



Strasbourg, 3 June 2022

Opinion n°1086 / 2022

CDL(2022)023

Or. Engl.
(GID)]

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

DRAFT OPINION

**ON DRAFT AMENDMENTS TO LAW N° 3/2016
ON THE PUBLIC PROSECUTION SERVICE**

on the basis of comments by

Ms Renata DESKOSKA (Member, North Macedonia)
Ms Hanna SUCHOCKA (Honorary President)
Mr Jose Manuel SANTOS PAIS (Expert)

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Contents

| | | |
|------|--------------------------------------------------------------|---|
| I. | Introduction | 3 |
| II. | Background | 3 |
| III. | Analysis..... | 4 |
| | A. Procedure of adoption of the draft amendments | 4 |
| | B. Prosecutor General as an <i>ex officio</i> member | 4 |
| | C. The tenure of the members of the SCP | 5 |
| | D. New mechanisms of accountability of the PG | 6 |
| | 1. New performance indicators | 6 |
| | 2. Composition and powers of the Evaluation Commission | 7 |
| | 3. Suspension of the PG and his/her deputies | 7 |
| | 4. Some other outstanding recommendations | 8 |
| IV. | Conclusion | 9 |

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I. Introduction

1. By letter of 6 May 2022, Mr Eduard Serebenco, the State Secretary of the Ministry of Justice, requested an opinion of the Venice Commission on the draft amendments to Law n°3/2016 on the Public Prosecution Service (CDL-REF(2022)013, hereinafter “the draft amendments”). These draft amendments were proposed following an Opinion of the Venice Commission CDL-AD(2021)047 on the amendments of 24 August 2021 to Law on the Prosecution Service, adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021; hereinafter – “the 2021 Opinion”).

2. Ms R. Deskoska (member, North Macedonia), Mr J.M. Santos Pais (expert, Portugal), and Ms H. Suchocka (Honorary President) acted as rapporteurs for this Opinion. In light of the very limited time for the preparation of this Opinion and of its follow-up nature, the present Opinion was drafted without a country visit or online meetings.

3. This Opinion was prepared in reliance on the English translation of the draft amendments. The translation may not accurately reflect the original version on all points.

4. This Opinion was drafted on the basis of comments by the rapporteurs. [Following an exchange of views with ***,] it was adopted by the Venice Commission at its *** Plenary Session (Venice, *** 2022).

II. Background

5. The 2021 Opinion focused on the amendments to Law n°3/2016 on the Public Prosecution Service adopted on 24 August 2021. The political context surrounding the adoption of those amendments and the process of their adoption were described therein.¹ In a nutshell, following the elections of July 2021 the new parliamentary majority, in an expedited procedure, passed through the Parliament amendments which reorganised the Superior Council of Prosecutors (the SCP) and introduced new mechanisms of accountability of the Prosecutor General (the PG). The composition of the SCP was reduced to 12 members: three *ex officio* (the Ombudsperson, the Minister of Justice, and the President of the Supreme Judicial Council), five prosecutors elected by their peers, and four non-prosecutorial members representing civil society. In addition, the retirement age for the members of the SCP was reduced to 65 years. The amendments also introduced mechanisms of *ad hoc* performance evaluations of the PG and provided for a mechanism of dismissal of the PG for a disciplinary violation.

6. These amendments, which had immediate effect, changed the balance of powers within the SCP and resulted in the opening of a criminal investigation against the then PG Mr Stoianoglo, who was suspended in October 2021 and replaced with a PG *ad interim*. Criminal proceedings against Mr Stoianoglo are still pending, and, in parallel, a performance evaluation report in his respect has been recently submitted to the SCP.

7. The present follow-up Opinion will not comment on the whole Law no. 3/2016 but rather will focus on those elements which have been identified as problematic in the “Conclusions” part of the 2021 Opinion, or which have been closely related to those conclusions. Finally, as it was clarified already in the 2021 Opinion, in the current Opinion the Venice Commission will not comment on the validity of the specific accusations against Mr Stoianoglo or the question of legality of his suspension, detention, etc. That being said, the Venice Commission reiterates that during the criminal investigation against the PG, fair trial guarantees should be strictly observed.

¹ See paras 6 et seq. of the 2021 Opinion

III. Analysis

A. Procedure of adoption of the draft amendments

8. One of the key criticism expressed in the 2021 Opinion concerned a swift adoption of the August 2021 amendments during the period of summer holidays, without proper deliberations in Parliament or a meaningful public discussion. The Venice Commission examined those amendments only *ex post*, when they have been made into the law and implemented, and, in particular, when some of the members of the SCP had already been replaced.

9. By contrast, the draft amendments under consideration have been submitted to the Venice Commission by the Ministry of Justice before their adoption. This demonstrates the readiness of the authorities to expose their proposals to scrutiny and possibly to criticism, which is commendable. In addition, the Venice Commission encourages the authorities to widely circulate the draft amendments and organise meaningful consultations with the civil society and with the main stakeholders, including the Superior Council of Prosecutors and prosecutors' associations, before they are voted in Parliament.

B. Prosecutor General as an *ex officio* member

10. In the 2021 Opinion the Venice Commission invited the authorities of the Republic of Moldova to consider returning the PG to the SCP as an *ex officio* member (with a corresponding adjustment of the composition of the SCP, if necessary). In the draft amendments this recommendation has been implemented: under the revised Article 69 the PG will return to the SCP as an *ex officio* member. Henceforth the SCP will have 13 members, including 4 *ex officio*, 5 elected prosecutors and 4 representatives of the civil society appointed by the different branches of power and institutions: the President of the Republic, Parliament, the Government, and the Academy of Sciences of Moldova.

11. The Venice Commission notes that by adding the PG to the composition of the SCP the drafters decreased further the proportion of the prosecutorial members "elected by their peers": the prosecutors will henceforth represent 5 out of 13 members. This number was initially 7 out of 12 and will be now 5 out of 13, which means the "substantive part" was reduced. Article 125 of the Constitution of the Republic of Moldova requires that the prosecutors represent a "substantive part" of the SCP, which is also in line with the Venice Commission's own approach: the Commission consistently recommended that prosecutors elected by their peers should represent a "substantive part", yet not necessarily a majority of members of a prosecutorial council.² The Venice Commission observes that the Consultative Council of European Prosecutors, as "the voice of serving prosecutors throughout Europe", advocated for a prosecutorial council where prosecutors elected by their peers would be in a majority.³ However, the CCPE Bureau acknowledged that "there may not be, as yet, a generally accepted requirement for a majority of prosecutor-members in Prosecutorial Councils". The Venice Commission, in accordance with its well-established approach, was ready to accept both an absolute and a relative majority of prosecutorial members in such a council.

12. In the proposed model five prosecutors elected by their peers will still remain the largest single group in the SCP. As to the non-prosecutorial members, their choice may be criticised, but at least they do not represent a politically homogenous group. Thus, three members of the SCP will represent independent institutions,⁴ and only four members may be seen as affiliated to the

² See Venice Commission, CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, para. 45.

³ See Opinion of the CCPE Bureau of 20 February 2020 following a request by the Superior Council of Prosecutors of the Republic of Moldova concerning the independence of prosecutors in the context of legislative changes as regards the prosecution service, points 33 et seq.

⁴ The Ombudsperson, the Supreme Judicial Council, and the Academy of Sciences.

ruling majority.⁵ Finally, under the draft amendments, the PG will not participate with the right to vote “with the exception of those concerning the adoption and drafting of normative acts and development strategies of the Prosecutor’s Office”.⁶ In all other situations (in particular in the matters of discipline and appointments) the PG will not be able to vote. So, the return of the PG in the composition of the SCP will not seriously affect the balance of powers therein.

13. In sum, while prosecutors elected by their peers will not have a majority, it would be very difficult for the SCP to take any important decision without the support of at least some of them. The other part of the SCP (lay and *ex officio* members) is not politically monolithic and will not therefore outvote the prosecutorial members very easily. The Venice Commission concludes that the composition of the SCP as described in the draft amendments follows previous recommendations of the Venice Commission.

C. The tenure of the members of the SCP

14. The 2021 Opinion largely focused on the reorganisation of the SCP. In particular, the Venice Commission stressed that the legitimate expectation of the members to finish their mandate should not be perturbed without very serious reasons.⁷ The Commission found it problematic that the lay members appointed under the old rules (which did not provide for any age-limit) were removed or would be removed prematurely, due to the application of the new rules.⁸

15. The Venice Commission understands that, from the institutional perspective, it might be difficult to return to the situation which existed before the amendments of August 2021, without undermining the legitimacy of the decisions taken by the SCP afterwards and without perturbing the security of tenure of those SCP members who have been appointed after the August 2021 reform. Furthermore, it is unclear whether the members whose mandates have been terminated under the new rules would be able and willing to resume their functions. However, at the very least the Moldovan authorities should acknowledge that the premature termination of the mandates of those members entitles them to a compensation. The Venice Commission also urges the authorities to prevent the repetition of such situations in the future. To do so, the composition of the SCP should be regulated at the constitutional level,⁹ as well as the duration of the mandate of their members. Respect for the stability of tenure of the members of the SCP may be seen as an unwritten principle: if at the time of the reform this duration was clearly stipulated in the Constitution, that would prevent the legislator to interrupt them by a legislative change reducing the retirement age. This would require a constitutional amendment in a special procedure requiring *inter alia* a qualified majority vote in Parliament (see Article 143 of the Constitution).

16. The Venice Commission understands that the draft amendments do not – and cannot – aim at amending the Constitution. And there is no uniform European standard as to which element of the system should be regulated by the Constitution and which should be governed at the level of the legislation. However, in the Moldovan context¹⁰ constitutional entrenchment of the composition and powers of the SCP and of the status of its members seems to be the only efficient remedy against frequent institutional reforms which lead to the reshuffling of the composition of the SCP. It follows that this recommendation will not be implemented without a revision of the Constitution. That being said, the Venice Commission realises that the time may not be ripe for yet another constitutional amendment in the area of the judiciary.

⁵ The Minister of Justice, a lay member appointed by the Government, a lay member elected by a simple majority in the Parliament, and a lay member appointed by the President, who is currently of the same political colours as the parliamentary majority.

⁶ See Article 77 (6-1) added by the draft amendments

⁷ See the first bullet-point in para 105 of the 2021 Opinion

⁸ See para 60

⁹ See para 103

¹⁰ See in particular paras 35 and 60 of the 2021 Opinion

D. New mechanisms of accountability of the PG

17. The August 2021 amendments have introduced a new mechanism of *ad hoc* evaluation of professional performance of the PG by the Evaluation Commission (EC). The Venice Commission noted that this new procedure was quite uncommon;¹¹ at the same time, the Commission acknowledged that “it is not excluded that, in addition to the dismissal of the PG for a crime or a disciplinary offence, the mandate of the PG may be terminated in cases of evidently poor performance – similarly to the mandate of the lower prosecutors”.¹² The Venice Commission made two key recommendations in regard of this new procedure.

1. New performance indicators

18. First, the Venice Commission recommended specifying the main indicators of (under)performance and explaining their difference from the disciplinary breaches. Amended Article 31-1 attempts to address this recommendation by setting a list of indicators to be assessed by the EC: the quality of the planning of the Prosecutor’s Office’s activity, the efficiency of the Prosecutor’s Office management, the efficiency of the organisation of the Prosecutor’s Office, the efficiency of institutional control, the efficiency of risk management, the public behaviour and trust, the internal and external communication, the impact of visibility, trust and institutional efficiency of the Prosecutor’s Office.

19. This list is far from being perfect. Thus, the meaning of some indicators is unclear: what sort of “public behaviour” the EC is supposed to assess and how it is related to the performance by the PG? What is a difference between the “efficiency of management”, “the efficiency of organisation”, “the efficiency of institutional control”, “institutional efficiency” and “the efficiency of institutional control” and which criteria are to be used to assess them? Some criteria – such as public trust – may be difficult to measure, let alone to assess.

20. Article 31-1 achieves, however, two goals: it explains what sort of skills and competencies are to be evaluated (managerial and communication skills, work organisation skills, etc.), and how underperformance is different from a breach of discipline. This list will give more structure to the reasoning of the EC and will make it more objective, as required by Article 125 (2) of the Constitution which proclaims that the PG may only be removed for “objective” reasons. Therefore, while addition of specific indicators to the Law is worth praise, the formulation of some indicators should be further improved and clarified.

21. The Venice Commission reiterates in this context that there is a general requirement of legal certainty in terms of foreseeability of any legal text. The more the rules are precise and detailed, the less is the risk of arbitrariness, even if not every rule may be formulated with a mathematic precision, and sometimes the legislature has to defer to the wisdom of institutions or individuals who may be entrusted with interpreting such terms as “efficiency”, “trust” etc. This is why the methodology of evaluations, and the composition of the Evaluation Commission is at least equally important as the substantive rules it will apply.

22. The Venice Commission notes in this context that the draft amendments still give to the SCP *carte blanche* in defining the method of performance evaluations and the relative weight of the performance indicators. In its December 2021 Opinion the Venice Commission stressed that while it may be necessary to keep certain rules flexible, the main principles governing the evaluation process should be described in the law. This recommendation has not been reflected in the draft amendments.

¹¹See para 63

¹² See para. 84

23. The Venice Commission is therefore of the view that while the inclusion of more specific indicators of performance goes in the direction of the previous recommendations of the Venice Commission, more precise formulation of the indicators remains necessary.

2. Composition and powers of the Evaluation Commission

24. On this issue the Venice Commission recommended that the evaluation made by the EC should not bind the SCP, and that the EC should not be allowed to function without the prosecutorial members. On the whole, the draft amendments address these recommendations.

25. As to the composition of the EC, the 2021 Opinion noted that it can function without any prosecutorial members. Under the draft amendments the EC will have 5 members: one proposed by the President of the Republic, one by the Ministry of Justice, one by the Superior Council of Magistracy, one by the SCP, and one by the assessed PG. Two of those members should have experience of working as prosecutors. This is positive, while not entirely reflecting the recommendation of the Venice Commission. The 2021 Opinion spoke not only about members *with experience* as prosecutors, but about *actual* prosecutors who should be represented on this Commission.¹³ The draft amendments exclude the possibility of the EC functioning only with the three members (those appointed by the SCM, the President of the Republic, and the Minister of Justice). In sum, the composition of the EC will now mirror, at least roughly, the composition of the SCP, as recommended in the 2021 Opinion.¹⁴ This is positive.

26. Most importantly, the results of an evaluation will be of an “advisory nature”, as it is now clearly stipulated by in Article 31-1 (7). That means that the main decision-making authority in respect of those performance evaluations will be the SCP, and not the EC. The Venice Commission concludes that the draft amendments address the main points of criticism related to the composition of the EC and the indicators it applies.

3. Suspension of the PG and his/her deputies

27. The 2021 Opinion commented on the suspension of the PG in relation to a criminal case against him or her. In particular, the Venice Commission recommended to indicate that the SCP should have the power to decide whether the suspension of the PG is justified.

28. New Article 55-1 (1) addresses this recommendation: it indicates that following opening of a criminal investigation targeting the PG the latter is suspended automatically for three days. During this period the SCP must meet for an extraordinary session and decide whether an extension of the suspension is necessary. The draft amendments should specify whether the deadline is calculated in workable or calendar days. If the SCP is unable to gather in the prescribed three-day period, the suspension may be extended by the decision of the President of the SCP.

29. In this model the initial three-days’ suspension is not automatic but follows a decision of the SCP to authorise criminal prosecution of the PG.¹⁵ This ensures that the SCP is involved at the very early stage and may decide whether there is a case to answer. Clearly, if the SCP decides that there is enough evidence for opening of a criminal case, it may at the same time decide whether any suspension is needed. That would be a possible alternative to the model proposed in the draft amendments, but the mechanism of a three-days’ mandatory suspension is also acceptable, given that it may be difficult to decide at the outset whether the suspension is needed and some more evidence may be necessary for a more reasoned and conscientious decision later. The draft amendments refer to a majority of the members present which is required to order

¹³ See in particular paras. 74, last sentence, and para. 78, and the key recommendation in the second bullet point in Article 74.

¹⁴ See para 78

¹⁵ See Article 34 (5) which establishes that the SCP should appoint a prosecutor to investigate a case against the PG

a suspension, but the Venice Commission would recommend that such decisions should be taken by the majority of all voting members of the SPC.

30. It is necessary to specify, however, that the extension of the suspension of the PG by the decision of the President of the SCP is an exceptional mechanism, which should be used only when the SCP is unable to meet for objective reasons, and such suspension should last until the SCP is able to meet and discuss this matter again. A fixed period should be defined for convening the meeting of the SCP.

31. The second limb of this recommendation was that the suspension of the PG should not automatically terminate the mandates of his or her Deputies. This recommendation was implemented: Article 18 (4-1) now provides that the suspension of the mandate of the Deputies of the PG is decided on the case-by-case basis. If a Deputy remains in his or her position, this Deputy may not intervene in criminal cases involving the suspended PG or in any case investigated by the prosecutor designated by the SCP to conduct the investigation in respect of the suspended PG. This is an important addition which reflects the recommendation of the Opinion.¹⁶

4. Some other outstanding recommendations

32. Several other recommendations in this context remain not fully addressed. As to the procedure of performance evaluations, it should be transparent, as required by Article 125 (2) of the Constitution. Transparency is ensured by the obligation of the EC to give a reasoned opinion (see Article 31-1 (7)). In addition, the law might provide for the public character of the proceedings before the EC. The law should specify that even within the framework of the performance evaluations the PG may refuse to provide information on specific cases if its disclosure may jeopardize the success of an ongoing investigation or any other similar vital interest of justice (like the protection of witnesses or victims, for example).

33. The 2021 Opinion also commented on the mechanism of a temporary replacement of a suspended PG. Under the current Law, an interim PG should be appointed by the President of the Republic at the proposal of the SCP, for a maximum duration of 12 months. The draft amendments specify that the mandate of the interim PG shall cease with the appointment of a new PG or with the termination of the suspension of the outgoing PG. This is a useful clarification. However, as stressed in the 2021 Opinion, it is unclear whether the interim PG may be re-appointed after the expiry of the 12 months. The possibility of re-appointment affects the independence of the officeholder. Therefore, as stressed in the 2021 Opinion, "it would be more appropriate for one of the Deputies, selected by the SCP, to temporarily perform the duties of the PG [...], for the period of time necessary to complete a criminal investigation against the suspended PG or to fill the vacancy".¹⁷

34. Finally, the Venice Commission recalls paras. 68 – 70 of the 2021 Opinion where it discussed a possible retroactive application of the new performance evaluation criteria in the case of Mr Stoianoglo. Since this criticism did not concern the text of the Law as such but rather its application in a particular case, these paragraphs were not reproduced in the conclusions of the 2021 Opinion as a key recommendation. However, this point remains relevant: the Venice Commission understands that the evaluation of Mr Stoianoglo's performance is ongoing, and that a negative report of the EC about Mr Stoianoglo's performance has been recently transmitted to the SCP.¹⁸ It means that Mr Stoianoglo risks being dismissed in relation to the underperformance related to the period prior to 24 August 2021.

¹⁶ See para 96

¹⁷ See para 100

¹⁸ <https://www.trm.md/en/social/alexandr-stoianoglo-a-contestat-raportul-de-evaluare-al-csp>

35. The Venice Commission notes that already before 24 August 2021 the law provided for the performance evaluation of prosecutors (see Article 28 et seq.). If the performance of the PG is to be assessed on the basis of those general rules in force before the August 2021 amendments, the application of the new *procedure* to the PG may not raise issues. However, if Article 31-1, which has been introduced in August 2021, is to be read as creating a completely new *material ground* for bringing the PG to liability for underperformance, it is questionable whether this Article could be applied retroactively. While retroactive application of the law is strictly prohibited only in the criminal law sphere,¹⁹ the general requirement of legal certainty in terms of foreseeability of the impact of the law, which is a basic principle of the Rule of Law,²⁰ implies that any assessment of the PG's performance before 24 August 2021, which ultimately may lead to his dismissal, should be based on such criteria of integrity and professionalism which could be uncontestedly derived from the pre-existing rules or from the very nature of the mandate of the PG, as stressed in the 2021 Opinion.²¹

36. Finally, the Venice Commission notes that the performance evaluation of the PG can still be initiated by the President or 1/3 of the SPC, and that is without any benchmark of seriousness and as often as once a year. The PG risks to be evaluated more often than ordinary prosecutors, which may distract the PG from fulfilling his or her mandate.

IV. Conclusion

37. By letter of 6 May 2022, Mr Eduard Serebenko, the State Secretary of the Ministry of Justice, requested an opinion of the Venice Commission on the draft amendments to Law n°3/2016 on the Public Prosecution Service ("the draft amendments"), which were developed by the Ministry following an Opinion on the same Law adopted by the Venice Commission in December 2021 ("the 2021 Opinion").

38. The authorities' openness to dialogue with the Venice Commission is worth praise. The Commission encourages the authorities to organise meaningful consultations with the civil society and with the main stakeholders, including the Superior Council of Prosecutors (the SCP) and the prosecutors' associations, before the draft amendments are voted in Parliament.

39. As a preliminary remark the Venice Commission notes that frequent institutional reforms of the SCP which in 2021 have led to the early termination of the mandate of some of its members clearly demonstrate the need to regulate these matters at the constitutional level in more detail. That would involve adoption of a constitutional amendment following a special procedure and by a qualified majority. The Venice Commission understands that the draft amendments under consideration do not aim at changing the Constitution, but this possibility should be seriously considered by the authorities, at least in relation to the composition of the SCP, as well as the duration of the mandate of its members.

40. In the overall, the draft amendments implement most key recommendations of the 2021 Opinion. Thus, in particular:

- the Prosecutor General (the PG) will henceforth be a member of the SCP *ex officio*, albeit with limited rights; the composition of the SCP will remain compatible with the previous recommendations of the Venice Commission: it is pluralistic enough and the number of prosecutors elected by their peers remains a "substantive part" in the overall composition of the SCP;
- the Evaluation Commission (the EC) will not be able to function without the prosecutorial members and its conclusions will be of an advisory nature, while the decision to remove the PG for underperformance will belong to the SCP;

¹⁹ See Article 7 of the European Convention on Human Rights

²⁰ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para 58.

²¹ See para. 70

- there will be no automatic suspension of the Deputies to the PG in the case of the suspension of the latter, and, as a rule, the SCP will decide both on the initial suspension of the PG and on any prolongation thereof.

41. The Venice Commission considers that the draft amendments could be improved even further if the authorities consider the following points:

- the law should specify that the PG may refuse to provide information to the EC on specific cases, if its disclosure may jeopardize the success of an ongoing investigation or if any other similar vital interests of justice so require;
- addition of specific performance indicators to the Law is welcome, but some of the indicators should be improved and clarified;
- suspension of the PG by a decision of the President of the SCP should be possible only when the SCP is unable to meet for objective reasons, and until, within a prescribed period, the SCP is able to meet and discuss this matter again;
- it would be more appropriate for one of the Deputies of the PG, selected by the SCP, to temporarily perform the duties of a suspended PG, without the need to seek re-appointment.

42. Finally, as regards the performance evaluation in respect of Mr Stoianoglo, and without prejudging the outcome of this process, the Venice Commission stresses that the evaluation of the PG's performance during the period before 24 August 2021 in a new procedure should be based on pre-existing substantive rules, and not on the criteria introduced by the August 2021 amendments.

43. The Venice Commission concludes that the draft amendments represent a significant improvement compared to the current version of the Law. The Venice Commission is confident that the few outstanding points raised in this Opinion can be easily addressed in the debates at the national level, but, if necessary, the Venice Commission remains at the disposal of the authorities of the Republic of Moldova for further assistance in this matter.