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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON RULES OF PROCEDURE ON CRITERIA AND STANDARDS FOR
THE EVALUATION OF THE QUALIFICATION, COMPETENCE AND
WORTHINESS OF CANDIDATES FOR BEARERS OF PUBLIC
PROSECUTOR'S FUNCTION
OF SERBIA**

on the basis of comments by

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**This document has been classified restricted on 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.*

INTRODUCTION

1. *By letter dated 18 March 2009, the Minister of Justice of the Republic of Serbia, Ms Snezana Malovic, requested an opinion on the (1) draft Criteria and standards for the election of judges and court presidents and on the (2) draft Rules of procedure on criteria and standards for the evaluation of the qualification, competence and worthiness of candidates for bearers of public prosecutor's function.*

2. *The present opinion is prepared jointly with the Judiciary and Law Reform Division of the Directorate of Co-operation of the Council of Europe on the basis of comments by Mr Pierre Cornu (Switzerland), Mr James Hamilton (Ireland), Mr Jean-Jacques Heintz (France) and Mr Guido Neppi Modona (Italy), who were invited by the Venice Commission and the Judiciary and Law Reform Division to act as rapporteurs. Their comments are in documents CDL(2009)088, 089 and 090 respectively.*

3. *This opinion was adopted at the ... Plenary Session of the Venice Commission (Venice, ... 2009).*

BACKGROUND

4. The Venice Commission adopted two opinions for Serbia during its 74th Plenary Session (14-15 March 2008), one on the draft Law on the High Judicial Council (CDL-AD(2008)006) and one on the draft laws on judges and on the organisation of courts (CDL-AD(2008)007). In these opinions, the Commission expressed its concern that the Constitution of Serbia did not sufficiently support judicial independence and that there was a risk of politicisation of the judiciary by the election of judges and of the High Judicial Council by Parliament¹. The draft laws were deemed, in general, to be in line with European standards, but there were a number of provisions which weaken judicial independence that the Venice Commission referred to².

5. The Law on Public Prosecution was among the package of laws, which included the two laws mentioned above, that were adopted on 22 December 2008 (CDL(2009)103). However, the Law on Public Prosecution itself was not subject to an opinion by the Venice Commission.

6. This Law on Public Prosecution refers to "*criteria for the evaluation of competence, work capacity and worthiness determined by the State Prosecutorial Council in accordance with the law*" (hereinafter the "draft criteria on prosecutors") in its Article 82 paragraph 1, which is the subject of this Opinion (CDL(2009)103).

GENERAL REMARKS

7. According to Article 74 of the Law on Public Prosecution, public prosecutors are elected by the National Assembly on the basis of a proposal from the Government and are elected for a term of 6 years with the possibility of re-election. Deputy public prosecutors are elected for the first time by the National Assembly and thereafter by the State Prosecutorial Council (hereinafter the "SPC").

¹ CDL-AD(2008)006, paragraph 74 ; CDL-AD(2008)007, paragraph 122.

² CDL-AD(2008)006, paragraphs 17, 76; CDL-AD(2008)007, paragraphs 49, 52, 82, 112, 114, 120, 124, 128.

8. The **provision for re-election of public prosecutors**, especially where such re-election takes place in the National Assembly, **leaves open the possibility of bringing political pressure to bear on public prosecutors and is therefore undesirable**. In relation to deputy public prosecutors, this does not seem to be a problem, since their reappointment is by the SPC.

9. The draft criteria on prosecutors, referred to in Article 82 paragraph 1 of the Law on Public Prosecution, define the criteria and standards for the evaluation of prosecutors and candidates to prosecutorial functions and concern the criteria for election to the position of public prosecutor and deputy public prosecutor. They are proposed to be adopted by the SPC.

10. The drafters tried to avoid any arbitrariness in the evaluation of prosecutors and the consequences of the evaluation. Precise criteria have been established and the procedure has been set out.

11. The purpose of the rules of procedure are to set out, as provided by Recommendation (2000)19 on the Role of Public Prosecutors in the Criminal Justice System of the Committee of Ministers of the Council of Europe, *“fair and impartial procedures...that are governed by known and objective criteria, such as competence and experience” for the appointment of public prosecutors.*”

12. However, a prosecutor’s work cannot be evaluated on objective criteria alone. Sometimes even purely objective criteria can be misleading. For instance, the criteria based on the number of cases dealt with or decisions rendered are not sufficient to objectively quantify a prosecutor’s work: it is common knowledge that a case may appear simple at first, but turn out to be very complicated.

13. The evaluation of a prosecutor or a candidate must therefore be based on careful examination and be as objective as possible, following a number of criteria in order to reach a general evaluation that can determine if the person concerned is or not competent to take on the duties of a prosecutor.

14. The practical difficulties associated with such an evaluation system should not be underestimated. If, for instance, the work of a prosecutor during a hearing must be evaluated, this will require that the evaluators attend the hearing and observe the prosecutor concerned. This requires time and the evaluator must know the subject of the specific case. **It might be easier to provide a presumption that - except where concrete elements exist - the prosecutor concerned is presumed to be capable of carrying out his or her duties in a satisfying manner.**

CHAPTER I –

GENERAL PROVISIONS

15. The central basis for assessment is an evaluation to be carried out in two separate ways: (1) by the superior of the public prosecutor concerned and (2) by his colleagues in the collegium of the prosecutor’s office in which he or she works.

Article 1

16. Article 1.2 shows the drafters’ intention to comply with Section 4 of Recommendation Rec(2000)19, which states that:

“States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational

conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal. Such conditions should be established in close co-operation with the representatives of public prosecutors.”

Article 2

17. The qualifications follow similar lines to those of the draft criteria on judges. First, a prosecutor requires both general expert knowledge as well as possession of particular knowledge, which is required to perform the function of a public prosecutor. Second, the prosecutor requires to have competence, which consists of demonstrated capability, demonstrated professional skill, analytical thinking, capacity to form opinions and make decisions, skill in explanation and quality of expression, communications skills and ability to participate in work. Finally, the prosecutor is evaluated under the heading “*worthiness*” and required to possess appropriate ethical standards, which are established based on the prosecutor’s reputation in his or her professional surrounding, through his or her behaviour within the performance of the public prosecutor’s function and outside it.

Article 3

18. Evaluation takes place according to three grades “*does not satisfy*”, “*does satisfy*” and the highest grade “*does satisfy for promotion*”. This grade scheme, which is relatively simple and straightforward, is an appropriate one for carrying out such evaluation.

19. However, it might be **suggested that a grade be attributed to each group of criteria. It might be easier to create a list of criteria and to grade each person for each criteria and then take an average, taking into account that some criteria may have more “weight” than others.** The risk however may be that a person is entirely satisfactory under certain important criteria, but not for other less important criteria with the result that the overall evaluation is misled by the global one on the basis of each group of criteria. For example, a prosecutor may well be satisfactory with respect to procedural acts, but less so in the delivery of oral arguments in front of the court. As these two criteria seem to be grouped together with others, it will be difficult to take an average.

20. The draft criteria on prosecutors **could also be simplified by dealing only in its chapters with provisions that are particularly necessary.**

Article 4

21. The evaluation is carried out by the SPC on the basis of data obtained from both the superior of the prosecutor concerned and the candidates’ peers in the collegium.

22. It is hard to see how the SPC is going to put this into effect. In order for this to work, databases will need to be set up that contain all the necessary information. If these databases do not yet exist, account must be taken of the fact that the respective computer systems of the different units within the Public Ministry of Serbia may be difficult to access. Furthermore, **all dossiers or files dealt with by the prosecutor concerned would have to be examined – this seems to be disproportionate to the aim to be achieved.**

Article 5

23. The SPC is obliged to establish and announce the average standard number of cases received and decisions rendered by each prosecutor within the period of the previous three years. Evaluation of efficiency in the procedure of prosecutors is then measured according to the number of decisions rendered by the individual as compared with the data on average of the number of decisions rendered by his or her colleagues.

24. **Quantitative criteria can be misleading.** Experience shows that the same type of decision can take much or very little time, require much or little expertise. Experience also shows that some prosecutors have the tendency to render more decisions than others for the same types of cases, however there is nothing to lead to the conclusion that one is more able than the other. **It is clear that the number of cases dealt with can provide an indication as to the ability of a prosecutor, but it would be dangerous to give it too much importance.**

Article 6

25. With respect to Article 6.3, caution should be applied when making a distinction between particularly complex cases and others. Some prosecutors are capable of constituting large dossiers or files for simple cases, whereas others manage to directly deal with the essential issues in smaller dossiers or files and therefore give the impression that the cases they are dealing with are simple.

CHAPTER II –

CRITERIA FOR EVALUATION OF DEPUTY PUBLIC PROSECUTOR WHO ARE, ON THE DAY OF THE CONSTITUTION OF THE STATE PROSECUTORIAL COUNCIL, BEARERS OF THE PUBLIC PROSECUTOR'S FUNCTION

Article 8

26. Article 8.2 states that a prosecutor whose number of decisions is less than 50% of the average number obtains the grade "*does not satisfy*". Between 50% and 120% of the average number the grade is "*does satisfy*". Where a prosecutor has more than 120% over the average number he or she obtains the grade "*does satisfy for promotion*".

27. However, under Article 8.3, an exception can be made in relation to a prosecutor who worked on particularly complex problems or performed particularly complex duties and in such cases a prosecutor with less than 50% of the average standard can be graded as "*does satisfy*" and a prosecutor above 50% and below 120% can be graded as "*does satisfy for promotion*". But, such an exception has to be "*particularly justified*". In relation to all of this, a concern arises once again with respect to the following: while an output significantly below the average is certainly grounds for examining the work record of a prosecutor, it cannot necessarily be assumed that either a high or a low number of cases is more than an indication of high or low performance unless one is also aware of the quality of the work being evaluated and its difficulty.

28. In this regard the exception provided for is itself somewhat mechanistic. **It would be appropriate to modify this proposal by adding a provision that the SPC may disregard these percentages where it is satisfied that notwithstanding an apparently low or high number of cases by reason of the nature of the work performed by the particular prosecutor the statistics do not give a true reflection of the work that has been performed.**

Article 9-13

29. The rules of procedure go on to deal with various other matters including demonstrated qualification (Article 9), demonstrated competence (Article 10), ability to relate to and co-operate with co-workers and other stakeholders (Article 12), and ethical questions (Article 13). In each case these matters are assessed according to the tripartite criteria already referred to, based on reports both from the superior officer and from colleagues. These procedures seem to be generally speaking appropriate.

30. However, as regards “*data on active participation in trainings and seminars at home and abroad*” (Article 11.2), it should be mentioned that **only the willingness of the prosecutor to undergo training should be evaluated as well as his or her active participation in the training**. In order for the evaluation to be useful, it must indicate whether the prosecutor was authorised by his or her superior officer to participate in trainings. Also, it is doubtful that each prosecutor can decide on his or her own whether or not to participate in a training abroad. The prosecutors whose superiors have rejected their request for training should not suffer any consequences.

31. “***Published expert and scientific work in relevant periodicals, or expert and scientific publications***” (also Article 11.2), **seems not to be an adequate criteria**. The duty of a prosecutor is to treat dossiers or files and not to publish articles. If a prosecutor prepares a summary of the case-law for his or her colleagues, his or her work is just as valuable as if he or she published this information. If a prosecutor decides to spend his or her time writing legal papers, he or she may gain points in the evaluation process, but during that time, his or her dossiers or files are not dealt with. Such publications may perform a useful function but they should not be a decisive and probably not even an important factor in evaluations. A fair weighting system needs to be attributed to them so as to not disadvantage those who spend less time on writing articles.

32. Under the same provision, the use of computer technology is mentioned, and this should of course be encouraged. However, those who only use the computer occasionally because they have a wide legal knowledge and a good memory, should not be disadvantaged in the evaluation process.

CHAPTER III –

CRITERIA FOR EVALUATION OF PUBLIC PROSECUTOR WHO ARE, ON THE DAY OF THE CONSTITUTION OF THE STATE PROSECUTORIAL COUNCIL, BEARERS OF THE PUBLIC PROSECUTOR’S FUNCTION

33. The rules of procedure go on to evaluate the criteria for evaluating the senior public prosecutor. These provides for special criteria for evaluating candidates under the heading of general capacity for heading the public prosecutor’s office (Article 15), capacity for realisation of supervision (Article 16), capacity for the improvement of work of the office (Article 17), and the capacity to manage a crisis (Article 18).

Article 15

34. Under the heading of general capacity, a number of sub-headings are identified, such as capacity to manage, organisational skills, ability to define targets, goals and priority tasks, and the ability to represent the office.

Article 16

35. This Article deals with the capacity to carry out supervision, and involves ability to supervise the work of deputies and other employees, to recognise and follow complex cases, to be ready to provide help and give instructions and advice to subordinates, and the ability to transfer the instructions and information of higher public prosecution to lower public prosecutors as well as to make correct and timely decisions and to deal with objections and complaints concerning the work of employees.

Article 17

36. This Article deals with the capacity to improve the work of the office based on the use of the most efficient methods, the capacity to steer employees towards the implementation of new ideas, information technologies, introducing innovations and teambuilding among other matters.

Article 18

37. This Article deals with the capacity to manage crises.

CHAPTER IV –

EVALUATION OF SPECIAL CATEGORIES OF BEARERS OF PUBLIC PROSECUTOR'S FUNCTION

Articles 21 and 22

38. Finally, in Chapter IV, there are a number of other specific provisions. Article 21, for example, sets out a specific provision relating to persons who review the decisions of others and Article 22 deals with specialised areas of prosecution.

CHAPTER V –

ESTABLISHMENT OF QUALIFICATION, COMPETENCE AND WORTHINESS OF PROSECUTORS' ASSISTANTS

39. No comments on this Chapter.

CHAPTER VI –

ESTABLISHMENT OF QUALIFICATION, COMPETENCE AND WORTHINESS OF CANDIDATES FROM OTHER BODIES AND ORGANISATIONS

Article 24

40. Under Article 24.4, the SPC should make sure to develop a procedure and criteria that are in conformity with Section 4 of Recommendation Rec(2000)19 (see paragraph 16 above).

CHAPTER VII –

PROCEDURE FOR ESTABLISHMENT OF QUALIFICATION, COMPETENCE AND WORTHINESS OF CANDIDATES WHO ARE, ON THE DAY OF THE CONSTITUTION OF THE STATE PROSECUTORIAL COUNCIL, BEARERS OF THE PUBLIC PROSECUTOR'S FUNCTION

Article 25.1 and Article 26.1

41. The solution of having not one person, but a collegium of colleagues decide on the qualification of a person seems to be acceptable. This will prevent that friendships or personal conflicts or animosities affect the evaluation.

Article 25.2 and Article 26.2

42. The fact that the superior officer to the prosecutor concerned can also give his or her opinion on the prosecutor concerned is to be welcomed. This will give the SPC the opportunity to obtain a better idea of the prosecutor concerned.

43. It might be **suggested that the SPC be able to, if it judges this to be useful, carry out research itself in order to form an opinion, especially if the opinion of the superior officer does not agree with the opinion of the collegium.** The SPC could hear the prosecutor concerned, search for information itself using other sources, examine the dossier or file treated by the prosecutor concerned etc.

Article 25.5 and Article 26.5

44. It is presumed that the prosecutors are competent and able to carry out their duties. **This principle should already be mentioned in the general provisions of these criteria** (see paragraph 14 above). Furthermore, the whole procedure could be simplified if this principle were applied in a more consistent manner. It could indeed be questioned whether it is worthwhile to compile large amounts of data on prosecutors whose capacity is well known by all of his or her colleagues. If, for instance, the collegium of prosecutors and the superior officer provide a brief report that is favourable, the research may not be necessary (the brief report should not cover all the criteria). If undue influence is suspected, a further step could be envisaged, for instance submitting the favourable report to a higher authority of the Public Ministry for confirmation.

Article 27

45. A slight concern that so far as concerns evaluation by colleagues, particularly when as is proposed it is intended to be anonymous, there could be scope for victimisation of a candidate, perhaps on the grounds of jealousy or some other wrong motive. Secondly, it is not clear that all prosecutors will necessarily have an informed view of the competence or ability of each of their colleagues under all of the particular headings. How can somebody who has not read a dossier or file have an informed view on whether it has been correctly handled? There is a danger that gossip, rumour and hearsay could play a role in assessments. Does every colleague working in the same unit of the prosecutors' office participate in this process or a selected number only? Or is the evaluator to take part in proceedings in which the prosecutor concerned is involved or must he or she seek information from judges and/or other persons who have participated in the proceedings? **This is a matter which requires careful thought and it may be that only selected colleagues who are known to have knowledge of and to work closely with candidates should be invited to perform this task, and then only when their own impartiality and objectivity was recognised. The idea of anonymity is questionable since it would make it impossible for the candidate to contest an unfavourable report.**

Article 28

46. The prosecutor cannot take part in the opinion of the collegium. This provision is appropriate.

Article 32

47. It is also appropriate that the prosecutor concerned be informed about the opinion of the collegium before it is submitted to the SPC and that he or she be given a reason for the grade in the opinion and that he or she can file a complaint to the SPC on this opinion.

48. However, it may not be necessary to file a “*complaint to the State Prosecutorial Council on foundation of the opinion of the Public Prosecutor or the Collegium*” in that form. This will only introduce a formal opposition on the part of the prosecutor concerned against his or her colleagues, who have given their opinion – which does not seem to be necessary. **The same result could be achieved by simply providing that the prosecutor concerned receive a copy of the opinions of the collegium and his or her superior before they are submitted to the SPC and can, if he or she so wishes, add written comments that will also be submitted to the SPC with his or her file.**

CHAPTER VIII -

DECISIONS BY THE STATE PROSECUTORIAL COUNCIL

Article 33 and Article 34

49. It might be useful to set out that the SPC can, on its own initiative, carry out further research if it deems this to be necessary where there are doubts with respect to the evaluation of a candidate. The SPC should, in particular, be able to hear the person concerned and his or her superior officer. The direct hearing of a candidate by the SPC should be made a rule in cases where the SPC deems that the candidate is not satisfactory.

CONCLUSION

50. The draft criteria are remarkably detailed, comprehensive and, on the whole, are to be welcomed as a good basis on which to establish objective criteria for the appointment and promotion of prosecutors. They provide for a concrete and objective evaluation of prosecutors, carried out by the SPC, an authority that provides guarantees of impartiality and competence.

51. The principal concerns with these draft criteria relate to two matters:

- (1) the risk of an over mechanistic approach to statistical information concerning workloads and the like, and;
- (2) secondly, evaluating persons through the use of questionnaires by their colleagues which are filled anonymously poses some risks (Article 27). This latter idea may need to be looked at again and some safeguards built in to avoid the possibility that a prosecutor could be evaluated unfairly.

52. Furthermore, the procedure will require much work from the prosecutors, who will be in charge of grading their subordinates as well as for the SPC. It will be important that persons responsible for the evaluation – at all levels – be able to take on this duty under conditions (especially sufficient time) that will lead to a fair outcome.

53. In order to simplify the procedure, one could renounce to the detailed evaluation of prosecutors who, according to the general opinion of their superiors, carry out their duties in a satisfactory manner and who have raised no problems of misbehaviour. This could also apply to their promotion. The system could provide that a positive opinion is required for a promotion within the Public Ministry and a detailed evaluation will only be required where prosecutors have received a negative opinion from at least one superior officer who was asked to provide an opinion. In this way, the means required would be drastically reduced.

54. The Venice Commission remains at the disposal of the Serbian authorities for any further assistance in this matter.