SUPPORT TO CRIMINAL JUSTICE REFORM IN UKRAINE

Strasbourg, 14 October 2013

Opinion no. 735 / 2013

CDL-AD(2013)025
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DIRECTORATE FOR HUMAN RIGHTS (DHR),

DIRECTORATE GENERAL FOR HUMAN RIGHTS AND THE RULE OF LAW

JOINT OPINION

ON THE DRAFT LAW ON THE PUBLIC PROSECUTOR'S OFFICE

OF UKRAINE

Endorsed by the Venice Commission
at its 96th Plenary Session
(Venice, 11-12 October 2013)

on the basis of comments by

Mr Nicolae ESANU (Member, Moldova)
Mr Peter PACZOLAY (Member, Hungary)
Ms Hanna SUCHOCKA (Member, Poland)
Mr Kaarlo TUORI (Member, Finland)

Mr Jeremy McBRIDE (DHR consultant, United Kingdom)
Mr Eric SVANIDZE (DHR consultant, Georgia)
Ms Lorena BACHMAIER WINTER (DHR consultant, Spain)
Mr Mikael LYNGBO (DHR consultant, Denmark)

Contents

I. Introduction 3

II. General remarks 3

III. Main criticism expressed in previous opinions 4
A. Excessive centralisation combined with the dependence of the Prosecutor General on the confidence of Parliament. 5
B. Prosecutors' role outside the criminal justice system 5
C. Other problems 8

IV. Article by article analysis 8
A. Section 1. The Principles of Organisation and Operation of Public Prosecutor's Offices 8
B. Section 2. Organisational Principles of the Public Prosecutor's Office 10
C. Section 3. The Status of Public Prosecutors 11
D. Section 4. Exercise of Public Prosecutors' Powers 14
E. Section 5. Procedures for Taking Public Prosecutor's Office 19
F. Section 6. Disciplinary Liability of a Public Prosecutor 21
G. Section 7. Dismissal of Public Prosecutors, Suspension and Termination of Their Powers 23
H. Section 8. Prosecutorial Self-Governance and Bodies Supporting the Prosecution Service 24
I. Section 9. Material and Social Support for the Public Prosecutor and other Prosecution Officers 28
J. Section 10. Organisational Support to the Public Prosecutor's Office 28
K. Section 11. International Cooperation 28
L. Section 12. Final provisions 29
M. Section 13. Transitional provisions 29

V. Conclusion 30

I. Introduction

1. By letter dated 2 August 2013, the Head of the Presidential Administration of Ukraine, Mr Lyovochkin, requested an opinion on the Draft Law on the Public Prosecutors Office of Ukraine (CDL-REF(2013)041 and comparative table CDL-REF(2013)043, hereinafter, the "Draft Law") from the Venice Commission and the Directorate General for Human Rights and the Rule of Law of the Council of Europe.

2. The Venice Commission invited Mr Nicolae Esanu, Mr Peter Paczolay, Ms Hanna Suchocka and Mr Kaarlo Tuori to act as rapporteurs for this opinion.

3. In the framework of the Project Support to Criminal Justice Reform in Ukraine, funded by the Danish Government, the Directorate for Human Rights (DHR) of the Directorate General for Human Rights and the Rule of Law of the Council of Europe invited Mr Jeremy McBride, Mr Eric Svanidze, Ms Lorena Bachmaier Winter and Mr Mikael Lyngbo to provide an expertise of the draft Law.

4. On 6 September a delegation of the Venice Commission and DRH[1], composed of Mr Esanu, Mr McBride, Mr Paczolay, Ms Suchocka, Mr Svanidze and Mr Tuori accompanied by Mr Markert and Mr Dürr from the Venice Commission's Secretariat and Mr Ristovski for the Council of Europe Office in Kyiv and Ms Tskhomelidze for the DRH Project visited Kyiv for meetings with the various stakeholders. The delegation met with (in chronological order): Mr Igor Kaletnik the Deputy Chairman of the Verkhovna Rada, Mr Serhiy Kivalov, the Head of the Parliamentary Committee on the Rule of Law and Justice, Mr Andriy Kozhemiakin, Head of the Parliamentary Committee on Legislative Support of Law Enforcement and other members of this Committee, Mr Oleksandr Lavrynovych, Chairman of the High Council of Justice, Mr Viktor Pshonka, Prosecutor General, Mr Andriy Portnov, Advisor to the President, Mr Pavlo Petrenko, Member of the Parliamentary Faction All-Ukrainian Union Batkivshchyna, Mr Valeriy Karpuntsov, Member of the Parliamentary Faction Political Party UDAR, Mr Oleg Makhnytskiy, Head of the Parliamentary Faction of All-Ukrainian Union Svoboda, as well as with NGO representatives. This opinion also reflects the results of these meetings.

5. In view of the urgency of this matter, the Bureau of the Venice Commission authorised the transmission of a draft of this opinion to the Ukrainian authorities in advance of its discussion at the plenary session. Following an exchange of views with Mr Vitaly Bilous, Deputy Prosecutor General, and Mr Andriy Kozhemiakin, Head of the Parliamentary Committee on Legislative Support of Law Enforcement, the present opinion was endorsed by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013).

II. General remarks

6. The Draft Law, if adopted, would replace the Law of Ukraine *On the Public Prosecution Service* that entered into effect on 5 November 1991 ('the Law of 5 November 1991'), which has been amended on many occasions since then - particular extensively in 2010 and 2012 - resulting in 'the Existing Law'.

7. The draft Law on the Public Prosecutor's Office of Ukraine is one of several laws that was prepared over the years on the prosecutor's office in Ukraine, for which the Venice Commission has provided opinions[2].

[1] When this opinion makes recommendations to the Ukrainian authorities it is understood that these are recommendations by the Venice Commission and the Directorate for Human Rights.

[2] Opinion on the present law and on the draft law of Ukraine on the Public Prosecutor's Office by Mr James. Hamilton (CDL (2001) 128, 7 December 2001; Opinion on the present law and on the draft law of Ukraine on the

8. The standards of the Council of Europe of relevance to legislation dealing with a public prosecution service are to be found in: the European Convention on Human Rights (hereinafter European Convention) and the related case law of the European Court of Human Rights; Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system[3]; Recommendation CM/Rec(2012)11 of the Committee of Ministers to member states on the role of public prosecutors outside the criminal justice system[4]; Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe[5]; the Venice Commission opinions; the Venice Commission's Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service[6]; the European Guidelines on Ethics and Conduct for Public Prosecutors ('the Budapest Guidelines') adopted by the Conference of Prosecutors General of Europe[7]; Opinion No. 3(2008) of the Consultative Council of European Prosecutors on 'The Role of Prosecution Services Outside the Criminal Law Field'[8]; and Opinion No.12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No.4 (2009) of the Consultative Council of European Prosecutors (CCPE) on "Judges and prosecutors in a democratic society" ('the Bordeaux Declaration')[9].

9. These standards can be found in a synthesised form in the Thematic Directory of Principles for a Draft Law on the Public Prosecution Office of Ukraine prepared as part of the Project "Support to Criminal Justice Reform in Ukraine".

10. This opinion first briefly reviews the concerns expressed in previous opinions about the Existing Law. It then outlines the significant advances made by the Draft Law towards fulfilling the requirement of Council of Europe standards and identifies the main aspects of the Draft Law that are still problematic in that regard. The opinion then provides an Article by Article analysis of the Draft Law, dealing with those provisions that need amendment, clarification, further consideration or deletion. It concludes with a summary of the recommendations made and an overall assessment of the acceptability of the Draft Law.

11. This opinion is based on an English translation of the Draft Law. The translation may not accurately reflect the original version on all points and, certain comments may result from problems in the translation.

III. Main criticism expressed in previous opinions

12. The Venice Commission has criticised the legislation on the Public Prosecutor's Office (hereinafter, the "PPO") in its previous opinions, finding the functions of this Office to considerably exceed the scope of functions that a prosecution service should have in a democratic society. The Commission has also reminded the Ukrainian authorities, on several occasions, that they should fulfil their commitment to change the role of the PPO in order to bring it into line with European standards.[10] When joining the Council of Europe on 9 November 1995, Ukraine undertook the commitment that:

Public Prosecutor's Office by Ms H. Suchocka (CDL (2001) 134, 7 December 2001; Opinion on the Draft Law Amending the Law of Ukraine on the Office of the Public Prosecutor (CDL-AD(2004)038, 12 October 2004; Opinion on the Draft Law of Ukraine Amending the Constitutional Provisions on the Procuracy (CDL-AD(2006)029, 17 October 2006); Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor (CDL-AD(2009)048, 27 October 2009); and Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (prepared by the Ukrainian Commission on Strengthening Democracy and the Rule of Law) (CDL-AD(2012)019, 15 October 2012).

[3] Adopted on 6 October 2000.

[4] Adopted on 19 September 2012.

[5] Adopted on 27 May 2003.

[6] CDL-AD(2010)040, 3 January 2011.

[7] On 31 May 2005; CPGE (2005) 05.

[8] CCPE(2008)3, adopted 15-17 October 2008.

[9] CM92009)192, 15 December 2009.

[10] See Opinion on the draft Law of Ukraine on the Office of the Public Prosecutor (CDL-AD(2009)048), paragraphs 28-30); Opinion on the draft Law of Ukraine on the Office of the Public Prosecutor (CDL-AD(2009)048, paragraphs 5-6.

the role and functions of the Prosecutor's Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards.

A. Excessive centralisation combined with the dependence of the Prosecutor General on the confidence of Parliament.

13. The Commission criticised a strong emphasis on the principles of unity and centralisation of the procuracy, modelled on the former Soviet "prokuratura", the powers of the Prosecutor General, who heads such a centralised structure, being exceptionally broad and not limited to ensuring a harmonised application of the law.[11] Inferior prosecutors do not enjoy sufficient guarantees of the independent or autonomous exercise of their functions, especially as concerns illegal instructions from superior prosecutors.

14. On the other hand, Article 122 of the Constitution provides that Parliament may express a no confidence vote in the Prosecutor General of Ukraine[12]. The latter does not form part of the Government, hence Parliament should not have the right to express a motion of no confidence, which is a purely political instrument. It may perhaps be seen as an instrument in applying checks and balances in the organisation of state bodies, but it is doubtful that it would provide a fair and just solution. Moreover, Article 106.11 of the Constitution does not place any limits on dismissal by the President. The Prosecutor General should be dismissed only for serious violations of the law, following a fair hearing.

15. The combination of excessive centralisation under the Prosecutor General with the dependence of the Prosecutor General on political organs thus creates problems for the independence or autonomy of the prosecution service.

B. Prosecutors' role outside the criminal justice system

16. The concern seen in the previous opinions with respect to the Existing Law has been that the powers conferred on public prosecutors in Ukraine considerably exceeded the scope of functions performed by prosecutors in democratic law-abiding State, with the result that the Public Prosecutor's Office was an unduly powerful institution that amounted in effect to a Soviet-style 'prokuratura'.

17. The Venice Commission acknowledges that, in some countries, the public prosecutor has functions other than those of criminal prosecution and has stated that such powers are legitimate if certain criteria are met. The competencies should be carried out in such a way as to respect the principle of the separation of state powers, including the respect for the independence of the courts, the principle of subsidiarity, the principle of speciality and the principle of impartiality of prosecutors.[13] This approach requires that the prosecutor's office be deprived of its extensive powers in the area of general supervision, which should be taken over by the courts, whereas the task of human rights protection should be transferred to the ombudsman.

18. In its 2012 Opinion on a previous draft law on the Public Prosecutors Office of Ukraine, the Venice Commission pointed out that *"Recommendation CM/Rec(2012)11 on the role of public prosecutors outside the criminal justice system provides for limitations on the powers the public*

[11] CDL-AD(2004)038, paras. 31-33.
[12] Article 122 of the Constitution: "The Procuracy of Ukraine is headed by the Procurator General of Ukraine, who is appointed to office with the consent of the *Verkhovna Rada* of Ukraine, and dismissed from office by the President of Ukraine. The *Verkhovna Rada* of Ukraine may express no confidence in the Procurator General of Ukraine that results in his or her resignation from office. (…)".
[13] See also summary of recommendations in Opinion No. 3(2008) of the Consultative Council of European Prosecutors on "the role of prosecution services outside the criminal law field", https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1608160&SecMode=1&DocId=1609216&Usage=2, p.10.

prosecutor may have outside the criminal law field. It should not be seen as recommending that prosecution services should have such powers."[14]

19. In this respect, it should be noted that the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2012)11 on 19 September 2012 on the role of public prosecutors outside the criminal justice system, in which it states under "common principles" that "5. Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system should apply, *mutatis mutandis*, to public prosecutors with responsibilities and powers outside the criminal justice system so far as it relates to:

– safeguards for them to carry out their functions;
– their relationship with the executive, the legislature and the judiciary; and
– their duties and responsibilities towards individuals."[15]

20. Consequently, paragraph 31 of Recommendation Rec(2000)19[16], which provides that "Where public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over those measures must be possible", must now be read as requiring judicial control over every decision of a public prosecutor which interferes with the fundamental rights and freedoms of any other person, including activities carried out in the course of supervisory functions or other functions outside the sphere of criminal prosecution.

21. The 1996 Constitution of Ukraine did not provide for supervision powers but admitted them in point 9 of the Transitional Provisions:

> *9. The procuracy continues to exercise, in accordance with the laws in force, the function of supervision over the observance and application of laws and the function of preliminary investigation, until the laws regulating the activity of state bodies in regard to the control over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect.*

22. The 2004 Constitutional Amendments[17] introduced a new paragraph 5 to Article 121 of the Constitution, which stated that the PPO was entrusted with the *"supervision over the respect for human rights and freedoms and over how laws governing such issues are observed by executive authorities, bodies of local self-government and by their officials and officers".* This provision, which had been criticised by the Venice Commission, effectively anchored the PPO to the old system, where the prosecutor's wide role comes as a result of the weakness of other institutions in the protection of human rights. It was annulled, however, by the Constitutional Court of Ukraine's decision of 30 September 2010. Notwithstanding this annulment the supervisor powers were retained on the basis of the earlier Transitional Provision.

23. In a democratic country, there is no need for a prosecutor's office to have such a strong role in this area and this was repeated several times in various Venice Commission opinions.[18] The Venice Commission suggested that Article 121.5 of the Constitution be deleted in order to limit the power of the prosecutor's office. It argued that this would provide a new impetus to reform the procuracy in Ukraine and help "to abandon" the old model of the *Prokuratura*. This message, among others, was received and implemented through the Constitutional Court's decision of 30 September 2010, which declared Law No.2222-IV of 8 December 2004 null and void and reinstated the 1996 version of the Constitution[19], thereby annulling Article 121.5.

---

[14] CDL-AD(2012)019, para. 99.
[15] Section C.5, Recommendation CM/Rec(2012)11, https://wcd.coe.int/ViewDoc.jsp?id=1979395&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.
[16] https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM.
[17] No.2222-IV of 8 December 2004.
[18] See Draft Vademecum on the Judiciary CDL-JU(2008)001, http://www.venice.coe.int/docs/2008/CDL-JD(2008)001-e.pdf.
[19] See Opinion on the constitutional situation in Ukraine (CDL-AD(2010)044, http://www.venice.coe.int/docs/2010/CDL-AD(2010)044-e.pdf, paragraphs 67-68.

24. Thus, apart from the prosecution role, the Existing Law gives the Public Prosecutor's Office the functions of supervising adherence to and application of laws, supervising adherence to the law by agencies engaged in detective operations, interrogation and pre-trial investigation, representing the interests of the individual or the state in court and supervising adherence to the law in the execution of court decisions in criminal cases and enforcement of other remedies dealing with restriction of personal liberty[20].

25. The retention of the general supervision power has - despite its supposedly transitional nature - been a repeated source of concern not only because of its nature but also because it is buttressed by wide powers for public prosecutors to summon persons to appear before them, to enter any premises in the public and private sectors and to order action to be taken to comply with the law[21]. The general supervision function and its accompanying powers thus give the Public Prosecutor's Office an extensive ability both to intrude into the functioning of the executive and to interfere with the interests and activities of private individuals and organisations. This capacity is compounded by the entitlement of the Prosecutor General and other public prosecutors to participate in the proceedings of the *Verkhovna Rada*, boards of ministries, central executive agencies, local councils and other administrative bodies.[22] These powers and rights individually and cumulatively run counter to the appropriate separation of powers in a democracy, as well as posing a threat to rights and freedoms that are supposedly safeguarded by the Constitution.

26. In this connection, it is important to bear in mind that Recommendation CM/Rec(2012)11 of the Committee of Ministers to member states on the role of public prosecutors outside the criminal justice system should not be seen as an encouragement to have the function of general supervision, with its accompanying powers, that is found in Ukraine. Rather, it is no more than a recommendation as to the safeguards that need to be in place where any supervisory role exists.

27. The reason why such a role is inappropriate in the context of Ukraine has been underlined by the Venice Commission:

> The only historical model existing in Ukraine is the Soviet (and czarist) model of "prokuratura". This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards[23].

28. The ability to represent the interests of citizens is problematic because of the ability thereby conferred to participate in any legal proceedings where such interests are seen to arise - regardless of the wishes of the individual and even his or her capacity to act on his or her own behalf (and thus contrary to his or her right of access to court under Article 6 of the European Convention) - and to apply to court whenever considered necessary and to appeal any court decisions concerning those interests. It is moreover unjustified because (a) the Prosecutor General is also mandated to act in pursuit of the state interest and this could clearly run counter to the interests of the individual being represented and (b) bodies such as the Ombudsperson are more suited to espouse the interests of the individual against the state.[24] The establishment of centres for free legal aid in Section 12 of the Draft Law is therefore welcomed. Such Centres are even more apt to assist individuals than the ombudsman.

29. It should be noted that the difficulties posed by the ability to represent the interests of citizens are exacerbated by the additional powers of a public prosecutor to make an appeal or cassation appeal and to file a petition for review of any court judgments in civil, administrative and commercial cases, regardless of whether or not he or she has been involved in any proceedings leading to those judgments[25].

---

[20] Article 5 and Section III.
[21] Articles 19-24 of the Existing Law
[22] Article 9 of the Existing Law.
[23] Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor (CDL-AD(2009)048), para.16.
[24] CDL-AD(2010)040, para. 71 *seq.*
[25] Article 37 of the Existing Law.

C. Other problems

30. Other concerns that have been expressed in earlier opinions that remain especially pertinent for the Existing Law, and thus the reform of the law dealing with the prosecution service in Ukraine, relate to:

- the threat to independence resulting from the relative shortness of the term of office, when coupled with the power of reappointment, of the Prosecutor General and subordinate public prosecutors[26];
- the threat to independence also resulting from the absence of adequate guarantees against the dismissal of the Prosecutor General[27];
- the absence of any input by a technical, non-political body in the appointment process for the Prosecutor General;
- the absence of any independent oversight over the operation and management of the Public Prosecutor's Office;
- the absence of arrangements to ensure that the assignment and re-assignment of cases meet the requirements of impartiality and independence and maximise the proper operation of the criminal justice system;
- the absence of objective criteria, such as competence and experience, governing the careers of public prosecutors[28];
- the absence of adequate remedies for public prosecutors concerned about being asked to carry out unlawful orders or instructions given by their superiors;
- the absence of objective criteria and a fair procedure for disciplinary action against public prosecutors[29]; and
- the potential to restrict investigation and reporting by the media through the ability to prohibit 'interference' with the functions of the Public Prosecutor's Office[30].

31. Previous drafts and the present Draft Law are very detailed and regulate issues which could be transferred to by-laws and decrees. Such a detailed regulation may cause confusion and contribute to not being able to distinguish important issues from less important ones.

IV. Article by article analysis

32. In response of the repeated criticisms, the Ukrainian authorities prepared a new Draft Law on the Public Prosecutor's Office. This Draft Law has been prepared by the Presidential Administration, in consultation with Prosecutors General's Office and other stakeholders. A detailed article by article evaluation of the new Draft Law show the welcome advance made by the drafters but also identifies some issues that need to be addressed.

A. Section 1. The Principles of Organisation and Operation of Public Prosecutor's Offices

33. Article 1 states in an appropriate, but very general, manner the role to be performed by the Public Prosecutor's Office.

34. Article 2 sets out in paragraph 1 four functions to be performed by the Public Prosecutor's Office, namely, prosecution, representation of the interests of the individual or the state, supervision agencies engaged in detective operations, interrogation and pre-trial investigation and supervision of execution of court decisions in criminal cases and observance of laws dealing

[26] Article 2 of the Existing Law.
[27] *Ibid*.
[28] See Section IV of the Existing Law.
[29] See Article 46-2 of the Existing Law.
[30] Article 7 of the Existing Law.

with restraint of personal liberty. As has already been indicated,[31] certain of these functions are problematic.

35. Given the concern about the excessive nature of the powers of public prosecutors, the stipulation in paragraph 3 that 'the Public Prosecutor's Office shall not be charged with functions that are not established in the Constitution of Ukraine' is warmly welcome. Of course, this provision will become fully useful only following amendments to Article 121 of the Constitution[32].

36. There is a need to specify that the phrase 'cases stipulated by *the law*'[33] in paragraph 1.2 only refers to the Draft Law. It should not extend to other legal provisions to perform functions not envisaged by the Constitution and the Draft Law. This point is of particular importance in view of the proposed amendments to Articles 7 and 259 of the Code of Ukraine on Administrative Offences insofar as these refer to 'supervision of compliance with the laws in the area of anti-corruption'[34]. These elements of the proposed amendments exceed the scope of functions envisaged by them and should thus be deleted. Moreover, a wider construction of the phrase cited above would also have the effect of allowing the prosecution to represent the interests of an individual in circumstances beyond those specified in Article 24 of the Draft Law which would be clearly inconsistent with European standards. Thus, this paragraph should make this restricted meaning for the phrase clearer, perhaps by the insertion of 'present' before 'law'.

37. Furthermore, the specification in paragraph 1.2 that the Public Prosecutor's Office should have the function of representing the 'interests of ... the state in court' is unduly broad since those interests could theoretically cover any matter that the state considers to relate to its functions or could be of general concern for it, even if that would involve intervention in proceedings that address the specific legal rights and obligations of individuals and private entities. Although Article 24.3 goes some way to potentially limiting the scope of this provision by excluding the right of representation where the function is entrusted to a particular governmental entity other than the Public Prosecutor's Office[35], there is still imprecision as to the interests for which representation can be provided. Therefore, pending the elimination of this function entirely, it would be appropriate to define strictly the nature of the interests for which representation can be provided. This might be achieved by excluding representation where the interests are no more than moral or political through providing that this is possible only where the state's specific legal rights would actually be affected.

38. Article 3 sets out a statement of principles that are meant to govern the work of the Public Prosecutor's Office. This article is entirely appropriate and is a welcome development of the rather terse statement of principles in Article 3 of the Existing Law. Of particular note is the inclusion in the statement of the political neutrality of the Public Prosecutor's Office, the inadmissibility of the illegitimate interference of the Office in the functions of the legislative, executive and judicial authorities, respect for the independence of judges and transparency of the Office's operation.

39. However, it should be noted that not only is the definition of the rule of law in paragraph 1.1 not one that is generally used but it is also different from the elaboration of the requirement to respect the rule of law in Article 5 of the Code of Professional Prosecutorial Ethics and Conduct adopted in 2012. The objective specified in the definition in paragraph 1.1 is certainly not objectionable but it would be preferable for this objective to be a discrete principle in Article 3 - as it is in Article 6 of the Code - and the rule of law to be defined in a manner consistent with the Code.

40. It should also be noted that the list of provisions in Article 3 adds 'territoriality' to the list of requirements set out in the Code but omits from the latter list the following principles: priority of interests; tolerance; equality before the law; humanism; presumption of innocence; professional

[31] See para. 28-29.
[32] See para. 75.
[33] Emphasis added.
[34] See clause 2 of Section 12.
[35] But see para. 87.

integrity and dignity; promotion of trust in prosecutorial authority; confidentiality; no engagement in the fulfilment of wrongful decisions or assignments; and model behaviour and discipline. Undoubtedly the principle set out in Article 3 of the Draft Law might be interpreted to embrace at least some of the requirements set out in the Code but it would be preferable for Article 3 to be harmonised more explicitly with the list in the Code.

41. The term 'illegitimate interference' in paragraph 1.6 is one that figures in many provisions of the draft Law but in English at least the word 'illegitimate' has a wider resonance than 'unlawful' or 'illegal'. However, this may be just a matter of translation since, for example, 'illegal interference' is used in Article 16.1.3 but 'illegitimate interference is used in Article 16.2 and Article 44.1.7 refers to intervention in 'the manner other than established by the law'. This may be a problem of translation only.

42. Article 4 recalls the hierarchy of norms including the direct applicability of international treaties and is a welcome provision.[36].

43. Article 5 limits the execution of the functions of the Public Prosecutor's Office to public prosecutors and is not inappropriate. However, it should be made clear that this exclusivity clearly does not apply to functions that can also be performed by other entities, such as the Ukrainian Parliamentary Commissioner for Human Rights[37].

44. Article 6 establishes an obligation for the Prosecutor General's Office to inform the public and the *Verkhovna Rada* about its operations is entirely new and is welcome because it gives substance to the transparency principle in Article 3.1.8.

45. However, there is a need to clarify whether the obligation relating to the public relates just to the Prosecutor General's Office (as paragraph 1 provides) or extends to the Public Prosecutor's Office as well (as is implied by paragraph 3)

46. Moreover, given the importance of securing the independence or autonomy of the public prosecution service, it would be desirable for there to be greater emphasis in paragraph 2 on the reporting obligation of the Prosecutor General's Office to the *Verkhovna Rada* being of a general character and thus not extending to the provision of details about individual cases. This might be achieved, for example, by this provision stipulating that the *Verkhovna Rada* being informed about the 'overall' activities' of the Public Prosecutor's Office or about its operation 'as a whole', with the provision of relevant statistics and an analysis of the range of work undertaken.

B. Section 2. Organisational Principles of the Public Prosecutor's Office

47. Article 7 establishes the structure for the Public Prosecutor's Office, involving the Prosecutor General's Office and regional and local public prosecutors. It also provides for unified principles of organisation and operations for the Public Prosecutor's Office, the unified status of public prosecutors, unified procedures of organisational support, funding exclusively from the State Budget and the resolution of internal issues by prosecutorial self-governance authorities. Apart from the appropriate restriction on funding sources, this provision is notable for the introduction of the notion of prosecutorial self-governance.

48. As compared to the Article 7 of the Existing Law, the Draft Law does not provide for specialisation within the Public Prosecutor's Office, for example on anti-corruption, organised crime or juvenile justice. Such a possibility could be authorised together with procedural guarantees ensuring that the same level of protection of individual's rights applies as for ordinary prosecutors.

49. Article 9 sets out the range of powers enjoyed by the Prosecutor General, and seems generally appropriate. In particular, as regards the appointment and dismissal of public

[36] On the issue of treaties concluded by the Prosecutor General, see however paras. 183-184.
[37] See paras. 101-103.

prosecutors to administrative positions (which are to be held for five years and to which reappointment is possible), it is welcome that the decision is not left entirely to the Prosecutor General since the Draft Law also envisages a role for the Prosecutors' Council of Ukraine in respect of appointments and roles for both it and the Qualifications and Disciplinary Commissions in respect of dismissal[38]. However, this role of the Prosecutors' Council of Ukraine in relation to appointments is only one of making recommendations[39] and, while the grounds for dismissal are elaborated in the Draft Law, there are no provisions specifying the criteria for appointment, and (perhaps even more importantly given the risk of improper influence) for reappointment, to administrative positions. There is thus a need for the inclusion in the Draft Law - possibly in Article 40 - both of the criteria required for such appointments (essentially ones relating to experience, integrity, judgment and management) and the process whereby this is to be assessed. Furthermore, it would also be appropriate for the Draft Law to require a reasoned decision for refusing to follow the recommendations of the Prosecutors' Council of Ukraine.

50. Moreover, there is a need to clarify what is the scope of the power in paragraph 1(10) to 'approve acts on issues related to organisation of the activity of the prosecution service'. In particular, it would be helpful to know whether this power just concerns internal organisation, which would be appropriate so long as it does not run counter to legislation, or extends to the exercise of prosecutorial discretion, which could go beyond the guidelines referred to in paragraph 1(12) and thus encroach unjustifiably on the independence of prosecutors.

51. Furthermore, some clarification as to the nature and extent of the powers conferred by 'other laws' - as referred to in paragraph 1(13) - would be desirable in order to establish whether the change being made by the Draft Law is as extensive as appears to be the case.

C. Section 3. The Status of Public Prosecutors

52. Article 16 first lists the various arrangements in the Draft Law that are intended to secure the independence of public prosecutors - some of which are elaborated in it but most of which rely on other provisions - and all are generally appropriate.

53. These arrangements should clearly include ones to ensure there is no improper interference with the exercise of the powers of public prosecutors, as Article 16.1.3 and 16.1.4, Article 16.2 and Article 16.4 ostensibly purport to do. However, there is a need for the scope of what is 'improper' to be clearly defined not only to satisfy the requirements of Article 7 of the European Convention that there be no risk of arbitrary prosecution, conviction or punishment but also to ensure that the scope of the powers of the public prosecutor is not inconsistent with Council of Europe standards[40].

54. Unfortunately, there is some uncertainty about whether Article 16.1.3 and Article 16.2 are concerned with unlawful or the more imprecise 'illegitimate' interference - as has already been noted[41] - but it is assumed that the former is intended. Nonetheless, apart from that possible concern (which may not be justified), there is a lack of precision as to the grounds for imposing liability since paragraph 1.4 refers to 'statutory liability for 'contempt of the public prosecutor' and paragraph 4 refers to ' influence on public prosecutors exerted *in any way*'[42] and 'disrespect of public prosecutors' entailing 'liability established by law'. There is no further reference to either term in the Draft Law and there is a need to establish both where this liability is established and whether its scope is in any way defined. At first sight, at least, the position regarding the latter might be seen to compare unfavourably with the second paragraph of Article 7 of the Existing Law, which states: 'Any influence exerted upon an officer of a public prosecutor's office with the aim to prevent discharging of his/her duties or make him/her adopt an unjustified resolution shall entail liability as provided by the law'. The present formulation - particularly of the concepts in

[38] Articles 50.6 and 73.
[39] Article 73.6.1.
[40] See paras. 25-29.
[41] See para. 41.
[42] Emphasis added.

paragraph 4 - is such that liability could be imposed in a way that curtails media freedom and public comment in a manner inconsistent with Article 10 of the European Convention. Such liability risks suffocating legitimate criticism and public debate. Amendments of these provisions are thus necessary to preclude the unjustified interference with media activities. Consequently, **liability for 'disrespect' in Article 16 should be clearly defined in the law and should exclude legitimate criticism according to the European Convention on Human Rights and the case-law of the European Court of Human Rights.**

55. There is also a need to clarify what powers are implied in the obligation in paragraph 5 to 'take the necessary measures to eliminate the threat' to a public prosecutor's independence.

56. The focus of Article 17 is on the extent to which public prosecutors are subject to direction by their superiors. As such it appears to make a distinction between the unqualified obligation to follow administrative orders, whether issued by the Prosecutor General or the heads of regional public prosecutor's offices, local public prosecutor's offences and structural units, and the extent to which instructions (and possibly administrative orders) can be issued by Higher Public Prosecutors (as defined in paragraph 3) regarding the performance of prosecutorial functions.

57. The obligation to follow administrative orders seems unproblematic as it is clear from paragraph 1 that it is restricted to organisational matters and cannot be a justification for limiting or infringing the independence of public prosecutors in the exercise of their prosecutorial powers.

58. The Venice Commission insists that the 'independence' (or autonomy) of prosecutors is different from that of judges.[43] As such, instructions to inferior prosecutors are not contrary to European standards but procedural guarantees are required to avoid possible abuse of this power of senior prosecutors. However, as regards the instructions that can be issued by Higher Public Prosecutors, the Draft Law is far from clear given the formulation of the supposed safeguard of independence in paragraph 3 - i.e., that public prosecutors, when exercising powers associated with the performance of prosecutorial functions, 'shall be independent and independently make decisions regarding the procedure of exercising such powers, guided by law' - and the terms both of the power to issue instructions in the same paragraph and the reference in paragraph 4 to administrative orders and instructions 'directly relating to the public prosecutor's exercise of prosecutorial functions'.

59. Firstly, the use of 'independence' in paragraph 3, while undoubtedly meant to refer to the guarantee in Article 16, is too vague a concept in the present context and it would be clearer if it were simply stated that a public prosecutor was 'not obliged to act under the direction of a Higher Public Prosecutor except as specified below'.

60. More importantly, the protection of 'independence' in paragraph 3 seems to be concerned with procedure rather than substance since it refers just to 'the procedure of exercising such powers'. The key components of the standard on internal/individual independence of prosecutors - namely, the right to request that instructions addressed to a prosecutor in individual cases are confirmed in writing, a procedure for requesting a replacement prosecutor and, in cases of alleged illegality, the right to complain to a court or an independent body like a prosecutorial council should thus be introduced into this paragraph.[44]

61. Moreover, in view of the country-specific circumstances[45], it would also be appropriate to underline the protection against hierarchical interference in individual cases by stipulating that any specific orders or instructions given to a public prosecutor by a Higher Public Prosecutor must always be made in writing together with the right of the public prosecutor concerned to be able to request further reasoning for the instruction, which should also be provided in writing.

62. Furthermore, the authorisation by paragraph 4 of not only 'instructions' but also of 'administrative orders' 'directly relating to the public prosecutor's exercise of prosecutorial

[43] CDL-AD(2010)040, para. 86.
[44] CDL-AD(2010)040, para. 040.
[45] See para. 27.

functions' blurs the distinction between the two categories of hierarchical powers and the activities of public prosecutors seemingly introduced in the first three paragraphs of the present provision.

63. Paragraph 4 properly provides that the issuing or execution of a manifestly criminal order or instruction by a Higher Public Prosecutor shall entail liability under the law. However, it ought also to be made clear that a public prosecutor must not only decline to follow such an order but also can both require that he or she be no longer required to handle any case affected by such an instruction or order and complain to a court or independent body about the allegedly illegal order or instruction.[46]

64. **To sum up, ideally all instructions to an inferior prosecutor should be given in writing, and oral instructions should be confirmed in writing upon request (or withdrawn) and in case of an allegation that an instruction is illegal a court or an independent body like a prosecutorial council should decide on the legality of the instruction.[47]**

65. Finally, consistent with the principles of transparency and accountability, the Draft Law should specify that **all general instructions and policy guidelines issued to public prosecutors must be published.**

66. The heading 'Incompatibility Requirements' for Article 18 does not seem entirely apt as its content is about the activities that public prosecutors should not engage in rather than anything that they are required to do. However, this may only be a translation issue.

67. Article 18.5 is not objectionable but it seems odd to locate it under the heading 'Incompatibility Requirements' since it is providing the opportunity of secondment to a Qualifications and Disciplinary Commission of Prosecutors, the National Academy of Prosecutors of Ukraine and other institutions as prescribed by law. Of course, it is entirely appropriate for public prosecutors seconded to such institutions not to hold the office of public prosecutor during their secondment. However, the provision authorising secondment should be distinct from that restricting the ability to hold the office of public prosecutor when on secondment.

68. Furthermore, the requirements set out in this provision are incomplete in that they appear to address only links with public institutions as it is assumed, but needs to be confirmed that 'representative mandate' in paragraph 1 only concerns public elective office and would not extend to elected positions (for example, in a church or the parent's association of a school). However, some involvement with the private sector, such as business activities and membership of certain organisations, will also have the potential to be incompatible with the performance of the role of public prosecutor and it would be appropriate for this provision to be extended to cover that sort of involvement.

69. Article 19 sets out for the first time the general rights and duties of a public prosecutor - including to become members of trades unions - and is clearly both appropriate and welcome.

70. However, it would be desirable for the source of the 'rules of prosecutorial ethics' referred to in paragraphs 2 and 4.4 to be identified as otherwise the basis for any alleged shortcoming might lack the certainty required for obligations giving rise to disciplinary and related liability. Presumably the source of those rules is the one referred to in Article 69.2.5, namely, the Code of Professional Ethics and Conduct of Public Prosecutors to be approved by the All-Ukrainian Conference of Public Prosecution Employees. However, it should be noted that there is no provision in the transitional provisions making applicable the Code of Professional Prosecutorial Ethics and Conduct adopted in 2012 until such time as one is approved by the All-Ukrainian Conference of Public Prosecution Employees.

[46] According to paragraph 10 of Recommendation Rec(2000)19, the prosecutor may request the re-assignment of the case if an instruction runs counter his conscience.
[47] CDL-AD(2010)040, para. 59.

71. In addition, it would be appropriate for paragraph 4.3 to specify that prosecutors should abide by all laws and not just the one on anti-corruption[48], even if a specific reference to the latter law is understandable and not inappropriate.

72. Furthermore, it would be appropriate to specify in this provision either that there is a duty to make an annual declaration of assets, income, expenses and financial liabilities or to indicate where this duty is imposed since non-compliance with it is specified in Article 44.1.4 as a ground for disciplinary proceedings but nowhere in the Draft Law is there an explicit requirement to make such a declaration.

73. Articles 20-22 deal with issues relating to the liability of public prosecutors - which is new - and their service ID cards and class ranks, none of which is, in principle, problematic.

74. However, the possibility given to the Prosecutor General by Article 22.4 to appoint prosecutors to the higher class ranks (with the consequence of a higher level of remuneration) mentioned in paragraph 1.2-.4 without following the regular promotion system can have the effect of undermining prosecutorial independence as such promotion does not depend upon any objective criteria. Such criteria should be introduced and compliance with them should be verified by the High Qualifications and Disciplinary Commission.

D. Section 4. Exercise of Public Prosecutors' Powers

1. Scope of the representation

75. The general concern about the retention of the function of representation of the interests of the individual and the state in court has already been raised above[49]. **Article 121 of the Constitution should be amended to remove the function of representation of the interests of individuals.** Section 12 of the Draft Law already provides for the establishment of centres for free legal aid, which should to take over from the prosecutor's office the representation of the interests of individuals together with specialised agencies established to look after the interests of persons unable to act on their own behalf (tutors etc.). Pending this constitutional amendment and the full availability of the centres the incompatibility of this representation by the prosecution service with Council of Europe standards should be minimised through amendments to the Draft Law. Any remaining exercise of this function by the prosecution service should be only subsidiary to the availability of the services of the legal aid centres.

76. Article 24, paragraph 1, refers to the ability of the public prosecutor to take 'procedural and other actions aimed at protection of interests of a citizen or the state in the manner prescribed by procedural law'. This provision does not make it particularly clear what is intended to be the procedural status of the public prosecutor in the relevant proceedings. It seems to be implicit in paragraphs 2-4 and Article 25 that the prosecutors are entitled to act on behalf of a party (plaintiff or applicant) regardless of the wishes of the individual concerned and even his or her capacity to act,[50] as well as the views of the relevant entities when representing state interests. Taking into account that – in contrast to the position of the Ukrainian Parliament Commissioner for Human Rights - the proposed amendments to the Civil Procedural Code of Ukraine do not extend to the prosecutor's role in representing the interests of citizens or the state under paragraph 2 of Article 45, it is to be concluded that the Draft Law intends to maintain an unqualified discretion for prosecutors to interfere with the right of access to court of the individuals and entities in issue.

77. This uncertainty exists also in the proposed amendment to be made by the Draft Law to the Law of Ukraine *On Enforcement Proceedings*, under which a public prosecutor will be entitled to:

> *"join enforcement proceedings initiated by others provided that he/she represented interests of a citizen or the state in the court in a respective case."*

[48] Presumably the Law of Ukraine *On Preventing and Combating Corruption*.
[49] See paras. 28-29 and 36-37.
[50] See para. 28.

and can become
"a party to those enforcement proceedings". [51]

78. Even if the public prosecutor were to intervene in proceedings where he or she is clearly and justifiably representing either an individual who is not in a position to act for him or herself[52] or the state in circumstances where the specific legal rights of the individual or the state are clearly engaged by proceedings which the individual or the state did not initiate and where they have not been the original defendant, the public prosecutor should be limited to exercising only the specific powers available to the individual or the state themselves in the relevant proceedings.

79. It would be appropriate therefore to amend Articles 24 and 25, as well as the relevant provisions of the Civil Procedure Code and the proposed amendment to the Law of Ukraine *On Enforcement Proceedings*, to state explicitly that, in the circumstances permitted, **the public prosecutor should only have the powers of the individual or state body (entity), which he or she represents.**

80. It is noted that, unlike Article 2 of the Draft Law but mirroring Article 121 of the Constitution, these provisions use the term 'citizen' rather than 'individual'. Insofar as this is not a matter of translation, this could entail an unjustified difference between citizens and any individual, contrary to Article 14 of the European Convention and Articles 24 and 25 should be amended to preclude this possibility.

81. The ability to represent the interests of a citizen is said by paragraph 2 of Article 24 to arise 'when the latter is incapable of independently protecting his/her infringed or contested rights or of exercising the procedural competences because of his/her minor age, incapacity or limited capacity'. This formulation clearly goes beyond intellectual capacity and could include situations in which a person does not have the means to bring proceedings to protect his or her rights, for which the introduction of legal aid ought to be an appropriate solution. It would, therefore, be appropriate to limit the capacity of representation by a public prosecutor to that of legal incapacity to act, whether by reason of age or otherwise.

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

83. The additional provision in paragraph 4 for the representation of the interests of a citizen, as opposed to the state, does not seem to be consistent with the terms of Article 128 of the Criminal Procedure Code[53] and, in view of the latter provision, it is not actually necessary and should be deleted.

---

[51] See clause 48 of section 12.
[52] In the sense above, see para. 34.
[53] This provides as follows:

1. The person to whom pecuniary and/or non-pecuniary damage has been caused by a criminal offence or another socially dangerous shall have the right enter a civil action, in the course of criminal proceedings before the trial has commenced against the suspect, accused or to a natural or legal person civilly liable by law for the damage caused by the acts of the suspect, accused or insane person who has committed a socially dangerous act.

2. A civil action in the interests of underage persons or persons lawfully declared incompetent or of diminished capacity may be entered by their legal representatives.

3. Civil action in the interests of the State shall be filed by a public prosecutor. Civil action may also be initiated by prosecutor in the cases stipulated for by the law and also in the interests of those citizens who cannot defend their

84. The need to restrict the representation by public prosecutors of state interests to the specific legal rights of the state has already been noted[54] and this provision should thus be amended to achieve this by providing a power of representation 'in the cases of violations or threat of violation of the state's specific legal interests' Furthermore, it should be confirmed that the term 'threat of violation' is no wider than the circumstances warranting anticipatory relief in civil proceedings.

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

86. The absence of any corresponding provision in paragraph 3 of Article 24 with regard to the need for a public prosecutor to prove that he or she is entitled to represent the interests of the state suggest that this step is not required, notwithstanding the preconditions in that paragraph on a public prosecutor's ability to represent those interests. The difference in approach is unjustified and this paragraph should be amended to require that the entitlement to represent the interests of the state be established before the process can be pursued further.

87. It should also be noted that, although the capacity of public prosecutors to represent the interests of the state under paragraph 3 of Article 24 is supposedly just a fallback position in that they should not intervene where other governmental entities have that role, this limitation is qualified by the specification that public prosecutors can act where the protection of state interests is not 'duly carried out', which could leave considerable leeway to public prosecutors as to the assessment made by these other governmental entities as to the need to bring proceedings in court and indeed allow the former to override the latter's judgment. This does not seem appropriate and this paragraph should be amended to restrict the power of representation simply to situations in which no other governmental entity has the capacity to provide representation. **In analogy to the procedure provided for in Article 24.2, the prosecutor should be allowed to take over the representation of state interests from other state bodies under Article 24.3 only after the approval by a court.**

88. The term “interests of the State” can be interpreted very widely and could include the general principle of legality, resulting that any supposedly incorrect application of the law, even in the relationship between private individuals, could be seen as a violation of State interests, which would allow the prosecutor to intervene. Such an interpretation of interests of the State would *de facto* re-introduce the general supervision. **In order to avoid an overbroad interpretation, Article 24.3 should define interests of the State as “legal rights of the State”** (e.g. property rights, rights to taxation etc.). A mere interest of public policy is not sufficient.

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

---

rights on their own due to their physical or economic situation, being underage or elderly aged, incompetence or limited legal capacity.

[54] See paras. 37 and 78.

2. Powers conferred for establishing the grounds of representation

90. The powers provided for in paragraph 5 seem far too wide. There is no 'procedural' sense in providing that a public prosecutor has the right to 'freely enter' all the premises listed in there, to receive copies of documents, to access databases, to conduct inspections or audits to see court files and to receive explanations. Only the last of these is stipulated to be with the consent of those affected rather than at the will of a public prosecutor. However, the public prosecutor should in fact only be seeking to attain the objectives implied in these powers by resort to the normal means that exist in civil procedure to obtain preliminary or interim judicial rulings for the purpose of preventing irreparable damage, securing and preserving potential evidence and pre-trial disclosure.

91. These powers are very reminiscent of those exercisable under pre-investigative inquiries in the criminal procedure context and under the general supervision function. This impression is reinforced by the reference in paragraph 8 to the action to be taken by public prosecutors should elements of administrative or criminal offences be found. As a consequence there is a serious risk of an absence of an equality of arms and thus a violation of the right to a fair trial under Article 6.1 of the European Convention[55]. This serious problem cannot be remedied by simply attributing the same or similar powers to advocates as it seems to be intended in proposed amendments to be made by the Draft Law to the Law of Ukraine *On the Bar and Bar Association*[56] since there is no guarantee that prosecutors and lawyers would actually have the same material at their disposal. It may even be very problematic to grant some of these powers to advocates.

92. Moreover, these powers, particularly when taken with the formulation of paragraph 7, would lead to a considerable disparity between the position of public prosecutors and other 'ordinary' parties to civil proceedings, thereby creating an issue of equality of arms.

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

94. Similarly the proposed amendment to the Law of Ukraine *On Enforcement Proceedings* that allows the public prosecutor, for the purpose of checking whether there are grounds in place for him or her to join enforcement proceedings to 'see documents of such enforcement proceedings, make excerpts and copies thereof'[57] should only be with the prior authorisation of the court concerned and after having shown cause why intervention in the enforcement proceedings would be justified. The proposed amendment should thus be amended accordingly.

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

96. Although the ability to conclude settlements before trial is in keeping with good civil procedure practice, the detail in paragraph 7 relating to the manner of achieving such settlements is both unnecessarily overlong and - when taken with the use of a 'note of alert' and the specific measures listed in this paragraph - gives the impression that the public prosecutor is directing rather than proposing and thus is acting under the powers accompanying the general supervision function. It would be sufficient for this provision simply to authorise the public

[55] *Cf.* other situations where the public prosecutor benefited from a privileged position or was furnished with powers not available to another party, such as in *Reinhardt and Slimane-Kaïd v. France* [GC], no. 23043/93, 31 March 1998 and *Stankiewicz v. Poland*, no. 46917/99, 6 April 2006.
[56] In clause 70 of Section 12.
[57] See clause 48 of Section 12.

prosecutor to conclude a settlement before trial. Paragraph 7 should thus be amended accordingly.

97. Only through the adoption of all the amendments set out above will a serious incompatibility with Council of Europe standards be averted.

98. Article 25 seeks to regulate the division of competences between various levels of prosecutors in case of representation of the interests of an individual or the state. It should not be read as giving any powers in addition to those set out in Article 24.

99. Article 25.5 provides that the Prosecutor General and his/her deputies as well as heads of regional public prosecutor's offices can file a claim for revision of a judgement by the Supreme Court against judgements passed in civil, administrative and economic matters. Contrary to the provisions of Article 25.4 and 24.6, Article 25.5 does not require the presence of any new circumstances for the claim. This may be unintended or be an error of translation. If however indeed a power were conferred upon the prosecutor to claim the revision of a final judgement in the absence of any new circumstances, this would be a violation of the *res iudicata* principle as well as Article 6 of the European Convention and should be changed.

100. Article 26 concerns supervision over observance of laws by the agencies conducting detective operations, inquiries and pre-trial investigations, as well as coordination between law enforcement agencies, and is unproblematic.

101. However, it is important that the role which it establishes should be seen as complementing and not in any way undermining the role of the Ukrainian Parliamentary Commissioner for Human Rights as the National Preventive Mechanism pursuant to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[58].

102. It would also be appropriate to echo Article 17.4 by providing at the end of paragraph 1 of the present provision that the issuance of instructions beyond a public prosecutor's competence shall entail liability under the law.

103. Article 27 concerns supervision over enforcement of laws in the enforcement of judgments in criminal cases and the application of coercive measures restricting personal liberty. Its content is generally appropriate but again the role that it establishes should be seen as complementing and not in any way undermining the role of the Ukrainian Parliamentary Commissioner for Human Rights as the National Preventive Mechanism.

104. In addition, there is a need to clarify that the power given by paragraph 1.2 to conduct an 'interview' with a detained person is limited to the purpose of the role of supervision established by this provision. Insofar as there is no such limitation, this paragraph should be amended to establish that it is so restricted.

105. Moreover, there is a need to clarify the scope of the power of a public prosecutor under paragraphs 3 and 4 to release someone held under someone else's purported authority as it appears to cover not only detention by an administrative decision but also one that is a consequence of 'a judicial judgment'. Insofar as these provisions do extend to detention pursuant to a judicial judgment rather than just making reference to a particular category of establishment in which persons can be held, it would be necessary to make it clear that they concern situations when a person is held in such establishments without a valid judicial judgment or beyond the term specified in it.

[58] Under Article 19-1 of the Law of Ukraine on the Ukrainian Parliament Commissioner for Human Rights.

E. Section 5. Procedures for Taking Public Prosecutor's Office

106. Article 28 specifies the requirements to be a candidate to become a public prosecutor. The definition of 'work experience' in paragraph 1.2 regarding one of the requirements to be a candidate for appointment as a public prosecutor seems unduly open as to what it comprises. It is certainly not limited to the criminal justice field or to work at a particular level (e.g., as a lawyer) and as such can be contrasted with the need for experience as a public prosecutor for appointments at a Regional Public Prosecutor's Office or in the Prosecutor General's Office. Although the latter cannot be expected for an initial appointment, the present requirement does not seem to be sufficiently exacting as a basis for appointment to this important role and the nature of this requirement should thus be reconsidered.

107. It is not clear what is the intention or effect of the second sentence of paragraph 4 - 'The special features of appointment of the Prosecutor General of Ukraine shall be regulated hereby' - since this appointment is in fact regulated by Article 41 of the Draft Law. In the circumstances it would seem appropriate to delete this sentence

108. Article 30 elaborates the selection procedure and is generally appropriate. However, the present wording of paragraph 1.1 could be interpreted as allowing the High Qualifications and Disciplinary Commission of Prosecutors of Ukraine to add to the list of requirements for selection of candidates for appointment as a public prosecutor. It might be better, therefore, for this paragraph to be modified so as to refer expressly to the list of requirements as set out in Article 28.

109. The proficiency test to be used for competitions to be taken by candidate public prosecutors is regulated by Article 32 - including provision for their recording and the publication of results - and is generally appropriate. However, the stipulation in paragraph 7 that the proficiency test is to be valid only for two years could have unduly harsh consequences for any successful candidate for whom no vacancy is found during that period and thus would be required to go through the whole procedure again. This may not, of course, occur in practice but there is a need to keep under review the impact of this particular restriction and possibly modify it in the light of experience.

110. Article 33 provides for background checks on candidate public prosecutors who have passed the proficiency test and is, in principle, appropriate. The procedure for such checks is to be governed by the Law of Ukraine *On Preventing and Combating Corruption*, which has not been examined for the preparation of this opinion.

111. However, it might be desirable for the special training courses which are required to be taken pursuant to paragraph 4 to be explicitly linked to the training at the National Prosecution Academy of Ukraine that is provided for in Article 34.

112. Article 35 deals with the procedure governing competitions for particular public prosecutor positions and is generally appropriate. However, there does not seem to be any basis prescribed for determining whether or not there has been a successful completion of special training provided for in Article 34 - paragraph 3 of the present provision merely refers to candidates who 'have taken special training' - and for resolving any disputes as to the issue of such completion having occurred. It needs, therefore, to be clarified whether or not the training is subject to assessment - which would certainly be appropriate - and, if so, how disputes regarding success are to be determined.

113. Articles 36-38 are concerned with the formal appointment of public prosecutors, the oath to be taken and appointments to temporary vacancies. Article 39.3 provides that upon the return to his or her post of the permanent post holder, the person holding the post temporarily will be dismissed if there is no vacancy. The temporary post holder should at least be kept on a reserve list for future vacancies as provided for under Article 38.3.

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

115. Article 39 deals with the transfer of a public prosecutor from one office to another, including the temporary filling of positions at a higher level, and is not generally problematic. However, paragraph 2 should specify some criteria for assessing competitions for transfer to a higher level public prosecutor's office. It may be that, like Article 35.1, the competition is to be administered in accordance with Article 35, although something more than ranking in the proficiency test would seem appropriate for appointment to a higher level public prosecutor's office. This paragraph should thus be amended accordingly.

116. Article 40 is concerned with the administrative positions in the office of public prosecutors. The term of office prescribed for administrative positions, other than that of the Prosecutor General, is five years and, as this seems to be renewable, it has already been noted[59] that there is a need to strengthen the arrangements to ensure that the possibility of such reappointment does not lead to the holders of these positions compromising their independence.

117. Although there is no reference in the Draft Law to the length of the term of office of the Prosecutor General, this would have been governed by Article 122 of the Constitution, which provided for a term of five years. However, a day before the visit of the Venice Commission's delegation to Kyiv, the *Vekhovna Rada* overwhelmingly voted on constitutional amendments and transferred them to the Constitutional Court. Even though the amendments relate to the judiciary, one of them concerns Article 122 and would remove any reference to length of the term from the Constitution. This could be interpreted as extending the term until retirement but this seems implausible. More likely the length of the mandate should be specified in the Law only. However, instead of removing the definition of the term from the Constitution, **Article 122 of the Constitution should be amended to provide for a longer mandate than the current five years and should exclude re-election**[60] in order to protect persons appointed as Prosecutor General from political influence.[61]

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

119. There is also no provision in the Draft Law for some form of technical vetting as to the suitability of candidates for appointment to the post of the Prosecutor General, which was already noted as being the subject of a recommendation of the Venice Commission regarding a previous draft law[62]. As has been indicated there, such a procedure - which is not inconsistent with the terms of Article 122 of the Constitution - is essential to ensure that the President and the *Verkhovna Rada* are properly informed as to the qualities of candidates before respectively nominating and approving the appointment of a particular individual. **Article 41 should be amended to provide that an advisory body, possibly the High Qualifications and Disciplinary Commission of Public Prosecutors, give non-binding advice on the candidates before the President and the *Verkhovna Rada* take their decision.**

[59] See para. 49.
[60] Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (prepared by the Ukrainian Commission on Strengthening Democracy and the Rule of Law) (CDL-AD(2012)019, 15 October 2012), at para. 32.
[61] See paras. 30 and 199.
[62] *Ibid*., at para. 33.

120. Article 43 deals with the dismissal of the Prosecutor General and, as has already been noted[63], does not address the earlier concerns expressed - namely, that the existing framework can be misused either by the President (Executive) or *Verkhovna Rada* (Legislative) to interfere with the independence of the Public Prosecution Service and recommendations made in this regard remain valid[64]. **Article 106.11 of the Constitution should be amended to provide that the President can dismiss the Prosecutor General only for specific grounds and that the Prosecutor General should benefit from a fair hearing. Furthermore, Article 122 of the Constitution should be amended to remove the no confidence vote against the Prosecutor General.** However, this should not preclude the adoption of the Draft Law under the present Constitution.

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

122. **A consultation procedure with regard to the Prosecutor General, giving him or her a right to be heard before any adverse decision, should be introduced in the constitutional reform process. However, even without such a constitutional amendment, a preliminary procedure before the High Qualifications and Disciplinary Commission of Prosecutors should be introduced in order to advise the President or the Verkhovna Rada on possible violations of professional responsibilities of the Prosecutor General.** Of course, such a procedure would not be binding upon the President or the *Verkhovna Rada.* Such a procedure would make it clear that such a step should be exceptional and thus protect the Public Prosecution Service from improper influence.

123. Although Article 122 of the Constitution makes no express provision for voluntary resignation, this form of termination is surely implied as much as that resulting from the completion of the currently prescribed five-year term of office. Nonetheless, the notion of being 'dismissed' in paragraph 1.1, as well as in Article 65, seems inappropriate as a way of describing who is leaving office at his or her own request. Subject to the comment previously made regarding the term of office for the Prosecutor General's term of office[65], the formulation of this provision should thus be amended accordingly.

124. Furthermore, paragraph 3 seems to assume that someone who has been the Prosecutor General could continue as a public prosecutor if the person concerned had previously been so appointed. This issue could be reconsidered.

125. Regardless of the preceding comment, it also seems inappropriate for a Prosecutor General removed from that position on a vote of no confidence – which would presumably turn on improper performance of duties – to continue in post as a public prosecutor.

F. Section 6. Disciplinary Liability of a Public Prosecutor

126. Article 44 deals with the grounds for disciplinary actions against public prosecutors - including the welcome inclusion of public statements violating the presumption of innocence - and these are all appropriate. However, there is a need to clarify the meaning in paragraph 1.5 of 'regular … violation of prosecutorial ethics' insofar as this provides a basis for disciplinary action against a public prosecutor under this provision.

[63] See para. 199.
[64] See para. 30.
[65] See para. 117.

127. As an objective basis for disciplinary action, a performance evaluation system should be introduced in the Law. Such a system should provide for objective criteria for evaluation and include necessary guarantees for appeals against negative evaluations.

128. **Article 44 should explicitly rule out that an acquittal of a person accused by a prosecutor can result in disciplinary proceedings against the prosecutor unless the charges were brought due to gross negligence or maliciously.** It seems that because of fear of performance indicators and of disciplinary proceedings prosecutors exert pressure on the judges to avoid acquittals. Currently prosecutors seem to feel obliged to win all cases lest they face disciplinary action. In a democratic system under the rule of law, prosecutors are parties subject to the principle of the equality of arms and necessarily lose cases without this resulting in disciplinary action against them.

129. Article 46 deals with the competence and obligation to complain about the conduct of public prosecutors and is generally appropriate. However, there is a need to clarify what is the nature of the obligation in paragraph 2 to make a complaint about a disciplinary violation. Presumably a failure to comply with this obligation would itself be grounds for disciplinary proceedings against public prosecutors but the position regarding other persons is less evident. It is thus important that the matter is clarified since the obligation applies to 'anyone who is aware' and a legal obligation for persons not working in law enforcement would not be appropriate. However, this may only be a translation issue.

130. In addition, it would be desirable to make the ability of Qualifications and Disciplinary Commissions to submit complaints, and thereby start disciplinary proceedings, more explicit in paragraph 3.

131. The procedure governing the conduct of disciplinary proceedings against prosecutors is set out in Articles 47 and 48. However, there is a need to clarify what action can be taken where disciplinary proceedings are barred pursuant to paragraph 2.4 because of a public prosecutor's dismissal or termination of powers as such a bar could otherwise result in the victim of a wrong being denied a remedy, which in some cases could be in violation of Article 13 of the European Convention.

132. Moreover, the powers to obtain information from individuals and citizens' associations in Article 47.5 is extensive and **there is a need to amend the Draft Law to ensure respect for the privilege against self-incrimination and legal professional privilege, as well as the exercise of human rights and fundamental freedoms. The Draft Law should be amended to provide that any liability as set out in Article 47.7 can only be established on the basis of the non-respect of a court warrant.**

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

134. Article 49 deals with the determination of disciplinary proceedings against public prosecutors and is generally appropriate. However, there is a need to clarify that the member of the agency performing disciplinary proceedings who carried out the inquiry is not entitled to participate or even be present in the deliberation and vote of the agency on the case concerned. Such a possibility would be inconsistent with the requirement of impartiality under Article 6.1 of the European Convention. Such a limitation on the participation of this particular member of the agency should be introduced, possibly by a definition of the term 'members' in the first sentence of paragraph 1.

135. The Draft Law should also be amended to include a provision that allows a challenge to the member of the agency performing disciplinary proceedings or his or her recusal in cases when there are reasons for doubts concerning his or her impartiality.

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

137. Article 50 is concerned with the disciplinary sanctions that may be applied against a public prosecutor and these are appropriate. However, paragraph 1 stipulates that these sanctions may not be applied against the Prosecutor General. This may be appropriate given the wide discretion over his or her removal but this stipulation still leaves it unclear as to whether disciplinary proceedings can nonetheless be instituted against the Prosecutor General, albeit without the possibility of imposing any sanctions. This uncertainty arises because the applicability of Articles 44-49 to the Prosecutor General is not explicitly excluded. There is thus a need to clarify the disciplinary liability of the Prosecutor General.

138. There is also a need to specify in paragraph 3 the grounds on which the head of the relevant public prosecutor's office can request the history of a disciplinary sanction imposed on a public prosecutor to be effectively ended prematurely as such a discretion could undermine the effectiveness of the disciplinary process.

139. Furthermore, the compatibility requirements referred to in paragraph 5 are presumably those in Article 18 of the Draft Law but it would be preferable for this to be stated explicitly and this provision should be amended accordingly.

140. The possibility of appealing against the results of decisions taken in disciplinary proceedings is regulated in Article 51. The provision for a choice of means of appeal in paragraph 1 is an unnecessary duplication of procedures and would lead to inconsistent decision-making. Given that the Draft Law establishes a special prosecutorial council, the link to the High Council of Justice should be severed. **In any case, the appeal against a disciplinary decision taken by the High Qualification and Disciplinary Commission should lie with a court only.**

G. Section 7. Dismissal of Public Prosecutors, Suspension and Termination of Their Powers

141. Article 52-63 set out and then elaborate the grounds for dismissal of public prosecutors and the termination of their powers, which are generally appropriate. However, the compatibility requirements referred to in Article 51.1.2 and Article 54 are presumably those in Article 18 of the Draft Law and it would be preferable for this to be stated explicitly and this provision should be amended accordingly.

142. The provision that a prosecutor cannot continue performing his or her duties when a judgment takes effect recognizing him or her guilty of administrative corruption offenses is not very clear. On its own, it could be interpreted in the sense that the prosecutor will be considered dismissed from the day when the judgment takes effect and no adoption of any formal act of dismissal is necessary. However, read in conjunction with Article 52, it seems that this not the correct interpretation. The same problem appears with Article 57.3 which provides a similar rule for criminal convictions.

143. In addition, unless this a problem of translation the text should be revised as it currently could be interpreted in the sense that the prosecutor can be dismissed even if he or she will be found guilty for not executing a minor civil obligation

144. In addition, the ground for dismissal provided for in Article 52.1.4 and Article 56 seems unduly harsh as the putting of a person into a position of close subordination will not necessarily be the fault of the public prosecutor concerned and securing a transfer is not something that would be within his or her control. It should not be impossible for the public prosecutor's office

concerned to find an alternative position in such a case or at least to put the person on paid leave until one becomes available and the ground should, therefore, be modified accordingly.

145. Moreover, although the specificity of the service might warrant dismissal for almost any offence, this would perhaps be disproportionate in the case of minor administrative offences (e.g., with respect to motoring) and there is a need, therefore, to clarify the effect of the ground of dismissal in Article 52.1.5 and Article 57.

146. Furthermore, some clarification is also needed as to the basis for involuntary termination of a person's Ukrainian citizenship given that loss of citizenship is a ground for dismissal in Article 52.1.6 and Article 58.

147. Also, dismissal, as opposed to termination, seems inappropriate in the case of someone found missing or dead, as is provided for in Article 52.1.7 and Article 59, and the Draft Law should be amended accordingly.

148. Similarly, dismissal, as opposed to termination, seems inappropriate in the case of someone who resigns voluntarily, as is provided for in Article 52.1.8 and Article 60 and the Draft Law should be amended accordingly.

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

150. Also, the use of the term 'long time' in paragraph 2 of Article 53 for the purpose of determining the period of impossibility to perform duties due to medical conditions that is used to justify dismissal is ostensibly imprecise and it would be better to specify that this is a general concept found in other legislation, such as the Labour Code of Ukraine.

151. Finally, it is noted that the age at which the powers of all public prosecutors - including the Prosecutor General - will be terminated is being raised from sixty-five to seventy. The draft constitutional amendments submitted by the *Verkhovna Rada* to the Constitutional Court the day before the visit of the Commission's delegation include the same retirement age for judges.

152. Article 65 deals with the formal taking of the decision to dismiss the Prosecutor General and, subject to the concerns previously expressed about the grounds for dismissing the Prosecutor General of Ukraine[66], is appropriate. However, it would be preferable if paragraph 1 explicitly referred to the provision containing those grounds - currently Article 43 - rather than just state 'on the grounds stipulated herein'.

153. Article 66 is concerned with the suspension of a public prosecutor's powers when on secondment or in the course of a pre-trial investigation or judicial proceedings, pursuant to Articles 155-158 of the Criminal Procedure Code, and is appropriate. However, it would be clearer if the relevant Articles of the Criminal Procedure Code were specifically stated in paragraph 1.2. Furthermore, it should be made clear that the suspension is of the prosecutor's powers but not of his or her salary or material or social support.

H. Section 8. Prosecutorial Self-Governance and Bodies Supporting the Prosecution Service

154. Articles 67-74 are concerned with the arrangements for prosecutorial self-governance. These provisions are very complicated. The Draft Law established a new Council of Public Prosecutors and by the draft constitutional amendments submitted to the Constitutional Court for

[66] See paras. 25 and 120-123.

opinion the day before the visit of the Commission's delegation. However, the link between the prosecutors and the High Council of Justice is retained, which is incoherent. This link should be severed.[67]

155. Taking into account the concerns with regard to the excessive powers of the self-governing bodies suggested in the 2012 draft Law of Ukraine *On the Public Prosecution Service*[68], paragraph 3 of Article 69 should be amended so as to specify that decisions of the Conference are only binding on public prosecutors to the extent that they are within its competence and that these decisions cannot be directed to individual public prosecutors.

156. In addition, the provision in paragraph 2 of Article 70 for the attendance of the President, the Chairman of the *Verkhovna Rada* and the others listed in that paragraph at sessions of the All-Ukrainian Conference of Public Prosecution Employees seems inconsistent with the notions of independence and self-governance, notwithstanding that this attendance is in a non-voting capacity. It should, therefore, be deleted.

157. Moreover, there is a need to clarify the voting system for delegates to the Conference that is specified in Article 71.2, which just refers to 'an alternative basis'. This could mean either a choice of candidates or could be a reference to some system for the transfer of preference votes. It should thus be more specific as to what is being proposed. If Article 71.2 were to provide that there must be alternative candidates, this would go too far. If no alternative candidates were to participate at the selection procedure the process would be blocked.

158. In contrast to the Conference, no arrangements at all are specified in Article 73 as to how 'the representatives' of public prosecutors who will constitute the Council of Public Prosecutors of Ukraine are to be selected and these clearly ought to be specified in the Draft Law.

159. Also, the composition of the Council is deficient in that it does not provide for any involvement of non-prosecutors[69]. The present provision should, therefore, be amended so as to allow for the appointment of at least some members who are not public prosecutors, such as lawyers and legal academics.

160. Furthermore, the stipulation concerning the provision of funding in Article 74 for the All-Ukrainian Conference of Public Prosecution Employees and the Prosecutors' Council of Ukraine seems unduly vague and does not give any indication as to who is either to determine the level of support or to make submissions as to what level of support might be needed. It would be appropriate for this provision to be amended to address these matters.

161. Article 75 deals with the status of the Qualifications and Disciplinary Commissions. However, its structure suggests that these Commissions are regarded as something merely auxiliary to the Public Prosecution Service rather than the key element in its regulation and self-governance. In this connection, it is particularly surprising that these Commissions - unlike, for example, the National Prosecution Academy of Ukraine[70] - do not have the status and other attributes of a legal entity. Moreover, no separate budgetary arrangements have been made for the Qualifications and Disciplinary Commission and the absence of these will necessarily undermine their independence. It would, therefore, be appropriate to amend this provision to rectify these omissions and thereby underline the importance of the role that is to be played by these Commissions.

162. Articles 76-78 are concerned with the membership of the Qualifications and Disciplinary Commissions and are generally unproblematic. However, although it is appropriate that the outside members of the Qualifications and Disciplinary Commissions should not be elected by

[67] See also para. 140.
[68] See Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (prepared by the Ukrainian Commission on Strengthening Democracy and the Rule of Law) (CDL-AD(2012)019, 15 October 2012), at para. 110
[69] See the Venice Commission's Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service 2010 (CDL-AD(2010)040, 3 January 2011), para. 66.
[70] See paragraph 2 of Article 83 of the Draft Law.

any prosecutorial body, the arrangements made in Articles 76.2, 77 and 78 seem unduly cumbersome and consideration should be given to using some existing body for this purpose. The fallback arrangement of using the convention of representatives of law universities and academic institutions in the transitional provisions[71] seems, in particular, to provide a simpler solution for appointment of non-prosecutorial members.

163. Furthermore, it seems inappropriate - as paragraph 4 of both Articles 77 and 78 envisage - for the head of the Regional or High Qualifications and Disciplinary Commissions to open the proceedings of the selection body for non-prosecutorial members since those heads will be public prosecutors. This paragraph should thus be amended to provide for this role to be performed by someone who is not a prosecutor.

164. In addition, there is a need to clarify the meaning of 'two-thirds' in paragraph 3 of Article 76, having regard to the fact that Article 81.5 stipulates that eight out of eleven possible members must attend meetings of Qualifications and Disciplinary Commissions for the proceedings at them to be valid.

165. Finally, the possibility, provided by paragraph 8 of Article 76, for chairmen, vice-chairmen and secretaries of the Qualifications and Disciplinary Commissions to be able to participate in the consideration of issues by prosecutorial self-governance bodies, at least if that entails an ability to do more than make submissions to those bodies, seems inconsistent both with the regulatory role to be performed by such members of those commissions and the role of the All-Ukrainian Conference of Public Prosecution Employees in appointing members, and adopting procedural regulations for, the commissions. It is also potentially inconsistent with the prohibition in paragraph 1 of Article 73 on public prosecutors who are members of Qualifications and Disciplinary Commissions being members of the Council of Public Prosecutors of Ukraine. There is a need, therefore for paragraph 8 to be harmonised with Article 73 to preclude any conflicting roles being played by chairmen, vice-chairmen and secretaries of Qualifications and Disciplinary Commissions.

166. Article 79 deals with the termination of membership of Qualifications and Disciplinary Commissions and are generally appropriate.

167. However, as already observed with respect to Article 53[72], termination because of impossibility to perform duties for health reasons is ostensibly imprecise and it would be better to specify that this is a general concept found in other legislation, such as the Labour Code of Ukraine.

168. Furthermore, the grounds for termination of membership of Qualifications and Disciplinary Commissions in paragraph 1 should also extend to the taking on of the various positions listed in the third and fourth sentences of paragraph 2 of Article 76 so that these grounds also extend to the taking on positions that prevent initial appointment to these commissions. This paragraph should thus be amended accordingly.

169. Moreover, there should be some provision and procedure to deal with improper conduct on the part of the members of Qualifications and Disciplinary Commissions which would render them unfit to continue in that capacity. The present Article should thus be amended to address this need.

170. Articles 80-82 are concerned with the powers, meetings and activities of Qualifications and Disciplinary Commissions and are generally appropriate. However, the right of access to documents, etc. in paragraph 3 of Article 80 appears to be unduly wide and, insofar as it extends to individuals and citizens' associations, would not be compatible with the right to respect for private life in Article 8 of the European Convention unless this is first authorised by a court. Insofar as this is not a condition governing such access, this provision should be amended accordingly.

[71] See clause 4 of Section 13.
[72] See para. 150.

171. Furthermore there is a need to clarify whether or not the power to interrogate individuals is governed by the privilege against self-incrimination and, insofar as it is not, the protection afforded by this privilege needs to be extended to any such interrogation.

172. Moreover, having regard to Article 46.4, there is a need for confirmation that the names of persons who are the subject of disciplinary proceedings cannot be included in the information posted on the website pursuant to paragraph 6 of Article 81, i.e., before any decision on the case has been taken. Insofar as this is not the case, this paragraph should be amended to provide the protection against disclosure that Article 46.4 purports to grant.

173. In addition, although there is provision in paragraph 1 of Article 82 for secretariats to be 'in place' to provide organisational support to the Qualifications and Disciplinary Commissions, there is no provision made in the Draft Law for the selection criterion or procedure for appointing those who will work in these secretariats. It is not clear whether they will be drawn from public prosecutors, although there is a reference in paragraph 2 to their salary, welfare support and social protection being governed by the Draft Law - strangely referring to its title rather to 'the present law' or provisions in it - and the Law on Public Service. There is, however, no specific mention of secretariat members in the later provisions of the Draft Law dealing with issues of salary, welfare support and social protection. It is clearly important that secretariat members have substantial experience in order to undertake their important task and their disciplinary record should also be unblemished. Appropriate selection criteria, as well as an appointment procedure, should thus be added to this provision. Furthermore, appropriate arrangements to secure the independence of those working for the Commissions are needed and Article 82 should be amended accordingly.

174. Finally, there is a need to clarify what, if any, disciplinary standards and mechanism are applicable to the members of secretariats insofar as they are drawn from public prosecutors. In such a case, it might be appropriate for the same disciplinary standards as those governing public prosecutors should also be applicable to them but there would be a need for some adjustment to the mechanisms to avoid any risk of them effectively being judge in their own cause. This issue thus needs to be appropriately addressed in Article 82.

175. Article 83 deals with the existing National Prosecution Academy of Ukraine and is appropriate. However, in view of the importance attached to international cooperation in the Draft Law[73] and the provisions regarding this Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system[74], training in foreign languages for public prosecutors might be added to the remit of the Academy.

176. Article 84 allows for the establishment of panels of prosecutors as advisory bodies for the Prosecutor General's Office and regional prosecutor's offices and is not, in principle, problematic. However, there is a need to clarify what is the intended relationship between the All-Ukrainian Conference of Public Prosecution Employees and the panels that are to be established under this provision as there seems to be some overlap in their functions, albeit that the panels are advisory and the Conference's decisions are binding.

177. Article 85 deals with the establishment of a Research and Methodology Board and other prosecutorial institutions and is generally unproblematic. However, there is a need to clarify whether membership of the proposed Research and Methodology Board is limited to public prosecutors and whether this is intended to be a full or part-time activity. The effectiveness of the proposed Board would certainly benefit from having on it persons from academic institutions with relevant research expertise. Nonetheless, if it is meant to be a full-time activity for some public prosecutors, there would need to be a provision to suspend their powers in that role and it would thus be appropriate to amend Article 66 accordingly.

[73] See paras. 183-184.
[74] At paras. 36-38.

178. Furthermore, it seems inconsistent with the essential function of public prosecutors for any of them to be engaged, as paragraph 4 authorises, in establishing and managing 'printhouses, social welfare companies, healthcare establishments' and founding print media. Indeed it could put them into situations of potential conflict of interest. It would be more appropriate for these services to be bought in by a regular procurement process and this paragraph should thus be amended accordingly. Such provisions are typical features of the old “prokuratura” system. It is doubtful if these provisions are in conformity with Articles 1 and 2 of the Draft Law which define the Public Prosecutor’s Office in a limitative way.

I. Section 9. Material and Social Support for the Public Prosecutor and other Prosecution Officers

179. Articles 86- 96 are concerned with the material and social support to be provided to public prosecutors and other prosecution officers. The possibility to provide individual bonuses and housing can lead to corruption or to undermine the independence of the prosecutor as distribution or allocation of these benefits will include an element of discretion. Only bonuses, for which completely objective criteria are defined, can avoid this problem.

180. Furthermore, the sort of material support envisaged by Article 88 seems inappropriate. The needs addressed should be adequately met out of the salaries of public prosecutors. This is because the dependence that is thereby engendered might either give scope for undue pressure to be applied to those public prosecutors who might seek to rely on the independence supposedly guaranteed to them or lead to a reluctance even to consider acting independently because of the fear as to what might be lost through doing so.[75] This may not be something that can be addressed with immediate effect because some elements of the support are already in the Existing Law[76]. However, it is noted that the present provisions are less extensive than the current ones and this trend could be pursued further over the course of an appropriate transitional period.

J. Section 10. Organisational Support to the Public Prosecutor’s Office

181. Article 97 is concerned with the guarantees and compensation to be provided to persons summoned to the public prosecutor's offices and, as such, is inappropriately located in a section of the Draft Law said to be concerned with the material and social support to be provided to public prosecutors.

182. There is a need to clarify whether the scope of the power of public prosecutors to summon persons to their offices goes beyond that provided for in Article 24 of the Draft Law and Section 11 of the Criminal Procedure Code.

K. Section 11. International Cooperation

183. Articles 98-100 deal with arrangements for international cooperation to be undertaken by the Public Prosecutor's Office. It should be clarified that no cooperation with other countries should be undertaken pursuant to Article 98 in a manner inconsistent with Ukraine’s constitutional guarantees and its treaty obligations regarding human rights. This is potentially important given the rather open-ended possibility envisaged in the second sentence of paragraph.1 since this could, for example, have the potential to cover cooperation relating to extradition or rendition. Insofar as this protection does not already exist, this provision should be amended to provide it.

[75] On the problems of judicial independence caused by bonuses and housing to judges, see CDL-AD(2010)004, para. 46).
[76] Articles 50 and 51.

184. Furthermore, it does not seem appropriate for the Prosecutor General to have the specific responsibility envisaged in Articles 99 and 100 for the conclusion and denunciation of treaties since that is more properly an executive and legislative function. In any event, the conclusion or denunciation of any treaties should not be inconsistent with Ukraine's constitutional guarantees and its treaty obligations regarding human rights. These provisions should thus be amended accordingly.

L. **Section 12. Final provisions**

185. This section concerns the final provisions, covering the entry into force of various provisions and the consequential amendment of other laws. The Law shall come into force three months from the day following the day when the High Qualifications and Disciplinary Commission of Prosecutors of Ukraine and the Council of Prosecutors of Ukraine announce the beginning of their operations. There seems to be no fixed deadline when the High Qualifications and Disciplinary Commission and the Council of Prosecutors have to make this announcement. **Given the importance of having the law entering into force as soon as possible, a fixed deadline should be introduced for the entry into force.**

186. The need for some changes to the proposed amendments to the Law of Ukraine *On Enforcement Proceedings* has already been noted[77].

187. In addition, the proposed amendments to Articles 7 and 250 of the Code of Ukraine on Administrative Offences refer to supervision of compliance with the laws in the area of anti-corruption that exceeds the scope of functions envisaged by the Draft Law. These proposed amendments should, therefore, be modified so as to delete supervision of compliance with the laws in the area of anti-corruption.

188. The Civil Procedural Code, in particular paragraph 2 of Article 45, should be amended so as to correspond to the restrictions concerning the provisions of representation by a prosecutor of individuals and state bodies (entities) in court.[78]

189. Furthermore, it needs to be clarified whether or not the powers of supervision to be both restated in Article 17 of the Law of Ukraine *On Agencies and Services of Children's Affairs and Special Children's Establishments*[79] and included in Article 31 of the Law of Ukraine *On Psychiatric Care*[80] are limited to issues relating to restrictions on the personal liberty. Insofar as these amendments are not so limited, they should be modified to that effect so as not to become a form of general supervision.

190. In addition, it is noted that certain amendments do not immediately appear to have anything to do with the provisions in the Draft Law, such as the amendment to the Law of Ukraine *On the Judiciary and the Status of Judges* regarding the basic salary of a court administrator and the Law of Ukraine *On the Bar and Bar Association* regarding the funding of lawyers' self-governance organisations.

M. **Section 13. Transitional provisions**

191. This section contains transitional provisions, which are not generally problematic. However, the stipulation in clause 13 that the actions mentioned in this provision comprise only 'recommendations to the Prosecutor General's Office' does not seem sufficiently strong enough to ensure that the appropriate action required to implement the Draft Law is actually

[77] See paras. 79 and 93.
[78] See paras. 74-104.
[79] Clause 34 of Section 12.
[80] Clause 52 of Section 12.

implemented. The provision should thus be amended to make the actions concerned requirements to be undertaken by the Prosecutor General's Office.

192. Notwithstanding the provision in paragraph 2 of Section XIII that everyone stays in their positions and retains their class ranks in the reorganisation following the adoption of the draft law, some provision should be introduced dealing with the plans for reorganisation, which might be quite different and possibly much more extensive than the sort of reorganisations arising in the ordinary course of activity envisaged in Articles 52.1.10 and 61. A failure to specify the process that will be adopted following the entry into force of the Draft Law could lead to unnecessary uncertainty that is detrimental for the exercise of independence.

V. Conclusion

193. The provisions of the draft Law on the Public Prosecutor's Office of Ukraine, submitted for Opinion in August 2013 - in terms both of what has been included and even more what has been omitted - constitute a very significant advance on previous proposals to replace the Existing Law. They have thus clearly laid some very firm foundations for a public prosecution service in compliance with European standards and that will meet the needs of a modern criminal justice system

194. The Venice Commission welcomes that the Draft Law embodies some very significant advances towards fulfilling the requirements of Council of Europe standards. These include:

- the exclusion of the general supervision function from the functions of the Public Prosecutor's Office[81];
- the exclusion of the right of any public prosecutors to participate in the proceedings of the *Verkhovna Rada*, boards of ministries, central executive agencies, local councils and other administrative bodies;
- the enhanced statement of principles of operation of the Public Prosecutor's Office[82];
- the introduction of a statement of general rights and duties of a public prosecutor[83];
- the improvement in the provisions to secure the independence of public prosecutors[84];
- the elimination of investigators from public prosecutor's offices[85];
- the establishment of more specific criteria and processes for the appointment of public prosecutors[86];
- the improvement in the criteria and processes used for disciplinary action against public prosecutors[87];
- fuller provision regarding the grounds for dismissal of public prosecutors[88];
- the introduction of arrangements to secure self-governance within the Public Prosecution Service[89]; and
- the reinforcement of the provisions of the new Code of Criminal Procedure on the admissibility in criminal proceedings of evidence obtained by coercion outside of pre-trial investigation[90].
- the establishment of centres for free legal aid, which should be able to take over from the prosecutor's office the representation of the interests of individuals [91]
- the deletion of the article on the official uniform for prosecutors[92].

[81] Article 2.
[82] Article 3.
[83] Article 19.
[84] Articles 16 and 17.
[85] Effective from the establishment of the State Investigation Bureau and at the latest five years after the Criminal Procedure Code came into effect, i.e., 20 November 2017; clause 1 of Section 13 of the Draft Law.
[86] Articles 28-36 and Articles 75-82.
[87] Articles 44-51 and Articles 75-82..
[88] Articles 52-64.
[89] Articles 67-74
[90] See clause 12 of Section 12.
[91] Section 12.
[92] Article 53 of the Existing Law.

195. Some key issues can be settled only in the framework of the ongoing process of constitutional revision. These are:

- Article 106.11 of the Constitution should be amended to provide that the President can dismiss the Prosecutor General only for specific grounds, following a fair hearing.
- Article 121 of the Constitution should be amended to remove the function of representation of the interests of individuals.
- Article 122 of the Constitution should be amended to remove the no-confidence vote in the Prosecutor General.

However, the preparation of such amendments should not preclude the adoption of the Draft Law under the current constitutional provisions.

196. In general the Draft Law is a good basis for completing the reform of the prosecution service. Nonetheless, there are five key issues of concern, which remain particularly serious obstacles to full compliance with European standards, which can be settled by amending the Draft Law.

197. First, and most significantly, the Draft Law - through Articles 2.1.2, 24 - still provides for the retention of functions that go beyond the criminal justice sphere relating to the representation of the interests of the individual and the state that go beyond the criminal justice sphere. Pending the revision referred to above, the Draft Law should mitigate the scope of the retained functions. Therefore, the relevant provisions of the Draft Law should be amended in such a fashion that reduces their more extreme reach, which gives the impression that much of the function of general supervision is in fact being retained. Specific recommendations to that effect are:

- Article 24.2 should be amended to provide that the role of the prosecutor in representing the individual should be only subsidiary and both the individual and any person entitled to represent the individual should be able object against such representation in court.
- Article 24.2 and 24.3 should explicitly provide that a public prosecutor can represent the interests of an individual or the state only after having presented justification for his or her intervention and after the acceptance of these grounds by the court.
- In order to avoid an overbroad interpretation, Article 24.3 should define interests of the State, which can be the basis for representation by the prosecutor, as “legal rights of the State”.
- The wide powers in Article 24.5, which are not required for establishing the grounds for representation, especially the free access to premises and access to databases should be removed.
- Article 24.6 should be amended to confer to the public prosecutor only the powers of the individual or state body, which he or she represents.

198. A second concern is that the provisions to protect the independence of public prosecutors omit standards and procedures for ensuring the internal independence of public prosecutors other than Prosecutor General, specifically:

- Article 17 should be amended to provide that instructions to an inferior prosecutor should be given in writing, and upon request any oral instructions should be confirmed in writing (or be withdrawn).
- In case of an allegation that an instruction is illegal a court or an independent body like a prosecutorial council should decide on the legality of the instruction
- All general instructions and policy guidelines issued to public prosecutors should be published.

199. The third concern relates to the position of the Prosecutor General in that there continues to be a threat to his or her independence from the relative shortness of the term of office when coupled with the power of reappointment, as well as from the absence of adequate guarantees against dismissal[93]. In addition no provision has been made for input by a technical, non-political body in the appointment process for the Prosecutor General[94]. Specifically the Draft Law should be amended to:

[93] See paras. 116-117, 118 and 120-123.
[94] See para. 119.

- Article 41 should be amended to provide that an advisory body, possibly the High Qualifications and Disciplinary Commission of Public Prosecutors, give non-binding advice on the candidates before the President and the *Verkhovna Rada* take their decision on appointment.
- Article 43 should be amended to provide for a preliminary procedure before the High Qualifications and Disciplinary Commission of Prosecutors in order to provide non-binding advice to the President and the *Verkhovna Rada* on possible violations of professional responsibilities of the Prosecutor General.

200. The fourth concern is that the important provisions to protect the independence of public prosecutors in Article 16 nonetheless continue to have the potential to restrict unjustifiably investigation and reporting by the media through its prohibition on 'interference' with their functions[95]. Specifically:

- Article 16 should be amended to clearly define liability for 'disrespect' as excluding legitimate criticism according to the European Convention on Human Rights and the case-law of the European Court of Human Rights.

201. The fifth concern relates to the disciplinary procedure, which requires further guarantees for the prosecutor, a reduction of the powers of the investigating body and a clear regulation for an appeal against disciplinary sanction:

- Article 44 should explicitly rule out that an acquittal of a person accused by a prosecutor can result in disciplinary proceedings against the prosecutor or regarded as a negative performance indicator unless the charges were brought due to gross negligence or maliciously.
- Article 47 should ensure respect for the privilege against self-incrimination and legal professional privilege, as well as the exercise of human rights and fundamental freedoms. Only the non-respect of a court warrant should entail liability set out in Article 47.7.
- Article 51 should provide that the appeal against a disciplinary sanction adopted by the High Qualification and Disciplinary Commission should lie with a court only.

202. In addition to these main shortcomings, there are many important points of detail concerning individual provisions for which amendments and/or clarifications are required.

203. Finally, given the importance of having the law entering into force as soon as possible, a fixed deadline should be introduced for the entry into force.

204. Although there is a fair amount of work still to be done, the changes that are required for the Draft Law can be accomplished without great difficulty within the framework that it has already set. These changes will bring about the transformation of the Public Prosecution Service that Ukraine undertook to secure when it joined the Council of Europe.

205. The Venice Commission and the Directorate for Human Rights remain at the disposal of the Ukrainian authorities for further assistance in this respect.

[95] See para. 53-54.