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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT 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”**

**on the basis of comments by:**

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*\*This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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## 1. INTRODUCTION

1. *By letter dated 22 January 2007, Minister of Justice Manevski requested an opinion on the draft laws on the public prosecutor's office and on the council of public prosecutors of "the former Yugoslav Republic of Macedonia" (CDL(2007)023 and 024).*

2. *The present joint opinion of the Venice Commission and the Department for Crime Problems of the Directorate General of Legal Affairs of the Council of Europe was prepared on the basis of comments by Mr Hamilton (CDL(2007)031) for the Venice Commission and Mr. Hjortenbergh (CDL(2007)041) for the Department of Crime Problems.*

3. *The present opinion was adopted by the Commission at its ... Plenary session (Venice, ...).*

## 2. GENERAL REMARKS

4. The laws have been drafted by an expert commission in Macedonia composed of public prosecutors, representatives from the Ministry of Justice, professors from universities and representatives from international organisations.

5. The two laws are interlinked. The Law on the Public Prosecutors Office (LPPO) establishes the functions, structures, organisation and competencies of the public prosecution service and makes provisions concerning the appointment and election of prosecutors, the rights and obligations of prosecutors, the cessation of function and dismissal of prosecutors, the disciplining of prosecutors, as well as provisions concerning other functionaries of the prosecutors office and its budget. The Law on the Council of Public Prosecutors (LCPP) establishes a body of that name which has functions in relation to the appointment, cessation of function, dismissal and disciplining of prosecutors, and that law provides for the composition, procedures of work and method of election of the Council (CPP). In view of the central role of the CPP in relation to matters which are dealt with in the Law on the Public Prosecutors Office it is proposed in this opinion to discuss the two laws together.

6. It is important to emphasise that these comments are based only on a reading of the text. A full evaluation of the proposals would require a knowledge of the actual situation on the ground in Macedonia which the rapporteurs cannot claim to have. The comments are, therefore, necessarily general in nature. Finally, the English text which has been examined is difficult to follow in places with the result that misunderstandings of the text due to translation difficulties cannot be excluded.

## 3. STRUCTURE OF THE PROSECUTORS OFFICE

7. Article 2 LPPO provides for the establishment of the public prosecutors office as a single and independent state organ that prosecutes perpetrators of crimes and other punishable acts sanctioned by law and performs other duties as stipulated by law. According to Article 6 the office is organised in accordance with the principles of hierarchy and subordination. Political organisation and activity in the public prosecutors office is prohibited (Article 7 LPPO).

8. While the Public Prosecutors Office is established as a single state organ it is divided into a number of separate offices (Article 11 LPPO). These are, firstly, the Public Prosecutors Office of the Republic of Macedonia, headed by the Public Prosecutor of the Republic of Macedonia (Article 16 LPPO). Secondly, there are four Higher Public Prosecutors Offices headed by Higher Public Prosecutors. Their function is to act before the appellate courts (Article 30(3) LPPO) established in four appellate court areas. Thirdly, there are Basic Public Prosecutors Offices which are established in 22 different territories (Article 13 LPPO). Each of these offices acts before the basic court (Article 30(2) LPPO). Fourthly, there is a specialised Public

Prosecutor for Prosecution of Organised Crime and Corruption whose office operates within the entire territory of the State.

9. As well as the Public Prosecutor of the Republic, the four Higher Public Prosecutors, the 22 Basic Public Prosecutors and the Public Prosecutor for the Prosecution of Organised Crime and Corruption each office also contains other public prosecutors who work under the direction of the head of the office.

10. Despite the establishment of separate offices it is clear from the text that they are all intended to form part of a single unitary system. However, that system is highly hierarchical and bureaucratic. The Public Prosecutor of the Republic is highest in rank and is responsible for the general conditions of the organisation and performance of the Public Prosecutors Office as a whole (Article 20 (1) LPPO) and is answerable to the Parliament. The Higher Public Prosecutors are answerable to the Public Prosecutor of the Republic and the Council of Public Prosecutors. The Public Prosecutor for the Prosecution of Organised Crime and Corruption is similarly answerable both to the Public Prosecutor of the Republic and the Council of Public Prosecutors. The Basic Public Prosecutors are answerable to the Higher Public Prosecutor, the Public Prosecutor of the Republic and the Council of Public Prosecutors. Finally, ordinary public prosecutors are answerable to the head of their office and also to the Council of Public Prosecutors (Article 20 LPPO). It is **not clear from the text how the dual answerability to a hierarchical superior and also to the Council of Public Prosecutors is intended to work and a clarification of their respective competencies would seem desirable**. However, it seems from the text of the Law on the Council of Public Prosecutors (LCP) that the answerability to them relates to their reporting on the performance of individual prosecutors rather than giving any instructions in relation to how work is to be carried out.

11. Each rank of the Public Prosecutors Office is responsible for oversight of the work and actions in concrete cases of the next rank down (Article 21 LPPO). The Public Prosecutor of the Republic is to draft a rule book on establishing criteria to assess the work of Public Prosecutors (Article 22 LPPO). At the same time the Council of Public Prosecutors is to enact a rule book on the criteria and manner of performance of oversight (Article 21 LPPO) – this overlap in functions requires to be clarified. Assessments carried out by superior prosecutors are to be submitted to the Council of Public Prosecutors (Article 22 LPPO). The Public Prosecutor of the Republic is to submit an annual report to parliament (Article 23). Each prosecutors office prepares annual reports and submits them to a higher office and the Public Prosecutor of the Republic prepares a single annual report for the work of all the public prosecutors offices (Article 24 LPPO).

12. In addition to assessing the work of inferiors, superior prosecutors can issue written obligatory instructions to inferior prosecutors. The Public Prosecutor of the Republic can instruct Higher Public Prosecutors, the Public Prosecutor for Prosecution of Organised Crime and Corruption and the Basic Public Prosecutors. The Higher Public Prosecutor can issue written obligatory instructions to the Basic Public Prosecutors in his area of jurisdiction (Article 25 LPPO). Under Article 26 LPPO the Public Prosecutor of the Republic can undertake criminal prosecution and other functions for which the Higher Public Prosecutor or Basic Public Prosecutor is competent, and likewise the Higher Public Prosecutor may take over criminal prosecutions for which the Basic Public Prosecutor is competent.

13. As such, a hierarchical structure of this sort is not incompatible with the norms established by the Council of Europe Recommendation Recommendation (2000) 19 of the Committee of Ministers on the role of public prosecution in the criminal justice system. The **basic organisational choice for a unitary system is in conformity with the standards** laid down in Rec (2000) 19 of the Committee of Minister of the Council of Europe. Public prosecution may be part of or subordinate to government (paragraph 13 of the Recommendation) or independent of the government (paragraph 14) as stated in this case in Article 2 LPPO. The

requirement that obligatory instructions be in writing is also in accordance with that provision. However, the **effect of such a system is to centralise a considerable degree of power in the hands of one individual**, the Public Prosecutor of the Republic. It is therefore **important to clarify the basis on which instructions should be given and prosecutions taken over so as not to eviscerate the independence of inferior prosecutors and deprive them of all initiative**. It would be desirable that the reasons for issuing instructions or taking over a prosecution be specified. The power of the Public Prosecutor of the Republic shows how important it is to evaluate carefully the mechanisms for the appointment, and dismissal of that individual so as to ensure that the prosecution system is truly independent and is not controlled by some individual from outside the system to whom the Public Prosecutor of Republic is in thrall.

#### 4. THE FUNCTIONS OF THE PROSECUTORS OFFICE

14. The functions of the prosecutors office would appear to be primarily criminal, both in relation to the investigation of crime and its prosecution. Article 31 LPPO sets out a number of powers of the prosecutor which may be carried out “while exercising its function of prosecuting the perpetrators of criminal acts”. Unfortunately, the translation of this Article is not in all respects clear. For example, the first matter referred to in Article 31 LPPO is “undertake necessary measures and activities for disclosing of criminal acts and their perpetrators”. It is not at all clear what is the extent of this power. There is a reference also to giving orders to apply “special investigative measures in the pre-trial procedure”. It is **not clear from the text what the special investigative measures are or whether they may be ordered by the prosecutor without any reference to a court of law**. Other matters referred to in the Article are the normal matters one would expect a prosecutor to have, such as leading the investigation and undertaking measures in the pre-investigation and investigation and determining whether prosecutions should be undertaken or continued, as well as the submission of indictments.

15. There are a number of other powers conferred on the prosecutor by Article 31 LPPO which may give **cause for concern**. There is a reference to a **power to “impose regular and extraordinary legal remedies against court decisions”**. It is not at all clear to what this power relates. It may be something similar to the right of protest which appears in the Russian and other procuratorial systems. However, it is not clear from the text whether this is so. The giving of a power to a prosecutor to grant some remedy against court decisions would, of course, be objectionable as being an interference with the function of the judiciary and an undermining of the independence of the judiciary. However, without more information about what this provision means it is impossible to say whether this is what is involved. Again, Article 31 LPPO refers to the protection of rights of persons against whom detention is imposed. There is no suggestion here that a court of law has to be involved or indeed has any power to protect those rights. Again, there is a reference to the prosecutor taking care of the manner of implementing sanctions imposed for criminal acts and it is not clear how this is to be exercised or how it relates to the powers of the courts of law.

16. Under Article 34(6) LPPO the Public Prosecutor is entitled to obtain all documents, files, cases and notifications needed for executing actions under his or her jurisdiction from state bodies and other public bodies. The same provision also **entitles the prosecutor to require data and notifications of other legal entities and citizens that he or she reasonably considers have such information**. This seems to be a **rather sweeping power if it is one that can be exercised without any court intervention**. In effect, it would seem tantamount to giving the prosecutor the power to demand any documents whatsoever from citizens and the practical scope of this power is not clear – are there powers of search and seizure or the like? It is noted that the law is confined to documents which are reasonably considered to be in the possession of the individual involved, but there does not seem to be any requirement that they be reasonably necessary for the performance of the prosecutor’s functions. There are subsequent provisions in Article 34 concerning the obligation to hand over the

documents concerned within 30 days and to the prosecutor having the right to obtain and survey these documents if this is not done but the law is short on the procedures by which this right can be effected. Does it require court intervention? Or is the prosecutor simply entitled to use state force to seize the documents and information concerned? Another issue which is not covered is the **problem related to self-incrimination** (Article 6 of the European Convention on Human Rights). These issues should be clarified in the text.

17. Art. 27(2) LPPO provides that the public prosecutor may inform the public of certain cases in which s/he is proceeding. It should be made explicit that information can be passed only if no confidentiality requirements are violated thereby.

18. Article 29(3) LPPO provides *inter alia* that the **Ministry of Justice** “performs monitoring over the diligence in the work of the public prosecutor’s office and examines writs and complaints of citizens regarding the work of public prosecutors”. This control **might endanger the independence of the Public Prosecutor’s Office** and needs to be specified more clearly as it could even cover intervention in specific cases, which require special safeguards according to Rec (2000) 19, para. 13.d.

19. Paragraph 11 of Article 34 LPPO contains a provision relating to bank accounts which unfortunately in the English translation is completely incomprehensible. (“The insight into the bank accounts, according to article 5 and 8 of this Article shall not present harm to bank secret”.) What can this possibly mean?

20. Article 36(3) LPPO provides that the Public Prosecutor initiates an *ex-officio* procedure for determining the justification of using firearms by authorised officials from the Ministry of Interior and other state bodies, which resulted with death or heavily body injury. **Such an ex-officio procedure should be started whenever a person has died or suffered bodily injury as a result of police intervention** or whilst the individual was in custody. Articles 2 and 3 of The European Convention on Human Rights and Strasbourg case law imply an obligation to carry out such investigations.

21. Article 38 LPPO empowers the Public Prosecutor to refer certain laws to the Constitutional Court to determine their constitutionality. It would seem from the text that this is confined to criminal laws or laws which impact on criminal matters, since the provision relates to the situation where their constitutionality and legality “are in question during the work of the Public Prosecutors Office”. However, this is not entirely clear and it should be clarified whether this relates only to criminal law matters or whether the public prosecutor has a general function in relation to the constitutionality of law.

22. Article 39 LPPO appears to give the prosecutor functions in relation to civil proceedings, or at least authorises the conferring of such functions, since it provides that “in the civil and other court procedures, as in the administrative procedures, the public prosecutor undertakes legal actions for which he is authorised in accordance with the law”. Unfortunately, there is no information as to what these authorised legal actions may be or may relate to.

23. Article 40 refers to the public prosecutor receiving charges, petitions and other risks and statements from citizens, other bodies and legal entities. Again, this seems to suggest powers similar to those exercised in some prokuratura type offices. It is not clear at all what the public prosecutors functions are in relation to such petitions and writs or whether this is simply confined to criminal law questions. Again this needs to be clarified.

24. It should be set out in Article 58 LPPO that the special rights of access, transport etc. should be available only in the exercise of the functions of the prosecutor.

## 5. THE INDEPENDENCE OF THE PROSECUTORS OFFICE AND ITS RELATION TO THE EXECUTIVE AND LEGISLATURE

25. As already noted the public prosecutors office is declared (in Article 2 LPPO) to be independent. However, as also noted, according to Article 20 (1) LPPO the Public Prosecutor of the Republic is answerable to Parliament. It is not clear what is the extent of this answerability (the text of the English translation of Article 20 simply states that the prosecutor of the Republic "is responsible in front of the parliament"). 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.**

26. The question of independence is also closely bound up with procedures relating to appointment, dismissal and discipline. Before looking at these issues it is necessary to refer to the Council of Public Prosecutors which has important functions in relation to these matters.

## 6. THE COUNCIL OF PUBLIC PROSECUTORS (CPP)

27. The Council of Public Prosecutors is established by the Law on the Council of Public Prosecutors (LCPP). According to Article 2 LCPP the CPP is an independent body which provides and guarantees the independence of public prosecutors in performing their duties. As with the Public Prosecutors Office itself, political organisation and activity by the CPP is forbidden and its **members may not be members of a political party** or indeed may not hold any other public function. (It is not clear whether this is intended to apply also to the **Minister for Justice** who is a member of the CPP. Presumably he **should not be covered** by this as one would expect the Minister for Justice would be a member of a political party.) (Article 3 LCPP).

28. The Council is to consist of 11 members. The Public Prosecutor of the Republic and the Minister for Justice are *ex-officio* members. One Council member is elected from among the other public prosecutors at the Public Prosecutors Office of the Republic. One CPP member is elected from among the public prosecutors of each of the four Higher Public Prosecutors Offices. One CPP member is to be elected by all of the public prosecutors in the Republic, but this person must belong to the minority community. Finally, three Council members are elected by the Parliament from the order of prominent lawyers, and two of these must belong to the minority community in the Republic.

29. As already noted, the provisions of the Law require the members of the CPP not to be involved in party political activity. This is clearly appropriate in the case of public prosecutors who are themselves forbidden from such activity. It would seem that the texts should make an exception for the Minister. It seems likely that the persons elected by the Parliament will at least be political sympathisers of some party or movement even if they are not in fact members. So far as prosecutors are concerned, however, it is important that a prohibition on party political activity does not prevent them exercising their freedom of expression, in particular to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights: see paragraph 6 Recommendation REC (2000) 19. (The same comment applies to Article 7 LPPO.)

30. There appear to be some anomalies in the system of election to the CPP. The ordinary public prosecutors in the Public Prosecutors Office of the Republic and in the Higher Public Prosecutors Offices are represented, but not the ordinary public prosecutors in the Office of the Prosecutor for Organised Crime and Corruption, or in the Basic Prosecutors Office. Nor are the Higher Public Prosecutors, the Prosecutor for Organised Crime and Corruption and the Basic Public Prosecutors themselves represented. There is a provision for minority representation. But these minority representatives are themselves elected by the whole body of prosecutors and the whole Parliament and to that extent may not necessarily represent minority opinion. It would seem from the text of Article 14 that at some point it was intended that the President of the Government should also be represented on the CPP since he is required to be notified of vacancies in the Council with a view to appointing a member (Article 14, although in fact there is no power for him to appoint such a member).

31. The term of office of members is six years. Where there is a premature termination of someone's term of office due to resignation, dismissal or the like, the **person replacing the former member** is to be appointed for a term of four years. This seems a rather extraordinary provision. If the outgoing CPP member had served less than two years, then the replacement would have to resign before the next Council elections were due. On the other hand, if the person had served more than four years that member would remain on the Council even though all the other members had retired. It would seem more sensible to provide for the new member **servicing for the unexpired residue of the old members term** (see Article 7(2) LCPP). The Council is to have a president who represents it.

32. It seems to be envisaged that membership of the CCP is a full-time occupation. In the case of the Public Prosecutor of the Republic this would clearly be an impossibility; should they not be capable of sending a representative to meetings if unable to attend in person?

33. Article 9 LCPP sets out the competencies of the CPP. It can submit an opinion to the government in relation to the proposal on appointment and dismissal of the Public Prosecutor of the Republic. It can elect and dismiss ordinary public prosecutors. It can hear appeals in relation to the disciplinary responsibility of ordinary public prosecutors. It can monitor and evaluate public prosecutors work on the basis of assessment of their performance by their superiors, and can also determine incompetent and dishonest performance of public prosecutors' duties. It can decide on temporary suspension of a public prosecutor. It can act upon motions and complaints by citizens and legal entities concerning the performance of public prosecutors. It can establish the number of public prosecutors and public prosecutors offices by means of a decision.

34. In relation to the latter power, the Venice Commission doubts if it is wise to confer this power on a body more than one half of whose members are elected by public prosecutors. **Elected prosecutors' representatives are not likely to be the most objective people in making a decision in relation to the number of persons who need to be employed in the prosecutors office.** In relation to disciplinary complaints against prosecutors there would seem to be a **case for a greater input on a body hearing such complaints from persons who are not prosecutors.**

35. There are detailed rules in relation to the voting procedures for the **election of members of the Council.** Article 30 deals with **objections to voting results. The time limits for making such objections are extraordinarily short.** A candidate has to lodge an objection to a voting result with the election committee within five hours after the completion of voting. The election committee has to issue a decision within twelve hours and any appeal has to be made within a further twelve hours from the receipt of this decision. That appeal would lie to an administrative court. The court has to make a decision within 48 hours of the date of its receipt. It is difficult to see why these matters have to be determined with such apparently undue haste when the

parliamentary members of the Council do not have to be elected until a period ending 30 days after the election of the prosecutors who are members of the CPP.

## 7. THE APPOINTMENT OF THE PUBLIC PROSECUTOR OF THE REPUBLIC

36. The first Article 42 LPPO (there are two articles numbered 42) provides that the Parliament appoints the Public Prosecutor of the Republic on the proposal from the government for a period of six years with a right of reappointment. A vacancy has to be advertised two months before that. Persons may apply within a fifteen day period (Second Article 42 LPPO). Presumably the Government then make a recommendation from among the persons who have applied although the text of the law does not in fact say so. When the Government make a proposal the Council of Public Prosecutors have 15 days to submit a positive or negative opinion in relation to this matter. The Government must attach this opinion to the proposal for appointment to the Parliament. (Second Article 42 (3) and (4) LPPO)

37. In order to be elected as a public prosecutor a person must be a citizen, must actively know the Macedonian language, must have working capacity and general health capacity, must have a university degree as a law graduate and must pass the judicial examination of the Republic of Macedonia. In order to be Public Prosecutor of the Republic, in addition to these criteria it is necessary to have 10 years experience as a public prosecutor or 12 years professional experience in some other capacity, or to have 10 years experience as a full-time or part-time university professor teaching a law related subject, or 10 years experience as a judge (Article 45 (2) LPPO). These very well defined requirements as to **seniority** seem quite rigid and are **not necessarily promoting effective management based on merits** (see also Article 56 (1) LPPO, which provides for an automatic advancement of prosecutors).

38. There is no necessary relationship between the advertising of and application for positions and the Government decision to make a recommendation. The Government are not obliged to propose the person whom they consider the best suited of the applicants. There is nothing to prevent them making a proposal which is based on political criteria. There is **no requirement for any expert input before they make their proposal. There is an input from the Council of Public Prosecutors but only after the Government has made their proposal and then it appears that the Council is confined to simply approving or disapproving the Government's proposal. There is nothing in the Law on the Council of Public Prosecutors to indicate the criteria the CPP is to adopt in approving or disapproving the proposal.** Are they confined to checking that the person complies with the minimum requirements of Articles 45 (1) and (2)? It is not clear. Furthermore, while the Council's opinion must be disclosed to the Parliament, the Parliament is not obliged to act on it and the Government is not obliged to withdraw a proposal because of an unfavourable opinion from the CPP.

39. It seems that it would be greatly **preferable if there was input from an expert group before any recommendation was made by the Government and if the Government was obliged to disclose the nature of the advice which it had received.** The arrangements proposed in the draft laws provide for the possibility of a highly politicised appointment of the Public Prosecutor of the Republic with only the most minimal control by any outside body. In fact, the Council's function is so minimal as hardly to amount to any degree of control whatever.

## 8. APPOINTMENT OF OTHER PROSECUTORS

40. The Council of Public Prosecutors appoints the Higher Public Prosecutors, the Public Prosecutor for Prosecuting Organised Crime and Corruption and the Basic Public Prosecutors for a period of four years from the rank of appointed public prosecutors with the right to reappointment (Article 43 LPPO). Public prosecutors in the Office for the Prosecution of Organised Crime and Corruption are elected by the Council of Public Prosecutors for a period

of six years with a right to reappointment. Other ordinary prosecutors are appointed by the Council of Public Prosecutors. Article 44 LPPO provides that there is to be no discrimination on the basis of sex, race, colour of skin, national and social background, political and religious belief, property assets and social welfare in the appointment of prosecutors. Article 44 (2) provides for a quota system for minority communities' representation in the prosecutors office (described as the principle of adequate and equal representation of the citizens that belong to every community in the Republic).

41. Articles 36 – 42 LCPP deal with the election of public prosecutors by the Council of Public Prosecutors. Ordinary public prosecutors at the Basic Public Prosecutors Office are elected from the list of candidates submitted by the judges and Public Prosecutors Training Academy who have applied when there is an announcement. Ordinary prosecutors at the Public Prosecutors Office of the Republic and the Higher Public Prosecutors Office are elected from existing public prosecutors and a number of criteria are established in Article 38 LCCP. These include expert knowledge, in respect of which specialisation, graduate studies and attendance at continuing education are to be taken into account, attitude to work or promptness in performing duties, ability to professionally deal with legal issues, undertaking additional work activities, enjoying and safeguarding the public prosecutors office's reputation (which is determined on the basis of communications with the parties and other bodies), independence, impartiality and trustworthiness, and professional relations with the Public Prosecutors Office Professional Service. The Council also elects the higher and basic public prosecutor.

42. It must be borne in mind that giving the right to determine the numbers of prosecutors to the Council (Article 43 (3) LPPO) implies that the possibilities for superior prosecutors to perform effective management of their offices will be limited. This is, anyhow, a general problem of the division of powers between the Council and The Prosecutor's Office

**43. No criteria are set out as to how the Higher and Basic Public Prosecutors or the ordinary public prosecutors in the Basic Public Prosecutors Office are to be appointed.** The law simply provides for the CPP to conduct a vote. Furthermore, if applicants for the Basic Public Prosecutors Office fail to get elected on three occasions they lose their priority in the list of candidates (Article 37 LPPO).

44. Such a system is not capable of ensuring the avoidance of favouritism, corruption and improper influence. If no criteria are established, how are the council to perform their functions? Furthermore, there is no provision for the Council to be assisted by any expert body. One would have expected, for example, that **the appointment of ordinary public prosecutors in the Basic Prosecutors Office should be made according to order of merit in the examination** unless there is very good reason to do otherwise, but there is no such provision in the law.

45. So far as concerns **appointment as ordinary prosecutors in the Public Prosecutors Office of the Republic and Higher Prosecutors Office**, at least criteria are set out (Article 38 LCCP). However, many of these **criteria are highly subjective** and in practice would be **likely to be dependant solely on the opinion of the superiors of the candidates concerned**. The existence of such a procedure for what is in effect the major outlet for promotion for the ordinary prosecutors is unlikely to inculcate among prosecutors any degree of independence of mind and is likely to lead to a mentality which will regard keeping the immediate superior happy and not in any way challenging anything said or done by the immediate superior as the highest value to be respected. Such a system is likely to reinforce the power of the Public Prosecutor of the Republic by inculcating an attitude of subservience and an unwillingness to challenge received opinion among the prosecutors as a whole.

46. Furthermore, it has to be born in mind that the majority of the CPP are elected by prosecutors. In these circumstances the opportunities for bestowing favouritism or, as previously mentioned opportunities for corruption would be quite likely to present a problem.

47. 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.** The system which is proposed does not meet these criteria.

48. Article 41 LCPP deals with the appointment of prosecutors in areas where at least 20% of the population come from the minority. In these cases as well as being supported by two-thirds of the council the appointment has to be supported by at least two of the minority representatives. However, given that the minority representatives are themselves elected by the entire body of prosecutors or by the entire Parliament, it is difficult to see these as true representatives of the minority and this safeguard for minority rights, if it is intended to be such, is unlikely to be effective.

## 9. THE RIGHTS AND OBLIGATIONS OF PUBLIC PROSECUTORS

49. Article 48 LPPO provides that public prosecutors may not be detained or held in relation to actions, opinions and decisions made within the performance of their function. Such a provision should not apply to actions which are carried out corruptly or fraudulently. Article 48(2) LPPO is somewhat obscure due to what appears to be a faulty translation. It is difficult to know what it means but it seems to be intended to confer an exemption from civil liability in relation to prosecutors' decisions. Where prosecutors are restrained from performing a function because of their detention, investigation for a criminal act or disciplinary procedure, they have the right to two-thirds of their salary. Presumably this is only until the complaint against them is determined.

50. The exclusion of liability for prosecutors seems too absolute. Are there any possibilities to correct wrongdoing by prosecutors apart from criminal cases against prosecutors or disciplinary action, which will be decided by the authorities themselves ? It could be reasonable that a citizen appeal to a court seeking compensation from the State for illegal actions by a prosecutor. Clearly, a claim should not be directed against an individual prosecutor.

51. Article 56 LPPO speaks of the prosecutor being "entitled and obliged to continue his professional advancement". Presumably by this is meant training. It would be desirable to set out more concretely what exactly is involved and what these rights and obligations mean in practice.

52. Article 62 LPPO 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.

## 10. CESSATION OF FUNCTION, DISMISSAL AND DISCIPLINING OF PROSECUTORS

53. Articles 65-72 LPPO deal with the cessation of function and dismissal of prosecutors. These matters also dealt with in Articles 43-50 LCPP.

54. Firstly, there seems to be some confusion in terminology. This may be a translation difficulty. Article 65 LPPO refers to dismissal of prosecutors and Article 66 refers to the cessation of their terms of office. However, there is considerable duplication between the two Articles and both, for example, refer to persons being dismissed or ceasing to hold office when convicted of a criminal offence and sentenced to more than six-months imprisonment. It may be that Article 65 is intended to refer only to the Public Prosecutor of the Republic and Article 66 is

intended to refer to other prosecutors. The Law on the Council of Public Prosecutors refers to termination of public prosecutors position. These expressions are used in relation to termination for every possible reason, including loss of citizenship, reaching retirement age, loss of capacity to perform duties, as well as misbehaviour. There would be something to be said for **distinguishing between matters which lead automatically to termination of office, such as reaching the retirement age or reaching the end of one's term of office and matters where some judgment has to be made that a person is unfit for office or has misbehaved**, which is what in the English language would normally be meant by "dismissal".

55. In the case of the Public Prosecutor of the Republic Article 65 LPPO requires that dismissal on grounds of loss of capacity to perform the prosecutor's function, election to some other office or a request to be dismissed, or conviction for a criminal offence, should be taken by the Parliament of the Republic.

56. 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 thus to protect the reputation of the whole prosecution service (see also Article 48 CPP).

57. However, Article 65 also provides for dismissal where a person is convicted of a criminal offence and is sentenced to a shorter prison sentence or other criminal sanction for a crime that makes the prosecutor unfit to perform the function of public prosecutor. Unfortunately, there is no attempt to determine what is meant by being unfit to perform the function. Presumably what is intended here is offences such as those described on American visa application forms as involving "moral turpitude". There are, however, obvious difficulties in creating a power which is so vaguely defined and which is capable of subjective application. In practice, this provision could be used to dismiss somebody for conviction for any criminal offence, even a relatively minor regulatory matter. If **certain offences are regarded as serious enough to warrant dismissal regardless of what punishment is actually imposed perhaps those offences should be specified. Also, perhaps consideration should be given to referring to offences which carry a penalty of at least six months rather than offences where such a penalty is in fact imposed**.

58. 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 of the Republic 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.

59. Article 67 LPPO permits the dismissal of the Public Prosecutor of the Republic as a result of an **"achievement of unsatisfactory results"** in the performance of his function. This is a **too vague criterion for dismissal**. It leaves open the possibility of dismissal merely because the Parliament does not like the Public Prosecutor's decisions. It leaves open the possibility of bringing improper political pressures to bear on the Public Prosecutor.

60. There is a procedure set out in Article 67 LPPO whereby liability for achieving unsatisfactory results has first to be determined by a **Commission consisting of seven members established by the Government**. Article 67 states that members of the Commission are **elected by professional lawyers** that are not state officials and not from the range of judges or public prosecutors. It is **not clear who participates in this election or what procedures govern it**. If there were to be such a system, it would be desirable to set this out more clearly. It would also be **necessary to set out precisely what is meant by achievement of**

**unsatisfactory results.** It would be necessary to ensure that this could not be used as a tool for getting rid of a Public Prosecutor of the Republic who made unpopular decisions.

61. In the case of prosecutors other than the Public Prosecutor of the Republic decisions on dismissal are taken by the Council of Public Prosecutors. The same difficulty in relation to commission of criminal offences not punished by imprisonment for at least six months arises in relation to these (Article 48 LCPP). 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.**

62. Article 68 LPPO also allows the dismissal of public prosecutors due to serious disciplinary violation that make them “inappropriate for performing the function of the public prosecutor”, or “due to unprofessional or bad faith exercise of the office”. Article 69 defines **serious disciplinary violations** as “serious breach of the public peace and order that destroys the reputation of the public prosecutor”, “serious violation of the rights of the parties and of other participants in the proceedings, that jeopardises the reputation of the public prosecutors function”, “improper conduct towards individuals, state organs or other legal entities in relation to the performance of their function or otherwise”, “violation of the principle of non-discrimination” and “disabling to conduct supervision upon the work of the public prosecutor by the higher Public Prosecutions Office”, whatever the last reason means. It seems to the writer that in general these **criteria are rather vague** and capable of subjective or inconsistent application.

63. The provisions relating to discipline seem to be somewhat confusing and difficult to understand. Article 72 LPPO provides for a procedure for determining disciplinary liability conducted by a Commission of five members established by the Public Prosecutor of the Republic. The Council of Public Prosecutors can hear an appeal against the decision of the Commission. However, Article 74 LPPO provides that the procedure for determining liability for public prosecutors due to serious disciplinary violation or incompetent and careless work is to be conducted upon the proposal of the Public Prosecutor of the Republic and that the decision on dismissal of the public prosecutor is to be made by the Council of Public Prosecutors. It is not clear whether there is a first hearing by the Commission of five members with an appeal to the Council of Public Prosecutors or whether where dismissal is proposed as a sanction matters are heard in the first instance by the Council of Public Prosecutors. In any event, in addition to the matters already referred to it is clear that a **prosecutor can be dismissed for unprofessional or bad faith exercise of his office and also for incompetent performance, including unsatisfactory professional expertise, lack of knowledge of laws, wrong implementation of the laws, and public prosecution decisions which are not very well prepared** (Article 71 LPPO). Again, **some of these criteria seem to allow for highly subjective assessment.**

64. Article 71 LPPO also refers to “under incompetent performing” (sic), serious violation of the Public Prosecutors Code, “not time properly or carelessness performance of the public prosecution function” (sic) and “partial relation while working with the cases”, whatever that means, releasing information and data without permission, and unjustified refusal or not acting upon instructions. It is not clear whether these matters also warrant dismissal or a lesser disciplinary punishment. Article 70 LPPO refers to various **other matters which warrant disciplinary proceedings** and again it is **not clear whether these may result in dismissal.** Some of them are relatively trivial and others are very serious – including, for example, receiving gifts and other benefits in relation to the prosecution function. Whether the proceedings are to be heard before a Commission with an appeal to the CPP or initially before the CPP, the **provisions do not set out clearly the rights of the prosecutor to be represented and to conduct a defence.** They do not refer to the right to be informed in advance of the charges made against him. Article 72(3) LPPO refers to the public prosecutors

right to initiate administrative proceedings against a decision of the CPP before a competent court, but it is not clear whether this is purely a procedural review or a full appeal.

## 11. OTHER PROVISIONS

65. Articles 76-87 refer to professional service in the public prosecutors office. They provide for a role of a Secretary General to the Public Prosecutors Office of the Republic and Secretaries of the other prosecutors offices, but the role of these officers in relation to the public prosecutors is not clearly defined. They also refer to another functionary known as a Councillor and again his or her role is not clearly defined. Both the Secretaries and the Councillors are to be lawyers though with lower qualification requirements than for prosecutors.

66. Article 88 CPPO requires the Ministry of Finance when proposing a budget for the prosecutors office to submit the proposal to the public prosecutor for an opinion in advance. That opinion is then in turn submitted to the parliament before they vote on the budget. These proposals seem to be good ones.

## 12. CONCLUSIONS

67. It is clear that a considerable amount of work and thought has gone into these proposals. In the Commission's opinion they provide a good basis and a useful framework for further work. In order to establish a genuinely independent prosecution service further clarification is required particularly in the following areas:

1. the power of more senior prosecutors to give instructions to and take over the cases of junior prosecutors,
2. the need to clarify further prosecutors powers with regard to investigation bodies,
3. the need to establish objective criteria for appointment, dismissal and disciplining of prosecutors,
4. the procedures for conducting hearings into dismissals or disciplinary matters,
5. the role of the Government and Parliament in the appointment of the Public Prosecutor of the Republic and the need to establish objective criteria and procedures so to de-politicise the selection process.

68. The Commission remains at the disposal of the Macedonian authorities for further assistance in this matter.