisions have been declared unlawful and the time-limits for those steps to be taken) but squarely suggests that there is no automatic reinstatement in the post of judge exclusively on the basis of the HAC's declaratory decision. Therefore, the material provided indicates that the legal consequences arising from the HAC's review of such matters are limited and reinforces the Court's misgivings about the HAC's ability to handle the matter effectively and provide a sufficient review of the case. 127. Second, looking into the manner in which the HAC arrived at its decision in the applicant's case and the scope of the dispute, the Court notes that important arguments advanced by the applicant were not properly addressed by the HAC. In particular, the Court does not consider that the applicant's allegation of a lack of impartiality on the part of the members of the HCJ and of the Parliamentary Committee was examined with the requisite diligence. The Government's assertions in this respect are not convincing. 128. Furthermore, the HAC made no genuine attempt to examine the applicant's contention that the parliamentary decision on his dismissal had been incompatible with the Status of Members of Parliament Act 1992 and the Rules of Parliament, despite the fact that it had competence to do so (see Article 171-1 §§ 1 and 5 of the Code of Administrative Justice, cited in paragraph 62 above) and the applicant clearly raised the matter in his claim and submitted relevant evidence (see paragraphs 29 and 33 above). No assessment of the applicant's evidence was made by the HAC. Meanwhile, the applicant's allegation of the unlawfulness of the voting procedure in Parliament was further reinterpreted as a claim about the unconstitutionality of the relevant parliamentary resolution. By proceeding in this manner, the HAC avoided dealing with the issue in favour of the Constitutional Court, to which the applicant had no direct access (see Bogatova v. Ukraine, no. 5231/04, § 13, 7 October 2010, with further references). 129. Therefore, the Court considers that the review of the applicant's case by the HAC was not sufficient and thus could not neutralise the defects regarding procedural fairness at the previous stages of the domestic proceedings". In this case, the HAC also failed to provide the guarantees required under the ECHR since "the judicial review was performed by judges of the HAC who were also under the disciplinary jurisdiction of the HCJ. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ's independence and impartiality (as examined above), the Court is not persuaded that the judges of the HAC considering the applicant's case, to which the HCJ was a party, were able to demonstrate the "independence and impartiality" required by Article 6 of the Convention" (para. 130). See also the conclusion about the insufficiency of the review of disciplinary decision by a court reached in *Ramos Nunes de Carvalho E Sá v. Portugal* [GC], no. 55391/13, 6 November 2018: "211. In the instant case the proceedings in question did not relate to purely legal issues of limited scope or to highly technical questions that could be dealt with satisfactorily on the basis of the case file alone. On the contrary, the applicant's appeals concerned important factual and legal issues (see paragraph 206 above). Even if the Supreme Court considered that it was not its task to conduct a re-examination of the evidence, it nevertheless had a duty to ascertain whether the factual basis for the decisions taken by the CSM was sufficient to support the latter's conclusions. In such a situation, the importance for the parties of obtaining an adversarial hearing before the body performing the judicial review should not be underestimated (see, *mutatis mutandis*, *Margaretić*, cited above, §128). In the instant case such a hearing would have made it possible to undertake a more thorough review of the facts, which were disputed. - *The decision-making powers* 212. The Court observes that the Judicial Division of the Supreme Court was prevented by its own case-law (see, in particular, paragraphs 29 and 81 above) from substituting its assessment for that of the disciplinary body. Nevertheless, it was empowered to set aside a decision wholly or in part in the event of a "gross, manifest error", and in particular if it was established that the substantive law or procedural requirements of fairness had not been complied with in the proceedings leading to the adoption of the decision. Thus, it could refer the case back to the CSM for the latter to give a fresh ruling in conformity with any instructions issued by the Judicial Division regarding possible irregularities (see, conversely, *Oleksandr Volkov*, cited above, §§ 125-26, and *Kingsley*, cited above, § 32). - *The reasons given for the Supreme Court's decisions* 213. Lastly, the Court considers that the Judicial Division of the Supreme Court, ruling within the limits of its jurisdiction as defined by national legislation and its own case-law, gave sufficient reasons for its decisions, replying to each of the applicant's grounds of appeal. Nevertheless, the lack of a hearing in respect of the decisive factual evidence, which the Judicial Division of the Supreme Court justified by reference to the limited nature of its powers, prevented it from including in its reasoning considerations relating to the assessment of those issues". Furthermore, the available review was also considered inadequate in *Kövesi v. Romania*, no. 3594/19, 5 May 2020 as this "was limited to the formal review of the removal decree, while any examination of the appropriateness of the reasons, the relevance of the alleged facts on which the removal had been based or the

78. The second approach has been often used and it has thus shaped some of the stipulations found in the soft law standards.[74]

79. Nonetheless, national practice and the recommendations of the bodies responsible for developing the soft law standards have increasingly focused on the use of the first approach.[75]

80. Whether a particular professional disciplinary tribunal fulfils the requirements of Article 6(1) is a matter of fact in each case but useful guidance as to the approach to be followed in determining this issue can be seen in the recent ruling of the European Court in respect of the Supreme Council of Judicature in Cyprus, of which it said:

> 86. The SCJ is composed of all thirteen judges of the Supreme Court. Pursuant to Article 153 § 8 of the Constitution the proceedings before the SCJ are of a judicial nature and the judge concerned is entitled to be heard and present his case to it. The practice and procedure to be followed in disciplinary proceedings against judges are set out in detail in the relevant Procedural Rules. Rule 13 secures for the judge against whom proceedings have been taken all the rights provided for under Articles 12 § 5 and 30 of the Constitution, which provide equivalent safeguards to Articles 6 §§ 1, 2 and 3 of the Convention (see paragraphs 46 and 47 above). The SCJ holds hearings, summons and hears witnesses, assesses evidence and decides the questions before it with reference to legal principles.
> 87. In those circumstances, the Court finds that the disciplinary proceedings were conducted before a court.[76]

81. What is particularly important about the observations of the ECtHR was the emphasis on the procedures to be followed rather than the members of the Supreme Council of Judicature being judges. This is because the ECtHR does not require the members of a court to be professional judges; they can be lay persons, civil servants and even members of the armed forces so long as

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fulfilment of the legal conditions for its validity, especially the endorsement of the proposal of the Minister of Justice by the CSM in accordance with Article 54(4) of Law no. 303/2004 (…) was specifically excluded" (para. 154).

[74] See, e.g., the Explanatory Memorandum to Rec(2000)19 ("As to disciplinary decisions *(e),* it should at the end of the day be possible for prosecutors to submit them to review by an independent and impartial entity. However, this is not meant to prevent the requirement of previous administrative or hierarchical review") and the observations made by the Venice Commission as to the need for a right of appeal ("[…] Given the power of the disciplinary commissions to dismiss a […] prosecutor, an appeal to a court of law would be essential, at least for cases where a serious penalty was imposed" (CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §110) and "An appeal to a court against disciplinary sanctions should be available" (*The Prosecution System*, para. 52)) and that this should preferably be rehearing rather than review ("This Article provides for the right of the prosecutor, subject to disciplinary sanction, to appeal to the Administrative Court. However, the basis for the exercise of this right is not clear. Is it a right to a rehearing – which is preferable - or is it purely procedural review?"; CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §38). See also the views of CCPE ("States should take measures to ensure that disciplinary proceedings against prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review"; paragraph 87 of the Explanatory Note to the Rome Charter), the United Nations Office on Drugs and Crime ("A decision of a disciplinary hearing should also be subject to appellate review should either party see fit"; the UNODC/IAP Guide, p.32) and of the Special Rapporteur on the independence of judges and lawyers ("70. Given their important role and function, the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities.44 There should be a framework for dealing with internal disciplinary matters and complaints against prosecutors, who should in any case have the right to challenge – including in court – all decisions concerning their career, including those resulting from disciplinary proceedings"; Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/20/19, 7 June 2012). In addition, Article 21 of the United Nations Guidelines provides that: "21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review". In addition. GRECO in its 4th Evaluation Reports recommended that a right of appeal to a court against disciplinary decisions be introduced by the Czech Republic (para. 191.xiv) and Turkey (para. 241. xv). It also recommended that Spain develop "a specific regulatory framework for disciplinary matters in the prosecution service, which is vested with appropriate guarantees of fairness and effectiveness and subject to independent and impartial review" (para. 169.xi)

[75] See, e.g., *The Prosecution System* ("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") and the Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3 ("Both the CCPE and Venice Commission have underlined that setting up a Prosecutorial Council is a very welcome step towards depoliticisation of a Prosecutor's Office"; para. 45). See also GRECO's recommendation in its 4th Evaluation Report in respect of Hungary that disciplinary proceedings for prosecutors in be handled outside the immediate hierarchical structure of the prosecution service (para. 222.xvii) and the Russian Federation (para. 294.xxi).

[76] *Kamenos v. Cyprus*, no. 147/07, 31 October 2017

they comply with the requirements of independence and impartiality under Article 6(1) of the ECHR.[77]

82. Moreover, despite approval being given to prosecutorial disciplinary bodies whose membership is restricted to prosecutors[78], European soft law standards increasingly see a less exclusive approach as being more appropriate, with membership being extended to persons such as lawyers, legal academics and members of civil society[79].

83. However, these standards still suggest that either the majority of members of such prosecutorial disciplinary bodies should be prosecutors[80] or that they cannot be outvoted[81].

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[77] See, e.g., *Langborger v. Sweden* [P], no. 11179/84, 22 June 1989, *Ettl and Others v. Austria*, no. 9273/81, 23 April 1987 and *Engel and Others v. Netherlands* [P], no. 5100/71, 8 June 1976.

[78] See, e.g., this view of the Venice Commission: "[...] Article 65.6 of the draft Law sets out that in proceedings against judges, the commissions should be composed of judges, while in proceedings against prosecutors, it shall consist of prosecutors – this solution is to be welcomed. [...]"; CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §95.

[79] See, e.g., the following views of the Venice Commission, the CCPE and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR): "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" (*The Prosecution System*); "[...] [I]t would be preferable that disciplinary decisions be made by a small body none of whose members is also on the Prosecutorial Council, and which would contain an element of independent outside participation. Should the proposed scheme be maintained, it would be advisable to specify, in line with Article 136 of the Constitution (stressing the autonomy of the state prosecution), that the Chair of the Prosecutorial Council entrusted with disciplinary decisions, as well as the Chair of the Disciplinary panel, must be lay members, not state prosecutor members [...]"; CDL-AD(2014)041, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)041-e), §100; "33. The main novelty of Article 1 of the Draft Law is the establishment of the Prosecutorial Council, via the new Article 81, which is a very welcome step towards depoliticisation of the Prosecutor's Office. In addition, it is very important that the Prosecutorial Council is conceived as a *pluralistic body*, which includes MPs, prosecutors, members of civil society and a Government official" Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039) (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)039-e); and "This Amendment establishes that the "HPC shall have eleven members: four deputy public prosecutors elected by public prosecutors and deputy public prosecutors, five prominent lawyers elected by the National Assembly, the Supreme Public Prosecutor of Serbia and the minister in charge of the judiciary. Both the CCPE and Venice Commission have underlined that setting up a Prosecutorial Council is a very welcome step towards depoliticisation of a Prosecutor's Office and therefore, it is very important that it is conceived as a pluralistic body, which includes prosecutors, members of civil society and a government official. In order to ensure the neutrality of this body, the independence of the Prosecutorial Council and its members should be clearly stipulated"; Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3, paras. 46-47.

[80] See, e.g., the following views of the Venice Commission, the CCPE and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR): "It is welcome that a significant number of members of the Council are prosecutors elected by their peers (four out of nine) and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. Notably, in one of its previous opinions the Venice Commission noted that "the balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers [...] seems appropriate" (See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, para 36) and "The Venice Commission has also pointed out in particular that if such councils 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 into the appointment and disciplinary process and thus to shield prosecutors, at least to some extent, from political influence. Moreover, in one of its previous opinions, the Venice Commission noted that the balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers, seems appropriate. In light of the above, the Bureau of the CCPE recommends reconsidering the composition of the HPC and making sure that it is composed of a majority, at least slight, of prosecutors from all levels of the prosecution service, and that the other part includes lawyers, legal academics and members of civil society, while there remains only one member from the executive power" **(**Opinion of the CCPE Bureau following a request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3 (https://rm.coe.int/opinion-on-serbia-june-2018-3/16808b7144), paras. 45-48). This view was reiterated in a second Opinion of the Bureau (CCPE-BU(2019)2 (https://rm.coe.int/opinion-on-serbia-march-2019-/168093dadf), paras. 6-13). It is also a recommendation made by GRECO in its 4th Evaluation Reports in respect of Armenia (para. 233.xiii), Bulgaria (para. 153.xiv) and Ukraine (para. 273.xxiii).

[81] "If members of such a council were elected by Parliament, preferably this should be done by qualified majority. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's appointment and disciplinary proceedings because due to their 'daily prosecution work' prosecutors may have a different attitude

84. This is also the approach now being taken by the ECtHR, at least in the case of bodies dealing with the disciplining of judges where the majority of members are drawn from or appointed by executive and legislative bodies, leading to doubts considered to be well-founded as to the independence and impartiality of the bodies concerned.[82]

85. Similar concerns would undoubtedly be considered justified by the ECtHR were the majority of members of a prosecutorial disciplinary body drawn from or appointed by executive and legislative bodies.

86. More recently, the ECtHR has noted:

> the growing importance which Council of Europe and European Union instruments attach to procedural fairness in cases involving the removal or dismissal of prosecutors, including the intervention of an authority independent of the executive and the legislature in respect of decisions affecting the appointment and dismissal of prosecutors.[83]

87. Apart from the considerations just discussed, the need for the members of a disciplinary tribunal to satisfy the requirement of independence will not, in the view of the ECtHR, be fulfilled where they are subject to the possibility of removal during their mandate or to any form of hierarchical dependence.[84] However, the ECtHR will not regard independence as being in question simply because those serving on the disciplinary body are still members of the relevant profession.[85]

88. The requirement of independence is also applicable to any body that can review the ruling of a disciplinary tribunal.[86]

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from judges on judicial independence and especially on disciplinary proceedings. In such a case, the Council could be split in two chambers, like in France, where the *Conseil supérieur de la magistrature* sits in two chambers, which are competent for judges and prosecutors respectively', *The Prosecution System*, para. 66.

[82] See Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013; "109. The Court has held that where at least half of the membership of a tribunal is composed of judges, including the chairman with a casting vote, this will be a strong indicator of impartiality (see Le Compte, Van Leuven and De Meyere v. Belgium, 23 June 1981, § 58, Series A no. 43). It is appropriate to note that with respect to disciplinary proceedings against judges, the need for substantial representation of judges on the relevant disciplinary body has been recognised in the European Charter on the statute for judges (see paragraph 78 above). 110. The Court notes that, in accordance with Article 131 of the Constitution and the HCJ Act 1998, the HCJ consists of twenty members, who are appointed by different bodies. However, what should be emphasised here is that three members are directly appointed by the President of Ukraine, another three members are appointed by the Parliament of Ukraine, and another two members are appointed by the All-Ukrainian Conference of Prosecutors. The Minister of Justice and the Prosecutor General are ex officio members of the HCJ. It follows that the effect of the principles governing the composition of the HCJ, as laid down in the Constitution and developed in the HCJ Act 1998, was that non-judicial staff appointed directly by the executive and the legislative authorities comprised the vast majority of the HCJ's members. 111. As a result, the applicant's case was determined by sixteen members of the HCJ who attended the hearing, only three of whom were judges. Thus, judges constituted a tiny minority of the members of the HCJ hearing the applicant's case (see paragraph 24 above). 112. It was only in the amendments of 7 July 2010 that the HCJ Act 1998 was supplemented with requirements to the effect that ten members of the HCJ should be appointed from the judicial corps. These amendments, however, did not affect the applicant's case. In any event, they are insufficient, as the bodies appointing the members of the HCJ remain the same, with only three judges being elected by their peers. Given the importance of reducing the influence of the political organs of the government on the composition of the HCJ and the necessity to ensure the requisite level of judicial independence, the manner in which judges are appointed to the disciplinary body is also relevant in terms of judicial self-governance. As noted by the Venice Commission, the amended procedures have not resolved the issue, since the appointment itself is still carried out by the same authorities and not by the judicial corps (see paragraphs 28-29 of the Venice Commission's Opinion, cited in paragraph 79 above). 113. The Court further notes that in accordance with section 19 of the HCJ Act 1998, only four members of the HCJ work there on a full-time basis. The other members continue to work and receive a salary outside the HCJ, which inevitably involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality. In particular, in the case of the Minister of Justice and the Prosecutor General, who are ex officio members of the HCJ, the loss of their primary job entails resignation from the HCJ". See also GRECO's recommendation in its 4th Evaluation Report that a disciplinary process be established in Turkey "guided by objective criteria without undue influence from the executive powers"; para. 241.xv.

[83] *Kövesi v. Romania*, no. 3594/19, 5 May 2020, at para. 156.

[84] Neither was found to be established in either *Ouendeno v. France* (dec.), no. 39996/98, 9 January 2001 or Gubler v. France, no. 69742/01, 27 July 2006 but in Grace Gatt v. Malta, no. 46466/16, no. 8 October 2019 all the members of the disciplinary body were subordinate to the charging officer.

[85] See Di Giovanni v. Italy, no. 51160/06, 9 July 2013, which concerned judges serving on the National Council of the Judiciary which had decided disciplinary proceedings in respect of the applicant judge.

[86] Thus, in Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013, the ECtHR held that: "the judicial review was performed by judges of the HAC who were also under the disciplinary jurisdiction of the HCJ. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ's independence and impartiality (as examined above), the Court is not persuaded that the judges of the HAC considering the applicant's case, to which the HCJ was a party, were able to demonstrate the 'independence and impartiality' required by Article 6 of the Convention" (para. 130). However, this situation was

89. The need for independence in the composition and operation of a prosecutorial disciplinary body has also been emphasised by the Venice Commission on a number of occasions.[87] It is also a concern of GRECO.[88]

90. A lack of impartiality of members of the disciplinary body deciding a particular case will be established for the purpose of Article 6(1) where, apart from them acting with actual personal bias[89] against the person being disciplined, that person has an objective basis for her or his fears that they will not act impartiality on account of factors such as their earlier involvement in the matter, their expression of an opinion regarding the matter under consideration, their possible interest in the outcome of the proceedings, their subordination to someone making a prejudicial statement about her or him or a member being exposed to an improper influence.[90]

91. The requirement of impartiality will also not be fulfilled where the disciplinary body is responsible for both framing the charges and determining them[91] or framing the charges and then determining the composition of the tribunal that would determine them[92].

92. The possibility of the impartiality requirement not being satisfied has also been the focus of observations by the Venice Commission with respect to draft legislation dealing with prosecutorial disciplinary bodies.[93] It has also been a concern expressed by GRECO.[94]

93. The ECtHR has not had the occasion to rule on the need for a possibility to challenge a member of a disciplinary body where the person being disciplined is concerned about a lack of impartiality but such a requirement is implicit in its finding that the failure to uphold a challenge resulted in the body being composed of persons about whom there was an objective basis for fearing that

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distinguished in *Ramos Nunes de Carvalho E Sá v. Portugal* [GC], no. 55391/13, 6 November 2018, with the ECtHR noting, in particular, that "the judges of the Supreme Court, who are highly qualified and often in the final stages of their careers, are no longer subject to performance appraisals or in search of promotion, and the CSM's disciplinary authority over them is in reality rather theoretical" (para. 163).

[87] See, e.g., the following observations: "[…] However, disciplinary measures should not be decided by the superior who is thus both accuser and judge, like in an inquisitorial system. Some form of prosecutorial council would be more appropriate for deciding disciplinary cases"; CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)008-e), §77; "[…] [S]ince the disciplinary plaintiff is elected after obtaining the opinion of the session of the Supreme State Prosecution Office, among its prosecutors, one may wonder how objective the disciplinary plaintiff is likely to be where the complainant is the Supreme State Prosecutor. An alternative may be, to ensure complete autonomy and independence to the 'disciplinary plaintiff', that she/he be not a state prosecutor of the Supreme State Prosecution Office and be not elected 'after obtaining the opinion of the session of the Supreme State Prosecution Office'"; CDL-AD(2014)041, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §99; "As regards the Disciplinary Committee, it is welcome that Article 114 now provides that the president of the Committee must be a lawyer member of the Prosecutorial Council […]. The new provision enhances the credibility and democratic legitimation of the disciplinary procedure while at the same times minimising the risk that the objectivity of the process is questioned. Under the draft, however, the members of the Committee are appointed on the nomination of the Supreme Public Prosecutor (in the capacity of President of the Council). For the reasons explained above, this remains a problematic solution and should be reconsidered"; and "The new paragraph 3 of Article 114 provides that the Supreme Public Prosecutor shall not be a member of the Disciplinary Committee. […] [t]his appears to be a desirable provision […]";CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)003-e) §§52- 54.

[88] Thus, in its 4th Evaluation Report in respect of Monaco, it recommended that the operational independence of the Judicial Service Commission – which is concerned with disciplinary proceedings against prosecutors – be enhanced; para. 198.vii.

[89] As to which, see *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005.

[90] One or more of such factors were found to be present in, e.g., *Gautrin and Others v. France*, no. 21257/93, 20 May 1998, Castillo Algar v. Spain, no. 28194/95, 28 October 1998, Olujić v. Croatia, no. 22330/05, 5 February 2009, Harabin v. Slovakia, no. 58688/11, 20 November 2012, Sturua v. Georgia, no. 45729/05, 28 March 2017, Kostyuchenko v. Russia, no. 6991/07, 9 July 2019 and Grace Gatt v. Malta, no. 46466/16, no. 8 October 2019.

[91] As was found to have occurred in *Kamenos v. Cyprus*, no.147/07, 31 October 2017.

[92] As was the situation in *Igor Kabanov v. Russia*, no. 8921/05, 3 February 2011. *Cf. Ramos Nunes de Carvalho E Sá v. Portugal* [GC], no. 55391/13, 6 November 2018, in which the President of the Supreme Court also presided over the disciplinary tribunal whose rulings were reviewed by that court. However, the President did not sit in the division dealing with reviews of such rulings and its members were formally appointed by the most senior Vice-President. Moreover, "the applicant did not allege that the judges of the Judicial Division had been acting on the instructions of the President of the Supreme Court or had otherwise demonstrated bias. Nor did she claim that the President of the Supreme Court could have influenced the judges of the Judicial Division by any other means. In particular, it is not established that those judges were specially appointed with a view to adjudicating her case" (para. 155).

[93] Thus, in the ER, it recommended in respect of the Republic of Moldova 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"; para. 189.xv.

[94] As was the case, e.g., in Harabin v. Slovakia, no. 58688/11, 20 November 2012.

they would not act impartially.[95] The importance of having a specific provision allowing for members of a prosecutorial disciplinary body to be challenged for possible bias by the person being disciplined has also been emphasised by the Venice Commission.[96]

94. Finally, in order to fulfil the requirements of Article 6(1) of the ECHR, a prosecutorial disciplinary body dealing with a particular case should always be constituted in accordance with the specific legal provisions governing this, including those relating to the term of office of its members. Any failure in this regard will result in the body concerned not being a "tribunal established by law" for the purposes of Article 6(1).[97]

4.4.2 Procedures to be followed

95. The specific requirements to be followed in the conduct of disciplinary proceedings in order to comply with Article 6(1) of the ECHR are extensive.

96. In the first place, there is the need for the person subject to the disciplinary proceedings to know the case that he or she has to meet. This will necessitate, in particular, the disclosure of documents on which the allegations against her or him are based.[98] In addition, there may be a need for this to be done in a way that affords the prosecutor concerned the time and facilities necessary for her or his defence.[99]

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[95] As was the case, e.g., in Harabin v. Slovakia, no. 58688/11, 20 November 2012.

[96] "The Draft Law should also be amended to include a provision that allows a challenge to the member of the agency performing disciplinary proceedings and his or her recusal in cases when there are reasons for doubts concerning his or her impartiality"; Joint Opinion, Ukraine, §§135 and 136.

[97] As was found to have occurred in Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013; "152. As to the instant case, it should be noted that, by virtue of Article 171-1 of the Code of Administrative Justice, the applicant's case could be heard exclusively by a special chamber of the HAC. Under section 41 of the Judicial System Act 2002, this special chamber had to be set up by a decision of the president of the HAC; the personal composition of that chamber was defined by the president, with further approval by the Presidium of that court. However, by the time this was undertaken in the present case, the president's five-year term of office had expired. 153. In that period of time, the procedure for appointing presidents of the courts was not regulated by domestic law: the relevant provisions of section 20 of the Judicial System Act 2002 had been declared unconstitutional and new provisions had not yet been introduced by Parliament (see paragraphs 41 and 49 above). Different domestic authorities had expressed their opinions as to that legal situation. For example, the Council of Judges of Ukraine, a higher body of judicial self-governance, considered that the matter had to be resolved on the basis of section 41 § 5 of the Judicial System Act 2002 and that the First Deputy President of the HAC, Judge S., was required to perform the duties of president of that court (see paragraph 51 above), while the General Prosecutor's Office took a different view on the matter (see paragraph 52 above). 154. Accordingly, such an important issue as the appointment of the presidents of the courts was relegated to the level of domestic practice, which turned out to be a matter of serious controversy among the authorities. It appears that Judge P. continued to perform the duties of the president of the HAC beyond the statutory time-limit, relying essentially on the fact that procedures for (re)appointment had not been provided for by the laws of Ukraine, while the legislative basis for his authority to act as president of the HAC was not sufficiently established. 155. Meanwhile, during that period Judge P., acting as president of the HAC, constituted the chamber which considered the applicant's case and made proposals for the individual composition of that chamber. 156. In these circumstances, the Court cannot conclude that the chamber dealing with the applicant's case was set up and composed in a legitimate way satisfying the requirements of a "tribunal established by law". There has therefore been a violation of Article 6 § 1 of the Convention in this respect". Furthermore, the ECtHR found that the dismissal of the applicant was contrary to domestic law in that it "was voted on in the absence of the majority of the MPs. The MPs present deliberately and unlawfully cast multiple votes belonging to their absent peers. The decision was therefore taken in breach of Article 84 of the Constitution, section 24 of the Status of Members of Parliament Act 1992 and Rule 47 of the Rules of Parliament, requiring that members of Parliament should personally participate in meetings and votes. In these circumstances, the Court considers that the vote on the applicant's dismissal undermined the principle of legal certainty, in breach of Article 6 § 1 of the Convention" (para. 145).

[98] E.g., the disclosure of investigation files was found by the ECtHR not to have occurred in *Aksoy (Eroğlu) v. Turkey*, no. 59741/00, 31 October 2006, *Güner Çorum v. Turkey*, no. 59739/00, 31 October 2006 and Kahraman v. Turkey, no. 60366/00, 31 October 2006.

[99] See Peleki v. Greece, no. 69291/12, 5 March 2020, in which this requirement was considered to have been fulfilled even though there had been some requalification of the charges involved. However, a different approach was taken in *Ramos Nunes de Carvalho E Sá v. Portugal* [GC], no. 55391/13, 6 November 2018; thus, while "reiterating that while the first paragraph of Article 6 applies to the determination of both civil rights and criminal charges, the third paragraph protects only persons "charged with a criminal offence", the Court finds that the applicant's complaint that she was not informed in detail of the accusation against her, and that she therefore did not have adequate time and facilities for the preparation of her defence, is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and should be rejected under Article 35 § 4" (para. 128). This ruling may, however, be a formalistic one as it should be evident that not knowing the case to be met and not being able to prepare any defence will inevitably deprive most hearings of any value and thus unfair.

97. The importance of the prosecutor knowing the case against her or him has also been emphasised by the Venice Commission[100] and the United Nations Office on Drugs and Crime[101].

98. Secondly, the possibility of suspending a prosecutor pending the outcome of disciplinary proceedings might be appropriate given the nature of the offence concerned or the surrounding circumstances.[102] However, where this is to be regarded as amounting in itself to the determination of the "civil rights" of the prosecutor concerned[103], the proceedings leading to the suspension decision must themselves be compliant with the requirements of Article 6(1) and should be open to challenge[104].

99. The Venice Commission also recognises that a prosecutor's suspension pending the outcome of disciplinary proceedings might be appropriate.[105] However, it has also indicated that such a measure should not normally affect her or his salary or other material conditions.[106]

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[100] "Article 71 […] provides for the right of a […] prosecutor to defend himself or herself in disciplinary cases. The Article requires that the […] prosecutor be informed in a way which includes separately and clearly the actions attributed to him or her, the subject matter of the investigation and the place, time and aspects of the actions which are alleged to have occurred. The […] prosecutor has the right to require the testimony of the witness and the collection of evidence in his or her favour. They have the right to examine the files in person or through their legal representatives and to receive copies and may also defend themselves orally or in writing before the HSYK or via their legal representatives. These provisions seem clear and appropriate and the amendment is a considerable improvement to the text. The right of defence will be regulated in a more detailed manner, increasing the protection of the [prosecutor] concerned. Nevertheless, such procedural safeguards in the disciplinary proceeding are not a sufficient substitute for legal remedies against decisions which interfere with subjective rights [of prosecutors] and the absence of any right of appeal to a court of law is a serious defect in the draft Law"; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §75.

[101] "Prosecutors subject to disciplinary hearings should be made aware of the allegations of their misconduct, and this should be communicated to the prosecutors clearly and effectively"; the UNODC/IAP Guide, p. 32.

[102] The suspension in *Müller-Hartburg v. Austria*, no. 47195/06, 19 February 2013 concerned disciplinary proceedings in respect of an alleged breach of a trusteeship agreement by a lawyer, in Helmut Blum v. Austria, no. 33060/10, 5 April 2016 it related to proceedings in respect of alleged double representation and falsification of evidence by a lawyer and in *Paluda v. Slovakia*, no. 33392/12, 23 May 2017 it concerned offences arising from the bringing by a judge of a criminal complaint against the President of the Supreme Court for abuse of authority and a public statement by the judge that the President was improperly distributing the cases before the Supreme Court. The ECtHR made no finding as regards the merits of the suspensions in these cases.

[103] See paras. 33-40 above.

[104] Thus, in *Paluda v. Slovakia*, no. 33392/12, 23 May 2017, the ECtHR stated that: "49. From the procedural point of view, the Court observes that, in connection with his suspension, the applicant was heard neither in respect of the suspension nor the underlying disciplinary charges. 50. Furthermore, although the suspension itself does not constitute the subject of the present complaint, the Court considers its repercussions on the applicant relevant to the assessment of the proportionality of the absence of access to court in relation to that suspension. From that perspective, the Court notes that the suspension entailed the applicant's disqualification from the exercise of his office and the withholding of 50% of his salary (see paragraph 10 above), while at the same time he continued to be subject to restrictions such as not being able to engage in gainful activity elsewhere (see paragraph 27 above). 51. While the restoring of the withheld part of his salary is of importance in relation to redressing the effects of the suspension on the applicant, as such it has no direct connection with the fact that he had no access to court in relation to it. As regards the lack of access to court, there do not appear to have been any additional corrective or remedial measures taken at the time of the suspension or thereafter. 52. As to the duration of the applicant's inability to challenge his suspension, the Court observes that it could last as long as the suspension did itself. Thus, by law, it could last for as long as two years. In the absence of any indication to the contrary, it is assumed that it did indeed last for two years (given that the disciplinary proceedings themselves lasted two years and nineteen days (from 8 September 2009 until 27 September 2011)). 53. In sum, the applicant had no access to proceedings before a tribunal within the meaning of Article 6 § 1 of the Convention in relation to a measure that placed him for two years in the situation of being unable to exercise his mandate and having one half of his salary withheld, while at the same time being unable to exercise other gainful activity. 54. Moreover, the Court notes that the Government have not invoked and nor has it established otherwise any conclusive reason for denying the applicant judicial protection in respect of that measure. In this regard, the Court considers it important to draw a clear distinction between the arguably compelling reasons for suspending a judge facing a certain type of disciplinary charge and the reasons for not allowing him or her access to a tribunal in respect of that suspension. In the Court's view, the importance of this distinction is amplified by the fact that the body taking that measure and the procedure in the course of which it was taken fell short of the requirements of Article 6 § 1 of the Convention and the fact that the measure was taken within as particular a context as that pertaining to the present case. 55. In view of the foregoing considerations, the Court concludes that the applicant's lack of access to court could not have been proportionate to any legitimate aim that it pursued and that, accordingly, the very essence of that right was impaired (see Baka [GC], cited above, § 121). There has accordingly been a violation of Article 6 § 1 of the Convention".

[105] "Furthermore, consideration should be given to the inclusion of a power in this provision to suspend a public prosecutor pending the outcome of disciplinary proceedings. This is an important element of international standards on the investigation of serious human rights violations"; Joint Opinion, Ukraine, §133.

[106] "Article 66 is concerned with the suspension of a public prosecutor's powers when on secondment or in the course of a pre-trial investigation or judicial proceedings, pursuant to Articles 155-158 of the Criminal Procedure Code, and is appropriate. However, it would be clearer if the relevant Articles of the Criminal Procedure Code were specifically stated in paragraph 1.2. Furthermore, it should be made clear that the suspension is of the prosecutor's powers but not of his or her salary or material or social support"; Joint Opinion, Ukraine, §153. However, see also its concern for criteria where salaries are reduced; "In Section 87.3 ASPGPOPEPC the prosecutor is entitled to a salary of an amount that is equal to the total of his/her basic salary and regular supplements for the duration of suspension. Fifty per cent of this amount may be withheld until the termination of suspension. There are no criteria when 50 per

Nevertheless, where suspension does affect payment of a salary or other material conditions, the ECtHR will not consider this to be in violation of the right to respect for private life where there was no bar on the person concerned undertaking some other employment.[107]

100. Thirdly, although the linkage of a system of discipline often tends to be closely linked to the hierarchical organisation of the prosecutor's office so that "disciplinary measures are typically initiated by the superior of the person concerned"[108], there is beginning to be recognition that the proceedings would benefit from them being conducted by an appropriately qualified disciplinary prosecutor[109].

101. Fourthly, the proceedings should be held in public unless – as authorised by Article 6(1) - it can be shown that the exclusion of the press and public was strictly necessary in the interests of morals, public order or national security, in the interests of juveniles, for the protection of the private life of the parties or to prevent prejudice to the interests of justice. This is a test that is unlikely to be satisfied in most disciplinary proceedings concerned with those working in the criminal justice system since public scrutiny is crucial to ensuring the accountability of the system's operation.[110]

102. Fifthly, there is no case law or explicit soft law standard concerning the possibility of a prosecutor subject to disciplinary proceedings having the benefit of legal representation in them. Nonetheless, in the light of what may be at stake for a prosecutor in these proceedings, an entitlement to be legally represented may nonetheless be required under Article 6(1), even though there is no obligation for the cost to be borne by the State.[111]

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cent of the salary can be retained. This could be used to put pressure on the prosecutor. Discretion should be removed in this case"; CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §79. See also paras. 38-40 above.

[107] See *Camelia Bogdan v. Romania*, no. 36889/18, 20 October 2020, in which there was no bar and in which earlier cases involving one were distinguished. See also *Fontanesi v. Austria* (dec.), no. 30192/96, 8 February 2000, in which the suspension only applied to some activities and was not shown to have had any negative impact on the business of the lawyer concerned.

[108] *The Prosecution System*, para. 51.

[109] Thus, the Venice Commission has observed of a draft law that: "The new proposal in Article 112 is that the Disciplinary Prosecutor should be a judge appointed by the Prosecutorial Council on a proposal of the President of the Supreme Court. While one can see merit in such a solution, it would be desirable to make it clear that the appointee will not act in a judicial capacity while exercising the function of Disciplinary Prosecutor. An alternative, to avoid that disciplinary investigations against public prosecutors be conducted by a judge and that the President of the Supreme Court be involved, would be that the disciplinary prosecutor be appointed by the Prosecutorial Council from among qualified lawyers, with the same requirements of the lay members of the Council. This would give increased autonomy and independence to the disciplinary investigations, which is of particular importance both for the public prosecutors and the general public"; CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §§52- 54. Also, GRECO in its 4th Evaluation Report recommended in respect of Bulgaria that the ethics commissions established in prosecution offices be given the right to initiate disciplinary proceedings; para. 153.xviii. In addition, see GRECO's concern that in Bulgaria the Inspection of Prosecutors' "statutory and budgetary dependence on the Prosecutor General may lead to self-censorship in sensitive cases" (para. 186).

[110] Thus attempts to justify holding proceedings in private were unsuccessful in, e.g., *Diennet v. France*, no. 18160/91, 26 September 1995, Serre v. France, no. 29718/96, 29 September 1999, Hurter v. Switzerland, no. 53146/99, 15 December 2005, Olujić v. Croatia, no. 22330/05, 5 February 2009, Nikolova and Vandova v. Bulgaria, no. 20688/04, 17 December 2013, Mutu and Pechstein v. Switzerland, no. 40575/10, 2 October 2018 and *Ramos Nunes de Carvalho E Sá v. Portugal* [GC], no. 55391/13, 6 November 2018. The following observations in the last case are particularly important: "in the circumstances of the present case – taking into consideration the specific context of disciplinary proceedings conducted against a judge, the seriousness of the penalties, the fact that the procedural guarantees before the CSM were limited, and the need to assess factual evidence going to the applicant's credibility and that of the witnesses and constituting a decisive aspect of the case – the combined effect of two factors, namely the insufficiency of the judicial review performed by the Judicial Division of the Supreme Court and the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial review stage, meant that the applicant's case was not heard in accordance with the requirements of Article 6 § 1 of the Convention" (para. 214).

[111] The relevant principles were summarised by the ECtHR in *P. C and S. v. United Kingdom*, no. 56547/00, 16 July 2002 as follows: "88. There is no automatic right under the Convention for legal aid or legal representation to be available for an applicant who is involved in proceedings which determine his or her civil rights. Nonetheless, Article 6 may be engaged under two interrelated aspects. 89. Firstly, Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations (see Golder v. the United Kingdom, judgment of 21 February 1975, Series A no. 18, p. 18, § 36). Failure to provide an applicant with the assistance of a lawyer may breach this provision where such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory as is the case in certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or the type of case (see Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, pp. 14-16, §§ 26-28, where the applicant was unable to obtain the assistance of a lawyer in judicial separation proceedings). Factors identified as relevant in Airey in determining whether the applicant would have been able to present her case properly and satisfactorily without the assistance of a lawyer included the complexity of the procedure, the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses, and the fact that the subject matter of the marital dispute entailed

103. Sixthly, the prosecutor concerned should have the possibility of an oral hearing, i.e., one in which he or she and any witnesses will testify and be examined before the disciplinary body.[112] The right to an oral hearing is particularly important as it enables the disciplinary body to assess the credibility of those appearing it. The need for such a right has also been emphasised by the Venice Commission[113] and any waiver of it should be unequivocal.

104. Seventhly, the person subject to the disciplinary proceedings should be able to have examined any witnesses who could substantiate her or his defence.[114]

105. Eighthly, the equality of arms also requires that the person subject to the disciplinary proceedings should have an opportunity to comment on statements relied upon in the proceedings[115] and to respond to submissions made against the person subject to the disciplinary proceedings[116].

106. Ninthly, the ECtHR has not had occasion to rule on the applicability of the privilege against self-incrimination in the context of disciplinary proceedings. Moreover, as has been seen,[117] such proceedings are not regarded as criminal ones and so a compulsion for a prosecutor to testify

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an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. In such circumstances, the Court found it unrealistic to suppose that the applicant could effectively conduct her own case, despite the assistance afforded by the judge to parties acting in person. 90. It may be noted that the right of access to a court is not absolute and may be subject to legitimate restrictions. Where an individual's access is limited either by operation of law or in fact, the restriction will not be incompatible with Article 6 where the limitation did not impair the very essence of the right and where it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see Ashingdane v. the United Kingdom, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). Thus, although the pursuit of proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice, and the manner in which it functions in particular cases may be shown not to have been arbitrary or disproportionate, or to have impinged on the essence of the right of access to a court (see Del Sol v. France, no. 46800/99, ECHR 2002-II, and Ivison v. the United Kingdom (dec.), no. 39030/97, 16 April 2002). It may be the case that other factors concerning the administration of justice (such as the necessity for expedition or the rights of others) also play a limiting role as regards the provision of assistance in a particular case, although such restriction would also have to satisfy the tests set out above. 91. Secondly, the key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance by a lawyer and manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair (see, for example, McVicar v. the United Kingdom, no. 46311/99, §§ 50-51, ECHR 2002-III). There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures".

[112] As was found by the ECtHR not to have occurred in *Stojakovic v. Austria*, no. 30003/02, 9 November 2006 and *Gülmez v. Turkey*, no. 16330/02, 20 May 2008. Cf. A. v. Finland (dec.), no. 44998/98, 8 January 2004, (in which a claim about the absence of an oral hearing before a disciplinary board was rejected on account of such a hearing being possible pursuant to the right of appeal against the board's ruling to a court) and Peleki v. Greece, no. 69291/12, 5 March 2020 (in which witnesses were heard and the applicant could present arguments at an appellate hearing).

[113] Thus, it has observed that "In the case of prosecutors other than the Public Prosecutor of the Republic decisions on dismissal are taken by the Council of Public Prosecutor. […] Again, there are no provisions relating to the right of a prosecutor to appear before the council and make a defence or to know in advance the case to be made" (CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia" (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)011-e), §61) and that "In disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. […]"; *The Prosecution System*, para. 52).

[114] Thus, in Olujić v. Croatia, no. 22330/05, 5 February 2009 the ECtHR held that: "84. The Court observes further that, although it is not its task to examine whether the court's refusal to admit the evidence submitted by the applicant was well-founded, in its assessment of compliance of the procedure in question with the principle of equality of arms, which is a feature of the wider concept of a fair trial (see Ekbatani v. Sweden, 26 May 1988, § 30, Series A no. 134), significant importance is attached to appearances and to the increased sensitivity of the public to the fair administration of justice (see Borgers v. Belgium, 30 October 1991, § 24, Series A no. 214-B). In this connection the Court notes that the NJC admitted all the proposals to hear evidence from the witnesses nominated by the counsel for the Government and none of the proposals submitted by the applicant. 85. It is not the Court's function to express an opinion on the relevance of the evidence or, more generally, on whether the allegations against the applicant were well-founded. However, it is for the Court to ascertain whether the proceedings in their entirety, including the way in which the evidence was taken, were fair (see Asch v. Austria, cited above, § 26). In the circumstance of the present case, the Court finds that the national authorities' refusal to examine any of the defence witnesses led to a limitation of the applicant's ability to present his case in a manner incompatible with the guarantees of a fair trial enshrined in Article 6 (see, mutatis mutandis, Vidal v. Belgium, cited above, § 34). There has therefore been a violation of Article 6 § 1 as regards the principle of equality of arms".

[115] As the ECtHR found had not occurred in *Vanjak v. Croatia*, no. 29889/04, 14 January 2010 when the disciplinary body took account of statements made by persons who had not been examined as witnesses and thus not heard by it.

[116] See, e.g., *Bacchichetti v. Italy*, no. 22584/06, 18 February 2010 in which it was found that the disciplinary body but not the applicant had been aware of a report relevant to the proceedings before it that concerned his alleged failings. See also Da Cerveira Pinto Nadais de Vasconcelos v. Portugal, no. 36335/13, 19 March 2019 (in which there was no opportunity to comment on an automatically raised plea).

[117] See paras. 44-45 above.

would not be contrary to this privilege but it would be violated if the testimony so given was then used in subsequent criminal proceedings.[118]

107. Nonetheless, the need to take account of the privilege against self-incrimination in the organisation of disciplinary proceedings has been recognised by the Venice Commission.[119]

108. Tenthly, no special requirements governing the admissibility of evidence in disciplinary proceedings have been elaborated so far and so the general requirement under Article 6(1) that this should be "fair" will need to be observed.[120]

109. This will preclude, in particular, the use of evidence obtained by torture,[121] confessions obtained through the use of inhuman and degrading treatment,[122] confessions or other statements made without the assistance of a lawyer[123] and evidence obtained through the incitement to commit an offence[124].

110. However, the mere fact that evidence has – in some other way – been obtained illegally will not lead to the proceedings being regarded as unfair, notwithstanding that the means used involved a violation of the right to respect for private life under Article 8 of the ECHR.[125]

111. Eleventhly, the ruling of the disciplinary body should be reasoned and the ECtHR will be particularly concerned about rulings which do not address matters affecting the credibility of evidence relied upon by it.[126]

112. The Venice Commission has also drawn attention to the importance of dissenting opinions by members of a prosecutorial disciplinary body in respect of its ruling (if any) being disclosed.[127]

113. Twelfthly, there is a need to ensure that the proceedings before a disciplinary tribunal and its subsequent ruling do not breach the presumption of innocence under Article 6(2) of the ECHR as a result of the making of a statement that the prosecutor concerned is guilty of an offence, either where the criminal proceedings concerned are still pending[128] or they have come to an end (whether following an acquittal or as a result of being discontinued)[129].

114. However, the finding of a breach of a disciplinary offence involving the same matter as a criminal offence in respect of which the person has either been acquitted or the relevant proceedings have been discontinued will not breach the presumption of innocence where the standard of proof used in the disciplinary proceedings is less exacting than that used in the criminal ones, there was

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[118] As was found to have occurred in *Saunders v. United Kingdom* [GC], no. 19187/91, 17 December 1996.

[119] Thus, it observed of a draft law that: "Furthermore there is a need to clarify whether or not the power [of the disciplinary body] to interrogate individuals is governed by the privilege against self-incrimination and, insofar as it is not, the protection afforded by this privilege needs to be extended to any such interrogation"; Joint Opinion, Ukraine, §171.

[120] *Schenk v. Switzerland*, no. 10862/84, 12 July 1988.

[121] *Harutyunyan v. Armenia*, 36549/03, 28 June 2007.

[122] *Hajnal v. Serbia*, no. 36937/06, 19 June 2012.

[123] *Vanjak v. Croatia*, no. 29889/04, 14 January 2010.

[124] *Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008.

[125] As in *Khan v. United Kingdom*, no. 35394/97, 12 May 2000. However, note that in *Terrazzoni v. France*, no. 33242/12, 29 June 2017, the ECtHR found no violation of Article 8 where, in disciplinary proceedings against a judge, use had been made of a transcript of a telephone conversation that had been intercepted by chance in criminal proceedings in which the judge concerned had not been involved. It was significant for this conclusion that the interception had been carried out in accordance with the requirements of Article 8 and that there had been effective scrutiny capable of limiting the interference in question to what was necessary in a democratic society.

[126] See, e.g., *Vanjak v. Croatia*, no. 29889/04, 14 January 2010, in which the ECtHR found that a police disciplinary court had not given satisfactory reasons for accepting a confession by the applicant as accurate and genuine when he had claimed that it had been obtained under pressure. See also *Loupas v. Greece*, no. 21268, 20 June 2019 (failure to take account of a particular body of evidence) and *Aslan Ismayilov v. Azerbaijan*, no. 18498/15, 12 March 2020 (failure to explain why a witness was considered unreliable)

[127] "There is also a need to clarify the point of the provision made in paragraph 6 specifying the non-disclosure of any dissenting opinions as these could be important for the exercise of the right of appeal under Article 51. Insofar as a public prosecutor does not have access to them for this purpose, the provision should be amended accordingly"; Joint Opinion, Ukraine, §§135 and 136.

[128] See, e.g., *Matijasevic v. Serbia*, no. 23037/04, 19 September 2006.

[129] See, e.g., *Asan Rushiti v. Austria*, no. 28389/95, 21 March 2000, *Vulakh and Others v. Russia*, no. 33468/03, 10 January 2012 and *Urat v. Turkey*, no. 53561/09, 27 November 2018.

an independent establishment of the facts by the disciplinary body and the constitutive elements of the two offences are not identical.[130]

115. Thirteenthly, the ruling of the disciplinary body should generally be pronounced publicly in the sense that its text is accessible to anyone interested in reading it. This would not be required if there are compelling reasons for keeping it confidential but, in practice, the ECHR is unlikely to consider this justified given the possibility of just denying access to particular information that needs to be kept confidential.[131] Furthermore, the pronouncement must occur in a timely manner.[132]

116. Fourteenthly, a prosecutor subject to disciplinary proceedings should have sufficient opportunity to prepare her or his defence in the event of a requalification of the facts by an appellate body.[133]

117. Finally, the overall length of the proceedings needs to be reasonable.[134]

118. In addition to the requirements arising from Article 6(1) of the ECHR, it should also be noted that GRECO has recommended that the time-limits within which investigations into alleged

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[130] Thus, the ECtHR stated in *Vanjak v. Croatia*, no. 29889/04, 14 January 2010 that: "68. As to the present case, the Court notes that the Constitutional Court in dismissing the applicant's complaint relied, inter alia, on a different standard of proof required in disciplinary proceedings from that required for a conviction of a criminal offence. The Court reiterates that it has accepted the justifiability of similar reasoning in the context of civil tort liability … 69. The Court firstly notes that in the disciplinary proceedings the applicant was not found guilty of a criminal offence but of a disciplinary one. Although the first–instance disciplinary decision stated that the applicant had committed a criminal offence, this was rectified by the appellate disciplinary body, which expressly stated that the act in question had constituted a disciplinary offence of inappropriate conduct. It further asserted that no one could be considered liable for a criminal offence as long as his or her liability had not been established in a final judgment. 70. As to the factual basis of the disciplinary offence against the applicant, the Court notes that the disciplinary bodies found that the applicant had acted as an intermediary in procuring illegally a certificate of Croatian citizenship for a third person and had passed on a sum of money for that purpose. These findings sufficed to establish the applicant's disciplinary responsibility. The Court considers that the disciplinary bodies were empowered to and capable of establishing independently the facts of the case before them. In doing so the Court does not consider that such language was used – other than what was rectified by the appeal court – so as to call in question the applicant's right to be presumed innocent. 71. In this connection the Court points out that one of the crucial elements of the criminal offence in respect of which an investigation in respect of the applicant was opened and later on discontinued was that the applicant himself had taken the money (see paragraphs 14 and 15 above). This aspect was, however, not decisive for the disciplinary offence in question. Thus, the constitutive elements of the disciplinary and the criminal offences in question were not identical. 72. In view of this, the Court considers that the decision on the applicant's dismissal did not run contrary to the right guaranteed under Article 6 § 2 of the Convention".

[131] Thus, in Nikolova and Vandova v. Bulgaria, no. 20688/04, 17 December 2013 the ECtHR stated that: "84. In the instant case the Court notes that, owing to the classification of the first applicant's case as secret, not only did the Supreme Administrative Court examine the case in camera (see above), but the judgments given were not delivered in public and were not available at the registry of the court or on its Internet site, nor could the first applicant herself obtain a copy. The file was not declassified until after the expiry of the statutory time-limit in July 2009, that is to say, more than five years after the final judgment of the Supreme Administrative Court had been delivered. 85. Accordingly, the judgments given by the Supreme Administrative Court in the applicant's case were not delivered publicly and were entirely unavailable to the public for a considerable period of time. The Court has previously had occasion to observe that where a court case involves the handling of classified information, techniques exist for allowing some degree of public access to the decisions given while maintaining the confidentiality of sensitive information. Some States Parties to the Convention have adopted such mechanisms, opting, for instance, to publish only the operative part of the judgment (see Welke and Białek, cited above, § 84) or to partially classify such judgments (see A. and Others v. the United Kingdom [GC], no. 3455/05, § 93, ECHR 2009). The Court is not convinced that in the instant case the protection of the confidential information contained in the file made it necessary to restrict the publication of the judgments in their entirety, still less for such a considerable period of time. Furthermore, as the Court noted above on the subject of the holding of public hearings, the restrictions on publication of the judgment resulted from the automatic classification of the entire file as secret, without the domestic courts having conducted an assessment of the necessity and proportionality of such a measure in the specific case. 86. Accordingly, there has been a violation of Article 6 § 1 owing to the fact that the judgments given in the instant case were not made public".

[132] *Cf.* the three months' delay found acceptable in *Lamanna v. Austria*, no. 28923/95, 10 July 2001 with the elapse of more than five years before publication which contributed to the violation found in the Nikolova and Vandova case. This was also the subject of a recommendation by GRECO in its 4th Evaluation Report in respect of Portugal; para. 189.xii.

[133] *Villnow v. Belgium*, no. 16938/05 16938/05, 29 January 2006.

[134] See, e.g., *W.R. v. Austria*, no. 26602/95, 21 December 1999, *Luksch v. Austria*, no. 37075/97, 31 December 2001, *Ouendeno v. France* , no. 39996/98, 16 April 2002, Malek v. Austria, no. 60553/00, 12 June 2003, Marschner v. France, no. 51360/99, 28 September 2004, Schmidt v. Austria, no. 513/05, 17 July 2008, Olujić v. Croatia, no. 22330/05, 5 February 2009, Cangelaris v. Greece, no. 28073/09, 3 May 2012, *Müller-Hartburg v. Austria*, no. 47195/06, 19 February 2013, Helmut Blum v. Austria, no. 33060/10, 5 April 2016 (in which the acknowledgement of the delay and the consequent reduction in the penalty imposed meant that the applicant was found no longer to be a victim) and Padlewski v. Austria, no. 11553/11, 16 May 2017. In its 4th Evaluation Report, GRECO recommended in respect of Bosnia and Herzegovina that the disciplinary procedure be revised "to ensure that cases are decided in a timely manner" (para. 157.xiv).

disciplinary offences must be concluded should not be so short as to prevent these being done thoroughly.[135]

4.5 Sanctions

119. There is no case law regarding the specific nature of the sanctions that may be imposed for a disciplinary offence committed by a prosecutor or indeed anyone other professional. Nor is this issue addressed in the soft law standards.

120. However, the ECtHR has made it clear that the sanctions actually imposed in disciplinary proceedings must be ones provided for by law.[136]

121. Moreover, on many occasions where disciplinary proceedings have the potential to violate rights under the Convention such as freedom of expression, the ECtHR has emphasised the importance of the sanctions actually imposed respecting the principle of proportionality.[137]

122. In addition, it has assessed as proportional the reduction of a salary imposed as a disciplinary sanction imposed on a judge when finding that this did not entail a violation of the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the ECHR.[138]

123. The ECtHR has also concluded that the forfeiture of a civil servant's retirement benefits following his dismissal from the public service for having committed serious offences against property, as well as abuse of office and concealment, was not in violation of Article 1 of Protocol No. 1, essentially because it did not leave him without any means of subsistence.[139]

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[135] 4th Evaluation Report in respect of Andorra (para. 182.xii)

[136] See *Rodriguez Hermida v. Spain* (dec.), no. 40090/98, 27 April 1999, in which it found an allegation that this had not been the case was unsubstantiated. In its 4th Evaluation Report, GRECO also recommended that the sanctions that might be imposed in Luxembourg be defined more clearly; para. 159.xiv.

[137] See, e.g., *Houdart and Vincent v. France* (dec.), no. 28807/04, 6 June 2006 ("The Court reiterates that in assessing the proportionality of interference [with the right to freedom of expression], the nature and severity of the penalties imposed are also factors to be taken into account (see Paturel v. France, no. 54968/00, § 47, 22 December 2005). The Court observes, in this connection, that the penalty imposed by the professional disciplinary bodies, namely a warning, is the most moderate disciplinary penalty available. It notes that the penalties for defamation under the Freedom of the Press Act of 29 July 1881 are much harsher. Furthermore, the publication itself was not subjected to any restriction. The Court thus finds that the penalty imposed on the applicants cannot be regarded as disproportionate to the legitimate aim pursued. The impugned interference may accordingly be regarded as "necessary in a democratic society") and Schmidt v. Austria, no. 513/05, 17 July 2008 ("43. As regards the proportionality of the penalty at issue, the Court observes that the most lenient sanction provided for in section 16 (1) of the Disciplinary Act was applied, namely a written reprimand. 44. In sum, the Court considers that the domestic authorities gave relevant and sufficient reasons for their decision. They did not go beyond their margin of appreciation when issuing a reprimand against the applicant. 45. It follows that there has been no violation of Article 10 of the Convention").

[138] See *Harabin v. Slovakia*, no. 58688/11, 20 November 2012; "156. The Government argued that the disciplinary measure in issue had a legal basis and that it did not amount to a disproportionate interference with the applicant's right under Article 1 of Protocol No. 1. On the basis of the applicant's indication, it followed that the remaining 30% of his monthly salary which he continued receiving while the sanction applied corresponded to approximately EUR 1,800. That sum was more than double the average salary within Slovakia's national economy in 2011. 157. The applicant argued that the penalty imposed was disproportionate with regard to any legitimate aim, and that it had a substantial impact on his family, as he was supporting two minor children. In his view, the sanction should have concerned exclusively the supplementary part of his pay, which related to his role as President of the Supreme Court, but not his remuneration as a judge. The sanction was disproportionate also in view of the range of pecuniary penalties under the Criminal Code and the restrictions in law in respect of judges suspended from office pending the outcome of disciplinary proceedings. 158. The Court notes that the sanction imposed on the applicant, namely a 70% reduction in his annual salary, resulted in a reduction of his remuneration of a total of EUR 51,299.96. The sanction thus amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. In order to be compatible with Article 1 of Protocol No. 1, such interference must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see, for example, Beyeler v. Italy [GC], no. 33202/96, §§ 108-114, ECHR 2000-I). 159. The applicant was sanctioned in the context of disciplinary proceedings pursuant to Article 136 § 3 of the Constitution, and the sanction was imposed under section 117(5)(c) of the Judges and Assessors Act 2000. The interference complained of was thus provided for by law, as required by Article 1 of Protocol No. 1. 160. The Constitutional Court sanctioned the applicant after it had concluded that he had breached his responsibilities in the context of the administration of courts under section 42(2)(a) of the Courts Act 2004. The Court is of the view that the interference pursued a legitimate aim in the public interest, namely to ensure monitoring of appropriate use of public funds and compliance by the applicant with his statutory obligations as President of the Supreme Court. 161. While it is true that the amount of the sanction is not negligible, the Court nevertheless considers that, in the circumstances, in imposing it the Constitutional Court did not act contrary to the requirement under Article 1 of Protocol No. 1, according to which there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised".

[139] *Philippou v. Cyprus*, no. 71148/10, 14 June 2016; "71. The Court observes that it was open to the PSC to impose any of the ten penalties provided for by section 79(1) of the Public Service Law. In the circumstances, it was inevitable that the penalty imposed on the applicant would be at the more severe end of the sliding scale of penalties, and after hearing the applicant's counsel, the PSC chose the most severe penalty, namely dismissal. As a result, section 79(7) of the above Law applied, that is, the applicant forfeited his

124. The need for proportionality to be respected where sanctions are imposed for disciplinary offences committed by prosecutors is a general consideration that the soft law standards expect to be observed.[140]

125. Furthermore, it has been recognised that the proportionality of specific sanctions imposed on a prosecutor can be better judged if there is a clear indication in the formulation of particular disciplinary offences concerned as to how serious their commission is to be viewed.[141]

126. Moreover, proportionality will be more readily achievable if the scale of sanctions available to the disciplinary body is sufficiently extensive enough so that the circumstances of the individual case can be taken into account.[142]

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retirement benefits. 72. In practice, and again differently from the case of Apostolakis, that did not leave the applicant without any means of subsistence. In this respect the Court notes that the forfeiture concerned the applicant's public service retirement benefits, that is, a retirement lump sum and a monthly pension (see paragraph 17 above). He remained eligible to receive, and did receive from August 2012, a social security pension from the Social Insurance Fund to which he and his employer had contributed (see paragraph 39 above)".

[140] This has been emphasised by the Venice Commission ("[…] The sanction of a 20% cut in salary for a period of three months for a minor disciplinary offence (Article 98) seems disproportionate", (CDL-AD(2014)041, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §95) and "In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity", (Joint Opinion, Moldova, §§117, 118 and 120)), the CCPE ("The ability to transfer a prosecutor without his/her consent should be governed by law and limited to exceptional circumstances such as the strong need of the service (equalising workloads, etc.) or disciplinary actions in cases of particular gravity, but should also take into account the views, aspirations and specialisations of the prosecutor and his/her family situation", (paragraph 70 of the Explanatory Note to the Rome Charter)) and the United Nations Office on Drugs and Crime ("If a prosecutor is found guilty of professional misconduct, the sanctions that are imposed should be proportional to the gravity of the infraction committed and be based in law", (the UNODC/IAP Guide, p. 32)). This was also recommended by GRECO in its 4th Evaluation Reports in respect of Georgia (para 204.xv) and "the former Yugoslav Republic of Macedonia" (para. 251.xvi; in particular it was recommended that "dismissal of a prosecutor is only possible for the most serious cases of misconduct") see also fns. 142 and 145 below

[141] Thus, the Venice Commission has stated that: "In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity"; Joint Opinion, Moldova, § 120.

[142] Thus, in Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013, the ECtHR observed that: "At the time when the applicant's case was determined, only three sanctions for disciplinary wrongdoing existed: reprimand, downgrading of qualification class, and dismissal. These three types of sanction left little room for disciplining a judge on a proportionate basis. Thus, the authorities were given limited opportunities to balance the competing public and individual interests in the light of each individual case" (para. 182). In its 4th Evaluation Report in respect of Ukraine, GRECO recommended that it extend "the range of disciplinary sanctions available to ensure better proportionality and effectiveness"; para. 273.xxix.

127. Nonetheless, the case law of the ECtHR has also made it clear that, in cases involving serious misconduct, the sanctions imposed should not be trivial[143]. A similar view has been expressed by the Venice Commission[144] and GRECO[145].

128. An increase in a disciplinary penalty on an appeal has not been considered by the ECtHR to disclose any appearance of a violation of Article 6(1).[146]

129. The Venice Commission has drawn attention to the desirability of some flexibility in the application of any disqualifications – such as eligibility for promotion or transfer – that are consequential upon a disciplinary sanction having been imposed.[147]

130. At the same time, it has pointed out the potential danger of the disciplinary system being undermined where there is a broad discretion to end a prosecutor's disciplinary history prematurely.[148]

131. Finally, it should be noted that the imposition of a sanction – especially one with serious consequences for the individual concerned, such as dismissal – is likely to entail a violation of the right to respect for private life under Article 8 of the ECHR where this has occurred contrary to national law or to any of the requirements of the ECHR discussed above.[149]

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[143] This is especially the case where the misconduct has implications for the protection of the right to life and the prohibition on torture and inhuman and degrading treatment or punishment. See, e.g., Gafgen v. Germany [GC], no. 22978/05, 1 June 2010 ("125. As to the disciplinary sanctions imposed, the Court notes that during the investigation and trial of D. and E., both were transferred to posts which no longer involved direct association with the investigation of criminal offences (see paragraph 50 above). D. was later transferred to the Police Headquarters for Technology, Logistics and Administration and was appointed its chief (see paragraph 52 above). In this connection, the Court refers to its repeated finding that where State agents have been charged with offences involving ill-treatment, it is important that they should be suspended from duty while being investigated or tried and should be dismissed if convicted (see, for instance, Abdülsamet Yaman, cited above, § 55; Nikolova and Velichkova, cited above, § 63; and Ali and Ayşe Duran, cited above, § 64). Even if the Court accepts that the facts of the present case are not comparable to those at issue in the cases cited herein, it nevertheless finds that D.'s subsequent appointment as chief of a police authority raises serious doubts as to whether the authorities' reaction reflected, adequately, the seriousness involved in a breach of Article 3 – of which he had been found guilty") and Myumyun v. Bulgaria, no. 67258/13, 3 November 2015 ("70. In this case, the Ministry of Internal Affairs carried out an internal inquiry and promptly opened disciplinary proceedings against the three police officers who had ill-treated the applicant. However, the proceedings did not lead to sanctions in relation to the ill-treatment to which they had subjected the applicant. Their only result was that two of the officers, Mr N.K. and Mr I.K., were deprived of the chance of promotion for three years for having unlawfully detained the applicant (see paragraph 22 above). Those proceedings cannot therefore be regarded as an adequate procedural response to the act of torture to which the applicant fell victim").

[144] Thus, it has stated that "In relation to the commission of a criminal offence conviction for an offence followed by imprisonment for at least six months is grounds for dismissal. This is a clear provision and there is no difficulty implementing it. However, there seems to be a somewhat lenient approach to prison sentences. It should be taken into account that in many states normally any kind of prison sentence means that a prosecutor is no longer qualified as a prosecutor. This is quite important to protect the reputation of the whole prosecution service […]" (CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §56) and that "According to the Article 95.1.e, the term of office of a judge or a prosecutor shall cease 'if he/she was sentenced to prison by a final verdict'. Criminal conviction may not necessarily result in a prison sentence, however, the conviction, in most cases, should lead to the termination of office" (CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)008-e) §122).

[145] In its 4th Evaluation Reports, it recommended that sanctions be "dissuasive and proportionate" (in respect of Armenia (para. 233.xviii), Bosnia and Herzegovina (para. 157.xiv)) or "adequate" (in respect of Azerbaijan (para. 128.xvii)).

[146] In *Luksch v. Austria* (dec.), no. 37075/97, 21 November 2000, in which the suspension-period imposed on an accountant had been altered by the Appeals Board from "up to one year" to "one year".

[147] "Disciplinary sanctions are "in force" one year from their application, during which the prosecutor cannot be promoted to a higher position and cannot benefit from incentive measures (Article 42.5). It is suggested to reconsider this provision. On the one hand, a warning or a reprimand is usually not 'in force' for a specific period of time, but simply stands. On the other hand, it appears inflexible to exclude promotion etc. for a certain time regardless of the individual circumstances"; Joint Opinion, Moldova, §§117, 118 and 120.

[148] Thus, it has observed of a draft law that: "There is also a need to specify in paragraph 3 the grounds on which the head of the relevant public prosecutor's office can request the history of a disciplinary sanction imposed on a public prosecutor to be effectively ended prematurely as such a discretion could undermine the effectiveness of the disciplinary process"; Joint Opinion, Ukraine, § 138.

[149] Thus, in Oleksandr Volkov v. Ukraine, no. 21722/11, 9 January 2013, the ECtHR held that: "166. The dismissal of the applicant from the post of judge affected a wide range of his relationships with other persons, including relationships of a professional nature. Likewise, it had an impact on his "inner circle" as the loss of his job must have had tangible consequences for the material well-being of the applicant and his family. Moreover, the reason for the applicant's dismissal, namely breach of the judicial oath, suggests that his professional reputation was affected. 167. It follows that the applicant's dismissal constituted an interference with his right to respect for private life within the meaning of Article 8 of the Convention" and that: "186. ... the interference with the applicant's right to respect for his private life was not lawful: the interference was not compatible with domestic law and, moreover, the applicable domestic law failed to satisfy the requirements of foreseeability and provision of appropriate protection against arbitrariness. 187. There has therefore been a violation of Article 8 of the Convention".

5 CURRENT LAW AND PRACTICE

5.1 Introduction

132. The examination of the current law and practice regarding the disciplinary liability of prosecutors in the Republic of Moldova considers first the existing legal framework. It then considers how this works in practice, taking account of discussions held with key actors in the operation of the disciplinary system, the analysis of cases and the limited statistical information available. It concludes by identifying shortcomings as regards the fulfilment of European and international standards as a whole and GRECO Recommendation xviii in particular, whether as a matter of law or of practice.

5.2 The legal framework

5.2.1 Introduction

133. The imposition of disciplinary liability on prosecutors is specifically governed by the Law on the Public Prosecution Service ("the PPS Law") and Regulations adopted by the General Prosecutor's Office of Moldova ("the GPO") and the Supreme Council of Prosecutors ("the SCP"). However, as Article 4 of the PPS Law makes clear, all activity of the Public Prosecution Service of the Republic of Moldova is subject also to the Constitution of the Republic of Moldova ("the Constitution") and international treaties to which the Republic of Moldova is party.

134. What constitutes a disciplinary violation, as well as the procedure for determining them and the sanctions that can be imposed are set out in Section 2 of Chapter VII of the PPS Law. These provisions need to be read in the light of the Law on Institutional Integrity Assessment No. 325 dated December 23, 2013, Law no. 133 of 17 June 2016 on the declaration of assets and personal interests (as amended), Integrity Law No. 82 of 25 May 2017, the Code of Ethics for Prosecutors adopted by the General Assembly of Prosecutors ("the Code of Ethics"), the Regulation on the content and procedure for submitting a referral on a disciplinary offence committed by a prosecutor adopted by the SCP ("the Referral Regulation").

135. The provisions relating to the SCP, its College of Discipline and Ethics ("the College")[150] and the Inspection of prosecutors ("the Inspection") – which have responsibility for the procedure to be followed in disciplinary cases – are set out in Chapter XI of the PPS Law. These provisions have been supplemented by Regulation of the Apparatus of the Superior Council of Prosecutors (as amended and completed)[151] and the Regulation on the organisation and activity of the Discipline and Ethics College ("the College Regulation") – both adopted by the SCP and the Regulation on the organisation, competence and functioning of the Inspection of Prosecutors adopted by the GPO ("the Inspection Regulation").

136. The disciplinary procedure applies not only to serving prosecutors – including the PG - but also to those who have ceased employment service.[152] However, there are no sanctions that can be imposed on persons who have ceased to be prosecutors. Nonetheless, an application for resignation will not be examined and an order on resignation that has been delivered will be suspended where disciplinary proceedings in progress or a notification has been filed.[153]

137. In general, a prosecutor may only be subject to disciplinary liability within a year from the date when the violation concerned occurred.[154] However, this liability may be extended for a further period of two years where it was committed "in the procedural activity".[155]

[150] This is one of three Colleges subordinated to the SCP by Article 82 of the PPS Law. The other two are the College for Prosecutors' Selection and Career and the College for Prosecutors' Performance and Evaluation.
[151] This concerns only the support for the operation of the SCP and has no specific relevance to the handling of disciplinary cases.
[152] Articles 36(1) and 58(6) of the PPS law.
[153] Article 40(5) and (6) of the PPS Law.
[154] Article 40(1) of the PPS Law.
[155] Article 40(2) of the PPS Law.

138. The latter formulation is a modification of the original proposal considered by the Venice Commission, in an opinion of a draft version of what became the PPS Law which had enumerated certain disciplinary violations for which disciplinary liability could be extended.[156]

139. Nonetheless, not only is the concept of "procedural activity" somewhat unclear but the change does not respond to the view of the Venice Commission that the focus should be on the reasons for disciplinary action not being taken before the regular time-limit of one year rather than the nature of the violations. It indicated that:

> Such reasons may include deliberate concealment or cases where the facts only come to light in judicial proceedings (especially ones in which a miscarriage of justice is established) at a later date. It is only these latter considerations which should justify a departure from the limitation period.[157]

5.2.2 Grounds

140. Seven types of disciplinary violation are specified in Article 38 of the PPS Law, namely,

> a) inappropriate fulfilment of the service duties;
> b) incorrect or biased application of the legislation, if this action is not justified by the change of the practice of application of legal norms established in the current law-enforcement;
> c) illegal interference in the activity of other prosecutor or any other interventions with the authorities, institutions or officials for the purpose of solving of any issue;
> d) intentional hindrance, by any means, of the activity of the Prosecutors Inspection;
> e) severe violation of the legislation;
> f) undignified attitude or manifestations affecting the honour, professional untrustworthiness, prestige of the Public Prosecution Service or that violate the Code of ethics for the prosecutor;
> g) violation of the obligation provided in art. 7 parag. (2) subparag. a) of Law no. 325/2013 on the assessment of institutional integrity.

141. Although the Venice Commission considered that the terms on which prosecutors could be sanctioned were generally phrased clearly and unambiguously, it expressed concern at the vagueness of some of them.[158] In particular, it was concerned about the formulation of the violations that became b) and c) above. As adopted, there was a slight change to the formulations of these two violations. Nonetheless, they remain rather unclear as to what conduct is covered.

142. Moreover, there is also scope for uncertainty as to what amounts to "inappropriate fulfilment" in a) and "severe" in e), as well as what would constitute "undignified attitude or manifestations affecting the honour, professional untrustworthiness, prestige of the Public Prosecution Service" in sub-paragraphs f), particularly given that this is seemingly distinct from the requirements in the principle of professionalism in paragraph 6.5 of the Code of Ethics.

143. As has been seen, the ECtHR recognises that it will not necessarily be possible or reasonable to expect that all the different circumstances covered by a term should be specified in the legislation concerned and that uncertainty can be removed through a body of case law applying it and the manner in which the use of the term is explained by the body which applies it.[159]

144. There would thus be scope for removing some uncertainty or ambiguity in the formulation of the disciplinary violations in Article 38 through both the way in which the findings in particular cases are explained and their publication.

145. **However, there could also be greater specificity as to what "service duties" comprise and what makes a violation of legislation "severe", as well as what "legislation" in this context actually covers.**

146. Moreover, the application of the violations in Article 38 ought always to be interpreted in the light of the guarantees of rights and freedoms in the Constitution and the ECHR. For example, the rights

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[156] Joint Opinion, Moldova, para. 115.
[157] *Ibid*, at para. 116.
[158] *Ibid*, at paras. 118-119.
[159] See para. 63 above.

to respect for private life and to freedom of expression in respectively Articles 28 and 32 of the Constitution and Articles 8 and 10 of the ECHR are likely to be particularly relevant to the application of the ground in sub-paragraph f).[160]

5.2.3 Disciplinary body

147. The Inspection is the body responsible for verifying notifications concerning facts that may constitute disciplinary violations, which will lead either (a) to the termination of the proceedings because no ground for bringing the prosecutor concerned to disciplinary responsibility has been identified or (b) to the transmission of the materials to the College of Discipline and Ethics if a reason for bringing her/him to disciplinary action is identified.[161]

148. The Inspection is a subdivision of the GPO[162] and is to be constituted of 6 Inspectors, including a Chief Inspector[163].

149. Inspectors in the Inspection are authorised to file a notification concerning facts that may constitute a disciplinary violation following the checks carried out pursuant to their duties.[164] There is no formal bar on an inspector carrying out the verification of a notification which s/he made.

150. The GET was concerned that “the Inspection’s statutory and budgetary dependence on the Prosecutor General (“the PG”) may lead to self-censorship in sensitive cases”.[165]

151. Moreover, the Venice Commission considered that there was an inconsistency in this arrangement as the functions conferred on the Inspection seemed to overlap with those of the Colleges under the SCP, “at least where individual issues are involved” and that this should be reviewed with a view to addressing it.[166]

152. In addition, one of the requirements for an effective investigation into alleged violations of the ECHR is that the investigation should be independent from the executive, which implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms.[167]

153. **There is thus the potential for the initial investigation into facts alleged in a notification in respect of a prosecutor to be inconsistent with the procedural obligation that arises from rights under, for example, Articles 2, 3, 5 and 8 of the ECHR.**

154. A decision of the Inspector to terminate the disciplinary proceedings may be appealed by the author of the notification to the College.[168]

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[160] In addition to these grounds, there is a separate basis for disciplinary liability under the obligation of prosecutors, like all civil servants, to the obligation to comply with a specific legal regime concerning the finding of illegal assets, conflicts of interest, incompatibilities, restrictions and limitations. This regime is set out in the Law on Institutional Integrity Assessment No. 325 dated December 23, 2013, Law no. 133 of 17 June 2016 on the declaration of assets and personal interests (as amended), Integrity Law No. 82 of 25 May 2017. The responsibility for investigating possible non-compliance with this regime is entrusted to the National Integrity Authority. It works through integrity inspectors, who draw up a statement of findings if they find a violation of this regime. This statement is subject to challenge in court by the person subject to control If the statement of findings of the violation of the legal regime of conflicts of interests remains final, the National Integrity Authority is required to notify - within no more than 5 days - the authority responsible for appointing the person concerned - in order that it might initiate disciplinary proceedings or terminate the mandate, employment or service relations of her or him. The prosecution system has only one role in this unique disciplinary procedure if it is definitively found that a prosecutor has violated the regime of conflicts of interest, incompatibilities, prohibitions (restrictions and limitations): dismissal by order of the PG.

[161] Articles 46 and 49 of the PPS Law.

[162] Article 52 of the PPS Law.

[163] Paragraph 3.1 of the Regulation on the organisation, competence and functioning of the Inspection of Prosecutors the Regulation on the organisation, competence and functioning of the Inspection of Prosecutors.

[164] Articles 43(1)(d) and 52(6) of the PPS Law. The duties include verification of the organizational work of prosecutors and prosecutor’s offices and preparing information for prosecutors’ performance assessment and promotion.

[165] ER, para. 186.

[166] Joint Opinion, Moldova, para. 125.

[167] See, e.g., *El-Masri v. “the former Yugoslav Republic of Macedonia”* [GC], no. 39630/09, 13 December 2012, at para. 183 and *Mocanu and Others v. Romania* [GC], no. 10865/09, 17 September 2014, at para. 320.

[168] Article 49(4) of the PPS Law.

155. Where the materials following verification of a notification are transmitted to the College, it is then responsible for adopting a decision on the disciplinary case.[169]

156. A member of the College who submitted the notification concerned – or was the subject of it – cannot participate in the examination of the disciplinary case.[170]

157. In addition, there is a stipulation in the College Regulation that a member may not "participate to the examination of an agenda issue if circumstances exist excluding his/her participation to the examination or raising doubts regarding his/her objectivity" and for a College member to be recused by either the prosecutor concerned or the person submitting the referral to it.[171] In the latter cases, a decision on recusal is to be taken by a majority vote of the College members present, without the participation of the member whose recusal is sought.[172] This has the potential to comply with the requirement of impartiality under Article 6(1) of the ECHR.

158. The College is a body subordinated to the SCP.[173] However, it has an entirely separate membership, comprising five prosecutors elected by the General Assembly of Prosecutors ("the General Assembly") and two persons elected by the SCP via public bidding among civil society representatives.[174]

159. The SCP is authorised to determine appeals against decisions of the College.[175] The membership of the SCP comprises fifteen persons:[176] six of them by virtue of their position;[177] five prosecutors elected by the General Assembly;[178] and four representatives of civil society[179]. Its members are specifically authorised to submit notifications concerning facts that may constitute a disciplinary violation.[180]

160. The GET noted that:

> nothing 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 Discipline and Ethics Board and voting on this appeal as a member of the SCP.[181]

161. This is correct in that a member may submit a notification, may appeal against termination of disciplinary proceedings on the basis of being the author of the notification and the absence of any specific bar on sitting on appeals determined by the SCP.

162. However, there is a stipulation in the PPS Law that a member may not "participate to the examination of an agenda issue if circumstances exist excluding his/her participation to the examination or raising doubts regarding his/her objectivity".[182]

163. A failure by the member to comply with the obligation to declare her or his abstention would, where it led to participation in the determination of an appeal against a decision of the College, almost certainly be regarded by the ECtHR as inconsistent with the requirement of impartiality under Article 6(1) of the ECHR as the any doubts of the prosecutor who was the object of the proceedings on this matter could be expected to meet the threshold of being objectively justified.

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[169] Articles 50 and 51 of the PPS Law.
[170] Article 50(8) of the PPS Law.
[171] Requests for recusal can be made until the examination of a disciplinary case begins; paragraph 58 of the College Regulation.
[172] Paragraphs 17-19 of the College Regulation.
[173] Article 82 of the PPS Law.
[174] Article 83(1)-(3) of the PPS Law. Article 83(4) precludes SCP members and members of another College from being members of the College of Discipline and Ethics.
[175] Article 70(1)(f) of the PPS Law.
[176] Article 69(1) of the PPS Law.
[177] The PG, the chief-prosecutor of the Prosecutor's Office of ATU Gagauzia, the President of the Superior Council of Magistracy, the Minister of Justice, the President of the Union of Lawyers and the Ombudsman.
[178] One from prosecutors of the GPO and four from prosecutors of the territorial and specialized prosecutors' offices.
[179] Elected by competition; one each by the President of the Republic, the Parliament, the Government and the Academy of Sciences of Moldova.
[180] Article 43(1)(b) of the PPS Law.
[181] The reference to a Discipline and Ethics Board undoubtedly reflects a different translation of the PPS Law.
[182] Article 78(1).

164. Nonetheless, there is no provision in the PPS Law or the College Regulation – which also governs appeals – that would allow such a prosecutor to raise an objection about the failure of an SCP member to recuse her/himself. This is in marked contrast to the provisions governing recusal of College members discussed above.[183]

165. This underlines the concern in the ER about SCP members being involved in several stages of disciplinary proceedings against a prosecutor.

166. There is provision in the PPS Law for an appeal against the determination of an appeal by the SCP to be heard directly by the Supreme Court of Justice, which will by the same panel of five judges which hears the appeals against decisions of the Superior Council of Magistracy.[184]

167. However, the Administrative Code adopted in 2018 provides for the examination of actions against decisions of the SCP to be by the Chisinau Court of Appeal, with appeals against the rulings of the latter then lying to the Supreme Court of Justice.[185] The adoption of this arrangement occurred without a corresponding amendment to the PPS Law. Nonetheless, the arrangement made in the Administrative Code is now the one to be used, thereby providing two levels of judicial scrutiny over decisions concerned with alleged disciplinary violations by prosecutors.

168. In addition, there is provision for appeal to a court against the order of the PG regarding dismissal pursuant to the decision of the College.[186]

5.2.4 Procedure

169. The disciplinary procedure is required by the PPS Law to be based upon five entirely appropriate principles, namely: legality; respect for the decision-making independence of the prosecutor; equity; proportionality of the sanction of the disciplinary violation committed; and transparency.[187]

170. Apart from the possible appeals, this procedure – as already outlined – involves four stages: submission of a notification of facts which may constitute a disciplinary violation; verification of the notification by the Inspection; examination of the case by the College(in case the Inspection finds reasons for disciplinary liability); and adoption of a decision.

171. A prosecutor can only be suspended from office where the consideration of a disciplinary violation runs in parallel with a criminal investigation as it is the latter that provides the authorisation for such a measure.[188] Such a suspension does not imply the cancellation of the social guarantee and thus is unlikely to affect rights under the ECHR, especially as the suspension decision can be challenged in a court.[189]

172. The possibility of submitting a notification under the PPS Law is appropriately wide since, as well as being open to those within the prosecution system (i.e., members of the SCP, the Prosecutors Performance Evaluation College and the Inspection) and based on facts that became known to them in the exercise of rights or performance of service duties, a notification can be submitted by any interested person and can be based on information circulated by the mass-media.[190] The Referral Regulation adds to this list by specifying that the PG and chief prosecutors can submit notifications.[191] There is no legal basis for this addition, although it is not problematic since they

[183] See para. 157 above. See also para. 188 below for another situation in which a problem of compliance with the impartiality requirement could arise.
[184] Article 79.
[185] Article 191.
[186] Articles 39(6) and 58(4) of the PPS Law.
[187] Article 37 of the PPS Law.
[188] The combined effect of Articles 33(4), 40(4), 51(2) and 55 of the PPS Law.
[189] Article 55(3) and (6) of the PPS Law respectively.
[190] Article 439(1) and (2) of the PPS Law.
[191] Paragraph 2.1. There is no similar addition to the list in paragraph 7.1 of the Inspection Regulation or in paragraph 42 of the College Regulation.

would come within the notion of "interested persons". However, that notion could also cover prosecutors of any level.

173. According to the Referral Regulation, notifications can be submitted electronically and not just in writing as specified in the PPS Law.[192] However, the Regulation also provides that, in addition to the bar on anonymous submissions found in the PPS Law,[193] notifications cannot require that "all prosecutors of the prosecutor's offices be held accountable", use licentious or offensive language or be illegible or unreadable.[194] In addition, they cannot contain "insufficient and inconclusive information",[195] which would appear to go well beyond the specification in the PPS Law that "any notification alleging the facts that do not refer to disciplinary violations" is to be considered "manifestly unfounded"[196].

174. These additions[197] undoubtedly rely upon the provision in the PPS Law that the procedure for the submission and the content of notifications shall be regulated based on the regulation approved by the SCP.[198] However, while the possibility of submitting electronic notifications extends the ability to draw attention to possible disciplinary violations, those relating to the content of notifications would seem to run counter to what is in the PPS Law and could result in no attempt being made to undertake the verification stage, i.e., the stage

> at which there shall be established the facts imputed to the prosecutor and their consequences, the circumstances in which these were committed, as well as any other relevant information in order to infer the existence or nonexistence of the disciplinary offence elements.[199]

175. However, this risk could possibly be limited by the requirement for the Inspector who has been allocated the notification for "preliminary verification" to return it to the author within five working days of the allocation and state "the shortcomings established by a decision that cannot be subject to appeal, with an explanation of the right to lodge a new notification".[200] Nonetheless, an opportunity to correct those shortcomings rather than start the process anew might be less bureaucratic.

176. The verification stage is to be undertaken by an Inspector who has been assigned this task[201] and who has various, appropriate powers of inquiry for this purpose.[202] At the same time, the prosecutor against whom the notification was lodged ("the prosecutor concerned") is entitled to rights of defence comparable to those under Article 6(1) of the ECHR,[203] as well as obligations not to undermine the verification stage.[204] In the Inspection Regulation, the prosecutor concerned is also stated to be entitled to challenge the action of the Inspection conducting the verification with

[192] Paragraph 3 of the Regulation and Article 44(1) of the Law.
[193] Article 44(2) of the Law and paragraph 4.1(a) of the Regulation.
[194] Paragraph 4.1(b)-(d).
[195] Paragraph 4.1(c).
[196] Article 44(3).
[197] Which are not found in the Inspection Regulation.
[198] Article 44(2).
[199] Article 46(1) of the PPS Law.
[200] Article 45(2).
[201] The power of assignment is implicit in the attributions of the Chief Inspector in paragraph 6.2 of the Inspection Regulation but is not specifically mentioned in it.
[202] Thus, the inspector has the right to: a) make copies of the relevant documents, including the examination of the case files related to the acts described in the notification; b) require further information necessary from the head of the prosecutor mentioned in the notification, as well as from other public authorities, people with responsible functions or private persons; c) request, if necessary, the person who filed the notification to provide written and verbal explanations, as well as other additional information in relation to the facts alleged in the notification; d) undertake other necessary measures for the purpose of notification verification"; Article 46(3). There are more extensive powers – most notably as regards the use of special investigative measures and proposing the suspension from office of the inspector concerned – in paragraph 8.2 of the Inspection Regulation.
[203] Namely, "a) know the contents of the notification; b) present oral and written explanations; c) submit evidence that demonstrates or deny certain facts alleged in the notification or relevant to the notification; d) be assisted by a lawyer or a representative; e) participate in the examination of the disciplinary cause"; Article 48(1).
[204] Namely, "a) not impede in any way the verification undertaken by the inspector; b) not contact personally or through a representative the author of the notification, except when in presence of the inspector"; Article 48(2).

the Chief Inspector or the PG and to be required, at the request of the Inspector, to appear in person to provide the necessary explanations.[205]

177. At the conclusion of the verification stage, the Inspector is required to issue a justified (i.e., reasoned) decision on either (a) terminating the proceedings because no ground for bringing the prosecutor concerned to disciplinary responsibility has been identified or (b) transmitting the materials to the College if a reason for bringing her/him to disciplinary action is identified.[206]

178. In the latter case, the Inspector's decision – together with her/his report on the basis of the verification and disciplinary case file – must be submitted to the College within three working days.[207] In addition, the Inspector is required to inform the author of the notification but no time-limit for so doing is prescribed and there is no detail as to the information to be given to the author.[208]

179. There is also supposed to be a model of the report on the results of the notification verification approved by the SCP at the proposal of the College.[209]

180. The procedure for such appeals is governed by just the College Regulation[210] whereas that for the examination of a disciplinary case by the College is governed by both the PPS Law and the College Regulation.[211]

181. At least five of the College's seven members must participate in its meetings for them to be quorate.

182. The College's meetings will normally be held in public but it may decide, ex officio or at the request of the prosecutor concerned, to examine a case in closed session in the interest of public order or national security, to ensure the principle of confidentiality of the prosecution or to protect the privacy of participants in the proceedings.

183. In the case of appeals against the termination of disciplinary proceedings by an Inspector, the College will hear both the person who filed the appeal and Inspector, who can present evidence or other documents considered relevant. The College will also request the Inspection to provide the materials for verifying the notification on the disciplinary offence.

184. After examining the appeal, the College can: dismiss it and uphold the contested decision or admit the appeal and then examine the case on its merits with a new decision or order the remission of the procedure to the Inspection for further investigation. There is no appeal against the rejection of an appeal or ordering remission.

185. In the case of examining a disciplinary case referred by an Inspector, one of the members of the College will be appointed as rapporteur and thus be responsible for studying the case file, presenting the case to its meeting, proposing the solution by presenting the report and drafting the decision.

186. The report is to be presented at beginning of the examination of the case. It should contain the description of the disciplinary case, the legal classification of the offence, the applicable normative framework, the disciplinary record of the prosecutors, the proposal regarding the final solution on this case.[212]

187. **However, if it is more than a neutral review of the allegations and the evidence assembled, it could lead to the rapporteur taking on a prosecutorial role, which would be inconsistent with her/his later participation in the decision taken by the College.**

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[205] Paragraph 9.
[206] Articles 46 and 49 of the PPS Law.
[207] Article 49(2) of the PPS Law.
[208] *Ibid.*
[209] Article 49(3) of the PPS Law.
[210] Paragraphs 77^1- 77^7.
[211] Article 50 of the Law, which in paragraph 6 provides for the adoption of a regulation by the SCP.
[212] Paragraph 49 of the College Regulation.

188. Also, it is not clear at what stage the solution is to be presented, i.e., does it come before, during or after the examination? Only the last would really be consistent with the provision of a fair hearing as otherwise all the evidence would not have been taken into account.

189. The rapporteur or other member of the College may request the Inspection to conduct additional controls or to collect new documents or evidence "if the information in the case file is not complete or sufficient".[213]

190. **Reliance on such a provision could lead to the College acting as party rather than adjudicator and thus be incompatible with the impartiality requirement for the latter role.**[214]

191. There is provision for the prosecutor concerned and the person who submitted the notification to be represented or assisted by a lawyer or other person, chosen by them as a representative.[215] There is, however, no indication as to whether the costs of such representatives will be met out of public funds.

192. In addition, provision is made for summoning the prosecutor concerned, a representative of the Inspection (i.e., the Inspector who carried out the verification or another Inspector) and the person who filed the notification. Thus, the prosecutor concerned and the person who filed the notification should be notified at least three working days before the date of the hearing as regards the place, date and time of the examination. They are required to immediately inform the College as to the impossibility to appear for justified reasons.

193. However, the examination of a disciplinary case will not be prevented by the failure of the prosecutor concerned, or the person submitting the notification or their representatives to appear in person without such reasons. There is no indication as to the basis on which it will be determined that a reason is justified, including whether there will be a suspension of the proceedings where no reasons have been received before the examination starts so that it can be established whether both that the notification was duly received and that there are justified reasons for the non-appearance.

194. Although there is provision at the verification stage for the prosecutor concerned to know the contents of the notification, there is no similar requirement for the report of the Inspector and the case file to be disclosed to her/him.

195. **Insofar as there is no such disclosure, this would undoubtedly affect the ability of the prosecutor concerned to know the case against her/him and to prepare her/his defence.**

196. Where the prosecutor concerned and/or her/his representative does participate in the examination, the hearing of their explanations is mandatory.

197. The prosecutor concerned also has the right to formulate "requests/approaches" and to give explanations and is also entitled to refuse to testify against her/himself.

198. It is recognised that the hearing of witnesses or other persons relevant to the examination "may be necessary".[216] This is specified as a matter for the decision of the College of Discipline and Ethics.

199. However, while it is assumed that requesting that a witness or other person be heard is possible under the ability to formulate "requests/approaches", **there is no indication as to the prosecutor concerned is actually entitled to examine and cross-examine those who are heard.**

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[213] Paragraph 48 of the College Regulation.
[214] *Cf.* the situations in *Karelin v. Russia*, no. 926/08, 20 September 2016 and *Wettstein v. Switzerland*, no. 33958/96, 21 December 2000.
[215] Article 50(2).
[216] Article 50(5) of the PPS Law and paragraph 54 of the College Regulation.

200. Moreover, although there is provision for requiring the witnesses and other persons who have been heard to be removed from the courtroom in case of hearing information that may affect the principle of confidentiality of the prosecution and privacy, there is no indication as to the process by which this is decided. Such removal is distinct from a decision to hold a closed session and should – like the latter – be regulated.

201. **There are no express rules governing the admissibility of evidence relied upon in the examination and no provision for a presumption of innocence or a privilege against self-incrimination.**

202. The first might benefit from the application of the principle of equity that is supposed to govern disciplinary procedure,[217] the second is guaranteed by the Constitution[218] and the third could at most require reliance on the case law of the ECtHR[219].

203. In view of the provision for a member of the College to act as rapporteur and the absence of any active role envisaged for an Inspector, it is evident that the latter – despite her/his investigative role – does not amount to a disciplinary prosecutor.

204. At the end of the examination, the College withdraws to deliberate for the adoption of the decision in the case.

205. According to the PPS Law and the College Regulation, it may make one of four possible decisions: the finding of a disciplinary violation and the application of a sanction; the finding of such a violation but a termination of the proceedings where the time-limit for accountability has expired; the finding of a violation but the termination of the proceedings where the prosecutor concerned ceased her/his duties before the issuing of the decision; and the termination of the proceedings as no offence had been committed.[220]

206. **The second of these possible decisions seems inconsistent with the provisions on disciplinary liability in Article 40.**

207. This is because the time-limits prescribed in this article preclude a prosecutor from being held liable and that should, as a matter of principle, preclude not only the imposition of a sanction but also the finding that a violation has occurred.

208. The third of the possible decisions reflects the fact that none of the sanctions provided for in the PPS Law cover the situation of persons who are no longer serving prosecutors.

209. A decision of the College should be motivated and the detailed requirements regarding this are specified in the College Regulation.[221]

210. All decisions should be publicly delivered by the President of the College and then be published on the website of the SCP within three days of its delivery.

211. Although the PPS Law provides for appeals to the SCP against decisions of the College,[222] there is no detail concerning the procedure to be followed apart from the provision concerning recusal discussed above[223].

212. Furthermore, the provision in the College Regulation regarding the procedure concerning appeals[224] is somewhat surprising.

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[217] Article 37(c) of the PPS Law
[218] Article 21.
[219] See paras. 106-107 above.
[220] Article 51(1) and paragraph 68 respectively.
[221] In paragraphs 73-76.
[222] In article 70(1)(f).
[223] See para. 164.
[224] In paragraphs 78-82.

213. Thus, after stating the entitlement to appeal and providing an appropriate requirement as to notification of the hearing,[225] it then provides that "after examining the appeals" the SCP can either maintain the College's decision without amendment or admit the appeal and adopt a new decision in this case. However, it is only where the appeal is admitted that the provisions on the examination procedure and the content of the decision of the College on the disciplinary case shall also apply to the SCP.[226]

214. As a result, it leaves it unclear as to whether there is any hearing to seek the admission of an appeal or if this is to be dealt with solely in writing. The absence of a hearing for what is, in effect, a leave requirement for an appeal is not incompatible with Article 6(1) of the ECHR. However, that is likely to be only so where the appellate issue involves only questions of law, as opposed to ones of fact.[227] It is not evident that that would be the nature of most appeals against decisions of the College.

215. Moreover, it ought to be clear whether the decision is based exclusively on the submission of the person making the application. Certainly, if submissions from other parties are considered in deciding not to admit an appeal, it would be inconsistent with the equality of arms for the person appealing not to have been able first to comment on them.[228]

216. **There is, therefore, a serious risk that appellate decisions taken by the SCP would not fulfil important procedural requirements under Article 6(1) of the ECHR.**

217. A number of deadlines must be observed throughout the process of considering disciplinary cases before the Inspector, the College and the SCP.

218. Thus, a notification must be forwarded to the Inspection within three days of its receipt by the Secretariat of the SCP[229] and verification must normally be completed within thirty days of its receipt[230], with a possibility of a ten-day extension by the Inspector if there are reasonable grounds justifying this[231]. However, the deadline for verification is just ten days where the prosecutor concerned has made an application for resignation, an order on resignation has been delivered or the case involves her/his actions, inactions or acts affecting the legitimate rights and interests of another person.[232]

219. There is a deadline of ten working days for appealing against an Inspector's decision on termination of disciplinary proceedings but no deadline for the examination and determination of any such appeal. Although, the College is required "usually" to adopt a decision on a disciplinary case within two months of receipt of the materials from the Inspection,[233] there is no specific provision concerned with the extension of the time taken for this purpose.

220. Appeals to the SCP against decisions of the College in disciplinary cases must be submitted within five working days of their delivery and a deadline of ten working days for appealing a decision of the SCP to the Supreme Court of Justice.[234]

221. There is a requirement for the SCP to examine appeals against decisions of the College within one month from their registration with it.[235] Moreover, the SCP is subject to the requirement that disciplinary procedure must be carried out "as a rule" within six months of the notification,[236]

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[225] I.e., the decisions of the College can be appealed by the person submitting the notification, the Inspection and the prosecutor concerned and the date, time and place of the examination of the appeal must be communicated at least three working days to the person submitting the referral and the prosecutor concerned.
[226] Paragraph 81.
[227] See, e.g., *Miller v. Sweden*, no. 55853/00, 8 February 2005.
[228] See, e.g., *APEH Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, 5 October 2000.
[229] Article 45(1) of the PPS Law.
[230] Article 47(1) of the PPS Law.
[231] Article 47(2)
[232] Articles 33(4), 40(4) and (5) and 47(3) of the PPS Law.
[233] Article 50(6) of the PPS Law
[234] Respectively paragraphs 78 and 82 of the College Regulation.
[235] Paragraph 79 of the College Regulation.
[236] Article 40(3) of the PPS Law.

except for the thirty day deadline applicable where the prosecutor concerned has made an application for resignation, an order on resignation has been delivered or the case involves her/his actions, inactions or acts affecting the legitimate rights and interests of another person.[237]

222. These deadlines are quite tight but, if observed, should ensure that the period involved during the stages in which the Inspector, the College and the SCP are involved does not exceed the reasonable time requirement in Article 6(1) of the ECHR.

223. **The provision for three levels of appeal against decisions taken by the College seems excessive and could unduly prolong the disciplinary process.**

5.2.5 Sanctions

224. The PPS Law envisages five possible sanctions that might be imposed following the finding of a disciplinary violation, set out from the least to the most severe, namely: warning; reprimand, decrease in salary; demotion in position; and dismissal from the prosecutor position.[238]

225. Furthermore, the need to observe proportionality in the application of disciplinary sanctions is underlined in: the statement of principles of disciplinary procedure;[239] a further requirement of proportionality;[240] and the specification that they be applied "depending upon the gravity of the committed violations"[241].

226. Moreover, there is a specific requirement that reasons be given for the sanction imposed.[242]

227. The determination of the sanction to be imposed in a particular case is normally a matter for the College or, in the event of an appeal, the SCP.[243]

228. However, the PPS Law provides that dismissal based on the sanctioning decision is to be made by the PG[244] and the College Regulation refers to this sanction – and that of demotion – being a "proposal" to be submitted to the PG[245]. This could suggest that the PG is regarded as having a discretion as to the implementation of these sanctions rather than this is a mere formality.

229. **Insofar as there is a real discretion for the PG, there is a risk that the non-implementation of the "proposal" would result in appropriate action not being taken against the prosecutor concerned. This would be particularly unjustified where the disciplinary violation involved a violation of rights and freedoms under the ECHR.**

230. It has already been noted that no sanction can be imposed where there is a finding of a disciplinary violation but the prosecutor concerned has ceased her/his duties before the issuing of the decision, which is a consequence of none of the sanctions available being applicable to persons who are no longer serving prosecutors even though disciplinary proceedings can be brought against them.

231. **However, there is no reason in principle why sanctions should not be imposed on persons who have ceased to be prosecutors but have committed disciplinary violations while they were serving ones.**

232. This would be particularly appropriate in the case of violations of a serious nature and, in such cases, it would not necessarily be disproportionate for forfeiture to be applied to some or all of the pension benefits acquired by the prosecutor concerned pursuant to her/his service.[246] This would, of course, require an addition to the list of sanctions provided in the PPS Law.

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[237] Articles 33(4) and 40(4) and (5) of the PPS Law.
[238] Article 39(1) of the PPS Law.
[239] Article 37(1)(d) of the PPS Law.
[240] Article 41(2) of the PPS Law.
[241] Article 39(1) of the PPS Law.
[242] Paragraph 74(h).
[243] Article 51(1)(a) and paragraphs 68(a) and 81 of the College Regulation.
[244] Article 39(6).
[245] Paragraph76.
[246] E.g., as occurred in the situation considered in *Philippou v. Cyprus*, no. 71148/10, 14 June 2016.

233. The "term of action" for a disciplinary sanction is one year and during this period the prosecutor concerned cannot be promoted to a higher position or benefit from any incentives.[247] The Venice Commission had suggested that these provisions be reconsidered both because a warning or a reprimand was usually not "in force" for a specific period of time but simply stands on a person's record, and because it appeared inflexible to exclude promotion, etc. for a certain time regardless of the individual circumstances. However, the specification of the "term of action" is needed because this makes it an aggravating circumstance for any further disciplinary violations committed in the course of it, as provided for in Article 41(4). Nonetheless, no such violations may be committed then and a prosecutor may actually perform with exceptional distinction.

234. **Thus, an absolute bar on promotion and receiving benefits during this period does not seem appropriate.**

5.3 Practice

5.3.1 Introduction

235. This section reviews recent practice in respect of disciplinary proceedings.

236. It first notes the general perception of prosecutors regarding the current mechanism of disciplinary liability.

237. It then examines the approach taken to reporting on disciplinary proceedings by the bodies concerned.

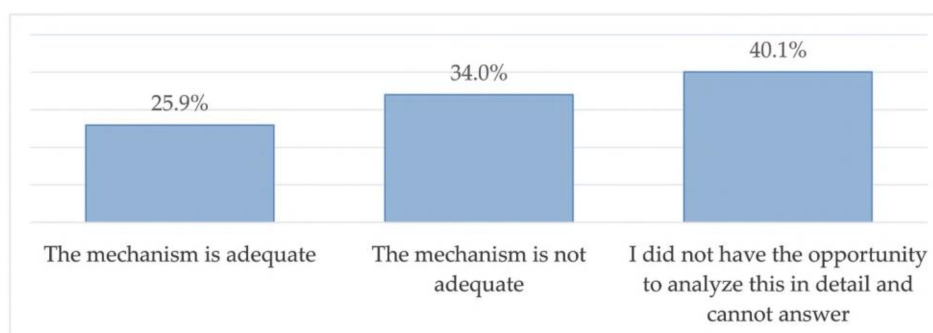
238. Thereafter, it sets out the statistical data that has been published in the reports covering 2017-2019 for the SCP[248] and the College[249] and the report of the GPO for 2019 in respect of the Inspection[250].

239. It then considers the decision-making of the Inspection and of the College and the SCP, as well as some cases decided by the National Integrity Authority regarding prosecutors in respect of breaches of the standards governing conflicts of interest, incompatibilities and restrictions.[251]

5.3.2 Perceptions of prosecutors

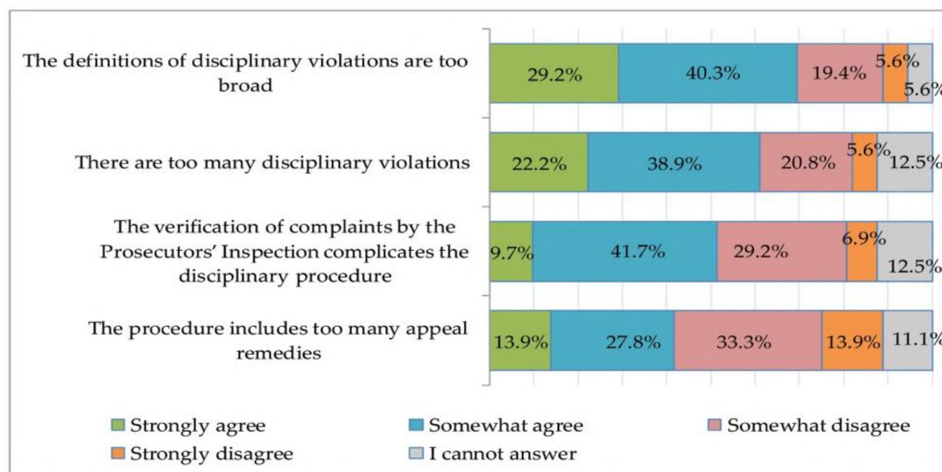
240. The two table below do not indicate a great deal of confidence in the mechanism of disciplinary liability on the part of prosecutors.[252] The first relates to their overall perception and the second deals with the factors that have shaped it.

Graphic 1: Overall perception of prosecutors



[247] Article 41(3) and (5) of the PPS Law.
[248] Public report on the activity of the Prosecutor Office for 2017, 2018 and 2019.
[249] Public report on the activity of the College of Discipline and Ethics for 2017, 2018, 2019.
[250] Public report on the activity of the Prosecutor Office 2019.
[251] Here.
[252] Legal Resources Centre from Moldova, *Report on perception of judges, lawyers and prosecutors on judicial reform and combatting corruption* (2020), questions 56 and 56.1.

Graphic 2: Factors shaping perception



5.3.3 Disciplinary reports

241. The PG, the Inspection, the College and the SCP are all subject to obligations to report on their activities, which necessarily covers the conduct of disciplinary proceedings.

242. Thus, the PG is required to present each year to the Parliament a report on the activity of the Public Prosecution Service for the previous year.[253] This should undoubtedly cover the Inspection as one of its subordinate bodies. Although the Inspection is itself required to prepare an annual activity report,[254] this is not made public.

243. Furthermore, the College is required by the College Regulation to submit an annual report to the SCP, which should be placed on the latter's official website.[255] As a result, these annual reports will be endorsed by decisions of the SCP adopted in plenary.

244. Finally, the SCP's President is her/himself required to present an annual report of activity of the SCP to the General Assembly of Prosecutors,[256] in which the College's activity will be included.

245. All these official reports have the potential to do more than provide, for each year, an aggregation of statistical data and a description of different activities.

246. In particular, they can be the principal means of informing not just prosecutors but also the public as to the disciplinary failings and status of prosecutors. As such, they can be important instruments for promoting transparency and thereby contributing to an increase in the public's trust in the justice system and, more particularly, in the moral authority and the integrity of prosecutors.

247. In addition, they can go beyond recording the activities carried out during the reporting period and also analyse the link between the activities and the objectives set to be achieved, thereby tracking any real progress made.

248. Certainly, the reports that have been examined for the years 2017-2019 fulfil the function of transparency, recording statistical data on the activity of the prosecutor's office in disciplinary matters in a manner that is easy for the public to follow and understand. Moreover, there have been articles in the media drawing upon reports on the College's activity.[257]

249. However, there is no analysis of the activities of any of the bodies concerned from the perspective of results – negative or positive – in relation to their institutional objectives, nor any analysis of

[253] Article 11(3) of the PPS Law; by 31 March of the respective year.
[254] Article 52(6)(e) of the PPS Law and paragraph 6(1)(e) of the Inspection Regulation.
[255] Paragraphs 21(g) and 23; by 20 January of the respective year.
[256] Article 72(d) of the PPS Law.
[257] Here and here.

the factors leading to the commission of disciplinary offences or particular types of disciplinary misconduct.

250. This reflects an absence, from an institutional point of view, of any profound goals regarding the objectives of the disciplinary activity and of any particular concern to identify vulnerabilities that could lead to disciplinary offences being committed by prosecutors.

251. The reports of the GPO do include certain objectives regarding the integrity of prosecutors and the identification of possible violations of the law from a disciplinary perspective.[258] However, they are rather general and are not integrated coherently into a system in which the objectives would be accompanied by an analysis of the causes that led to the commission of disciplinary offenses, together with the formulation of specific preventive measures.

252. Moreover, although some institutional deficiencies or impediments have been identified, these have not been adequately analysed and no solutions have been proposed. Thus, the College's report for 2017[259] revealed several deficiencies but these were not reviewed by the SCP, neither through its decision approving the report[260] nor through its own annual report for 2017.

253. Amongst the important attributions for the Inspection are, according to the Inspection Regulation: improving the quality of justice, the efficiency of the activity of the GPO, and organisational performance of prosecutors' offices and prosecutors; identifying vulnerabilities; and proposing optimal solutions and applicable measures in order to eliminate institutional risk factors and dysfunctions in the activity of the bodies of the GPO.[261] However, none of these matters are addressed in any of the reports of the Inspection that have been examined by the experts.

254. **In the absence of any qualitative analysis, it will be difficult for any of the bodies discharging the responsibility for discipline to be sure that they are making an effective contribution to strengthening the integrity of prosecutors.**

5.3.4 Statistical data

255. The available data relates to the number of disciplinary verifications by the Inspection, the disciplinary aspects verified, the source of notification, the disciplinary outcomes and the sanctions applied.[262]

a. Number of verifications

256. In the first two years under review (2017 and 2018), the number of complaints and prosecutors verified was around 100 but they increased significantly in 2019.

257. Thus, there were 112 complaints regarding 115 prosecutors in 2017, 105 complaints regarding 133 prosecutors in 2018 and 244 complaints regarding 260 prosecutors in 2019.

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[258] See, e.g., Public report on the activity of the Prosecutor Office for 2017 (p. 104, identifying the cases imputable to the prosecutors for adopting the acquittal sentences and those for terminating the criminal proceedings on the grounds of rehabilitation, and notifying the Prosecutors' Inspection in order to carry out service investigations), Public report on the activity of the Prosecutor Office for 2018 (p. 163, identifying cases imputable to prosecutors of human rights violations in the criminal process and notifying the Prosecutors' Inspection in order to conduct further investigations) and Public report on the activity of the Prosecutor Office for 2019 (p. 171, ensuring in the Prosecutor's Office a climate of institutional integrity, in accordance with the standards established in the field of legislation).

[259] The report on the activity of the College of Discipline and Ethics for 2017, page 4.

[260] Decision no. 12-24/18 of the Superior Council of Prosecutor regarding the annual activity report of the College of Discipline and Ethics of Prosecutors for 2017.

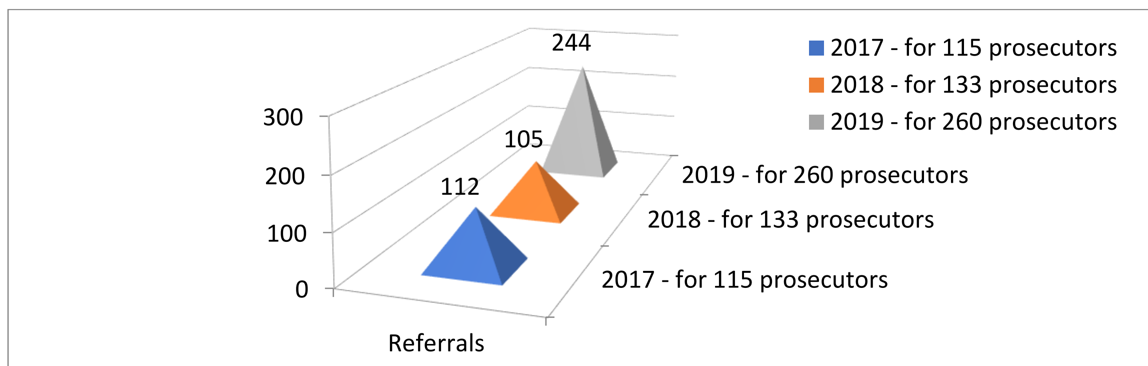
[261] Paragraph 1(4)(a) and (b).

[262] Apart from the cases discussed below, there has been one case just where the Inspection ordered the termination of the disciplinary proceedings regarding a prosecutor suspected of violating the legal regime of conflict of interest since the National Authority of Integrity triggered the specific control provided by the Law no 132/2016. Although the integrity inspectors had found that a prosecutor had violated the conflict of interest regime by examining and rejecting complaints lodged by a natural person against a notary, with whom his wife was employed as an accountant, the Chisinau Court ordered the annulment of the statement of findings issued by the Authority and the latter's appeals were rejected by the Chisinau Court of Appeal (27 May 2020) and the Supreme Court of Justice (30 September 2020).

258. The latter increase has inevitably led to an increase in all the other statistical figures considered below.

259. In its report for 2019, this increase was primarily explained by the greater number of notifications submitted by the heads of the GPO's hierarchical structures but also of those filed by citizens and lawyers.[263]

Graphic 3 – Complaints regarding prosecutors 2017 - 2019:

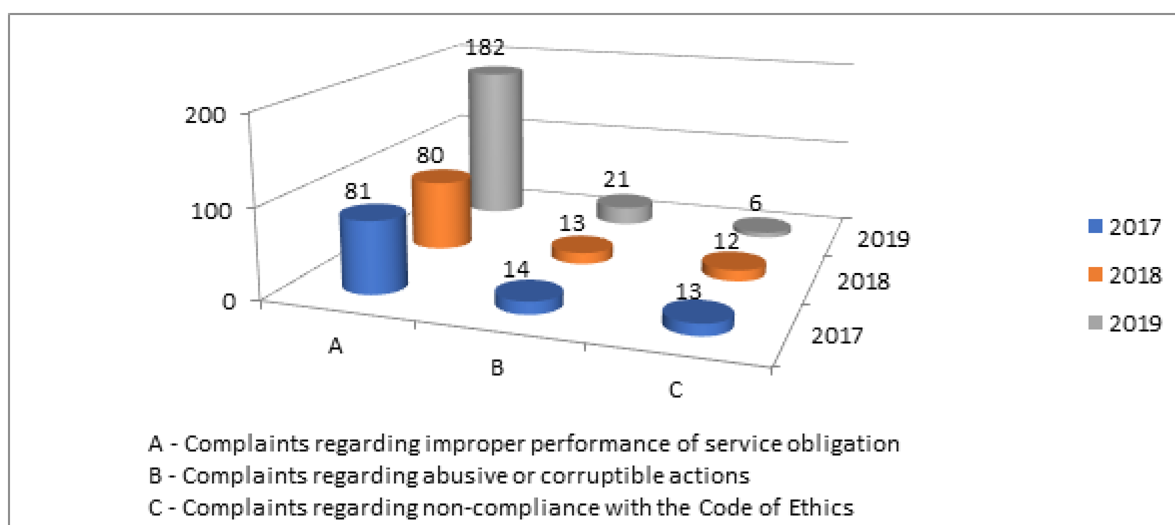


b. Aspects verified

260. Most of the complaints in the period under review concerned improper performance of service obligations in respect of carrying out/leading prosecutions and representation of the accusation in the courts. In particular, they concerned incomplete, superficial, and unilateral investigation of the circumstances of the cases, violations of the reasonable time for prosecution, insufficient control by the leading prosecutor, illegal and unfounded decisions, failure to challenge the illegal court decisions and failure of the prosecutor to attend a court session. Thus, there were 81 such notifications in 2017, 80 in 2018 and 182 in 2019 – Marked with letter "**A**" in graphic 4 below.[264]

261. In addition, there were a number of notifications regarding abusive or corruptible actions (14 in 2017, 13 in 2018 and 21 in 2019) and non-compliance with the Code of Ethics (13 in 2017, 12 in 2018 and 6 in 2019 – marked with letter "**B**" and "**C**" in graphic 4 below.[265]

Graphic 4: Notifications concerning improper performance



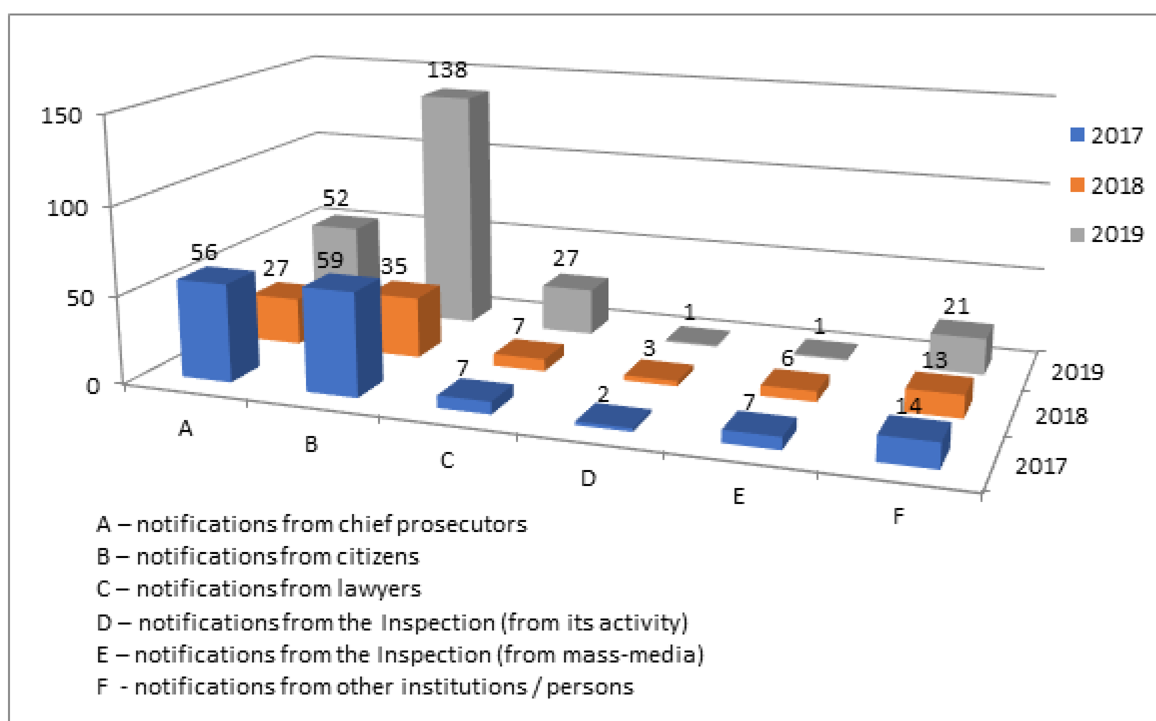
[263] Public report on the activity of the Prosecutor Office 2019, at pp.16 – 17.
[264] A in Graphic 4.
[265] Respectively B and C in Graphic 4.

c. Source of notifications

262. Notifications have come from:

- chief prosecutors of the subdivisions of the GPO and the territorial and specialized prosecutors (56 in 2017, 27 in 2018 and 52 in 2019) – marked with letter “**A**” in graphic 5 below;
- citizens (59 in 2017, 35 in 2018 and 138 in 2019) – marked with letter “**B**” in graphic 5 below;
- lawyers (7 in both 2017 and 2018 and 27 in 2019) – marked with letter “**C**” in graphic 5 below;
- the Inspection from its activity (2 in 2017, 3 in 2018 and 1 in 2019) – marked with letter “**D**” in graphic 5 below;
- the Inspection from mass media (7 in 2017, 6 in 2018 and 1 in 2019) – marked with letter “**E**” in graphic 5 below; and
- representatives of other institutions (14 in 2017, 13 in 2018 and 21 in 2019) – marked with letter “**F**” in graphic 5 below.

Graphic 5 – Sources of notifications to the Inspection:



d. Disciplinary outcomes

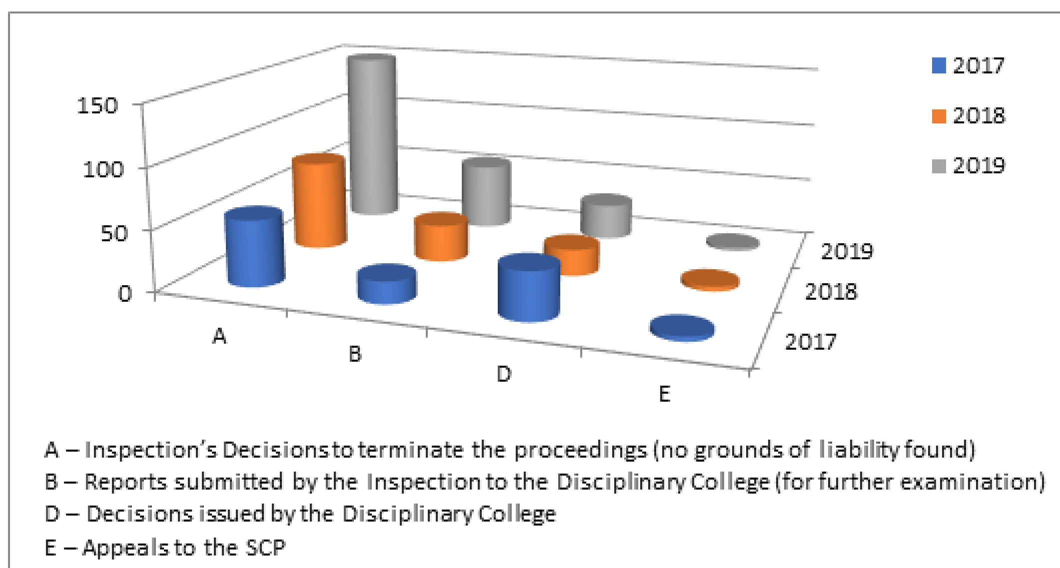
263. The dynamics of the disciplinary process can be seen in the outcomes of its different stages in the period under consideration:

- decisions by the Inspection to terminate because no grounds of liability were identified (55 in 2017, 75 in 2018 and 149 in 2019) – marked with letter “**A**” in graphic 6 below;
- submissions by the Inspection to the College (45 in 2017, 31 in 2018 (of which 26 were rejected, 1 admitted and resent to the Inspection and 4 in course of examination) and 56 in 2019 (of which 46 were rejected, 2 admitted and resent to the Inspection and 8 in course of examination) – marked with letter “**B**” in graphic 6 below;
- decisions after examination by the College (39 in 2017 (of which disciplinary violations were found in 30 cases and 9 were terminated for no grounds of liability), 22 in 2018 (of which disciplinary violations were found in 16 cases and 6 were terminated for no

grounds of liability) and 30 in 2019 (of which disciplinary violations were found in 24 cases and 6 were terminated for no grounds of liability) – marked with letter "**D**" in graphic 6 below; and

- appeals to the SCP (4 in 2017 (of which 2 challenges by the Inspection were rejected and 2 admitted), 9 in 2018 (of which 2 challenges by the Inspection were rejected and 2 others rejected, with 4 challenges by sanctioned prosecutors being rejected and 1 admitted) and 3 in 2019 (2 rejected and 1 admitted) – marked with letter "**E**" in graphic 6 below.

Graphic 6 – Disciplinary outcomes 2017 - 2019:

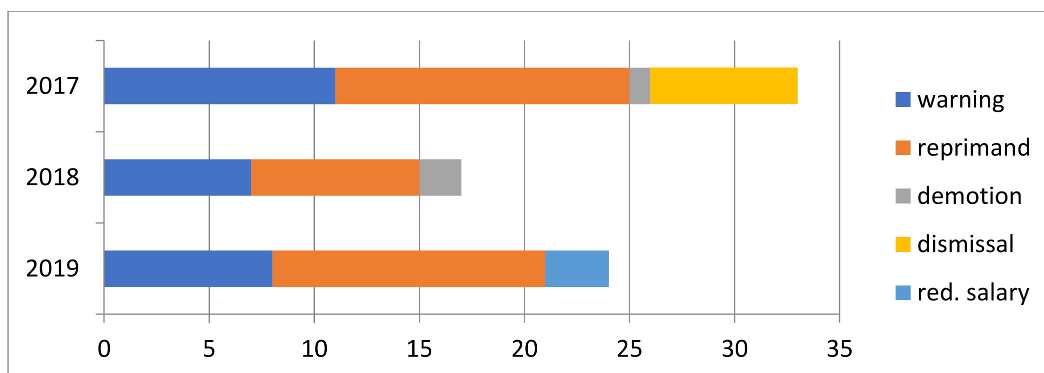


e. Sanctions

264. The following sanctions have been applied:

- 2017 – 11 warnings, 14 reprimands, 1 demotion and 7 dismissals;
- 2018 – 7 warnings, 8 reprimands and 2 dismissals; and
- 2019 – 8 warnings, 13 reprimands and 3 reductions in salary.

Graphic 7 – Sanctions applied 2017 - 2019:



5.3.5 Inspection decision-making

265. This sub-section considers the nature of notifications received by the Inspection, the way in which these are processed and the increase in the workload, as well as the perception by prosecutors of the Inspection's work.

266. As can be seen from the statistics, the vast majority of the cases considered by the Inspection related to wrongful application of the law, incomplete, superficial, and unilateral investigation of the circumstances of the cases, violations of the reasonable time for prosecution, insufficient control by the leading prosecutor, illegal and unfounded decisions, failure to challenge the illegal court decisions and the absence of the prosecutor from court sessions.

267. At the same time, there are very few *ex officio* notifications, whether based on media reports or resulting from the Inspection's verification of the organizational work of prosecutors and prosecutor's offices. The former was something highlighted in the ER on account of the fact that "numerous cases of misconduct of prosecutors have been reported in the media".[266] It has not been possible to establish whether this was the result of an approach by the Inspection that was not proactive and lacked transparency, as some of GET's interlocutors suggested, but it does seem surprising. Moreover, there has been no suggestion that the issues raised in the media are picked up in notifications from other sources.

268. Similarly, the level of *ex officio* notifications resulting from the verification activities of the Inspection seems extremely low, particularly given the specific focus to be given to violations of ethics and professional conduct and the range of issues raised by chief prosecutors and other prosecutors themselves. There may, of course, be some explanation for this, including a preference to rely on the notifications of others and a deference to the fact that it is the GPO which "leads, controls, organizes and coordinates the activity of the territorial and specialized prosecutor`s office".[267] However, as has been noted above, this is not something on which there is any reflection in the annual reports of the PG.

269. The limited number of both kinds of *ex officio* notifications undoubtedly requires further examination, which might be undertaken pursuant to the College's power to adopt recommendations on the prevention of disciplinary violations within the GPO and the SCP's more general responsibility regarding the Code of Ethics.[268]

270. **It would be appropriate for the College and the SCP to undertake such an examination so that any necessary revision to the working practices of the Inspection can be made.**

271. Although all notification concerning the facts that may constitute a disciplinary violation are to be submitted to the Secretariat of the SCP and, after being registered, then forwarded to the Inspection not later than 3 working days from its receipt,[269] in practice they are sent to the PG who through an internal resolution submits them to the Inspection.

272. **There is no evidence that this leads to any vetting of notifications or to the giving of any instructions to the conduct of their verification. However, neither possibility is precluded by such an arrangement, which only serves to reinforce the subordination of the Inspection to the PG.**

273. It is clear from the review of the decisions given by the inspectors in 2018 and 2019 that the evidence which the inspectors must consider – i.e., the explanations of the complainants and of the accused prosecutors, as well as the relevant procedural documents – requires time and professional attention in order to establish whether a notification is well-founded.

274. Moreover, the structure of the reports substantiating decisions to refer cases to the College are complex and similar to any jurisdictional act, involving the following elements:

- an introductory part (including the name of the inspector, the author of the notification, compliance with the formal and substantive conditions of the notification, the date and name of the inspector to whom the notification was assigned, the period during

[266] See para. 11 above.
[267] Article 8(3)(a) of the PPS Law.
[268] Under respectively Articles 89(b) and 70(1)(o) of the PPS Law.
[269] Article 45(1) of the PPS Law.

which the verification took place and possible information on extension of verification terms);

- a descriptive part:
  - the summary of the notification, the description of the disciplinary accusation ascertained by the inspector for each act, the evidence (explanations of the author of the notification, of the witnesses, specialists, the legislative/normative/departmental acts alleged to be violated and other relevant documents and decisions),
  - the disciplinary legal framework,
  - the position of the prosecutor for disciplinary action in relation to the disciplinary accusation brought, including the result of the verification of the evidence invoked in his/her defence and the justification for an inspector's refusal to admit evidence requested by her/him,
  - any aggravating and mitigating circumstances that could influence the individualization of the sanction,
  - relevant information characterizing the personality and career of the prosecutor disciplinary,
  - indications whether or not the prosecutor prosecuted was represented before the Inspection, and
  - mentions about informing the prosecutor of the materials of the disciplinary procedure file, and if it was not made known, for what reason;
- the operative part of the report (the decision to send the materials to the College, the mention of bringing the decision to the notice of the complainant and the prosecutor and the signature of the inspector who performed the control).[270]

275. Decisions to terminate the disciplinary procedure because no grounds for disciplinary liability were identified had, broadly, the same content as reports to the College.

276. However, it was learnt in the course of the interviews that inspectors do not necessarily refer to the College all cases concerned with delay in the handling of proceedings. It is understood that they take account of the workload of the prosecutors concerned and give them an informal warning so that they either ask their superiors to reassign cases or they plan their activities better.

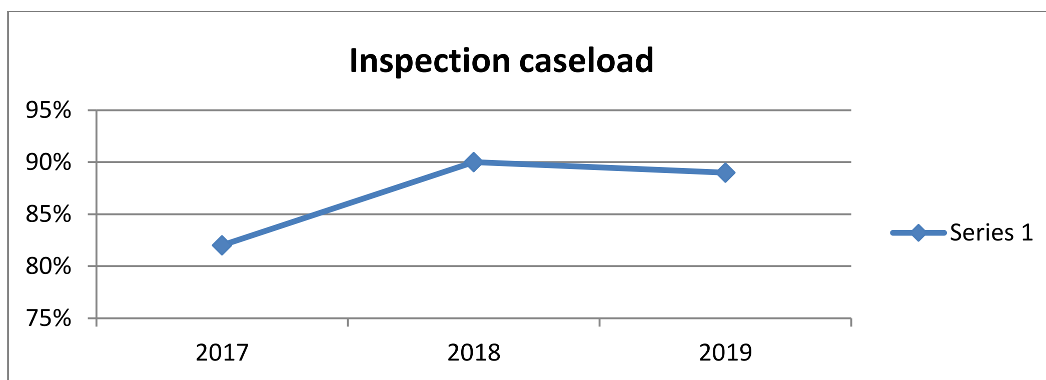
277. **This might be an appropriate response in at least some cases but it also calls into question for disciplinary proceedings to be instituted at all. Informal resolution within the relevant prosecutor's office might provide a speedier and less costly solution.**

278. It can be concluded from this analysis of the cases and decisions given by the inspectors for 2018 and 2019 that the vast majority of cases were complex both by the subject matter of the complaint and by the activities involved in resolving each case.

279. Of the cases sent by the Inspection to the College, the percentage of those admitted by the College is a good one for the Inspection, namely 82% in 2017 (including after appeals to the SCP against College decisions), 90% in 2018 and 89% in 2019.

Graphic 8 – Inspection caseload

[270] Thus complying with SCP decision no. 12 245/16 of 27 October 2016.

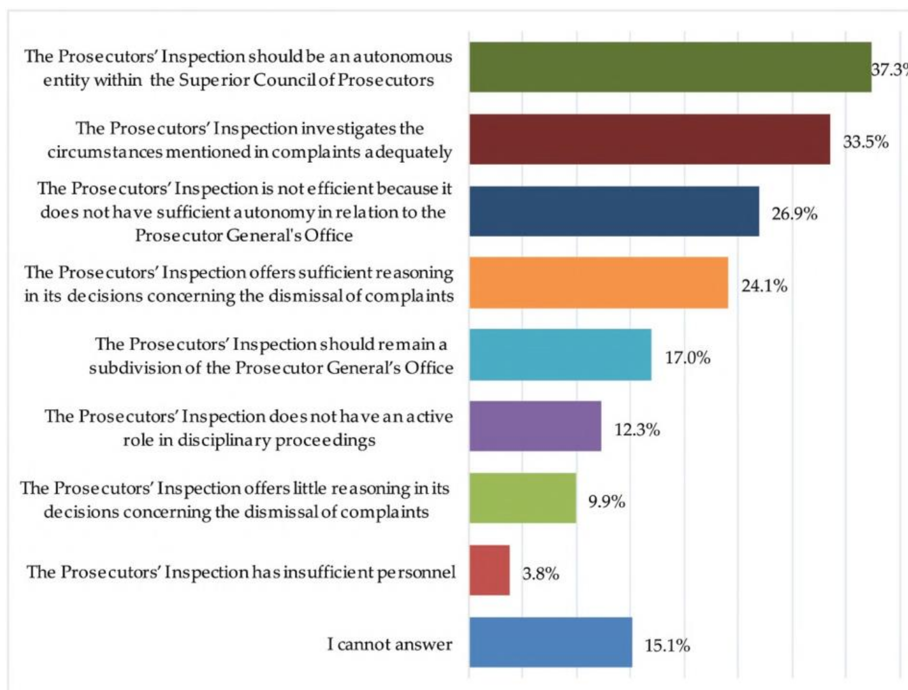


280. Taking into consideration the activity of the six inspectors in the Inspection[271] regarding cases handled in the period 2017-2019, their case load for the first two years was – without taking into account the administrative and coordination responsibilities of the chief inspector – approximately 20 each[272] but double that in 2019[273].

281. Of course, it may be a good sign that the number of complaints has been increasing in that this suggests greater efforts are being made to ensure compliance with ethical standards. However, in the event of the number of complaints remaining at the same level as in 2019 or increasing, it will be important to ensure that the increased workload for inspectors does not lead to any loss of quality or efficiency in their decision-making, with negative consequences ensuing not just for disciplinary control but for the prosecution system as a whole.

282. The response given by prosecutors regarding the activity of the Inspection in disciplinary procedure – seen in the table below – appears rather mixed and does not suggest an overwhelming vote of confidence in the present arrangements.[274]

Graphic 9: Views of prosecutors on the activity of the Inspection



[271] At the time of the interviews there were only five inspectors in post.
[272] Based on 112 notifications in 2017 and 105 in 2018.
[273] Based on 244 notifications.
[274] Legal Resources Centre from Moldova, *Report on perception of judges, lawyers and prosecutors on judicial reform and combatting corruption* (2020), question 58.

5.3.6 College and SCP decision-making

283. This sub-section considers certain issues arising from decisions taken by the College and the SCP in 2018. It is based upon a review of a number of such decisions that were made available to the experts. However, it is recognised that the picture gained from this review is only impressionistic and not comprehensive. The issues concern participation in decision-making, reasoning, grounds for liability, sanctions, appeals and proceedings against former prosecutors.

284. In two of the cases reviewed, the prosecutor responsible for the notifications served as a member of the College considering them.[275] This is contrary to the explicit prohibition in the PPS Law[276] and suggests that this is not something that is being appropriately controlled. It may be that the prosecutors concerned raised no objection to such participation.

285. **However, the recusal of a College member who submits a notification ought to be automatic. There is thus a need to review the arrangements for constituting the membership of the College to ensure that this occurs.**

286. Many of the decisions of the College reviewed, other than those for the last part of 2018, were only briefly reasoned. In particular, they did not contain the main elements of disciplinary liability: the objective side of the act (i.e., the constituent elements of a particular disciplinary violation), the serious consequences produced by it and the factors leading to the sanction imposed, including any aggravating circumstances. Indeed, in certain cases where it was not the first disciplinary violation by the prosecutors concerned, the sanctions given were amongst the lightest without any explanation as to why that was considered appropriate.

287. This approach is inconsistent with the need to provide all the persons concerned with the information necessary to determine whether a decision is well-founded. Poorly reasoned decisions risk being overturned on appeal or when subject to judicial control. More fundamentally, they do not demonstrate appropriate rigour in decision-making and lead to the development of a coherent body of case law to guide both those adjudicating and those seeking to observe the relevant standards.

288. In contrast, appeal decisions by the SCP were well and coherently motivated, containing all the necessary elements for an interested person to extract sufficient information regarding the factual and legal grounds that led to the particular ruling given. Thus, in addition to the description of the ruling by the College, these decisions presented the factual elements of the disciplinary accusation, the evidence, including whether any was taken by the SCP, the position of the prosecutor concerned (including whether s/he was present at the hearing), the consequences of the disciplinary violation, the form of the prosecutor's culpability in committing it and any conditions that might aggravate or mitigate the sanction to be applied.

289. The decisions of both the College and the SCP reinforce the concern already expressed about vagueness in the formulation of the grounds of disciplinary liability.[277]

290. Thus, some violations were dealt with as "severe violation of the legislation" "when they could equally have been treated as inappropriate fulfilment of the service duties".[278] For example, misplacing the work card[279] seems to have been placed on the same level of abstract/legal gravity as the disciplinary deed of a prosecutor which resulted in the death of an accused[280]. As a result, those determining disciplinary liability are faced with a lack of clarity as to what is the scope of the service duties of prosecutors and what amounts to a violation of the legislation, as well as how these differ.

[275] Decision no. 13-15/18 of May 25, 2018 and Decision no. 13-14/18 of June 29, 2018, both unpublished.
[276] Article 50(8).
[277] See paras. 142-144 above.
[278] Respectively Article 38(e) and (a) of the PPS Law.
[279] Decision no 12-130/18 of September 6, 2018, of the SCP (unpublished).
[280] Decision no 12-8/18 of January 19, 2018, of the SCP (unpublished).

291. Moreover, there is also a problem in clarifying what is understood as a "violation of the obligation provided in art. 7 parag. (2) subparag. a) of Law no. 325/2013 on the assessment of institutional integrity",[281] in which it is provided that "public agents shall have the following obligations: a) not to admit manifestations of corruption". Is this limited to a prohibition on being corrupted or does it extend to not allowing acts of corruption of which the prosecutor is aware and how does it relate to provisions on corruption in the Code of Ethics?[282] Does it really differ from the requirements in the principle of integrity in paragraph 6.3 of the Code of Ethics or the obligation in Article 6(3)(i) of the PPS Law?[283]

292. In several cases, the College – whose decisions were upheld on appeal by the SCP – ordered the dismissal of the prosecutor for misconduct which was based on severe acts having been committed.[284] However, in other proceedings involving apparently serious violations, the much milder sanction of reprimand was imposed, notwithstanding that this was not the first disciplinary violation found in respect of the prosecutors concerned and the availability of more severe options such as reduction in salary or demotion.[285]

293. Furthermore, sanctions seem to be imposed for trivial matters, such as loss of an ID card[286] and lateness for work[287] notwithstanding that respectively this was not occasioned by any fault on the part of the prosecutor concerned or that there had been no serious consequences ensuing or a pattern of behaviour involved.

294. The analysis of the sample of rulings suggests some inconsistency in the approach to determining the sanctions to be imposed so that they may not be dissuasive in all cases and possibly not being proportionate to the violation involved. Moreover, in terms of the less serious matters, the resort to disciplinary proceedings does not always seem appropriate, particularly where other levers might be used (such as an informal warning or a loss of salary for time not worked).

295. It was not possible to establish how many of the decisions given by the College in the sample of cases provided were then appealed to the SCP as not all those decisions were accompanied by rulings of the SCP.

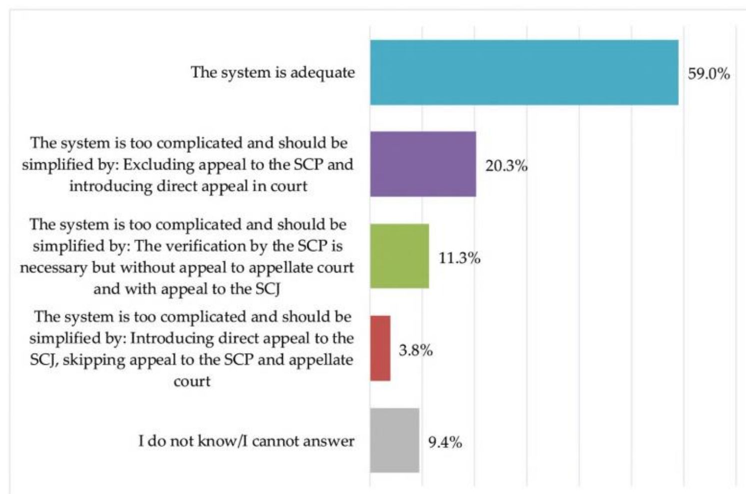
296. Two appeals from decisions of the SCP have been rejected for procedural reasons.[288] And the Chisinau Court of Appeal has allowed one prosecutor's appeal, ordering the annulment of the sanction imposed by the College and the termination of the disciplinary investigation.[289] A fourth case is being reheard by the Chisinau Court of Appeal after its ruling was remitted by the Supreme Court of Justice after allowing the prosecutor's appeal.[290]

297. There does not seem to be any undue delay in the handling of these appeals.

[281] Article 38(g) of the PPS Law.
[282] Particularly paragraphs 6.3.2 and 6.3.6 which respectively provide that the prosecutor shall "by being aware of the risks of corruption, he/she shall not admit corruptible conduct in his/her activity, shall not claim or accept gifts, favours, benefits or other illicit remunerations for the performance or, as the case may be, failure to perform function duties or by virtue of the function held" and "not provide grounds for being considered a person suitable for committing acts of corruption or abuse".
[283] The latter obliges prosecutors to "declare any acts of corruption, facts of corruptive behaviour and any actions related to the acts of corruption, which have become known".
[284] E.g.: Decision no 12-8/18 of January 19, 2018, of the SCP (unpublished). This case concerned a finding of a violation under Article 38(1)(a) of the PPS Law when it was considered that there was no need to apply the measure of preventive arrest where there was a failure by the prosecutor to take account of a suspect who showed clear signs of being mentally unstable.
[285] E.g.: Decision no 13-18/18 of July 27, 2018, of the College (unpublished). This case concerned a finding of a violation under Article 38(1)(a) and (f) in respect of a meeting with a citizen outside the prosecution actions managed by the prosecutor concerned, which involved discussions whose nature was contrary to professional ethics.
[286] E.g.: Decision no 12-130/18 of September 6, 2018, of the SCP (unpublished).
[287] E.g.: Decision no 12-129/18 of September 6, 2018, of the SCP (unpublished).
[288] Prosecutor Vinițchi Pavel v. Superior Council of Prosecutors, by the conclusion of November 12, 2018 of the Supreme Court and prosecutor Pitel Anatolie v. Superior Council of Prosecutors, by the conclusion of the Supreme Court of 25 July 2018,
[289] Judgment of September 30, 2019 given by the Chisinau Court of Appeal, in the case of prosecutor Axentiev Alexei v. Superior Council of Prosecutors.
[290] Case of prosecutor Filimon Ivan v. the Superior Council of Prosecutors, the Supreme Court of Justice, by decision of 17 June 2020.

298. The view of prosecutors on the current appellate arrangements shows the majority consider them to be appropriate.[291]

Graphic 10: Attitudes to appellate arrangements



299. However, notwithstanding the successful appeal in the third of the cases referred to, it remains questionable to have four levels of decision-making in disciplinary cases.

300. The decisions of the College are not currently being published, notwithstanding the legal requirement to do so[292] and the more general requirement of transparency applicable to the Public Prosecution Service[293].

301. The failure to do so is explained particularly by concerns about the confidentiality of criminal proceedings. However, it is improbable that any such details about such proceedings need to be given when indicating the nature of a disciplinary violation and the sanction imposed. In many instances, it would be a disproportionate interference with the right to respect to private life to name the prosecutors who are being sanctioned but - even in the more serious cases where this would be justified and as GRECO has recommended[294] – there should be no impediment to providing a brief but non-specific indication of the circumstances involved.

302. **Transparency as to the outcome of disciplinary proceedings would both promote public confidence in the Public Prosecution Service but would also contribute to helping prosecutors appreciate what is required by the standards applicable to them.**

303. The College has found disciplinary violations in proceedings brought against former prosecutors, as authorised under the PPS Law.[295]

304. However, these end without any sanctions being imposed since, as has already been noted, there are none relevant to the situation of persons who are no longer working in the prosecution service.[296] At most the finding of a violation can be entered on the employment record of a former prosecutor.

305. **This could be an insufficient response to a serious violation by the prosecutor concerned.**

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[291] Legal Resources Centre from Moldova, *Report on perception of judges, lawyers and prosecutors on judicial reform and combatting corruption* (2020), question 60.

[292] Article 51(4) of the PPS law provides that "Within 3 working days from the date of issuing the opinion, the decisions of the College of discipline and ethics shall post it on the official website of the Superior Council of Prosecutors".

[293] Article 3(2) of the PPS law provides that "(...) the activity of the Public Prosecution Service is transparent and is built upon the presumption of guaranteeing the access of the society and mass–media to the information related to this activity, with exceptions provided by law and ensuring compliance with the personal data regime".

[294] See para. 11 above.

[295] Article 36(1).

[296] It is understood that there were proceedings against 5 former prosecutors in 2020.

5.4 Conclusions

306. GRECO has recommended that "additional measures be taken in order to strengthen the objectivity, efficiency and transparency of the legal and operational framework for the disciplinary liability of prosecutors".

307. These measures concerned, in particular, the location of the Inspection within the GPO as opposed to the SCP, the possibility of SCP members taking part in disciplinary decision-making and the transparency of the disciplinary process.

308. Nothing learnt from the review of the current law and practice suggests that the need for these measures is unwarranted or that they would be inconsistent with European and international standards.

309. Furthermore, it is particularly welcome that the transfer of the Inspection to the SCP is envisaged in the Action Plan as a one of the steps required for the implementation of Objective 1.1 of the Strategy.

310. However, it is clear that not only is action required also to address the other two points raised by GRECO but there are also other matters requiring attention in order to bring the conduct of disciplinary proceedings in respect of prosecutors into line with European and international standards, as well as to promote its efficiency.

311. In the first place, in order to remove the risk of impartiality in the conduct of disciplinary proceedings, there is a need to review the arrangements for ensuring that the prosecutor responsible for a notification does not serve as a member of the College considering them.

312. In addition, insofar as appeals to the SCP are retained, the regulations designed to ensure impartiality should be the same as those for the College.

313. Moreover, there should be no possibility of members of the College requesting the Inspection to conduct additional controls or to collect new documents or evidence and the presentation of the case against a prosecutor should be the responsibility of an inspector rather than a member of the College acting as rapporteur.

314. Secondly, the formulation of the disciplinary violations in Article 38 of the PPS Law could be improved through providing greater specificity as to what "service duties" comprise and what makes a violation of legislation "severe", as well as what "legislation" in this context actually covers and what "manifestations of corruption" are supposed to cover.

315. Thirdly, the limited number of both kinds of *ex officio* notifications requires further examination with a view to making revisions to the working practices of the Inspection.

316. Fourthly, the informal resolution by the Inspection of some of the matters that are currently the subject of disciplinary proceedings is not appropriate. It would be preferable for there to be a general requirement for any superior prosecutor to seek a resolution of a possible disciplinary issue within the unit concerned before submitting a notification. Moreover, less serious matters might be better handled by allowing the possibility of a written warning being placed on the file of a prosecutor, subject to a right of appeal by her/him in the event of disagreement as to this being well-founded.

317. Fifthly, there is a need for consideration to be given to simplifying the structure of the disciplinary process, particularly in the light of the transfer of the Inspection to the SCP and thereby strengthening its independence. One option might be to remove the possibility of appeals from the College to the SCP and leave appeals to the court system.

318. Sixthly, there is thus a need to provide members of the College with guidance on reasoning their decisions.

319. Seventhly, the arrangements governing sanctions need attention. In particular, there is no reason in principle why sanctions should not be imposed on persons who have ceased to be prosecutors

but have committed disciplinary violations while they were serving ones. This would be particularly appropriate in the case of violations of a serious nature and, in such cases, it would not necessarily be disproportionate for forfeiture to be applied to some or all of the pension benefits acquired by the prosecutor concerned pursuant to her/his service. This would, of course, require an addition to the list of sanctions provided in the PPS Law.

320. In addition, the absolute bar on promotion or receiving benefits during the “term of action” for a disciplinary sanction is one year should be modified.

321. Also, an analysis should be undertaken of the approach to imposing sanctions with a view to identifying the factors relevant for applying each of them and ensuring that decision-making in this respect is both consistent and proportionate.

322. Eighthly, the possibility of finding a violation but terminating the proceedings where the time-limit for accountability has expired is inconsistent with the time-limits in Article 40 of the PPS Law, since these should preclude not only the imposition of a sanction but also the finding that a violation has occurred.

323. Ninthly, there are gaps in the way the conduct of disciplinary proceedings is regulated that need to be filled. These concern: the information to be provided to the author of a notification in addition to the decision; the rules governing the admissibility of evidence relied upon in an examination; provision for a presumption of innocence or a privilege against self-incrimination; the entitlement of the prosecutor concerned to examine and cross-examine those who are heard in the proceedings; whether there is any hearing to seek the admission of an appeal or if this is to be dealt with solely in writing; and notifying the author of a notification where the disciplinary proceedings are terminated.

324. Finally, there is thus an urgent need for the decisions in disciplinary proceedings to be published promptly and on a systematic basis. Furthermore, the reporting on the initiation and outcome of disciplinary proceedings should go beyond the provision of statistical information and should seek to analyse both the nature and the reasons behind the disciplinary violations established, as well as suggestions for preventive measures that ought to be taken.

6 CONFIDENTIAL COUNSELLING

6.1 Introduction

325. Counselling involves the provision of professional assistance and guidance to resolve specific problems in a positive way, particularly through helping to clarify the relevant issues. Its confidential nature is regarded as important because those being counselled might not otherwise be prepared to discuss or disclose relevant information concerning themselves. This confidentiality is not, however, absolute as information may be disclosed where there is a risk of serious harm to either the public or the person being counselled.

326. Although originally undertaken - and still widely used - with a view to resolving personal and psychological problems, the benefits of being able to discuss problems in a work environment connection without some form of adverse judgement being made about the person seeking advice is increasingly being recognised. This is especially so where the problems concern compliance with ethical standards which, by the very nature, require interpretation when applying them to concrete situations.

327. In recent years, certain justice systems have begun to draw upon the experience of using some form of such counselling in other parts of the public service as a means of improving compliance with ethical standards.

328. In the course of its 4th Evaluation Round, GRECO systematically drew attention to the failure to make use of it in order to strengthen integrity in the prosecution services. In particular, as noted

above, it was recommended that confidential counselling within the prosecution service be provided for all prosecutors in the Republic of Moldova.[297]

329. Similarly, the Consultative Council of European Prosecutors has stated in its Opinion No. 13(2018) “Independence, accountability and ethics of prosecutors” that:

> Since the ethical issues faced by prosecutors are increasingly varied, complex and evolve over time, member States should provide available mechanisms and resources (specific independent bodies, experts within the Councils of Justice or prosecutorial councils, etc.) to assist prosecutors as regards the questions they raise (for example, whether or not to recuse themselves from a case because of a possible conflict of interests and knowledge or prejudices they may have, or the possibility for them to have supplementary activities such as arbitration, etc.).[298]

330. Nonetheless, the relative newness of this tool makes somewhat difficult the task of identifying practices that have proven to be functional for some prosecution systems, have had good results in practice and can be considered as recommended for the prosecution service, in particular, that of the Republic of Moldova.

331. This section of the paper considers first the use of confidential counselling within the public administration of the United States and Germany. It then reviews GRECO’s consideration of certain elements of confidential counselling in the course of a number of Council of Europe member states in the course of its 4th Evaluation Round. It concludes by identifying those features of confidential counselling arrangements that seem to be particularly significant.

6.2 Use in public administration

332. In both the United States and Germany legislative arrangements have been made for the use of counselling with respect to ethical standards by those working for federal agencies and departments.

333. In the United States, this was a consequence of the establishment – pursuant to the Ethics in Government Act of 1978[299] – of the Office of Government Ethics and the position of a Designated Agency Ethics Official (“DAEO”) in each executive branch agency.

334. This was done in order to promote both an ethical culture among the employees in the public sector and public trust in the integrity of these civil servants and the public agencies in which they work.

335. For example, the mission of the DAEO in the Department of the Interior described as seeking to

> build this ethical culture by providing ethics advice, counselling and education to DOI's employees, as well as managing the financial disclosure report process. The Ethics Office is not an enforcement or investigatory office. Our mission is prospective: helping employees think through potential conflicts of interest before taking action.[300]

336. The primary element of the Department of Interior's ethics programme is considered to be the provision of advice and counsel on a wide variety of ethics-related issues, including gifts and entertainment, travel, outside employment, post-government employment, fundraising, misuse of position and government resources, and political activities.

337. However, its Departmental Ethics Office also manages the collection, review and analysis of financial disclosure reports. This review is intended to affirm to the public that the Department’s integrity is beyond reproach, thereby ensuring the public's trust in its employees and programme.

[297] Similar recommendations were made for the prosecution systems in other member states of the Council of Europe.
[298] https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d, at para. 64.
[299] https://www.govinfo.gov/content/pkg/USCODE-2010-title5/pdf/USCODE-2010-title5-app-ethicsing.pdf.
[300] https://www.doi.gov/ethics/about.

338. Moreover, in its overview of the 4th Evaluation Round, GRECO referred to requirements for public financial disclosure and a system of confidential counselling and training as part of a holistic integrity framework for the United States Congress.[301]

339. Amongst the measures included in Germany's Federal Government Directive Concerning the Prevention of Corruption in the Federal Administration,[302] there is provision for the appointments for federal agencies of contact persons for corruption prevention.[303]

340. A contact person may be responsible for more than one agency as appointments are based on the tasks and size of an agency. The tasks with which a contact person may be charged are:

a) serving as a contact person for agency staff and management, if necessary without having to go through official channels, along with private persons;
b) advising agency management;
c) keeping staff members informed (e.g. by means of regularly scheduled seminars and presentations);
d) assisting with training;
e) monitoring and assessing any indications of corruption;
f) helping to keep the public informed about penalties under public service law and criminal law (preventive effect) while respecting the privacy rights of those concerned.

341. Contact persons are prohibited from disclosing any information that they have gained about staff members' personal circumstances. However, they may provide such information to agency management or personnel management if they have a reasonable suspicion that a corruption offence has been committed.

6.3 The 4th Evaluation Round

342. Some indication as to the use of confidential counselling in the context of justice systems and the difficulties involved in its implementation in them can be seen in some of the evaluation and compliance reports for GRECO's 4th Evaluation Round, most notably, those for Austria, Croatia, Germany and Lithuania, with that for Croatia providing the most detail.

343. In respect of Austria, the GET referred in the evaluation report to a Professional Codex that had been adopted by a professional organisation - the Association of Austrian Prosecutors – which was presumed to apply only to its members and not to all prosecutors in the country.[304] However, the GET was concerned about the extent to which prosecutors were aware of the Codex and considered that it would need to be complemented with additional concrete information and examples in order to better assist prosecutors in daily life.

344. GRECO had thus recommended that: (i) that all prosecutors are bound by a code of conduct accompanied by, or complemented with appropriate guidance and (ii) that a system be put in place to provide confidential counselling and to support the implementation of the code in daily work.

345. In the subsequent compliance report, GRECO welcomed the fact that new rules of conduct and supporting guidelines were being prepared, which would be for all prosecutors.[305] It also noted, as further steps in the right direction, that a compliance website would be created and that compliance officers would be designated with the role of elaborating a policy and of providing advice. It was recognised that there would be a need to reassess these reforms once the process was more advanced and more specific information was available, including on the content and

[301] *CORRUPTION PREVENTION Members of Parliament, Judges and Prosecutors CONCLUSIONS AND TRENDS*, 2017, p. 11.
[302] https://www.bmi.bund.de/SharedDocs/downloads/EN/themen/moderne-verwaltung/Richtlinie_zur_Korruptionspraevention_in_der_Bundesverwaltung_englisch.pdf?__blob=publicationFile&v=1. This directive applies to the supreme federal authorities, the authorities of the direct and indirect federal administration, the federal courts and federal special funds, as well as to the armed forces.
[303] Point 5.
[304] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806f2b42, at para. 161.
[305] https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680966744, at para. 68.

scope of the rules of conduct and on the functions of the compliance officers. Nonetheless, GRECO was prepared to conclude that its recommendation had been partly implemented.

346. As regards Germany, GRECO had recommended in the evaluation report that - as a complement to developing a compendium of the existing rules for ethical/professional conduct[306] - the adoption of practical measures for the implementation of the rules, including dedicated training and confidential counselling for all public prosecutors.[307]

347. The subsequent compliance report noted that the compendium had been elaborated, distributed and made available to both legal practitioners concerned and to the public at large.[308] Furthermore, it was noted that this compendium included practical examples, guidelines and comments and was serving as a basis for both training on ethical and professional conduct and counselling by contact persons for corruption prevention. There was no indication as to how the counselling was actually working but GRECO concluded that its recommendation had been implemented satisfactorily.

348. In the case of Lithuania, the GET noted in the evaluation report that the Prosecutor General had appointed three senior specialists, working in the personnel and legal department of the Prosecutor General's Office, to provide information and advice to prosecutors on declarations of private interests. It was reported that consultation took place confidentially, by telephone or e-mail and that prosecutors could also address the Chief Official Ethics Commission on ethical issues.[309] However, while welcomed, it was observed that there was no dedicated awareness policy on ethical issues. It was recommended that the code of ethics be complemented in such a way as to offer practical guidance by way of explanatory comments and/or practical examples on conflicts of interest and ethical issues and that further measures be taken to raise prosecutors' awareness of these issues, notably by stimulating institutional discussions.

349. The second compliance report referred to a report by the authorities report that the Commission of Ethics of Prosecutors had been charged with providing advice on ethical issues upon request.[310] It was noted in this report that the Commission examines requests for advice at its meetings, provides a written response to the prosecutor in question and ensures publication of anonymised cases on the website of the prosecutor's office (except for cases which are examined by the Commission in camera, of which only the operative part of the Commission's conclusions is made public). This development, together with extensive training of prosecutors, led GRECO to conclude that its recommendation had been implemented satisfactorily.

350. In the evaluation report for Croatia, the GET made observations on the existing counselling system for judges on ethics, integrity and the prevention of conflicts of interest and on the approach to interpreting ethical principles for prosecutors, both of which are of undoubted relevance for the provision of confidential counselling to prosecutors.

351. As regards the former, the GET made three significant observations:

- There needs to be a change in mind set and approach to focus also on the preventive angle of the notion of conflict of interest, rather than only looking into this matter from a criminal law perspective;
- the establishment of an institutionalised advisory service could not only assist in better advising judges in case of integrity-related dilemmas, but also in bringing coherence to the court's integrity policy and in developing best practice across the profession; and

[306] To be accompanied by explanatory comments and/or practical examples specifically for public prosecutors, including guidance on conflicts of interest and related issues.
[307] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c639b, at para. 226.
[308] https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168072fd68, at para. 48.
[309] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c7660, at paras. 234-235.
[310] https://rm.coe.int/grecorc4-2019-18-fourth-evaluation-round-corruption-prevention-in-resp/168096d994, at para. 52.

- the development of further guidance in this area of public concern could further clarify ethical standards and help interpret values in concrete situations as well as in their aspirational dimension.[311]

352. In addition, the GET noted that the existing system was rarely used in practice and, as the availability of confidential counselling will only be effective if actually used, it was not surprising that it concluded that "the current advisory system on ethics needs to be significantly stepped up to demonstrate its operability in practice".[312]

353. Responsibility for supervising the adherence to and the interpretation of the code of ethics for prosecutors has been entrusted to the Ethical Committee. This is appointed by the Extended Collegiate Body of the Public Prosecution Office and consists of the president and two members. It has a dual role; responding to prosecutors' requests to interpret the ethical principles applicable to them and issuing opinions/recommendations regarding complaints against the behaviour considered by the submitter to be contrary to the code.

354. According to the evaluation report:

> the Committee receives a broad range of questions from the prosecutors e.g. on how to act outside court or prosecution office in relation to a party in a case, on potential restrictions they should place on their social contacts, on possible membership of clubs and associations etc., which proves their need for guidance in this field, especially in relation with potential incompatibilities and situations of conflict of interest. The approach of the Ethical Committee is an informal one, their opinions are not binding, and breaches of ethical rules are not addressed by this Committee. If the breach of the Code of Ethics is serious enough, it will be considered as a disciplinary offence and it will be up to the State Prosecutorial Council to sanction it. The Ethical Committee maintains an advisory role. [313]

355. However, the GET found that the Ethical Committee was:

> rather cautious in issuing opinions on very concrete ethical dilemmas, preferring to stick to the description of principles; it does not record the requests received, nor the answers given and does not give general guidance to the prosecutors on the practical interpretation of the principles enshrined in the Code.[314]

356. As a result, it considered that:

> counselling services currently available to prosecutors could be strengthened, general guidance with regard to concrete typical situations of potential incompatibilities and situations of conflict of interest could be offered not only to the requesting prosecutor, but to all of them.[315]

357. In respect of the latter point, it was noted that the Ethical Committee was looking into making its decisions and general guidance for the prosecution profession more easily accessible on-line, as well as to increasing its interaction with the Judicial Academy. This recognises the potential value of drawing upon advice given in individual cases to provide more general guidance and training, while still respecting confidentiality.

358. It was noted in the subsequent compliance report that, following an internal reflection process on disciplinary cases for ethical violations, their causes and outcomes, the Ethics Committee had issued and distributed Guidelines for the interpretation of fundamental ethical and deontological principles from the Code of Ethics of public prosecutors.[316]

359. GRECO was pleased to note this more proactive role on the part of the Ethics Committee and also observed that

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[311] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c2e17, at para. 106.
[312] *Ibid.*
[313] *Ibid.*, at para. 158.
[314] *Ibid.*
[315] *Ibid.*
[316] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c2e19, at para. 40.

the development of guidance drawing on the experience gathered to date and providing inspirational values for the profession, as well as the formalisation of a lifelong learning programme on integrity matters for prosecutors, can constitute most valuable measures for prosecutors facing ethical dilemmas in their daily work.[317]

6.4 Some conclusions

360. The emphasis now being placed on the need for confidential counselling needs to be seen in the context of GRECO's concern that codes of conduct should be practical documents that help guide prosecutors, judges and others in their daily work. This is important to avoid them becoming no more than a "statement of principles that gathers dust on a shelf".[318]

361. The main role of a system of confidential counselling within the prosecution service is to provide advice and assistance to individual prosecutors and others working for it on the matter of compliance with ethical standards. This advice and assistance ought, however, to be drawn upon through the provision of more general guidance, as well as training, for all working in the prosecution service.

362. The object of a system of confidential counselling is threefold: to help apply general ethical standards in concrete situations; to contribute to developing a culture of commitment to those standards; and to prevent risks of non-compliance with them from being realised.

363. Such a system can be seen to have a number of benefits – both from the perspective of the prosecution service and the individual prosecutor – that will flow from the achievement of these objects.

364. Thus, within the prosecution service, confidential counselling can lead to an increase in trust and stimulate dialogue and team spirit, developing an organisational culture and ensuring an optimal working climate in which the integrity of the prosecutor's profession is respected. It can also stimulate a more cooperative relationship between the management of prosecution offices and individual prosecutors. In addition, it can result in a more consistent interpretation and application of ethical standards and thus more appropriate decision-making. Furthermore, a preventive approach to the observance of ethical standards will ultimately be more resource efficient. The overall outcome will be an enhancement in the quality of prosecutorial services and greater public confidence in the prosecution service.

365. As far as individual prosecutors are concerned, confidential counselling will help them to identify and resolve at an early stage any doubts or uncertainties that they may have as to what ethical standards require. In addition, they will gain greater familiarity as to what those standards entail and the potential consequence of not complying with them. Ultimately, it will lead to them being better able to act consistently with ethical standards and thus behave appropriately with respect to all with whom they interact in the course of their duties.

366. A system of confidential counselling can be established in various forms, including through: the setting up of a special committee within the prosecution service or subordinate to the body of self-governance; the designation of experienced prosecutors in individual prosecution offices; and the appointment of specialists from outside the prosecution service. Such a system could also be created by a professional association but that could mean that its coverage only extends to those prosecutors belonging to it.

367. In order to encourage prosecutors and others in the service to make use of the system of confidential counselling, it should be clear that advice and assistance will be provided on a confidential basis unconnected to the disciplinary process, subject only to any need to prevent serious harm to the public or a particular individual.

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[317] *Ibid.*, at para. 41.

[318] As observed in the intervention by Marin Mrčela, President of GRECO, on the occasion of the Opening of the Judicial Year of the European Court of Human Rights, 26 January 2018; https://rm.coe.int/intervention-by-marin-mrcela-president-of-greco-on-the-occasion-of-the/1680780a28.

368. The observance of confidentiality should not, however, preclude the publication of anonymised cases and the use of them in training as part of efforts to strengthen compliance with ethical standards.

369. Moreover, it should be recognised that those providing the confidential counselling can also draw upon their experience to identify general risks and vulnerabilities in the prosecution service with respect to corruption, as well as to suggest steps to preclude them from being exploited and propose the clarification of ethical standards.

7 Pathways to compliance

7.1 The disciplinary system

370. The principal change to the disciplinary mechanism proposed by GRECO and endorsed in this paper concern the location of the Inspection within the SCP rather than the GPO, the preclusion of the possibility of SCP members taking part in disciplinary decision-making and ensuring the transparency of the disciplinary process. However, the paper also recommends a number of other changes relating to the basis for imposing disciplinary liability on prosecutors, the conduct of the proceedings and the analysis of those proceedings and the outcome of them.

371. In some instances, the implementation of the recommendations would require no more than simple amendments to the PPS Law.

372. This is particularly so for the recommendations relating to: the automatic bar on promotion and receiving benefits for one year from the date of disciplinary sanction's commencement; the rules governing the admissibility of evidence relied upon in an examination; provision for a presumption of innocence or a privilege against self-incrimination; and the entitlement of the prosecutor concerned to examine and cross-examine those who are heard in the proceedings.

373. The first of these recommendations could be achieved by the insertion at the end of Article 41(5) of a qualification such as "except in exceptional circumstances and so long as this could not be seen as undermining the sanction that was imposed".

374. The remainder of these recommendations relating to admissibility of evidence, the presumption of innocence and examination and cross-examination of witnesses could be addressed by the insertion of specific provisions setting out appropriate requirements in respect of these matters in Article 50 of the PPS Law and Section VI of the College Regulation.

375. Similarly, implementation of the recommendation relating to the formulation of the disciplinary violations in Article 38 requires only the addition of "under Article 6(3)" at the end of its paragraph (a) and the deletion of its paragraphs (e), (f) and (g).

376. Furthermore, implementation of the recommendation on eliminating the possibility of finding a violation but terminating the proceedings where the time-limit for accountability has expired would only require the rewording of Article 51(1)(b) and paragraph 68(b) of the College Regulation as follows: "ending the disciplinary proceedings without finding a disciplinary violation, when the time limits for bringing the disciplinary actions have expired". This would not affect the continued applicability of a time-limit for accountability.

377. Most of the other recommendations are likely to entail somewhat more complex legislative changes and/or administrative arrangements, with some others requiring further examination before taking any action.

378. The most significant change clearly concerns the transfer of the Inspection to the SCP, which will entail much more than amendments to Article 52(1), (3) and (5) of the PPS Law, the provisions which specifically refer to the GPO and the PG.

379. Although the transfer of the Inspection away from the GPO would, in principle, enhance the objectivity of this element of the disciplinary process, this could be called into question by its

subordination to the SCP on account of its own role in this process. There is thus a need to consider what arrangements would be needed to avoid this possibility arising.

380. In addition, other issues that would be appropriate to address are: should all the functions of the Inspection be transferred to the SCP; would any changes to the role of inspectors in the disciplinary be appropriate in the event of the transfer; would there be any practical difficulties for inspectors performing the verification process if located within the SCP rather than the GPO; should there be any change to the requirements for appointment as an inspector; and what administrative support arrangements would be needed following a transfer?

381. The possibility of the Inspection's autonomy being threatened as much by its location in the SCP as in the GPO could be entirely precluded by establishing it as an entirely separate body from both bodies. However, this does not really seem practicable given the relatively small size and workload of the Inspection and the additional costs that might be involved in establishing it in this way.[319]

382. A possible threat to the Inspection's autonomy could be mitigated by establishing it as a separate sub-division within the SCP. However, this would not change the need for someone to have similar responsibilities *vis-à-vis* the Inspection as the PG currently has, particularly as regards the adoption of a regulation governing its activities, the appointment of inspectors, the exercise of disciplinary control over them and the receipt of reports on its work.

383. There would seem little point in transferring the Inspection to the SCP if it did not take on those responsibilities.

384. Moreover, a comparable arrangement already exists in the Regulation on the Organisation, Competence and Functioning of the Judicial Inspection established by the Superior Council of Magistracy,[320] which also has a role in disciplinary proceedings in respect of judges.

385. This Regulation states that "the Judicial Inspection is a specialized, independent body"[321] but there are no provisions to secure that independence and the technical and material assurance of its activity is carried out by "the Superior Council of Magistracy through the Secretariat of the Council"[322].

386. It does not seem that the autonomy of the Judicial Inspection has been called into question by this arrangement and it is possible that no concerns would arise in this regard should a similar one be adopted for the Inspection within the SCP.

387. However, the potential for conflict between the overall responsibility of the SCP for the Inspection and their respective roles in the disciplinary process could be precluded entirely if the SCP – as opposed to its College – had no appellate function in disciplinary cases and this was left entirely to the courts. Such an approach would be in line with the suggestion that appeals be left entirely to the court system as a means of simplifying the disciplinary process.

388. The current duties of the Inspection are governed by Article 52(6) of the PPS Law and paragraph 6.1 of the Inspection Regulation, with the latter being more expansive than the former.[323] The

[319] As occurs in some larger jurisdictions; e.g., Bulgaria has thee Inspectorate at the Supreme Judicial Council and France has the Inspectorate General of Judicial Services.
[320] In Decision No. 506/24 of 13 November 2018.
[321] Paragraph 1.1.
[322] Paragraph 11.1.
[323] "Inspection of Prosecutors shall have the following competences: a) conduct the verification of the organisational activity of prosecutors and of prosecutor's offices; b) examine the notifications regarding the facts that can constitute disciplinary offences in the actions of prosecutors; c) keep the statistical record of all notifications and their verification results; d) prepare information for the evaluation of the performances of prosecutors and his/her promotion to other positions; e) prepare the annual report regarding his/her activity; f) to keep the record of cases of undue influence denounced by prosecutors and public servants of the Prosecutor's Office in accordance with the Regulation on the record of cases of undue influence; g) keep the record and ensure the examination of the warnings on possible illegalities committed within the bodies of the Prosecutor's Office, received in the conditions of the Regulation on integrity warnings and ensure the application of protection measures of employees who submitted warnings; h) conduct the verification of holders and candidates for public and technical offices in the bodies of the Prosecutor's Office, in accordance with the internal regulations; i) review the applications, information, notifications on the violations admitted by public servants,

majority of them concern the function of verification in the disciplinary process,[324] ones that could be seen as connected to that function[325] and ones that can be seen as linked to the SCP's role in guaranteeing the independence of prosecutors[326]. These should, therefore, continue to be functions performed by the Inspection within the SCP.

389. However, those relating to aspects of performance evaluation having no relationship with disciplinary matters,[327] verification and review concerning staff and applicants for employment within the GPO and elsewhere[328] and other indications of the PG[329] seem to be ones for which alternative arrangements should be made as they are not matters for which the SCP has any responsibility.

390. The only new function that it seems appropriate for the Inspection to take on is not one that is really a consequence of its transfer to the SCP but arises from the concern to ensure both impartiality and efficiency.

391. At present inspectors submit their decisions on verification to the College but it is a member of the College who acts as rapporteur and is thus responsible for studying the case file, presenting the case to its meeting, proposing the solution and drafting the decision. As has been indicated, if the report made by the rapporteur is more than a neutral review of the allegations and the evidence assembled, this could lead to her/him taking on a prosecutorial role, which would be inconsistent with her/his later participation in the decision taken by the College. Moreover, the relevant analysis should already have been made in the decision of the inspector and it seems rather inefficient for her/him not to be responsible for presenting the case to the College, with all its members performing only the adjudicatory function.

392. This is an approach that can be seen in some other systems.

393. For example, in Bosnia-Herzegovina, there is the position of Disciplinary Prosecutor who is responsible for presenting allegations of misconduct by prosecutors (and judges) to the High Judicial and Prosecutorial Councils and advocating the imposition by them of adequate disciplinary sanctions. S/he does not perform an investigatory role but does perform one similar to verification in that s/he analyses investigative reports prepared in respect of prosecutors and isolates those cases which are suitable for submission to the Disciplinary Panels. The Disciplinary Prosecutor prepares cases for submission and presents them in writing and orally.

394. The adoption of a similar role for inspectors following the transfer of the Inspection to the SCP could enhance the efficiency of the disciplinary process and strengthen its objectivity.

395. Its implementation would not require an amendment to the PPS Law but there would need to be amendments to paragraphs 47-49 of the College Regulation and appropriate provision relating to it in the regulation governing the Inspection that would need to be adopted by the SCP. The latter would not, however, to be otherwise significantly different from the existing Inspection Regulation, although it would be appropriate for the Chief Inspector to inform the SCP rather than the PG about attempts of undue influence on her/himself or on the subordinate inspectors.[330]

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public servants with special status and technical personnel; j) initiate the verification of holders and candidates to public offices by the verification body, in accordance with Law no. 271 of 18.12.2008 on the verification of holders and candidates for public offices; k) manage and take the record of calls and addresses to the specialised anticorruption line, in accordance with the provisions of the Law no. 252 of 25.10.2013 for the approval of the Regulation on the functioning of the system of anti-corruption telephone lines; l) conduct, planned or unannounced controls on the examination of concrete cases/referrals or of distinct fields of activity (ordinary controls) or on the examination of the entire activity of a prosecutor's office (complex controls); m) exercise other indications of the Prosecutor General in accordance with the legislation in force and departmental acts, within the limits of competence".

[324] I.e., items (a), (b), (c) and (e).

[325] I.e., items (g), (k) and (l).

[326] I.e., item (f).

[327] I.e., item (d).

[328] I.e. items (h), (i) and (j).

[329] I.e., item (m).

[330] This is currently the last item in paragraph 6.2.

396. The impartiality of the College would be strengthened by its members hearing cases no longer being able to request the Inspection to conduct additional controls or to collect new documents or evidence "if the information in the case file is not complete or sufficient".[331]

397. A concern about transfer raised in the course of the interviews related to the ability of inspectors to have access to prosecution files on account of them not being within the GPO structure. Such access is undoubtedly necessary for proper verification of at least some matters covered by notifications, particularly those in which the appropriate handing of a prosecution is called into question.

398. Nonetheless, this does not seem to be an issue that cannot be readily solved. Existing inspectors are not prosecutors – even if all the current ones are former ones – and are not bound by the secrecy obligation in Article 6(3)(k) of the PPS Law. However, they are bound by a comparable obligation of non-disclosure in the Inspection Regulation.[332] Moreover, a requirement to allow an Inspector access to criminal investigation materials where required for the purpose of verification and the conduct of disciplinary proceedings would not be inconsistent with the provision in the Criminal Procedure Code governing access to them in "the interests of other persons"[333].

399. This is, therefore, a matter that can be adequately resolved through a legislative provision authorising Inspectors to have access to criminal investigation materials where required for the performance of their functions.

400. The current requirements for appointment as an inspector do not limit candidates to former prosecutors but simply specify that they meet the following conditions: "a) a law degree diploma or equivalent; b) working experience in legal field for at least 7 years; c) not being previously found guilty of committing a crime; d) an excellent reputation in terms of Article 20, paragraph (2) of this law".[334]

401. These conditions are not irrelevant, but they do not seem sufficient. Certainly, working in a legal field does not mean that the person has familiarity with the operation of the criminal justice and public prosecution systems, which are clearly necessary for dealing with notifications and relate matters. Furthermore, in view of the recommendation that the inspector presents the case to the College, it would be necessary for the persons appointed to have both drafting and advocacy skills to discharge this responsibility.

402. There does not seem to be a need to limit appointments to former prosecutors as persons who have worked as lawyers should also be capable of performing the function.

403. It would, therefore, be appropriate to develop the requirements for appointment in a way that takes account of the discussion in the preceding two paragraphs. These should be put into effect once the terms of the present inspectors come to an end.

404. At present, the funding of inspectors and the administrative support provided to them is met from the GPO's budget. In the event of the Inspection being transferred to the SCP, there would thus be a need for an equivalent amount of funding and support to be provided by the SCP, which would necessitate its annual budget being adjusted upwards accordingly.

405. The transfer of the Inspection and the legislative amendments concerning disciplinary liability and proceedings could usefully be accompanied by another measure that could ensure that less serious shortcomings on the part of prosecutors are dealt in a simpler fashion.

[331] Paragraph 48 of the College Regulation.
[332] "Inspectors … cannot … disclose information which became known to him/her in the course of exercising his/her function"; paragraph 4.4.
[333] "Criminal investigation materials shall not be disclosed unless the disclosure is authorized by the person conducting the criminal investigation and to the extent he/she considers it possible during which the presumption of innocence shall be observed and the interests of other persons and of the criminal investigation shall not be affected under the conditions of the Law No. 133 dated July 8, 2011 on the Protection of Data of Personal Character"; Article 212(1).
[334] Article 52(2) of the PPS Law.

406. As has been seen, there is already an element of informal resolution of some failings by inspectors when dealing with the verification of notifications. However, the sort of cases involved – particularly ones relating to delay because of the workload – should not normally be entering the disciplinary process. Rather they are, in many instances, ones that ought to be capable of being dealt with through effective management of the different prosecutor's offices.

407. This could be facilitated through the adoption of two, connected measures. First, by introducing a requirement in the PPS Law for a superior prosecutor to seek a resolution of a possible disciplinary issue within the unit concerned before submitting a notification so long as s/he does not consider a penalty greater than a warning is merited. Secondly, in such cases the PPS law could be amended to authorise the superior prosecutor to issue a written warning to the prosecutor concerned, which would then be placed on her/his file, subject to a right of appeal by her/him in the event of disagreement as to this being well-founded.

408. The recommendation that it be possible to impose sanctions on former prosecutors in respect of whom disciplinary violations have been imposed would require the introduction into Article 39 of a sanction or sanctions that would be appropriate to the situation of someone no longer working in the prosecution service.

409. These should probably include a reduction in the pension payable, either permanently or for a specified period, and an amendment to the person's employment record, particularly if this is something to be provided when seeking other employment. However, there ought to be consultation with the General Assembly of Prosecutors before determining the sanctions to be stipulated.

410. If it is decided not to eliminate the SCP's role in determining appeals against decisions of the College, there would then be a need to amend the PPS Law and/or the College Regulation so as to allow a prosecutor to raise an objection about the failure of an SCP member to recuse her/himself, just as is already possible in respect of a member of the College hearing a case.[335]

411. There are two matters for which some further study of existing practice seems to be required in order to establish whether, and if so what, steps need to be taken to enhance the conduct of disciplinary proceedings.

412. The first concerns the limited number of both kinds of *ex officio* notifications, which would require interviews with inspectors to establish, in particular, whether they have not seen problems in the media or in the conduct of their activities that should be the subject of notification or there is some problem which makes an *ex officio* notification inappropriate. In the light of that information, there may be a need to provide inspectors with guidance or some other form of assistance in the use of this power.

413. The second concerns the approach to imposing sanctions. As the review of sample decisions has suggested, this may not be entirely consistent and proportionate. As the current system has been in operation for several years, it would now be timely to review the approach that has been followed, not only to establish whether this impression is justified but also to elaborate some criteria for determining when the imposition of one rather than another from the range of sanctions is warranted in order to guide future decision-making.

414. Finally, there are three important practical matters that require attention, namely, the reasoning of decisions by the College, their publication and the enhancement of the reporting on the handling of disciplinary proceedings.

415. Disciplinary rulings need to be clearly reasoned as regards the findings of fact, the standards violated, and the sanction being imposed. This important to satisfy the person responsible for the notification, the prosecutor concerned and the public in general that a matter has been dealt with

[335] Under paragraph 58 of the College Regulation.

appropriately. Moreover, a well-reasoned ruling will mean the need for an appeal is reduced but also enable any filed to be suitably focused.

416. The impression gained from the review of decisions by the College was that these objectives were not always being met. In these circumstances, it would be useful for some guidance could be prepared to help members of the College. Some assistance in this connection might usefully be sought through the good offices of the CCPE.

417. Having well-reasoned decisions is, however, insufficient to meet the requirements of transparency. Indeed, the failure to publish any so far is bound to encourage public concern about the operation of the disciplinary process.

418. Although there may be concerns about publishing information that runs counter to the need for confidentiality in criminal proceedings, as well as the right to respect for private life, these are concerns that can be taken into account in the drafting of decisions by indicating - for the version to be published – any names that should be anonymised and any other details that should be presented in a restricted manner.

419. It would be appropriate for this approach to be adopted with respect to all future decisions as soon as possible. However, existing decisions should also be given similar treatment in the course of at most two years so that eventually all decisions are publicly available.

420. Achieving this will give an important boost to transparency but it is not sufficient. The public also need to be able to get an informative picture as to the handling of disciplinary proceedings and, as has already been noted, the present approach to reporting does not engage in real analysis.

421. Following the transfer of the Inspection to the SCP, the publication of reports will become the sole responsibility of the SCP. The preparation of annual reports will continue to be undertaken by the Inspection. However, it would be more useful if this was consolidated with the report of the SCP on all disciplinary matters so that a more comprehensive picture can be obtained. Such a report must go beyond statistics and identify the sort of problems that are occurring, as well as reflect on any preventive measures that are considered necessary.

422. Implementation of the above recommendations should not entail any additional financial costs but the budget line for the Inspection would need to be reallocated from the GPO to the SCP.

7.2 Confidential counselling

423. The recommendation by GRECO that confidential counselling should be provided within the prosecution service for all prosecutors is not a mere reflection of developments in public administration. Thus, as has been seen above – it is founded on the clear advantages for both the prosecution service and individual prosecutors in seeking compliance with ethical standards through an approach that relies in the first place on prevention rather than punishment.

424. It was thus encouraging to find that the members of the SCP with whom the experts met recognised that a system of confidential counselling could not only contribute to the awareness on the part of prosecutors of the need for them to respect professional ethics but was also necessary for the prosecution system in the Republic of Moldova. It was even more encouraging to learn that there is already provision in the Code of Ethics for the appointment of ethics counsellors to perform this task,[336] notwithstanding that this has yet to occur.

425. In order to realise both the object of this provision in the Code of Ethics and to fulfil point (ii) of GRECO's Recommendation xvii, there are several matters that need to be addressed. They concern the independent role of the proposed counsellors and the body appointing them, their mandate/responsibilities, the requirements for appointment, the terms of appointment and the number of counsellors that should be appointed.

[336] Paragraph 11.

7.2.1 Independent role/appointing body

426. As was made clear in the ER,

> GET wishes to stress that the function of providing confidential counselling in concrete cases ought to be given to dedicated practitioners who have specific expertise in the field and are *distinct from disciplinary bodies*[337]

427. In order for prosecutors to have confidence in the counselling system and thus be prepared to seek advice from its counsellors, it is essential that it be established in a way that separates it from the bodies responsible for the disciplinary process.

428. This seems to have been something that influenced the amendment in 2019 by the General Assembly of Prosecutors of the relevant provision of the Code of Ethics. The change made then meant that the proposed ethics counsellors would not work under the GPO but would be nominated by the SCP. Certainly, as a result of this change, there would no longer be a connection between the ethics counsellors and one element of the disciplinary process, namely, the Inspection.

429. However, the SCP also has a role in the disciplinary process, both through the College and its role as an appellate body. Moreover, the SCP's connection with the disciplinary process will be enhanced if, as is proposed, the role of the Inspection in this process is transferred from the GPO to it.

430. One way of removing this apparent connection of the ethics counsellors with the disciplinary process might be – on the assumption that the proposed transfer of the Inspection's role occurs – to reverse the change to the Code of Ethics so that they are appointed by the PG.

431. However, on account of the principle of hierarchical subordination as applied in the Republic of Moldova, there is unlikely to be much trust in the confidential nature of any counselling where the PG appoints those providing it. This will be so even if the concerns about possible breaches of confidentiality turn out in practice to be unjustified. It is also doubtful, for similar reasons, if the responsibility for appointment was given to chief prosecutors.

432. Appointment by the General Assembly of Prosecutors would certainly preclude any possible connection between the ethics counsellors and the disciplinary process. Such an approach would also mean that prosecutors would have some involvement in the appointment of those who will advise them.

433. Nonetheless, this is likely to prove impractical in practice, even if the constraints imposed by the pandemic are discarded. This is because the General Assembly of Prosecutors meets only once a year, which would not necessarily coincide with when the need for appointments will arise. Moreover, the parliamentary nature of its proceedings would not be well-suited to the task of assessing which candidates would be the most suitable for appointment.

434. However, appointment of ethics counsellors by the SCP – which is meant to act as the guarantor of the independence and impartiality of prosecutors[338] – does not necessarily mean that their role will not be clearly distinct from that of those elements within the SCP that deal with disciplinary matters.

435. To some extent, the independence of the ethics counsellors can be secured through clarity as to the tasks to be performed by them, the requirements for appointment and the unquestionable autonomy of them once appointed, as well as the existence of protection for them against improper removal.

436. Nonetheless, this could usefully be reinforced by removing the appellate role of the SCP in disciplinary proceedings, as has already been suggested.

[337] ER, at para. 164 (emphasis added).
[338] Article 68(2) of the PPS Law.

437. This would ensure that there was a clear separation of the ethics counsellors from the disciplinary process while retaining responsibility for their appointment within the SCP.

7.2.2 Mandate/responsibilities

438. For the ethics counsellors, the principal task to be specified for them is to provide advice and assistance to prosecutors and others working in the prosecution service, as well as to members of the SCP and its staff, as to the requirements in concrete situations of the ethical standards applicable to them. Such advice and assistance should be provided upon the initiative of individual prosecutors and others concerned.

439. Ethics counsellors should have an unambiguous duty of confidentiality both as regards those seeking advice and assistance and the particular advice and assistance provided. This duty should be limited only by an obligation to disclose an actual or potential problem of compliance with ethical standards where there is a clear risk of serious harm to the public or the person seeking advice and assistance.

440. In addition, ethics counsellors might be charged with drawing up an annual report with the results of their counselling activity, which should include an analysis of the risks regarding the integrity of the prosecutors and others involved in the prosecution service. This should be prepared in a manner that respects the anonymity of all who have sought advice and assistance and should be presented to the SCP. It should also be published and thereby contribute to increasing awareness about applying ethical standards in concrete situations.

441. It would also be appropriate for ethics counsellors to contribute to the professional training organized by the National Institute of Justice or other bodies, as well as to related activities (such as round tables and workshops), to which prosecutors, judges and other legal professionals are invited and in which the focus is on the application of ethical standards.

442. Furthermore, ethics counsellors should have regular meetings amongst themselves to discuss issues that they have considered and the advice and assistance provided. The aim of such meetings should be to ensure as much as possible a consistent approach to the interpretation and application of ethical standards. The conclusions of such discussions might take the form of guidance notes which could be posted on the website of the ethics counsellors as a resource that could be consulted by prosecutors and others involved in the prosecution service.

443. The Code of Ethics should include a requirement to treat ethics counsellors with respect.

7.2.3 Requirements for appointment

444. Paragraph 11 of the Code of Ethics currently provides

> The granting of confidential counselling … will be ensured by persons … elected from among the former members of the self-administration bodies within the Public Prosecution Service. The selection will take into account the prosecutor's reputation and communication skills.

445. This would mean that the counsellors must have served on the General Assembly, the SCP or one of its subordinate colleges.[339]

446. However, although former members of the College and some members of the SCP through their appellate role will have some familiarity with the requirements of ethical standards in particular cases, this will not necessarily be extensive given the limited range of cases that so far have been considered in disciplinary proceedings. Moreover, while "reputation" may be an indicator of integrity, neither this nor "communication skills" affords a guarantee that such persons have the necessary qualities to act as ethics counsellors.

447. The qualities needed to be a counsellor relate to: an ability to listen in a way that shows the person's problems/issues are recognised and understood; a non-judgemental approach;

[339] Pursuant to Article 65(3) of the PPS Law.

trustworthiness and a recognition of the importance of confidentiality; a patient and calm manner; and problem-solving skills.

448. In addition, an ethics counsellor will need a good familiarity with the applicable ethical standards, the associated requirements of the criminal law and the organisation and operation of the prosecution service.

449. Moreover, as the ethics counsellors will be expected to draw more general guidance from the cases on which they have worked and to contribute to training and related activities, they will also need the appropriate communication skills for these tasks.

450. The knowledge requirements tend to support an approach of appointing ethics counsellors from those who have worked as prosecutors and whose experience in the service has been significant. However, that does not necessarily mean that such persons will have all the other qualities required. Nor should it be assumed that persons coming from outside the prosecution service will not have or could not readily fill gaps in their knowledge. It would, therefore, be inappropriate to restrict the appointment of ethics counsellors to those who have been prosecutors.

451. At the same time, it does not seem necessary to limit the pool of potential candidates with a prosecutorial background in the way that paragraph 11 of the Code of Ethics currently does. Certainly, there may well be other prosecutors who will have as much experience as those specified in it in dealing with ethical dilemmas. It would be appropriate, therefore, to provide that prosecutors with managerial experience could also be considered for appointment as an ethics counsellor.

452. However, insofar as ethics counsellors are drawn from those who have acted as prosecutors, they should not resume such a role after a period as ethics counsellor. If that remained a possibility, there might then be a reluctance to confide in them on account of fears that discussions with them could be used against the persons seeking advice and assistance at a later stage. This points to the desirability of those prosecutors appointed as ethics counsellors taking on this role towards the end of their careers in the prosecution service.

453. Furthermore, in order to underline the importance of integrity, no one appointed as an ethics counsellor should have a disciplinary record regarding any shortcoming in that respect.

454. It is likely that many, if not all, of those who are considered to have the requisite qualities for appointment as ethics counsellors will have never previously performed this role. It would be appropriate, therefore, for appointments to be made subject to completion of an appropriate training programme once it becomes feasible for such training to be provided. Although the NIJ should undoubtedly have a role in the provision of such training, it might be more efficient for this to be undertaken with other public bodies that adopt confidential counselling arrangements. In the short-term, it would be desirable for those appointed as counsellors to have at least a briefing from one or persons who have performed this role in other countries.

455. As the members of the SCP responsible for appointing ethics counsellors will not necessarily have the background to judge whether candidates for appointment have all the qualities other than knowledge for appointment, it would be desirable for them to be advised in this process by persons with extensive experience of ethics counselling. It is recognised that this will also not be immediately practical as, at present, there are no such persons in the Republic of Moldova. In the short-term, therefore, the need for such advice could only be met from persons outside the country, whose involvement would need to be facilitated by the authorities in them.

7.2.4 Terms of appointment

456. In order to preserve their independence, appointment as an ethics counsellor should be for a single term as otherwise their behaviour might be influence by concerns about re-appointment. This would also be consistent with the suggestion that any prosecutors appointed to this position should be ones who are approaching the end of their careers.

457. The term of appointment should be limited to five years, which would ensure that ethics counsellors do not become either case-hardened or complacent, while also allowing them to draw on experience gained and to build up prosecutors' confidence in them.

458. Ethics counsellors should be remunerated at the level of a senior prosecutor so that there is no inhibition based on status as regards anyone that they might advise and assist.

459. Finally, ethics counsellors should only be capable of removal for serious misconduct, which should be defined to include any unjustified breach of the confidentiality of counselling sessions.

7.2.5 Numbers and location

460. The number and location of ethics counsellors are interrelated matters. As they ought to be readily accessible, this would not be achievable if they were only located in Chisinau. This points to the need for a distribution of them in some relationship to the territorial prosecutors' offices.

461. However, at the outset there may not be a need for one for each such office as the workload of ethics counsellors can be expected to develop gradually as familiarity with the benefits of counselling grows. It may, therefore, be appropriate for an individual counsellor to cover two or more offices so long as the time taken to reach their offices would not be excessive.

462. At the same time, it would not be appropriate for the offices of the ethics counsellors to be located in prosecutors' office, even if this might initially seem the most practical arrangement. This is because of the need to ensure that the counselling is really confidential. Certainly, it is unlikely that prosecutors would feel assured of this being so if: they could be seen entering the office of an ethics counsellor; there was a rgisk that other prosecutors entering while they were there; and a possibility of unauthorised access to a counsellor's files existed.

463. Thus, the offices of ethics counsellors should not be placed in or even close to any prosecutors' offices. It should not be impossible for an office in some other public institution to be allocated for this purpose.

7.2.6 Budget

464. The introduction of confidential counselling is not something that can be accommodated within the existing budget of the SCP.

465. In particular, there will be additional requirements to be met in terms of salaries for counsellors, offices and associated facilities and some administrative support.

466. Undoubtedly, the extent of the funding needed will initially be relatively modest as it will take time to scale up the arrangements being proposed and to establish the exact number of counsellors that will be required.

467. Nonetheless, unless appropriate budgetary allocations are made, it is unlikely that an effective confidential counselling system can be established.

468. Moreover, in the longer term, it can be expected that the existence of such a system will ultimately lead to greater compliance with ethical standards and thus lead to a reduction in the financial cost of operating the disciplinary system.

8 Conclusions and Follow-Up

469. This paper endorses the Recommendations xvii and xviii by GRECO as regards the establishment of arrangements for confidential counselling and changes to the disciplinary mechanism. In addition, it recommends a number of other changes relating to the basis for imposing disciplinary liability on prosecutors, the conduct of the proceedings and the analysis of those proceedings and the outcome of them.

470. It is also suggested that the SCP cease to determine appeals from the College and that these be determined solely by the courts. This would contribute to simplifying the system and meet concerns as to the autonomy of the Inspection being threatened by its location in the SCP.

471. Together, the implementation of all these recommendations and this suggestion should lead to greater compliance with the ethical standards applicable to prosecutors and a disciplinary system that is simpler, more effective and more transparent, as well as one that is much more likely to command the confidence not just of prosecutors but of the public at large.

472. Implementation of the recommendations will require some amendments to the PPS Law and the associated regulations and administrative organisation. In addition, there will be a need to revise the budgetary allocation for the SCP, both to accommodate the transfer to it of the Inspection and to establish the arrangements for confidential counselling.

473. The introduction of arrangements for confidential counselling should be gradual so that account can be taken of the developing workload and of any adjustments required in the light of the initial experience of its operation.

474. There will also be a need for some international assistance as these arrangements begin to be put in place, particularly as regards the appointment of counsellors and the preparation of those appointed.

475. It is especially important that existing obligations to publish the decisions in disciplinary cases are fulfilled in a way that makes them accessible and understandable and that this occurs promptly. This should be accompanied by the enhancement of the analysis in annual reporting on the handling of disciplinary proceedings.

476. Finally, further study is necessary as regards the limited use made of *ex officio* notifications and the approach to the imposition of sanctions so that there is, respectively, optimal use of the possibility of initiating disciplinary proceedings and the finding of violations are accompanied by appropriate and proportionate penalties.

9 RECOMMENDATIONS

9.1 The disciplinary system

477. It is recommended that the disciplinary system be modified by:

i. Locating the Inspection in the SCP and establishing it there as a separate sub-division;
ii. Providing that persons appointed as inspectors have familiarity with the operation of the criminal justice and public prosecution systems and drafting and advocacy skills;
iii. Providing a right in the Criminal Procedure Code and/or the PPS Law for inspectors to have access to criminal investigation materials where required for the purpose of verification and the conduct of disciplinary proceedings;
iv. Giving inspectors the function of presenting cases in proceedings before the College;
v. Introducing a requirement for a superior prosecutor to seek a resolution of a possible disciplinary issue within the unit concerned before submitting a notification so long as s/he does not consider a penalty greater than a warning is merited and authorising the superior prosecutor to issue a written warning to the prosecutor concerned, which would then be placed on her/his file, subject to a right of appeal to the College by her/him in the event of disagreement as to this being well-founded.
vi. Revising the formulation of the disciplinary violations in Article 38 of the PPS Law by the addition of "under Article 6(3)" at the end of its paragraph (a) and the deletion of its paragraphs (e), (f) and (g);
vii. Inserting at the end of Article 41(5) of the PPS Law of a qualification such as "except in exceptional circumstances and so long as this could not be seen as undermining the sanction that was imposed";
viii. Introducing provisions dealing with the admissibility of evidence, the presumption of innocence and the examination and cross-examination of witnesses in Article 50 of the PPS Law and Section VI of the College Regulation;
ix. Rewording Article 51(b) of the PPS Law and paragraph 68(b) of the College Regulation to read "ending the disciplinary proceedings without finding a disciplinary violation, when the time limits for bringing the disciplinary actions have expired" and introducing into Article 39 of the PPS Law of a sanction or sanctions that would be appropriate to the situation of someone no longer working as a prosecutor; and
x. Deleting Paragraph 48 of the College Regulation authorising College members to request the Inspection to conduct additional controls or to collect new documents or evidence.

478. In addition, it is recommended that the College be provided with guidance on the reasoning of its decisions and that these henceforth be published promptly in an accessible and understandable manner. Also, all existing decision should be similarly published within the next two years at the latest.

479. Furthermore, the annual reports of the Inspection and the SCP should be consolidated so that a more comprehensive picture can be obtained on all disciplinary matters. Such a report must go beyond statistics and identify the sort of problems that are occurring, as well as reflect on any preventive measures that are considered necessary.

480. Moreover, is recommended that that studies be undertaken into the limited number of both kinds of *ex officio* notifications and the approach to imposing sanctions in order to establish what steps may need to be taken to enhance the conduct of disciplinary proceedings.

481. Furthermore, it is recommended that alternative arrangements be made within the GPO for the Inspection's current functions relating to performance evaluation having no relationship with disciplinary matters, verification and review concerning staff and applicants for employment within the GPO and elsewhere and other indications of the PG.

482. Finally, it is recommended that the budget line for the Inspection should be reallocated from the GPO to the SCP.

483. It is also suggested that the SCP cease to consider appeals from the decisions of the College and that these be handled only by the courts.

9.2 Confidential counselling

484. In order to realise both the object of paragraph 11 in the Code of Ethics and to fulfil point (ii) of GRECO's Recommendation xvii on the provision of confidential counselling, it is recommended that:

i. The counsellors be appointed by the SCP;
ii. The principal task of the counsellors to provide advice and assistance to prosecutors and others working in the prosecution service, as well as to members of the SCP and its staff, as to the requirements in concrete situations of the ethical standards applicable to them, and this should occur upon the initiative of individual prosecutors and others concerned;
iii. The counsellors should have an unambiguous duty of confidentiality both as regards those seeking advice and assistance and the particular advice and assistance provided, limited only by an obligation to disclose an actual or potential problem of compliance with ethical standards where there is a clear risk of serious harm to the public or the person seeking advice and assistance;
iv. The counsellors might be charged with drawing up anonymised annual report with the results of their counselling activity, which should include an analysis of the risks regarding the integrity of the prosecutors and others involved in the prosecution service, which should be published by the SCP;
v. The Code of Ethics should include a requirement to treat ethics counsellors with respect;
vi. The qualities required for appointment as a counsellor should comprise a good familiarity with the applicable ethical standards, the associated requirements of the criminal law and the organisation and operation of the prosecution service and appropriate communication skills;
vii. The pool of potential candidates should not be limited to persons with a prosecutorial background but should include any prosecutor with managerial experience;
viii. No one appointed as a counsellor should have a disciplinary record regarding any shortcoming in respect of integrity;
ix. Appointment as a counsellor should be for a single term of five years;
x. Counsellors should be remunerated at the level of a senior prosecutor;
xi. Counsellors should only be capable of removal for serious misconduct, which should be defined to include any unjustified breach of the confidentiality of counselling sessions;
xii. Counsellors drawn from those who have acted as prosecutors should not subsequently resume that role;
xiii. The number and location of counsellors should bear some relationship to the territorial prosecutors' offices, taking into account the evolving need for their services;
xiv. The offices of counsellors to be located in public institution other than prosecutors' office; and
xv. Appropriate budgetary allocations to the SCP should be made for the introduction of confidential counselling.

485. It is also recommended that those appointed as counsellors who have never previously performed this role benefit from an appropriate training programme and that members of the SCP responsible for appointing counsellors be advised in this process by persons with extensive experience of counselling. However, it is recognised that it may not be initially practicable to

obtain of these from persons in the Republic of Moldova. In the short term, therefore, it would be desirable for those appointed as counsellors to have at least a briefing from one or persons who have performed this role in other countries and for SCP members also to be advised by such persons.