Translation from Ukrainian into English

EXPERT ANALYSIS

Disciplinary practice of the Qualification and Disciplinary Commission of Prosecutors for 2023 (covering an additional period from September 2022 to May 2024 regarding certain categories of prosecutors and complainants)

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Table of Contents

List of abbreviations

Analysis for 2022	Expert analysis of the disciplinary practice of the relevant prosecutor's office conducting disciplinary proceedings for 9 months of work (2021-2022), prepared by the Council of Europe National Consultant Volodymyr Petrakovskyi with further comments by Prof. Dr. Lorena Bachmaier, within the framework of the project "Human Rights Compliant Criminal Justice System in Ukraine", 2022, 83 p.
Analysis of the QDCP Secretariat	Analysis of the activities of the Body in charge of disciplinary proceedings conducting disciplinary proceedings against prosecutors (from November 2021 to December 23), prepared by the Department of Organisational Support (Secretariat) of the Qualification and Disciplinary Commission of Prosecutors of the Department of Personnel and Civil Service of the Office of the Prosecutor General, January 2024 - 56 p.
Venice Commission	European Commission for Democracy through Law (Council of Europe)
HCJ	High Council of Justice
Inspectorate General	General Inspectorate of the Office of the Prosecutor General
Research in 2019	Disciplinary Liability of Prosecutors in Ukraine / O. Banchuk, M. Kamenev, Y. Krapyvin, B. Malyshev, V. Petrakovskyi, M. Tsapok - K.: Moskalenko O. M., 2019. - 140 p.
OECD	Organisation for Economic Co-operation and Development
EC	European Commission
EU	European Union
Court	European Court of Human Rights
Law	Law of Ukraine "On the Public Prosecution Service" of 14.10.2014 No. 1697-VII
QDCP	Qualification and Disciplinary Commission of Prosecutors
CPC	Criminal Procedure Code of 13.04.2012 No. 4651-VI
CCPE	Consultative Council of European Prosecutors (Council of Europe)
CJEU	Court of Justice of the European Union
NAPC	National Agency for the Prevention of Corruption
PP	Public Prosecutor
PPS	Public Prosecution Service
SAPO	Special Anticorruption Prosecutors Office
GRECO	Group of States against Corruption (Council of Europe)
Ukraine Facility	Regulation (EU) 2024/792 of 29 February 2024 adopted by the European Parliament and the Council

Executive Summary

This document presents the third iteration of the expert analysis of the disciplinary practices of the Qualification and Disciplinary Commission of Prosecutors ("the QDCP") for the year 2023, including a broader period coverage for specific categories of prosecutors and complainants. The analysis was based on the methodology used in the study "Disciplinary Liability of Prosecutors in Ukraine" (2019) prepared by O. Banchuk, M. Kamenev, E. Krapyvin, B. Malyshev, V. Petrakovskyi, M. Tsapok under the Council of Europe project "Continued support to the criminal justice reform in Ukraine", funded by the Government of Denmark, and the European Union within the framework of the project "Strengthening the role of civil society in ensuring democratic reforms and the quality of public authority". The latter was the first study to analyse the activities of the QDCP since its first formation in 2017. This methodology was also employed in 2022 for the analysis of the QDCP disciplinary practices over nine months after the commission resumed its work at the end of 2021, carried out under the Council of Europe project "Human Rights Compliant Criminal Justice System in Ukraine".

Following an overview of European standards on disciplinary liability in the justice system, primarily those applicable to prosecutors, the present analysis focuses on four aspects: refusing to open disciplinary proceedings (section II); conducting disciplinary proceedings (section III); classifying disciplinary offences and imposing sanctions (section IV); closing of disciplinary proceedings; and finally, appealing against the decisions of the QDCP (section VI).

This analysis not only reviews the implementation of the previous recommendations and the progress made since the first analysis, but also delves into areas that may be problematic from the perspective of European standards, as in the case of additional procedural aspects regarding the prosecutors of Specialised Anti-Corruption Prosecutor's Office. This analysis also assesses the compliance of the national legislation and its application with the recent case law of the Court of Justice of the European Union on disciplinary proceedings against prosecutors and judges.

As demonstrated further, the disciplinary practices in 2023 retain many features observed in 2017-2018. For example, the profile of complainants whose complaints led to the opening of disciplinary proceedings and the profile of prosecutors held accountable remain consistent characteristics. The most successful complainants continue to be heads of prosecution offices or other prosecutors. Typically, the prosecutors subjected to disciplinary proceedings are individuals who do not hold administrative positions and have no extensive professional experience in the prosecution service. The primary allegations against them concern to improper performance of official duties or failures to act.

The analysis primarily focused on the application of substantive legal provisions by the QDCP. Mainly, the analysis was dedicated to examining how and on what grounds the QDCP found a prosecutor disciplinary liable in a specific case, how it reasoned its decision, and whether it imposed

a proportional sanction. It should be noted that the QDCP should continue its efforts to distinguish offenses by the severity criterion and establish more reliable criteria for choosing appropriate sanctions.

Procedural aspects of disciplinary proceedings were also covered, albeit receiving fewer critics or comments in general. This mainly concerned the need to reassess the use of certain sources of evidence in disciplinary proceedings (e.g., the use of information obtained secretly by law enforcement agencies).

In general, it is to be commended that the functioning of the QDPC in its role of a disciplinary body has developed positively in many areas. Its decisions have improved in quality and consistency; these decisions are generally based on legal requirements, show legal certainty and foreseeability, allowing prosecutors to exercise their right to defence. The QDCP is committed towards improving the professional standards of this body and to provide effective response to the needs in balancing independence and autonomy of the PPS and their accountability.

Nevertheless, there is still room for improvement in the work of the QDCP, and therefore some of the previous recommendations from 2019 and 2022, which do not seem to have been followed, are being reiterated in the present report along with new recommendations. The recommendations drawn in previous reports, which appear to remain unresolved, where previously discussed with the Ukrainian partners, and therefore should be considered as still valid. The reasons or obstacles for non-implementation of these recommendations should be further analysed in order to assist the QDCP in overcoming these challenges and streamlining the process towards the implementation of recommendations. Concerning other recommendations set out anew in this report, they should be regarded at this stage as proposals, subject to the further discussions with the members of the QDCP.

Also, the fruitful cooperation with the QDCP in facilitating this study, as well as its willingness to engage in constructive dialogue to align the Ukrainian Public Prosecution Service with democratic standards, should be highlighted.

Background and methodology

In 2014, the Verkhovna Rada of Ukraine adopted a new Law "On the Public Prosecution Service", which established a whole new model for the functioning of the Ukrainian prosecution system. The drafters of the Law relied on the standards of the Council of Europe in order to ensure commitments Ukraine made upon joining the Organisation in 1995. Consequently, the Council of Europe bodies and experts were involved in all key stages of drafting the Law.

Among other things, the Law stipulated that disciplinary functions should first be transferred from the Prosecutor General and other senior prosecutors to an independent body. While similar bodies in various Council of Europe member states "differ in status and influence over the prosecution", their activities are crucial for "striking a balance between ensuring the autonomy of the prosecution service and its accountability, while also acting as a buffer between prosecutors and the political elite".[1] After all, "*the avoidance of abuse of the prosecutor's office for political purposes was the basis for the introduction of [such] bodies*"[2]. By 2016, the approach as to the latter was enshrined in the Constitution.

The transfer of disciplinary functions from the Prosecutor General and other senior officials took place in mid-2017 when the Qualification and Disciplinary Commission of Prosecutors ("the QDCP") began its activity. During the entire period of functioning of the QDPC, the Council of Europe's Project "Continued Support to the Criminal Justice Reform in Ukraine" provided expert and technical assistance[3] to this institution to ensure "that all stakeholders are committed to performing fully, loyally and positively all the immense work that effective implementation of the Law's provisions will require"[4]. Notably, this Council of Europe Project supported the 2019 study[5], which formulated a number of recommendations to the QDCP.

With the transitional provisions of the Law of 19.09.2019 No. 113-IX amending the Law on public prosecution service, *inter alia*, by putting forward the immediate measures to perform the re-attestation of the whole system of prosecutors, the work of the QDCP was put on hold for two hears. After the disciplinary body resumed its work at the end of 2021, the Council of Europe's project "Human Rights

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[1] A comparative study of prosecutorial self-government in the Council of Europe member states / Laura Stefan, Idlir Pechi / Council of Europe Project 'Further Support to Criminal Justice Reform in Ukraine', 2018, P. 5. Electronic resource: https://www.coe.int/uk/web/criminal-justice-reform/publications

[2] ibid.

[3] See web page of the Project 'Continued Support to the Criminal Justice Reform in Ukraine' https://www.coe.int/en/web/criminal-justice-reform/

[4] Comments by the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Law of Ukraine 'On the Public Prosecutor's Office' of 14 October 2014, DGI (2014) 30, §162. Electronic resource: https://www.coe.int/en/web/criminal-justice-reform/expert-opinions

[5] Disciplinary Liability of Prosecutors in Ukraine / O. Banchuk, M. Kamenev, Y. Krapyvin, B. Malyshev, V. Petrakovskyi, M. Tsapok - K.: Moskalenko O. M., 2019. - 140 p. Electronic resource (in Ukrainian): https://pravo.org.ua/wp-content/uploads/2020/10/1548703302disciplinary-responsibility-of-prosecutors-in-ukraine_ukr.pdf

Compliant Criminal Justice System in Ukraine"[6] continued to support the institution. The 2022 Analysis[7], prepared within this project, demonstrated that the disciplinary practices of 2021-2022 retained many characteristics of the practices from 2017-2018. As a result, the previously provided recommendations from 2019 were reiterated, along with a set of new proposed recommendations for improving the work of the disciplinary body.

The August 2024 marked the end of the term for the second composition of the QDCP (i.e. on 27 August 2024 the mandate of its six members ended[8]). Once the new members are appointed the third composition will take office. This presents an excellent opportunity for the Council of Europe's project "Fostering Human Rights in the Criminal Justice System in Ukraine"[9] to continue the analysis of QDCP's disciplinary practices using a predefined approach that embodies Council of Europe standards.

Methodology

In late January 2019, the Centre of Policy and Legal Reform presented the study "Disciplinary Liability of Prosecutors in Ukraine"[10]. The 2019 study focused on examining the practice of holding prosecutors accountable by the QDCP during 2017–2018. The authors analysed various aspects of disciplinary practice: the legislative regulation of holding prosecutors accountable, the compliance of national legislation with international standards, the organisational aspects of complaint review by the QDCP, the factors influencing decision-making, and the judicial practice in this area. The study resulted in a set of recommendations, mainly addressed to the QDCP.

However, that same year, QDCP's activities were halted by the Law of 19.09.2019 No. 113-IX. This interruption prevented the monitoring of the implementation of the recommendations or measuring their impact on QDCP's practices. Exactly two years later, the disciplinary body resumed its work in a new composition named as 'the Body in charge of disciplinary proceedings Conducting Disciplinary Proceedings'. Despite a long break in functioning and some loss of institutional memory, the 2022 Analysis, conducted following the 2019 study's framework, revealed that the previous recommendations remained relevant. Additionally, the 2022 Analysis proposed several new recommendations.

[6] See web page of the Project "Human Rights Compliant Criminal Justice System in Ukraine" https://www.coe.int/en/web/kyiv/human-rights-complaint-criminal-justice-system-in-ukraine

[7] Expert analysis of the disciplinary practice of the Body in charge of disciplinary proceedings in the prosecutor's offices, for the 9 months of its work (2021-2022). Electronic resource (in Ukrainian): https://rm.coe.int/report-disciplinary-practice-final/1680a9bf3c

[8] According to the third part of Article 74 of the Law of Ukraine "On the Public Prosecution Service", the Commission loses its authority to appoint new members, as only three members will remain.

[9] See web page of the Project: Fostering Human Rights in the Criminal Justice System in Ukraine https://www.coe.int/en/web/kyiv/fostering-human-rights-in-the-criminal-justice-system-in-ukraine

[10] The study was conducted by a group of experts with the support of the Council of Europe project 'Continued support to the criminal justice reform in Ukraine, funded by the Danish government, and the European Union within the framework of the project 'Strengthening the role of civil society in ensuring democratic reforms and the quality of public administration'. Electronic resource (in Ukrainian): https://pravo.org.ua/wp-content/uploads/2020/10/1548703302disciplinary-responsibility-of-prosecutors-in-ukraine_ukr.pdf

This iteration (2024) of the expert analysis of QDCP's disciplinary practices follows the implementation of the recommendations provided or reiterated in the 2022 Analysis during the study period (year 2023). This iteration also seeks to broaden the scope of QDCP's disciplinary practices regarding specific categories of prosecutors: the Prosecutor General and his or her deputies, prosecutors of the Specialised Anti-Corruption Prosecutor's Office (SAPO), as well as complainants, including judges.

The completion of this research task was made possible through *desk research*, which included:

- review of the Council of Europe standards on disciplinary accountability for prosecutors;
- standardised content analysis of a sample of 193 decisions issued by the QDCP members regarding the refusal to open proceedings during the study period;
- standardised content analysis of the QDCP decisions, issued during the study period, imposing sanctions on 132 prosecutors;
- standardised content analysis of the QDCP decisions, issued during the study period, on closing proceedings involving 127 prosecutors;
- searching for and, where appropriate, summarising relevant case law and practices of the High Council of Justice, as well as other legal sources;
- obtaining and analysing public sources of information (including statistical data) from the QDCP, SAPO, and the High Council of Justice;
- reporting on the implementation of previous recommendations, as provided by the QDCP during the present expert analysis.

Selection of the QDCP Members' Decisions on Refusal to Open Proceeding. Initially, it was planned that the selection would include at least one relevant decision from each QDCP member (a total of 10 members), issued each month during the study period. Each month-lot of 10 relevant decisions was intended to include at least one decision from every QDCP member, covering every month of 2023. Each month-lot was also meant to include at least one decision related to disciplinary complaints lodged by: a) the General Inspectorate, b) the head of the prosecution office, c) a lawyer, d) an individual or legal entity. Additionally, the selection was to encompass all relevant QDCP decisions if the disciplinary complaint concerned the General Prosecutor and his or her deputies, SAPO prosecutors, or if the complainant was a judge, received by the QDCP between September 2022 and May 2024.

Ultimately, the QDCP members issued 193 decisions, including: 85 concerning disciplinary complaints from individuals or legal entities, 42 from lawyers, 22 from prosecution heads, and 1 from the General Inspectorate, as well as 41 from judges. Among these complaints, 11 were related to the General Prosecutor and his or her deputies, and 34 concerned SAPO prosecutors.

The standardised content analysis of QDCP decisions was conducted using a questionnaire (Google Form) to classify data across various parameters: over 30 for decisions on applying sanctions or closing proceedings; about 20 for decisions on refusals to open proceedings. These data were later used as a basis for qualitative analysis and to compile statistical information. The questionnaires were based on those

developed for the 2019 study, with minor modifications made before preparing the 2022 Analysis (parameters that had little impact on the 2019 Study results were omitted; some parameters were consolidated; they are listed in the Appendix to the Ukrainian version of the analysis).

Requests for public information concerned decisions of the High Council of Justice and issues related to the organisation of the internal control unit of SAPO.

I. Standards of disciplinary proceedings[11]

The co-authors of the 2019 Study devoted considerable attention to outlining the relevant standards. They summarise that[12] "*[i]nternational standards in the field of disciplinary responsibility for prosecutors address the following issues:*

- *Independence of the bodies authorised to impose disciplinary sanctions;*
- *Transparency and objectivity in handling complaints against prosecutors;*
- *Grounds for holding prosecutors disciplinary accountable;*
- *List of sanctions for disciplinary offenses by prosecutors and their proportionality;*
- *Procedure for disciplinary proceedings against prosecutors;*
- *Prosecutors' right to judicial appeal of disciplinary decisions.*

As detailed in the comparative study on disciplinary responsibility for prosecutors in selected Council of Europe member states[13], these standards are primarily found in: the European Convention on Human Rights and its case law from the European Court of Human Rights; the UN Guidelines on the Role of Prosecutors from 1990; the International Association of Prosecutors' Standards of Professional Responsibility and the Explanatory Memorandum on the Essential Duties and Rights of Prosecutors from 1999; Recommendation Rec(2000)19 from the Committee of Ministers of the Council of Europe to member states on the role of prosecutors in the criminal justice system; Recommendation 1604 (2003) from the Parliamentary Assembly of the Council of Europe on the role of prosecutors in a democratic society governed by the rule of law; the European Guidelines on Ethics and Conduct for Public Prosecutors from 2005 (Budapest Guidelines); the Venice Commission Report on European Standards of Judicial Independence: Part II — The Prosecutor; the "Bordeaux Declaration" by the Consultative Council of European Judges and the Consultative Council of European Prosecutors on "Judges and Prosecutors in a Democratic Society"; Opinions of the Venice Commission and the opinions of the Consultative Council of European Prosecutors.

The comparative study also emphasises that "*these standards create a broad system of 'soft' law regarding prosecutorial services to promote the autonomy and independence of the prosecution, to prevent it from being under political control. The current trend in all European countries is towards greater institutional independence for prosecutorial services, enabling them to perform their duties without excessive internal or external interference, while striving to find an adequate balance between independence, hierarchical structure and coordination, accountability, and effectiveness*."[14]

[11] The section is almost entirely taken from the 2022 Analysis, but has been updated to reflect the emergence of new documents.
[12] The 2019 study, page 9.
[13] A comparative study on the disciplinary liability and proceedings against public prosecutors in selected Council of Europe member states / Mjriana Visentin (Italy), Lorena Bachmaier Winter (Spain), Gaja Štovičej (Slovenia) and Ian Welch (the United Kingdom with focus on England & Wales and Scotland), April 2021, §24. Електронний ресурс: https://rm.coe.int/comparative-study-disciplinary-proceedings/1680a2914a
[14] Same, §26.

A. Key Standards

The most comprehensive, though somewhat conceptual, description of key standards can be found in the Consultative Council of European Prosecutors (CCPE) Opinion No. 13 (2018) on "Independence, Accountability, and Ethics of Prosecutors." It emphasises that[15] "*the process of applying disciplinary sanctions to prosecutors should be clearly set out in written form and as closely aligned as possible to the level of judges, especially in member states that adhere to the principle of the unity of the judiciary and have connections between the functions of judges and prosecutors throughout their careers. In such cases, the provisions should generally be established by law and applied under the supervision of an independent professional body (e.g., composed mainly of judges and prosecutors elected by their peers), such as a Council of Judges or Prosecutors, which is authorised to appoint, promote, and impose sanctions on prosecutors.*" Additionally, "*[t]o ensure the independence of prosecutors, clear mechanisms should also be established for initiating disciplinary proceedings against prosecutors*".

Paragraph 47 of the opinion also emphasises that "*disciplinary proceedings ... should be based on the law in cases of serious breaches of duty (negligence, breach of secrecy, anti-corruption rules, etc.) and [be] based on clear and justified reasons; the proceedings should be transparent, apply established criteria and be carried out by a body independent of the executive; the prosecutors concerned should be heard and have the right to defend themselves with the assistance of their lawyers, be protected from any political influence and be able to exercise the right of* appeal; *any sanctions must also be necessary, adequate and proportionate to the disciplinary offence'.*

In addition, last year, the CCPE adopted Opinion No. 18 (2023) on Councils of Prosecutors as key bodies of prosecutorial self-government, which is intended to "*emphasise the key role of Councils of Prosecutors and other bodies of prosecutorial self-government in ensuring the institutional independence and autonomy of prosecutor's offices, as well as the functional independence of individual* prosecutors"[16].

The opinion insists: "[d*]ecisions affecting the service of prosecutors should be justified, ... including transfers and disciplinary violations, [prosecutors] should have access to legal remedies*"; prosecutorial self-government bodies should "*work transparently, justifying their decisions and procedures and thus realising their* accountability"[17] .

The opinions of the Venice Commission provided to Council of Europe member states when assessing their legislative provisions or draft laws on the prosecution or judiciary provide a better understanding of the practical problems as well as to the conceptual provisions. The Opinions of the

[15] Opinion of the Consultative Council of European Prosecutors No. 13 (2018) 'Independence, accountability and ethics of prosecutors', §§ 24-25. Electronic resource: https://rm.coe.int/opinion-13-ccpe-2018-ukr/1680939322

[16] Opinion of the Consultative Council of European Prosecutors No. 18(2023) on Councils of Prosecutors as key bodies of prosecutorial self-government, §17. Electronic resource: https://rm.coe.int/opinion-no-18-2023-ukrainian/1680aee41f

[17] Ibid, §§77-80.

Venice Commission in assessing laws or draft laws related to disciplinary liability of PPs, can give guidance, for example in:

Grounds for disciplinary liability

These may include, *inter alia*:

- unjustified decisions/actions or those taken contrary to the law, even for the purpose of satisfying the public interest[18] ;
- unscrupulous or highly irresponsible decisions/actions, for example, made under the influence of alcohol or drugs[19] ;
- breach of the duty to act impartially (biased actions/decisions)[20] .

There should not have been any grounds for disciplinary liability:

- unequal interpretation or application of the law (except in serious cases where the decision is clearly unacceptable)[21] ;
- bona fide mistakes or controversial procedural actions/decisions subject to appeal[22] ;
- situations that are beyond the control of the prosecutor and that can be reasonably explained by the malfunctioning of other elements of the legal system[23] .

Procedural guarantees:

- the prosecutor must be notified of the actions/decisions that are allegedly imputed to them (the subject of the inspection), in particular, the place, time and specifics of the actions that are alleged to have taken place; the prosecutor has the right to demand testimony from witnesses and collect evidence in their favour, to get acquainted with the materials personally or through their legal

[18] Poland - Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session, 8-9 December 2017, CDL-AD(2017)028-e, §89. Electronic resource: https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)028-e

[19] Opinion on the draft law on the Public Prosecutors' service of Moldova, adopted by the Venice Commission at its 75th Plenary Session, 13-14 June 2008, CDL-AD(2008)019, §53. Electronic resource: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)019-e

[20] Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, Adopted by the Venice Commission at its 126th Plenary Session, 19-20 March 2021, CDL-AD(2021)015, § 56. Electronic resource: https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)015-e

[21] Opinion on the draft law on the Public Prosecutors' service of Moldova, adopted by the Venice Commission at its 75th Plenary Session, 13-14 June 2008, CDL-AD(2008)019, §52.

[22] Montenegro - Opinion on the draft amendments to the Law on the State Prosecutor's Service and the draft law on the Prosecutor's Office for Organised Crime and Corruption, adopted by the Venice Commission at its 126th plenary session, 19-20 March 2021, CDL-AD(2021)012, §54. Electronic resource: https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)012-e

[23] Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, Adopted by the Venice Commission at its 126th Plenary Session, 19-20 March 2021, CDL-AD(2021)015, §55.

representatives and to receive copies of the materials, and may defend themselves orally or in writing or through their legal representatives[24] ;

- basic guarantees of a fair trial, including requirements for the impartiality of the "judge", should be ensured;[25]
- the prosecutor has the right to be heard in adversarial proceedings[26] .

B. Recommendations to Ukraine

To begin with, the first recommendations were made by Council of Europe experts back in 2013 when they assessed the draft law[27]. It was noted, in particular, that: a) the acquittal of a person is not in itself a proper ground for bringing a prosecutor to disciplinary liability; b) the prosecutor should be guaranteed the right to remain silent; c) the prosecutor should be provided with the opportunity to get acquainted with the dissenting opinion of the members of the disciplinary body; d) it cannot be considered proportionate to dismiss a prosecutor for a minor civil or administrative offence (for example, related to car ownership)[28] .

The need to ensure greater autonomy and organisational capacity of the disciplinary body was also emphasised[29] . In turn, concerns were expressed about the possibility of the disciplinary body to have access to private information without proper court authorisation[30]. A number of these recommendations were reiterated by the Council of Europe in its assessment of the already adopted Law[31].

Further recommendations in this regard were made by GRECO during the fourth round of evaluation, which has been ongoing since 1 January 2012 and focuses on the prevention of corruption among MPs, judges and prosecutors. GRECO insists that[32] :

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[24] Opinion on the Draft Law on Judges and Prosecutors of Turkey adopted by the Venice Commission at its 86th Plenary Session, 25-26 March 2011, CDL-AD(2011)004, §75. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)004-e

[25] Bulgaria - Urgent Interim Opinion on the draft new Constitution, issued on 27 May 2022 pursuant to Article 14a of the Venice Commission's Rules of Procedure, endorsed by the Venice Commission on 11 December 2020, at its 125th online Plenary Session (11-12 December 2020, CDL-AD(2020)035, §84. Electronic resource: https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)035-e

[26] Report on European Standards as regards the Independence of the Judiciary: Part II - the Prosecution Service, adopted by the Venice Commission at its 85th plenary session, 17-18 December 2010, CDL-AD(2010)040, §52. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e

[27] Joint Opinion of the Directorate General for Human Rights (DHR) of the Directorate General for Human Rights and Rule of Law of the Council of Europe and the European Commission for Democracy through Law (Venice Commission) on the Draft Law of Ukraine "On the Public Prosecution Service", CDL-AD (2013) 025. Electronic resource: https://www.coe.int/uk/web/criminal-justice-reform/expert-opinions.

[28] See also §§ 128, 132, 136, 143, 145, 171.

[29] Ibid, §§ 161, 173.

[30] Ibid, § 170.

[31] Comments by the Directorate General of Human Rights and Rule of Law (DGHR) of the Council of Europe on the Law of Ukraine 'On the Public Prosecutor's Office' of 14 October 2014, DGI (2014) 30, §§ 117-126.

[32] Evaluation Report (2017), §§ 216, 259-263; Compliance Report (2019), §§ 130-135, 167-176; Second Compliance Report (2022), §§ 106-111, 143-152. Electronic resource: https://www.coe.int/en/web/greco/evaluations/ukraine.

a) in order to "*ensure effective implementation of the rules, legal certainty and prevention of possible abuse of disciplinary proceedings*", the grounds for disciplinary liability set out in paragraphs 5 and 6 of part 1 of Article 43 of the Law should be removed or substantially clarified;
b) the list of disciplinary sanctions that can be imposed on prosecutors should be expanded;
c) the period within which prosecutors can be brought to disciplinary responsibility should be extended;
d) disciplinary proceedings should also be opened on the basis of anonymous complaints, if they contain the appropriate content;
e) the majority of the disciplinary body should be prosecutors;
f) decisions of the disciplinary body should be appealed only to the court.

In addition, according to the Ukraine Facility approved this year, "*the improved legal and institutional framework aimed at implementing GRECO recommendations will contain the following elements:*

- clarifying disciplinary offences relating to the conduct of prosecutors and their compliance with ethical standards, and expanding the list of available disciplinary sanctions to increase their proportionality and effectiveness;
- amend the provisions on the composition of the QDCP to ensure that the majority of seats are held by prosecutors elected by their peers and that an independent and objective pre-selection procedure is conducted for all candidates for QDCP members, including integrity checks;
- increasing the efficiency of disciplinary proceedings by extending the limitation *period*"[33] .

Ahead of the Ukraine Facility, the first EC assessment report on Ukraine[34] also stated that the system of disciplinary liability of prosecutors should be improved by expanding the list of disciplinary sanctions that can be imposed on prosecutors and extending the time limit within which prosecutors can be brought to disciplinary responsibility.

Similar recommendations were made by the OECD. In the report on the fourth round of evaluation of the implementation of recommendations under the Istanbul Anti-Corruption Action Plan, it was stated that: a) the grounds for disciplinary liability of prosecutors should be more clearly defined; b) the time limit for disciplinary liability should be extended; c) cases of misconduct should be properly investigated and liability for them should be made explicit[35] . Based on the results of the fifth pilot round, the OECD emphasises[36] that the grounds for disciplinary liability of prosecutors should be made clearer and more

[33] Section "Judicial System", Reform 4 "Reform of the Prosecutor's Office", p. 83 (Ukrainian version). Electronic resource: https://www.ukrainefacility.me.gov.ua/
[34] European Commission's opinion on Ukraine's application for EU membership (Ukraine 2023 Report), p. 24. Electronic resource: https://neighbourhood-enlargement.ec.europa.eu/ukraine-report-2023_en.
[35] OECD (2017), Anti-corruption reforms in Ukraine: 4th round of monitoring of the Istanbul Anti-Corruption Action Plan, p.98. Electronic resource: https://www.oecd.org/corruption/acn/OECD-ACN-4th-Round-Report-Ukraine-ENG.pdf.
[36] OECD (2022), Anti-Corruption Reforms in Ukraine: Pilot 5th Round of Monitoring Under the OECD Istanbul Anti-Corruption Action Plan, pp. 100-103. Electronic resource: https://search.oecd.org/corruption/anti-bribery/corruption/acn/anti-corruption-reforms-in-ukraine-b1901b8c-en.htm.

certain (especially, the grounds set out in Article 43(1)(5) and (6) of the Law), and a wider range of sanctions should be introduced.

Finally, in 2017, the Council of Europe carried out a needs assessment of the Council of Prosecutors and the QDCP. The report on the results of this assessment[37] contains a number of recommendations, of which the following are worth highlighting:

a) the presence of the prosecutor against whom the proceedings are being conducted, the applicant and other persons invited to participate is a rule, not a matter of discretion;
b) the prosecutor against whom the proceedings are being conducted can provide a full response to the applicant and fully defend himself/herself;
c) the prosecutor in respect of whom the proceedings are being conducted and his/her representatives have the right to make both oral and written statements;
d) the prosecutor in respect of whom the proceedings are being conducted has the right to remain silent and not to incriminate himself/herself;
e) general time limits for disciplinary proceedings should be established;
f) regular discussions should be held with the authorities that are involved in disciplinary proceedings against prosecutors to some extent.

[37] Report on the Needs Assessment of the Council of Prosecutors of Ukraine and the Qualification and Disciplinary Commission of Prosecutors / Council of Europe Project "Further Support to the Criminal Justice Reform in Ukraine", 2017, pp. 48-49.

II. Refusal to open disciplinary proceedings

The 2022 analysis contained the following recommendation (2019, revised): to **publish on the official website all decisions of the members to refuse to open proceedings with the removal of information that allows identifying the prosecutor, individuals or legal entities, as well as other identifying details.**

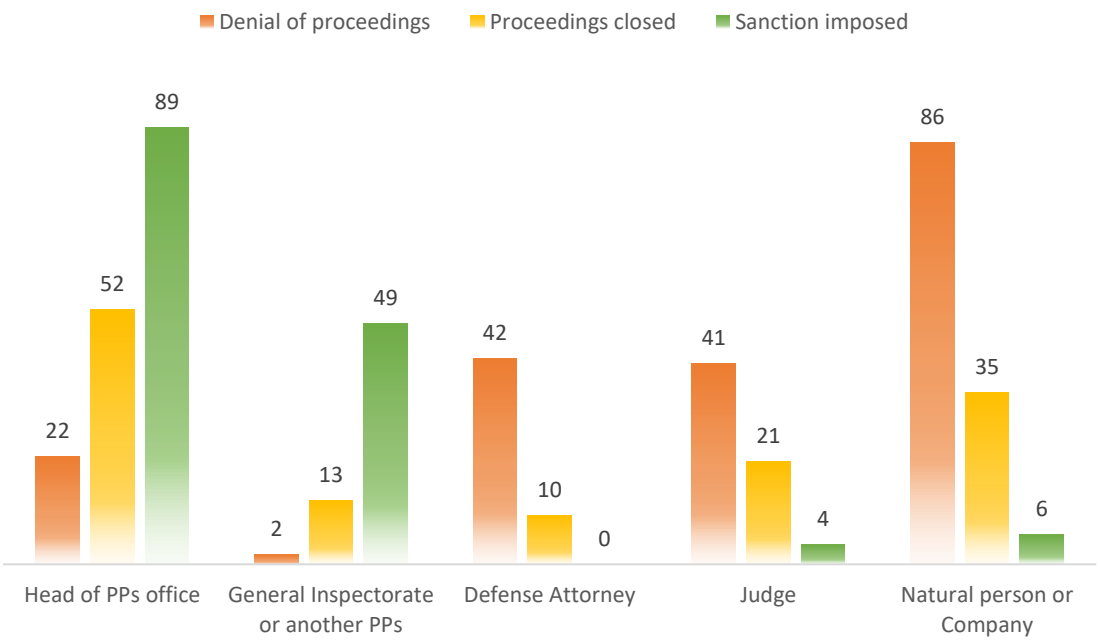
The QDCP **implemented the recommendation**: a publicly accessible section "Decision to refuse to open disciplinary proceedings" was introduced on the official website of the QDCP, which has been updated since 03.11.2022.

A. Statistics on refusals to open proceedings

The analysed (**selected**) decisions to refuse to open proceedings demonstrate many cross-cutting trends in the entire disciplinary practice of the QDCP. The disciplinary complaints in relation to which the analysed decisions were made concern:

a) prosecutors from local prosecutor's offices (46%);
b) prosecutors who do not hold administrative positions (almost 81%);
c) Alleged cases of non-performance or improper performance of official duties (almost 93%). This is often combined with allegations that the prosecutor has committed actions that discredit the title of prosecutor and may raise doubts about his/her objectivity, impartiality and independence, as well as the integrity of the prosecution service (30%).

At the same time, there are significant differences between complainants who were refused to open proceedings and those whose complaints were resolved by a decision to impose a sanction or close the proceedings. Indeed, in cases where the initiator was denied the opening of proceedings, the most prominent groups were individuals and legal entities (almost 43%), lawyers (almost 22%) and judges (21%), while in cases where proceedings had been opened, these groups were in total minority.



The QDCP also provided statistical information on decisions to refuse to open disciplinary proceedings **for the whole of 2023** by the following categories of complainants:

- 1 decision was made to refuse to open disciplinary proceedings based on complaints from the **General Inspectorate,** or **in 3% of cases of** consideration of such complaints (32 complaints were received in total);
- 50 decisions were made to refuse to open disciplinary proceedings following complaints from **heads of prosecutor's offices,** or **in 38% of cases of** consideration of such complaints (133 complaints were received in total);
- 33 decisions were made to refuse to open disciplinary proceedings following complaints from **judges,** or **in 67% of cases of** consideration of such complaints (49 complaints were received in total);
- 195 decisions were made on the basis of the **lawyers'** complaints to refuse to open disciplinary proceedings, or **in 97% of cases of** consideration of such complaints (202 complaints were received in total);
- 596 decisions were made to refuse to open disciplinary proceedings following complaints from **individuals and legal entities,** or **in 97% of cases where** such complaints were considered (614 complaints were received in total).

The most common group of prosecutors against whom the QDCP refused to open proceedings are those working in prosecutor's offices located in Kyiv city - 45% (compared to almost 26% in the previous analysed period). They are **once again followed by** prosecutors from the prosecutor's offices of Odesa region - almost 11% (compared to over 10% in the previous analysed period) and Dnipro region - almost 8% (compared to slightly over 9% in the previous analysed period). Also, the share of almost 8% was accounted for by prosecutors from Kyiv region (against 5% in the previous analysed period).

The members of the QDCP consider disciplinary complaints quite promptly, so an average of approximately 11 calendar days passed between the date of distributing a complaint to a particular member and the decision to refuse to open proceedings (the maximum period was – 36 days[38], which has been significantly reduced in comparison with 91 calendar days in the previous analysed period[39]).

The most common reason for refusal is the absence of elements of a disciplinary breach (Article 45(1)(2) of the Law) - in almost 94% of cases. The general shortcomings of these grounds for refusal to open proceedings are discussed in the 2019 Study[40]. Below, the report highlights these limitations in the QDCP practice.

B. Specific issues in refusing to open proceedings

Failure to comply with the decision of the investigating judge

The 2022 analysis contained the following recommendation (2019, clarified): to **open disciplinary proceedings on complaints containing specific factual data on the nature of actions/inactions of prosecutors in cases of a failure of the prosecutor to comply with the decision of the investigating judge or court, which cancelled the decision, actions or inaction of the prosecutor and/or declared it illegal and ordered to take certain actions**. This recommendation stemmed from the fact that in a number of cases the Body in charge of disciplinary proceedings refused to allow the defence or other participant in criminal proceedings to respond to the prosecution's failure to comply with investigating judges' decisions; these cases largely concerned the unjustified seizing or late restitution of goods seized during the investigation. In response to this recommendation, the Body in charge of disciplinary proceedings indicated at the end of 2022 that this approach was being followed[41] .

On the one hand, the QDCP has indeed reviewed several cases after the opening of disciplinary proceedings[42]. On the other hand, there are also a number of decisions in the practice of the members of the QDCP to refuse to open disciplinary proceedings in similar cases[43] . As noted in the 2022 Analysis, "*in such situations, the [QDCP] left the defence, the victim or the right holder/owner of the property virtually without any tools to protect against the prosecutor's failure to discharge or inadequate discharge of his/her duties. After all, they exhausted criminal procedural mechanisms in good faith, but the result determined by the court or the law was unreasonably blocked by the prosecutor*"[44] ; because "*[u]nlike other countries, Ukrainian investigating judges are not empowered and do not have appropriate*

[38] Decision of the QDCP member No. 93ds-24 dated 10.03.2024.
[39] Decision of the member of the Body in charge of disciplinary proceedings No. 181ds-22 dated 18.05.2022.
[40] The 2019 study, pp. 27-32.
[41] Letter of the Body in charge of disciplinary proceedings No. 07/3-1100vkh-22 dated 22.11.2022, p. 2.
[42] Decisions of the QDCP No. 25dp-23 dated 01.02.2023, 86dp-23 dated 19.04.2023, 156dp-23 dated 09.08.2023.
[43] Decisions of the QDCP member/chair No. 253ds-23 dated 06.04.23, 636ds-23 dated 11.08.23, 267ds-24 dated 10.05.24.
[44] Analysis 2022, page 16. The Role of the Investigating Judge in Criminal Proceedings: Report on the Results of the Study / Belousov Y., Wenger V., Orleans A., Krapyvin E., Shaputko S., Yavorska V.; edited by Belousov Y. - Kyiv, 2020. - pp. 53, 108-109, 190, 233.

mechanisms to monitor the implementation of their decisions[45] *. Therefore, the control over the execution is carried out directly by the parties who requested them. However, the defence also does not have reliable mechanisms for such control. Therefore, if the prosecution fails to comply with the decision of the investigating judge, the defence has no other option but to resort to the disciplinary* procedure"[46] .

It is possible that the members of the QDCP somehow distinguish between such cases. However, this method is not clear to an outside observer.

Accordingly, the **recommendation remains in place.**

Failure of the prosecutor to appear in court

The 2022 analysis contained the following recommendation (2019, clarified): to **open disciplinary proceedings based on complaints from individuals and legal entities containing specific factual data on the nature of actions/inactions of prosecutors, regardless of the exhaustive mention of all elements of misconduct**. This recommendation stemmed from the fact that in a number of cases the Body in charge of disciplinary proceedings refused to respond to defence lawyer and judges in cases of prosecutors' failure to appear in court.

On the one hand, the QDCP has indeed considered a number of such cases after opening disciplinary proceedings.[47] On the other hand, there are **dozens** of decisions in the practice of the members of the QDCP to refuse to open disciplinary proceedings **only in response to complaints from judges**. Even if apparently this could be seen as indicative that the members/chairs of the QDCP apply different evaluation criteria to such complaints (which, however, have not been fully understood), it might also be explained by the fact – as expressed by the members of the QDCP during interviews –, that representatives of the judiciary, unfortunately, are not prone to be actively involved in disciplinary proceedings. In many cases, they did not provide specific information about the prosecutor's disciplinary offence, which generally determined the refusal to open disciplinary proceedings, and in case of opening disciplinary proceedings, they did not participate in the Commission's meetings and did not provide relevant information upon the Commission's requests.

For example, in a number of decisions, members of the QDCP pointed out that the court did not decide that the prosecutor's failure to appear was contemptuous[48]. In other words, in the opinion of the members of the QDCP, the mere fact that a judge has filed a complaint is not enough to open disciplinary proceedings. However, the QDCP has also received a number of complaints from judges stating that a

[45] Ibid., The Role of the Investigating Judge in Criminal Proceedings: Report on the Results of the Study.
[46] Analysis 2022, page 16.
[47] Decisions of the QDCP No. 14dp-23 of 18.01.2023, 15dp-23 of 18.01.2023, 27dp-23 of 08.02.2023, 32dp-23 of 15.02.2023, 63dp-23 of 29.03.2023, 94dp-23 of 03.05.2023, 111dp-23 of 30.05.2023, 138dp-23 of 19.07.2023, 157dp-23 dated 09.08.2023, 181dp-23 dated 12.09.2023, 182dp-23 dated 12.09.2023, 196dp-23 dated 04.10.2023, 15dp-24 dated 24.01.2024, 19dp-24 dated 31.01.2024, 20dp-24 dated 07.02.2024, 25dp-24 dated 14.02.2024, 49dp-24 dated 03.04.2024.
[48] For example, decisions of the QDCP member/chair No. 50ds-23 of 02.02.2023, 151ds-23 of 14.03.2023, 189ds-23 of 24.03.2023, 1040ds-23 of 09.01.2024, 97ds-24 of 16.02.2024, 219ds-24 of 29.03.2024, 312ds-24 of 02.05.2024, 399ds-24 of 27.05.2024.

court had issued a decision recognising the prosecutor's failure to appear as contemptuous[49]. But even in such cases, the members of the QDCP refused to open disciplinary proceedings, in fact, reproaching the judges for making a hasty conclusion. Moreover, in several cases[50] , the QDCP member indicated that "*no documents were attached that would indicate that the court took measures to ensure the arrival of the prosecutor(s) to the court, as well as clarified the circumstances regarding the validity/disrespectfulness of the reasons for the non-appearance of any of the above prosecutors to the court hearing*"; although the same decision contained information that the court sent summons to the PPS.[51] In other words, it follows from the above-mentioned decisions that the members of the QDCP expect judges not only to notify them of the prosecutor's absence, but also to fully analyse the situation that caused the prosecutor's absence.

This position of the QDCP was criticised in the 2022 Analysis. It stated that "the *performance or non-performance of duties by the prosecutor in such cases does not depend in any way on the will of the court or other party. That is, the prosecutor either performs his/her duty properly or not. In some cases, even the court cannot know for sure or establish the real reason for the prosecutor's absence from the hearing. Moreover, the court may not be able to respond to every absence. Instead, the [QDCP] is quite capable of finding out the true circumstances of the absence and finding out the name of the person responsible for the disruption of the court hearing (in some cases, this may be the senior member of the group who failed to appear[52]). The second sentence of Article 324(1) of the CPC is by no means an obstacle to this, as it applies to only one case - when the prosecutor has informed the court of the reason for the absence, but the court has found it to be disrespectful. In other cases - in particular, when the prosecutor simply did not appear - this provision does not even apply. Therefore, the other party and, of course, the court are fully authorised to raise the issue of disciplinary liability of the prosecutor who ignored the court hearing. Not to mention that anyone who is aware of such facts has the right to file a disciplinary complaint with the [QDCP] about a disciplinary offence committed by a prosecutor (Article 45(2) of the Law*)."[53]

Accordingly, the **recommendation remains in place.**

Decision to refuse to open proceedings against the Prosecutor General and his or her deputies

According to the QDCP, 12 disciplinary complaints against the Prosecutor General and his or her deputies were received during the monitored period. In all but one case, the complainants were refused to open disciplinary proceedings.

The decisions to refuse to open proceedings against the Prosecutor General and his or her deputies by the members of the QDCP were in vast majority justified. However, in a few cases, it appears that it would have been more correct to issue the opposite decision.

[49] For example, decisions of the QDCP member/chair No. 282ds-23 of 19.04.2023, 361ds-23 of 15.05.2023, 480ds-23 of 15.06.2023, 681ds-23 of 30.08.2023, 440ds-23 of 08.06.2023, 262ds-24 of 16.04.2024.

[50] For example, decisions of the QDCP member/chair No. 88ds-23 of 16.02.2023, 480ds-23 of 15.06.2023, 681ds-23 of 30.08.2023, 284ds-24 of 23.04.2014.

[51] Decision of the QDCP member/chair No. 282ds-23 of 19.04.23.

[52] Decision of the QDCP No. 245dp-18 of 13.06.2018.

[53] Analysis 2022, page 17.

In one case,[54] the complainant-prosecutor alleged that the Prosecutor General had responded to his motion to dismiss the head of the commission from an internal investigation conducted against the same prosecutor without any grounds, without any motivation and in violation of the time limit. The decision to refuse to open the proceedings suggests that the QDCP member only lacked certain information on how and when the motion and the response to it were sent/transmitted to the addressees (motion - to the Prosecutor General; response - to the complainant). As noted in the 2019 Study and the 2022 Analysis, the lack of certain information should not be the first reason for refusing to open disciplinary proceedings, especially in cases where such information is likely to be available to the prosecutor's office, courts, public authorities or local self-government bodies, or other responsible entities. In addition, the complainant raised a wider range of issues in his complaint, which were only formally considered[55].

In another case[56], the complainant-defence lawyer argued that the First Deputy Prosecutor General had decided to grant access to things and documents under a procedure adopted by the Parliament in the context of martial law, which does not provide for judicial control over such a decision to interfere with fundamental human rights. If such action fell out of the scope of application of the martial law, undoubtedly it might be seen as a procedural infringement. If the disregard of the laws was done wilfully and knowingly by the PPS in question, it might trigger disciplinary liability. In refusing to open disciplinary proceedings, the member of the QDCP merely referred to the fact that the decision of the First Deputy Prosecutor General had not been appealed to the court. However, there is no mechanism for appealing such decisions to the court at the pre-trial investigation stage. Nevertheless, it is true that incorrect procedural decisions are to be challenged by way of the appeals. If the pre-trial decision is not subject to separate immediate appeal, then the procedural breach shall be challenged together with the appeal on the merits. It should be reminded that the procedural infringements, as a rule, are not to be corrected by way of opening disciplinary proceedings. However, if such decisions would entail disciplinary liability – for blunt disregard to the laws–, then the disciplinary proceedings should be followed, however, once the pending procedure where the infringement took place has been finished[57]. The criterion of "manifest disregard" of rights or laws may need to be clarified, just as GRECO has pointed out: there is need to provide clearer definitions of disciplinary offences relating to prosecutors´ conduct and ethical standards (Recommendation XXIX of the 4th round of evaluation), and is express in this assessment.

These cases do not necessarily demonstrate - but may give an outside observer who lacks the full extent of the data - a rather strong impression that the QDCP is more reserved in its decisions to open disciplinary proceedings against the first heads of the prosecutor's office. This is despite the fact that during the monitored period the QDCP duly considered a complaint against one of the Deputy Prosecutors

[54] Decisions of the QDCP members No. 496ds-23 dated 26.06.2023, 497 dated 27.06.2023 and 498ds-23 dated 28.06.2023.

[55] The QDCP explained that the relevant information, even if it is available in the PPS, is not available to it at this stage of the proceedings. This aspect should be taken into account when preparing legislative changes, answering the question: should the QDCP be empowered to request additional information to make a decision on the admissibility of a disciplinary complaint?

[56] Decision of the QDCP member No. 751ds-22 dated 22.12.2022.

[57] It is likely that the criterion of clear disregard for rights or laws needs to be clarified, just as GRECO indicates the need to provide clearer wording of disciplinary offenses (recommendation xxix following the results of the fourth evaluation round).

General[58]. However, this is not to be seen necessary as a dysfunction, since such practice corresponds to the practice in most European countries.

The Ukrainian legislation does not differentiate procedures (provide any additional requirements and/or safeguards to those) applied towards disciplinary proceedings against the PPS superiors (i.e., Prosecutor General, Deputy Prosecutors General) and other ordinary categories of prosecutors. In this regard, a complementary study may be worth to consider, *inter alia,* in view of comparative practice of the Council of Europe member states, the relevant case-law of the European Court of Human Rights[59] and the Venice Commission Opinions[60].

Decision to refuse to open proceedings against SAPO prosecutors

Based on the results of the fifth pilot round, the OECD report indicated that during the period of the temporary personnel (disciplinary) commission (September 2019 - November 2021) "*there were some attempts by the Prosecutor General to use it to pressure anti-corruption prosecutors*", which did not result in anything[61] . Although the OECD report does not provide evidence of this, but only refers to the words 'stakeholders', this aspect is worth considering in the context of the period under study.

According to the QDCP, 37 disciplinary complaints against SAPO prosecutors were received during the period under review (year 2023). In all **but three** cases[62] , the complainants, including the Head of SAPO, were denied the opening of disciplinary proceedings. The complainants were mainly lawyers, but also individuals and legal entities, including an anti-corruption NGO.

The nature of the decisions of the QDCP members to refuse to open proceedings suggests that the QDCP does not treat SAPO prosecutors differently. At the same time, in some cases, it appears that the members of the QDCP should have decided to open disciplinary proceedings.

For example, by decision No. 286ds-23 of 20.04.2023, a member of the QDCP refused to open disciplinary proceedings against the SAPO prosecutor, although, as stated in the decision itself, the prosecutor did not respond to "*repeated remarks of the court on the inadmissibility of the above statements [in the affirmative form of the person's guilt] without a verdict*". Being this easily seen and proofed, since the statements contrary to the presumption of innocence were done in public –if they were done in public, not being sufficient that they were made in the proceedings, albeit these being public–, it

[58] Decision of the QDCP No. 108dp-23 of 24.05.2023.
[59] Ex., *Stoinaglo v. Republic of Moldova,* available at: https://hudoc.echr.coe.int/eng?i=001-228733
[60] Venice Commission Opinion CDL-AD(2021)047-e of 2021 in respect of Republic of Moldova on amendments of 21 August 2021 to the Law on the Prosecution Service, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD(2021)047-e&lang=en
[61] OECD (2022), Anti-Corruption Reforms in Ukraine: Pilot 5th Round of Monitoring Under the OECD Istanbul Anti-Corruption Action Plan, p. 96. Electronic resource: https://search.oecd.org/corruption/anti-bribery/corruption/acn/anti-corruption-reforms-in-ukraine-b1901b8c-en.htm.
[62] Decisions of the QDCP on imposing disciplinary sanctions No. 95dp-23 of 03.05.2023 and 194dp-23 of 27.09.2023, as well as on closing disciplinary proceedings No. 25dp-23 of 01.02.2023.

appears to be clear that such declarations would entail, at least full disciplinary proceedings. To make a closer assessment the precise reasons for refusing to open such a case, would need to be known. Anyhow, even not being a severe infringement of duties, the fact that the respect for presumption of innocence is not adequately understood and that breaches are disregarded, might be seen as problematic, also for the image of the PPS. Therefore, this approach should be reconsidered.

By another decision - No. 845дс-23 of 06.10.2023 - the member/chair of the QDCP refused to open disciplinary proceedings against the SAPO prosecutor who had considered a crime report, in particular, against herself. This decision was taken by the QDCP member despite the fact that this represents a clear conflict of interest. According to the commentary to the Code of Professional Ethics and Conduct of Prosecutors, "*entrusting the consideration of a complaint to the prosecutor whose actions are being appealed, and the prosecutor's consideration of such a complaint, signing the* response" is also recognised as a conflict of interest[63] . It is clear that the relevant PP should have abstained of taking the decision in this case. But, as in other cases, it is unknown why this conduct was not corrected within the proceedings, by way of appeal to the superior. If there is no such possibility, this should be revised, to prevent the disciplinary proceedings to become the ordinary way of correcting procedural infringements by this – cumbersome– and inadequate way.

Finally, decision No. 267ds-24 of 10.05.2024 refused to open disciplinary proceedings against a SAPO prosecutor who had not taken measures to return property (a mobile phone) for several months, the seizure of which had been cancelled by the court. This decision of the QDCP member was preceded by a proposal of the Deputy Head of the SAPO to refuse to open disciplinary proceedings, which was sent to the QDCP based on the new provision of Article 8-1 of the Law (for a detailed overview of these provisions, see the subsection "Issues of the Additional Procedural Aspect" in Section III of this analysis).

Contents of decisions to refuse to open proceedings

The 2022 analysis contained the following recommendation (2022): **standardise approaches to the presentation of decisions to refuse to open disciplinary proceedings**. This recommendation stemmed from the fact that since decisions to refuse to open proceedings are individual, there was a wide variation in the practice of the Body in charge of disciplinary proceedings in terms of how members presented their decisions.

As of now, it appears that the QDCP **has implemented the recommendation**. After all, the decisions look similar, have a common structure and a similar logic of argumentation. However, the decisions could contain a more precise and concise factual and evidentiary argumentation, instead of lengthy less relevant issues.

[63] Commentary on the Code of Professional Ethics and Conduct for Prosecutors, approved by the decision of the Council of Prosecutors No. 36 of 23.11.2022, p. 76. Electronic resource: https://kdkp.gov.ua/uploads/files/KK%2024.11.2022-1-70.pdf

Therefore, the members of the **QDCP should continue to improve the quality of the legal reasoning and structure of their decisions in general** (not only regarding the specific category on opening of proceedings), as they continue to be overloaded with overly generous citations of legal information and, at the same time, remain quite uninformative.

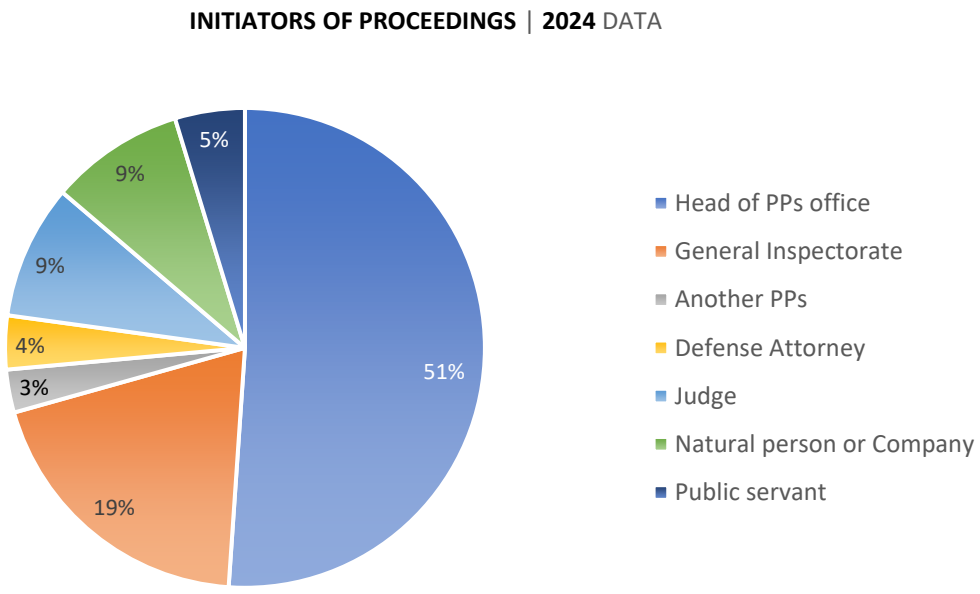
III. Conducting proceedings in disciplinary cases

The proceedings in disciplinary cases have not undergone any fundamental changes compared to the period covered by the 2022 Analysis. At the same time, the Law was supplemented with a procedural aspect that significantly changed the procedure for conducting disciplinary cases against SAPO prosecutors (an assessment of this procedural aspect is provided in subsection C of this section).

The QDCP has largely returned to considering disciplinary cases with physical attendance of prosecutors and complainants but continued to provide participants in disciplinary proceedings with the opportunity to join online. The evidentiary basis used by the QDCP also remained unchanged; however, as in the case of the 2022 Analysis, the use of polygraph examination results[64] was observed during the period under review, which was not the case with the first QDCP. While the QDCP continues to improve the quality and structure of its decisions, its decisions continue to be overloaded with not always relevant factual data and overly generous citation of legal information.

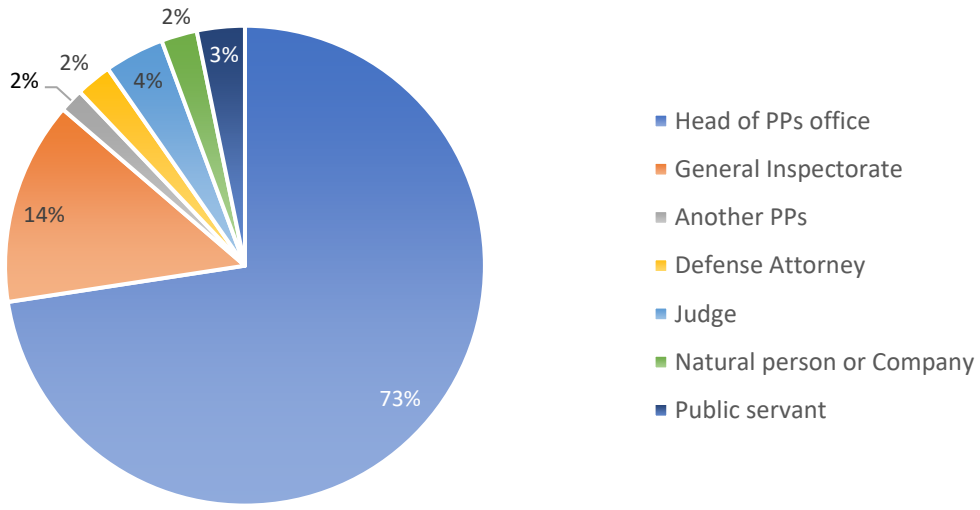
A. Statistics on the conduct of proceedings

The key group that is more successful than others in initiating proceedings is prosecutors themselves, or more precisely, heads of prosecutor's offices. At the same time, the **share of complaints from other complainants** that resulted in a decision to impose a sanction or close disciplinary proceedings **increased significantly** during the period under review (to 27%, compared to 11% in the previous period). The share of judges is **entirely formed** by complaints about prosecutors' absence without valid reasons.



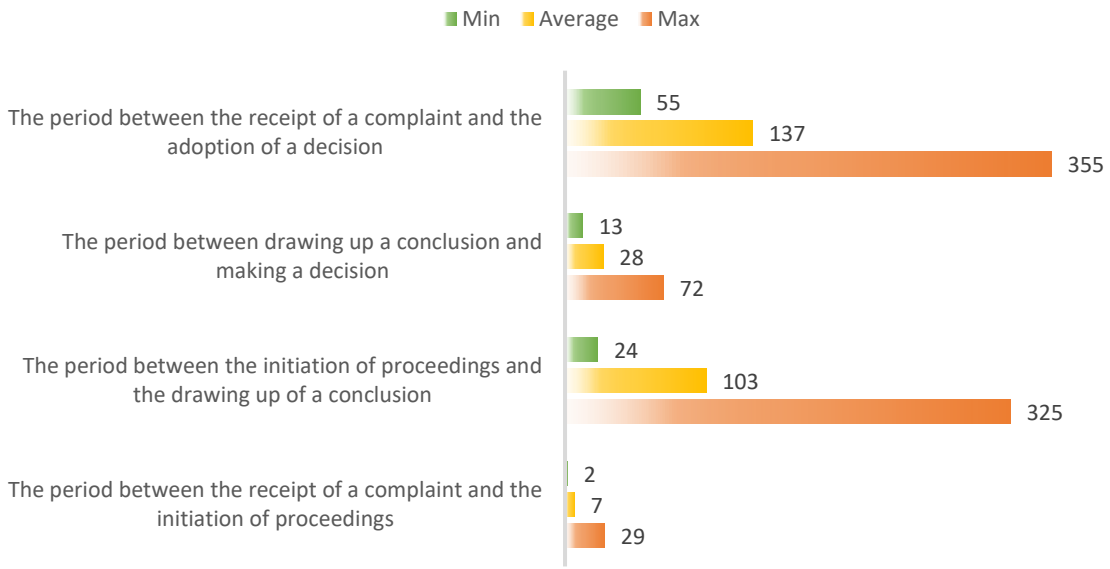
[64] Decisions of the QDCP No. 60dp-23 dated 29.03.2023, 74dp-23 dated 05.04.2023, 140dp-23 dated 19.07.2023.

INITIATORS OF PROCEEDINGS | 2022 DATA



As a rule, it takes an average of a calendar week (6-7 days) between the receipt of a disciplinary complaint and the decision to open proceedings, which is a reasonable period (a similar period was recorded in the 2022 Analysis). Further, the calendar periods between the stages of disciplinary proceedings naturally become longer.

SANCTIONS IMPOSED | 2024 DATA



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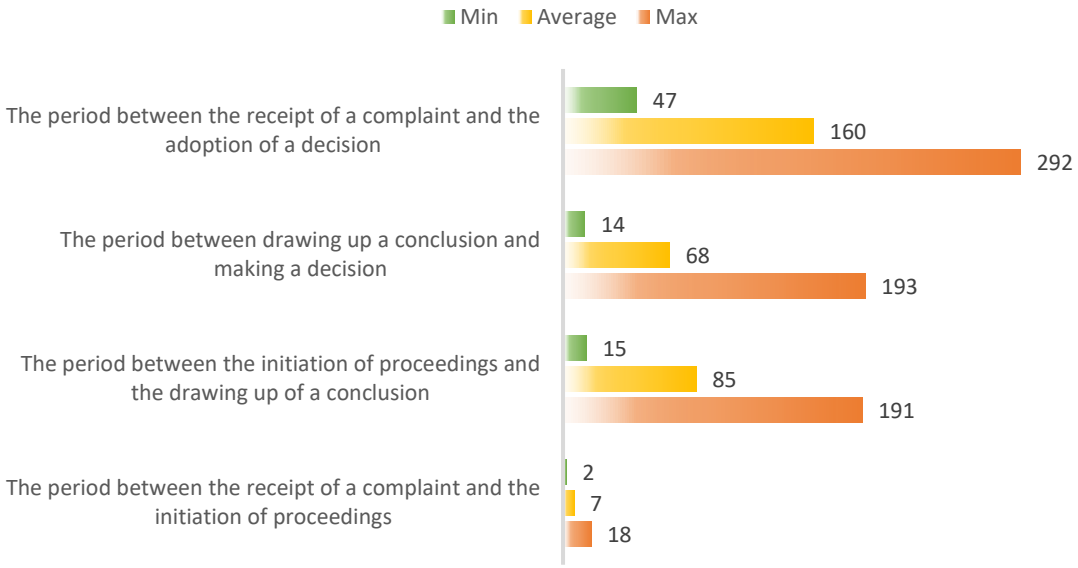

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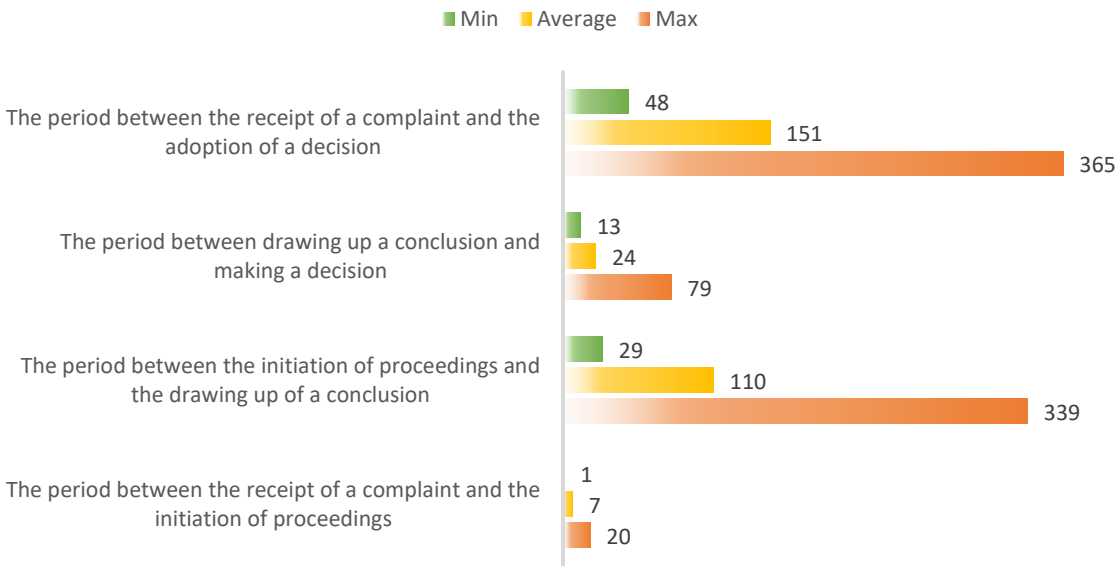
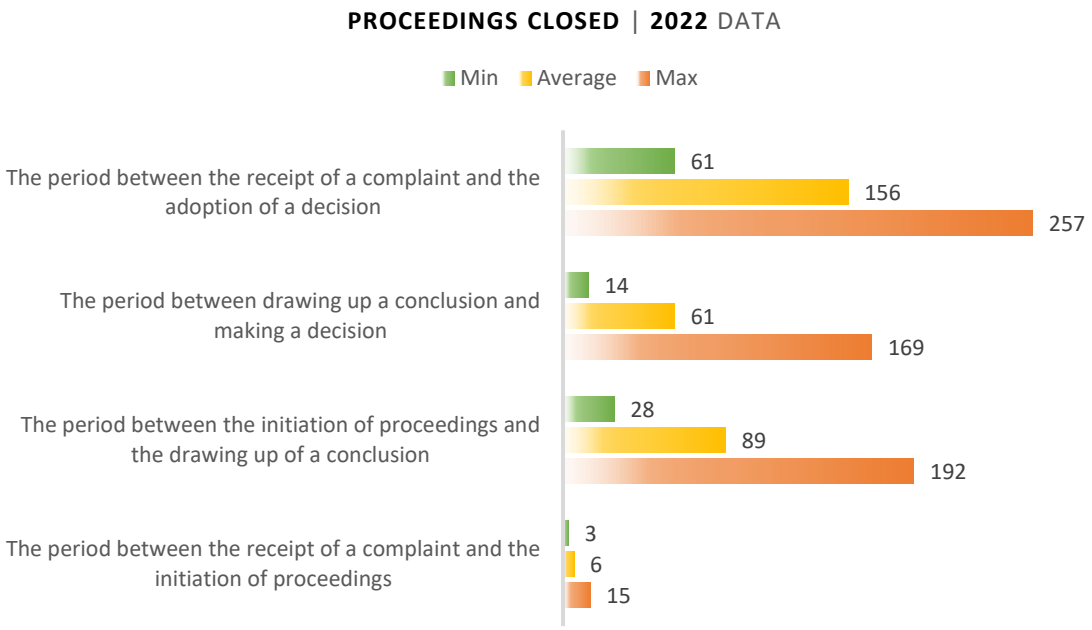
PROCEEDINGS CLOSED | 2024 DATA



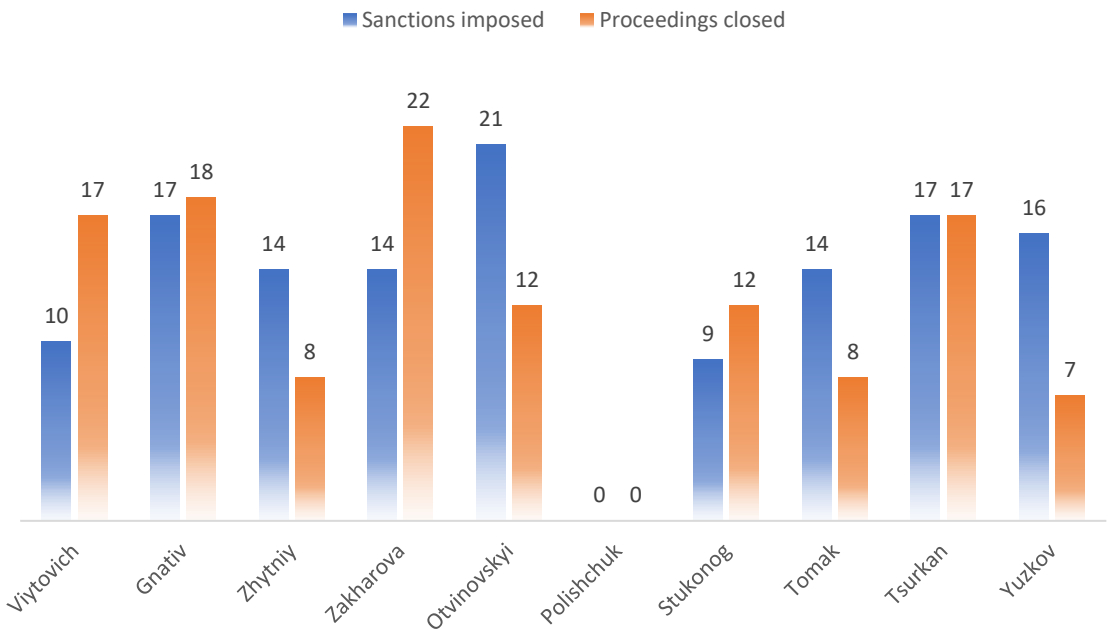


It is worth noting that during the period under review, the overall duration of the proceedings (from the date of receipt of the complaint to the date of the decision) has barely decreased: the average duration of the proceedings is still around 140-160 days. The best progress has been made by the QDCP in the period between the issuance of the opinion and the adoption of the decision, which has been **reduced by at least half on** average. However, the average time between the opening of proceedings and the issuance of an opinion seems to have **increased by almost half[65].** In the practice of the QDCP, proceedings lasted on average about 100 calendar days[66]. As noted in the 2022 Analysis, "*[t]he significant increase in the average duration of proceedings is apparently due to the fact that the period under study included martial law and a wide range of difficulties* associated *with it*"[67] . Therefore, the QDCP **should continue** to closely monitor complaints that refer to misconduct that occurred a long time ago.

An analysis of the decisions of the QDCP to impose a sanction or close the proceedings shows that not all members of the QDCP perform disciplinary functions. In this regard, the QDCP noted that since one of its members represents the QDCP in court, disciplinary complaints are not distributed to that member.[68] Although the graph below may be somewhat confusing, it should be noted that the system of auto-distribution of the workload of the QDCP operates on the number of complaints pending before a particular member (and the vast majority of these complaints will be decided not to open disciplinary proceedings). Therefore, the graph should not be taken literally: as if some of the members of the QDCP work less or more than others. Moreover, it should also be taken into account that one disciplinary complaint may concern two, three or even ten prosecutors. There are also cases when, after the opening

[65] The QDCP emphasizes that it strictly monitors the two-month period established by Part 9 of Article 46 of the Law for checking information on the presence or absence of grounds for bringing the prosecutor to disciplinary responsibility. Drawing up a conclusion by a member of the QDCP based on the results of the inspection is not included in the mentioned two-month period.
[66] The 2019 study, page 37.
[67] Analysis 2022, page 20.
[68] Letter of the QDCP No. 7/3-533vkh-24 of 28.05.2024, paragraph 4.

of a disciplinary case, another complaint is received against the same prosecutor, which also opens a disciplinary case, and then the two cases are merged and, as often happens, transferred to another member of the QDCP for review through a new auto-distribution. The graph below shows the completed proceedings by the QDCP member who issued the opinion on the presence or absence of misconduct.

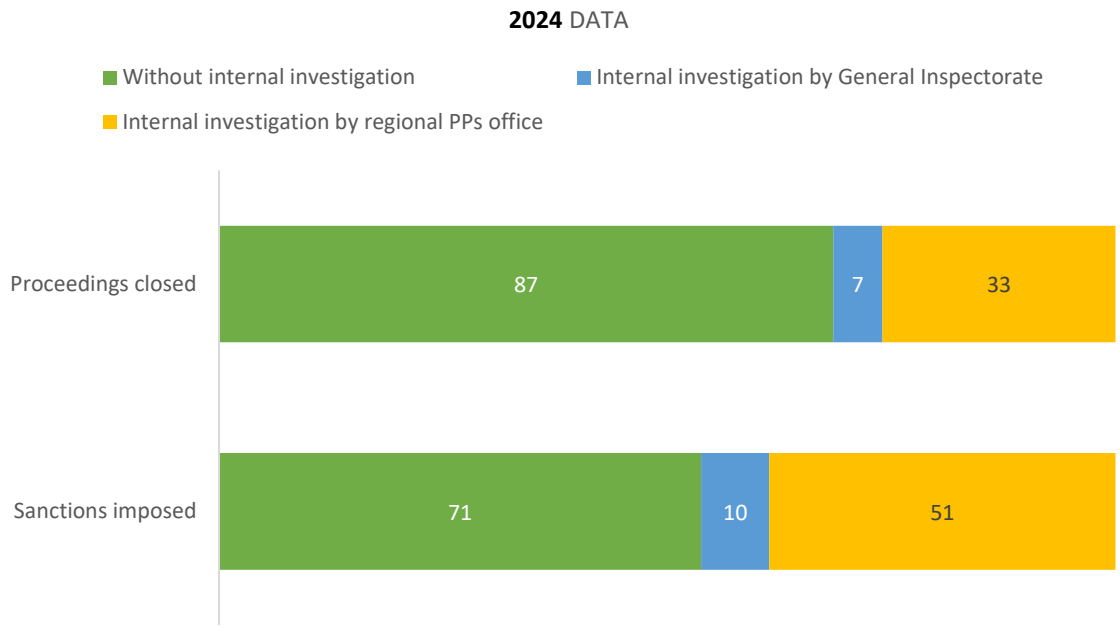


In the majority of cases (47% in total, compared to 61% in the previous analysed period), the prosecutors against whom the conclusion on the presence/absence of misconduct was considered were present at the meeting of the QDCP (45% of cases) or participated online (2%). In only 11% of cases was it not clear what their attitude to the proceedings was. In the remaining cases (43%, compared to 32% in the previous analysed period), prosecutors provided their arguments and/or position in writing.

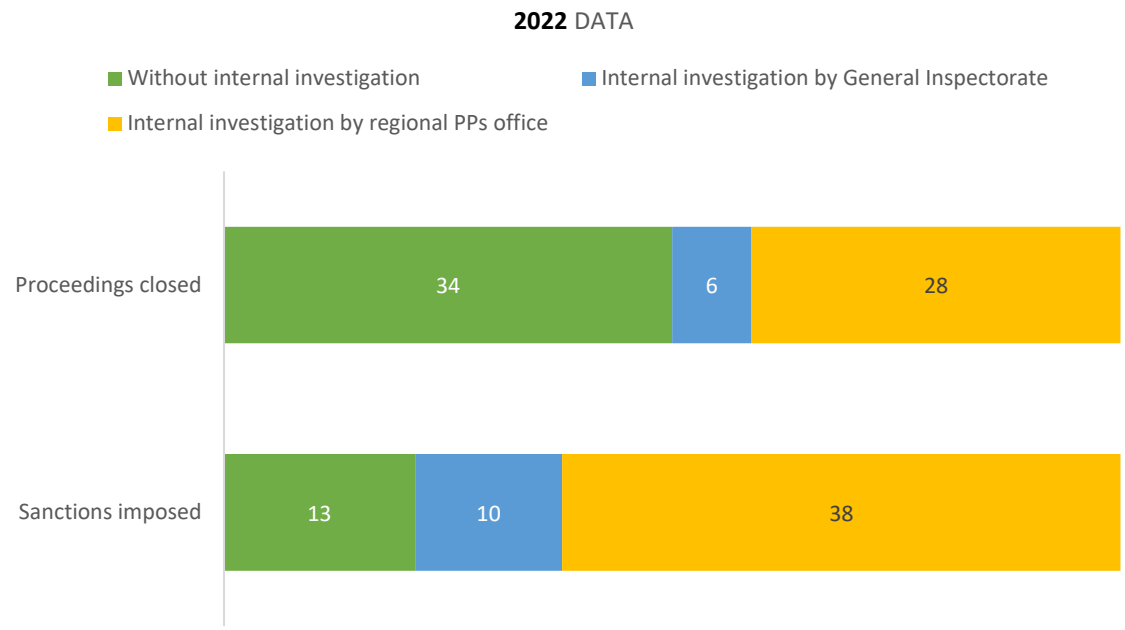
It is important to note that the practice, identified in the 2019 Study[69] and noted in the 2022 Analysis, persists in the QDCP, when considering the conclusion on the presence/absence of misconduct, other members depart from the conclusions of the member who prepared the conclusion and make the opposite decision: in 2023, there were 35 such cases[70] . As stated earlier, "*[t]his practice is to be welcomed, as it is a good indicator that the meetings ... are a real consideration and competition of the parties, and the* discussion *in the meeting room*"[71]. Also, during the period under study, a dissenting opinion to the decision of the QDCP was **recorded for the first time** (for more details, see subsection "E. Proportionality of sanctions" of Section IV of this analysis).

[69] The 2019 study, page 40.
[70] Information on the practice of disciplinary proceedings against prosecutors for 2023, paragraph 20. Electronic resource: https://kdkp.gov.ua/page/zvity-komisii
[71] Analysis 2022, page 22.

During the period under review, for the **first time, we noticed the** result of the QDCP, when in a clear majority of cases (61% in total) disciplinary complaints, which resulted in a decision to impose a sanction or close the proceedings, were not accompanied by materials of internal investigation: proceedings in which materials of internal investigation were available were closed against 40 prosecutors (almost 32%), and sanctions were imposed on 61 prosecutors (46%). As stated in the 2022 Analysis, "*[i]n the current practice of the Body in charge of disciplinary proceedings ... proceedings in which internal investigation materials are available were closed against 34 prosecutors (almost 42 per cent) and sanctions were imposed on 48 prosecutors (about 58 per cent)*"; when the 2019 Study found that "the *Commission .. examined the merits of 283 complaints [filed as a result of internal investigations], of which it closed 156 proceedings (55%) and brought 127* people *to disciplinary responsibility (45%)*"[72] . However, this result is rather dictated by the nature of the cases (which did not require the use of internal investigation tools) that came before the QDCP.



[72] The 2019 study, page 44.



During the monitored period, we identified only 1 case when the prosecutor recused a member of the QDCP. As follows from the decision of the QDCP to dismiss the application, the recusal was justified by the fact that "in the *opinion of the prosecutor ... the member of the Commission ... conducted a superficial inspection in the disciplinary proceedings and violated the two-month period established by law. Also, [the prosecutor] pointed to the bias of the Commission member ... in drawing up a conclusion on the existence of a disciplinary offence. He believes that the conclusion was drawn up according to a standard template, without providing a proper legal assessment of his arguments and* objections"[73]. These arguments are not clearly adequate as grounds for a recusal, but for the appellate review of the decision of the QDCP. Further, following consideration of the conclusion and the prosecutor's explanations and arguments, the latter was sanctioned in the form of a ban on appointment or transfer for a period of 6 months for failing to include information about being in the status of an accused in the integrity declaration[74] .

Also, in only 1 case was there a request by a member of the QDCP to remove the heads of the district prosecutor's offices from office for the duration of the disciplinary proceedings. The QDCP denied the motion, stating that "the *conclusion that there are no grounds for the removal of the prosecutor in order to prevent attempts to unlawfully influence the participants of the audit at this stage of the disciplinary proceedings for objective reasons was made on the basis of the materials provided by the person who filed the disciplinary complaint, and the Commission currently has no reason to doubt their reliability. However, such a conclusion does not mean that the relevant grounds are considered to be pre-established by the Commission before the completion of the inspection and the final decision on the results of the disciplinary* proceedings"[75] . The decision on the results of the proceedings (the case was closed)[76]

[73] Decision of the QDCP No. 227dp-23 of 06.12.2023.
[74] Decision of the QDCP No. 228dp-23 of 06.12.2023.
[75] Decision of the QDCP No. 61dp-23 of 29.03.2023.
[76] Decision of the QDCP No. 213dp-23 of 15.11.2023.

was made by the QDCP 8 months after the decision that refused to remove the prosecutors. During this time (within 8 months), the issue of the need for removal was not initiated again.

The practice of the QDCP on these issues (recusal and suspension) is obviously only being established. As of now (through the prism of the above cases), it cannot be called problematic.

Information on the practice of disciplinary proceedings

The current composition of the QDCP has started the practice of preparing a separate report on the practice of disciplinary proceedings, which is available on its official website[77].

Such reports are a good source of information about the activities of the QDCP, as they provide an overview of the most important quantitative and qualitative aspects of disciplinary practice. The reports are well structured and even follow the structure of this analysis to some extent.

The QDCP should build on this initiative and deepen the information content of the reports. In particular, it would be worth adding an overview of the reasons for refusing to open disciplinary proceedings on judges' complaints, the practice of reviewing preliminary findings of the SAPO Internal Control Unit, and the practice of reviewing (self-)recusals of the QDCP members.

Recommendation (2024): to add to the report on the practice of disciplinary proceedings information on the reasons for refusals to open disciplinary proceedings on judges' complaints, the practice of reviewing preliminary findings of the SAPO Internal Control Unit, as well as the practice of reviewing (self-)recusals of the QDCP members.

B. Specific issues in the conduct of proceedings

Internal investigations and other inspection practices

Starting with the 2019 Study, the QDCP is **recommended to refuse to use in disciplinary proceedings the information obtained as a result of interference with the procedural activities of a prosecutor during inspections by higher-level prosecutors of the state of compliance with the law and/or the state of organisation of work in lower-level prosecutor's offices; to inform the Council of Prosecutors of each revealed fact of interference with the procedural activities of a prosecutor during inspections by higher-level prosecutors of the state of compliance with the law and/or the state of organisation of work in the prosecutor's offices, which provides for access to the materials of ongoing pre-trial investigations, as a threat to the independence of prosecutors.**

[77] See the following link: https://kdkp.gov.ua/page/zvity-komisii

This recommendation stemmed from the fact that the 2019 Study[78] paid considerable attention not only to the institution of internal investigation, but also to other inspection practices in the prosecution service. And so, as noted in the 2022 Analysis, "[t*]his aspect remains relevant, mainly because the Law still does not address the issue of disciplinary inspectors. However, the fact remains that internal investigations and other inspection practices in the prosecution service are not based on the Law. The only exceptions are secret integrity checks and the system of individual performance evaluation of prosecutors (although such measures must also comply with established safeguards and European standards*)"[79] ; therefore, "*[the] QDCP should have been careful to examine how the process of documenting the challenged actions of the prosecutor during the internal investigation or other form of departmental* control was carried *out*"[80] .

No fundamental changes in this dimension were observed during the period under review. As evidenced by the decisions of the QDCP[81] , traditional inspection practices that are not based on the law continue to exist in the prosecutor's office and repeatedly become the starting point for bringing prosecutors to disciplinary responsibility.

Accordingly, the **recommendation remains in place**.

Use of the results of covert investigative (surveillance) measures

Starting from the 2019 Study, the QDCP is **recommended to refuse to use information obtained as a result of covert activities of law enforcement agencies in disciplinary proceedings**.

The 2022 Analysis noted that although *"[t]he admissibility of this practice in various types of proceedings (both judicial and quasi-judicial or administrative) of information obtained by law enforcement agencies in secret is still a highly controversial issue*", the first QDCP, the Body in charge of disciplinary proceedings, the HCJ and even the Supreme Court tolerate this practice. The current QDCP also continues this practice[82]. At the same time, the 2022 Analysis noted that "*the Venice Commission has expressed concern about the possibility of a disciplinary body to have access to private information without a proper* court order"[83] .

Last year, the legality of **this practice was also questioned by the Court of Justice of the European Union (CJEU)** in a preliminary ruling in the case[84] , which came from the Supreme Administrative Court of Lithuania. The Lithuanian court considered the complaint of a prosecutor who was dismissed from the prosecutor's office following disciplinary proceedings, where the main evidence against the prosecutor

[78] The 2019 study, pp. 41-50.
[79] Analysis 2022, page 23.
[80] Ibid.
[81] Decisions of the QDCP No. 37dp-23 dated 22.02.2023, 118dp-23 dated 14.06.2023, 132dp-23 dated 05.07.2023.
[82] For example, decisions of the QDCP No. 48 dp-23 of 15.03.2023, 52 dp-23 of 15.03.2023, 67 dp-23 of 30.03.2023, 97 dp-23 of 03.05.2023, 99 dp-23 of 03.05.2023, 109 dp-23 of 24.05.2023, 125 dp-23 of 21.06.2023.
[83] Analysis 2022, page 25.
[84] Case C-162/22, Judgement, First Chamber, 07 September 2023, Electronic resource: https://curia.europa.eu/juris/documents.jsf?num=C-162/22

were the materials of the covert investigative (surveillance) measures, namely the results of interference with private (electronic) communication (metadata from the mobile operator also served as evidence). This piece of evidence was obtained in the criminal proceedings against the dismissed prosecutor and was transferred to the disciplinary proceedings by the decision of the prosecutor who was leading the case against his colleague. The EU Court of Justice concluded that the transfer of the results of the covert investigative (surveillance) measures and other sensitive data obtained for the purposes of criminal proceedings to disciplinary and other administrative proceedings is contrary to EU law, as the latter relate to less dangerous types of offences[85].

Accordingly, the **recommendation remains in place.**

The standard of proof

Starting with the 2019 Study, the QDCP **recommends that the standard of proof "beyond reasonable doubt" be abandoned in disciplinary proceedings in favour of a less stringent standard, except in cases where the sanction for the misconduct is criminal in character (to be clarified in 2022)**.

As evidenced by a number of QDCP decisions adopted during the period under review[86] , the QDCP now uses the "balance of probabilities" standard of proof. However, it should be remembered that the standard of proof "beyond a reasonable doubt" can be applied to cases where the sanction for the misdemeanour is criminal in character.[87]

Accordingly, the QDCP seemed to have **implemented the recommendation**.

C. Additional procedural aspect regarding SAPO prosecutors

In early December 2023, the Parliament adopted amendments to the Law[88] , which slightly changed the procedure for disciplining SAPO prosecutors. The amendments to Article 8-1, which came into force in early 2024, stipulate that:

"Within the *structure of the Specialised Anti-Corruption Prosecutor's Office, separate from the Office of the Prosecutor General, there shall be established units for document management, including electronic document management (office), classified work, personnel management,* ***internal control*** *and other units necessary for the performance of the functions of the Specialised Anti-Corruption Prosecutor's Office. The*

[85] For more details, see "Results of NSDI in non-criminal proceedings: EU Court of Justice v Lithuania". Electronic resource: https://so.supreme.court.gov.ua/news/436/rezultaty-nsrd-u-nekryminalnykh-provadzhenniakh-sud-yes-proty-lytvy.
[86] For example, decisions of the QDCP No. 4dp-23 of 04.01.2023, 14dp-23 of 18.01.2023, 44dp-23 of 08.03.2023, 234dp-23 of 20.12.2023, 235dp-23 of 20.12.2023, 213dp-23 of 15.11.2023.
[87] For more details, see Lorena Bachmaier Winter, Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court (Pragmatism or another Twist towards Further Confusion in Applying the Engel Criteria?). Electronic resource: https://eucrim.eu/articles/disciplinary-sanctions-against-judges-punitive-but-not-criminal-for-the-strasbourg-court/
[88] Law No. 3509-IX dated 08.12.2023 "On Amendments to the Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Strengthening the Independence of the Specialised Anti-Corruption Prosecutor's Office".

units of the Specialized Anti-Corruption Prosecutor's Office ***referred to in this paragraph shall be subordinated to the*** *Deputy Prosecutor General -* ***Head of the Specialized Anti-Corruption Prosecutor's Office (person performing his/her duties)****.*

<...>

The procedure and powers of the internal control unit of the Specialized Anti-Corruption Prosecutor's Office shall be determined by the regulation approved by the Deputy Prosecutor General - Head of the Specialized Anti-Corruption Prosecutor's Office (person performing his/her duties).

The internal control unit of the Specialized Anti-Corruption Prosecutor's Office shall conduct a secret integrity check of the Specialized Anti-Corruption Prosecutor's Office prosecutors in accordance with the procedure approved by the Deputy Prosecutor General - Head of the Specialized Anti-Corruption Prosecutor's Office (person performing his/her duties).

Prosecutors of the Specialised Anti-Corruption Prosecutor's Office shall be subject to the provisions of Section VI "Disciplinary Liability of Prosecutors" of this Law, taking into account the specifics established by this part.

A disciplinary complaint about a disciplinary offence committed by a prosecutor of the Specialized Anti-Corruption Prosecutor's Office shall be filed in accordance with the procedure established by Article 45 of this Law for preliminary consideration of the circumstances set forth in the disciplinary complaint to the internal control unit of the Specialized Anti-Corruption Prosecutor's Office.

In case of receipt of a disciplinary complaint about a disciplinary offence committed by a prosecutor of the Specialized Anti-Corruption Prosecutor's Office to the relevant disciplinary authority, after its registration and identification of a member of the relevant disciplinary authority, but before the disciplinary proceedings are open, the secretariat of the relevant disciplinary authority shall, within five working days, send such disciplinary complaint for preliminary consideration of the circumstances set forth in the disciplinary complaint.

After the internal control unit of the Specialized Anti-Corruption Prosecutor's Office receives a disciplinary complaint about a disciplinary offence committed by a prosecutor of the Specialized Anti-Corruption Prosecutor's Office, it is obliged to conduct a preliminary review of the circumstances set out in the disciplinary complaint within 20 working days and, if there are grounds, to conduct an internal investigation.

Based on the results of the preliminary review of the circumstances set out in the disciplinary complaint, the materials of the internal investigation (if conducted), together with proposals to open disciplinary proceedings or refusal to open them, shall be sent to the Body in charge of disciplinary proceedings conducting disciplinary proceedings."

The QDCP reported that in 2024 (as of the end of May) it received 6 disciplinary complaints against SAPO prosecutors. All complaints were sent to the SAPO's internal control unit for preliminary review. All complaints were returned by the SAPO with proposals to refuse to open disciplinary proceedings against the SAPO PPs. After reviewing the complaints and the SAPO's proposals, in all cases, the members of the QDCP decided not to open disciplinary proceedings. Despite the non-binding character of the internal control unit's proposals, it seems that the decisions of both the SAPO internal control unit and the QDCP were aligned. But, as will be explained next, this system of prior checking by the internal control unit, might not be fully in compliance with the European standards.

Issues of the additional procedural aspect

The SAPO informed[89] that as of the end of June 2024, its internal control unit had no staffing, but consisted of three persons: the Head of the Unit (civil service position), the Prosecutor and the Chief Specialist (civil service position). The unit is directly subordinated to the Head of the SAPO (as required by the Law). Also, the unit still operates without a relevant regulation (i.e. without a document outlining the unit's procedure and powers), as this document is still being elaborated and approved.

Even if we leave aside the fact that the internal control unit is currently structured in such a way that the only prosecutor of the unit is subordinate to a civil servant, i.e. a person who does not enjoy the same level of independence as prosecutors, the described approach to the organisation of the SAPO internal control unit appears to exhibit certain notable shortcomings. And these shortcomings do not appear to add procedural guarantees to the SAPO prosecutors - quite the contrary - compared to other prosecutors in the prosecution authorities.

First, it should be noted that due to the special procedure for selecting SAPO prosecutors and the uncertain procedure for transferring within the SAPO (except for the voluntary consent of a particular prosecutor - as a general rule), the formation of the SAPO internal control unit at the expense of prosecutors will be a very lengthy process. Obviously, this is the reason why the current composition of the unit is formed by civil servants selected and appointed by the Head of the SAPO. As a result, preliminary consideration of disciplinary complaints, integrity checks, and internal investigations against SAPO prosecutors will be carried out not by their peers, as is currently the case in the prosecution system, but by civil servants (i.e. persons who do not enjoy the same level of independence as prosecutors), who are under the control of the head of the SAPO.

Secondly, unlike other prosecutors, disciplinary proceedings against a SAPO prosecutor will now count with a proposal for refuse or continue the disciplinary proceedings, proposal which elaborates the internal control unit, which is not an independent body, but subordinate to the Head of the SAPO. In other words, this preliminary assessment of the internal control unit in the procedure for disciplinary

[89] Letter of the SAPO No. 11-2260vkh-24 dated 26.06.2024, in response to the enquiry within the frame of the preparation of the present study.

proceedings against SAPO prosecutors resembles the old procedure that was in place in the prosecutor's office before the QDCP was established, when the Head of the PP Offices had disciplinary powers, powers they lost as a result of the 2014 reform. According to the QDCP, all 6 complaints against SAPO prosecutors were returned with proposals to refuse to open disciplinary proceedings signed by the Head of the SAPO or his deputy. Thus, it can already be stated that there might be a risk that the Head of the SAPO could use the preliminary check of the internal control unit to influence in the disciplinary proceedings against the SAPO PPs: either to protect them (with or without reason) or to put pressure upon them. Moreover, the functioning of this internal control unit and its investigations in cases of disciplinary liability is working currently under no precise legal framework. It shall work according to a Regulation adopted by the same Head of the SAPO. Currently, it operates without established procedures, regulations, or criteria for the preliminary review of disciplinary complaints.

At first glance, both shortcomings could be solved by forming the SAPO internal control unit at the expense of prosecutors who have guarantees of independence. However, the fact that the regulations (i.e., the document outlining the procedure and powers of the unit) are approved by the head of the SAPO and, accordingly, the prosecutors of the unit will act only in accordance with the regulations will not go away. After all, the Law does not actually define the procedures for exercising the powers of this unit. Moreover, due to the peculiarities of the selection of SAPO prosecutors, such selection is not carried out by a self-governing independent body (as required by the Council of Europe standards), but instead by an ad hoc competition commission formed by and including the head of the SAPO[90] . The Head of the SAPO will also participate in the periodic evaluation of prosecutors by the SAPO Internal Control Unit and exercise other personnel powers in relation to these prosecutors (approve leaves, business and study trips, give characteristics of these prosecutors in case of disciplinary offences, etc.).

Finally, the identified deficiencies are derivative of the one that lies at the heart of the model of the SAPO internal control unit that was laid down in the Law. The aforementioned amendments to the Law expressly stipulated that the internal control unit of the SAPO is directly and exclusively subordinated to the Head of the SAPO. However, the Head of the SAPO is a prosecutor of the SAPO. That is, a disciplinary complaint against the Head of the SAPO will be preliminarily reviewed by the SAPO internal control unit, which is subordinated to him; just as the SAPO internal control unit will also conduct a secret integrity check of the Head of the SAPO. This characteristic of the model (or rather the model as such) **is not just problematic**, it does not take into account not only Council of Europe standards but also EU law - and, accordingly, may not be compliant with the requirements for Ukraine's accession to the EU and the commitments accepted by Ukraine.

[90] We cannot but mention the fact that the current head of the SAPO was elected ad hoc by a competition commission, most of whose members were appointed by the Parliament in violation of the Constitution.

In May 2023, the CJEU issued a preliminary ruling[91] in a case that came from the Court of Appeal in Bucharest (Romania). Romania has a Judicial Inspectorate, which is empowered to conduct internal investigations against magistrates (judges and prosecutors). The Romanian law stipulates that the head of the Judicial Inspectorate must be a judge who is authorised to determine the procedure (regulations) of the Inspectorate and to appoint his deputy and select other inspectors. This law also stipulates that the termination of the consideration of a disciplinary complaint can only be approved by the head of the Judicial Inspectorate (judge), but if the complaint concerns the head of the Inspectorate, then by his deputy.

According to the facts of the case, the applicant had filed a number of disciplinary complaints which had been dismissed with the signature of the head of the Judicial Inspectorate or an inspector in agreement with the deputy head. Some of these complaints also alleged unlawful actions by the head of the Judicial Inspectorate[92] . The applicant insisted that there were insufficient guarantees of independence in the activities of the inspectors and that the powers of the head were excessive and poorly balanced[93] .

The CJEU set itself the following question: whether the EU right to adopt legislation allowing the head of a body authorised to exercise disciplinary functions to adopt regulations or acts of an individual nature on the selection, evaluation and performance of employees of that body (in particular, his deputy) is limited by the national government, even if the employees of such a body are authorised to exercise disciplinary functions in relation to such a head[94] .

In addressing this issue, the CJEU not only recalled the external and internal dimensions of judicial independence[95], but also stressed that such independence cannot be undermined in disciplinary proceedings; therefore, the body and its officials exercising or involved in the exercise of disciplinary functions must be independent in order to be able to act impartially and guarantee all procedural rights[96].

According to the CJEU, granting the head of a body exercising or involved in the exercise of disciplinary functions broad powers to select, evaluate and exercise the functions of employees of that body (including his/her deputy), even if the employees of such body are authorised to exercise disciplinary functions in relation to such head, may raise reasonable doubts as to the use of the powers and functions of this body as an instrument of pressure or political control over the judiciary[97]. Therefore, the CJEU concluded that EU law should be interpreted in such a way as to limit the national government's ability to adopt legislation:

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[91] Case C-817/21, Judgement, First Chamber, 11 May 2023. Electronic resource: https://curia.europa.eu/juris/documents.jsf?num=C-817/21

[92] Ibid, paras 16-19.

[93] Ibid, paras 22-22.

[94] See also, paras 24, 38.

[95] Ibid, para 46.

[96] Ibid, paras 48-49.

[97] Ibid, paras 50-53, 55-57.

"- which grants the head of the body authorised to conduct investigations and disciplinary proceedings against judges and prosecutors the power to adopt normative and individual acts relating, in particular, to the organisation of the work of this body, the selection of its employees, their evaluation, the conduct of their activities and the appointment of a deputy head,

- where, firstly, only these employees and the deputy manager have the right to conduct a disciplinary investigation against the manager, secondly, their career depends to a large extent on the decisions of the manager, and finally, the deputy manager's term of office expires at the same time as the manager's,

when this legislation is not drafted in such a way that there is no reasonable doubt in the minds of persons that the powers and functions of this body will not be used as an instrument for exerting pressure on judges and prosecutors or political control over their activities".

It follows from the above that the vast majority of the warnings expressed by the CJEU are fully applicable to the model of the SAPO internal control unit, which was laid down in the Law

IV. Disciplinary offences and sanctions

A. Statistics on sanctions imposed

The period under review demonstrates a **continuation of** the **trends** outlined in the 2019 Study and the 2022 Analysis, namely that the vast majority of sanctions were imposed on

a) of male prosecutors (75.8%);
b) prosecutors from local prosecutor's offices (almost 70%), followed by prosecutors from regional prosecutor's offices (18.2%);
c) prosecutors who do not hold an administrative position (77.3%).

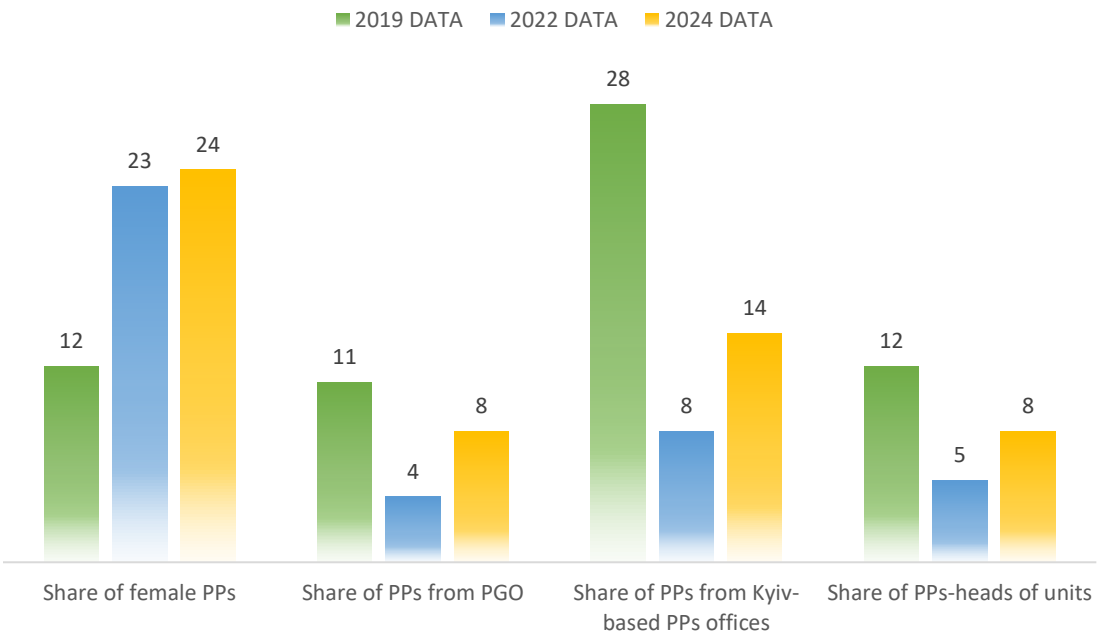
Obviously, these statistical indicators reflect the general gender (im)balance and organisational structure of the PPS. That is, prosecutors are predominantly men, and most of them work (as well as most cases allocated) at the local level.

Instead, in the period under review:

d) the proportion of prosecutors working in the Office of the Prosecutor General **has doubled** (to 8.3% from 4% previously);

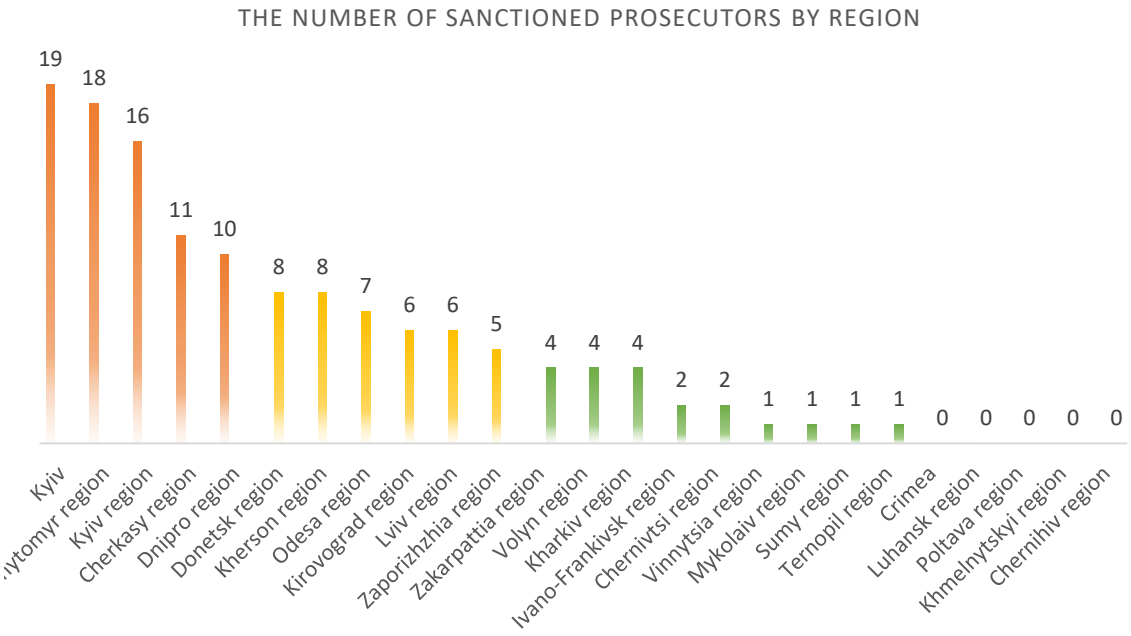
e) the proportion of prosecutors holding the positions of heads/deputy heads of departments has **slightly increased** (to 8.3% compared to the previous 5%);

f) the share of heads of prosecutor's offices **continued to decline** (to 14.4%, compared to the previous 16% and 19%, respectively).



Prosecutors working in Kyiv-based prosecutor's offices[98] were again the most prominent group among those who were sanctioned during the study period. Their share was **over 14%**. They were followed by prosecutors from Zhytomyr (over 13%), Kyiv (over 12%), Cherkasy (over 8%), Dnipro (over 7%) and Kherson (over 6%) regions.

The largest number of sanctions was imposed on prosecutors from the Prosecutor General's Office - 11, followed by prosecutors from Fastiv District Prosecutor's Office (Kyiv region) - 8, Korosten District Prosecutor's Office (Zhytomyr region) - 6, Zvenyhorod District Prosecutor's Office (Cherkasy region) and Kakhovka District Prosecutor's Office (Kherson region) - 5, Berdychiv District Prosecutor's Office and Zhytomyr District Prosecutor's Office (Zhytomyr region), Kyiv Region Prosecutor's Office - 4. Also, 3 sanctions were imposed on prosecutors from the following prosecutor's offices: Dnipro Central District Prosecutor's Office, Chudniv District Prosecutor's Office (Zhytomyr region), Lutsk District Prosecutor's Office (Volyn region), Zolotonosha District Prosecutor's Office (Cherkasy region), Znamiansk District Prosecutor's Office (Kirovohrad region), and prosecutors from Dnipropetrovs'k and Lviv regions.



Given the fact that the majority of disciplinary proceedings in the period under review (over 54%) were open on the basis of complaints from heads of prosecutor's offices, it can be assumed that "regional primacy" depends on the ability of prosecutors themselves to identify delinquents within their ranks and to defer them to disciplinary proceedings. This assumption is supported by statistics from other sections of this analysis.

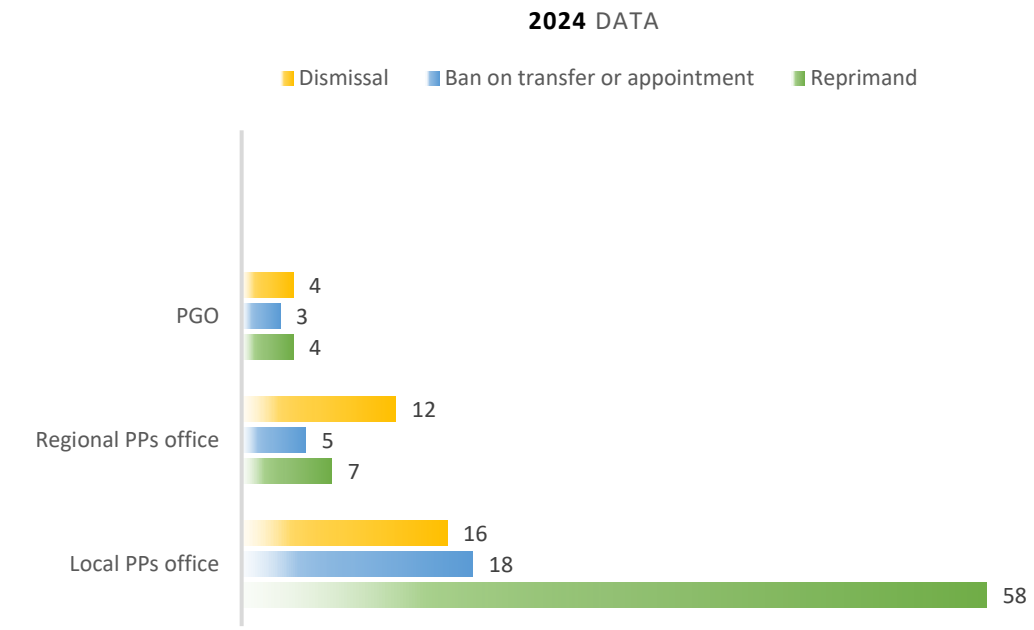
[98] This includes prosecutor's offices of all levels located in the city of Kyiv.

It is noteworthy that the share of prosecutors with 10 years or more of experience in the prosecution service is **over 70%**. The share of prosecutors with over 7 years of work experience in the prosecution service is **almost 90%**. The smallest group is made up of prosecutors with 1-3 years of experience in the prosecution service (only 2%). In addition, **in less than 17% of cases** (cumulatively), prosecutors brought to disciplinary responsibility had unliquidated or outstanding sanctions or faced the loss of bonuses.

When, according to the 2022 Analysis, "*almost 87% are prosecutors with 7 or more years of experience in the prosecution service. Moreover, almost 58% of the total number of prosecutors brought to disciplinary responsibility have 10 or more years of experience in the prosecution service. The smallest group is made up of prosecutors with 1-3 years of experience in the prosecution service (only about 5%). In addition, in less than 7% of cases (cumulatively), prosecutors brought to disciplinary responsibility had unliquidated or outstanding sanctions or faced the loss of bonuses "*[99] .

During the period under review, the QDCP imposed 132 sanctions, of which in the form of **a reprimand** in 71 cases (**almost 54% of the** total number of sanctions imposed), dismissal in 34 cases (**almost 26%)**, and the remaining 27 cases (**20%)** were **bans on transfer or appointment of various durations**. According to the 2019 Study, the QDCP imposed reprimands in 45% of cases, a ban on transfer or appointment in 30% of cases, and dismissal in 25% of cases[100] ; according to the 2022 Analysis, the Body in charge of disciplinary proceedings imposed a sanction in the form of a reprimand 40 times (almost 66% of the total number of sanctions imposed), dismissal - 12 (almost 20%), and the remaining 9 cases (14%) were bans on transfer or appointment[101] .

[99] Analysis 2022, page 28.
[100] The 2019 study, page 111.
[101] Analysis 2022, page 28.


2024 DATA
Dismissal
Ban on transfer or appointment
Reprimand
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4
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Regional PPs office
12
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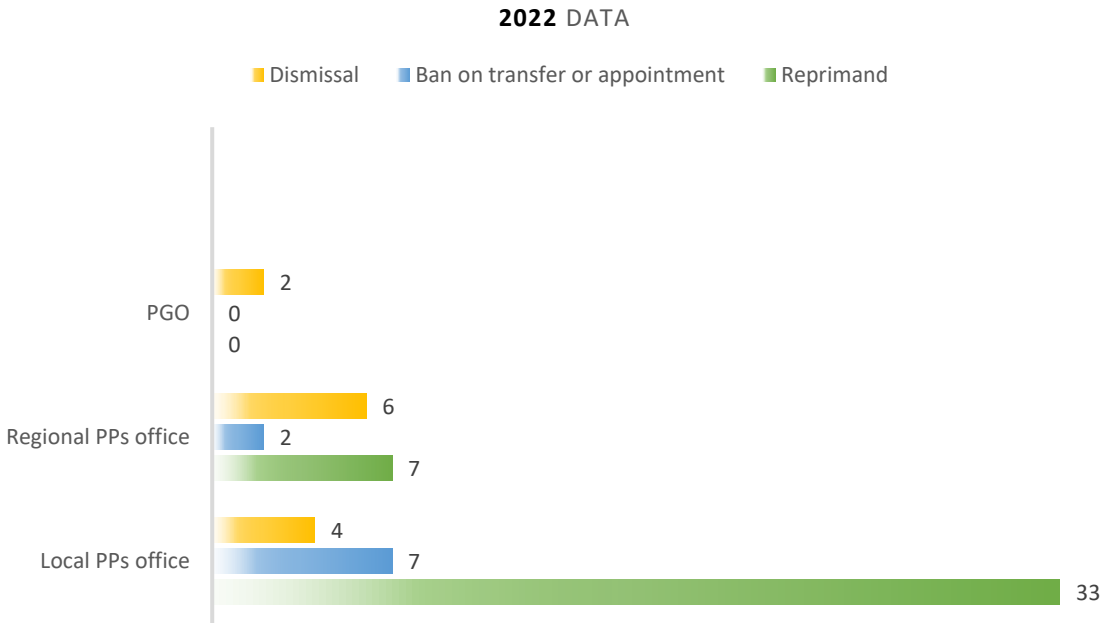
58


2022 DATA
Dismissal
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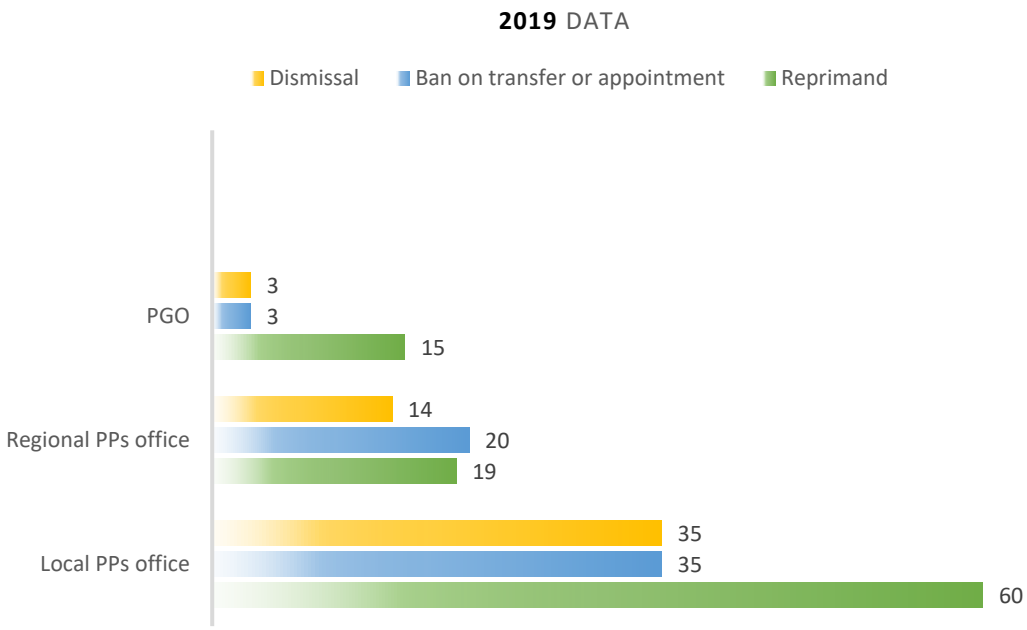
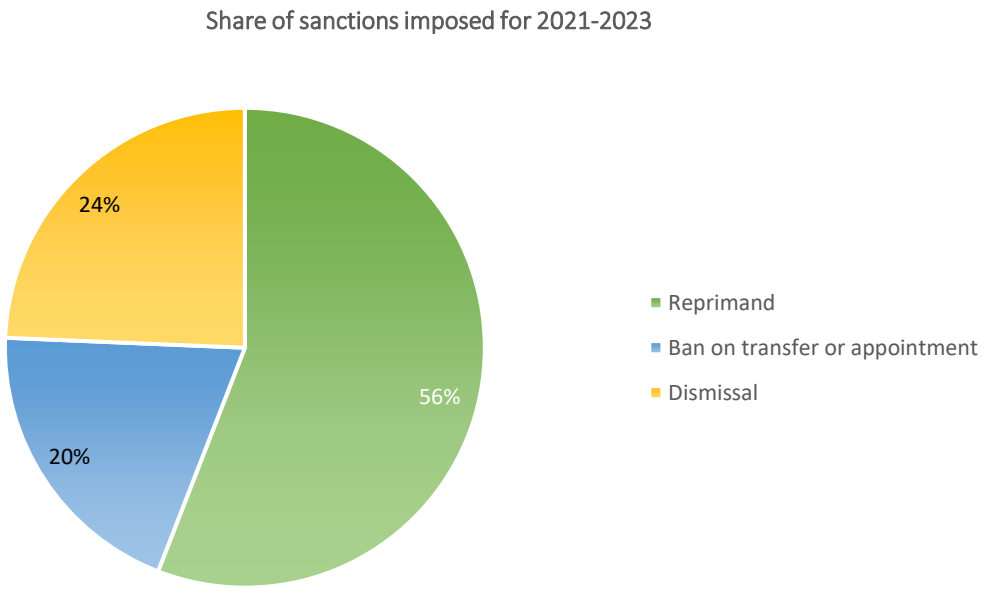


The pattern of sanctions imposed rather indicates that the QDCP treats prosecutors of different levels equally. In addition, the QDCP has started to apply disciplinary sanctions in the form of a ban on transfer or appointment for a certain period of time more often. The latter observation can be explained by the fact that during the period under review, the share of prosecutors who had an unlisted (unexpunged) disciplinary sanction at the time of bringing them to disciplinary responsibility slightly increased. In a small number of cases, prosecutors were brought to disciplinary responsibility twice in 2023. However, in two of these cases, such a step by the QDCP **does not seem appropriate**[102] . After all, two disciplinary sanctions were imposed on the same day, although several complaints against both prosecutors were received within a short period of time and, accordingly, should have been combined into one proceeding and resulted in one sanction.

Finally, as was also found in the 2022 Analysis, no head of the Office of the Prosecutor General (the Prosecutor General or her/his deputy) was disciplinary investigated during the period under review, although, as indicated in Section I of this expert analysis, several disciplinary complaints deserved to be considered by the full composition of the QDCP.

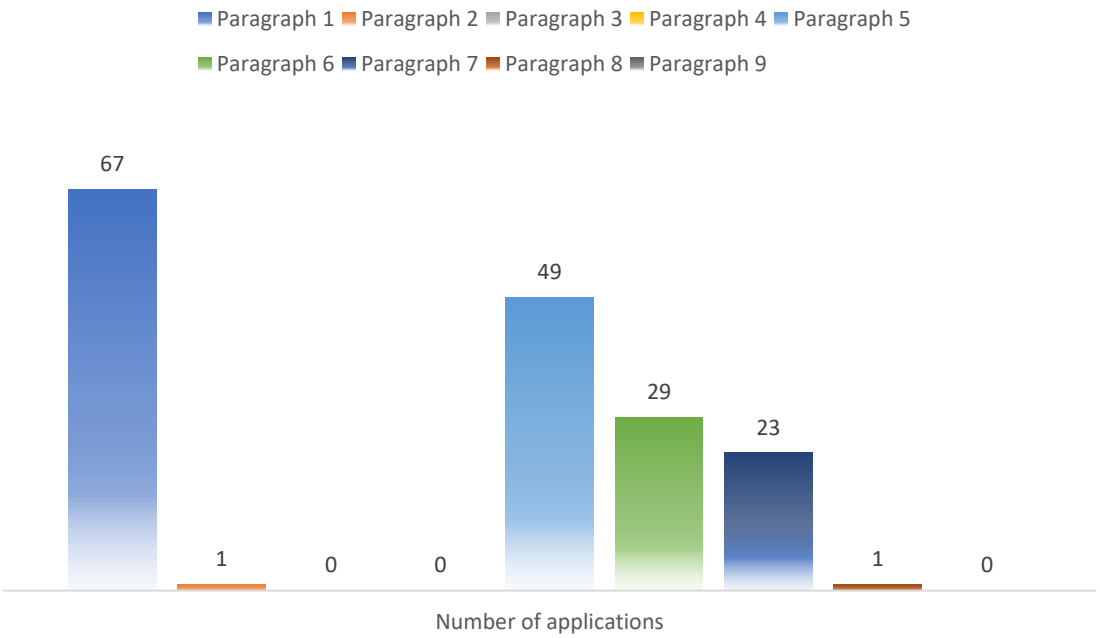
The analysis of the QDCP secretariat indicates that in the period from November 2021 to 2023, the QDCP brought 263 prosecutors to disciplinary responsibility (in 2021 - 15, in 2012 - 116, in 2013 - 132) with the following distribution of shares by type of sanction[103] :

[102] Decisions of the QDCP No. 92dp-23 and 93dp-23 of 26.04.2023, No. 190dp-23 and 191dp-23 of 27.09.2023.
[103] Analysis by the QDCP Secretariat, p. 44.



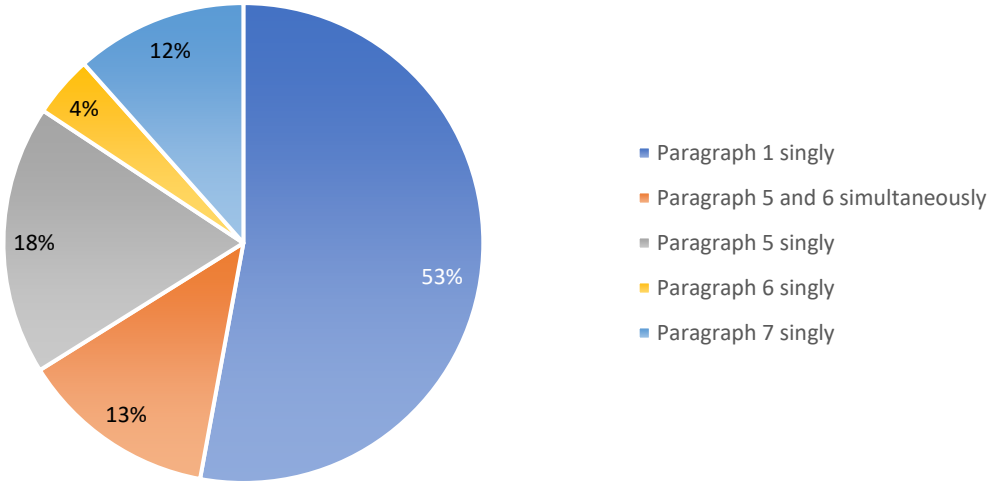
B. Types of offences

Failure to discharge or inadequate discharge of official duties (Article 43(1)(1) of the Law) **remains the** most common ground for disciplinary claims. Their aggregate share is over 50% (67 cases of application of this ground). It is **'traditionally'** followed by two grounds, which are often applied to a particular misconduct simultaneously: committing actions that discredit the rank of a prosecutor and may raise doubts about his/her objectivity, impartiality and independence, as well as the integrity of the prosecution authorities (Article 43(1)(5) of the Law) and systematic (two or more times within one year) or one-time gross violation of the rules of prosecutorial ethics (Article 43(1)(6) of the Law). The share of such cases is 31% and 22% respectively (41 and 29 cases respectively). The third place was **again** taken by violation of internal service regulations (Article 43(1)(7) of the Law; 23 cases, i.e. 17.4%).

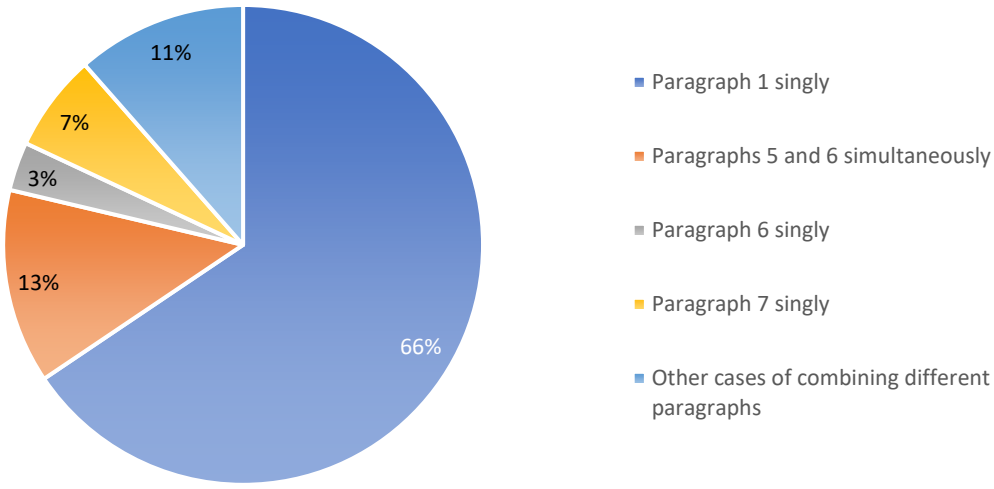


However, it should be borne in mind that each of these grounds may be applied both in conjunction with others and independently. At the same time, it is noteworthy that the number of cases of independent application of the grounds specified in paragraph 5 of part 1 of Article 43 of the Law has significantly increased. However, this growth **is mainly due** to the increase in the number of cases of late submission of integrity questionnaires by prosecutors, which the QDCP qualifies under paragraph 5.

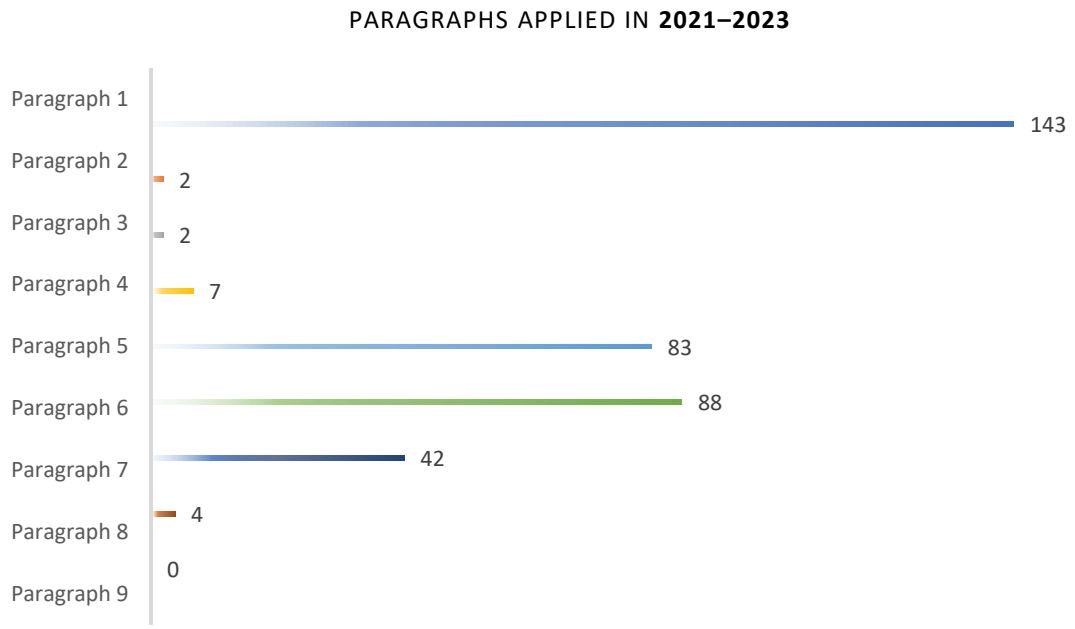
2024 DATA



2022 DATA



These data reflect a continuation of the trends identified in the 2019 Study and the 2022 Analysis, as well as those documented in the Analysis of the QDCP Secretariat[104] :



In terms of the grounds provided for in Article 43(1) of the Law, the following cases resulted in disciplinary sanctions during the period under review.

Paragraph 1. Failure to discharge or inadequate discharge of official duties

a) when performing the functions of a procedural supervisor and/or prosecutor:

- consideration of a defence lawyer's request on the basis of instructions from a supervisor, not the law
- failure to report a conflict of interest in a timely manner
- incorrect determination of jurisdiction and untimely transfer of proceedings to the pre-trial investigation body
- misleading the investigating judge about the timing of the investigation
- failure to properly comply with and/or ignore investigating judge's rulings on recognition of inaction as unlawful and obligation to take action
- unreasonable delay in sending an indictment (without or with distortion of information in the Unified register of pre-trial investigations)
- the indictment was sent after the pre-trial investigation had expired, which resulted in the criminal proceedings being closed by the court;

[104] Analysis by the QDCP Secretariat, p. 35.

- the indictment was sent untimely, which is why the court released the person from liability due to the expiry of the prosecution period
- missing a court hearing without valid reasons or attempting to postpone it without proper grounds
- the defendant was acquitted because a number of pieces of evidence were found to be inadmissible

b) in case of managerial status:

- transferred the key and password to the personal account in the Unified register of pre-trial investigations to another prosecutor
- failure of the senior prosecutor to ensure the attendance of another prosecutor of the group at the court hearing
- no consideration of the complaint about the failure to comply with (reasonable) time limits - instead, it was sent to the prosecutor in the proceedings
- the timeliness of the sending of the indictment by a member of the prosecutor's team was not controlled (it was sent after the pre-trial investigation had expired, which resulted in the criminal proceedings being closed by the court)
- conflicts of interest are not regulated

The 2022 analysis contained the following recommendation (2019): to **review the practice of not recognising the loss of a prosecutor's service card as a disciplinary offence**. This recommendation stemmed from the consistent criticism of this approach by the first QDCP and the Body in charge of disciplinary proceedings.

During the monitored period, the QDCP did not impose sanctions in such cases. Also, in one such case, a member of the QDCP refused to open disciplinary proceedings[105]

Accordingly, the QDCP **implemented the recommendation**.

Paragraph 2. Unreasonable delay in consideration of an appeal

- untimely consideration of the application

The QDCP, as well as the Body in charge of disciplinary proceedings and the QDCP (first composition), considers cases of untimely consideration of an appeal as deserving of qualification under both Article 43(1)(1) and (2)(1).

Paragraph 3. Disclosure of a secret protected by law that became known to the prosecutor in the course of discharging his/her duties

[105] Decision of the QDCP member No. 338ds-23 dated 03.05.2023.

During the period under review, the QDCP did not impose sanctions on this basis.

Paragraph 4. Violation of the procedure established by law for submitting a declaration by a person authorised to perform the functions of the state or local self-government

The 2022 analysis contained the following recommendation (2022): **Ensure that the provisions of the legislation on violation of anti-corruption restrictions are applied in line with the case law**. This recommendation stemmed from the fact that the Body in charge of disciplinary proceedings imposed sanctions based on facts that should have been preceded by the NAPC's conclusion (assessment). This is the position of the Supreme Court.

No such issues were identified during the period under review. Accordingly, it **appears that the QDCP has implemented the recommendation**.

Paragraph 5. Committing actions that discredit the authority of a prosecutor and may cast doubt on his/her objectivity, impartiality and independence, as well as on the integrity of the prosecution authorities

- failure to submit an integrity questionnaire on time
- inaccurate information in the integrity questionnaire (information on disciplinary proceedings should have been indicated)
- driving while intoxicated
- demonstration of an official service card instead of a driving licence
- refusal to undergo a test for intoxication (after the police stopped the car), in particular, combined with aggressive behaviour towards the police or attempts to negotiate with the police
- entering false information in the integrity questionnaire, which also resulted in the payment of bonuses
- out-of-court communication through a prosecutor's colleague, which looks like corrupt arrangements
- detention/suspicion of committing a crime
- use of the key access of the head of the prosecutor's office to the Unified register of pre-trial investigations in private interests, requesting information from investigators that is a secret of the pre-trial investigation for private purposes

In contrast to the Body in charge of disciplinary proceedings and the first composition of the QDCP, the QDCP is quite active in applying the ground provided for in Article 43(1)(5) independently of other grounds. But, as noted earlier in the present report, this activity is largely dictated by the increase in the number of cases of late submission of the integrity questionnaire by prosecutors, which the QDCP qualifies under paragraph 5.

Paragraph 6. Systematic (two or more times within one year) or one-time gross violation of the rules of prosecutor's ethics

a) as an independent ground:

- Driving while intoxicated, in particular, combined with an attempt to avoid responsibility due to the position and/or aggressive behaviour
- Failure to report a conflict of interest in a timely manner
- Providing inaccurate information in the 2022 performance evaluation report of the prosecutor (for a more detailed analysis of the case, see the subsection "Dismissal of the SAPO prosecutor" below)

b) in combination with other grounds set out in Article 43(1) of the Law (mainly clause 5):

- Driving while intoxicated, in particular, combined with an attempt to avoid responsibility due to the position and/or aggressive behaviour
- detention/suspicion of committing a crime
- use of the key access of the head of the prosecutor's office to the URPTI in private interests, requesting information from investigators that is a secret of the pre-trial investigation for private purposes
- Failure to report a conflict of interest in a timely manner

In addition to the fundamental flaw of paragraph 6, which is described below in the subsection "Dismissal of the SAPO prosecutor", it is worth noting the issues for which the QDCP is fully responsible.

At the end of 2022, the Council of Prosecutors approved the Commentary to the Code of Professional Ethics and Conduct for Prosecutors. This Commentary is even posted on the QDCP website[106]. At the same time, the decisions of the QDCP to impose a sanction under paragraph 6 do not mention it at all. However, this Commentary is mentioned in two decisions on imposing a sanction based on paragraph 5[107].

Recommendation (2024): use the Commentary on the Code of Professional Ethics and Conduct of Prosecutors during Disciplinary Proceedings[108].

Paragraph 7. Violation of internal regulations

- long-term absence from the workplace without valid reasons

[106] See here: https://kdkp.gov.ua/uploads/files/KK%2024.11.2022-1-70.pdf
[107] Decisions of the QDCP No. 216dp-23 dated 15.11.2023 and 228dp-23 dated 06.12.2023.
[108] Given that two members of the QDCP were part of the working group for the development of this Commentary.

Paragraph 8. Interference or any other influence of a prosecutor in cases or in a manner not provided for by law in the official activity of another prosecutor, officials, officers or judges, including through public statements regarding their decisions, actions or inaction, in the absence of signs of an administrative or criminal offence

- Providing unlawful oral instructions to the prosecutor of the department regarding the timing and results of consideration of the lawyer's request

The 2022 analysis contained the following recommendation (2019): to **consider the facts of unjustified removal of a prosecutor from procedural supervision as interference by the management in the prosecutor's official activities**. This recommendation stemmed from the fact that "the *possibility of transferring a case to another prosecutor is the functional equivalent of giving binding instructions in certain cases*[109]*. Therefore, to ensure confidence in the objectivity and impartiality with which prosecutors must act, it is crucial that the process of case assignment follows clear and transparent rules. Reassignments should also be made in accordance with strict, objective and transparent rules, in exceptional situations justified by reasons such as lack of initiative by the original prosecutor or a conflict of interest. The reasons for reassignment should be stated in writing, and prosecutors should have a legal remedy to appeal against decisions of higher prosecutors to reassign their cases if they believe that the decisions violate their independence"*[110]*.*

During the period under review, the QDCP did not impose sanctions on this basis, although such cases are not uncommon in the prosecutor's office, in particular in the SAPO[111]. The QDCP explains that this is due to the fact that they do not have the right to identify and initiate verification of such facts on their own, and liability can only be imposed upon substantiated disciplinary complaints.

Accordingly, the **recommendation remains in place**.

Paragraph 9. Public statement that violates the presumption of innocence

The 2022 analysis contained the following recommendation (2019, clarified): **to introduce into its practice the criteria for assessing whether prosecutors violate the presumption of innocence already developed by the Court**. This recommendation stemmed from the fact that "*[s]ince the issues surrounding the presumption of innocence have been*[112] *and will remain*[113] *a serious challenge for Ukraine even in the medium term, the Body in charge of disciplinary proceedings should be more prudent in dealing with such*

[109] OECD (2020), The Independence of Prosecutors in Eastern Europe, Central Asia and Asia Pacific, p.78. Electronic resource: https://www.oecd.org/corruption/The-Independence-of-Prosecutors-in-Eastern-Europe-Central-Asia-and-Asia-Pacific.pdf
[110] Ibid, p.83.
[111] Decision of QDCP No. 95dp-22 dated 05.03.2023; decision of the Council of Prosecutors No. 3-nzp-23 dated 05.09.2023.
[112] For example, Korban v. Ukraine, №26744/16, Vovk v. Ukraine, 54353/20 (communicated).
[113] For example, Information Note of the Council of Europe Expert Advisory Group to the Office of the Prosecutor General of Ukraine on the Public Outreach in War Crimes Proceedings: Compliance with Articles 6, 8 and 3 of ECHR prepared by Mr. Jeremy McBride and reviewed by Ms. Nona Tsotsoria.

complaints”[114] . Moreover, in its first annual report on Ukraine (as an EU candidate country), the European Commission also noted the existence of this problem[115] .

During the period under review, the QDCP - as well as the Body in charge of disciplinary proceedings and the first instance QDCP - did not impose sanctions on this ground. However, the QDCP received a disciplinary complaint from a lawyer, which stated that the SAPO prosecutor did not respond to “*repeated court observations on the inadmissibility of the above statements [in the affirmative form of a person’s guilt] without a* verdict”[116] .

Accordingly, the **recommendation remains in place**.

C. Consideration of applications for incompatibility of prosecutors by the HCJ

According to the HCJ[117], 13 decisions were made in 2022-2023 based on the results of consideration of 14 applications (including those received in previous periods), including 9 decisions to leave without consideration and return to the applicant the application on violation of the requirements for incompatibility by the prosecutor, in particular, in 2022 - 0, in 2023 - 9; 4 decisions to recognise the absence of violations by the prosecutor of the requirements for incompatibility with other activities or status.

The 4 decisions of the HCJ on the recognition of the absence of violations by the prosecutor of the requirements for incompatibility with other activities or status[118] show that the HCJ continues to hold a position that contradicts the conclusions of the Supreme Court,[119][120] that the acquisition of the status of a lawyer by prosecutors is permissible and does not entail legal liability.

However, it should be noted that in view of the opposite position of the two constitutional bodies regarding the presence/absence of incompatibility in the case of the prosecutor obtaining a certificate of the right to practice law, as well as the presence/absence of a disciplinary offense in such a case, the QDCP is unlikely to establish a consistent disciplinary practice on this matter.

Accordingly, the **recommendation (2019, clarified) remains** dependent on the outcome of the conflicting interpretations of the Supreme Court and the HCJ**: to consider the facts of prosecutors obtaining a certificate of the right to carry out a certain type of professional activity (lawyer, notary, etc.) as well as violations of ethics rules, and not only violations of incompatibility requirements**.

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[114] Analysis 2022, page 39.
[115] European Commission’s opinion on Ukraine’s application for EU membership (Ukraine 2023 Report), p. 51. Electronic resource: https://neighbourhood-enlargement.ec.europa.eu/ukraine-report-2023_en.
[116] Decision of the QDCP member/chair No. 286ds-23 dated 20.04.23.
[117] Letter of the HCJ Secretariat No. 22956/0/9-24 of 23.07.2024.
[118] Decisions of the HCJ No. 19/0/15-22 of 11 January 2022, 48/0/15-22 of 18 January 2022, 247/0/15-23 of 23 March 2023, 1344/0/15-23 of 19 December 2023.
[119] Resolution of 10.02.2021 in case No. 822/1309/17. Electronic resource: https://reyestr.court.gov.ua/Review/95439673
[120] Resolution of 14.04.2021 in case No. 826/9606/17. Electronic resource: https://reyestr.court.gov.ua/Review/96933508

D. Qualification of disciplinary offences

As noted in the 2019 Study[121], many complex legal issues arise in the process of qualifying misconduct and selecting sanctions, which can lead to inconsistencies in certain cases or broader internal inconsistencies in disciplinary practice.

The Analysis of the QDCP Secretariat emphasises that the Law "*does not contain sufficient conceptual framework and some elements of the mechanism of disciplinary liability of the prosecutor, which are important for law enforcement.* In particular, it mentions the absence of *"a definition of the concept of 'disciplinary offence of a* prosecutor'"[122] . Also, the Analysis of the Secretariat of the QDCP notes that "the *definition of the Law ... of the concept of "disciplinary offence of a prosecutor" will allow to specify which violation of which duties should be considered a disciplinary offence, as well as where these duties are enshrined*"; and "according to the *established practice of the QDCP, a disciplinary offence of a prosecutor is considered an unlawful, guilty act or omission, decision-making or failure to make a decision, consisting in the failure to discharge or inadequate discharge by the prosecutor of his/her official duties and other requirements established by the Law ... and other regulatory legal acts, for which he/she may be subject to disciplinary* sanctions"[123] .

These positions are an important aspect of the development of disciplinary practice, as they can be seen as the QDCP's response to the criticisms of the 2022 Analysis, discussed below.

Elements of a disciplinary offence

The 2022 analysis contained the following recommendation (2022): **to consider a disciplinary offence as a type of offence with a "formal" elements.** This recommendation stemmed from the fact that the Body in charge of disciplinary proceedings often closed disciplinary proceedings due to the absence of certain harm caused by the prosecutor's action.

No such issues were identified during the period under review. Accordingly, it **appears that the QDCP has implemented the recommendation**.

The principle of legality

The 2022 analysis contained the following recommendation (2022): **when reviewing alleged cases of failure to discharge or inadequate discharge of official duties as defined by orders of the Prosecutor General and other heads of the prosecutor's office, to assess such duties through the angle of Article 17(1)(2) of the Law**. This recommendation stemmed from the fact that the Body in charge of disciplinary

[121] The 2019 study, pp. 98-106, 115 and 126.
[122] Analysis by the HCJ Secretariat, p. 36.
[123] Ibid.

proceedings often brought prosecutors to justice for violations of departmental acts on the basis of Article 43(1)(1) of the Law, i.e. for failure to discharge or inadequate discharge of duties.

According to the disciplinary practice during the period under study, the QDCP did not evaluate orders of the Prosecutor General and other heads of the prosecutor's office through the angle of Article 17(1)(2) of the Law and continues to charge prosecutors with violations of departmental acts[124] .

Instead, as the 2019 Study also pointed out[125] :

- according to the Constitution, only laws should define the acts that constitute disciplinary offences and the liability for them (this is also insisted on by the Constitutional Court);
- the duties of the prosecutor are established by the Law, the Criminal Procedure Code and other laws, but not by subordinate legal acts;
- in turn, laws may specify the subjects and cases in which these subjects may impose mandatory requirements on prosecutors.

Accordingly, the 2019 Study noted that the practice of imposing sanctions for failure to discharge or inadequate discharge of duties specified by orders of the Prosecutor General is often problematic, as the content of such orders is not always consistent with the provisions of the Law[126] .

The same position - that when qualifying the prosecutor's actions and referring to the failure to discharge his/her official duty, the relevant obligation must be imposed on the prosecutor by the law - is also held by the HCJ[127] .

The 2022 Analysis additionally referred to "the *reservation contained in the joint opinion of the Venice Commission and the Department of Human Rights expressed on the draft Law. The Council of Europe bodies noted the fact that the wording of Article 17(4) of the Law "blurs the line between these powers and the activities of prosecutors, which were discussed in the previous three [parts] of this article"*[128] *. This implied a noticeable friction between part 4 of Article 17 ("Orders of an administrative nature, as well as instructions directly related to the exercise of prosecutorial functions by a prosecutor, issued (given) in writing within the powers defined by law, shall be binding on the relevant prosecutor") and paragraph 2 of part 1 of this Article ("Administrative subordination of prosecutors may not be a ground for limiting or violating the independence of prosecutors in the exercise of their powers"). In other words, on the one hand, the Prosecutor General and other heads of the prosecutor's office are authorised*

[124] For example, the decisions of the QDCP No. 37dp-23 of 22.02.2023, 48dp-23 of 15.03.2023, 118dp-23 of 14.06.2023.
[125] The 2019 study, pp. 98-100.
[126] Ibid.
[127] Generalisation of the practice of consideration by the High Council of Justice of complaints against decisions in disciplinary proceedings against prosecutors in 2017-2021, pp. 26, 34, 52. Electronic resource: https://hcj.gov.ua/sites/default/files/field/uzagalnennya_skargy_na_rishennya_prokurory.pdf
[128] Joint Opinion of the Directorate General for Human Rights (DHR) of the Directorate General for Human Rights and the Rule of Law of the Council of Europe and the European Commission for Democracy through Law (Venice Commission) on the Draft Law of Ukraine "On the Public Prosecutor's Office", CDL-AD (2013) 025, § 62.

to issue administrative orders directly related to the exercise of prosecutorial functions by the prosecutor, but on the other hand, such orders cannot be a ground for limiting or violating the independence of prosecutors in the exercise of their powers"[129] .

Accordingly, the **recommendation remains in place**.

Superior responsibility for the acts of a subordinator

The 2022 analysis contained the following recommendation (2022): To make use of the distinction between the **responsibility of heads of prosecution offices, senior teams and procedural supervisors for the actions of other prosecutors or law enforcement officers whose activities they are authorised to coordinate, direct or determine.** This recommendation stemmed from the fact that the Body in charge of disciplinary proceedings sometimes imputed to prosecutors the actions of other prosecutors or even law enforcement officers whose involvement was (at best) only formal.

On the one hand, during the period under review, the QDCP adopted a number of decisions that clearly differentiate between the responsibilities of prosecutors and investigators[130].

It should also be positively noted that the QDCP has begun to distinguish between the grounds for disciplinary liability of prosecutors and the grounds for responding to improper management (work organisation) committed by prosecutors holding administrative positions[131]. After all, the 2019 study noted that a prosecutor holding an administrative position should not be disciplined for failures in this position on the basis of Article 43 of the Law. Instead, the Body in charge of disciplinary proceedings should be guided by the provisions of Article 41 and Article 49.6 of the Law and refer the consideration of this issue to the discretion of the Council of Prosecutors or heads of prosecutor's offices who have personnel powers in relation to the relevant category of administrative position[132].

However, on the other hand, during the period under review, there was also a case when the QDCP imposed a sanction on one of the heads of the prosecutor's office for inaction committed by other prosecutors[133].

Accordingly, the recommendation **remains in place**.

Suspect status

As noted in the 2022 Analysis, *"[e]ven in the 2019 Study, the QDCP was recommended to refrain from mixing disciplinary and criminal proceedings until the latter is completed, where the suspect is a*

[129] Analysis 2022, page 43.
[130] Decisions of the QDCP No. 3dp-23 dated 04.01.2023, 202dp-23 dated 11.10.2023.
[131] Decision of the QDCP No. 187dp-23 of 20.09.2023.
[132] The 2019 study, pp. 101-102.
[133] Decision of the QDCP No. 18dp-23 of 25.01.2023.

prosecutor[134] *. That is, not to rush to assess an act in disciplinary proceedings when the same act is simultaneously the subject of assessment in criminal proceedings. The Venice Commission also calls for the same*[135]*. After all, such mixing, which often entails hasty assessments, can pose significant risks to the right to a fair trial*[136] *. This controversial, albeit traditional, approach to the dismissal of prosecutors continues to take place*[137] . [138]

This aspect of the QDCP's disciplinary practice remains unchanged. However, it should be noted here that a similar practice is observed in disciplinary proceedings against judges.[139] Moreover, as the researchers pointed out, "*[c]oncerns when several types of proceedings are initiated simultaneously regarding the same act of a judge - criminal and disciplinary, administrative offence and disciplinary - are quite* typical"[140] . In other words, this aspect has deep roots in the legal system of Ukraine.

Accordingly, **the recommendation (2019) remains: to review the practice of recognising as a disciplinary offence the sole fact of a prosecutor being accused of committing a crime.**

Acquittals

The 2022 analysis contained the following recommendation (2022): to **review the practice of recognising as a disciplinary offence only those cases where the unjustified acquittal of a person is directly caused by gross negligence or criminal intent of the prosecutor**. This recommendation stemmed from the fact that the Body in charge of disciplinary proceedings sometimes blamed prosecutors for declaring certain evidence inadmissible or other procedural violations that resulted in the acquittal of the accused.

On the one hand, during the period under review, the QDCP adopted a number of decisions closing disciplinary proceedings against prosecutors who were reproached only for the fact that the court had delivered an acquittal.[141]However, on the other hand, it seems that there have also been similar cases where the QDCP imposed sanctions on prosecutors for formal violations and/or poor quality of the pre-trial investigation, although the only reason for filing a complaint against them was the same fact – and it appears to be the court's acquittal.[142]

[134] The 2019 study, pp. 102-103.
[135] Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and ProsecutorialCouncil, Adopted by the Venice Commission at its 126th Plenary Session, 19-20 March 2021, CDL-AD(2021)015, §59.
[136] See, for example, Kemal Coşkun v. Turkey, no. 45028/07, §§ 44, 56.
[137] Decisions of the QDCP No. 48 dp-23 of 15.03.23, 52 dp-23 of 15.03.23, 109 dp-23 of 24.05.20, 125 dp-23 of 21.06.20.
[138] Analysis 2022, page 46.
[139] Analytical report "Unresolved problems of the institution of disciplinary liability of judges", Olena Ovcharenko, CPLR, 2024, pp. 15-18. Electronic resource: https://pravo.org.ua/books/nevirisheni-problemi-institutu-distsiplinarnoyi-vidpovidalnosti-suddiv/
[140] Ibid, page 16.
[141] Decisions of the QDCP No. 10dp-23 of 11 January 2023, 19dp-23 of 25 January 2023, 62dp-23 of 29 March 2023, 160dp-23 of 23 August 2023.
[142] Decisions of the QDCP No. 34dp-23 of 22.02.2023, 127dp-23 of 28.06.2023, 145dp-23 of 26.07.2023.

Accordingly, the recommendation **remains in place**.

Dismissal of the SAPO prosecutor

Based on the results of the fifth pilot round, the OECD report indicated that during the period of the temporary personnel (disciplinary) commission (September 2019 - November 2021) "*there were some attempts by the Prosecutor General to use it to pressure anti-corruption prosecutors*", which did not result in anything.[143] Although the OECD report does not provide evidence of this, but only refers to the statements of 'stakeholders', this aspect is worth considering in the context of the period under study.

As it follows from Section II of this analysis, the QDCP is rather lenient towards the SAPO prosecutors. Moreover, as the 2022 Analysis also found, the Body in charge of disciplinary proceedings did not bring SAPO prosecutors to disciplinary responsibility for actions (plea bargaining in corruption cases) for which other prosecutors were regularly sanctioned[144] .

During the period under review, the QDCP imposed sanctions on SAPO prosecutors twice. More precisely, both sanctions were imposed on the same prosecutor, and the second sanction was dismissal. Examination of this case - and both decisions of the QDCP should be considered as one case - leaves no doubt that the QDCP was used to put pressure on the SAPO prosecutors. It is noteworthy that the initiator and driver of this case was the head of the SAPO.

The first sanction was imposed by the decision of the QDCP No. 95dp-22 of 03.05.2023. The decision describes in detail the situation that prompted the Head of the SAPO to file a disciplinary complaint: the prosecutor refused to agree on the notice of suspicion with the qualifications that the NABU detectives and the Head of the SAPO, who until recently was a NABU detective himself, wanted to see[145]. Since the prosecutor could not be 'convinced' at the operational meeting[146] convened by the head of the SAPO, where the participants were detectives and their supervisors, the case was transferred to another prosecutor, who did agree to the notice of suspicion with the qualifications that the NABU detectives and the head of the SAPO wanted. The operational meeting also decided that the dissenting prosecutor 'ineffectively exercised his powers'. This decision of the operational meeting gave rise to an internal investigation against the prosecutor, which was conducted on the basis of the decision of the Head of the SAPO. The internal investigation resulted in the filing of a disciplinary complaint by the Head of the SAPO against the prosecutor. In addition to the aforementioned 'ineffective exercise of powers' in the case in which the prosecutor and the Head of the SAPO had a conflict, the prosecutor was reproached for not making proper efforts to find criminal proceedings that were to come from another prosecutor's

[143] OECD (2022), Anti-Corruption Reforms in Ukraine: Pilot 5th Round of Monitoring Under the OECD Istanbul Anti-Corruption Action Plan, p. 96. Electronic resource: https://search.oecd.org/corruption/anti-bribery/corruption/acn/anti-corruption-reforms-in-ukraine-b1901b8c-en.htm.

[144] Analysis 2022, pp. 54-55.

[145] He had also never held the position of a prosecutor before this position.

[146] The operational meeting is a rudimentary management tool. Its idea is to force the prosecutor to bow to the opinions of a group of other colleagues, in particular, managers, by showing him that he is 'out of the group'.

office[147] , and for not insisting on the need to appoint a detective in one of the criminal proceedings in a timely manner. The QDCP agreed with the Head of the SAPO only in the part concerning the sluggish search for criminal proceedings materials that should have come from another prosecutor's office and the untimely appointment of a detective in criminal proceedings.

Even if one agrees with the QDCP that allegations of this level deserve a disciplinary sanction, there is no way to avoid the fact - as it is unambiguously and in detail described in the QDCP decision - that the internal investigation and, accordingly, the disciplinary complaint result of a conflict between the prosecutor and the head of the prosecutor's office[148]. It was obvious to the QDCP that the source of the disciplinary complaint against the prosecutor could not be a misdemeanour, but a conflict with the head of the prosecutor's office.

The 2019 Study and the 2022 Analysis consistently emphasised that the QDCP should "be *careful about how the process of documenting the challenged actions of the prosecutor during the internal investigation or other form of departmental* control"[149] . Therefore, in such cases, the QDCP should first of all focus on studying how the inspection of the prosecutor's performance began and whether there were any signs of the use of illegal inspection practices or other methods of pressure from the senior prosecutors. And if such practices or methods are identified, measures should be taken against the superiors, not the prosecutor.

The QDCP insists that it took this conflict into account when assessing this case and also considered that the source of the disciplinary complaint against the prosecutor could have been a conflict with the head of the prosecutor's office rather than an offence, where the prosecutor (unlike the head of the office) had all the legal grounds for the position he took. However, in the end, the QDCP assumed that the conflict was caused by the prosecutor's inadequate discharge of duties, and not that the conflict led to the abuse of disciplinary proceedings against the prosecutor. Although the decision of the QDCP does not give grounds for a certain conclusion that in this case the disciplinary proceedings were used to exert pressure on the prosecutor, this cannot be completely ruled out.

The second sanction was imposed by the decision of the QDCP No. 194dp-23 of 27 September 2023 (less than 5 months after the first sanction, when the disciplinary complaint was received 2 months after the first sanction). This decision also fully describes both the factual aspects of the alleged misconduct and the relevant context around it. The Head of the SAPO accused the prosecutor of including inaccurate data in his annual reports (for 2021 and 2022), namely, including in the reports indicators that occurred a year earlier (and not in the reporting year). The prosecutor did not deny that some of the

[147] According to the decision of the QDCP, the materials were mistakenly sent by another prosecutor's office to another prosecutor's office instead of the SAPO.

[148] After the QDCP rejected the part of the SAPO Head's accusations related to 'ineffective exercise of powers' in the case in which the prosecutor and the SAPO Head had a conflict, the prosecutor filed a report with the Council of Prosecutors on the threat to his independence. However, by the decision of the Council of Prosecutors No. 4-nzp-23 of 05.09.2023, the prosecutor's appeal was denied.

[149] Analysis 2022, page 23.

indicators did indeed originate from the previous year and that such indicators were added to the indicators of the reporting year. As explained by the prosecutor, as well as other SAPO prosecutors - heads of departments, this procedure for calculating the indicators for the reporting year (with the addition of some indicators of the previous reporting period) was agreed between the SAPO prosecutors. The reason for this arrangement was that according to the temporary procedure for performance evaluation of prosecutors, the report was to be submitted **not** *for the year that had passed,* but for the year that was coming up; to be more precise, prosecutors had to submit the report by 10 November of the reporting year. Due to this circumstance, prosecutors could actually report only for 10 months of the reporting year and, accordingly, the figures for 2 months (November-December) would remain unaccounted for. For this reason, the SAPO prosecutors, including the heads of SAPO departments, agreed that the unaccounted figures for 2 months (November-December) would be included in the report for the next year. For example, if a prosecutor submitted a report for 2022 with indicators for 10 months, he or she will be able to add the indicators for 2 months (November-December) of 2022 to the indicators for 2023. All SAPO prosecutors reported in this way. However, the Head of SAPO, who was appointed after the SAPO prosecutors had reached this agreement, and the QDCP considered it illegal and actually cancelled it in a joint action.

In its arguments, the QDCP stressed that (marked in bold by the author):

"*as an experienced lawyer, the prosecutor ... could not but understand that unauthorised* ***actions taken in violation of the requirements of a legal source that is*** *assessed as imperfect are an* ***unacceptable*** *way to eliminate gaps or shortcomings in legal regulation*"

"by the *above actions [the prosecutor], as an employee of the prosecution authorities, systematically engaged in behaviour that, in the opinion of an outside unbiased observer, looks like an attempt to ensure the satisfaction of personal interests to the detriment of public interests. For example, the existing procedure for remuneration of prosecutors stipulates that a significant part of the material remuneration (annual bonus) is calculated and paid by the employer (the Prosecutor General's Office) based on the performance indicators reflected in the annual reports. Thus, an employee's entering false information in a document, the content and assessment of which are in direct causal connection with the payment of funds to him/her, gives the impression of dishonest actions (additions) committed to obtain material benefits. Such behaviour damages the authority of the [prosecutor] as a prosecutor and the reputation of the prosecution service as a whole.*"

"*for Ukraine, completion of its European integration is currently a vital condition for preserving statehood and protecting sovereignty, given that this process largely depends on the assessment by Ukrainian society and international partners of the effectiveness of the implementation of the national anti-corruption policy, the SAPO staff is justifiably subject to increased expectations of professionalism, integrity, strict compliance with the requirements of laws and standards of prosecutorial ethics. In view of this, the employees of this unit of the national prosecutor's office are also subject to increased*

responsibility for violations of discipline and the rule of law, as each such fact discredits the image of Ukraine's anti-corruption institutions."

At the same time, the QDCP, without proper explanation, rejected the circumstances established by itself that "[t*]he said actions were agreed by the prosecutor with his immediate supervisor*", "in *agreement with the SAPO management, a decision was made allowing the prosecutors [of SAPO] to include in the current year's report their performance indicators for November - December of the previous year*", and that the head of the department in which the prosecutor worked "*personally recommended [the prosecutor] not to take them into account in his work for 2021, but to reflect them as the results of work in the next 2022*".

If we distil the arguments of the QDCP to their essence, the first of the quoted paragraphs of the decision is the best reflection of it (marked in bold by the author): "*as an experienced lawyer, the prosecutor ... could not but understand that unauthorised* ***actions taken in violation of the requirements of a legal source that is*** *assessed as imperfect are an* ***inadmissible*** *way to eliminate gaps or shortcomings in legal regulation*". In other words, the QDCP not only completely and without proper explanation rejected the agreement between the SAPO prosecutors, but also actually denied the authority of prosecutors (as a collective) to make such agreements (decisions, practices). Also, the QDCP considered the temporary procedure for evaluation of prosecutors as a reliable 'legal' source that has almost the force of law and cannot be interpreted by the team of prosecutors. At the same time, the QDCP did not see the prosecutor's actions as a failure to discharge or inadequate discharge of official duties, but instead as a systematic violation of the rules of prosecutor's ethics and actions that discredit the authority of prosecutor and may raise doubts about individual's objectivity, impartiality and independence, as well as the integrity and incorruptibility of the prosecution authorities as a whole (Article 43(1)(5) and (6) of the Law).

This position of the QDCP might give rise to concerns about such an approach, as it lacks a convincing explanation. Furthermore, it appears to also contradict the direct recommendations of GRECO and does not take into account the criticism of GRECO and the OECD of paragraphs 5 and 6 of part 1 of Article 43 of the Law.

During the fourth round of evaluations (2017), GRECO issued a recommendation (xxv)[150] on the periodic evaluation of prosecutors. The recommendation stressed not only that "*regular evaluations [should be] based on pre-established and objective criteria*", but also that prosecutors should be given sufficient opportunity "*to participate in the evaluation process*". The second interim compliance report (2023) on this recommendation noted[151] that "[t*]he [evaluation] system is still very new and more experience is needed in its implementation to ensure its adequacy and effectiveness*". In other words, not

[150] Fourth evaluation round. Evaluation Report, para 228. Electronic resource: https://rm.coe.int/grecoeval4rep-2016-9-p3-76-greco-19-23-2017-/1680737206

[151] Fourth evaluation round. Second Compliance Report, para 131. Electronic resource: https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680aaa790.

only is GRECO far from considering the temporary evaluation procedure to be a 'legal' source, it also welcomes feedback (criticism and suggestions) from prosecutors on how the evaluation system (should) not work. After all, the system is still in test mode.

Also during the aforementioned round of evaluation, GRECO made a recommendation (xxix)[152] to clarify the grounds for disciplinary liability of prosecutors. At the same time, it expressed concern that "the *list of specific disciplinary offences contains some rather vague categories, in particular, 'committing acts discrediting the title of prosecutor (...)' and systematic or one-off 'gross violation of the rules of prosecutorial ethics'. Such terms appear insufficient to ensure effective enforcement, legal certainty and to prevent possible abuse of disciplinary proceedings ... [and] that such a general reference [to the code of ethics] has been repeatedly criticised by GRECO as too vague.*"

Based on the results of the fifth pilot round, the OECD emphasises[153] that "*more clarity and certainty should be given to the grounds for disciplinary liability of prosecutors (and this is particularly acute with regard to the grounds set out in paragraphs 5 and 6 of part 1 of Article 43 of the Law)*". The OECD explicitly states that paragraphs 5, 6 and 1 "are ambiguous *and open to arbitrariness and abuse in their application*" and that the current code of ethics for prosecutors "*formulates ethical norms in terms that are too general and thus do not add clarity to the listed grounds [of disciplinary liability]*".

In view of the above criticisms of GRECO and the OECD, and as mentioned in the 2022 Analysis, the QDCP should have been very careful in applying Article 43(1)(5) and (6) of the Law. Instead, it did not do so. One could still agree with the QDCP's decision (and only to a certain extent) if the prosecutor actually acted solely on the basis of personal discretion and judgement. However, in this case, as the QDCP found, the situation was quite different: the prosecutor acted on the basis of an agreement of the SAPO prosecutors and under the supervision of the head of department. Moreover, the QDCP unwisely used grounds to discipline the prosecutor, which were deeply problematic and had been vigorously criticised by GRECO and the OECD for years.

Decisions like this, raise concerns because they seem to be contradictory and, on the other hand, quite artificial, since the whole potential misconduct delves around whether the performance of two months should have been included in the performance indicators of the current year or of the following year. If the intent of fraud is not proven, and the accused prosecutor shows that there were different ways to understand the filling in of the performance indicators, such a behaviour can only be seen as a mistake or, a minor offence (if negligence is found). The fact that this issue is used to dismiss a prosecutor raises questions and does not help in ensuring the role of the QDCP as defender of the accountability and independence of the prosecutors, especially vis a vis the superior prosecutor. It is not argued in the present report that there might not have been reasons at all to discipline the prosecutor in this case – the report does not review that decision; it is not its task and it lacks the knowledge of all circumstances –,

[152] Fourth evaluation round. Evaluation Report, para 259.
[153] OECD (2022), Anti-Corruption Reforms in Ukraine: Pilot 5th Round of Monitoring Under the OECD Istanbul Anti-Corruption Action Plan, p. 100. Electronic resource: https://search.oecd.org/corruption/anti-bribery/corruption/acn/anti-corruption-reforms-in-ukraine-b1901b8c-en.htm.

however as it is reflected in the QCDP decision, the reasoning does not appear to be convincing. Considering the highly sensitive cases the SAPO deals with, and the usual pressure the SAPO prosecutors are subject to, the argumentation in these cases should be particularly detailed and coherent. It would be interesting to observe the outcomes of this case, how the QDCP decided and if the prosecutor appealed that decision.

Conflict of interest

The 2022 analysis included the following recommendation (2022): **to request informational clarification from the Council of Prosecutors in disciplinary proceedings regarding the alleged conflict of interest of a prosecutor**. This recommendation stemmed from the fact that the Body in charge of disciplinary proceedings assessed the alleged conflict of interest of the prosecutor without consulting the Council of Prosecutors, although in 2019, part 9 of Article 71 of the Law was supplemented by paragraph 7-1 as follows: *'[The Council of Prosecutors] shall provide explanations on compliance with the requirements of the legislation on the settlement of conflicts of interest in the activities of prosecutors, the head or members of the Body in charge of disciplinary proceedings conducting disciplinary proceedings'*.

During the period under review, the QDCP imposed several sanctions for failure to report conflicts of interest[154], as well as for failure of a manager to resolve a conflict of interest[155]. In these cases, the QDCP mostly applied to the Council of Prosecutors for its explanation, or the case file contained an explanation from the NACP.

Accordingly, the QDCP **implemented the recommendation**.

At the same time, the QDCP should seek clarification from the Council of Prosecutors[156] in all such cases, as the Law directly specifies the Council of Prosecutors as the body that provides clarification on compliance with the requirements of the legislation on the settlement of conflicts of interest in the activities of prosecutors, the head or members of the Body in charge of disciplinary proceedings conducting disciplinary proceedings.

E. Proportionality of sanctions

The 2022 analysis contained the following recommendation (2022): develop a **catalogue of clear and unambiguous circumstances mitigating/aggravating liability, as well as criteria for determining the severity of the disciplinary offence**. This recommendation stemmed from the fact that "it *was difficult to understand from the decisions of the Body in charge of disciplinary proceedings [how] certain mitigating/aggravating circumstances affect the choice of sanction. The interdependence between such circumstances and the sanction imposed could not be traced even when comparing methodically the*

[154] QDCP decisions №№ 49дп-23 of 15.03.2023, 76дп-23 of 12.04.2023, 126дп-23 of 28.06.2023, 128дп-23 of 28.06.2023.
[155] QDCP decisions №№ 126дп-23 of 28.06.2023, 128дп-23 of 28.06.2023.
[156] QDCP Secretariat analysis, pages 47 – 48.

decisions imposing a sanction in the form of a reprimand and a sanction in the form of a ban on transfer or appointment. At the same time, from the decisions imposing a sanction in the form of dismissal, it seems that the choice of sanction is entirely dictated by the nature of the offence"[157] . However, it was also noted that "*[o]bviously, it will take some time to resolve this issue, because it is through extensive disciplinary practice that a catalogue of clear and unambiguous circumstances mitigating/aggravating liability can be derived. However, the accumulation of a sufficient number of examples from which such a consistent catalogue can be derived should be carried out in a methodical* manner."[158]

The period under review demonstrates that the QDCP has **begun to implement this recommendation**. The analysis of the QDCP Secretariat[159] offers a first attempt to catalogue the circumstances that mitigate/aggravate liability.

The QDCP considers **mitigating** circumstances to include:

- sincere repentance[160] ;
- a positive description of the prosecutor, including achievements in professional activity[161] ;
- absence of other disciplinary sanctions[162] ;
- a long period of work in the prosecutor's office[163] ;
- absence of significant negative consequences for the rights and legitimate interests of other persons[164] ;
- organising resistance to military aggression or performing military service in the context of Russian aggression against Ukraine[165] .

The QDCP includes the following circumstances as **aggravating** circumstances:

- insincerity[166] ;
- negative or mediocre characterisation of the prosecutor[167] ;
- disciplinary action[168] ;
- gross misconduct[169] ;

[157] Analysis 2022, page 50.
[158] Ibid.
[159] Analysis by the HCJ Secretariat, pp. 47-48.
[160] For example, decisions of the CDCP No. 66dp-22 of 01.06.2022, 79dp-22 of 15.06.2022, 229dp-23 of 13.12.2023.
[161] For example, decisions of the CDCP No. 37dp-22 of 27.04.2023, 58dp-22 of 25.05.2023, 229dp-23 of 13.12.2023.
[162] For example, the decisions of the CDCP No. 48dp-22 of 11.05.2022, 58dp-22 of 25.05.2023, 221dp-23 of 22.11.2023.
[163] For example, decisions of the QDCP No. 48dp-23 of 11.05.2022, 79dp-22 of 15.06.2022.
[164] For example, the decisions of the CCPD No. 8dp-22 of 12.01.2022, 48dp-22 of 11.05.2022.
[165] For example, decisions of the QDCP No. 179dp-22 of 19.10.2022, 200dp-23 of 04.10.2023.
[166] For example, decisions of the QDCP No. 8dp-22 of 12.01.2022, 181dp-22 of 19.10.2022, 29dp-23 of 08.02.2023.
[167] For example, decisions of the QDCP No. 48dp-22 of 11.05.2022, 197dp-23 of 04.10.2023.
[168] For example, decisions of the CCPD No. 193dp-23 of 27 September 2023, 197dp-23 and 200dp-23 of 04 October 2023, 212dp-23 of 08 November 2023.
[169] For example, decisions of the CCPD No. 33dp-22 of 11.04.2022, 214dp-23 of 15.11.2023, 229dp-23 of 13.12.2023.

- ongoing or intentional nature of the violation[170] ;
- disciplinary offence undermines the credibility and authority of the prosecutor's office[171] ;
- negative publicity from a disciplinary offence[172] .

This list is a good start by this composition of the QDCP. However, it obviously requires further development and verification of their suitability and reliability. Such verification will be possible only through further long-term disciplinary practice of more than one QDCP composition. On the other side, it should be reconsidered whether some of the applied aggravating and mitigating circumstances are aligned with a sanctioning system and the principle of equality. For example, considering the "long work of a prosecutor in office" as a mitigating circumstance, does not seem to be coherent, precisely when experience should exclude certain misconducts. On the other side, the fact that the concrete offence negatively affects the authority of the PPS, should not be seen in itself as an aggravating circumstance, but as a constitutive element for the disciplinary offence, as it is set out in Article 43.1.5 Law. Finally, the characterisation by others as a mitigating/aggravating circumstance seems to be controversial. However, wording such as "undermines trust and credibility" and "caused a public outcry" are very vague terms that rarely comply with the principle of legal certainty. Moreover, similar wording in Article 43 of the Law has already been criticised by GRECO and the OECD. These examples of aggravating/mitigating circumstances show **how necessary** it is for the disciplinary offences to be defined in a more specific way.

It is also necessary to return to the issue of determining the nature (severity) of the offence. As noted in the 2022 Analysis, "*[w]hen defining this aspect, the QDCP often uses the category of "gross", the content of which remains unclear (the relevant criteria are still absent). Moreover, as a rule, it is stated that "the gross nature of the said disciplinary offence of the prosecutor ... is obvious"[173]. Instead, as emphasised in the 2019 Study[174] , the scope of "gross" misconduct should include cases where the prosecutor violates human rights and freedoms or creates obstacles to their exercise. In addition, cases of real or ideal aggregation (when the challenged act contains signs of several misdemeanours defined in different paragraphs of part 1 of Article 43 of the Law) can be considered as more serious misdemeanours. The classification of the remaining misdemeanours as "gross" requires reliable and clear criteria for* inclusion"[175] . This description **remains relevant** in the light of the period under study.

Finally, a case concerning the decision of the QDCP No. 133dp-23 of 12.07.2023 should be mentioned. This decision imposed a sanction on the prosecutor in the form of a one-year ban on transfer or appointment for refusing to take a blood alcohol test after the police stopped his car. At the same time, a member of the QDCP disagreed with the decision of the commission in terms of the sanction imposed

[170] For example, the decisions of the QDCP No. 190dp-23 of 27.10.2023, 200dp-23 of 04.10.2023.
[171] For example, decisions of the QDCP No. 29dp-23 of 08.02.2023, 65dp-23 of 30.03.2023.
[172] For example, the decision of the QDCP No. 213dp-22 of 23.11.2022.
[173] Decisions of the QDCP No. 109dp-23 of 24.05.2023, 125dp-23 of 21.06.2023, 140dp-23 of 19.07.2023, 225dp-23 of 06.12.2023.
[174] The 2019 study, pp. 122-123.
[175] Analysis 2022, page 49.

and expressed a separate (partially divergent) opinion.[176] In this opinion, the QDCP should have dismissed the prosecutor for his behaviour. This case is important not only because it is the first (recorded) case of a dissenting opinion in the history of the QDCP (first and second composition together). It is important in the context of proportionality of sanctions. In fact, there was a **debate within the QDCP** on the following question: are there any misdemeanours so "gross" (grave, egregious, etc.) that the prosecutor's liability cannot be mitigated by any set of circumstances that traditionally mitigate liability? In other words, is there a type of misdemeanour for which the appropriate sanction will always be the most severe available? Even if the answer to this question is yes, this type of a disciplinary offence must be properly defined. That is, there should be clear criteria for determining (distinguishing) the gravity of such a type of misconduct from the rest.

Recommendation (2022, revised): to continue developing a catalogue of clear and unambiguous circumstances that mitigate/aggravate liability, as well as to develop criteria for determining the severity of the offence. Ideally this should be done by way of legal provisions.

[176] Dissenting opinion of the QDCP member Polischuk V.V. to the QDCP decision No. 133dp-23 of 12.07.2023.

V. Closing disciplinary proceedings

As noted in the 2022 Analysis, "*[c]ontinuations of proceedings are characterised by a lower frequency and variety of situations that require a multifaceted analysis. However, their importance for shaping disciplinary practice cannot be* overestimated *at times*"[177] .

A. Statistics on closed proceedings

During the period under review, the QDCP closed proceedings against 127 prosecutors. The figures for these cases are **largely similar** to the figures for sanctions cases (as well as the figures from the 2022 Analysis) and relate to:

a) of male prosecutors (almost 79%);
b) prosecutors of local prosecutor's offices (almost 64%), followed by prosecutors of regional prosecutor's offices (almost 23%);
c) prosecutors who do not hold an administrative position (over 75%);
d) prosecutors who have been working in the prosecutor's office for 10 years or more (almost 83%);
e) of prosecutors who had no sanctions during the year (over 96%).

In terms of percentage, prosecutor's offices located in Kyiv accounted for almost 23% of closures, and prosecutor's offices in Dnipropetrovs'ka oblast accounted for over 14%. (These prosecutor's offices also had the "first place" in the previous period under review, although prosecutor's offices from Dnipropetrovska oblast were in the first place then). This is followed by prosecutor's offices from Kyiv region - 9.4%, Cherkasy region - 7.1%, Zhytomyr and Odesa regions - 6.3% each, and Donetsk region - 5.5%.

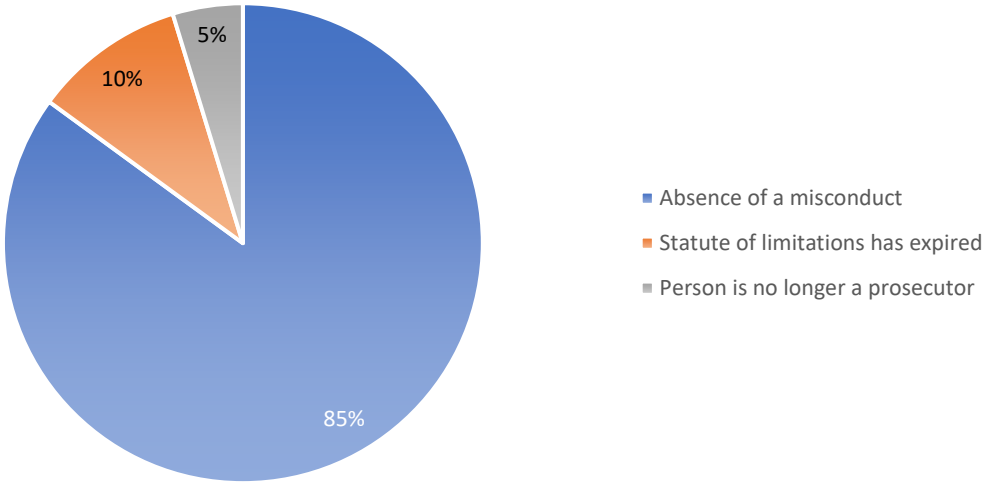
Most proceedings were closed against prosecutors from the Pravoberezhna District Prosecutor's Office of Dnipro (9), the Prosecutor General's Office and the Kyiv City Prosecutor's Office (7), the Dnipro Regional Prosecutor's Office (5), and the Prymorskyi District Prosecutor's Office of Odesa and the Korosten' District Prosecutor's Office (Zhytomyr region) (4). Seven other prosecutor's offices had 3 cases each: Ternopil Regional Prosecutor's Office, Shevchenkivskyi District Prosecutor's Office of Zaporizhzhia, Donetsk Regional Prosecutor's Office, Obukhiv District Prosecutor's Office (Kyiv region), Korostyshiv District Prosecutor's Office (Zhytomyr region), Shevchenkivskyi District Prosecutor's Office of Kyiv, and Chernivtsi District Prosecutor's Office.

During the period under review, the QDCP - as well as the Body in charge of disciplinary proceedings in the previous analysed period - most often closed proceedings due to the absence of a misconduct - 104 times (85%). Compared to the previous period under review, the number of proceedings closed due to the expiry of the one-year period within which a prosecutor can be brought to disciplinary

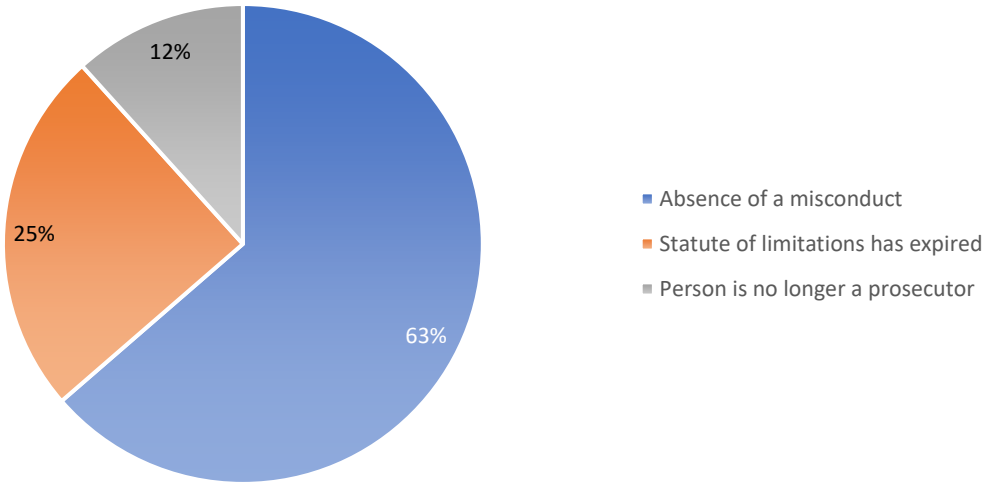
[177] Analysis 2022, page 51.

responsibility **has more than halved** (10% vs. 25%). As the QDCP points out in its report on disciplinary practice for 2023, "*in disciplinary proceedings closed due to the expiration of the time limit for bringing a prosecutor to disciplinary responsibility, disciplinary complaints were filed by the complainants with the Commission in many cases (in respect of 12 prosecutors, or 92%) after the expiration of such a time limit or shortly before it* expired"[178] . Also, 6 proceedings (less than 5%, against 12% in the previous analysed period) were closed due to the fact that the person is no longer a prosecutor.

GROUNDS FOR CLOSING THE PROCEEDINGS| **2024** DATA

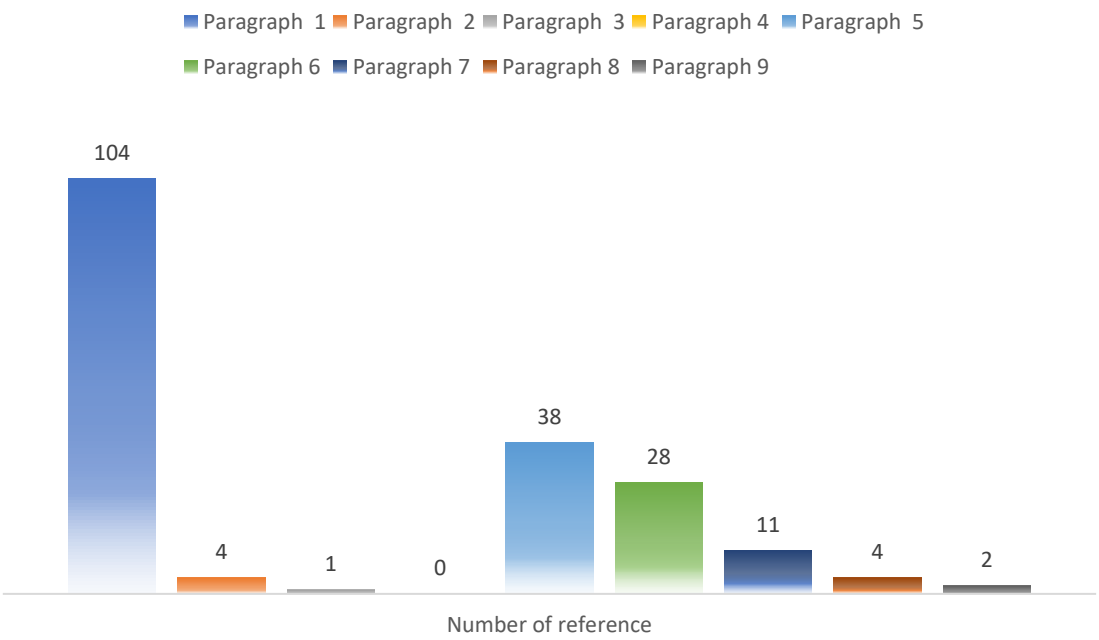


GROUNDS FOR CLOSING THE PROCEEDINGS | **2022** DATA



[178] Information on the practice of disciplinary proceedings against prosecutors for 2023, paragraph 32. Electronic resource: https://kdkp.gov.ua/page/zvity-komisii

As in the cases where the proceedings ended with the imposition of a sanction during the period under review, the **most frequent** grounds for closure in the closed proceedings were non-performance or improper performance of official duties - almost 82% of cases (Article 43(1)(1) of the Law). They are followed by cases where two grounds are often mentioned simultaneously: committing actions that discredit the authority of a prosecutor and may raise doubts about his or her objectivity, impartiality and independence, as well as affect the integrity of the prosecution service (Article 43(1)(5) of the Law) and systematic (two or more times within one year) or one-time gross violation of the rules of prosecutors' ethics (Article 43(1)(6) of the Law).



B. Specific issues in closed proceedings

Materials of the parliamentary provisional investigative commission

During the period under review, the QDCP received a rather unusual complaint from a member of parliament, the head of the temporary investigative commission of the Verkhovna Rada. The provisional investigatory commission was established to investigate the death of another MP who died suddenly in a taxi at the age of 33. A pre-trial investigation was also conducted in connection with the death of the MP, which ended in closure, as the investigators, supported by the prosecutors, believed that the MP's death was caused by "acute coronary insufficiency, acute coronary heart disease".

The materials of the Temporary Investigation Commission were sent to the QDCP because the Temporary Investigation Commission considered the pre-trial investigation to be "unsatisfactory" and found the work of the prosecutors who provided procedural guidance in the pre-trial investigation to be "negligent", in particular, in terms of conducting primary investigative actions.

Although the decision of the QDCP No. 183dp-23 of 12.09.2023 to close disciplinary proceedings against prosecutors who provided procedural guidance in the pre-trial investigation is generous in detail, and the QDCP's conclusions look convincing, it is not possible to provide an objective third-party assessment. After all, as follows from the decision of the QDCP, the materials of this disciplinary proceeding include many volumes.

In any event, as pointed out above, it seems that when there is a lack of judicial remedy in the proceedings, the practice of the claimants is to file a disciplinary complaint. This should be avoided. The solution is not putting every prosecutor (or judge) under disciplinary proceedings for every mistake in the cases they handle, but to provide adequate mechanisms to correct those mistakes within the proceedings. And only in case of a clear breach of the law and/or the official duties by these professionals, the QDCP should apply sanctions with deterrence effect.

Ineffective procedural guidance

The 2022 analysis contained the following recommendation (2022): to be **more scrupulous in considering alleged cases of ineffective procedural guidance in criminal proceedings concerning crimes against human life, health and personal safety**. This recommendation stemmed from the fact that "*according to Article 3 of the Constitution, a person, his or her life and health, honour and dignity, inviolability and security are recognised as the highest value in Ukraine. In addition, the European Court of Human Rights has repeatedly stated that states must be particularly vigilant and effectively (thoroughly and objectively) investigate cases of unlawful deprivation of life; rape; acts of violence, including racially motivated violence; attacks on demonstrators, including the LGBT community. A separate category of cases that require vigorous measures from states is the use of force and weapons by law enforcement officials."*[179] *These high positive obligations of the state require prosecutors to treat this category of criminal proceedings "with the utmost care and seriousness" and to involve them more closely in the investigation process (at least at the level of careful planning and monitoring of the implementation of the investigation plan*)"[180] .

During the period under review, the QDCP closed disciplinary proceedings several times in cases where the carrying out the investigation of violent crimes was ineffective.[181] However, it cannot be said that these cases were treated with greater care and thoroughness by the QDCP.

Accordingly, the **recommendation remains in place**.

It should be added that in similar cases, the QDCP **could have acted** as thoroughly as it did when reviewing the materials of the Verkhovna Rada's provisional investigative commission mentioned above.

[179] Standards of pre-trial investigation / Belousov Y., Wenger V., Gryga R., Gulmahomedov D., Derkach S., Krapyvin E., Orleans A., Parkhomenko P., Petrakovskyi V., Pirogova O., Semak I., Yavorska V. ; International Renaissance Foundation.
[180] Analysis 2022, page 54.
[181] Decisions of the QDCP No. 21dp-22 dated 25.01.2023, 96dp-23 dated 03.05.2023.

Courts found no violations

The 2022 analysis contained the following recommendation (2022): to **review the practice of not bringing prosecutors to disciplinary responsibility for actions/decisions that fall within the competence of judges; at least to ensure equal treatment of prosecutors regardless of their place of work**. This recommendation stemmed from the fact that the Body in charge of disciplinary proceedings held prosecutors accountable for acts for which judges were not disciplined; in addition, in such cases, the SAPO prosecutors were not disciplined either.

No such issues were identified during the period under review. Accordingly, it **appears that the QDCP has implemented the recommendation**.

VI. Appeal against the results of disciplinary proceedings

The decision of the QDCP based on the results of disciplinary proceedings can be appealed to the court or to the HCJ, as the Constitution (Article 131) directly states that the HCJ is the appellate body for the disciplinary body of prosecutors. However, the Council of Europe has repeatedly recommended Ukraine to remove this provision from the legislation so that only courts review the decisions of the QDCP for several years now[182] .[183]

A complainant who disagrees with the decision of the QDCP can appeal it only to the HCJ, and only if the QDCP grants the leave to appeal. During the monitored period, no cases were identified where the QDCP refused to grant the leave to appeal. However, in one case, the HCJ left the complaint against the QDCP decision without consideration and returned it to the complainant[184] , because the QDCP did not grant leave to appeal; however, the QDCP decision did not mention that the complainant had applied for such leave to appeal[185] .

A. Appeals to the HCJ

During the period under review, the HCJ managed to review 11 decisions of the QDCP, of which **only 3 were cancelled**. Also, the review of 2 decisions adopted by the QDCP in 2023 was suspended due to a parallel court appeal[186] . In these 13 cases, the appellants were usually prosecutors (8 out of 13). In 2 of the cancelled cases, the appellants were prosecutors, and the sanctions cancelled were dismissal from the prosecutor's office and a reprimand.

The HCJ's decision cancelling the QDCP's decision to dismiss the prosecutor was based on the fact that the prosecutor had submitted a voluntary resignation, which was not properly considered, long before the disciplinary proceedings against him were initiated, which resulted in his 'forced' dismissal. This fact was established by a decision of the Supreme Court in an administrative case brought by a prosecutor. Therefore, as the HCJ pointed out, the prosecutor's office has an obligation to dismiss the prosecutor at his or her own request[187] .

The decision of the QDCP imposing a reprimand was cancelled by the HCJ on the grounds that the time limit for bringing to disciplinary responsibility had expired. The HCJ agreed with the QDCP that the

[182] Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, Venice Commission, 14 October 2013, CDL-AD(2013)025-e, para 140. Available at: https://www.venice.coe.int/webforms/documents/?PDF=CDL-AD(2013)025-e

[183] Fourth evaluation round "Prevention of corruption in relation to members of parliament, judges and prosecutors", Evaluation Report, para 263. Electronic resource: https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207.

[184] Decision of the HCJ No. 1282/0/18-23 of 18.12.2023.

[185] Decision of the QDCP No. 89dp-23 of 26.04.2023.

[186] Decisions of the HCJ No. 1345/0/15-23 of 19.12.2023 and 75/0/15-24 of 30.01.2024.

[187] Decision of the HCJ No. 696/0/15-24 of 07.03.2024.

misconduct was of a 'continuing character', but did not support the QDCP in determining when the misconduct ended.[188]

In the third case, the appellant was the head of the prosecutor's office, who succeeded in cancelling the decision of the Qualification and Disciplinary Commission to close the disciplinary proceedings. However, in this case, the HCJ simultaneously issued a new decision to close the disciplinary proceedings, changing the grounds for such closure as being time-bared for disciplinary accusation[189] .

It should be noted that in 2023, the HCJ prepared a Compendium of the practice of considering appeals against decisions in disciplinary proceedings against prosecutors for 2017-2021. The summary was extensive and very detailed. Therefore, only some of the conclusions should be mentioned in the present report. The HCJ points out:

"*2. During 2017-2021, the High Council of Justice adopted 125 decisions after reviewing appeals against decisions in disciplinary proceedings against prosecutors, including 62 decisions (49.6%) upholding the Commission's decisions, 25 decisions (20%) cancelling/amending the Commission's decisions, and 38 decisions (30.4%) dismissing appeals against the Commission's decisions. At the same time, the review of decisions on the merits mostly resulted in decisions to uphold the Commission's decisions - over 71%.*

<...>

6. When deciding whether there are grounds for cancelling the Commission's decisions in disciplinary proceedings against prosecutors, the Council proceeds from the following:

- In order to bring a prosecutor to disciplinary responsibility, a reliable fact of a violation by a particular person must be established;

- when qualifying the actions of the prosecutor and referring to the failure to fulfil the obligation, the relevant obligation must be imposed on the prosecutor by the law;

- each established fact of a violation and the existence of a misconduct must be supported by admissible and appropriate evidence;

- incorrect qualification of the prosecutor's actions is a ground for cancellation of the decision to bring him/her to disciplinary responsibility;

- violation of the disciplinary procedure is grounds for cancellation of the decision in such proceedings;

- In each case, the Commission is obliged to establish the fact of disciplinary misconduct in the actions of the prosecutor and the grounds for bringing him/her to disciplinary responsibility;

- the expiry of the time limits for imposing a disciplinary sanction is a ground for closing disciplinary proceedings, and therefore, the relevant issue should be clarified in each proceeding.

The studied practice, in turn, shows that the Council cited the following grounds for cancelling decisions:

[188] Decision of the HCJ No. 716/0/15-24 of 12.03.2024.
[189] Decision of the HCJ No. 1022/0/15-24 of 04.04.2024.

- absence of disciplinary offence in the actions of the prosecutor due to failure to establish the objective or subjective side of such offences, lack of evidence to confirm their commission;

- incorrect qualification of the prosecutor's actions;

- violation by the Commission of the procedure for conducting disciplinary proceedings against a prosecutor (in particular, one that resulted in a violation of the right to defence);

- expiry of the term for imposing a disciplinary sanction".

Therefore, as correctly stated in this Compendium of the HCJ, it "*is a kind of guideline for both the Body in charge of disciplinary proceedings conducting disciplinary proceedings against prosecutors and for prosecutors in respect of whom decisions have been made as a result of the relevant disciplinary proceedings, and for persons who have filed a disciplinary complaint about a prosecutor's disciplinary* offence"[190] .

B. Appeal to the court

At the beginning of 2020, the law changed the jurisdiction of cases against the QDCP: from the Supreme Court to the District Administrative Court, whose territorial jurisdiction extends to Kyiv. Since then, a dispute between the prosecutor and the QDCP can potentially go through 5 rounds of court proceedings: First Instance, Appellate Instance, Cassation Instance, Joint Chamber of the Cassation Court and the Grand Chamber of the Supreme Court. We can agree with the QDCP Secretariat that this change has slowed down the development of case law on appeals against QDCP decisions[191] .

During the period under research, the courts of at least the first instance managed to review 27 decisions of the QDCP, of which **only 3 were cancelled**. In addition, in one case, the complainant withdrew the application [192] , and in another, the application was left without consideration[193] . It is noteworthy that in the vast majority of cases (17, or 63%), the decision of the QDCP that imposed a disciplinary sanction in the form of a reprimand was appealed in court. In 7 cases (or 26%), dismissal was appealed; in two cases the closure was appealed and in one case the prosecutor appealed ban on transfer or appointment.

Out of the three decisions of the QDCP that were cancelled by the courts, two of them were about a reprimand and one about dismissal. So far, only in one case (regarding the reprimand) the case on review

[190] Ibid, page 50.

[191] Analysis by the HCJ Secretariat, p. 53.

[192] Ruling of the Kyiv District Administrative Court of 19.06.2024 in case 320/13449/24. Electronic resource: https://reyestr.court.gov.ua/Review/119845017

[193] Ruling of the Kyiv District Administrative Court of 07.07.2023 in case No. 640/9556/22. Electronic resource: https://reyestr.court.gov.ua/Review/112061109

of the decision of the Qualifications and Disciplinary Commission has been completed in the cassation court[194]. The other two cases are at the stage of appeal (on the appeal of the QDCP)[195] .[196]

The mere fact that a reprimand reaches the Supreme Court and gives rise to an appeal in cassation should be reconsidered, both in terms of efficiency, costs and significance. Such opportunities for continuing disputes throughout the judicial system on minor issues, including at the level of the Supreme Court, are completely contrary to European experience.

The decision of the Court of Appeal[197] to cancel the decision of the QDCP No. 9dp-22 of 12 January 2022 and the decision of the Court of First Instance[198] to cancel the decision of the QDCP No. 151dp-22 of 21 September 2022 are mainly based on the fact that the QDCP did not comply with the declared standard of proof "beyond reasonable doubt", in particular, based its conclusions on somewhat contradictory evidence that leaves room for discussion.

It should be noted here that the 2019 Study and the 2022 Analysis consistently emphasised that the QDCP should "*abandon the use of the 'beyond reasonable doubt' standard of proof in disciplinary proceedings in favour of a less stringent standard*"[199]. As noted earlier, while the QDCP started implementing this recommendation.

The decision of the court of the first instance[200] on cancellation of the decision of the QDCP No. 234dp-23 of 20.12.2023, mainly emphasises that:

- the QDCP cannot apply Article 43(1)(5) of the Law as a ground for disciplinary liability for late submission of integrity declarations, as late submission of integrity declarations was not included in the relevant order of the Prosecutor General, which defines the list of actions that discredit the authority of a prosecutor and may raise doubts about his objectivity, impartiality and independence, as well as the integrity of the prosecution authorities[201] ;
- in its decision, the QDCP expressed a contradictory position, in particular, stating that submission of integrity declarations is an obligation under the Law, and therefore, in the court's opinion, such cases should fall under Article 43(1)(1) of the Law;

[194] Decision of the Administrative Court of Cassation of 15.04.2024 in case K/990/11297/24. Electronic resource: https://reyestr.court.gov.ua/Review/118367469
[195] Decision of the Sixth Administrative Court of Appeal of 23.11.2023 in case 640/17125/22. Electronic resource: https://reyestr.court.gov.ua/Review/115177010
[196] Decision of the Sixth Administrative Court of Appeal of 15.07.2024 in case 320/1079/24. Electronic resource: https://reyestr.court.gov.ua/Review/120379692
[197] Resolution of the Sixth Administrative Court of Appeal of 19.02.2024 in case No. 640/6156/22. Electronic resource: https://reyestr.court.gov.ua/Review/117084351
[198] Decision of the Kyiv District Administrative Court of 13.10.2023 in case No. 640/17125/22. Electronic resource: https://reyestr.court.gov.ua/Review/114196973
[199] 2019 Study, pp. 60-63; 2022 Analysis, pp. 25-26.
[200] Decision of the Kyiv District Administrative Court of 13.06.2024 in case No. 320/1079/24. Electronic resource: https://reyestr.court.gov.ua/Review/119998012
[201] The said order of the Prosecutor General refers to an integrity 'questionnaire', not a 'declaration'.

- an extract from the list of user actions in the integrity declaration verification subsystem is inadmissible because it does not meet the definition of an electronic document and was provided in an incomplete form.

Leaving aside the rather formalistic approach of the first-instance court to the rules of evidence and admissibility of evidence, it is only appropriate to recall that the 2019 Study and the 2022 Analysis consistently emphasised that the QDCP should not use the list of actions that discredit the authority of prosecutor and that may raise doubts about his or her objectivity, impartiality and independence, as well as the question the integrity of the prosecution authorities as a whole, as defined by the relevant order of the Prosecutor General, and instead "*formed its own approach to determining the range of such acts through its own disciplinary* practice"[202] .

Finally, it is worth quoting the information provided by the HCJ in its summary: "During the *summary, it was found that during 2017-2021, following the judicial review of the HCJ decisions appealed against in complaints against decisions in disciplinary proceedings against prosecutors, the Supreme Court issued decisions upholding 11 decisions of the Council and cancelling only 5 decisions of the HCJ (of which 4 HCJ complaints have already been reviewed, and one complaint has not yet been considered). Thus, the Supreme Court reviewed 16 decisions of the Council on the merits, which is 12.8% of the total number of decisions made as a result of consideration of appeals against decisions in disciplinary proceedings against prosecutors (125*)"[203] .

[202] Analysis 2022, page 44.

[203] Summary of the practice of consideration by the HCJ of complaints against decisions in disciplinary proceedings against prosecutors in 2017-2021, page 42.

Conclusions and Recommendations

1. It is positive to see that the QDCP is moving towards alignment with European standards. The activities of the QDCP are generally based on the requirements of the Law, and the trend towards consistency and predictability is becoming stronger and more visible. It is also positive that the pattern of sanctions imposed indicates that the QDCP treats prosecutors of different levels equally, that the length of the proceedings has not increased significantly despite increased workload, and that the decisions are more harmonised in terms of structure and reasoning. All these factors are positive and show that, despite the difficult circumstances of the country which is at war and has large number of prosecutors devoted dealing with investigations of war crimes and working under high emotional pressure, the main institutional framework is still functional and open to improvements.

2. The expert analysis showed that the second composition of the QDCP continues to ensure the continuity of the disciplinary practice formed by the first composition of the QDCP in 2017-2018. At the same time, the second composition of the QDCP implemented a number of previous recommendations, thus deviating from the previously established practice. In particular, it refused to use the standard of proof 'beyond reasonable doubt' in disciplinary proceedings in favour of a less stringent standard; it refused to recognise the loss of a prosecutor's official service card as a disciplinary offence.

3. Other significant improvements have been made in areas where the Council of Europe and other international organisations have already pointed out the need to remedy shortcomings. For example, ensuring the presence of prosecutors in disciplinary proceedings, which is an additional guarantee of fairness, namely the right to be heard and the right to defend oneself, to make both oral and written statements.

4. However, there are also many other recommendations that remain relevant due to lack of or insufficient incomplete implementation. Among them:

- to open disciplinary proceedings on complaints containing specific factual data on the nature of actions/inactions of prosecutors in cases of failure of the prosecutor to comply with the decision of the investigating judge or court, which cancelled the decision, actions or inaction of the prosecutor and/or declared it illegal and obliged to take certain actions

As noted in the 2022 Analysis, this primarily concerns the deliberate failure to comply with the investigating judge's decisions, for example, on the return of property. In this aspect, consideration should also be given to amending the Law, as the party's attempts to enforce the court decision through disciplinary proceedings against the prosecutor are not adequate. In addition to disciplinary proceedings, it should be possible to apply to a judicial authority to assess the execution. The fact that the prosecutor does not execute the court decision and does not even ensure its execution is a very

serious deficiency of the national justice system. This was highlighted in the previous report as an error that needs to be addressed, primarily through disciplinary proceedings against a prosecutor who fails to comply with a court decision, but also more broadly (through legislative changes) to ensure more effective protection of rights.

- to open disciplinary proceedings based on complaints from individuals and legal entities containing specific factual data on the nature of actions/inactions of prosecutors, regardless of the exhaustive mention of all elements of the offence

In several decisions, the QDCP refused to open disciplinary proceedings precisely because of the lack of supporting documents, as was evident in the case of judges' complaints about the failure of a prosecutor to appear in court, when his/her presence was mandatory and he/she had been duly notified. The fact that these types of situations occur, and that the response is to open possible disciplinary proceedings, which the QDCP is apparently trying to stop by refusing to open proceedings, raises some concerns. It should be investigated whether this is a common practice of the prosecutor's office, whether it is due to a lack of proper communication between the court and the prosecutor's office, or whether it is due to work overload. If absences are justified, they should not lead to disciplinary action, for example, when they are due to poor organisation or communication. Otherwise, the credibility of the QDCP is at risk if prosecutorial absence from court is seen as normal and the QDCP refuses to open proceedings on complaints from judges.

The vast majority of the conclusions and recommendations made in the 2019 Study and the 2022 Analysis also remain relevant.

5. As noted in the 2022 Analysis, some of the identified problems or criticisms, including those of a cross-cutting nature, are caused by the legislator: unclear and ambiguous grounds for disciplinary liability, a narrow range of disciplinary sanctions, and the absence of the institution of disciplinary inspectors. However, the overwhelming majority of the repeated recommendations can be implemented by the QDCP on its own.

6. The QDCP has begun methodically developing appropriate criteria and approaches to assessing certain cases, determining the severity of a disciplinary offence or the proportionality of a sanction, which will allow overcoming even the problems envisaged by the legislator. While this is a positive development, this initiative is far from complete. More legal certainty is needed in this area.

7. The QDCP has significantly improved its analysis and assessments in cases of violations of anti-corruption legislation, in particular in cases of alleged conflict of interest. The reason for this is the involvement of the expertise of other (competent) bodies, such as NAPC and the Council of Prosecutors. There has also been a noticeable improvement in the analysis and assessments of the

QDCP in cases where there is a need to differentiate between the responsibility of different participants in criminal proceedings.

8. The period under review does not give grounds to assert that the QDCP is a threat to the SAPO prosecutors. However, some of the cases reviewed, as well as recent innovations in the disciplinary proceedings against the SAPO prosecutors, may result in unequal application of disciplinary liability to the SAPO prosecutors and other prosecutors.

9. Most of the decisions to refuse to open proceedings are made in relation to complaints of 'failure to discharge or inadequate discharging of official duties'. Statistical information shows that the vast majority of complaints filed by prosecutors themselves result in disciplinary proceedings being opened, while complaints filed by legal entities or individuals (including lawyers) are dismissed. This may be perfectly normal, as prosecutors are closer to other prosecutors and may therefore have more information about duties that other prosecutors are not performing properly. However, it should be further analysed whether this has a solid substantive basis - that complaints filed by persons other than prosecutors are manifestly ill-founded - or whether it is rather a pattern of inadequate protection of the prosecutorial community from external complainants (in the sense that only prosecutors can hold other prosecutors accountable).

In this regard, it is surprising that complaints filed by judges are rejected in more than 60% of cases, as the judges complaining do not lack legal knowledge. Simply put, the large number of refusals by the members of the QDCP to open disciplinary proceedings based on complaints from judges about prosecutors' failure to appear in court is of some concern. The QDCP should either articulate its position in more detail and convincingly in the relevant decisions or abandon the current approach to the consideration of this category of cases.

10. The QDCP and its members/chairs continue to improve the quality and structure of their decisions, but they are still overloaded with citations of legal information and not always the necessary factual details of the cases considered.

11. The low success rate of attempts to challenge the decisions of the QDCP in the HCJ and courts indicates that they are quite reasonable and that the QDCP members/chairs are prudent in their role.

12. There is a need for a number of changes at the legislative level. It is clear that the following recommendations should not be implemented directly by the QDCP, which has no legislative power. However, it is useful to mention them here so that the QDCP can highlight such reforms and, if possible, initiate or support some of them. *The following reforms are worth considering*:

- the list of disciplinary offences should be clarified. In particular, the most frequently mentioned grounds for disciplinary liability need to be more clearly and precisely stated, as in their current form they

do not comply with the principle of legality required for the imposition of legal sanctions. The present recommendation refers to paragraphs 1, 5, 6 of part 1 of Article 43 of the Law, which have been repeatedly criticised.

- it is worth considering changing the procedure for appealing against the decisions of the QDCP. It seems neither necessary nor effective to review any disciplinary sanctions at the highest level of the judiciary; as for reprimands, the appeal process should be completed in the HCJ or in the court of first instance.

- the powers of the Head of the SAPO to adopt regulations and to intervene in the evaluation and promotion of officials within the SAPO should be reconsidered, as the amendments to the Law in this regard do not seem to be in line with European standards and in some respects contradict the case law of the CJEU.

A. Consolidated Recommendations

As to practice of disciplinary proceedings against prosecutors by the QDCP

i. To open disciplinary proceedings based on complaints containing specific factual data on the nature of actions/inactions of prosecutors in cases of failure of the prosecutor to comply with the decision of the investigating judge or court, which cancelled the decision, actions or inaction of the prosecutor and/or declared it illegal and obliged to take certain actions;

ii. To open disciplinary proceedings based on complaints of individuals and legal entities containing specific factual data on the nature of actions/inactions of prosecutors, regardless of the exhaustive mention of all elements of misconduct;

iii. To continue analysing the reasons for refusing to open disciplinary proceedings, especially those coming from judges;

iv. To continue analysing and providing consistency of the practice and decisions about recusals of the members of the QCDP and the suspension of proceedings. Albeit this does not seem to be problematic at present, preventing future inconsistencies is relevant;

v. To refuse to use in disciplinary proceedings the information obtained as a result of interference with the procedural activity of a prosecutor during the inspection by the higher level prosecutor's office of the compliance with the requirements of the law and/or the state of organisation of work in lower level prosecutor's offices; to inform the Council of Prosecutors about each revealed fact of interference with the procedural activity of a prosecutor during the inspection by the higher level prosecutor's office of the compliance with the requirements of the law and/or the state of organisation of work in prosecutor's offices;

vi. To refuse to use information obtained as a result of covert activities of law enforcement agencies in disciplinary proceedings;

vii. To use the Commentary to the Code of Professional Ethics and Conduct for Prosecutors in disciplinary proceedings;

viii. To consider the facts of unjustified removal of a prosecutor from procedural supervision as interference of the management in the official activity of the prosecutor;

ix. To introduce into its practice the criteria for assessing violations of the presumption of innocence by prosecutors, which have already been developed by the Court;

x. To consider the facts of prosecutors obtaining a certificate of the right to carry out a certain type of professional activity (advocacy, notary, etc.) as violations of ethical rules, and not only violations of the requirements for incompatibility;

xi. When reviewing alleged cases of non-performance or improper performance of official duties as defined by orders of the Prosecutor General and other heads of the prosecutor's office, to assess such duties in the light of Article 17(1)(2) of the Law;

xii. To delineate the responsibility of heads of prosecution, senior teams, and procedural supervisors for the actions of other prosecutors or law enforcement officers whose activities they are authorised to coordinate, direct or determine;

xiii. To review the practice of not recognising as a disciplinary offence only the fact of accusing a person of committing a crime;

xiv. To review the practice of recognising as a disciplinary offence only those cases where the unjustified acquittal of a person is directly caused by gross negligence or criminal intent of the prosecutor;

xv. Continue to develop a catalogue of clear and unambiguous circumstances that mitigate/aggravate liability, as well as criteria for determining the severity of a disciplinary offence;

xvi. To consider more thoroughly alleged cases of ineffective procedural guidance in criminal proceedings for crimes against human life, health and personal safety;

xvii. Ensure that the register and statistics of disciplinary claims are consistent, so that one case based on different grounds does not appear as two cases, and also that it is not sanctioned under two different headings;

xviii. To ensure that the Commentary to the Code of Professional Ethics and Conduct for Prosecutors in disciplinary proceedings is disseminated and used.

As to broader reforms relating to disciplinary proceedings against prosecutors:

xix. The list of disciplinary offences should be clarified in the Law. In particular, the most frequently invoked grounds for disciplinary liability would need to be more clearly and precisely drafted, to comply with the principle of legality required for disciplinary sanctions.

xx. Consider reforming the procedure for appealing against the decisions of the QDCP, in particular, the appellate review, with the aim of to ensuring effectiveness and efficiency of the procedure.

xxi. The powers of the Head of the SAPO to adopt regulations and to intervene in the evaluation and promotion of officials within the SAPO might be worth of re-consideration, to be better aligned with European standards.

Appendix A. Forms of standardised content analysis of QDCP decisions.

Appendix is available in the Ukrainian version of the analysis.