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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

CONCERNING PROSECUTORS[1]

[1] *This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 112th Plenary Session (6-7 October 2017)*

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I. INTRODUCTION

This document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning prosecutors – their status, functions, guarantees of independence, their accountability, internal organisation of the prosecution service, its relation to other branches of the government, etc. This compilation does not concern fair trials guarantees and impartiality of the courts. Its aim is to provide an overview of the doctrine of the Venice Commission on this topic.

The compilation is intended to serve as a source of reference for drafters of constitutions and of legislation on the prosecution service, researchers, as well as for the Venice Commission's members, who are requested to prepare opinions and reports concerning legislation dealing with such issues. When referring to elements contained in this compilation, please cite the original document but not the compilation as such.

The compilation is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the opinions from which extracts are cited in the compilation relate to individual countries and take into account the specific situation there. The citations will therefore not necessarily be applicable in other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

Venice Commission reports and studies, quoted in this compilation seek to present general standards for all member and observer States of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Each citation in the compilation has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to gain a full understanding of the Commission's position on a particular issue, it is useful to read the complete chapter in the Compilation on the relevant theme you are interested in. Most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this compilation (venice@coe.int).

II. LEVEL OF REGULATION – CONSTITUTIONAL AND LEGISLATIVE

"It is not necessary for much organisational detail [on the prosecution service] to be included in the Constitution; an ordinary law of Parliament should be sufficient and would be more flexible. […]"

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution [...].

It would not be essential to set out in the Constitution detailed provisions regarding public prosecution. All that would be required would be:

- A guarantee of the independence of the general prosecutor of the Republic in the performance of his functions;
- The method of his appointment;
- The method of his removal from office."

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"[…] Less fundamental matters can be fixed by laws passed by the Parliament such as the term of office, age of retirement, remuneration and pension of the general prosecutor, and the organisation of the prosecution service and the conditions of employment of its staff. This would be preferable to fixing these matters by regulations or decrees of the government, if public confidence in the independence of the system from the government is to be maintained. […]"

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"[…] 'When, not only the fundamental principles but also very specific and 'detailed rules' on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk. This also increases the risk, for the future adoption of eventual necessary reforms, of long-lasting political conflict and undue pressure and cost for society.'"

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §18

"[…] [A]ny functions conferred on the prosecutor should be referred to in [the law dealing with the prosecutor's office] and should not be contained elsewhere."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §21

"[…] The cases when a member of a prosecutor's council can be dismissed should be specified in the Act. Such a provision of course deserves having the status of cardinal act."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §53

"[…] BiH is not the only country in which a judicial council has been created by ordinary legislation; this is also the case in, for instance, Denmark and Hungary. Yet, an explicit constitutional basis would facilitate the role of the HJPC as the guarantor of the independence of the judiciary."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §24

"[…] The criteria for the assessment are to be determined by the HJPC. Since the performance is one of the criteria in the appointment and, since, moreover, negligence or carelessness in the performance constitutes a disciplinary offence, it would be important to have at least the basic criteria of the assessment stated expressly in the draft Law."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §83

"Also, according to this system, all 18 judicial and prosecutorial members of the HJPC – as well as its president and two vice-presidents – shall be elected by the Parliamentary Assembly of BiH in a procedure which *is to be determined by a separate regulation* adopted by the Parliamentary Assembly. By leaving the definition of the election procedure to a separate regulation to be adopted by the Parliamentary Assembly in the future, the draft Law

makes it difficult to assess the extent to which the requirement of transparency of the procedure has been met. It remains undetermined whether, for instance, the elections will require a qualified majority - as would be strongly recommended in order to avoid political appointments and to promote the election of persons with a high reputation acceptable to a wide majority - or whether members of the civil society will have the possibility of participating or overseeing the procedure.

This election procedure should be developed in the law and, as stated in Recommendation CM/Rec(2010)12: 'Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions'."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§41 and 42

"[…] The grounds for dismissal should be stated in the Constitution, e.g. stated misbehaviour or incapacity. […]"

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

III. FUNCTIONS AND POWERS OF THE PROSECUTION SERVICE

2.1 POWERS IN THE CRIMINAL FIELD

2.1.1 Investigation and prosecution of crimes on behalf of the State in criminal cases

"[…] [M]ost systems provide for a monopoly on criminal prosecutions by the state or an organ of the state."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §15

"Systems of criminal justice vary throughout Europe and the World. The different systems are rooted in different legal cultures and there is no uniform model for all states. There are, for example, important differences between systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. There are systems where prosecution is mandatory (the legality principle) and others where the prosecutor has discretion not to prosecute where the public interest does not demand it (the opportunity principle). In some systems there is lay participation in the fact-finding and/or law-applying process through the participation of jurors, assessors or lay judges, with consequences for the rules of criminal procedure and evidence. Some systems allow for private prosecution while others do not do so or recognise the possibility of private prosecution only on a limited basis. Some systems recognise the interests of a victim in the outcome of criminal proceedings as a *'partie civile'* where others recognise only a contest between the prosecutor representing the public or the state and the individual accused."

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II the Prosecution Service, §7

"The *Recommendation (2000)19 of the Committee of Ministers on the Role of public prosecution in the criminal justice system* allows for a plurality of models of the Prosecution Service. […]"

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 28

"As regards the basic models referred to in the Concept, one could suggest that the function of the general prosecutor and the other public prosecutors should be confined to the prosecution

of crime, through the criminal courts, and should not be extended to the protection of the public interest in civil matters and administrative causes. […]"

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"[…] The direction in which the Venice Commission would recommend to go has been clearly formulated in Recommendation 1604 (2003) of the Parliamentary Assembly, which states: *'the power and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal-justice system, with separate, appropriately located and effective bodies established to discharge any other function.'*"

> CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, §76

"It is particularly positive that the Draft Law proposes a significant reduction of the number of tasks of the Prosecution Service by specifying that provisions not related to the prosecution service's core role, such as its participation in civil cases and the supervision of the compliance with the law, will expire within three years from the entry into force of the Draft Law, thereby providing sufficient time to draft legislation which will transfer these responsibilities to other bodies. This will also allow the Prosecution Service to focus on its core task of criminal prosecution. […]"

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §11

"In the case of Montenegro, the fact that the Constitution prescribes, in its Article 134, that there is a 'unique' State Prosecution Service inevitably tended to favour the choice which has been made to establish the special public prosecutor within the framework of the existing prosecution service. Otherwise, the authorities would have been compelled to embark on the difficult process of attempting to amend the Constitution. At the same time, if a special public prosecutor's office is to serve a useful purpose, a degree of autonomy within the framework of the existing prosecution service is necessary."

> CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §14

2.1.2 Specific powers of the prosecution related to criminal investigations

2.1.2.1 Decision to prosecute or not to prosecute

"[…] *In conformity with the principle of legality, the public prosecution service must act only on the basis of, and in accordance with, the law. This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle).*"

> CDL-AD(2016)007, Rule of Law Checklist, §91

"[…] it is important to clarify, in the law, whether individual prosecutors shall act on the basis of the principle of legality (meaning prosecution of all cases fulfilling the elements of a crime) or the principle of opportunity (which allows for prosecutorial discretion as to the decision of whether or not to prosecute). […]"

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §106

"Articles 7-12 relate to the conducting and carrying out of criminal investigation. These provisions seem appropriate to ensure that the prosecutors control of the investigative powers is secured. Article 10 empowers the prosecutor to decide on the exemption from criminal liability of a person 'for opportunity reasons' and it would appear that at least to this extent the Moldovan prosecution authorities are to operate the opportunity principle. It is

obviously desirable that a prosecutor should have these powers so as, for example, to give immunity to a witness in return for testimony against a more important participant in crime. However, it is necessary that criteria for the exercise of this power should be set out."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §24

"Although Article 34.1.d, which mentions the prosecutor's discretion in decision-making, seems to confirm that the opportunity principle applies, this fundamental distinction should be more clearly specified, and, if the principle of opportunity is to be applied, the rights of victims, including remedies for decisions not to prosecute, should be provided for."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §32

"The fact that so much of the prosecutor's work is subject to scrutiny by courts of law also provides a form of accountability. In systems where the prosecutor does not control the investigation, the relationship between the prosecutor and the investigator necessarily creates a degree of accountability. The biggest problems of accountability (or rather a lack of accountability) arise when the prosecutors decide not to prosecute. If there is no legal remedy - for instance by individuals as victims of criminal acts - then there is a high risk of non-accountability."

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §45

"In most cases the decision to prosecute will be made simply on the basis of whether there is sufficient evidence to prosecute. In some cases, there may be matters unrelated to the weight of evidence tending to suggest that a prosecution may be undesirable. These may relate to the circumstances of the offender or the victim, or to the damage a prosecution might cause to the interests of a third party. Exceptionally, there may be cases where a prosecution would risk causing damage to wider interests, social, economic or relating to questions of security. Where such public interest questions arise, care should be taken not to violate the rule of law, and while the prosecutor may think it wise to consult with persons having a special expertise, he or she should retain the power to decide whether a prosecution is in fact in the public interest. If the prosecutor can be subject to an instruction in such a case, then that instruction should be reasoned and where possible open to public scrutiny."

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §56

"The prosecutor must act fairly and impartially. Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner. It is not the prosecutor's function to secure a conviction at all costs. The prosecutor must put all the credible evidence available before a court and cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case. Where evidence tending to favour the accused cannot be disclosed (for example, because to do so would compromise the safety of another person) it may be the duty of the prosecutor to discontinue the prosecution."

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §17

"Furthermore, paragraphs 24-36 of Recommendation Rec(2000)19 provide for a number of important duties of the public prosecutor towards individuals. Quite a number of these are not referred to at all in the draft Law, such as the duty not to initiate or continue prosecution when an impartial investigation shows the charge to be unfounded, not to present evidence that they know or believe on reasonable grounds was obtained illegally, and to disclose to the other parties (meaning primarily the accused) 'any information which they possess that may affect the justice of the proceedings'."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §107

2.1.2.2 Supervision of the investigation by the prosecutors and the courts

"[…] In any case, prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges. In some countries a 'prosecutorial bias' seems to lead to a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §73

"[…] [T]here 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.

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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§104 and 105

"Article 23 contains a provision allowing a judge to issue a decision on the application of a special prosecutor obliging a bank to monitor payment operations and to report them to the special prosecutor. It is recommended that clear criteria for the grant of an order to this effect be set out in the law, especially considering that sanctions are provided for the cases of failure to execute the decision […].

It is welcomed that an appeal is provided against such decisions […]."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§62 and 63

"It would be important to include a provision to the effect that data containing relevant information helpful to an accused person cannot be withheld from that person [by the prosecutor's office] in the event of a prosecution being brought."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §67

"Article 6 sets out the obligation to co-operate with the Public Prosecutor's Office by making those who refuse to do so criminally responsible. It should be remembered that the Public Prosecutor's Office's activities may jeopardise certain fundamental rights such as privacy, the confidentiality of communications, right to the protection of personal data etc. A proper balance between the different rights must be established by appropriate judicial control."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §21

"The fourth paragraph of Article 5 should make it clear that orders given to the police and investigative bodies by prosecutors should be subject to judicial control. This paragraph corresponds to Article 102 of the draft Law, which mentions that police and investigative body operations must be subject to judicial control, not just control by prosecutors."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §18

"[…] Leaving the choice of the court to the accusing party is a serious violation of the adversarial principle and gives an unfair advantage to the prosecution. The possibility to select the court should be withdrawn from the Prosecutor General."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §84

2.1.3 Specialized prosecutors

"[…] [T]he Draft Law does not provide for specialisation within the Public Prosecutor's Office, for example on anti-corruption, organized 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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §48

"[…] [A]lthough not proposing or advocating in favour of a unique or universal model of anti-corruption agency, the above [international] instruments clearly define an international obligation for states to ensure institutional specialisation in the sphere of corruption, i.e to establish specialised bodies, departments or persons (within existing institutions) in charge of fighting corruption through law enforcement.

Key requirements for a proper and effective exercise of such bodies' functions, as they result from the above instruments, include:

- independence/autonomy (an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence);
- accountability and transparency;
- specialised and trained personnel;
- adequate resources and powers.

The use of special prosecutors in such cases [(corruption, money laundering, trade of influence etc.)] has been successfully employed in many countries. The offences in question are specialised and can better be investigated and prosecuted by specialised staff. In addition, the investigation of such offences very often requires persons with special expertise in very particular areas. Provided that the special prosecutor is subject to appropriate judicial control, there are many benefits to and no general objections to such a system. The decision whether such a system would be useful and appropriate in the current circumstances of Montenegro is essentially a policy choice for the relevant authorities in that country."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§17, 18 and 23

"The international instruments which define the duties of prosecutors lay a particular emphasis on the duty of prosecutors to deal with crimes committed by public officials. Specialised offices to investigate such cases have become quite common in the recent years. The Venice Commission in its opinions has been supportive of the establishment of specialised anti-corruption investigation/prosecution units enjoying a certain autonomy from the general prosecution system.

The model for such offices varies. In some cases the special prosecutor's office remains formally part of the general prosecution structure but as an autonomous unit, so that it cannot be instructed by other, more senior, prosecutors or by the government. In other cases a completely independent office has been established."

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §§46 and 47

"[…] [The OECD Report on Specialised Anti-Corruption Institutions] suggests that special anti-corruption departments or units within the police or the prosecution service could be subject to separate hierarchical rules and appointment procedures or that police officers dealing with corruption cases, although institutionally placed within the police, report in individual cases only and directly to the competent prosecutor."

> CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §55

"Article 53 (adding Article 148/c) proposes to establish a new Prosecutor's Office of the Special Anti-corruption Structure (SAS). Creation of such special structure may have a positive effect on the fight against corruption; it is important that the special prosecutors enjoy at least the same independent status as ordinary prosecutors. […]"

> CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §89

2.2 OTHER FUNCTIONS OF THE PROSECUTION SERVICE

"In the opinion of Consultative Council of European Prosecutors the constitutional history and legal tradition of a given country may thus justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with Council of Europe values. 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."

> CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, §16

"[…] [T]he Commission would support a very different approach to the powers of the prosecutor's office which results from a text adopted by the Parliamentary Assembly. While it is not binding on Member States, the Parliamentary Assembly of the Council of Europe, in Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, having recited (at paragraph 6) that the various non-penal law responsibilities of public prosecutors *'give rise to concern as to their compatibility with the Council of Europe's basic principles'* went on to declare its opinion (at paragraph 7):
'it is essential… that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function.'"

> CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, §56

"[…] It is therefore necessary to be guided by the general democratic principles of a law-governed state. Foremost amongst them is the principle of separation of powers and its consequent principle: the autonomy of individual branches of authority and the principle of balance (equilibrium) of powers. That means prosecution organs should not overstep the bounds of areas reserved for legislative authority, executive power and an independent judiciary. It is therefore necessary to do away with those functions of the prosecutor's office that do not conform to those principles and may actually constitute a threat to their implementation."

> CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, §13

2.2.1 Participation in civil proceedings in the interests of private individuals or State entities

"Under Article 39 the representation of citizens' interests in court is still a function of the prosecutor. The Venice Commission has in the past observed that this function should only be conferred on prosecutors in cases where citizens are unable to act on their own behalf by reason of disability or some other such cause, and in no case should it be conferred on prosecutors to the exclusion of the right of a citizen to seize the court directly."

> CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, §24

"[…] The role of the prosecutor should be limited to make an appeal in cases where he or she is a party to the proceedings. […]

[…] The prosecutor may also initiate civil proceedings to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings. […] [I]t is important that this should only be subsidiary […]. […] [T]he main task of the prosecutor is to represent the interest of the state and general interest, it may also be questioned whether the prosecutor is necessarily the most appropriate person to undertake this function, or whether it might not be more appropriately exercised by a body such as an ombudsman."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §§29-30

"Section 27.1.b and 27.4 APS give the prosecutor wide powers to interfere in relations between private parties ('prosecutors … may use their powers to take action in lawsuits between other parties', 'prosecutors shall have the right to seek redress even if they were not party to the proceedings'). While they may be required in some specific cases (e.g. urgent action on behalf of a fugitive to safeguard his or her rights) such wide controlling powers should be narrowly defined in the APS."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §35

"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.

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."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§82 and 85

"The Venice Commission remarks very positively that the competence of the State Prosecutor in property law matters have been dropped and were not implemented in the new Constitution; […]."

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §18

"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. […]"

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §89

"[…] [The prosecutors] 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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §87

2.2.2 Right to initiate extraordinary review proceedings

"Section 30.6 APS appears to override the *res iudicata* effect of final court decisions: 'Prosecutors may seek a legal remedy against final court decisions'. This competence is 'subject to a separate act with reference to reasons and in the cases defined by law'. However, it seems that these 'final' court decisions are first and second instance decisions, which are still open to cassation by the Curia."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §40

"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 judgment by the Supreme Court against judgments 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 judgment in the absence of any new circumstances, this would be a violation of the *res judicata* principle as well as Article 6 of the European Convention and should be changed."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §99

"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.

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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§93 and 95

"Under Article 17 of the present Law, it remains a task for the State Prosecutor's Office to 'apply legal remedies for the purpose of protection of constitutionality and legality'. The Delegation was informed that this task is similar to the institute of cassation in the interest of law, which exists also in other countries. It is available only in the field of criminal and administrative law and results in a request for re-opening of a final case by the Chief State Prosecutor to the Supreme Court for the benefit of human rights protection. In these circumstances there is no objection to such a possibility, which is quite distinct from the general supervisory powers over courts, which the prosecutor enjoyed, for example, in the Soviet Union […]".

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §26

2.2.3 General supervision of "legality" of actions of other State bodies, private individuals and entities. Other powers of the prosecution in non-criminal field

"The revised Article 104 par 1 retains the quite extensive supervisory powers of the Office of the Prosecutor. Such a "supervisory" prosecution model is in fact reminiscent of the old Soviet *prokuratura* model. At the same time, over the last decades, many post-communist democracies have sought to deprive their prosecution services of extensive powers in the area of general supervision, by transferring such prerogatives to other bodies, including national human rights institutions (such as an Ombudsperson). The rationale for such reforms was to abolish what was considered to be an over-powerful and largely unaccountable prosecution service. Maintaining the prosecution service as it is in the Constitution could mean retaining a system where vast powers are vested in only one institution, which may pose a serious threat to the separation of powers and to the rights and freedoms of individuals. The maintenance of such wide prosecutorial supervisory powers has been repeatedly criticized by international and regional organizations, among them OSCE/ODIHR and the Venice Commission. In numerous opinions on this topic, including specifically on the legal framework regulating the prosecution service in the Kyrgyz Republic, the OSCE/ODIHR and the Venice Commission have recommended, for the above-mentioned reasons, that the supervisory role of prosecutors be abandoned and that their competences be restricted to the criminal sphere. […]"

> CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" in the Kyrgyz Republic, §98

"In its 2012 *Opinion on the Draft Law on the Public Prosecutors Office of Ukraine*, the Commission once more emphasized, as a central issue in the context of judicial reforms in ex-Soviet countries, the necessity to remove powers outside of the criminal law field from the prosecutor's competences. It also found problematic, *inter alia* in light of Article 6 of the ECHR, the prosecutor's ability to represent the interests of citizens. The Commission acknowledged that, in the past, such competences might have been justified as a way to address the failure of the responsible institutions to ensure the proper application of laws and observance of human rights. In the Commission's view, a modern and efficient European prosecution service should concentrate on the criminal law sphere, which should represent its main, if not only, area of concern. Powers relating to the general supervision of legality should be taken over by courts and human rights protection by ombudsperson institutions. Maintaining such far-reaching competences and related powers would result in the prosecution service remaining an unduly powerful institution, posing a serious threat to the separation of powers in the state and to the rights and freedoms of individuals.

The Commission pointed out in this context that the Committee of Ministers' *Recommendation on the role of public prosecutors outside the criminal justice system* providing for limitations on the powers the public prosecutor may have outside the criminal law field "*should not be seen as recommending that prosecution services should have such powers*." In addition, as recommended by the Committee of Ministers in its recommendation, where the public prosecution has a role outside the criminal justice system, *"appropriate steps should be taken to ensure that this role is carried out with special regard to the protection of human rights and fundamental freedoms and in full accordance with the rule of law, in particular with regard to the*

right to a fair trial […]." Any related powers should be defined in a clear and restrictive manner and be subject to judiciary control.

[…] The ability to represent the interests of citizens is, however, problematic as prosecutors are also mandated to act in pursuit of the state interest, which could clearly run counter to the interests of any individual being represented. There are other bodies - such as the ombudsperson - that would be better suited to defend the interests of the individual against the state."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§42, 43 and 49

"As regards the powers of senior prosecutors set out in Article 30, the second paragraph should not be used to disregard final judgments, and appeals for extraordinary retrial should be subject to strict conditions. […] As regards 'subject prosecutors', Article 31 indicates as one of their chief functions, in addition to criminal actions, the bringing of 'popular actions'. […] As provided by Article 97 of the Law on the Constitutional Court, not only any party but also the Public Prosecutor's Office has the legal capacity to bring such an action. The scope of this action and the risk of creating a judicial overload by exercising it make it inadvisable to grant legal capacity to several levels of the Public Prosecutor's Office as this needs to be used consistently and in a coherent and centralised fashion."

> CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §37

"[…] There are no objections to limited powers of prosecutors, for example as regards the status of persons or in disciplinary proceedings against the legal profession. Moreover it is also possible to entrust the prosecutor's office with the task of defending the state interest in court proceedings outside the field of criminal law. However, a general supervisory power of the prosecutor both over the state administration and the court system is not in line with the principles of separation and the division of powers which are found in democratic constitutions."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §38

"Article 6 refers to various powers which are conferred on the prosecution service. Some of these are very far reaching. They include the power to demand from legal entities, irrespective of their type of ownership, as well as from individuals, documents, materials, data and other information. There is also power to summon any official person or citizen and demand verbal or written explanations. This power can be exercised for the purpose of carrying out criminal prosecution but may also be exercised in relation to any infringements of fundamental human rights and freedoms or violations of legal order. This seems to go much further than a power exercised only for the purpose of criminal prosecution and again appears to be redolent of a *prokuratura* as a 'fourth power' operating outside of the constraints of a court of law and carrying out its own system of justice. There is also a power to 'freely enter the offices of state institutions, enterprises, irrespective of their type of property, as well as of other legal entities'. This presumably includes private companies. In addition to the power of entry there is a power to have access to all documents and materials. Again, what is striking about Article 6 is that all of these powers appear to be exercisable by the prosecutor without reference to a court of law, without the necessity to obtain a warrant or to have the approval of a judge. The exercise of many of these powers should indeed be made dependent on a court warrant."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §22

"The extensive powers which are conferred on the prosecutor's office to act without the authority of a court and which were criticised in previous Venice Commission opinions are all retained. For example, under Article 9 orders of the Public Prosecutor are binding upon all public authorities, and all citizens can be required to appear before the public prosecutor upon his or her summons and to provide explanations. In the case of non-appearance

without a valid excuse an official or a citizen may be brought before the prosecutor by the militia. Officials and citizens are liable under law for failure to carry out the lawful orders of the public prosecutor.

Article 56 gives the public prosecutor power to enter premises of public authorities and local authorities, citizens' associations, enterprises, institutions, organisations whatever their ownership and to have access to documents and materials, and to require their production. The prosecutor can request that decisions, instructions, orders and other acts and documents be produced for verification and obtain information on the status of legality and measures to ensure it. These powers can be exercised when carrying out supervision of the observance and application of laws. Given the comprehensive nature of the power to supervise the observance of laws, these powers are very far reaching indeed."

CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, §§22-23

"According to Section 4.3 APS, business entities and other organisations have to provide data and documents to the prosecutor, performing duties in his or her official capacity, within a deadline set by the prosecutor. Such a general statement certainly goes too far and should be better defined. In the field of criminal law, Section 4.3 limits these powers through the Code of Criminal Procedure. It seems however that no such limitation exists in non-penal matters, even if there are no sanctions against the refusal to provide such data and documents.

Section 4.4 APS gives prosecutors the power to enter various premises and rooms simply by presenting their identity cards. It seems that these powers extend even to private persons ('premises or rooms at the disposal of the organ or person affected by the procedure'). […] Such powers should be restricted to public institutions and entry into private premises (and of course searches) against the will of the owner of the premises should be possible only on the basis of a court warrant."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§23-24

"In Bulgaria, […] the prosecution is also in charge of the "general supervision of legality" (see Article 127 §§ 5 and 6 of the Constitution; Article 136 § 5 of the JSA). This is a loosely defined competency to intervene in the name of the State in administrative (non-criminal) cases and even in private disputes, conduct checks and issue binding orders even where there is no case to answer under the Criminal Code.

[…] In particular, Article 145 of the JSA allows prosecutors to "require documents, explanations, other materials", "conduct checks in person", summon individuals for questioning, and issue binding orders "within the competence" of the prosecution service. Since this "competency" (related to the general oversight of legality) is described very vaguely, coercive powers listed in Article 145 have no clear limits. In addition, Article 145 § 4 imposes on private individuals and companies the obligation to cooperate with the prosecutors, in particular by "letting them [i.e. the prosecutors] access to the premises and places concerned". Again, this provision appears to give the prosecution almost an unfettered power to enter private premises, whenever the "interests of the legality" call for it.

In the opinion of the Venice Commission, coercive powers of the prosecution service outside of the criminal law sphere should be seriously restricted, if not totally suppressed. The JSA should describe, with sufficient precision, in which cases (falling outside of the scope of the Criminal Procedure Code) the prosecutors may seize documents, summon people for questioning, enter private premises, issue binding orders, etc. If such actions interfere with privacy, secrecy of correspondence, etc., they should be accompanied by appropriate procedural safeguards (such as the requirement of a "reasonable cause", the need to obtain prior judicial authorisation, etc.)."

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §§41-43

"It is unclear what is meant by representing the general interests of society and defending the legal order, whether this is to be interpreted as requiring the prosecution service to exercise functions of general supervision over and above criminal prosecution, or whether this is merely to be understood as qualifying the way in which criminal prosecution was to be conducted."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §10

"Section 28.4 APS empowers prosecutors to 'dissolve or wind up' a legal entity if it is in 'contravention' of the 'Fundamental Law and any other legal regulation'. There are many violations of a law, which do not warrant a dissolution of a legal entity (e.g. minor infringements of tax legislation). A dissolution of an entity in such a case is likely to violate the freedom of association. The law should specify which violations of law justify dissolution."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §36

"[…] The Prosecutor General should not have the function of coordinating and taking an active part in actions of civil society and private bodies. Civil society requires freedom from the state and should not work under state control; the exercise by the Prosecutor General of preventive-style oversight of civil society action, even if it were only consultative in nature, can deter civil society from its activities."

> CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §17

2.2.4 Right of legislative initiative

"[…] It would, however, be undesirable that a Prosecutor-General should have power to initiate legislation or participate in parliamentary debates. Similarly, the nature of participation in the plenary sessions of courts should be defined so as to make it clear that the Prosecutor-General is not exercising any judicial function, assuming this is in fact the case."

> CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §24

"[…] [T]he draft law provides that where the prosecutor considers it expedient, he or she shall participate in meetings of any commissions, committees and other collective bodies established by the bodies of executive power, representative bodies, local self-government bodies or the President […]. Such rights serve to build the prosecutor's power vis-à-vis other state organs and create a sort of super-authority within the state which is very dangerous to the development of a democratic, law-abiding state."

> CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §25

"[…] The prosecutor may, of course, hand down an opinion on a legal act within his scope of interest being dealt with by parliament. Upon a motion of the legislative authorities, he may take part in committee work on the appropriate draft law. He should not, however, be endowed with the formal right of legislative initiative. He may enjoy the right to submit a motion or a request to parliament or the government, which have the right to initiate legislation. His participation in parliamentary sittings should be possible only at the invitation of parliament or a parliamentary committee. That is required by the rules of the balance of power. […]"

> CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, §62

IV. STATUS OF THE PROSECUTORS – INDEPENDENCE AND ACCOUNTABILITY

3.1. APPOINTMENT AND TERM OF OFFICE

3.1.1 Appointment of the Prosecutor General

"The Venice Commission, when assessing different models of appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the requirement of *democratic legitimacy* of such appointments, on the one hand, and the requirement of *depoliticisation*, on the other. Thus, an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicisation of the prosecution office.

The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. […]

[…] [T]he nomination of the candidate should be based on his/her objective legal qualifications and experience, following clear criteria laid down in the Draft Law. It is not sufficient for a candidate for such a high office to be subjected to the general qualification requirements that exist for any other prosecutorial position; the powers of the Chief Prosecutor require special competencies and experience. […]"

> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §19, 20 and 27

"According to Article 65(2) of the draft revised Constitution, the Prosecutor General is elected for a six years term by a majority of the total members of the Parliament. The requirement of a qualified majority in Parliament for the election of the Prosecutor General is recommended."

> CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §83

"No single, categorical principle can be formulated as to who - the president or Parliament - should appoint the Prosecutor General in a situation when he is not subordinated to the Government.[…] Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.

In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. […]

[…] A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office. […]

If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment […].

In any case, the Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament."

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§35-38, 40

"It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, *carte blanche* in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the government. It might consist of the occupants for the time being of some or all of the following positions:

- The President of each of the courts or of each of the superior courts.
- The Attorney General of the Republic.
- The President of the Faculty of Advocates.
- The civil service head of the state legal service.
- The civil service Secretary to the Government.
- The Deans of the University Law Schools.

A public announcement would be made inviting written applications for the position of general prosecutor and stating the qualifications required for the position; it is suggested that these should be not less than those required for appointment to high judicial office. The Commission would examine the applications and submit to the government (or to Parliament if that is preferred) not more than, say, three names all of whom the Commission considered to be suitable for appointment. The government (or Parliament, as the case might be) would be free to make the selection from those names. In order to emphasise the importance of the position of general prosecutor he might be appointed by the President of the Republic on the nomination of the government (or Parliament) although the President would have no power to reject the nomination. A possible variation of the above proposal is that the selection of nominee that is made by the government should be approved by Parliament before submission to the President. Not all the matters set out need to be stated in the Constitution which might merely say 'the general prosecutor of the Republic shall be appointed by the President of the Republic on the nomination of the (government) (with the approval of Parliament) (Parliament)'. The other matters would be set out in a law of Parliament."

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, pp. 6 – 7

"[…] It is necessary that some committee of technically qualified persons should examine whether candidates for this position [as Prosecutor General] have the appropriate qualifications and meet the relevant criteria. […] There are a number of options which could include the Superior Council simply giving an opinion on the suitability of all the candidates or alternatively ranking them in order of preference. […]"

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §42

"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 prosecution 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."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §118

"It is to be welcomed that […] the Prosecutorial Council will elect the Chief Special prosecutor from among those having applied to the public advertisement and based on the evaluation of

their expert knowledge and competence to discharge the function of Chief Special Prosecutor, including by the way of interviews conducted by the Prosecutorial Council with the candidates meeting the requirements set out by the draft law […].

It is also to be welcomed that the conditions for the election of the Chief Special Prosecutor and special prosecutors have been broadened […] to enable the access not only of prosecutors, but also of persons having at least 12 years (for the Chief Special Prosecutor) or 10 years (for special prosecutors) of work experience as a judge or attorney, to such positions. In addition, persons "*whose previous work shows that he/she has special knowledge and competences to work on the cases falling under the jurisdiction of the Special Public Prosecutor's Office*" will be eligible for such positions (see Articles 12 and 13 of the revised Draft Law). This should reduce the risk of the Special Prosecutor's Office being too inward looking and may help to foster a more independent outlook. […]"

> CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §§34 and 36

"Under Section 22.2.a ASPGPOPEPC the Prosecutor General will, after the expiry of his or her mandate, continue to exercise his powers until the beginning of the mandate of the new Prosecutor General.

There is, however, a transition problem when the mandate of the Prosecutor General expires. Section 22.2.a ASPGPOPEPC means that 1/3 plus one member of Parliament can effectively keep him or her in office by blocking the election of a new Prosecutor General and they could thus extend his or her mandate indefinitely. It is not clear to what extent this question was considered in detail when the Fundamental Law and the ASPGPOPEPC were passed. However, the Fundamental Law lays down a long mandate of nine years of service for the Prosecutor General and it would seem unacceptable that a minority of the members of Parliament can in fact keep him or her in office indefinitely by creating a deadlock in the election of a successor.

There may be various solutions. One possibility may be to prescribe a deadline - in the Fundamental Law or the ASPGPOPEPC - within which Parliament must have elected a new Prosecutor General. Another solution might be simply to repeal Section 22.2.a ASPGPOPEPC, so that the mandate of the Prosecutor General automatically expires after the termination of his or her mandate. Both solutions of course create the problem that there may be a period without a formally elected Prosecutor General but this may put the necessary pressure on Parliament to elect the successor. What needs to be avoided as well is that the same blocking 1/3 minority can indefinitely extend an interim period under the Deputy Prosecutor General, who was appointed by the outgoing Prosecutor General."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§55, 57, and 59

"The revised Draft Amendments provide for the positions of the High Justice Inspector (HJI) and Prosecutor General (PG). These office-holders cannot be elected through a proportionate system. There is no single model for their election; at the same time, it seems desirable that such important appointments should attract a high degree of consensus, and (if this is attainable) without compromising on the qualities of the successful candidate. However, it is difficult to see a principled argument for requiring a 2/3^{rds} majority rather than a 3/5^{ths} – again, this is more a political than a legal question."

> CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §21

"Numerous welcomed references are made throughout the draft Law to respect the principle of non-discrimination. However, certain questions should be avoided. For example, the second paragraph, relating to the procedure for electing the Deputy Prosecutor General, proposes in Article 43 that where the holder of the post is a man, the woman who received

the most votes will be the Deputy and vice versa. The necessary respect for the principle of equality and non-discrimination must be combined, however, with the need for respect for and legitimacy of the person occupying the post. The number of votes should therefore be the chief criterion, not just being of one or the other gender. Situations should be avoided where a person having received fewer votes gets the post for simply being a man or a woman, since doing so could undermine the confidence placed by society in such an important post. It is therefore recommended gender balanced lists be drawn up and that the Prosecutor General and his/her Deputy be elected from the list which has received the most votes."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §40

3.1.2 Appointment of the lower prosecutors

3.1.2.1 Appointing body

"All prosecutors […] are appointed and dismissed by parliament with no qualified majority. The prosecutorial system […] is therefore totally under the control of the ruling party or parties: [t]his is not in conformity with European standards."

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §104;
See also CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §12

"[…] [I]n a system that is as fragmented as Bosnia and Herzegovina, it would be very unhelpful and not recommended that the appointment competence be moved from the State level (the HJPC) to the Entity level (the parliaments). This would increase the risk of politicisation and should be avoided."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §80

"[…] [T]he Deputies are appointed and removed by the Prosecutorial Council directly whereas the competence to appoint and remove the Prosecutors remains with Parliament (at the proposal of the Prosecutorial Council). This seems to indicate a distinction between the deputies, seen as civil servants, and prosecutors who would have some kind of political mandate. Such a logic might be appropriate for the Chief State Prosecutor but not for the high state prosecutors and even less so for basic state prosecutors."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §29

"[…] [T]he system of subjecting the prosecution to political control is not in contrast with European standards. […] [T]he appointment of the Supreme State Prosecutor by parliament can be deemed acceptable, but it would have been necessary to require a qualified majority. […]

It is instead not acceptable to have entrusted the Parliament with the power to appoint all the other state prosecutors. Presumably, these are lawyers who must be selected in view of their technical expertise, and who perform their tasks under the direction of the Supreme State Prosecutor. In fact, they are civil servants, who do not need to be elected and who need to perform their duties without a fixed term."

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §§108-109

"[…] It seems [the] appointments [of deputy prosecutors] are entirely in the hands of the Chief Prosecutor. In a hierarchical system such as that of BiH, giving so much power over appointments to a single individual especially without any requirement to consult with anybody else, could be a recipe for the Chief Prosecutor to select deputies chosen for their compliance and lacking the necessary independence of thought necessary in a good prosecutor."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §81

"[…] [T]he recommendation for appointment [of inferior prosecutors] should come from the Prosecutor General with the Superior Council having the right to refuse to appoint a person but only for good reason. […]"

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §44

"[…] [T]he ambition should be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutorial Council rather than the Parliament since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters. […]"

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §32

"It is welcome that state prosecutors and heads of state prosecution offices will be appointed (for five years, as stipulated by the Constitution) by the Prosecutorial Council."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §74

"[…] In order to prepare the appointment of qualified prosecutors expert input will be useful. This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §48

"It seems that in relation to appointments an expert body, not an elected body, which would assess candidates performance at examinations and interviews is a necessary part of any system in which appointments based on merit are made. […]"

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §47

"As mentioned in Article 57, the written examination to be conducted for persons applying for election as state prosecutors for the first time is to be set and corrected by a commission established within the Prosecutorial Council. It is questionable whether the use of elected representatives is appropriate for such a task. On the other hand, to guarantee impartiality and fairness in the procedure for electing state prosecutors, some outside input would be desirable."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §78

"If the Prosecutor General is to override such advice [from an advisory expert body] it should be on the basis of a reasoned decision and the fact that advice is being overridden should be disclosed. There are other possible means by which safeguards could be built into the system without unreasonably fettering the Prosecutor General's power to run his office effectively. For example, some jurisdictions have introduced the concept of an Inspectorate which carries out an examination of the way in which an office has been run and decisions taken and certifies that these decisions were properly made or alternatively makes recommendations for what should happen in the future.

The Venice Commission thus in principle accepts 'external' as well as 'internal' advisory bodies. The choice of model should depend on an overall assessment of the nature of the relevant prosecution system. The Prosecutor General should have an advisory board, possibly consisting of some of his own senior officials and with appropriate outside participation, to

whom he would report and from whom he could seek advice, without at the end of the day putting him in a situation where he cannot reject that advice where appropriate.

The advantage of establishing a body with a mixed composition would be that it allows prosecutors to receive regular feedback from society about their work. Such a body could also provide valuable external advice or input to Parliament. It would therefore seem prudent to arrange for a prosecutors´ council with at least some external representation, for example in relation to appointment of prosecutors above a certain level. This would (and should) not compromise the power of the Prosecutor General to make the final decision in appointment matters."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§48, 51, and 51

"[…] [T]he written examination to be conducted for persons applying for election as state prosecutors for the first time is to be set and corrected by a commission established within the Prosecutorial Council. It is questionable whether the use of elected representatives is appropriate for such a task. On the other hand, to guarantee impartiality and fairness in the procedure for electing state prosecutors, some outside input would be desirable."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §78

3.1.2.2 Qualification requirements

"[...] [I]t is mandatory to ensure that appointments of prosecutors and deputy prosecutors are made on the basis of objective criteria. These criteria in turn must be established in advance by law or in conformity with the procedure provided by law, on the basis of a transparent procedure and that decisions must be reasoned."

> CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §34

"The draft Law […] sets out general requirements that persons wishing to be appointed as […] prosecutors need to satisfy, as well as requirements for the appointments to the different […] prosecutor's offices. General requirements include citizenship of BiH, a good medical record, professional competence, the bar exam and the absence of any criminal proceedings. These appear to be appropriate and in line with European standards."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §73

"Among the qualifications for becoming a prosecutor in Article 11, the requirement to be a professional lawyer (third paragraph) should be clarified to show whether this means all law graduates or only those who have been advocates and are registered with the bar. The profession of prosecutor should be open to all those who have followed law studies satisfactorily, have passed the necessary prosecutor examinations and had the necessary training.

The fourth paragraph of Article 11 stipulates the requirement to 'speak at least two official languages' without specifying the level of knowledge required. Prosecutors already working as such should be allowed time to learn the second language. In addition, the second language concerned may not always be used in a specific case, because another language than that learned may be required. It seems therefore difficult to guarantee the right to use local languages, as set out in Article 32.23 or Article 63 of the preliminary draft Law."

> CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §§26-27

"The new draft opens positions in the Prosecutor's Office to judges as well as prosecutors, and takes account of experience in other legal matters when calculating whether candidates have the necessary experience. In the opinion of the Venice Commission, such a

broadening of the opportunity to work in the Prosecutor's Office can only be to the advantage of prosecutors themselves and to the functioning of the Office, provided it is implemented in such a way as to ensure fairness of competition between persons whose experience will not always be directly comparable, and that experienced prosecutors are given comparable opportunities to apply for positions within the judiciary."

> CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §40

"Chapter 2 deals with recruitment of […] prosecutors and Section 1 deals with the traineeship period. Article 8 sets out the qualifications of trainees. Among the qualities required of a trainee […] prosecutor is the following (Article 8(g)):

> *'Not to have physical or mental health problems or disabilities which will prevent to perform the profession of […] prosecutorship throughout the country, or not to have handicaps such as unusual difficulties for speaking or controlling movement of organs that may be regarded as odd by other people.'*

This provision is far too broad and would not be regarded as generally acceptable according to European standards in its approach to how to deal with persons under a physical or mental disability. The test of something appearing odd to other people seems an inappropriate one.

Article 8(h) disqualifies persons who have been convicted of an intentionally committed crime and punished by imprisonment of more than six months. It seems inappropriate that any person who has committed an intentional offence serious enough to be punished by imprisonment of any duration should be regarded as suitable for appointment as a […] prosecutor. […]

[…] [I]t seems extraordinary that physical appearance should be a valid criterion for suitability for appointment as a judge or prosecutor. So far as concerns behaviour and reactions it needs to be clarified what is meant by these and what type of behaviour or reaction would disqualify a candidate."

> CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§31-32 and 35

"The Draft Law […] introduces additional requirements for candidates to prosecutorial positions, including subjective personality criteria such as personal integrity (Article 19.3), a faultless reputation (Article 23.1.f) and, to a certain degree, observance of the rules and standards of professional ethics (Article 21.2.e and Article 23.2.d). Especially in a younger democracy, it would be important to ensure that these subjective criteria contribute to efficiency and do not allow for bias and abuse. The Draft Law should specify how to determine whether or not the candidates meet those criteria and perhaps also make it possible for candidates to challenge decisions on appointments in court.

Similarly, there is a need to clarify the way in which the health check required under Article 24 for appointment and after every five years of service is to be implemented, with a view to ensuring that the information gathered thereby is not disclosed or stored in a manner incompatible with the right to respect for private life. If needed, appropriate arrangements should be made to safeguard the right in a manner consistent with Article 8 ECHR. Moreover, it would be useful to specify which criteria will be of relevance in the '*psychological and psychiatric assessment of candidates for prosecutor's office and of prosecutors in office*'."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§102 and 103

"Article 33 provides for background checks on candidate public prosecutors who have passed the proficiency test and is, in principle, appropriate. […]"

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §110

"However, the provision then goes on to say that in making the list, 'care shall be taken of the national composition of the population, adequate representation of members of national minorities, as well as knowledge of professional legal terminology in national minority languages using court'. It is unclear what this means in practice. What happens if the original list based on professional competence, etc., does not contain anyone from a particular national minority or with the necessary language skills? Is the list to be supplemented? Presumably, if it can be supplemented with persons who did not have the necessary professional skills to make it on to the original list, they must at least reach some acceptable minimum standard. Is a quota to be fixed? These matters need to be clarified in the text of the Law, as the practical implications of the current provision are very vague. […]"

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia. §32

3.1.2.3 Appointment procedure

"Article 21 of the Draft Law sets out the principles of a competition-based appointment of prosecutors, through an objective, impartial and transparent selection process. This is a welcome new provision."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §100

"[…] Normally one would expect that appointments would be made only of persons who had succeeded in the competitive examination and that they would be made in the order in which the candidates had been successful unless there was very good reason to the contrary."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §45;
See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §77

"As regards the system for entering on a prosecutor's career, implementing regulations should clearly indicate the existence of objective proof such as written papers in the competitive examination concerned."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §52

"The appointment process starts with a public announcement of vacancies that must be well-publicised. The announcement is followed by nominations of candidates by special departments set up by the judicial or prosecutorial sub-councils of the HJPC for nominations for vacancies in the different courts and prosecutors' offices consisting of four or five judges or prosecutors. This suggests that candidates cannot apply for a certain position directly, but only through the sub-councils. Such a practice could be seen as problematic, as it could undermine the transparency and openness of the process."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §76

"This Article, which regulates the nomination and election of candidates for public prosecutor's office, is rephrased and seems not to have introduced any major changes, except for the introduction of the obligation to publish the list of candidates on the Internet site of the State Prosecutorial Council. The obligation to publish the list of candidates is to be welcomed."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §31

"[…] [T]he HJPC is both the body making the decision [on appointment] and hearing the appeal. There does not appear to be any provision for an appeal to a court of law, which should be added."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §78

"The Venice Commission has in the past welcomed systems where the process of appointing prosecutors 'avoids unilateral political nominations', and where several State authorities and bodies participate in the appointment process and seek consensus on candidates. While the right to nominate candidates should be clearly defined, advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society. […]"

> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §17

3.1.3 Term of office; early termination of office not for prosecutor's fault

"[…] Article 122 of the Constitution should be amended to provide for a longer mandate than the current five years and should exclude re-election in order to protect persons appointed as Prosecutor General from political influence."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §117

"[…] [T]he proposed seven year term of the Prosecutor General rather than the current five years is to be welcomed as this is both a sufficiently long period that goes beyond the term of any one government or of the President, and it also removes a significant threat to independence by excluding re-appointment. This gives effect to the Venice Commission's general recommendation concerning the term of office for a Prosecutor General."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §89

"[…] *for the institution to be in line with Council of Europe standards, the Prosecutor General should be appointed for a single term, either considerably longer than five years or until retirement. The grounds for dismissal (serious violations of the law) should be laid down in the constitution, or at the very least the constitution should refer to a law setting out these grounds.'"*

> CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §41

"It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office. That would ensure the greater stability of the prosecutor and make him or her independent of current political change.

If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment so that again no question of attempting to curry favour with politicians arises. On the other hand, there should be no general ban on the Prosecutor General's possibilities of applying for other public offices during or after his term of office."

> CDL-AD(2010)040, European Standards as regards the independence of the judicial system: Part II - the Prosecution Service, §§37-38

"Prosecutors should be appointed until retirement. […]"

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §50

"[…] Since it is obvious that prosecutors (as is also the case in Montenegro) may of course be removed under disciplinary proceedings, fixed term appointments in combination with a possibility of reappointment cast doubt on the independence of the prosecution service. This is, of course, emphasised in systems such as that in Montenegro where there is considerable political influence on appointment decisions."

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §34

"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."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §114

"[…] The general prosecutor's period of office should not be co-terminus with that of the government since this would tend to lead to the assumption in the public mind of his political allegiance."

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"It is to be welcomed that, as provided by Article 48, a person may only be elected as Supreme Public Prosecutor for a maximum of two terms."

> CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §31

"Article 95.3 sets out that 'when a judge or a prosecutor reaches the mandatory retirement age, his/her term shall automatically cease'. It is recommended to provide more flexibility by allowing a judge to finish considering/deliberating a case or else retirement could disrupt the work of the court, which may result in the re-hearing of a case."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §123

"[…] [D]ismissal 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 to introduce the possibility to challenge the reorganisation decision in court."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §149

3.2 EXTERNAL AND INTERNAL INDEPENDENCE

3.2.1 Place of the prosecution service within the system of separation of powers: is it a part of the executive, the judiciary, or a power on its own?

"While the independence of judges and the judiciary in general have their origin in the fundamental right for persons to a fair trial […] the independence of prosecutors and the prosecution system does not have such a common standard."

> CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §7

"[…] [T]he major reference texts allow for systems where the prosecution service is not independent from the executive. Nonetheless, where such systems are in place, guarantees must be provided at the level of the individual case to ensure that there is transparency concerning instructions that may be given."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §16

"It should be noted that the Constitution defines the prosecution system as part of the 'Judicial Authority' (Chapter IX of the Constitution). This has important consequences for the independence of the prosecution from other state bodies including the courts. Recommendation 2000 (19) of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution makes a clear distinction between the prosecution and judicial functions. The explanatory memorandum states that while the task of both public prosecutors and judges is to apply the law or to see that it is applied, judges do this reactively, in response to cases brought before them, whereas the public prosecutor pro-actively, acts in order to the application of the law. The independence of the prosecutors from the Judiciary should be made explicit."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §6

"As the prosecutor acts on behalf of society as a whole and because of the serious consequences of a criminal conviction, the prosecutor must act fairly, impartially and to a high standard. Even in systems where the prosecutor is not part of the judiciary, the prosecutor is expected to act in a judicial manner.

It is therefore important that the qualities required for prosecutors be similar to those of a judge and that suitable procedures for appointment and promotion are in place. […]"

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§11 and 12;
See also CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §17

"[…] While the Constitution should confer independence on the system as well as on the general prosecutor care will have to be taken to maintain a balance between, on the one hand, the protection of subordinate prosecutors from interference by the Government, Parliament, the police or the public and, on the other hand the authority and responsibility of the general prosecutor for ensuring that they carry out their functions properly."

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"Under Council of Europe standards, the public prosecutor's office may either be subordinate to the executive or independent. However, adequate safeguards must be in place to ensure the transparency of any exercise by the Government of prosecution powers. Paragraph 13 of the Committee of Ministers of the Council of Europe's Recommendation Rec (2000) 19 sets out certain conditions which should be met where the prosecutor's office is part of or subordinate to the executive. […]"

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §26

"[…] While judges should be independent, this concept is not fully applicable to the prosecutors; it is more accurate to speak of 'autonomy' rather than full-fledged 'independence' of the prosecution service. Certain asymmetry of institutions and procedures applicable to the two branches of the judiciary is inevitable."

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §40

"There are no international standards that require the independence of the prosecution service. But, at the same time, it is clear that there is a general tendency towards introducing the independence of the prosecution service. […] At the same time it is important to avoid that the prosecutors' independence becomes a threat to the judges' independence."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §20

"[…] The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. […]"

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §26
> See also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §84

"Yet, certain more detailed standards and recommendations do exist. Thus, the Committee of Ministers of the Council of Europe requires member States to ensure that public prosecutors are free from 'unjustified interference' with their professional activities. The Rome Charter, adopted by the CCPE in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE encourages the general tendency towards greater independence of the prosecution system. In many member states of the Council of Europe, a tendency of giving more independence to the prosecution service may be seen, particularly as regards decisions reached by the prosecution in criminal cases. […] The Venice Commission further notes that in many countries 'subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases'. That being said, a general tendency of giving more independence to the prosecution service has not yet transformed itself into a binding rule that is uniformly applied across Europe."

> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §16

"The fundamental principle which should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have confidence in the system which is essential in any healthy society."

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"The ambiguity of the draft with respect to the independence of the procuracy is however not the prime concern with respect to the model of prosecution developed in the draft law. The principle of independence alone is no guarantee of a democratic prosecution model. Indeed, it can lead to the creation of an all-powerful prosecutor's office which is a threat to the democratic functioning of other state organs, including courts of law. It was precisely in communist states that the prosecutor's office became a tool of repression as a result of such separation, its broad scope of authority and its exemption from all supervision. […]"

> CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §23

"[…] It is, of course, legitimate to site the prosecution service either in the judiciary or the executive, and if it is sited in the judiciary then a clear distinction has to be drawn between courts of law and the branch of the judiciary exercising the prosecution power (see in particular paragraphs 17 – 20 of Recommendation Rec 2000 (19) on the Role of Public Prosecution in the Criminal Justice System which deals with the relationship between public prosecutors and court judges)."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §13

"The independent status of the general prosecutor and the public prosecution service does not necessarily preclude the possibility of an annual report to Parliament describing in general terms his work but without commenting on individual cases. However, it does mean that a decision by him to prosecute in a particular case, or not to prosecute, cannot be appealed against, or overturned by any executive or parliamentary authority. […]"

CDL(1995)073rev., Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"The deletion of Article 104 on special reports to be provided upon the request by Parliament and by Government is to be welcomed because it removes a possibility to exert political pressure on the Chief State Prosecutor in individual cases."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §55

"[…] [I]t should be made clear that the prosecutor should not have an obligation to report to the National Assembly on the details of individual cases. "

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §25

3.2.2 Impeachment of the Prosecutor General by the Parliament or dismissal by the President[2]

"In many systems there is accountability to Parliament. In countries where the prosecutor general is elected by Parliament, it often also has the power to dismiss him or her. In such a case, a fair hearing is required. […] [A]ccountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §42

"[…] [It] 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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §125

"It is proposed to remove the competence of the Verkhovna Rada to declare no confidence in the Prosecutor General, thus forcing him or her to resign. This is a very welcome proposal, which has been strongly recommended by the Venice Commission in its past opinions on the ground that the Verkhovna Rada should not have the right to express a motion of no confidence (which is a purely political instrument) in the Prosecutor General who is not a member of the Government. The removal of this competence is therefore strongly supported by the Venice Commission […]."

CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §12

"In Section 23.2 ASPGPOPEPC it is set forth that, based on the recommendation of the President of Republic, Parliament may exempt (dismiss) the Prosecutor General from office if the Prosecutor General is unable to fulfil his or her duties arising from the mandate for reasons beyond his/her control. Similarly, as per Section 23.7 ASPGPOPEPC, based on the recommendation of the President of Republic, Parliament shall pronounce the Prosecutor General's forfeiture of office in a decision if the Prosecutor General fails to fulfil his/her duties arising from his/her mandate for reasons falling within his/her control or commits a crime established in a final and absolute judgment or otherwise becomes unworthy of his/her office. The Prosecutor General should have a right to be heard before exemption or forfeiture from office."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §61

[2] See also the chapter on disciplinary liability below

"No procedures are set forth as to how the Parliament should arrive at their decision. There are no provisions, for example, entitling the Public Prosecutor […] to make a defence, to call evidence or address the Parliament, nor are the procedures to be adopted by the Parliament on the occasion of such a vote set out."

> CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §58

"[…] 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. […]

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.

[…] [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."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§120, 121, and 122

"[…] [C]riminal prosecution against the Prosecutor General can now only be initiated by a prosecutor appointed by the SCP [the Superior Council of Prosecutors] (Article 35. 5), and not, as in the current Law, by the Parliament at the proposal of the Speaker. This is a welcome stipulation intended to enhance the independence of the Prosecutor General. However, since the Prosecution Service is a hierarchically organized and centralized body, it may be difficult for prosecutors to investigate criminal cases against other prosecutors (especially against the Prosecutor General). The Draft Law should clarify how investigations into possible criminal conduct of prosecutors are to be undertaken, and ensure that a mechanism exists whereby independence from the hierarchy of the Prosecution Service is guaranteed to those in charge of such investigations. Consideration may be given to assigning this task to an existing independent body or creating a separate independent body for this purpose.

[…] It is also noted that, among the reasons for dismissal of prosecutors, thus including the Prosecutor General, Article 61 lists 'being medically regarded as unable to work for fulfilling the duties'. This should be determined by a medical certificate. It should also be made clear whether the decision of the President to dismiss the Prosecutor General on this account is subject to judicial challenge so as to provide a safeguard against any abuse of this power.

In view of the above comments, it is recommended to include in the Draft Law a specific mechanism for the dismissal of the Prosecutor General, distinct from the provisions regulating dismissal of other prosecutors and based on clear conditions and criteria […]"

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§113, 127 and 128

3.2.3 Financial independence: budget of the prosecution service, remuneration of the prosecutors, staffing of the prosecutor's offices

"[…] [An] own budget [for the prosecutor's service] which is to be approved by the Parliament […] is an appropriate provision and [it] is a good guarantee for the independence of the prosecutor's service."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §69

"[…] The financial independence of the Public Prosecutor's Office must be ensured without resorting to funds involving the carrying out of certain actions or donations from private or foreign sectors."

> CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §59

"As stated by Article 32 of the draft law, financial resources for the Special Office are to be provided from the general budget of the State Prosecutor's Office. Additional indications on the criteria or indicators taken as a basis for the budget proposal, its author (by the Chief Special Prosecutor?) and the deciding authority (is it the Parliament, upon adoption of the general budget or by subsequent decision of the Supreme Prosecutor?) would be recommended."

> CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §72

"Like for judges, remuneration in line with the importance of the tasks performed is essential for an efficient and just criminal justice system. A sufficient remuneration is also necessary to reduce the danger of corruption of prosecutors."

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §69

"[…] 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.

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. […]"

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§179 and 180

"[…] It would be useful to set out in the law at least criteria for establishing the minimum number of positions that guarantee the effectiveness of the Office and how this number can be changed. […]

Finally and most importantly, in view of its potential impact on the capacity, efficiency and quality of work of the Office, and its autonomy, the recruitment procedure applicable to the above categories [of support staff] should also be adequately regulated by the law. The absence, in the current draft, of any such information - whether recruitment may be organised through competition or other modalities - is a source of concern."

> CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§68 and 71

"[…] Additional guarantees likely to increase the autonomy and the efficiency of the Special Office may include, for instance, establishing the Chief Special Prosecutor's capacity as budget administrator."

> CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §24

"*Here again, sufficient remuneration is an important element of autonomy and a safeguard against corruption.*"

CDL-AD(2016)007, Rule of Law Checklist, §94

3.2.4 Hierarchical organization of the prosecutorial system: instructions and reporting obligations

"[…] [T]he 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.

[…] The main element of such 'external' independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.

The independence of the prosecution service as such has to be distinguished from any 'internal independence' of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. […]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§28, 30 and 31

"The hierarchical model is an acceptable model although it is perhaps more common where prosecution services are sited within the judiciary for the individual prosecutor to be independent. The hierarchical model is more commonly found where the prosecution service is regarded as a part of the executive. A hierarchical system will lead to unifying proceedings, nationally and regionally and can thus bring about legal certainty. […] What is more a matter of concern is the obvious contradiction between the principle of the autonomy of the individual prosecutor referred to in Article 2(4) and the principle of hierarchical control referred to in Article 2(5)."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §15

"*There is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence.* […]

Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

[…] *Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular on behalf of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias.*"

CDL-AD(2016)007, Rule of Law Checklist, §§91, 92 and 95

"That said, in the interest of ensuring consistency of prosecutorial acts with prosecutorial policy, a certain degree of hierarchical interference may be legitimate, if combined with appropriate rules and guarantees. In addition, to avoid the risk of corporatism in this profession, specific arrangements may be helpful, such as the appropriate inclusion of outside/civil society input in self-governing bodies of prosecutors.

[…] [A]ctions, inactions and acts of prosecutors may be challenged with the superior prosecutor and the decision taken by the latter can be challenged further in court (Article 34.4). While this provision, especially as regards the availability of judicial supervision, is in principle to be welcomed, it raises several issues.

First, it leaves some room for potential abuse, since Article 34.4 does not specify who may challenge the actions, inactions and acts of prosecutors, or how often they may do so. Some limitation as to who may challenge (e.g. only interested parties) and how often they may do so (e.g. a decision not to prosecute may only be challenged once) would serve the interest of legal certainty and clarity. As it stands, anyone could potentially challenge the decision not to prosecute someone, and such challenges could be made numerous times. Whilst this issue may be regulated in the Criminal Procedure Code, the necessary clarifications should be provided, either by expressly stating the modalities of such appeals, or by reference to other applicable provisions, e.g. in the Criminal Procedure Code."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§75, 107 and 108

"[The provision] sets out the principles upon which the activity of the prosecution service is organised. These are duties to carry out activities in accordance with the law, the duty of transparency, the principle of independence, the principle of the autonomy of the individual prosecutor *'which allows them to take decisions by their own with regard to files and cases under their examination'* and the principle of internal hierarchical control and judicial control. […]"

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors service of Moldova, §14

"The Law on the organisation and procedure of the Office of Procurator should define the procuracy as a system of relatively independent authorities preferably organised in correspondence to the court system. It would be for the higher authority to control the level immediately below. However, the highest authority should not directly control the lowest one. In this way, the system of prosecution would be protected against direct political intervention or influence."

CDL-INF(1996)006, Opinion on the Draft Constitution of Ukraine, Section VII, p.14

"It is because of questions of this sort that it is important to specify exactly what is meant by describing the system as hierarchical. The important thing is to specify what exactly is the power of instruction given to anybody within the system, to whom exactly this power is given, what precisely is the scope of authority of individual prosecutors, when they may make decisions on their own initiative, which decisions require to be approved by a more senior prosecutor, which decisions may be reviewed or set aside, and by whom and on what grounds. […]"

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors service of Moldova, §37

"[…] Article 3.6 of the Draft Law provides that the prosecutor's work '*may be subject to review from the superior prosecutor and the court',* in accordance with the Draft Law and the Code of Criminal Procedure.

[…] It is important for prosecutors that the law provides clear rules as to when and by whom such revision may be done (any superior prosecutor or only the immediate supervisor), and on what grounds and under what conditions. Moreover, the extent to which the superior prosecutor may review the work of subordinates should likewise be specified […].

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§36 and 38

"Article 38 […] deals with the establishment of the number of public prosecutors. This number is to be related to performance benchmarks. The earlier provision allowed for the determination of that number by the [Prosecutorial] Council on the proposal of the Minister of Justice, on the initiative of the Supreme Public Prosecutor. The involvement of the Minister of Justice in this decision is absent in the new text. This change reinforces the autonomy of the Prosecutor's Office and aims at providing an objective basis for the decision concerning numbers and should be welcomed. […]"

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §28

"It is important to be clear about what aspects of the prosecutor's work do or do not require to be carried out independently. The crucial element seems to be that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy (for example giving priority to certain types of cases, time limits, closer cooperation with other agencies etc.) seems to be an issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role.

Some specific instruments of accountability seem necessary especially in cases where the prosecutor's office is independent. The submitting of public reports by the Prosecutor General could be one such instrument. Whether such reports should be submitted to Parliament or the executive authority could depend on the model in force as well as national traditions. When applicable, in such reports the Prosecutor General should give a transparent account of how any general instruction given by the executive have been implemented. […]

[…] The biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy - for instance by individuals as victims of criminal acts - then there is a high risk of non-accountability."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§43-45

"According to Draft art. 65(3), the Prosecutor's Office shall be accountable to the Parliament. Like any state authority, the prosecutor's office needs to be accountable to the public and in many systems, there is accountability to Parliament. However, in such a situation the risk of politicisation should be avoided. […] [A]ccountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out. In case the accountability leads to a dismissal procedure, a fair hearing should be guaranteed.

CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §82

"[…] [R]elationships within the prosecution system between the different layers of the hierarchy should be governed by clear, unambiguous and well-balanced regulations (Principle XIV of the Rome Charter). […]

The internal functional autonomy of prosecutors should likewise be reinforced. Thus, it would be appropriate to make it clear in the law that decisions regarding the pursuance and treatment of criminal cases are carried out without undue interference from the Government. […]"

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 17 and 90

"[…] The whole question of parliamentary accountability of prosecutors raises a delicate and difficult question. It is certainly reasonable that a prosecutor should be answerable for public expenditure and the efficiency of the office, but there is an obvious danger in making a prosecutor answerable for the decisions in relation to individual prosecutions. Not only is there

a risk of populist pressure being taken into account in relation to particular cases raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature. It would therefore be important to clarify the extent to which the prosecutor is to be accountable to Parliament and for what matters."

> CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §25

"[…] It needs to be made very clear in what circumstances the prosecutor's autonomy can be overridden by a senior prosecutor. […] [I]f the prosecutor's decision is incorrect or illegal […] a superior prosecutor can override it. But what is meant by incorrect? Is it enough for a senior prosecutor to decide that he or she would have made a different decision or must the junior prosecutor have acted outside the scope of his or her authority? The latter alternative is clearly to be preferred […]."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §16

"[…] If the Supreme State Prosecutor can take all acts directly, even without giving an instruction to the prosecutor in charge of the case, any control of illegal instruction could easily be avoided by directly ordering such acts.

[…] [D]irect exercise of authority by the Supreme State Prosecutor must not be used to circumvent guarantees against illegal instructions."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§34 and 108

"The possibility to make a request to commit an instruction [from a higher prosecutor] in writing and the suspension of the instruction until the instruction is written is welcomed […]

According to paragraph 5, 'if the prosecutor finds the instruction incompatible with a rule of law or his/her legal conviction, he/she may request exemption from the administration of the given affair in writing with a view to his/her legal position. Any such request may not be refused; in this case, the administration of the given affair shall be entrusted to another prosecutor or the superior prosecutor may withdraw the given affair within his/her own competence.' This regulation is fully in line with Recommendation Rec(2000)19. Nonetheless, the Venice Commission is of the opinion that '[a]n allegation that an instruction is illegal is very serious and should not simply result in removing the case from the prosecutor who has complained. 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'."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§67 and 69
> See also CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §59

"[…] Article 18 on the mandatory instructions of a higher-ranking public prosecutor to a lower-ranking public prosecutor - should be revisited in order to cover the situation of a prosecutor dealing with an instruction that runs counter to his/her conscience; an appeal to an independent prosecutorial body against alleged illegal instructions should be introduced; […]."

> CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §42

"Section 13.1 APS provides that superior prosecutors may take over cases from subordinate prosecutors or assign cases to other subordinate prosecutors. However, the Act does not provide any criteria under which cases can be removed from subordinate prosecutors. Without such criteria, the removal of cases can be arbitrary. Subordinate prosecutors are not

independent but they perform their activity under the authority of the Prosecutor General. Nonetheless, the removal of cases from a prosecutor without criteria could be abused to assign a case to another prosecutor who is more willing to follow an illegal instruction. Of course this will not happen in normal practice but the law should provide guarantees even against mere possibilities of abuse. There should be criteria for taking away cases from subordinate prosecutors."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §32

"For prosecutors, it is an offence to fail to comply with instructions of a superior prosecutor, unless such compliance would constitute a violation of law or of the provisions of Article 67 of the draft Law. This does not seem to be in compliance with paragraph 10 of Recommendation Rec(2000)19 which provides that: 'All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.' Even this safeguard is not sufficient. In cases of illegal instructions, the prosecutor should have the possibility of making an appeal to an independent body, e.g. the prosecutorial council. A simple replacement of the prosecutor does not prevent an illegal instruction from being carried out."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §106

"[…] [T]he power to give instructions [to a junior prosecutor] extended only to general instructions but not to giving instructions how to deal with particular cases. […] Such a limitation should be clearly spelled out in the Law."

> CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §19

"Consequently, where a prosecutor other than the prosecutor general is given an instruction he or she has a right to have the instruction put in writing but Recommendation 2000 (19) does not prevent the allegedly illegal instruction from being given nonetheless. The prosecutor is also entitled to initiate a procedure to allow for his or her replacement by another prosecutor where an instruction is believed to be illegal or contrary to his or her conscience.[…]"

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §58

"[…] It is recommended to stipulate that all specific orders by a superior prosecutor must always be made in writing and that verbal orders must either be confirmed in writing, or withdrawn. The lower-ranking prosecutor should also be entitled to request further reasoning for the instruction, which should also be provided in writing. In addition, as underlined by the Venice Commission, '*[i]n 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*'."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §72

"Moreover, in view of the country-specific circumstances, 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."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §61

"Article 12 refers to the prosecutor taking measures envisaged by the law in order to restore citizens' legitimate rights that were infringed through the illegal actions of criminal

investigation bodies. It is assumed that in exercising such powers the prosecutor remains at all times subordinate to any court of law which may have seisin of a case and if that is not the case the law should be amended to ensure this. However, since the investigation bodies are subject to the prosecutor's control in the case of an obvious illegality it seems correct that the prosecutor should have power to require the investigation bodies to put right anything that was incorrectly done."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §25

"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. Such guarantees should cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §32

"Article 3.3 states that: '*[t]he principle of Prosecution Service' independence requires its political neutrality and excludes the possibility of Prosecution Service' subordination to legislative and executive authority, as well as of influence or interference from other state bodies and authorities in the Prosecution Service' activity*'. This is a clear statement […] [h]owever, it is suggested to exclude influence and interference from any source and not just from state bodies and authorities.

[…] According to earlier opinions of the Venice Commission on the matter, the two principles mentioned - procedural independence and procedural hierarchy - are not mutually exclusive in their application, but have to be applied in a concerted and harmonious way. […] [T]he Draft Law does not provide sufficiently clear guidance on how these two principles should be harmonized in practice […]."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§33 and 35

"Under Article 28(3) the Prosecutor General is entitled to issue written orders, resolutions, and mandatory instructions and is also entitled to revoke, suspend or cancel acts issued by prosecutors if they run counter to the law. Articles 32(5) and (6) appear to enable any person within the hierarchy of the prosecution service to issue mandatory instructions to more junior persons. The prosecutor general's power to suspend or cancel acts is confined to acts issued by prosecutors which run counter to the law. It would seem from this that the prosecutor general may not override the decision to prosecute or not to prosecute merely because he disagrees with a decision if in fact that decision was taken in accordance with the law but as already stated the scope of senior prosecutors' powers to override the decisions of their juniors requires clarification."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §34

"The text is careful to make it clear that in addition to the possibility of a senior prosecutor overruling a junior one, a court of law may also be used to contest a prosecutor's decisions and actions of a procedural character. Again, it is not clear how far this extends. Can a court of law compel a prosecutor to institute a prosecution? Can a court of law restrain a prosecutor from prosecuting? These issues are of course linked to the question whether the prosecution service of Moldova is to operate the opportunity principle or the legality principle. This is a matter which ought to be specified in an article which deals with the principles upon which the activity of the service is based."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §18

"Is there any provision whereby a review of a prosecutorial decision may be sought? If that is the case, it is important to ensure that the system could not be paralysed. Clearly any system would be unworkable where a person affected by a decision could appeal in succession to superior prosecutors all the way up the system to the prosecutor general.

[…] [I]f every single instruction or decision of any prosecutor can be appealed right up the line to the prosecutor general such that the decision of a territorial prosecutorial can be overridden by the decision of a prosecutor of the level of the court of appeal, which in turn can be overridden by a prosecutor in the general prosecutor's office which in turn can be overridden by the head of a subdivision of the general prosecutor's office, which in turn can be overridden by the deputy of the prosecutor general, which in turn can be overridden by the first deputy of the prosecutor general and which can finally be overridden by the prosecutor general, the system would appear to be highly cumbersome, slow and inefficient."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §§36 and 39

"Articles 157-160 provide for inspection supervision in state prosecution offices by the Ministry of Justice through the use of Judicial Inspectors. It is not clear how this can be in line with the independence of the prosecution service (as guaranteed by article 134 of the Constitution) or with other systems of control, for example by the Prosecutorial Council and by the Ethics Commission. At the very least there appears to be a high degree of duplication which is undesirable. In the opinion of the Venice Commission, the Ministry of Justice should not have a function of day-to-day control of the prosecution office although an input into overall general policy questions would be reasonable. […]"

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §113

"[…] [T]he draft law, which deals with the independence of the Prosecutor, prohibits 'any interference of the […] media […] with the prosecutor's activity'. This is a potentially dangerous provision. There exists a justified fear that such a formulation encroaches on media freedom. Care must be taken to protect the media's right to criticize the prosecutor; where this oversteps what is lawful by, for example, causing prejudice to a forthcoming trial, it should be dealt with only by way of a judicial decision."

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §28

"[…] [I]t is recommended to ensure that all general instructions and policy guidelines issued to special prosecutors should be published, including in the annual report submitted by the Special Office to the Prosecutorial Council (and the Parliament)."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §59

"These provisions have been amended and the overall tenor is to make it clear that the Ministry of Justice's supervision relates only to the organisation of work and the application of the rule book in relation to the administration, especially in relation to matters such as filing, keeping official records and proper work and operation of administration and not to prosecutorial decision making. Article 159 as it now stands seems to make this clear. More generally, it is important that the inspection supervision (control) be conducted in such a way so as to ensure effective respect of independence of the prosecutorial activity of individual public prosecutors and their functional immunity. It is recommended that this important requirement be explicitly stated by the Draft law."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §65

"Article 11 […] introduces an obligation, for the new Office [of the special public anti-corruption prosecutor], to prepare a regular (six-month) activity report, to be submitted to the Supreme

Public Prosecutor, as part of the institutional supervision of the latter over the Special Office. It is welcomed that, as recommended by the Venice Commission, the Office shall also submit an annual activity report to the Prosecutorial Council and make it available to the public by publishing it on its website. Additional ad-hoc reports may be prepared at the request of the Supreme Public Prosecutor or of the Prosecutorial Council. […]"

> CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §30

3.2.5 Transfers, secondments, etc.

"[…] The principle of irremovability applies to judges and not to prosecutors. Nonetheless, prosecutors should have a possibility to appeal against compulsory transfers."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §80

"The issue of secondment always bears in it on the one side the necessity to overcome functional problems by allocating human resources efficiently – sometimes against the will of the concerned persons – in order to insure the fulfillment of the tasks required […] and, on the other side, the legitimate interest of the persons involved and the avoidance of potential abuse. […] [F]orced secondment is something to be looked at with care, because it can endanger the independence of the office holder."

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §45

"[…] One of the provisions […], allows [...] prosecutors, who have been found unsuccessful in one region, to be transferred to another region. Again, one can see the possible potential for using this as a means of exerting pressure on the individual […] prosecutor. It would be important that the procedural safeguards for any […] prosecutor who is to be transferred under compulsion should be set out in the law and the criteria for such transfer clearly stated together with the possibility for the […] prosecutor affected to answer any case which is made against him or her and to have a right of appeal to a court of law against any decision to transfer.

Article 36 provides for […] prosecutors to change from one branch to the other which does not give rise to objection in principle, but see paragraph 47 above. Article 37 deals with the appointment of […] prosecutors to the Ministry of Justice and these appointments are made by the Minister. This latter procedure seems to give scope for the executive to exercise influence and control over the judiciary and at the very least to have potential to interfere with the independence of individual judges. […]"

> CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§48-49

"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 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.

[…] However, this role of the Prosecutors' Council of Ukraine in relation to appointments [of prosecutors to administrative positions] is only one of making recommendations 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."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§49 and 116

"In introducing secondment against the will of a prosecutor, the potential risks should be balanced by safeguards. While a full appeal with suspensive effect against a secondment order might lead to an inability to deal with urgent situations of staff shortages, the prosecutor who is being seconded could be allowed to file a protest to the Prosecutorial Council, which would at least allow for an ex post review of the contended secondment. This would also allow some scrutiny of the rather vague term 'other justified reasons'."

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §48

"Article 84 specifically deals with the secondment/transfer of a prosecutor to another Prosecutor's Office without his or her consent (emphasis added), in cases of reorganization of the Public Prosecutor's Office leading to the lowering the number of positions of public prosecutors involving the termination of certain such position. While the secondment under Articles 81 and 82 appears to be temporary (for a period 'up to one year'), no such mention is made under Article 84, which seems to mean that, in this case, the secondment/transfer is not only compulsory but also permanent. Here again, it is essential to ensure that a possibility to appeal against such a measure is provided."

> CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §46

3.3 IMMUNITIES OF PROSECUTORS, CRIMINAL CHARGES AGAINST PROSECUTORS

"It is important for their independence that prosecutors enjoy inviolability, although this should not be absolute (an exception may be made, for example, in cases of corruption). As stated in Article 35.1, inviolability (partial or full) of prosecutors is meant to contribute to the protection of prosecutors' independence in decision-making. Article 35 actually appears to cover both functional (substantial) immunity and procedural guarantees (judicial inviolability).

The restriction on powers of search and seizure in Article 35.2 aimed at protecting the inviolability of a prosecutor is in principle appropriate. However, the restriction extends only to 'his/her' goods, objects, documents or correspondence rather than what is in his or her possession. This could lead to unjustified interference with the right to respect for private life under Article 8 of the ECHR and to a breach of the prohibition on self-incrimination under Article 6(1) as a result of undue emphasis on who has title to the items in question at the time of the search and seizure. Hence, the inviolability mentioned in Article 35 should cover all items in the prosecutor's possession.

Article 35.3 notes that a prosecutor '*cannot be held legally liable for his/her opinion expressed within criminal prosecution and in the process of contributing to justice*'. Whilst this provision appears to cover some aspects of the prosecutorial function, e.g. statements by the prosecutor that in his/her opinion, a person is guilty of a crime, it does not cover the entire range of actions undertaken by prosecutors in the fulfilment of their duties, such as ordering various investigative activities, procedural actions, etc. The provision should be phrased more widely, for example by stating that the prosecutor enjoys inviolability/immunity for lawful official actions taken in the course of his/her duties."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§110-112

"A prosecutor, like a judge, […] may be subject to certain restrictions aiming to safeguard his or her impartiality and integrity.

[…] It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone.

Therefore, the Commission focuses on methods to limit the risk of improper interference, which range from conferring independence on a prosecutor, subject to such powers of review, inspecting or auditing decisions as may be appropriate, to the prohibition of instructions in individual cases, to procedures requiring any such instructions to be given in writing and made public. In this connection the existence of appropriate mechanisms to ensure the consistency and transparency of decision making are of particular importance.

Prosecutors should not benefit from a general immunity, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.

There are various standards on the acceptability of involvement of civil servants in political matters. 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."

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§17, 19, 22, 61-62;
> See also CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§33 and 34

"[…] While some protection of prosecutors from arbitrary or abusive process emanating from another organ such as the police might be desirable, it would be preferable if any limitation on the power to commence a criminal process was subject to judicial control. […]"

> CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §27

"Article 91 deals with the liability of the prosecutor for damage caused to an injured party 'in the proceedings by the state prosecutor as a result of his/her performing of the duties of his/her prosecutorial office unlawfully, unprofessionally or unconscientiously.' This article makes a reasonable distinction between wider liability of the State towards the victim (arg. 'unlawfully, unprofessionally or unconscientiously') and more narrow liability of the prosecutor towards the State which already compensated the victim (arg. 'deliberately'). This means that the victim has a wider claim against the State and the State can recover the compensation paid only when the prosecutor caused the damage deliberately."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §94

"Section 3.5-7 APS provide the Prosecutor General and prosecutors with the same level of immunity as members of Parliament. Such wide immunity clearly goes too far. […]"

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §21

"[…] Under the new provision, criminal investigations as to whether […] prosecutors have committed criminal offences in connection or in the course of their duties or in relation to conduct considered incompatible with the requirements of their status and duties, are to be carried out through the HSYK's own inspectors with the approval of the HSYK. As an alternative, an investigation may be carried out through a […] prosecutor more senior than the one who is to be investigated. […]

Nevertheless, under Article 82, which is in line with Article 159 of the Constitution, permission of the Minister for Justice (as the Council's President) is still needed, even if a proposal by the relevant Chamber of the HSYK is first required. Therefore, consideration

might be given to transferring the competences from the Minister to the HSYK and its inspectors […]."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§83-84

"[…] Procedural immunity has to be lifted by the Prosecutorial Council unless there are strong indications that false accusations are levelled against the prosecutor in order to exert pressure."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §93

"Article 88 provides that […] prosecutors alleged to have committed an offence cannot be arrested, searched, or interrogated nor can their houses be searched except in cases where an offender is found committing an offence *flagrante delicto*. In previous opinions, the Venice Commission has criticised the exclusion of […] prosecutors from provisions relating to arrest, search or interrogation, except in cases where such arrests or other procedures would interfere directly with the operation of a court of law."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §88

"[…] Article 2.II states that the Chamber of Deputies of the Plurinational Legislative Assembly will be able to bring charges against, among others, judges of the highest courts, including the Constitutional Court, the State Prosecutor General and the Deputy Prosecutor General, for offences committed in the exercise of their functions. This provision creates a direct threat of politicisation of the system by leaving the charge in the hands of the Chamber of Deputies which, despite having great political legitimacy, is not a judicial body and may decide not to proceed with a trial for purely political reasons. Clearly, the State Prosecutor General, the Deputy Prosecutor General and the judges of higher courts must be publicly accountable for their actions, but a decision to bring or not to bring charges should lie with the Public Prosecutor's Office and not with the Executive or Legislative. If the charge were brought by the Public Prosecutor's Office, the Chamber of Deputies might exercise a veto corresponding to its political function and in that case society would be informed about the whole debate."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §13

"[…] [T]here would appear to be no inherent objection to certain categories of persons being tried by a specially constituted court, since the use of military tribunals to try persons in the military or of a country's cassation court to try government ministers has never been suggested by the European Court of Human Rights to be contrary to the right to be tried by an independent and impartial tribunal established by law, although it has found their use to try civilians to be generally unacceptable […]."

CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, §20

"The Draft Law introduces the institution of a Special Prosecutor whose role is to examine allegations of crimes committed by the Chief Prosecutor and make recommendations to the Prosecutorial Council concerning the possible dismissal of the Chief Prosecutor. […]

The idea of creating a Special Prosecutor who obtains his/her temporary mandate from the Prosecutorial Council and may carry out investigations into the alleged misbehaviour of the Chief Prosecutor is laudable. However, the status of the Special Prosecutor, as well as his/her powers, is not entirely clear in the Draft Law, and the terminology used may be somewhat misleading.

[…] On this point, the Venice Commission, OSCE/ODIHR and the CCPE/DGI consider that the Special Prosecutor should not be a part of the hierarchical system of the prosecutors' offices, and should be answerable to the Prosecutorial Council only; otherwise his/her independence

would be compromised. At the same time, the Special Prosecutor should have certain powers which ordinary prosecutors do have, and enjoy similar privileges.

[…] Finally, the Draft Law must explain clearly the nature of the decisions taken as a result of the 'investigation'. In particular, what happens if the report of the Special Prosecutor establishes the existence of a 'probable cause' to believe that the Chief Prosecutor has committed a crime (Article 9^2 par 10), but the recommendation contained in the report is not followed by the Prosecution Council or by the Parliament and the Chief Prosecutor is thus not dismissed? Does this mean that the Chief Prosecutor may not be prosecuted anymore in relation to the facts which led to the opening of the 'investigation'? If such decision means that the Chief Prosecutor would be 'acquitted', this may imply that the 'investigation' conducted by the Special Prosecutor is in essence a criminal investigation and must comply with all guarantees of fair trial enshrined in Article 6 of the European Convention of Human Rights. Furthermore, the Draft Law should specify that once the report is adopted by the Parliament, a criminal investigation may be initiated against the Chief Prosecutor; if this leads to the raising of criminal charges, this is to be dealt with by criminal courts and the Chief Prosecutor should then be treated as any other citizen. […]

In any event, whatever the nature of the "investigation", this procedure should be subjected to specific safeguards, including, amongst other things, the rights of the defence. The Chief Prosecutor should be entitled to appear before the body taking the decision, present his/her arguments and benefit from other procedural guarantees which are appropriate for this kind of procedure and commensurate with the gravity of the potential sanction. […] If, following his/her dismissal, the Chief Prosecutor is brought to trial, he/she should enjoy all guarantees of the right to a fair trial provided by Article 6 of the European Convention of Human Rights, and should benefit from the presumption of innocence.

[…] First of all, it would not be reasonable to require that the procedure of appointment of the Special Prosecutor should be triggered by the majority of the members of the Council – a smaller number of members should suffice. Ideally, each member of Prosecutorial Council should be able to initiate a discussion within the Prosecutorial Council on the appointment of a Special Prosecutor.

Second, as regards the second phase - the appointment of the Special Prosecutor – it should be possible to have this decision taken by a *simple majority* of the members of the Prosecutorial Council. One should bear in mind that members of the Prosecutorial Council are supposed to be eminent persons appointed specifically to oversee the actions of the Chief Prosecutor. If five of them consider that there is a need for an investigation and agree on the person who should be the Special Prosecutor, such an investigation should be opened. After all, the opening of an investigation does not amount to the definite dismissal of the Chief Prosecutor. Furthermore, the discontinuation of the investigation should not be decided by the Special Prosecutor alone; whatever his/her findings are, they should be presented to the Prosecutorial Council which should then decide whether or not these constitute sufficient grounds for dismissing the Chief Prosecutor.

Third, it would be important for the public to be able to scrutinise the process whereby the Prosecutorial Council and other bodies consider the report of the Special Prosecutor. It is therefore recommended to require the publication of the report of the Special Prosecutor upon its completion, with the proviso that some information which should remain confidential for a legitimate reason, such as whistle-blower protection, may be withheld or redacted by the Special Prosecutor.

Finally, the Government should not have the power to block this process: once the Prosecutorial Council, after having heard the report by the Special Prosecutor, decides that there is a 'probable cause' to believe that the Chief Prosecutor has committed a crime, the file should go directly to the Parliament.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§66, 67, 72, 74, 75, 81-84

3.4 CONFLICTS OF INTEREST

"A prosecutor, like a judge, may not act in a matter where he or she has a personal interest […]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §17

"[…] [S]ome 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 […]".

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §68

"[The provision] prevents prosecutors from acting as members of Parliament or of local authorities, or being members of political parties or engaging in party political activity or being members of executive or supervision boards of trade associations or other legal associations established in order to gain a benefit. These appear to the writer to be appropriate provisions and not to be in conflict with the provisions of paragraph 6 of Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe."

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §52

"[…] Judges and prosecutors may not be members of political parties and those who become members are deemed to have resigned from the profession. The question of judges and prosecutors joining political parties is one which is at times controversial and it may be reasonable in the developmental state of Turkey to impose such a condition."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §53

"Prosecutors cannot be involved in any political activity and this is clearly regulated by Hungarian law which follows European practice. Section 44.1 ASPGPOPEPC states that 'Prosecutor may not be a member of Parliament, Member of the European Parliament, local municipality board representative, mayor or state leader.'

Hungarian law contains also anti-corruption rules which are welcome (financial disclosure rules in Section 44.2 et al. ASPGPOPEPC). As per Section 45 ASPGPOPEPC, prosecutors may not be the senior officers or members obliged to participate in business associations, cooperation companies and cooperatives, or the members of the supervisory boards (members with unlimited liability) of the above mentioned institutions and the members of individual businesses."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§64-65

"This Article has been amended to permit meetings of professional associations of prosecutors to take place during work time, provided they do not "disturb the process of work". This appears to be a reasonable provision."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §28

"Article 90.3 of the draft Law would prohibit the judge and prosecutor from membership of any management or supervisory board of the public or private company or any other legal entity. This seems very broad and would prohibit membership of any charitable or non-profit

organisation which had legal personality, possibly including even professional organisations."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §117

"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.[…]"

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §178

"The situation with regard to remuneration seems to be more complicated. The draft Law should provide general restrictions on the type of remunerated work that is incompatible with a […] prosecutor's position. Any offer of remunerated work that may lead to or appear to lead to improper influence, must be declined. However, receiving remuneration should not systematically be linked to disciplinary misconduct. For instance, where a litigant is a student at or involved in work with a university or research institution at which the […] prosecutor is engaged in academic work, it would be unreasonable to demand from the […] prosecutor to abandon the academic work altogether. However, this may (and in some cases must) lead to self-recusal and/or a declaration of conflict of interest.

Article 92 of the draft Law requires a […] prosecutor to seek the opinion of the HJPC on whether activities he or she intends to undertake are in conflict with his or her duties under the law. Presumably this should be confined to cases where the […] prosecutor has reason to have at least a doubt about the issue."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§95 and 118

"Article 89.3 of the draft Law provides that judges and prosecutors may not be members of any organisation that discriminates on various grounds, including sex and sexual orientation. There are various churches and religions which do so discriminate and it is perhaps not intended to prevent judges and prosecutors being adherents of or practising such religions."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §115

"Article 93 of the draft Law requires judges and prosecutors to provide an annual financial report concerning their activities outside their duty as a judge or as a prosecutor. However, the provision falls short of requiring a judge to declare all of his or her assets. It should be noted that full asset disclosure has proved a valuable weapon in combating corruption in other countries."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §120

"The introduction of a bar on exercising the functions of a prosecutor where directly subordinated to a relative is not specifically required by European and international standards but could well contribute to strengthening public confidence in the public Prosecution Service. Its implementation would require effective monitoring of the process of appointing and promoting prosecutors."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §83

3.5 PERFORMANCE ASSESSMENT, DISCIPLINARY LIABILITY AND PROCEEDINGS

3.5.1 Performance assessment and promotions

"Article 43 refers to assessment of the prosecutor. The system requires an assessment examination every five years. This procedure is somewhat doubtful. It seems that if there is to be continuing assessment of prosecutors then it should take place on an ongoing basis. For example, in Ireland there are twice yearly reviews of every prosecutor by a superior officer and the system is based on a discussion between the employee and the employer who try to reach agreement on how the employee is performing and what training or further development are required. This is intended to ensure that problems are identified at an early stage. It is difficult to justify a system which would allow persons to continue for as long as five years without pointing out that they were not performing satisfactorily and then would confront them with a negative assessment. Of course, in Moldova care has to be taken that a system does not interfere with the proper autonomy of prosecutors. However, it still seems that it would be appropriate that there be an assessment of the performance of prosecutors at intervals much closer than five years and that any deficiencies would be referred to and addressed as soon as they arose rather than waiting for such a long interval."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §46

"Article 59 deals with promotion. Subject to regulations approved by the Superior Council, promotion is decided by superior officers. There is a need for a greater degree of objective transparency in this process such as recommendation of suitability by an appropriate board. This needs to be spelled out in the Article. It is not clear who is to appraise 'professional and personal achievements' but it should not be left to the sole discretion of an immediate superior."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §50

"[…] There is a need for […] objective transparency in [the] process [of promotion of prosecutors] such as recommendation of suitability by an appropriate board. […] [Because] it should not be left to the sole discretion of an immediate superior."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §50

"[…] The concept of 'moral characteristics' as a criterion for promotion has been removed from the list and this is to be welcomed. The new list of criteria includes a number of new matters which include obeying the rules on professional ethics, and the substitution of a revised performance evaluation and development system in place of the earlier appraisal system. The new criteria seem on the whole to be more appropriate than the old, and in the case of prosecutors go some way to implement paragraph 7 of Recommendation Rec(2000)19".

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §41

"[…] If the [Prosecutorial] Council is to have a role [in evaluations], it would be preferable that this role be confined to that of oversight with the actual evaluations being carried out by a technical body. […]

In the opinion of the Venice Commission, the evaluation commission should be much more independent of the Council than is proposed. It is difficult to justify why the eminent lawyers should excluded from this process. The Venice Commission believes, on the contrary, that the input of some 'outsiders' would help to guarantee impartiality and independence. In addition, the possibility of an appeal against the decisions of the evaluation commission should be clearly provided."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§83-84

" […] [T]here is an appeal to a court against erroneous or untrue assessments (Section 52.4 ASPGPOPEPC), which is positive […]."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§64-65

"The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §76

"The possible cases of dismissal covered in Article 18 raise a problem in paragraph 6, which provides that dismissal may be the outcome of 'receiving a definitive report of 'unsatisfactory' for the post in question following the performance assessment for public prosecutors'. This is a factor which should be regulated with greater precision to prevent it becoming a route for undue interference and impartiality. The competent authority should be specified, together with the circumstances in which these grounds may be applied. Otherwise the paragraph should be deleted."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §31

"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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §127

"Some of proposed sub-criteria, in particular the quantitative ones (see Article 77), would need careful consideration, to ensure that measuring quantity of work will not be done merely by counting cases without due regard to their weight. The number of 'convicting' judgments should in no circumstances be a criterion. No prosecutor should have a personal interest in securing a conviction. Certainly, if a prosecutor has an unusually high number of acquittals it is reasonable to ask why this is the case; yet, it is not appropriate to measure this as a criterion either of quality or quantity of work without any further enquiry.

Similarly, success on appeal should not be a criterion. While it is reasonable to examine the track record of any prosecutor whose 'results' diverge more than 20% from the average, the evaluator must remain open to considering possible explanations likely to justify these figures.

As regards the practice of assessing the quality of work by examining random cases, this seems a reasonable approach, as is the practice of inviting the person evaluated to put forward examples of good work he or she has done.

[…] It is recommended however that the provisions of the draft law be reviewed to clearly specify that the case-load of heads of prosecution offices as well as their evaluation criteria should adequately take into account their managerial tasks."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§86-88 and 91

"In addition, since the decision assessing the performance of a judge is to be made by the President of the court, it would be desirable that the President of the court not have the sole decision in this matter. Cases where Presidents of courts abuse their position with regard to ordinary judges are not unknown in many countries. A similar point may be made about the power of the Chief Prosecutor to assess the performance of all the subordinate prosecutors. There is, however, an appeal to the relevant sub-council."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §84

"[…] The arrangements for providing the incentives listed are not in themselves problematic; however, as regards the awarding of bonuses in particular, the observation in the 2008 Opinion that this should be done '*in a very objective, impartial and transparent manner (...) [and that there] are doubts about a body which is largely selected by prosecutors exercising such functions*' remains relevant. It would be appropriate, therefore, for the provision of incentive measures to be reasoned and to be linked as much as possible to the procedure for performance evaluation. […]"

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §114

3.5.2 Grounds for disciplinary liability and sanctions

"[…] [T]here should be personal liability on prosecutors only if they have acted in bad faith or in some very improper manner, such, for example, as taking decisions while under the influence of alcohol or drugs."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §53

"Article 62 deals with disciplinary violations. Some of these provisions are somewhat vague and potentially dangerous and could perhaps be used to undermine a prosecutor or to control him. Criterion (b) referring to unequal interpretation or application of legislation is particularly dangerous. This seems to be capable of being applied in a very subjective manner. There is a need to distinguish between failure to work and the more subjective assessment of the quality of decisions which are made. If the latter is to be second-guessed unless in a severe case where decisions are patently insupportable then there is a problem with the autonomy of the individual concerned."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §52

"[…] Persons who leave their posts without permission or excuse for more than 10 days or who do not attend work for a total of 30 days in the year are deemed to have resigned from the profession. There does not seem to be any exception in this last provision made for persons who are ill and this should be remedied."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§48-49

"Article 64 provides that the cutting of salary relates to unauthorised absence. Condemnation is a written notification indicating a fault and can be imposed for conduct harming respect and trust for the official position, discrediting the service by dressing in an inappropriate manner, using state owned instruments for private purposes, ill-treatment towards colleagues and other persons. The risk of abusing disciplinary power has been reduced by the fact that the final decision on disciplinary sanction is now made by the HSYK, but such a risk still remains. It is therefore highly recommended that the regulations on disciplinary sanctions be revised in order to reduce the reasons for such sanctions, to secure proportionality and to limit disciplinary sanctions to severe violations of the duties of […] a prosecutor."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §63

"It seems that causing a perception of something rather than actually doing it are not appropriate criteria for carrying out a serious sanction on a […] prosecutor. A perception may be entirely wrong and it should be necessary to prove that the […] prosecutor has engaged in misconduct rather than that some persons think he or she might have done. This is carried to extremes in Article 68(e) which permits a change of location where a judge is deemed to have:

'caused a perception that he has been involved in bribery or extortion even though no material evidence is obtained."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §71

"[…] [A]lthough the specificity of the service might warrant dismissal for almost any offence, this would perhaps be disproportionate in the case of minor administrative offences (e.g., with respect to motoring) […]."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §137

"In relation to the commission of a criminal offence conviction for an offence followed by imprisonment for at least six months is grounds for dismissal. This is a clear provision and there is no difficulty implementing it. However, there seems to be a somewhat lenient approach to prison sentences. It should be taken into account that in many states normally any kind of prison sentence means that a prosecutor is no longer qualified as a prosecutor. This is quite important to protect the reputation of the whole prosecution service […]."

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §56

"According to the Article 95.1.e, the term of office of a judge or a prosecutor shall cease 'if he/she was sentenced to prison by a final verdict'. Criminal conviction may not necessarily result in a prison sentence, however, the conviction, in most cases, should lead to the termination of office."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §122

"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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §153

"In Section 87.3 ASPGPOPEPC the prosecutor is entitled to a salary of an amount that is equal to the total of his/her basic salary and regular supplements for the duration of suspension. Fifty per cent of this amount may be withheld until the termination of suspension. There are no criteria when 50 per cent of the salary can be retained. This could be used to put pressure on the prosecutor. Discretion should be removed in this case."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §79

"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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §128

"Article 50 is concerned with the disciplinary sanctions that may be applied against a public prosecutor and these are appropriate. However, paragraph 1 stipulates that these sanctions

may not be applied against the Prosecutor General. This may be appropriate given the wide discretion over his or her removal but this stipulation still leaves it unclear as to whether disciplinary proceedings can nonetheless be instituted against the Prosecutor General, albeit without the possibility of imposing any sanctions. This uncertainty arises because the applicability of Articles 44-49 to the Prosecutor General is not explicitly excluded. There is thus a need to clarify the disciplinary liability of the Prosecutor General."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §137

"[…] The sanction of a 20% cut in salary for a period of three months for a minor disciplinary offence (Article 98) seems disproportionate."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §95

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

It is important, in light of their independence, that prosecutors have security of tenure. The terms under which they may be sanctioned (even removed from office) should therefore be phrased clearly and unambiguously. […]

In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§117, 118 and 120

3.5.3 Disciplinary proceedings[3]

"[…] A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified. The body, for example, might be of similar composition to the nominating body described in paragraph 5 above or consist of the remaining members of the National Jurisdiction Council. Alternatively the body might consist of three judges appointed by the presidents of their courts. It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of *ex officio* members rather than be appointed *ad hoc*, in order to avoid suggestions that its members have been chosen so as to obtain a particular result. […]"

> CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"[…] [I]t would be preferable that disciplinary decisions be made by a small body none of whose members is also on the Prosecutorial Council, and which would contain an element of independent outside participation. Should the proposed scheme be maintained, it would be advisable to specify, in line with Article 136 of the Constitution (stressing the autonomy of the state prosecution), that the Chair of the Prosecutorial Council entrusted with disciplinary decisions, as well as the Chair of the Disciplinary panel, must be lay members, not state prosecutor members […]"

[3] On this topic see also Chapter 4.2.3 below on the procedures before the prosecutorial council

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §100

"In the case of prosecutors other than the Public Prosecutor of the Republic decisions on dismissal are taken by the Council of Public Prosecutor. […] Again, there are no provisions relating to the right of a prosecutor to appear before the council and make a defence or to know in advance the case to be made."

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §61

"Articles 152 *et seq* establish [specific bodies] within the Public Prosecutor's Office to deal with disciplinary proceedings. Due to their complexity, they risk to be over-burdened, something that should be simplified. The right to a fair hearing and access to an independent judge who will supervise the trial must not be infringed. It would therefore be advisable not to establish special courts for this purpose as these may lead to inequitable results both for the victim/private party through possible corporatism and for the prosecutor."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §53

"[…] However, disciplinary measures should not be decided by the superior who is thus both accuser and judge, like in an inquisitorial system. Some form of prosecutorial council would be more appropriate for deciding disciplinary cases."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §77

"[…] [S]ince a [disciplinary] complaint may be initiated by a person who is a member of the Council or represented on the Council, there should be a provision excluding such a person from participating in the ensuing proceedings."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §96

"[…] If a member of the Superior Council of Prosecutors has initiated the proposal [for disciplinary proceedings] then clearly that person should not vote on the proposal or take part in the decision made by the Superior Council. However, the present text does allow him or her to vote […] and it seems that this would be the case even for the person accused. It is important to ensure that people who can initiate disciplinary proceedings do not themselves participate in making the decision as it is necessary that such decisions are made by a fair and impartial tribunal even though there is an appeal to the Superior Council and thereafter to the courts."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §66

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

[T]he same issue of impartiality does arise in a different form as there is no provision precluding the SCP member who has initiated disciplinary proceedings from taking part in the determination of an appeal against a decision of the Disciplinary Board.

Disciplinary proceedings may also be taken against members of the Superior Council. If any such member appeals a decision against him/herself taken by the Disciplinary Board, the Draft

Law should prevent him/her from hearing the case against him/herself, so as to avoid any threats to the impartiality required of members of the Superior Council. […]"

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§116, 122 and 123

"[…] Article 65.6 of the draft Law sets out that in proceedings against judges, the commissions should be composed of judges, while in proceedings against prosecutors, it shall consist of prosecutors – this solution is to be welcomed. […]"

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §95

"[…] [S]ince the disciplinary plaintiff is elected after obtaining the opinion of the session of the Supreme State Prosecution Office, among its prosecutors, one may wonder how objective the disciplinary plaintiff is likely to be where the complainant is the Supreme State Prosecutor. An alternative may be, to ensure complete autonomy and independence to the 'disciplinary plaintiff', that she/he be not a state prosecutor of the Supreme State Prosecution Office and be not elected 'after obtaining the opinion of the session of the Supreme State Prosecution Office'."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §99

"The new proposal in Article 112 is that the Disciplinary Prosecutor should be a judge appointed by the Prosecutorial Council on a proposal of the President of the Supreme Court. While one can see merit in such a solution, it would be desirable to make it clear that the appointee will not act in a judicial capacity while exercising the function of Disciplinary Prosecutor. An alternative, to avoid that disciplinary investigations against public prosecutors be conducted by a judge and that the President of the Supreme Court be involved, would be that the disciplinary prosecutor be appointed by the Prosecutorial Council from among qualified lawyers, with the same requirements of the lay members of the Council. This would give increased autonomy and independence to the disciplinary investigations, which is of particular importance both for the public prosecutors and the general public.

As regards the Disciplinary Committee, it is welcome that Article 114 now provides that the president of the Committee must be a lawyer member of the Prosecutorial Council […]. The new provision enhances the credibility and democratic legitimation of the disciplinary procedure while at the same times minimising the risk that the objectivity of the process is questioned. Under the draft, however, the members of the Committee are appointed on the nomination of the Supreme Public Prosecutor (in the capacity of President of the Council). For the reasons explained above, this remains a problematic solution and should be reconsidered.

The new paragraph 3 of Article 114 provides that the Supreme Public Prosecutor shall not be a member of the Disciplinary Committee. […] [t]his appears to be a desirable provision […]."

> CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §§52- 54

"In disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. […]"

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §52

"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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §133

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

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §75

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

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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§135 and 136

"[…] Given the power of the disciplinary commissions to dismiss a […] prosecutor, an appeal to a court of law would be essential, at least for cases where a serious penalty was imposed."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §110

"This Article provides for the right of the prosecutor, subject to disciplinary sanction, to appeal to the Administrative Court. However, the basis for the exercise of this right is not clear. Is it a right to a rehearing – which is preferable - or is it purely procedural review?"

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §38

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

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §171

V. PROSECUTORIAL COUNCIL

"While a number of countries have established prosecutorial councils, there is no uniform standard binding on all European states for such councils.

The Venice Commission believes that these councils, where they exist, are an appropriate structure to ensure the transparency and protection of lower-ranked prosecutors, by providing valuable input in the appointment and disciplinary processes."

> CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§13 and 14

"Very little work has been done to lay down international standards in relation to Prosecutorial Councils, unlike the situation with regard to Judicial Councils. While it is tempting to apply the standards relating to the latter to Prosecutorial Councils, there are some differences between the judiciary and the prosecution which are significant for the organisation of their respective councils."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §37

"[…] In different countries there are different models which permit to the management of appointments and disciplinary liability of prosecutors, and the creation of a separate Prosecutorial Council is one of them. Another avenue is to have a joint Judicial and Prosecutorial Council (with separate chambers, if necessary).[4] That being said, creation of two separate councils is definitely a legitimate option, and may even be preferable in countries with a strong prosecution service and week judiciary, since the presence of the prosecutors in the joint Council may be perceived as a threat to the independence of judges. Therefore, the Venice Commission considers that the choice made by the drafters – to have two separate councils – is acceptable."

> CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §87

4.1 FUNCTIONS AND POWERS OF THE PROSECUTORIAL COUNCIL

"[The function of t]he Prosecutorial Council is […] 'to ensure the independence of state prosecutorial service and state prosecutors'. Its function should also be to oversee that prosecutorial activity be performed according to the principle of legality.

[…] [A]ll members of the prosecutorial council [are] elected and dismissed by the parliament. No qualified majority is required. This […] leaves the Council in the hands of the parliament majority; this, coupled with the appointment and dismissal of all prosecutors by parliament with no qualified majority, makes the prosecutorial system […] too vulnerable to political pressure and jeopardises the possibility for the prosecutorial functions to be carried out in an independent manner according to the principle of legality."

> CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §§110-111

"[…] [T]he ambition should be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutorial Council rather than the Parliament since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters. […]"

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §32

[4] See CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §88, where the Venice Commission welcomed the splitting of the Council into two chambers – one for judges and another for prosecutors.

"Article 74 regulates the functions of the National Council for the Public Prosecutor's Office, but none of them allow it to issue compulsory decisions (in this draft Law, the Council appears to be a simple consultative body on prosecution policy and does not possess any competence for appointing or for disciplinary measures). In this way, the institution is deprived of the ability to prevent both internal and external influences from affecting sensitive subjects such as access to and performance of the prosecutorial function."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §44

"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 selfgovernance. In this connection, it is particularly surprising that these Commissions - unlike, for example, the National Prosecution Academy of Ukraine - 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."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §161

"The work of the HJPC should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.

In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly 'may remove the Presidency or a member of the Presidency from the Council.' This provision should be deleted. On the other hand, it should be a right, not a duty of the President of the HJPC to attend the Parliamentary Assembly's session and/or engage in the discussion of the report."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71-72

4.2 COMPOSITION OF THE PROSECUTORIAL COUNCIL AND THE STATUS OF ITS MEMBERS

4.2.1 Election/appointment of the members of the prosecutorial council

"[…] There is no European standard to the effect that members of a prosecutorial council cannot be elected by parliament. […]

This position has not prevented the Venice Commission from subsequently questioning legislation providing parliament with very significant powers as to electing members of a prosecutorial council. […]"

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§43 and 44

"It is recommended that a substantial element or a majority of the members of the HJPC be *elected* by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. […]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §45

"[…] [I]t is very important that the Prosecutorial Council is conceived as a *pluralistic body*, which includes MPs, prosecutors, members of civil society and a Government official. […]

If the Chief Prosecutor is elected and removed by a simple majority of votes in Parliament (see Article 9^1 par 4 and Article 9^2 par 12), it becomes all the more important for the Prosecutorial Council to have a *sufficient non-political component*, to prevent the parliamentary majority from imposing its will upon this body.

It is welcome that a significant number of members of the Council are prosecutors elected by their peers (four out of nine), and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. […]"

> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§33, 35 and 36

"[…] [The] prosecutorial council […] cannot be an instrument of pure self-government but [should derive] its own democratic legitimacy from the election of at least a part of its members by Parliament."

> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §41

"The 2004 Law created the HJPC as a single and uniform body. Although this is not entirely unusual, ideally the two professions – judges and prosecutors – should be represented by separate bodies. For this reason the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils.

However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. […]"

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§58-59

"The composition of the National Council for the Public Prosecutor's Office, which is regulated in Article 72, also presents problems. It is currently composed exclusively of prosecutors. The President is the State Prosecutor General, followed by the departmental prosecutors and subject prosecutors; the only non-prosecutor member is the Director of the Disciplinary Proceedings.

The Venice Commission has compared many systems and has always considered that where such a type of council exists – its establishment is not an obligation - it should be composed not only of prosecutors but also of other actors such as lawyers or legal academics from appropriate branches of law. The composition of the National Council for the Public Prosecutor's Office should not grant unduly large internal powers to the public prosecutors, which would prevent them from being publicly accountable and their actions should be transparent."

> CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §§42-43

"[…] Under this provision, practicing defence lawyers cannot be members of the Prosecutorial Council elected by Parliament within the "civil society quota" (Article 8^1 par 2 (d)). […] [G]iven the limited powers of the Prosecutorial Council and the fact that under normal circumstances, it sits only twice a year and deals only with matters related to the appointment and removal of the Chief Prosecutor, it is not clear why a defence lawyer should not be able to serve on this body. […] With regard to the conflict of interest argument, this risk may be reduced by more specific and narrowly formulated conflict of interest rules. In any event, in the proposed setup the Prosecutorial Council does not have any say in the appointment or dismissal of lower prosecutors who participate in criminal trials. The Venice Commission has in the past emphasized the importance of including, in the appointment process of prosecutorial councils

or similar bodies, legal professionals with non-political expertise, and has expressly mentioned members of the Bar among them. It is of course for the Georgian authorities to decide whether it is justified to retain this prohibition in the Draft Law. However, the Venice Commission, OSCE/ODIHR and the CCPE/DGI note that it would be unwise to automatically exclude a whole class of independent legal professionals, who might have necessary expertise in matters debated in the Council, from being represented on the Prosecutorial Council; if some restrictions are necessary, they should be formulated as narrowly as possible."

> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§53 and 54

"[…] [A]ll members of the prosecutorial council are appointed and dismissed by parliament with no qualified majority. The prosecutorial system […] is therefore totally under the control of the ruling party or parties: [t]his is not in conformity with European standards."

> CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §104;
> See also CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §13

"In addition, an anti-deadlock mechanism should be foreseen for the election of the eminent lawyers, e.g. a three-fifth majority for subsequent voting, as provided for in Article 91 of the Constitution for the election of the lay members of the Judicial Council, or the proposal of a higher number of candidates and the election with the absolute majority of the components of the Parliament, or the election by Parliament using a proportional system, or to transfer of the power to elect to university faculties and lawyers' representatives."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §49;
> See also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §23

"[…] The balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers also seems appropriate. It is also welcome that the power to appoint half of the members of the Prosecutorial Council be given to different bodies: it helps to avoid a corporatist management of the prosecution service and can provide a democratic legitimacy to it. Furthermore, it is wise that the Minister of Justice should not him- or herself be a member but it is reasonable that an official of that Ministry should participate. One may wonder however whether ten members, in addition to the president, are not too many, since there are reportedly only 140 state prosecutors in Montenegro."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §38

"[…] The self-governing nature of the SCP might be questioned given the *ex officio* membership of the Minister of Justice and of the President of the Superior Council of Magistracy. It is suggested to consider their membership being one without voting rights.

Regarding the civil society members of the SCP, it could be useful to specify, in the light of their relevance to the functioning of the criminal justice system, the most relevant sectors that they should come from (the bar, human rights NGOs etc.) and their suitable legal training/experience. In addition, their appointment by the Parliament seems problematic if the goal is really to have a Council free of political influence. If this system is maintained, one option could be to establish a committee within Parliament, on which all parties are represented equally, to deal, according to a transparent procedure, with the issue of appointment of civil society members. Another solution could be to provide for their appointment by representatives of their profession - Lawyers' Union, assembly of university senates, etc.

Prosecutors who are elected as members of the SCP are detached from office while serving on the Council. For the sake of their independence and impartiality while serving on the Council, it is suggested to preclude SCP members from becoming candidates for the appointment as Prosecutor General, for example by placing a bar on those who have been members within the 12 months prior to the process of selection."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§131-133

"[…] [I]n the particular context of BiH, involving the legislative power in the election of the members of the HJPC will lead to a highly politicised process where the merits of the individual nominees are unlikely to have any significant effect on the outcome."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §44

"Article 18 still provides that, out of the five public prosecutor members elected by the Prosecutorial Conference, only one is elected from among basic Public Prosecutor's Offices, while four are elected from among public prosecutors belonging to the Supreme, Special and High Public Prosecutor's Offices. To ensure a proportional and fair representation of all levels of the prosecution service, at least two members should be elected from among Basic Public Prosecutor's Offices, taking also into account that the Supreme Public Prosecutor is *ex officio* the President of the Prosecutorial Council.[…]"

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §21

"Unlike the current composition of the [High Judicial and Prosecutorial Council], the draft Law provides that the HJPC shall not include members of the professional legal community (currently elected by the Bar Associations). The Venice Commission has, in its 2012 Opinion on legal certainty and the independence of the judiciary in BiH, questioned the wisdom of having judges, prosecutors, and legal professionals present in the HJPC, an institution which both determines the criteria for the appointment of judges and prosecutors and then carries out this appointment itself. However, instead of excluding legal professionals altogether, consideration might be given to adding members on behalf of the professional community, which would not excessively broaden the size of the HJPC, while ensuring the representation of the users of the judicial system."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §31

"[…] [T]he right to appoint a member of the [Prosecutorial] Council should remain with the Protector of Human Rights [i.e. the ombudsman] or at least the President of Montenegro should be obliged to consult with the Protector before making his or her proposal. As for qualifications, relevant human rights experience should be a criterion."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §53

"This amendment introduces specific criteria concerning professional knowledge etc. for the appointment of prosecutors and their deputies. Even more detailed criteria shall be laid down by the Prosecutorial Council.

The amendment should be welcomed especially in the light of the strong political influence on appointments of prosecutors […]. Thus, the amendment underlines that the criteria must be linked strictly to professional knowledge and qualifications. Furthermore, the wording appears to be sufficiently broad in order not to preclude any relevant criteria."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §§38-39

"Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's' appointment and disciplinary proceedings […]. […]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §66

"[…] [U]nder the Draft Law the politicisation of the Council is somehow reduced by the fact that two out of the four members elected by the Parliament come from civil society and not from the ranks of MPs. However, these candidates still have to obtain the approval of the governing majority (see Article 8^1 par 2 (d)) which may predetermine their position for the entire period of their service. In order to make those persons less dependent on the will of the ruling majority, it is necessary to put in place additional guarantees, applied both at the stages of *nomination* and of *election* of candidates.

First of all, the nomination of members of civil society and academia (Article 8^1 par 2 (d)) should be done in a transparent manner, with the selection process following clear rules and criteria, which should be set out in the Draft Law. A range of options could be considered here. One possibility (the simplest option) is for certain office holders to gain membership of the Council automatically, e.g. the head of a law faculty, or the President of the Bar Association may become *ex officio* members of the Prosecutorial Council without being elected by Parliament.

Additionally, a possible option would be to appoint one or more members of the judiciary to the Prosecutorial Council. Judges could bring their own practical expertise in the criminal justice system to the work of the Council, and would also help enhance the independence of this body, and thereby the public's trust in the Council's work. A range of possible judges could be considered for this position, including chairpersons of certain courts (e.g. the Supreme Court, the Tbilisi city court and/or regional courts).

An alternative solution, which is closer to the scheme proposed by the Draft Law, would be to give the nominating power to one or several independent bodies outside of the Ministry of Justice or the Prosecutorial Council, such as the High Council of Justice, the Bar Association, or a body representing law universities and academic institutions. In this process, consideration should be given to the need to achieve proper gender balance amongst the candidates. The nominating power may also be given to certain well-established NGOs, which will increase transparency of the Prosecutorial Council and public trust in its autonomy. In cases where the power to nominate candidate would belong to external actors, the Parliament should still retain the power to approve or not approve them.

At the same time, if there are too many nominating bodies, and, as a result, too many candidates, it might be useful to establish a parliamentary committee composed of an equal number of representatives of all parties represented in Parliament. The role of such committee would be to pre-select a certain number of candidates and propose them to the Parliament for elections. It is important to ensure the plurality of candidates at this stage: the Parliament should have at least two or ideally three candidates for each vacant position to choose from.

At the stage of elections by the Parliament it is important to ensure that the resulting composition of the four Council members elected by the Parliament is not politically monolithic. To achieve this, two alternative solutions may be considered: election by a qualified majority or the introduction of quotas for the opposition.

The most radical solution would be to require that at least two out of the four members elected by Parliament are elected by *qualified majority* (one member representing the Parliament, and one member representing civil society). This would ensure that at least two members of the Council are elected as the result of a compromise, which would somehow counterbalance those two members whose election depends more on the support of the ruling majority, and the fact that the Minister of Justice sits on the Council *ex officio*.

Since such a qualified majority may be hard to achieve in the current political context in Georgia, an alternative solution is also possible: the Draft Law might introduce *quotas for members appointed by opposition parties*. This means that opposition parties should have the right to appoint at least one member of the Council, regardless of their number of seats in

Parliament. Given the current relative strength of the opposition in the Georgian Parliament, the opposition might even be given two seats out of four: one for an MP and one for a representative of civil society whom the opposition wishes to nominate. Whichever solution is chosen, the parliamentary majority would still control more seats in the Prosecutorial Council, due to the participation of the Minister of Justice, but its decisive influence within the Council would be reduced and the Council would become more politically balanced; in order to pass important decisions or to block them, candidates chosen by the parliamentary majority would need to obtain support of those elected by qualified majority or appointed by the opposition, or those members which are elected by the Conference of Prosecutors."

> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§45-52

"To ensure geographical diversity, the Draft Law may further provide that no more than one vacancy on the Prosecutorial Council should be filled by a representative of a particular region or the city of Tbilisi (including the Chief Prosecutor's Office and district Prosecutor's Offices of the city of Tbilisi). Regarding the need to achieve proper gender balance in the composition of the Prosecutorial Council, it is noted that in accordance with the 1995 UN Beijing Platform of Action, States should establish the goal, if necessary through positive action, of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary. It is recommended include a similar requirement of gender balanced representation in the Draft Law."

> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §58

"[…] The draft Law indicates that the composition of the HJPC needs to reflect the ethnical composition of BiH, with at least six members of each of the Constituent Peoples and an appropriate number of members from among Others. Equal gender representation should also be ensured. These requirements were already present in the 2004 Law, but at the time, no numbers were given, the Law simply spoke of 'general representativeness' (Article 4.4).The need to have at least six representatives of each Constituent People, together with the requirement of the gender equality, may make the selection of appropriate members very difficult and inflexible (see below and Sections D and F). In addition, the Venice Commission has already stated in its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the powers of the High Representative (CDL-AD(2005)004), that the judiciary should not be organised along ethnic lines.

In addition, in a country of the size of BiH, using a requirement for a certain ethnic composition for the HJPC will make it very difficult in practice to also meet the requirement of ensuring an equal representation of the sexes. The Venice Commission strongly supports policies aimed to ensure gender balance in public institutions and believes they should be welcomed and that all efforts in this direction should be praised. However, an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence - taking the country's size and population into account - may undermine the effective functioning of the system.

Article IX.3 of the Constitution of Bosnia and Herzegovina, which stipulates that 'Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina', does not refer to exact quotas, but refers instead to a general representation of the peoples of Bosnia and Herzegovina. The same wording appeared in the previous version of the draft Law and, in the given circumstances, it would be preferable to revert back to that version."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§32, 35 and 36

"So far as concerns the election of the other members, the two members from the General Prosecutor's office and the six members from the territorial and specialized prosecutors'

offices, it is not stipulated whether these are elected separately by their own offices or all together in a general meeting of prosecutors. Presumably, however, the latter would not work since the larger offices would be in a position to outvote the smaller."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §60

4.2.2 Term of office of the members of the prosecutorial Council

"[…] [I]n most countries, members of judicial councils are elected for a rather short period of time (three years in the Netherlands, six years in 'the former Yugoslav Republic of Macedonia' etc.). In some countries, members of the judicial council have life tenure (Canada, Cyprus etc.) or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §49

"It is envisaged in Article 18 that there should be a four year term of office for the Council. This is a reasonable period. Members can be re-elected provided that at least four years have expired since their previous term of office (Article 25). This seems a reasonable provision as it would be undesirable for persons to remain on the Council for too long a period."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §40

"Article 76 foresees a term of office for the elected SCP members of 4 years, but sets no limit to the number of times SCP members may be re-elected. This may have the undesirable effect of entrenching certain individuals in the SCP bureaucracy, and of SCP members losing their connection to prosecutorial practice, since during their term on the Council its members are not active prosecutors (Article 72.8). It is recommended to consider limiting SCP members to a single term in office or providing for some gap before re-election (two terms being the maximum suitable).

135. It is also noted that the duration of terms of members coincides with that of the SCP President. A period of 3 years for the latter might be more appropriate so that candidates can be assessed from their initial service on the Council. Moreover, an arrangement whereby not all members are elected at the same time (one-third every two years), which could also limit the potential issue of the prosecutorial members being subordinate to the Prosecutor General, may be considered. […]"

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§134 and 135

4.2.3 Election/appointment/dismissal of the President of the prosecutorial council. Other bodies of the council

"The election of the chairman by of the Council by its members is welcomed (Article 85)."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §62

"[…] [T]here are no common European standards on who should preside a prosecutorial council […].

However, the introduction of an election-based system may be seen as a step towards improving the autonomy (guaranteed by Article 164 of the Constitution) and the legitimacy of the SPC […]".

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§31 and 32

"Even if the Minister is a member of the Prosecutorial Council *ex officio*, having him/her chair the Council may raise doubts as to the independence of this body. It would be advisable to have the Chairperson elected by the members of the Prosecutorial Council from their ranks (with the Minister him/herself ideally being excluded as a possible nominee). The Council shall be given opportunity and time (e.g., one month from the date when all members have been appointed and it is fully functional), to elect its own Chair by simple majority. Should it fail to do so, the Minister of Justice may still be entitled to assume the Chairperson's position *ex officio*."

> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §40

"[…] [T]he hierarchical nature of the prosecution service and the obligation on the Supreme State Prosecutor to manage the prosecution service makes it appropriate that that person should also chair the Prosecutorial Council. […]"

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §38

"Article 8 of the draft Law provides that the Parliamentary Assembly is to elect a President and two Vice Presidents of the HJPC who are to rotate their offices every 16 months during the four-year term of the HJPC. Essentially, they are supposed to act as a *troika*. These three officers cannot be from the same Constituent People or from among Others. For the same reason as under Section D above (election of the members of the HJPC) with respect to the composition of the HJPC, it is not appropriate for the President and the Vice Presidents of the HJPC to be chosen along ethnic lines and the decision on their election should not be left to the Parliamentary Assembly. In addition, this system of rotating presidents weakens the HJPC."

"[…] [I]t is important that the draft Law provide restrictive grounds for which the Parliamentary Assembly may decide to dismiss the president and vice-president. It is hard to imagine the reasons (except resignation), which may result in a decision being made by the Parliamentary Assembly to end the term of office of the president and vice-president, but retaining membership in the HJPC. There should be input from an expert body before Parliament takes a decision. In addition, unlike the election process where there is a prior selection limiting the choice of the Parliamentary Assembly, in the decision on dismissal, the Parliamentary Assembly is not limited and acts on its own. This is inappropriate and needs to be reconsidered."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§47 and 48

"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."

> CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §173

4.2.4 Procedures before the prosecutorial council[5]

"This Article sets out that the sessions of the SPC are open to the public, if the SPC does not decide to work in closed session, in accordance with its rules of procedure. […]

This amendment should be welcomed and will contribute to the transparency of the SPC's activity. However, the majority of the SPC's procedures are of a personal nature (election, dismissal) and the persons involved (candidates to positions of prosecutors or prosecutors in office) are not political actors, they are therefore not expected to reveal their personal data to the public. Security or other reasons related to the protection of personal data might also require closed sessions."

> CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§39 and 40

"The HJPC is empowered to set up commissions which can make decisions and perform tasks on its behalf (Article 17 of the draft Law). This is a valuable provision given the wide range of functions proposed to be assigned to the HJPC. However, decisions on appointments of judges and prosecutors cannot be delegated to commissions. The election of judges and prosecutors is by a majority vote of all members, but for the election of judges the decision must be supported by at least seven judges, and likewise for prosecutors. This prevents either judges or prosecutors from imposing their will on the other profession."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §57

"The Venice Commission therefore welcomes the establishment [...] of two sub-councils: one for judges and one for prosecutors. It seems to be a balanced solution which, on the one hand, prevents excessive interference of one of the legal professions into the work of the other while, on the other hand, making it possible to maintain the current structure of the HJPC as a common organ of/for judges and prosecutors.

Each sub-council shall have 11 members – nine members elected from among judges or prosecutors and two members elected on behalf of the legislative and executive powers. The sub-councils nominate judges and prosecutors, assess their performance, and decide on the status of individual judges and prosecutors (temporary assignment, disciplinary proceedings, termination of the terms of office, etc.). Neither judges nor prosecutors should have any influence over each other's disciplinary issues or appointments. Although all members of the HJPC have a vote, and therefore the non-judge members are in a position to influence the vote, the requirement that a candidate for judicial office be supported by seven of the nine judge members makes it impossible for a candidate to succeed without the judges' support and unlikely that a candidate with the necessary judicial support will be defeated.

[…] Even though the Venice Commission has repeatedly expressed concerns about systems with such mixed councils, it is of the opinion that - in the particular context of BiH - such a system is appropriate, provided that the two sub-councils in the HJPC are afforded a maximum amount of autonomy."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§61, 62 and 64

"Another Commission shall be established [within the Prosecutorial Council], as part of the Council's tasks under the draft law, to evaluate the performance of prosecutors. In addition to the fact that this is likely to lead to a considerable concentration of power for the Council, one may wonder whether this would not be better handled by a specialised inspectorate rather than the Council."

[5] On this topic see also Chapter 3.4.3 on disciplinary proceedings

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §64

"Article 71.4 of the draft Law provides for random assignment of cases in a manner pre-selected by an HJPC decision. It needs to be made clear that this has to be subject to the obligation to provide a commission which does not contain persons from the same court or prosecution office as the accused and which contains persons of appropriate rank. The mechanics of achieving this are not clear."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §111

"[…] It is envisaged that in matters such as conducting examinations to determine appointments, or in dealing with the disciplinary matters, the Council would operate through small commissions consisting normally of three members. Such a model is open to a number of criticisms.

Firstly, the conferring of such important powers on a small body which will exercise them directly creates a very powerful body which may be susceptible to corruption. There is an argument that the powers in relation to appointments, promotions and discipline should not all be exercised by the same small group of people.

Secondly, the Council will not merely make decisions of principle but will be involved in the operational day-to-day work. In that case, one may wonder whether the electoral method of choosing a council, while appropriate for a body intended to be representative and to exercise a general supervisory role, is the best way to select persons who will have a very technical role. For example, one of the functions of a Commission composed of members of the Council dealing with examinations will be to set and correct examination questions (see Article 57). This is hardly a function one would normally confer on an elected body whose function should rather be to oversee and guarantee the integrity of the process rather than to be involved in its technical aspects. It is also envisaged that the Council will itself conduct interviews for positions in the prosecution service (Article 58)."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§65-67

"Under the present Article 32(4), the decision of the Prosecutorial Council on a complaint is final and cannot be challenged in court. The amendment introduces an appeal to an administrative court against a decision of the Prosecutorial Council. This is an improvement, which is in line with the practice in many European countries."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §37

"Article 98 provides for appeals against decisions of the Superior Court Council of Prosecutors to a court of law. It is not clear whether this appeal is by way of a full re-hearing on the merits or whether it is merely a procedural appeal on grounds of excess of jurisdiction, failure to observe proper procedures or the like."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §64

"[…] Many of the decisions of the Prosecutorial Council are indeed of sufficient importance that an appeal to a court of law should be provided as well as the possibility of procedural review. […]"

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §68

"The new article 36b […] provides that a candidate shall be entitled to have an insight into documentation of *other candidates*, the results of written tests, assessments of the *other* candidates and opinions on *other* candidates and to deliver a written statement thereon. […] [T]his provision can open the door to nasty business and false allegations between candidates. Such a provision can bring much unnecessary and undeserved damage to the

candidates. The question is also, if this provision is not conflicting with the right on privacy. In general one has to be very careful with the outcome of assessments, because the objective and impartial quality of that outcome can be controversial."

> CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §40

"Article 81 rightly foresees non-participation of SCP members on matters where doubts about their objectivity may exist. It may be useful to be more explicit at least in two clear-cut cases: first, to specify that members of the SCP should not hear cases brought against themselves, and second, that they should not hear cases they themselves have initiated […]."

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §138

4.2.5 Status of the members of the supreme prosecutorial council. Early termination of office of the members of the prosecutorial council

"[…] This is a source of concern as it may mean that the electing body would have the possibility to confirm a Prosecutor member even when there are grounds for his/her dismissal. The decision of the Prosecutorial Council should directly result in dismissal without the intervention of a political organ."

> CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §54

"A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the SPC, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of 'lack of confidence'. Article 41 clearly defines the reasons that can lead to a dismissal of the SPC members. The disciplinary procedure must therefore only focus on the question whether the SPC member failed to perform his or her duties '*in compliance with the constitution and law'.* This question must not be confused with the question whether said member still enjoys the confidence of the public prosecutors and deputy public prosecutors who participated in his or her election. The disciplinary procedure has to guarantee the SPC member a fair trial. While a reference to a fair trial is made under Article 46a, details on related guarantees should be provided.

In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, for instance, an 'impeachment' of a member is allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. In fact, the draft Law lacks specific provisions on disciplinary issues in respect of SPC members and merely focuses on dismissal. An appeal to a court of law should also be provided.

[…] Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced."

> CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§52-54 and 56

"Article 28 deals with dismissal from the Council. Members are to be dismissed if they discharge their duties '*unconscientiously and unprofessionally*' or are convicted of an offence making them '*unworthy of discharging the duties of a Prosecutorial Council member*'. It is strongly recommended to define these dismissal grounds more closely. For example, it is not clear what sort of offence would make one 'unworthy' to be a member of the Council. Prosecutor members are also dismissed if a disciplinary sanction is imposed. However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure. In addition, the law should also provide for unjustified failure to perform duties as a ground for dismissal."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §53

"In addition, Article 28 should ensure a fair hearing for the person to be dismissed and that the decision can be appealed to a court. Dismissal should be decided upon by the other members of the Council, with a qualified majority, without the member concerned."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §55

"[…] The Commission reiterates its recommendation that the provision on remission of the dismissal decision to the electing body - an external, and sometime political body - be deleted and that the dismissal be decided upon by the other members of the Council, with a qualified majority, without the member concerned."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §26

"The Draft Law should include provisions that describe the status of the members of the Prosecutorial Council; this is essential to guarantee both the independence and the stability of this body.

"First, the Draft Law should specify that members of the Prosecutorial Council participate in the work of this body in their personal capacity, and may not receive instructions from individuals or bodies outside the Council in the exercise of their functions as members of the Prosecutorial Council.

[…] it should not be easy to remove a member of the Council from his/her position. While early removal should always be possible in cases of gross misconduct or incompatibility, such decisions should at all times be based on specific grounds enumerated in the Draft Law, and should be confirmed by the majority of the members of the Council itself.

There is only one provision which deals with the early termination of office of members of the Council: Article 8^1 par 3 appears to suggest that if a prosecutor elected to the Council is dismissed from service, his/her membership in the Prosecutorial Council shall also be terminated before the expiry of the usual four-year term. This may create a dangerous situation, as under the current law, the dismissal of an ordinary prosecutor is the prerogative of the Chief Prosecutor. It means that the Chief Prosecutor, using his disciplinary powers, would be able to remove from the Council those prosecutors who voted for the opening of the investigation against him/her. Again, since the prosecutorial members of the Council sit there in their personal capacity, it should be for the Council itself to decide whether or not one of its members should leave the Council.

At the same time, the grounds for early removal may be different for those members of the Council who sit there in their personal capacity and those members who sit in the Council *ex officio*. If a member of the Prosecutorial Council have been elected in his/her personal capacity, he/she should not automatically be removed from the Council if his/her title or job changes during the term of service."

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§60-64

"[…] [I]t seems […] that a person can be removed from the HJPC for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.

Disqualification may be linked to a criminal or a disciplinary offense. Membership may also be suspended where the member's status as a judge or prosecutor is suspended, for instance due to an on-going criminal investigation or for other reasons under the law.

In addition, the decision on cessation has been transferred from the HJPC to the Parliamentary Assembly. This decision does not seem to require a qualified majority. When taken together with the very vague drafting of certain of the situations (if a member fails to perform duties in a proper, effective or impartial manner; when the member commits an act due to which he or she no longer merits to perform the duties on the Council; etc.), this may lead to politicisation – or the impression of politicisation – of the activities of the HJPC, whose members depend on the Parliamentary Assembly not only for their election, but also when exercising their mandate.

The inability of the HJPC member to perform functions should indeed result in dismissal, even if this was caused by objective reasons. However, the period of time he or she is absent should be taken into account: a minimum period of time must be clearly defined after which the dismissal of the member may be sought."

> CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§51-53 and 55

"Furthermore, elected members of the SPC may be dismissed by the National Assembly (even if on proposal by the SPC in the case of public prosecutors or deputy public prosecutors, by the Bar Association for lawyers, by deans of faculties of law for professors). This role of the National Assembly could easily lead to the politicisation of the work of the SPC as its decisions are not strictly based on objective grounds. The danger of politicisation in this situation is clear when compared to a system of an independent Prosecution Service, but it is even more pronounced than in the case of a Prosecution Service that comes under the Executive (where the decisions on dismissal made by a minister – or other state official – and the political accountability of the minister are, in principle, separate from each other).

There is an additional factor that increases the danger of politicisation: the proposed vote of confidence in the dismissal procedure. A vote of confidence has its place in the political sphere and is a tool that should only apply in the political decision-making process. […]

A vote of confidence should be seen as specific to political institutions and is not suited for institutions such as the SPC. The members of the SPC are elected for a fixed term and their mandates should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons (see comments under Chapter V below). The Venice Commission therefore strongly recommends that the amendment to Article 9a on the suspension of office due to a vote of confidence not be kept."

> CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§27, 28 and 38

"The exemption (dismissal) of members of the prosecutors' council without any criteria is problematic. As per Section 9.2 ASPGPOPEPC more than one half of the valid votes cast shall be required for exemption from membership. The council can dismiss one of its members by simple majority. The cases when a member of a prosecutor's council can be dismissed should be specified in the Act. Such a provision of course deserves having the status of cardinal act."

> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §53

"It is noted that the Prosecutorial Council is to fix the amount of its members' emoluments for their work on the Council. In the opinion of the Commission, it is not wise for a body of the State to set its own emoluments."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §58

"[…] [I]n view of the wide powers of members of the Prosecutorial Council, no member should be entitled, while serving on the Council, to be promoted within the service. […]"

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §52; See also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §24

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