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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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)

Adopted by the Venice Commission
at its 92nd Plenary Session
(Venice, 12-13 October 2012)

on the basis of comments by

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I. Introduction

1. On 1 February 2012, the Venice Commission received a request for an opinion on the draft Law on the Public Prosecutor's Office of Ukraine from Mr Anders Herkel, Chair of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe. This draft Law has been prepared by the Ukrainian Commission on Strengthening Democracy and the Rule of Law.

2. The Venice Commission invited Mr James Hamilton, Mr Jørgen Steen Sørensen and Ms Hanna Suchocka to act as rapporteurs for this opinion.

3. The Venice Commission is aware that a Law "on amendments to some legal acts regarding the improvement of the Office of the Public Prosecutor functioning" **was adopted by Parliament on 18 September 2012**. The Commission hopes, however, that **elements of this opinion will be taken up in a future revision of the law**.

4. The present opinion was adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012).

II. General remarks

5. The draft Law on the power of the Public Prosecutor's Office of Ukraine (hereinafter, the "draft Law on PPO") 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[1]. The last one was Opinion 539 / 2009 on the draft Law of Ukraine on the Office of the Public Prosecutor[2], adopted by the Venice Commission in June 2009.

6. The Venice Commission has criticised the Public Prosecutor's Office (hereinafter, the "PPO") in its past opinions, saying that it found 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.[3]

7. This is also supported by the Parliamentary Assembly of the Council of Europe's Recommendation 1604, adopted in 2003, on the Role of the public prosecutor's office in a democratic society governed by the rule of law[4]. In this Recommendation, the Parliamentary Assembly found that, among the various peculiarities regarding the role of the PPO that gave

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[1] See Opinion on the draft Law of Ukraine amending the constitutional provisions on the procuracy, http://www.venice.coe.int/docs/2006/CDL-AD(2006)029-e.pdf; Opinion on the draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, http://www.venice.coe.int/docs/2004/CDL-AD(2004)038-e.pdf; Opinion on the present Law and on the draft Law of Ukraine on the Public Prosecutor's Office, http://www.venice.coe.int/docs/2001/CDL(2001)134-e.pdf; Opinion on the draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, http://www.venice.coe.int/docs/2004/CDL-AD(2004)038-e.pdf; Opinion on the present Law and on the draft Law of Ukraine on the Public Prosecutor's Office, http://www.venice.coe.int/docs/2001/CDL(2001)128-e.pdf, http://www.venice.coe.int/docs/2001/CDL(2001)134-e.pdf.

[2] See Opinion on the draft Law of Ukraine on the Office of the Public Prosecutor, http://www.venice.coe.int/docs/2009/CDL-AD(2009)048-e.pdf.

[3] See Opinion on the draft Law of Ukraine on the Office of the Public Prosecutor, http://www.venice.coe.int/docs/2009/CDL-AD(2009)048-e.pdf, paragraphs 28-30 (the conclusions); Opinion on the draft Law of Ukraine on the Office of the Public Prosecutor, http://www.venice.coe.int/docs/2009/CDL-AD(2009)048-e.pdf, paragraphs 5-6.

[4] Recommandation 1604(2003) http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17109&Language=EN.

rise to concern as to their compatibility with the Council of Europe's basic principles, were the public prosecutors' varied non-penal law responsibilities.

8. 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 were legitimate if certain criteria were met. In other words, 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.[5] 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 referred to the ombudsman.

9. In this respect, it should be noted that the Committee of Ministers of the Council of Europe has 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."[6]

10. Consequently, paragraph 31 of Recommendation Rec(2000)19[7], 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.

11. In the context of the prosecution service and before the Constitutional Court of Ukraine's decision of 30 September 2010 annulling the amendments introduced by the Law on Amendments to the Constitution of Ukraine No. 2222-IV of 8 December 2004, a problem arose with respect to Article 121.5 of the Constitution. This provision, which had been criticised by the Venice Commission, 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 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.

12. 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.[8]

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[5] 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.

[6] Section C.5, Recommendation CM/Rec(2012)11, https://wcd.coe.int/ViewDoc.jsp?id=1979395&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[7] https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM.

[8] See Draft Vademecum on the Judiciary CDL-JD(2008)001, http://www.venice.coe.int/docs/2008/CDL-JD(2008)001-e.pdf.

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[9], thereby annulling Article 121.5.

13. The draft Law on PPO subject to this opinion represents a move towards abandoning the supervisory role prosecutors currently hold over the administration. The Venice Commission is well aware that the role of the prosecutor was one of the most disputed issues in post-soviet countries when the reforms of their prosecutorial systems began. These reforms proceeded to strip prosecutors of their general supervisory powers, restricting their hitherto very broad role and narrowing it down to criminal cases, in accordance with European standards. The change introduced by this draft Law on the PPO, omitting the supervisory role of the prosecutor over the administration and not listing it among the functions of prosecutors, is therefore to be welcomed. The aim of limiting the supervisory power of prosecutors is justified and is in line with European standards.

14. However, other obstacles in the Constitution remain. For instance, Article 122 of the Constitution provides that Parliament may express a no confidence vote in the Prosecutor General of Ukraine[10]. 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 balance in the organisation of state bodies, but it is doubtful that it would provide a fair and just solution. The Public Prosecutor should be dismissed only for serious violations of the law, following a fair hearing.

15. The wording of Article 122 of the Constitution is repeated in Article 8 of the draft Law on PPO and shows how certain provisions of the current Constitution continue to block the adoption of regulations on the PPO that would be fully in line with European standards.

III. Draft Law on the Public Prosecutor's Office

A. General

16. The purpose of this draft Law is set out in its Preamble and is to set forth the legal framework for the organisation of the PPO of Ukraine, the system of that office, the status of public prosecutors, the system and procedure for prosecutorial self-governance and to establish the system and the general procedure supporting the operation of the office.

17. The draft Law is divided into nine sections that deal with the following matters: Section I – the principles of organisation and operation of the Public Prosecutor's Office; Section II – the system of the Public Prosecutor's Office; Section III – the status of the prosecutors; Section IV – the procedure for the appointment of public prosecutors; Section V - disciplinary liability; Section VI – dismissal, termination and suspension of public prosecutors; Section VII – the exercise of the public prosecutor's office powers; Section VIII – prosecutorial self-governance;

[9] 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.

[10] 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. (…)".

Section IX – support for public prosecutors; Section X – organisational support and Section XI that deals with final and transitional provisions.

18. The system proposed by the draft Law is built on the principle of the independence of the prosecutor's office as well as hierarchical control. In the system of the prosecutors' office, these two principles do not contradict one another. As pointed out in the Venice Commission's Report on European standards as regards the independence of the judicial system: Part II – the prosecution service: "there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court (…) the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general".[11] This statement by the Venice Commission has been taken into consideration by the authors of the draft Law on PPO.

B. Section I. Principles of Organisation and Operation of the Public Prosecutor's Office (Articles 1-5)

Article 1

19. This Article sets out that the main task of the PPO is to be involved in the administration of justice. It provides that the PPO shall facilitate the administration of justice through the performance of the functions provided in the Constitution and in the draft Law "to ensure a balance of interests of the individual, the society and the state". This last part raises a number of questions, for instance what kind of a balance within the administration of justice should be ensured by prosecutors (in Ukraine, there is no "opportunity principle", but a "legality principle", see Article 3 of the draft Law on PPO). While this provision certainly has a positive intention, its wording should be clarified.

20. In addition, the prosecutor's functions are not exclusively regulated by the draft Law on PPO, which raises the question of whether they are covered by the Penal Code or by other codes (see Article 17 of this draft Law). An explicit reference to these provisions should be made in the draft Law.

Article 2

21. This Article deals with the PPO's functions and closely follows the provisions of the Constitution. These functions include: 1) to supervise the observance of laws by the authorities involved in the operational investigation activities, inquiries and pre-trial investigation, 2) to support the prosecution in court on behalf of the state, 3) to supervise the observance of laws in the enforcement of judgments delivered in criminal cases, as well as in the application of other coercive measures related to the restraint of an individual's personal liberty, 4) to represent the interests of the individual or the State in court in the cases strictly provided by this Law (see Articles 61 and 62 of the draft Law).

22. The function of supervision over the observance and application of laws and the function of preliminary investigation, referred to in paragraph 9 of the transitional provisions of the Constitution, are no longer listed amongst the functions of the procuracy, so it seems that the intention of the draft Law is that this transitional provision, which was only intended to last for a limited period of time, would finally cease to exist. The continuance of this power was criticised

[11] See Report on European standards as regards the independence of the judicial system: Part II – the Prosecution Service (CDL-AD(2010)040), http://www.venice.coe.int/docs/2010/CDL-AD(2010)040-e.asp, paragraph 28.

by the Venice Commission in previous opinions[12] and its long overdue discontinuance would be welcome. This provision also contains an express prohibition on conferring other functions on the PPO and this is to be welcomed.

Articles 3-5

23. These provisions set out that the fundamental principles of the PPO's operation are the rule of law, legality, independence and openness, and provides that the functions of the PPO shall be performed solely and exclusively by the public prosecutors and may not be delegated or transferred to other agencies or officials.

24. These general principles of the organisation of the PPO are in line with European standards.

C. Section II. System of the Public Prosecutor's Office (Articles 6-15)

25. The draft Law simplifies the system of the PPO and this Section provides for three separate parts of this system: the Office of the Prosecutor General, the Regional Public Prosecutors Offices and the District Public Prosecutor's Offices.

26. Uniformity is to be ensured by uniform principles of organisation and operation, uniform status of all public prosecutors, uniform procedure for organisational support for the prosecutors' work, the sole and exclusive funding of the PPO out of the state budget, and addressing the issues of the internal operation of the PPO by prosecutorial self-governance bodies. Limits on the numbers of public prosecutors are established by this Section.

27. This change is welcome and it seems that this simplification of the system is intended to rid it of the entire structure of the military prosecutor's office and possibly to reorganise specific offices such as those dealing with transport, the environment and other prosecutors' offices. This complicated structure, which is a heritage of the post-soviet system, was also criticised by the European Union.

Chapter 1. Organisational Principles of the System of the Public Prosecutor's Office

Article 6

28. This provision sets out that the system of PPO shall consist of: 1) the Prosecutor General of Ukraine, 2) Regional PPO, and 3) District PPO.

Article 7

29. It is unusual for a law to set a maximum number of prosecutors at the various levels of the PPO. This should be reconsidered, as the development of crime patterns in various parts of Ukraine may warrant temporary or permanent increases in the number of prosecutors and, under the current wording of the draft Law, would need an amendment to the law. This is impracticable and might be revisited.

[12] 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 11, 54 and 68.

Chapter 2. Prosecutor General of Ukraine

30. This Chapter deals with the Prosecutor General of Ukraine and his/her office. According to Article 122 of the Constitution, the Prosecutor General is appointed to office with the consent of Parliament, and dismissed from office by the President of Ukraine. The Constitution also provides that Parliament may express no confidence in the Prosecutor General leading to his/her resignation from office (see above). The Constitution fixes the term of office at five years.

Article 8

31. Under this provision, the Prosecutor General is appointed by the President with the consent of Parliament. S/he may, under set circumstances, be dismissed by the President, and may also be subject to a vote of no confidence by Parliament.

32. However, there are three issues that should be considered. The first is that of the mandate of the Prosecutor General, which is five years (this is also in line with Article 122.2 of the Constitution). It is understood that the mandate cannot be renewed, but this should be confirmed.

33. The second issue concerns the appointment procedure of the Prosecutor General. In the Report on European standards as regards the independence of the judicial system: Part II – the Prosecution Service[13], the Venice Commission recommends that professional, non-political expertise be involved in the process. This seems particularly relevant in the present case, since the decision as such is apt to be, at least to some extent, politicised due to the requirement for consent of Parliament.

34. In addition, in Section IV of the draft Law on PPO (see Section E below), there are very detailed provisions on the procedure for taking up the position of public prosecutor, but the provision in Article 23 seems to indicate that this procedure does not apply to the appointment of the Prosecutor General (this would also seem unlikely). If this is correct, there seem to be no criteria for the appointment of a Prosecutor General and no procedure for the technical vetting of candidates for suitability. There is no procedure whereby a candidate may apply to be considered for the position, which appears to be left entirely in the hands of the President to nominate and Parliament to approve. If this were so, it would seem doubtful whether European standards are met. This should be clarified.

35. The third issue is about the procedure under which the Prosecutor General may be dismissed (by the President) or receive a vote of no confidence (by Parliament). A number of compulsory grounds for dismissal or resignation of the Prosecutor General, are provided for in this draft Law. These include inability to exercise powers for health reasons, incompatibility established by a decision of the High Council of Justice, breach of oath, a judgment of conviction against him/her that has taken legal effect, termination of his/her citizenship, or that s/he is missing or deceased. These grounds do not seem to be intended to be exclusive, but no guidance is given to the President as to any other basis on which a Prosecutor General may be dismissed and it would seem that the President is given an unfettered discretion in this regard. It seems rather unclear which procedural guarantees exist to ensure that the power of dismissal and the vote of no confidence are not misused to interfere with the independence of the PPO. This is neither regulated in Article 8 nor anywhere else in Chapter 2.

[13] See Report on European standards as regards the independence of the judicial system: Part II – the Prosecution Service (CDL-AD(2010)040), http://www.venice.coe.int/docs/2010/CDL-AD(2010)040-e.asp.

36. However, Section V of the draft Law on PPO (Articles 37-45, see Section F, below) contains very detailed provisions on disciplinary liability of prosecutors, and there may be some indications that these rules would also apply to the Prosecutor General. For example, Article 44.5 states that specific types of disciplinary sanctions do not apply to the Prosecutor General, and this would seem to indicate that the Chapter generally does apply to the Prosecutor General. On the other hand, it seems doubtful that this is correct, since a number of the procedures prescribed do not seem to naturally apply to this position. This issue should be clarified, especially because the power of dismissal and the vote of no confidence are laid in the hands of highly political institutions, which render crucial the issue of the procedure.

37. It may be that the view is taken by Ukrainian constitutional lawyers that the constitutional provisions preclude Parliament from legislating to fetter the discretion of Parliament or the President in any respect. If so, and if the view is that Parliament is precluded by the Constitution from legislating in this area, it seems that a constitutional amendment may be necessary. It is clearly desirable that comprehensive criteria and procedures for the appointment and dismissal of the Prosecutor General should be established and that neither the President nor Parliament should have an unfettered discretion in this respect.

38. There would appear to be no obstacle to the reappointment of the Prosecutor General either in the Constitution or the draft Law. It is not compatible with the independence of the office that the office-holder may seek reappointment at the hands of organs of the executive.

Article 9

39. This provision regulates the fundamental powers of the Prosecutor General and confers the following functions: 1) representation of the PPO as a state authority in its relations with other bodies; 2) the exercise of control over the efficiency of operation of the secretariat of the PPO; 3) approval of the procedure for distribution of cases between the public prosecutors of the Prosecutor General's Office subject to the consent of the Assembly of Public Prosecutors of that office; 4) approval of the personnel composition of the divisions of the Prosecutor General's office; 5) the enforcement of decisions passed by the Assembly of Public Prosecutors of the Prosecutor General's Office; 6) enforcement of compliance with requirements for professional development; 7) the appointment and dismissal of public prosecutors; 8) the appointment to and dismissal from various senior administrative offices including the Deputy Prosecutor General, division heads of the Prosecutor General's Office, and Regional and District Public Prosecutors and 9) the approval of guidelines for public prosecutors to ensure uniform application of the law.

40. On the whole, this provision seems to be reasonable. It is understood that the powers of appointment and dismissal in Article 9.2, 9.7 and 9.8 must be exercised in accordance with the provisions in Section V.

41. However, two important issues should be clarified. One concerns the hierarchical relationship between the Prosecutor General (and indeed the entire PPO) and the political level. It is unclear whether the PPO is meant to be subordinate to the executive so that it may, in principle or in practice, receive instructions in individual cases, or whether it is meant to be independent from the executive (at least in individual cases). This should be clarified.

42. The other issue is the hierarchical relationship between the Prosecutor General (and his/her office) and the PPO at the regional and district levels.

43. It appears from Article 9.9 that the Prosecutor General shall approve guidelines for public prosecutors to ensure uniform application of legal provisions. These guidelines are presumably meant to be of a general nature so that this provision does not in itself empower the Prosecutor General to give instructions in individual cases.

44. Under Article 9.10, the Prosecutor General "shall issue orders on the matters within the scope of his/her administrative powers." This provision apparently refers to orders in specific cases, but the question is what is meant by "administrative" powers. This question should, however, be seen together with Article 18 of the draft Law on PPO (see below).

45. The same issue arises with respect to regional and district prosecutors, see Articles 13.10 and 15.10.

46. Unlike the powers of the President and Parliament to appoint the Prosecutor General, the latter's powers to appoint other prosecutors are not unlimited, but must be exercised subject to the provisions in Section IV of the draft Law on PPO. While the draft Law provides for a hierarchical system with respect to the exercise of administrative powers, insofar as line prosecutors exercise prosecutorial and professional functions, the Prosecutor General has no power to direct them how this should be done or to overrule their decisions.

47. In effect, it would appear that once a prosecutor is assigned to a case then all prosecutorial and professional decisions are to be exercised independently by the prosecutor. The Prosecutor General would not have the power to assign cases, but rather his/her function would be limited to approval of the procedure to be followed. Even in this respect the Prosecutor General's function is subject to the approval of the Assembly of Prosecutors.

48. It may be noted that one of the Prosecutor General's proposed functions is to give effect to the decisions of the Assembly, which is a rather powerful body whose functions are dealt with in Article 67 of the draft Law on PPO. These powers include the power to decide all issues of internal operation of the office or concerning individual prosecutors or employees, such decisions being binding.

49. As the Venice Commission has stated in many opinions[14], both the hierarchical model of prosecution services and the model wherein each prosecutor is independent of every other are valid models, although each has its advantages and disadvantages. Among the advantages of the individual independence model is that the prosecution itself is not such a mighty institution and not so much power is centralised in the hands of a single individual. On the other hand, it may be easier to deal with problems of corruption in a hierarchical model provided that the senior persons in the hierarchy are not themselves corrupt which, unfortunately, in quite a number of systems cannot be assumed to be the case. Essentially, the choice between models is one of policy, which will be informed by the unique circumstances and experience of any given society.

Article 10

50. This Article provides for the appointment of a Deputy Prosecutor General who must be a public prosecutor of 15 years standing and is appointed by the Prosecutor General. The Prosecutor General's Office is to have separate divisions for court prosecution, the representation of the interests of the individual or the state in court, and for providing international legal assistance. The specialisation of prosecutors is provided for.

Articles 12-15

51. These Articles provide corresponding provisions in relation to Regional and District Public Prosecutors. Again, their powers in relation to their offices are as similarly

[14] See Draft Vademecum on the Judiciary CDL-JD(2008)001, http://www.venice.coe.int/docs/2008/CDL-JD(2008)001-e.pdf.

circumscribed as the powers of the Prosecutor General already described and in effect their powers are largely administrative. The Assemblies of Prosecutors of Regional or District Public Prosecutors Offices have administrative powers in relation to those officers corresponding to those of the Assembly of Public Prosecutors of the Prosecutor General's Office already referred to.

D. Section III. Status of Public Prosecutors (Articles 16-22)

Article 16

52. "Prosecutors" are defined so as to include prosecutors at every level, with the exception of the Prosecutor General. The draft Law on PPO provides that all prosecutors are to have a uniform status. Prosecutors are to have tenure in their office until the age of 65.

Article 17

53. This provision regulates the guarantees for the independence of the public prosecutor. These guarantees include the procedures for appointment, discipline and dismissal, the prohibition of interference with the exercise of their prosecutorial powers, liability for contempt of the public prosecutor, the procedures for funding and providing organisational support for prosecutors' offices, the financial support and social security for public prosecutors, the functioning of the prosecutorial self-governance bodies, the personal security arrangements for prosecutors, as well as the rights to retire and receive a pension.

54. In general, the provision seems reasonable and appropriate. However, Article 17.2 makes an important statement that the independence of the public prosecutor shall be guaranteed by "procedure for exercising powers set forth in the procedural law and other laws". Specific reference should be made to these other laws.

55. It should be noted that the guarantees set out in Article 17.1.8, which provide unconditional security arrangements for family members of the prosecutor and his/her property go too far. Security arrangements should depend on the level of danger in each concrete case.

Article 18

56. This Article regulates the question of hierarchy and issuing of orders in individual cases. It provides that in exercising their powers, public prosecutors are to act within the limits established by law. They are to be subordinate to their direct superiors, but the Article makes it clear that this applies only in relation to orders of an administrative nature.

57. It is expressly provided in Article 18.1 that administrative subordination of public prosecutors shall not be a ground for limiting or infringing on their independence in the exercise of their prosecutorial powers. In Article 18.2, "direct superiors" are defined so as to include the Prosecutor General and Deputy Prosecutor General in relation to the Prosecutor General's Office, as well as to Regional and District Public Prosecutors. For prosecutors in the Regional and District Public Prosecutors' Offices, the Regional and District Public Prosecutors are the direct superiors. In Article 18.3, upon receiving an order a prosecutor is to inform his/her immediate superior and execute the order. If in doubt regarding its legitimacy, including where the prosecutor has doubts whether his/her independence may be infringed, under Article 18.5 the prosecutor has "the right to require a written confirmation upon receiving which s/he is bound to execute such an order". Again, the direct superior must be informed in writing of the execution of the order. A prosecutor who executes an illegitimate order which does not comply

with the requirements of the act is legally liable for doing so. Under Article 18.6, the issuance and execution of a manifestly criminal order entails liability under the law.

58. This solution seems to be in line with the opinion of the Venice Commission: "In order to avoid undue instructions, it is essential to develop a catalogue of such guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system…"[15] The right to require a written confirmation is an important guarantee for the prosecutor to keep his/her independence even in the system of hierarchical subordination.

59. There should also be a right to appeal against what the prosecutor deems to be an illegal instruction: "…Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction." [16]

60. There is, however, a need for clarification of the following provisions:

(1) on the one hand, Article 18.1 seems to indicate that subordination to the superior prosecutor only applies to orders of an "administrative nature". This wording seems to be opposed to orders in individual criminal cases. This understanding would support the next sentence, which says that administrative subordination of public prosecutors "shall not be the ground for limiting or infringing on public prosecutors' independence in the exercise of their powers";
(2) on the other hand, Article 18.3 – 18.6 seem to indicate that there is also direct subordination in individual criminal cases. If these provisions are not aimed at such cases, the regulation of legitimacy issues does not seem to make much sense. The draft Law should be entirely clear on this point. If the provision applies to individual cases, it seems doubtful that it is in full conformity with European standards, for example on the issue of the right to replacement in cases where the order is believed to be illegal or contrary to the prosecutor's conscience.[17]

Article 19

61. An important rule for the functioning (impartiality) of prosecutors is the principle of incompatibility and non-political activity. Article 19 regulates the requirements for incompatibility including political activity.

62. It is generally accepted by the Venice Commission that there are various standards on the acceptability of involvement of civil servants in political matters. Generally, a prosecutor "should not hold other state offices or perform other state functions, which would be found inappropriate for judges. Prosecutors should avoid public activities that would conflict with the principle of their impartiality".[18]

63. Hence under Article 19.2, a prosecutor may not be involved in other paid or entrepreneurial activities, except for teaching, research, artistic activities medical practice and sports activities. The exception for medical practice seems rather curious and should be removed. A prosecutor with business interests must act through a proxy under Article 19.3. A prosecutor may not be a member of a political party or trade union or take part in political actions, rallies, or strikes under

[15] Report on European standards as regards the independence of the judicial system: Part II – the prosecution service, http://www.venice.coe.int/docs/2010/CDL-AD(2010)040-e.pdf, paragraph 32.
[16] *Ibid.,* paragraph 59.
[17] *Ibid.,*paragraphs 53-60.
[18] *Ibid.,*paragraph 62.

Article 19.4, or be a candidate for elected positions in state authorities and local self-government bodies or take part in election campaigns under Article 19.5.

64. On the whole, the prohibition on political involvement can be justified in the current politically polarised conditions of Ukraine. While there remains some doubt whether the absolute prohibition on participation in a trade union or taking part in industrial action may not be disproportionate on the whole, given the independent function of the prosecutors and legal guarantees for their status and position, it may on balance be justified in the specific case. While prosecutors may not be members of trade unions they are expressly entitled to establish non-governmental organisations and participate in them to protect their rights and interests and to enhance the professional level.

65. The Venice Commission accepts (and has done so on previous occasions) that this standard is implemented differently in different countries depending on political and historical matters. A ban on membership of political parties or trade unions and on taking part in political actions, rallies and strikes will probably need to be accepted if deemed necessary in Ukraine.

66. Nevertheless, a ban on showing "his/her favour" to political parties or trade unions should, however, be implemented with care and should obviously be understood only to apply to the exercise of professional duties. This could be expressed more clearly in the draft Law.

Article 20

67. Under Article 20.3, public prosecutors have a right to be involved in professional development and to receive two weeks' training once every three years. Article 20.4 provides that they are under a duty to observe their oath, under Article 20.5 to show respect to individuals, not to take actions that may cast doubt on their independence and impartiality, not to take other actions that discredit them as representatives of the PPO, not to disclose confidential information, and to abide by the requirements of the Law on the Principles of Preventing and Combating Corruption, as well as to abide by the rules of prosecutorial ethics.

68. They are obliged, under Article 20.5.5, to make an annual declaration on property, income, expenditures and financial obligations. While this may be regarded as something of an intrusion into personal affairs, it is justified as a means of reducing the risk of corruption. Prosecutors are not to be conferred with state awards or other awards, decorations or certificates of merit except for awards for personal courage and heroism in conditions involving risks to life and health.

Article 21

69. This provision imposes a requirement on the state to reimburse damage caused by a public prosecutor's illegitimate decisions. This provision is welcome.

70. However, the provision goes on to say that the State, upon reimbursing the damage, has the right to demand recourse from the prosecutor. This should be confined to cases where the prosecutor has acted in bad faith or been grossly negligent.

E. Section IV. Appointment (Articles 23-36)

71. This Section sets out detailed provisions in relation to the initial appointment to the position of public prosecutor and to subsequent appointments to different positions as prosecutor as well as to administrative positions.

Articles 23-25

72. These provisions are very detailed and provide, for example, for a very central role for the Qualifications Commission of Judges and Public Prosecutors.

73. The basic requirement for a candidate for appointment as a prosecutor in the District Public Prosecutor's Office under Article 23.1 is to have higher legal education, meaning at least a Master's degree in law, special training at the National School of Judges, and a command of the state language. Under Article 23.2, for appointment as a prosecutor in the Regional Public Prosecutor's office five years' experience as a prosecutor is required. Article 23.3 sets out that for appointments to the Prosecutor General's Office a person must have 10 years' experience as a prosecutor and be 40 years old. The requirement to be 40 years old is discrimination on grounds of age, which is not justifiable by any objective necessity. The requirement for 10 years' experience in itself guarantees that a very young candidate will not be appointed. The age requirement to be President of Ukraine is only 35.

74. Candidates are selected on a competitive basis under Article 24.1. Article 25 sets out that the Qualifications Commission of Judges and Public Prosecutors is required to advertise competitions for vacancies. Persons, who meet the requirements for the competition, take a screening examination, the results of which are published. This is followed by a special screening of the integrity of successful candidates. In relation to the special integrity screening, it is important to note that while information may be sought from any enterprise, institution or organisation, and while any non-governmental organisation or individual may submit information to the Commission about the integrity of candidates, the candidate is entitled to familiarise himself/herself with all of this information and to provide explanations, refutations or denials.

75. Those candidates who pass the screening then receive special training at the National School of Judges. Following this, there is a qualifying examination. The Qualifications Commission is required to rank candidates based on the results of the examination and to include them in a pool for filling vacancies.

Articles 28-35

76. Where vacancies arise, a further competition takes place. This involves, under Article 28, a written anonymous test, practical assignments and, under Article 31.3, a qualifying interview following which the Qualifications Commission makes a submission to the Prosecutor General of Ukraine (Article 32.5). The status and operation of the Qualifications Commission and the National School of Judges is separately dealt with in the Law on the Judiciary and the Status of Judges. It is not clear whether the Prosecutor General has discretion to reject the recommendation of the Commission and if so on what basis s/he may do so. However, Article 33 states that the Prosecutor General shall issue an order based on the submission from the Commission, which appears to suggest that s/he could not reject the recommendation without at least having a clear reason to do so. This should be clarified.

77. The provisions relating to examinations appear appropriate, if a little complex. It seems quite onerous to have no less than three examinations as well as the special integrity screening. A question does arise, however, with respect to the screening of the integrity of the candidates under Article 29. In order to conduct a special screening, the Qualification Commission has a right to gather information on the candidate from various institutions, enterprises and organisations of all forms of ownership. Screening is conducted by "competent state authorities within the scope of their power". The wording is very general: what kind of organs is it referring to? In addition, the guarantees for the candidate seem to be rather weak. The candidates have a right to familiarise themselves with such information, provide relevant explanations, refute or deny them because the results of such special screening of integrity

have important consequences for the career of a candidate for prosecutor's office. Following the review, the Qualifications Commission may decide not to admit a candidate to special training. The negative result of a special screening of integrity closes the door to the candidate to any further procedures. In other words, the candidate is eliminated from the list of potential candidates for prosecutorial post. While the introduction of a procedure for the right to reply is to be welcomed, this procedure should be revisited and more details should be provided in the draft Law.

78. Article 35 deals with the appointment to another prosecutor's office based on application that is the prosecutor's own free will.

79. Apparently, there are no provisions on the (involuntary) transfer to other offices. If such transfer is meant to be possible (which presumably it is), there should be provisions on this, including on procedure and complaint. This is, in practice, an important issue of independence.[19]

80. Corresponding provisions apply in the case of appointments to more senior positions as well as to posts which carry administrative responsibility. Where a person is appointed to an administrative position, dismissal from that post does not terminate his/her public prosecutor's powers. Where the term of office of an administrative position expires, the holder of the office continues to be a prosecutor.

81. On the whole, this Section seems to provide a very good basis for the appointment of prosecutors.

F. Section V. Disciplinary liability (Articles 37-45)

82. This Section deals with disciplinary liability of the prosecutor. It puts the Disciplinary Commission of Judges and Public Prosecutors at the centre of the procedures.

Article 37

83. The grounds on which the prosecutor may be held disciplinarily liable are listed in this provision and are the following:

a) Clear display of prejudice against or contempt towards any participant in proceedings. The reference to contempt may be too wide. It would be wrong if a prosecutor displays contempt towards a party or a witness before hearing him/her, but it may be understandable, even if it might not be wise, to show contempt for a witness who is clearly lying. A prosecutor should not be subjected to disciplinary liability for holding a witness believed to be dishonest in contempt.
b) A conscious violation of legal requirements while exercising powers or for clearly poor exercise of powers. Poor exercise of powers should not give rise to disciplinary liability in the absence of bad faith.
c) Unreasonable delay in review of a claim or complaint.
d) Disclosure of secret information.
e) Failure to submit property declarations or their late submission.
f) Systematic or severe violation of the rules of prosecutorial ethics.
g) Other failure to fulfil official duties due to bad faith and which harms the reputation of the PPO.

[19] *Ibid.,* paragraph 60.

Articles 38

84. Disciplinary proceedings are conducted by the Disciplinary Commission of Judges and Public Prosecutors, which is provided for by the Law on the Judiciary and the Status of Judges.

Article 39

85. Any person having knowledge of the facts which may give rise to disciplinary liability may make a complaint. Proceedings will not be instituted on foot of complaints or reports that do not contain specific information or anonymous complaints.

86. Article 39.2 states that the Disciplinary Commission shall approve and post on its official web-page a sample of a complaint on prosecutors to make the information public. This provision is welcome, but should be clarified to say that it refers to an abstract, fictional case against prosecutor "x".

Article 40

87. Where a complaint is received, a member of the Commission appointed at random decides whether to accept it. Where the complaint is accepted an inspector is appointed to examine it. The inspector has power to require persons to respond to his/her enquiries.

Articles 41-42

88. Under Article 41, the inspector's report is then sent to a panel of three members of the Commission who will decide whether to institute proceedings. Under Article 42, where proceedings are instituted the case is considered at a meeting of the Commission. The meeting is attended by the complainant and the prosecutor against whom the case is instituted. The parties may be represented and the prosecutor may call witnesses. The case is conducted as an adversarial procedure.

Articles 43-44

89. The decision must be given not later than four months after the complaint. These sanctions include administrative admonition, reprimand, severe reprimand, temporary suspension, or a decision that the prosecutor is in breach of oath, which results in loss of position. The prosecutor may appeal a decision to the High Council of Justice or a court of law. However, it should be clarified when such a decision should be appealed to the High Council of Justice and when to a court of law.

90. On the whole these provisions appear to provide good guarantees of fairness of procedure. The only element that could raise a problem is that a member of the Commission may act as a complainant. This is probably intended to facilitate cases in which a whistle-blower, who does not dare bring the case himself/herself, informs a member of the Commission instead. Even though the member of the Commission may take no further part in the proceedings, it is nevertheless unwise that a member of the Commission should have such an involvement. It seems unlikely that a member of the Commission would be the only person having personal knowledge of a matter giving rise to a complaint and one would expect that a Commissioner would normally act on foot of information provided by some other person. This should be clarified.

G. Section VI. Dismissal, termination and suspension of powers (Articles 46-59)

91. This Section deals with the dismissal for misbehaviour, as well as the termination of office for other reasons, including reaching the age of 65 or dying. It seems strange to deal with these quite different matters together in the same part of the draft Law. However, there is long established precedent in the law of Ukraine for doing so. The grounds for dismissal or termination of office are the following (Article 46.1): inability to act due to ill-health, violation of the incompatibility requirements, breach of oath, a judgment of conviction that has taken legal effect, termination of citizenship, recognition of being missing, death, submission of a letter of resignation, and submission of a letter of voluntary dismissal.

92. With reference to termination on health grounds under Article 47, the draft Law on PPO does not distinguish between a case where the judge seeks to retire on health grounds and proceedings to remove the judge due to alleged poor health. The draft Law provides two possibilities: the submission of a medical certificate or a court decision finding a prosecutor partially capable or incapable. Where retirement on health grounds is not voluntary, in the Commission's opinion, a court decision should be required.

93. Dismissal on grounds of incompatibility under Article 48 requires a submission from the High Council of Justice. Dismissal for breach of oath under Article 49 requires a finding of the Disciplinary Commission. In Article 50, where there is a judgment or conviction it is a function of the court concerned to inform the Prosecutor General (Article 52). Similarly, where there is a finding that a prosecutor is recognised as missing, it is for the court to inform the Prosecutor General. A prosecutor can seek voluntary dismissal at any stage under Article 53, but it would appear that the decision whether to accept this is for the Prosecutor General. Where a prosecutor has 20 years' service s/he has the right, under Article 54, to submit a letter of resignation. Resignation may be terminated, under Article 55, where there is a judgment of conviction or recognition that the resigned judge is missing or is dead. Presumably the significance of this relates to pension entitlements.

94. With the exception of a finding of breach of oath there does not appear to be a mechanism to determine a contested matter. For example, the question of incompatibility could be in dispute. The question of the effect of a judgment of conviction could be in dispute. There could be an issue over whether citizenship had been lawfully terminated. This needs to be addressed.

H. Section VII. Exercise of the Public Prosecutor's Office's powers (Article 60-64)

95. This Section deals with a number of miscellaneous matters. Powers in relation to supervision of the observance of laws by authorities involved in pre-trial activities and in the enforcement of judgments are referred back to the Code of Criminal Procedure.

Article 61-62

96. Article 61 gives the prosecutor a far-reaching right and obligation to represent the individual's interest in court "if there is information available on the violation of rights, freedoms, or the need to protect the interests of a minor or a child, an incompetent person, a disabled person, or a person with a metal illness, provided they are incapable of acknowledging or independently protecting their interests and legal representatives do not duly protect their interests." This provision apparently relates to civil cases.

97. It seems, however, clear that this procedure arises only where individuals are incapable of acknowledging or independently protecting their interests and do not have their own legal

representatives. It is stated that the public prosecutor may independently decide whether there are justified grounds for representation and the form of its provision. With regard to representation of the state's interests, this arises only in relation to the economic interests of the state and where those interests are not truly protected by the state authorities and other legal entities of public law. There does not appear to be any acknowledgement that the State's interest and the individual's interest may be in conflict or any rule as to what should happen where this is the case. This should be clarified.

98. Article 62 provides that the prosecutor represents the state's interest in court if there is information available or a threat to the state's economic interests due to acts or omissions of any legal entities in their relation with the state.

99. In general, the Venice Commission has supported the position that the prosecution service should primarily focus on criminal law (see above). Recommendation CM/Rec(2012)11 on the role of public prosecutors outside the criminal justice system provides for limitations on the powers the public prosecutor may have outside the criminal law field. It should not be seen as recommending that prosecution services should have such powers.

Article 63

100. This provision effectively provides for a hierarchical power in relation to appeals of court decisions. In effect senior prosecutors may overrule a more junior prosecutor's decision not to appeal all the way up to the Prosecutor General. It does not appear that where a prosecutor decides that s/he will appeal that a more senior prosecutor may override that decision. This should be clarified.

I. Section VIII. Procedural self-governance (Articles 65-74)

101. This Section establishes an important principle of prosecutorial self-governance. This is perhaps the most innovative provision in the draft Law on PPO. As already seen, the draft Law envisages it as one of the key guarantees for the independence of the prosecutor.

102. The Section begins by discussing the objectives of prosecutorial self-governance. Its aim is to address the issues of internal operation of the PPO. This is described as "an independent corporate addressing of certain issues by public prosecutors". It is also seen as an important guarantee for ensuring the public prosecutors' independence. Its operation aims to ensure the protection of prosecutors from interference in their work and to enhance the quality of their performance. The issues to be addressed in this manner include organisational support, social security of public prosecutors and their families, ensuring organisational unity, participating in determining the needs for personnel, financial, logistical and other support, and appointing public prosecutors to the High Council of Justice, the Qualifications Commission and the Disciplinary Commission.

103. According to Article 66, an Assembly of Public Prosecutors is envisaged in the PPO and in each of the Regional and District Prosecutor's Offices. It must meet at least once every three months and is summoned either by the relevant senior prosecutor or on the request of at least one third of all the prosecutors in the office concerned. Although prosecutors have the right to attend other employees may be invited, but have no vote. Decisions are made by majority vote. The quorum is one half of all the members. The Assembly may discuss the issues of internal operation of the Office or of an individual prosecutor or employee of the Secretariat and make binding decisions on issues which arise. In effect the draft Law on PPO would provide for the democratic control over the administration of the office, that is, if decisions taken at mass meetings can be regarded as a

truly democratic exercise. Prosecutors holding administrative positions would be required to report to the Assembly.

104. The draft Law under Article 66.1.3 and Article 69 also envisages the creation of an All-Ukrainian Conference of Public Prosecution Employees. This Conference would meet once every two years. It would represent all employees of the Public Prosecution Service. It would appoint and dismiss the prosecution members of the High Council of Justice, the Qualifications Commission and the Disciplinary Commission. These members would report to the Conference. It could make decisions binding on all prosecutorial self-governance bodies. The members of the Conference would be elected by the Assemblies. Decisions would be made by open ballot. In the period between Conferences, the highest body of prosecutorial self-governance would be a 15 member Council of Public Prosecutors of Ukraine elected by the prosecutors. This Council would elect its own head, deputy head, and secretary.

105. The functions of the Council would include arranging for implementation of measures to ensure independence of public prosecutors and to provide improvement of organisational support, to consider the issues of legal protection of public prosecutors, social security of public prosecutors and their families, and to make appropriate decisions on these issues, to approve and dismiss the head of the State Court Administration of Ukraine, to review public prosecutors' complaints against public prosecutors holding administrative positions and to take appropriate action, as well as to hear reports on the work of the members of the Qualifications Commission and the Disciplinary Commission. Decisions passed by the Council would be binding on all the prosecutorial self-governance bodies and all the prosecutors. These decisions could be overridden only by the Conference itself.

106. There are no international norms governing the establishment or functioning of prosecutorial self-governance bodies. It therefore seems that it is entirely a matter of policy for the Parliament of Ukraine whether it wishes to establish such bodies along the lines envisaged in the draft Law on PPO.

107. There is no doubt that these proposals are visionary and even revolutionary. The Venice Commission is not aware of any jurisdiction which has created bodies of prosecutorial self-governance intended to have such powers over the administration of the prosecution system. The establishment of such a system might go too far because representatives elected by prosecutors are capable of acting in what they see as the interests of their members to the exclusion of any other consideration including that of the public interest or indeed the interests of members of the public. If this were to happen, the creation of this system could make the administration of the prosecution service by the persons appointed to administrative positions virtually impossible.

108. It seems perhaps that the authors of this draft Law, in their anxiety to ensure that the Prosecutor General is not too powerful an individual, have neglected the risk that the Head of the Council of Public Prosecutors will be a very powerful person indeed. Through his/her influence over the activities of the prosecutorial representatives on the Disciplinary and Qualifications Commissions s/he will undoubtedly have more influence over appointments, promotions, discipline and dismissals than ever did the Prosecutor General or the heads of the Regional and District Prosecution Offices.

109. One particular aspect of the proposal, which gives rise to concern, is the idea that members of the Qualifications Commission and the Disciplinary Commission should have to report back to their electorate in such a manner. They should not be subjected to such pressures in respect of these duties. This seems unwise. Once people are appointed to these Commissions they should be under an obligation to act in a quasi-judicial manner and regardless of either personal considerations or the wishes of their electorates. In relation to

such bodies there is also a considerable risk that members may be tempted to engage in corruption in relation to appointments and promotions. That at least has been the history in quite a number of other jurisdictions. There is a need to take steps to guard against this risk. It would be helpful, for example, if members of the Commissions were precluded from running for office for a second time.

110. The idea that the Council can give binding instructions to individual prosecutors should also be revisited. This is a surprising provision to find in a draft Law which appears in other respects to have gone so far to guarantee and protect the independence of the individual prosecutor. This provision should be deleted.

111. Finally, there is clear potential for confusion in the respective roles of the Prosecutor General and the other administrative officers and that of the Council, all of whom are charged with implementing the decisions of the bodies of self-government. Who is to resolve the inevitable disagreements over how this is to be done? This should be clarified.

J. Section IX. Support for the Public Prosecutor (Articles 75-82)

112. It is very important that judges and prosecutors should have guarantees of an adequate and appropriate salary and terms and conditions. This Section pegs the salaries of prosecutors to judicial comparators. This approach appears appropriate. Likewise, the guarantees for paid holidays, health benefits, social security, physical protection, and pensions, are all very important ones.

K. Section X. Organisational support for operation of Public Prosecutor's Office (Articles 83-90)

113. The guarantees of support for the prosecution service in the state budget are important and appropriate ones. However, the degree of control given to the self-governance bodies over the secretariat and support services of the prosecution service could paradoxically undermine rather than support the provision of adequate support services for the PPO.

IV. Conclusions

114. The draft Law on PPO is an important step towards the reform of the Public Prosecutor's Office in Ukraine to bring it into line with European standards. It intends to abandon the supervisory role prosecutors currently hold over the administration and has taken into consideration much of the criticism voiced by the Venice Commission in previous opinions.

115. There are a few outstanding issues that will need to be clarified. However, it is clear that a meaningful reform of the prosecution service of Ukraine will be difficult to achieve without making the necessary amendments to the current Constitution.

116. The following provisions*, inter alia*, should be clarified:

a) (Article 1) Given that there is no "opportunity principle" but a "legality principle" in the Ukrainian system, it is unclear what kind of a balance within the administration of justice the prosecutors should ensure. This might be reworded.
b) (Article 7) Setting a maximum number of prosecutors at the various levels of the PPO should be reconsidered, as the development of crime patterns in various parts of Ukraine may warrant temporary or permanent increases in the number of prosecutors -

under the current wording, an amendment to the law would be needed, which is impracticable.

c) (Article 8) It should be clarified which procedural guarantees exist to ensure that the power of dismissal and the vote of no confidence not be misused to interfere with the independence of the PPO.
d) (Article 9) The hierarchical relationship between the Prosecutor General (and indeed the entire PPO) and the political level should be clarified.
e) (Article 17) The independence of the public prosecutor is guaranteed by a "procedure for exercising powers set forth in the procedural law and other laws" – this should be clarified.
f) In addition, the provision that guarantees unconditional security arrangements for family members of the prosecutor and his/her property seem broad and should be made dependent on the level of danger in each concrete case.
g) (Article 18) The subordination to the superior prosecutor seems to apply only to orders of an "administrative nature", however the provision seems to indicate that there is also direct subordination in individual criminal cases. This should be clarified because if the provision applies to individual cases, it is doubtful that it is in full conformity with European standards.
h) (Article 19) The requirements for incompatibility, including political activity: a ban on membership of political parties or trade unions and on taking part in political actions, rallies and strikes will probably need to be accepted if deemed necessary in Ukraine. Nevertheless, a ban on showing "his/her favour" to political parties or trade unions should be implemented with care and should be understood to only apply to the exercise of professional duties.
i) (Article 21) The fact that the state is required to reimburse damages caused by a public prosecutor's illegitimate decisions is welcome, but the fact that the state then has recourse against the prosecutor should be confined to cases where the prosecutor has acted in bad faith or been grossly negligent.
j) (Article 23) The requirement to be 40 years old to be appointed to the PPO is discrimination on grounds of age, which is not justifiable by any objective necessity.
k) (Article 61) The public prosecutor's power to represent an individual's interest in court should be revisited.

117. As regards Section VIII on procedural self-governance (Articles 65-74), the Venice Commission is not aware of any jurisdiction which has ever created bodies of prosecutorial self-governance intended to have such powers over the administration of the prosecution system. This might be approached with caution, especially because representatives elected by prosecutors are capable of acting in what they see as the interests of their members to the exclusion of any other consideration including that of the public interest or indeed the interests of members of the public. Care also needs to be taken to guard against any risk of corruption.

118. The powerful position of the Head of the Council of Public Prosecutors should be revisited as s/he will be able to influence the activities of the prosecutorial representatives on the Disciplinary and Qualifications Commissions and hence will have more influence over appointments, promotions, discipline and dismissals than the Prosecutor General or the heads of the Regional and District Prosecution Offices ever did.

119. The Venice Commission is aware that a Law "on amendments to some legal acts regarding the improvement of the Office of the Public Prosecutor functioning" was adopted by Parliament on 18 September 2012. It received a letter from Mr Lavrynovych, Minister for Justice, on 3 October 2012, informing it that the Working Group on Reform of the Office of the Public Prosecutor's Office and the Bar of Ukraine was preparing a draft Law on the Office of the Public Prosecutor of Ukraine and that this draft Law will be submitted to the Venice Commission. The Commission hopes that elements of the present opinion will be taken up by

this Working Group's draft Law as well as by the Constitutional Assembly in its preparation of amendments to the Constitution of Ukraine.

120. The Venice Commission is ready to assist in this important task, should the Ukrainian authorities make a request for such assistance.