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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

POLAND

OPINION

ON

THE DRAFT AMENDMENTS TO THE LAW ON THE PUBLIC PROSECUTOR'S OFFICE

Adopted by the Venice Commission at its 140th Plenary Session (Venice, 11-12 October 2024)

on the basis of comments by

Ms Marta CARTABIA (Member, Italy)
Ms Regina KIENER (Member, Switzerland)
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Table of Contents

I. Introduction

1. By letter of 15 July 2024, the Minister of Justice of Poland requested an opinion on the draft amendments to the Law on Public Prosecutor's Office ("the draft Law") (CDL-REF(2024)039, including the Explanatory Report).

2. Ms Marta Cartabia, Ms Regina Kiener, Mr Martin Kuijer, Mr Tomáš Langášek and Mr Jean-Claude Scholsem acted as rapporteurs for this Opinion.

3. On 12 and 13 September 2024, a delegation of the Commission composed of Ms Cartabia, Ms Kiener, Mr Kuijer, Mr Langášek, accompanied by Mr Taras Pashuk from the Secretariat, travelled to Warsaw and had meetings with the Minister of Justice, the National Prosecutor's Office, the Supreme Court, representatives of parliamentary factions, the Chancellery of the President, the Office of the Ombudsman, members of the Disciplinary Court to the Prosecutor General as well as with representatives of associations of prosecutors and civil society organisations. The Commission is grateful to the Ministry of Justice and to the Council of Europe office in Warsaw for the excellent organisation of this visit.

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

5. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 12 and 13 September 2024. The draft opinion was examined at the joint meeting of the Sub-Commissions on Judiciary and the Rule of Law on 10 October 2024. Following an exchange of views with the Minister of Justice, it was adopted by the Venice Commission at its 140th Plenary Session (Venice, 11-12 October 2024).

II. Background

6. The Venice Commission summarised the history of the public prosecution service in Poland in its 2017 Opinion on the Act on the Public Prosecutor's office, as amended ("the 2017 Opinion").[1]

7. The 1989 amendment of the Constitution of the Polish People's Republic and the subsequent changes made to the 1985 Act on Prosecuting Authority ended the existing quasi-independent position of the public prosecution towards the executive and linked the public prosecution to the executive power. The power of the Public Prosecutor General was thereafter exercised by the Minister of Justice, to whom the public prosecution was subordinated. Even after the entry into force in April 1990 of the amendments to the 1985 Act on Prosecution Authority, the public prosecution formally continued to act as an independent constitutional authority which, according to Article 64(1) of the former, so-called Small Constitution,[2] *shall safeguard the people's rule of law; shall watch over the protection of social property; shall ensure that the rights of citizens be respected*. In practice, however, the Ministers of Justice who alternated in the function since the elections in 1991, reportedly identified themselves with the position of the Public Prosecutor General and allegedly tended to interfere with particular criminal cases.

8. The Constitution of 1997 represented a major change to the legal status of the public prosecution. The constitutional provisions concerning public prosecution were omitted, based on the prevailing reasoning that prosecutorial authority was regarded as a public power emanating from the executive branch. Currently, the only references to the public prosecution in the Constitution are Article 103(2), which provides that no public prosecutor shall exercise

[1] See, more elaborately, Venice Commission, CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, §§ 7-14.

[2] Full title: the Constitutional Act of 17 October 1992, on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-government.

the mandate of a deputy, and Article 191(1), which establishes *locus standi* of the Public Prosecutor General in proceedings before the Constitutional Tribunal.

9. In 2009, the 1985 Act on Prosecuting Authority was amended: the office of the Public Prosecutor General and the office of the Minister of Justice were separated, and the Public Prosecutor General became the chief authority of the public prosecution as an authority ensuring legal protection. In Article 10(a), the term of office of the Public Prosecutor General was set to six years as of the date of the oath and was made non-renewable. The Public Prosecutor General was appointed by the President of the Republic from among candidates nominated by the National Council of the Judiciary and the National Council of the Prosecuting Authority. The Law provided for high qualifications for the candidates and for guarantees against arbitrary dismissal.[3]

10. However, the 2009 reform was not accompanied by a constitutional entrenchment of the status of the Public Prosecution Service led by the Public Prosecutor General, nor by a clarification of the manner in which the accountability of the institution was guaranteed. In fact, the Polish Constitution has remained largely silent on the public prosecution service to-date.

11. Following parliamentary elections in Poland in October 2015, far-reaching reforms in the judiciary and the prosecution service were carried out. The new Law on the Public Prosecutor's Office, which restored a personal union between the Minister of Justice and the Public Prosecutor General, was adopted on 30 January 2016 and came into effect on 4 March 2016. The law was analysed by the Venice Commission in the 2017 Opinion, in which the Commission concluded that the amalgamation between political and prosecutorial functions generated *"a number of insurmountable problems as to the separation of the prosecution system from the political sphere"*.[4]

12. In December 2023, following parliamentary elections held in October 2023, a new government was appointed. The current government announced an Action Plan aimed at restoring the Rule of Law in Poland.[5] One of the key measures included in this Action Plan is a reform of the public prosecution service.

III. Analysis

A. Preliminary remarks

1. As regards the law-making process

13. The standards and best practices of the due law-making process are increasingly the subject of international recognition; they are described in the Venice Commission's Rule of Law Checklist[6], its Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist[7], and its numerous reports and opinions on specific countries. Under the Rule of Law Checklist,[8] the process for making law must be transparent,

[3] The Venice Commission considered this reform as a crucial step towards enhancing the independence and autonomy of the public prosecution service as a whole and of individual prosecutors (see Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the independence of the Judicial System: Part II – the Prosecution Service, § 26).
[4] See Venice Commission, the 2017 Opinion, § 110.
[5] See Polish Minister of Justice presents Action Plan for restoring the rule of law, 21 February 2024 // https://www.gov.pl/web/justice/polish-minister-of-justice-presents-action-plan-for-restoring-the-rule-of-law
[6] Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, 18 March 2016.
[7] Venice Commission, CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a Checklist.
[8] Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, Benchmarks A.5.

accountable, inclusive, and democratic. To satisfy this requirement, the public should have access to draft legislation, and should have a meaningful opportunity to provide input.[9]

14. On 15 July 2024 the present draft Law was included in the list of legislative and programme works of the Council of Ministers. The Council of Ministers plans to finalise the draft in the fourth quarter of 2024, following which the draft will be submitted to the Parliament. The Venice Commission notes that the current reform of the prosecution is occurring in a highly polarised political climate. It emphasises therefore the need for thorough consideration of input from various stakeholders, including political actors, legal community, and the broader public.

15. Considering the significant implications that this draft Law has for the rule of law in the country, the Venice Commission recommends that the Ministry of Justice and the Sejm Committee on Justice and Human Rights ensure broad public consultations at the further stages of the preparation of the draft Law.

2. On the scope of the draft Law within the public prosecution reform

16. The present draft Law primarily addresses the issue of the separation of the office of the Prosecutor General from that of the Minister of Justice. The Polish authorities consider this as the first step in addressing the fundamental reforms to public prosecution in Poland and justify this phased approach as necessary to swiftly correct the shortcomings of the 2016 reform. In the view of the Venice Commission, this approach is understandable.

17. However, it will be crucial to proceed with further substantive reforms, as highlighted in the Venice Commission's 2017 Opinion. In particular, the Venice Commission has previously observed that the pivotal role of the Prosecutor General within the Polish public prosecution system is grounded in the broadly defined powers vested in the office, which can be exercised in relation to individual criminal cases, beyond the criminal sphere, as well as over the professional careers of prosecutors. The Commission found these powers to be excessively broad. Although a comprehensive follow-up assessment of the 2017 recommendations will not be undertaken in this Opinion, the Venice Commission will, where appropriate, refer to its earlier recommendations from the 2017 Opinion when commenting on the current draft Law.

18. The Venice Commission stresses the need to proceed with a global reform of the public prosecution service in due course.

3. The level of regulation of the Prosecution Service

19. The main objective of the draft Law is the separation of the roles of the Minister of Justice and the Prosecutor General. The proposed amendment to Article 1 of the Law deletes the provision that the office of the Prosecutor General is held by the Minister of Justice, in line with one of the key recommendations of the 2017 Opinion: *"The Venice Commission is of the opinion that the prosecutorial system should be depoliticized and that the offices of the Public Prosecutor General and that of the Minister of Justice be separated."*[10] The Venice Commission welcomes the follow up given to its previous recommendation. The reform under discussion is therefore necessary to restore the rule of law, as previously recommended.

20. Having said that, the Venice Commission notes that the prosecution service has been the subject of frequent reforms in the recent past which does not contribute to the stability of the system. In that regard, the Commission also notes the absence of constitutional entrenchment regarding the position, role, function, and accountability of the Prosecutor General and indeed the prosecution service as such.

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[9] Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, Benchmarks A.5.iv.
[10] Venice Commission, the 2017 Opinion, § 112.

21. The Commission has previously expressed the view that the guarantees of independence of the prosecutor general in the performance of her/his functions, the method of her/his appointment, and the method of her/his removal from office should be enshrined in the Constitution. Regarding the draft Law at hand, the Commission notes that this is the third legislative reform within a relatively short period which significantly restructures the public prosecution service. A legitimate and effective functioning of the public prosecution service, however, requires the confidence of the public as well as the respect of the judiciary and legal professionals.[11] Adopting major reforms regularly and repeatedly risks undermining public trust and respect, and can create a vicious circle of perpetual change. Even when a reform aims at addressing and rectifying significant rule of law violations, it must do so in a viable way, seeking a broad political and social consensus. From the legal perspective, one way to reduce the likelihood of the frequent reforms and to provide stability to the system is the constitutional entrenchment of the main features of the new public prosecution system. Given the qualified majority requirement for constitutional amendment in the Polish Constitution, this option may currently not be available in practice, in view of the considerable social and political polarisation. Nonetheless, constitutional entrenchment remains a crucial objective for promoting greater stability and social consensus.

B. European standards regarding the public prosecution service

22. The Venice Commission will assess the draft Law in the light of the European standards that are of relevance to the legislation on public prosecution services, as well as of existing good practices in the field, as available in particular in the Committee of Ministers of the Council of Europe Recommendations regarding the functioning of the public prosecution, the Venice Commission earlier reports and opinions, and the opinions of the Consultative Council of European Prosecutors (CCPE).

23. The Venice Commission has earlier observed that there is no common standard on the organisation of the prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence.[12] The Committee of Ministers of the Council of Europe requires member States to ensure that public prosecutors are free from "unjustified interference" with their professional activities.[13] The Rome Charter, adopted by the CCPE in 2014, proclaims that "*[t]he independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged.*"[14]

24. The Venice Commission has observed that the independence of prosecutors is not of the same nature as the independence of judges[15] and that certain asymmetry between institutions and procedures applicable to judges and prosecutors is inevitable[16]. It has emphasised that the

[11] Venice Commission, CDL-AD(2010)040, Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, 3 January 2011, § 34.
[12] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, paragraph 91.
[13] Recommendation CM/Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, point 11.
[14] CCPE, Opinion No. 9(2014) on European norms and principles concerning prosecutors"('the Rome Charter'), Article IV.
[15] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the independence of the Judicial System: Part II – the Prosecution Service, § 86.
[16] Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, § 40. See also: Venice Commission, CDL-AD(2014)010, Opinion on the draft law on the review of the Constitution of Romania, § 185; CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, §§ 65-66.

difference in the level of independence between judges and prosecutors should not be used to undermine the role and status of the public prosecution service.[17]

C. Appointment of the Prosecutor General

25. The draft Law provides that the Prosecutor General shall be appointed by the Sejm by an absolute majority of votes, with the consent of the Senate (draft Article 13b §§ 1 and 2). The election will be preceded by a public hearing of the candidates (draft Article 13b § 15). Candidates for the position may be proposed by several entities (see below). The law does not provide for a specific anti-deadlock mechanism securing election of a candidate; it only stipulates that the incumbent Prosecutor General shall serve until the new Prosecutor General takes the oath of office (draft Article 13b § 20) and that the Speaker of the Sejm shall start the appointment procedure afresh if the Sejm fails to appoint the Prosecutor General or the Senate does not agree to that appointment (draft Article 13b § 19). The Prosecutor General is elected for one non-renewable term of office of six years (draft Article 13e).

1. General remarks

26. The draft Law opts for a model of appointment of the Prosecutor General which presents the following characteristics: candidates need to be sponsored (by a given number of members of either chamber of the Parliament, by a given number of prosecutors through the prosecutorial council, by the General Council for Science and Higher Education, or by non-governmental organisations); the Speaker of the Sejm is given a veto power on the candidates on the basis of the legal requirements; the Prosecutor General is elected by the Sejm by an absolute majority; the Senate needs to give its consent (by simple majority). This system bears several risks of politicisation.

27. The Venice Commission, when assessing different models for the appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the need for democratic legitimacy of such appointments, on the one hand, and the requirement of depoliticization, on the other. [18] Thus, an appointment process which involves the executive and/or legislative branch of government has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, additional safeguards are needed in order to reduce the risk of politicisation of the prosecution service. The Venice Commission has expressed the view in the past that the establishment of a prosecutorial council, which would play a key role in the appointment of the Chief Prosecutor, could be considered as one of the most effective modern instruments to achieve this goal.[19]

28. In Poland, the National Council of Prosecutors to the Prosecutor General exists, which the current draft Law intends to reform and rename as National Prosecution Council. The draft law envisages a role for the Council in the nomination process (by allowing it to propose a maximum of three candidates), but not in the subsequent selection process of the proposed candidates. In the Commission's view, in line with the comparative experience (and, *mutatis mutandis*, with the previous system in Poland – see paragraph 9 above), the National Prosecution Council should instead play a central role in the selection of the candidates for the position of Prosecutor General based on their objective qualifications. Giving the Council such a central role in the selection

[17] Venice Commission, CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, § 70.
[18] Venice Commission, CDL-AD(2015)039, Opinion on the draft Amendments to the Law on the Prosecutor's Office of Georgia, § 19.
[19] Venice Commission, CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 19, 20 and 27.

process could contribute to the depoliticization of this phase of the process, while the subsequent involvement of both chambers of the Parliament in the election of the Prosecutor General could provide democratic legitimacy. This would require changes in the Council's composition, ensuring an appropriate element of external expertise on the Council (through the participation of practicing lawyers, judges specialising in criminal law, university professors, researchers, and other members of civil society; see paragraph 65 below). The Commission will analyse the draft Law more in detail, against the background of these general remarks.

2. Nomination

29. Draft Article 13b § 3 delineates a group of five entities authorised to nominate candidates for the position of Prosecutor General, who will be elected by the Parliament. These entities are: (1) a group of at least 35 deputies (one candidate); (2) a group of at least 15 senators (one candidate); (3) the National Prosecution Council, from among those who have received the support of at least 60 active prosecutors (three candidates, see also draft Article 13b § 11); (4) the General Council for Science and Higher Education (one candidate); (5) non-governmental organisations whose statutory tasks include activities related to the protection of the principle of a democratic state of law, the protection of the rule of law and human rights, and which have carried out these tasks for a period of at least 3 years preceding the date the candidate is proposed (one candidate).

30. The wide range of entities entitled to nominate candidates is intended to contribute to the depoliticization of the appointment process. However, it seems problematic that deputies and senators should be granted the right to propose candidates, given that the Parliament itself is tasked with electing the Prosecutor General. As a general principle, it is undesirable for the appointing body to also have the power to nominate candidates because this creates an inherent bias in favour of the candidates it has proposed. While the nominating power is conferred upon relatively small groups of members within the Sejm and the Senate, allowing thereby opposition minorities to expand the list of candidates, the process nevertheless favours those candidates who are nominated by groups aligned with the political majority. This could, in turn, undermine the significance of the other entities involved in the nomination process. The Venice Commission therefore recommends excluding the political groups from the nomination procedure, which would enhance the impartiality and fairness of the process.

31. During the country visit, the delegation of the Venice Commission was informed that the General Council for Science and Higher Education was included among the nominating entities in order to provide an institutional basis for academia to contribute to the selection process. This inclusion enhances the diversity of the nominating bodies. Further diversity from civil society is ensured through the participation of non-governmental organisations. The aim of ensuring such diversity is welcome. However, the Venice Commission has recently raised the issue of the practical challenges associated with identifying and selecting appropriate representatives from NGOs.[20] In addition to those entities, it may be advisable to consider a similar role for the Bar Association and the National Council of Legal Advisers. It is noteworthy that these entities participate in the Social Council of the Prosecutor General (as set forth in draft Article 13r § 4).

32. The draft Law grants the National Prosecution Council, as one of the nominating bodies, the power to nominate three candidates, which is a higher quota of candidates compared to other entities (one candidate each), presumably in view of the professional expertise that the National Prosecution Council would provide.

[20] See Venice Commission, CDL-AD(2022)054, Ukraine – Opinion on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", §§ 33-35.

33. Indeed, the Venice Commission has previously recommended that professional expertise should be involved in the selection process. In particular, as stated above, a prosecutorial council with a key role in the appointment of the Chief Prosecutor can be considered as one of the most effective modern instruments to achieve the goal of depoliticising the prosecution service.[21]

34. The Venice Commission is of the view that the National Prosecution Council should act as such expert body, provided that it is reformed with a view to ensuring the appropriate level of independence[22] and of expert input. The National Prosecution Council could be entrusted with the selection (and possibly shortlisting) of the candidates on the basis of the legal requirements, with a view to submitting them to the Parliament for the election. If the National Prosecution Council was given such a power in the selection and shortlisting of candidates, the envisaged power to propose candidates should be removed.

35. Instead of the proposed system of nominating the candidates by selected authorised bodies, the National Prosecution Council could carry out the assessment of candidates through a transparent competitive process, also following a public call for applications.

36. In this context, the authority of the Speaker of the Sejm to reject an application if s/he *"finds that a candidate does not meet the requirements set out in Article 13c"* (draft Article 13b § 12) would become superfluous. At any rate, this provision should be removed from the draft Law, as it confers unnecessary discretionary power to the Speaker, without even the obligation to provide reasons for rejecting an application.

3. Eligibility criteria

37. The risk of politicisation can be further reduced by establishing clear criteria in the law regarding the objective legal qualifications and professional experience required for appointment.[23]

38. The eligibility criteria are set out in draft Article 13c which provides that a person may be appointed to serve as the Prosecutor General if s/he meets the following criteria: (1) s/he is a public prosecutor with active status; (2) s/he possesses at least 20 years of experience as a public prosecutor or judge, in active status; and (3) s/he has served as a public prosecutor for a continuous period of 10 years immediately preceding the date of his/her nomination for the position of Prosecutor General.

39. These criteria restrict the pool of candidates to senior career prosecutors, which is a positive development insofar as it ensures that the candidates have sufficient prosecutorial experience. However, to reduce even further the discretion to the appointing political body and to increase the professional requirements to the candidates, the proposed criteria should be further specified to ensure that candidates have the specific competencies required for this high-level organisational role, including managerial skills.

4. Election

40. The Commission opined that in countries where the Prosecutor General is elected by the Parliament, the obvious danger of a politicisation of the appointment process could be reduced

[21] Venice Commission, CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 19 and 20.
[22] Venice Commission, CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 42.
[23] Venice Commission, CDL-AD(2015)039, Opinion on the draft Amendments to the Law on the Prosecutor's Office of Georgia, § 27.

by the use of a qualified majority as a mechanism to achieve consensus on such appointments[24]. The requirement of qualified majority voting should improve the independence of the appointee as it reduces the likelihood of appointing a party loyalist. Yet, a qualified majority rule may also lead to deadlock and dysfunction, particularly so in polarised environments where ideological cleavages and/or previous political developments make it difficult to achieve qualified majorities.

41. The draft Law provides that the Prosecutor General is appointed by the Sejm by an absolute majority (draft Article 13b § 2), with the consent of the Senate.[25] In the view of the Venice Commission, the requirement of absolute majority in the Sejm, in contrast to the simple majority, is acceptable, as it is the lowest level of qualified majority. The specific, politically polarised local context, combined with the relatively short six-year term of office of the Prosecutor General (draft Article 13e § 1), may justify the approach proposed in the draft Law, particularly when the following considerations are taken into account.

42. First, the draft Law involves both chambers of the Parliament in the appointment process. The two chambers imply an institutional plurality and the representation of different interests in the selection process. As the Venice Commission stated previously, second parliamentary chambers may act as counterweights and checks within the Parliament.[26] Accordingly, subject to other possibly intervening factors, the participation of both the Sejm and the Senate seems a reasonable option with a view to achieving the selection of an independent appointee.

43. The question remains, however, as to how the two-chamber mechanism stands from the perspective of deadlock. It is clear that such a mechanism entails the risk of disagreement between the chambers. A paralysis of the office due to inactivity after the expiry of the Prosecutor General´s term would be prevented by draft Article 13b § 20 which stipulates that the incumbent Public Prosecutor General shall serve until the new Public Prosecutor General takes the oath of office. Still, this provisional situation should not turn into a long-term arrangement.[27] The potential passivity of the Senate is addressed in draft Article 13b § 17 of the draft Law which states that failure on the part of the Senate to pass a resolution within one month shall amount to tacit consent to the appointment of the Public Prosecutor General. Nevertheless, a problematic scenario remains in the event of repeated disagreements between the two chambers when the Senate keeps actively rejecting the candidates selected by the Sejm. During the country visit, some interlocutors observed that a similar mechanism had been tested in practice with regard to the appointments of the Ombudsman, and that it has proved to be a working method for ensuring constructive dialogue and achieving broader consensus on appointments.

44. Second, the draft Law stipulates qualification criteria which narrow the potential pool of candidates to senior professionals in the public prosecution service. Even though these criteria could be further refined, as discussed above, the political discretion is already significantly restricted by the proposed eligibility rules. Moreover, a high level of professional qualification contributes to preserve the political independence of the Prosecutor.

45. Third, the requirement of a public hearing adds transparency and public accountability to the process of electing the Prosecutor General. By exposing the candidates to public scrutiny, the hearing ensures that the electorate, civil society, and other stakeholders have access to the process, allowing for a more open assessment of the qualifications, competencies, and integrity

[24] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 36. Also: Venice Commission, CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, paragraph 83.
[25] The draft Law does not make any specific requirement to the majority in the Senate which implies a simple majority (Article 120 of the Constitution).
[26] Venice Commission, CDL-AD(2024)007, Report on Bicameralism, 18 March 2024, § 183.
[27] Venice Commission, CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, § 57.

of each candidate. This transparency reduces the likelihood of behind-the-scenes political manoeuvring and fosters greater public confidence in the process.

46. In conclusion, considering that the requirement of a qualified majority of two-thirds or three-fifths in a highly polarised political environment – such as the current political climate in Poland – would effectively grant the political minority a blocking or veto power, and in the light of the above considerations, the Venice Commission considers that the proposed arrangements for the election of the Prosecutor General by an absolute majority vote of the Sejm, with further approval by the Senate, may be considered acceptable.

5. Security of tenure

(a) Term of office

47. The Venice Commission has previously recommended that a Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office of the Prosecutor General should not coincide with the Parliament's term in office.[28]

48. The draft Law introduces a six-year term for the Prosecutor General and does not allow for reappointment (draft Article 13e §§ 1 and 2). The proposed six-year mandate of the Prosecutor General exceeds the Sejm´s four-year term and – despite of being rather short – falls within a range of acceptable solutions in terms of the overall length and thus complies with the Venice Commission´s recommendations. Non-renewability is all the more important to safeguard independence.

(b) Dismissal of the Prosecutor General

49. Like any state authority, including judges, the prosecutor's office needs to be accountable to the public.[29] Article 13l of the draft Law gives the Sejm the authority to dismiss the Prosecutor General. In countries where the Prosecutor General is elected by the Parliament, the Parliament often also has the power to dismiss him or her. Since the Prosecutor General occupies a critical position within the justice system, it may be reasonable that the body responsible for electing the officeholder also retains the power to remove a person from this position. In such a case, a fair hearing is required. Even with such a safeguard, there is a risk of politicisation: *"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."*[30] In this context, it is important to distinguish between the power to take a decision on dismissal and the power to initiate such a procedure. The latter may be better vested in a different entity, in order to safeguard the office from undue political influence.

50. From the foregoing it follows that the Parliament should not be granted broad discretion in dismissing the Prosecutor General, as this could expose the office to undue political influence. In such a scenario, the Prosecutor General would run the risk of being dismissed on the basis of shifting political dynamics or partisan considerations, rather than objective legal and professional criteria. This undermines the principle of prosecutorial independence, which is essential for ensuring impartiality and the fair administration of justice. If the Prosecutor General is perceived as being "at the mercy" of the political sphere, it may compromise the integrity of the office and

[28] Venice Commission, CDL-AD(2010)040, Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, 3 January 2011, § 37.
[29] Venice Commission, CDL-AD(2010)040, Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, 3 January 2011, § 41.
[30] Venice Commission, CDL-AD(2010)040, Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, 3 January 2011, § 42.

undermine public confidence in the independence of the prosecutorial system. To prevent this, the dismissal procedure must be subject to clear, narrowly defined grounds that protect the officeholder from arbitrary or politically motivated action, thereby maintaining the necessary balance between accountability and independence. Moreover, accountability to the Parliament for individual cases of prosecution or non-prosecution should be ruled out.[31] The Venice Commission recommends that the draft Law be amended accordingly.

- "Breach of oath" and "dignity of office"

51. Under Article 13l of the draft Law, the Sejm *"shall dismiss the Prosecutor General before the expiration of his/her term of office if he/she has violated his/her oath of office"*. The dismissal on this basis shall be voted at the request of the Speaker of the Sejm, a group of at least 35 deputies or a group of at least 15 senators, by a majority of at least 3/5 votes in the presence of at least half of the statutory number of deputies of the Sejm (draft Article 13l § 5). In contrast to the appointment process, which involves both chambers, the draft Law does not require the Senate's consent for the dismissal of the Prosecutor General. The reason for this asymmetry in the role of the Senate was not clarified by interlocutors during the country visit. The oath reads (draft Article 13d): *"I solemnly swear to observe the Constitution of the Republic of Poland and the law, to uphold the rule of law, civil rights and freedoms and the independence of public prosecutors, and to perform the duties entrusted to me impartially, with the utmost care and attention to the dignity of the position entrusted to me."*

52. As with any oath, the wording reflects broad and general principles. If these open-ended concepts are used as a basis for dismissal, it confers excessive discretion on the political body responsible for initiating and adopting such a far-reaching decision as the removal of the Prosecutor General. Although the dismissal on this basis requires a qualified majority of three-fifths, the proposed regulation leaves the security of tenure inadequately protected by law.

53. The risk is aggravated by the wording of the new Article 13h which states *inter alia* that the Prosecutor General may not engage in public activities that are incompatible with "the dignity of his/her office". The Venice Commission has previously stated that concepts such as the "dignity" of a judicial officer are too subjective to serve as a basis for taking significant measures in respect of the professional career of that judicial officer (i.e. disciplinary liability, dismissal, etc.).[32]

54. For the Venice Commission, the use of such provisions as a basis for removing the Prosecutor General lacks foreseeability and should be avoided.[33]

55. In previous cases, the Venice Commission recommended using a "mixed legislative technique", i.e. retaining the comprehensive formula and complementing it with the most common examples of actions. These specific examples would cover the majority of situations and would at the same time serve as guidance when applying the comprehensive formula.[34] Another technique could be to explain the provision in the explanatory memorandum in more concrete

[31] Venice Commission, CDL-AD(2010)040, Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, 3 January 2011, § 42.
[32] Venice Commission, CDL-AD(2014)018, Kyrgyz Republic – Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges, 16 June 2014, § 22.
[33] See ECtHR, *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 173-185, ECHR 2013) in which the ECtHR noted that the text of the oath offered wide discretion in interpreting the offence of "breach of oath". In paragraph 185, the Court concluded that *"the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of "breach of oath" and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects. Against this background, it could well be assumed that almost any misbehaviour by a judicial officer occurring at any time during his or her career could be interpreted, if desired by a disciplinary body, as a sufficient factual basis for a disciplinary charge of "breach of oath" and lead to his or her removal from office."*
[34] Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, § 108.

terms in order to provide further guidance.[35] Additionally, the regulation could specify that the application of such provisions is limited to situations in which the actions are intentional, involving deliberate abuse or, arguably, with repeated, serious or gross negligence.[36] The Venice Commission recommends using these techniques and revising the draft provisions regarding the "breach of oath" and "dignity of office", if these grounds for dismissal are to be maintained at all.

- *Other grounds for dismissal*

56. Draft Article 13l § 1 provides for other grounds for dismissal. While some of them are obvious (like statement of resignation, permanent incapacitation), other grounds are formulated in an excessively broad manner. For example, the Prosecutor General *shall* be dismissed if he/she has been sentenced by a final and non-appealable court judgment for committing an offence or fiscal offence, or if a disciplinary penalty has been imposed on him/her under a final and non-appealable decision. According to the Venice Commission, in both instances, dismissal may be warranted; however, it would depend upon the gravity of the offence in question. The draft Law should therefore be more specific in delineating the threshold of severity that would warrant dismissal. Clear guidelines on the types of offences that justify such a sanction would provide greater legal certainty. Similar considerations should apply to the imposition of disciplinary penalties, ensuring that the responses to misconduct remain proportionate and consistent with the principle of fairness. The Venice Commission recommends amending the draft Law accordingly.

- *Procedural guarantees against unfair dismissal*

57. The draft Law does not provide for specific procedural guarantees in case the Parliament intends to use its power to dismiss the Prosecutor General. The Venice Commission has previously stated that "a fair hearing is required".[37] Given that the dismissal of the Prosecutor General may fall under the civil limb of Article 6 of the European Convention of Human Rights, the question arises as to whether there is access to court in respect of a claim of unfair dismissal. With regard to the dismissal of the chief Anti-Corruption Prosecutor, the ECtHR insisted on the availability of judicial review, stating that it was in the interest of the State to provide such a remedy.[38] Where judicial review of parliamentary decisions on dismissal was provided for, but proved insufficient, this resulted in violations of the Convention.[39]

(c) Criminal liability of Prosecutor General

58. The draft Law provides that the Prosecutor General *"may not be held criminally liable or deprived of liberty without the prior consent of the Sejm"* (draft Article 13i § 1); *"[a] request for consent to prosecute, detain or arrest the Prosecutor General may be submitted by the National Prosecution Council or the Minister of Justice"* (draft Article 13i § 3). An exception to the requirement of parliamentary consent for the arrest of the Prosecutor General is provided for in cases of arrest in *flagrante delicto* (draft Article 13i § 2). According to the Explanatory Report, the provisions on the immunity and inviolability of the Prosecutor General are aimed at ensuring the effective protection of the work of the head of the prosecutorial authority.

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[35] Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, § 49.
[36] Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, § 109.
[37] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 40.
[38] ECtHR, *Kövesi v. Romania* (no. 3594/19, 5 May 2020). The ECtHR stated that "*In a legal framework where the removal from office of the chief prosecutor of the DNA was decided on by the President following a proposal by the Minister of Justice with the endorsement of the [Supreme Council of Magistrates], the absence of any judicial control of the legality of the decision of removal cannot be in the interest of the State.*" (paragraph 124).
[39] ECtHR, *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 124-129, ECHR 2013); *Ovcharenko and Kolos v. Ukraine* (nos. 27276/15 and 33692/15, §§ 126-127, 12 January 2023).

59. The Venice Commission has previously recommended that prosecutors should not enjoy general immunity, which could lead to corruption, but rather functional immunity for actions carried out in good faith in pursuance of their duties.[40] However, the draft Law does not set out criteria for deciding whether to lift the immunity or inviolability of the Prosecutor General. These provisions should be amended accordingly.

60. While there must be safeguards against arbitrary and unlawful prosecution or detention of the Prosecutor General, the involvement of the Sejm in the process of lifting the immunity and inviolability unnecessarily contributes to the politicisation of the relevant criminal investigations. Certain interlocutors suggested that the Supreme Court might be an appropriate body to decide on this issue. Also, in the systems where prosecutorial councils have the necessary degree of independence, including independence from the Prosecutor General, such competence could be allocated to them.[41] Ultimately, it will be for the domestic authorities to find the most appropriate solution to secure that the decision on lifting or maintaining the immunity and inviolability of the Prosecutor General can be taken in an independent and impartial manner. At any rate, the Venice Commission recommends that the competence of the Parliament be removed from this process.

61. Apart from that, it is pertinent to recall the challenges in ensuring an independent and impartial criminal investigation into allegations against the Prosecutor General, as discussed by the ECtHR, the Venice Commission, and other international bodies.[42] Given the hierarchical structure of the prosecution service, with the Prosecutor General holding extensive powers, it may be difficult for prosecutors to conduct criminal investigations against the Prosecutor General. In light of these concerns, consideration should be given to assigning this responsibility to an independent body outside the usual hierarchy of the prosecutorial system.

D. Counterweight to the powers of the Prosecutor General

1. National Prosecution Council

62. The draft Law proposes deleting Chapter 2 of Section II (on the National Council of Prosecutors to the Prosecutor General). Instead, Chapter 2A will introduce a new National Prosecution Council. Article 50 of the draft Law (final provisions) clarifies that the former Council will be abolished as of the date that the new Public Prosecutor General elected under the new procedure takes his/her oath.

(a) Composition

63. The composition of the new Council is regulated in draft Article 42b with four representatives of political institutions (i.e. of the President, of the Speaker of the Sejm, of the Marshal of the Senate and of the Minister of Justice), one representative of Prosecutor General's Office, one representative of public prosecutors of the Institute of National Remembrance and an unspecified number of representatives elected in respect of each regional public prosecutor's office. According to the current structural hierarchy of the prosecution service, there are 11 regional offices[43]. For the sake of legal clarity, it would be advisable to give a specific number of such representatives in the draft Law.

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[40] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §61; CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, § 29; See also CCPE Opinion No. 9(2014), Article X and its Explanatory Report (para. 88).

[41] Venice Commission, CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, § 93.

[42] See the overview in Venice Commission, CDL-AD(2022)032, Bulgaria - Opinion on the draft amendments to the Criminal Procedure Code and the Judicial System Act, §§ 7-13.

[43] See the structure on the website of the National Prosecutor's Office at https://www.gov.pl/web/prokuratura-krajowa/lista-prokuratury-regionalne.

64. Assuming that the representatives of the prosecutor's offices are prosecutors themselves, [44] the Council will be composed of 17 members of which a substantive part is elected by their peers.[45] This would be in line with international parameters.

65. As regards the four representatives of state authorities, the draft Law does not provide for any eligibility criteria to prevent these members from acting as political representatives within the Council. Typically, such positions would be reserved for lay members drawn from other legal professions and academia. As the regulation currently stands, the Venice Commission's primary concern is that the new Council still lacks meaningful input from external experts, such as practicing lawyers, criminal-law judges, university professors, researchers, and other members of civil society.[46] Although a Social Council is envisaged (see paragraphs 74-77 below), the Venice Commission considers that the participation of civil society members in the National Prosecution Council is necessary for a proper balance in its composition. The Venice Commission recommends providing in the draft Law eligibility criteria ensuring that the members nominated by the state authorities be chosen amongst practising lawyers, criminal-law judges, academics, and other members of civil society.

66. As the hierarchy of the prosecution service in Poland includes not only regional offices, but also circuit and district offices, the Venice Commission recommends that the system for appointing the members of the Council ensures that all the levels of the prosecutorial system are represented.[47]

(b) Powers of the National Prosecution Council

67. The powers of the new Council enumerated in draft Article 42i are similar to those of the "old" Council, i.e. the amendments insist on "a purely advisory role of this institution"[48]. The tasks of the Council will include, *inter alia*, giving opinions on draft normative acts concerning the public prosecutor's office, taking a position on issues relevant to the functioning of the public prosecutor's office, enacting rules of professional ethics and ensuring compliance, expressing views on training and measures taken to improve professional qualifications. Most of these powers may be summarised as the competence to issue advisory opinions.

68. However, the Council does *not* have any decision-making powers in respect of the prosecutors' appointment, career, and discipline. The proposed amendments to Article 74 provide for prosecutors to be appointed by the Prosecutor General "after seeking the opinion" of the Council, which is not binding. The Venice Commission reiterates that it seems inappropriate to leave the appointment process entirely to the prosecutorial hierarchy alone.[49] If the current system is to be maintained, it is recommended that the draft Law should at least introduce the obligation for the Prosecutor General to provide a reasoned decision to override such advice, and the fact that the advice was overridden should be disclosed.[50] In addition, the Venice Commission notes that the application of disciplinary sanctions or other decisions relevant to the career of a prosecutor are currently outside the competence of the Council.

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[44] It might be worthwhile stipulating that explicitly in the draft law.
[45] Venice Commission, CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, § 26. See also CCPE, Opinion No. 18 (2023) "On Councils of Prosecutors as key bodies of prosecutorial self-governance", § 46.
[46] See Venice Commission, the 2017 Opinion, § 104.
[47] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 66.
[48] See the criticism in the 2017 Opinion, § 102.
[49] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 48.
[50] See the 2017 Opinion, § 84.

69. As there are no well-established international standards on the prosecutorial councils, there remains a wide margin of appreciation of States in this respect. With regard to Poland, where the organisation of public prosecution includes the prosecutorial council, the Venice Commission has already recommended that the purely advisory role of such council had to be reconsidered.[51] The general trend towards promoting the independence and autonomy of the public prosecution service suggests for a stronger role for the prosecutorial council, which should be an independent body itself. The Venice Commission would like to reiterate this recommendation.

70. The Venice Commission has acknowledged that if the prosecutorial councils are composed in a balanced way, including prosecutors, lawyers and representatives of civil society, and if they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input into the appointment of prosecutors, applying disciplinary measures against them and shielding the prosecutors (at least to some extent) from political influence. Depending on the method of appointment, the prosecutorial councils can provide democratic legitimacy to the prosecution system.[52]

71. The Venice Commission wishes to stress that one of the key advantages of having a prosecutorial council is that it can act as a counterweight to a powerful Prosecutor General. The prosecutorial council may dilute the power of the Prosecutor General, give the prosecutors a say in the processes that affect their career and discipline, and free up the Prosecutor General to deal with the complex legal issues.

72. In that respect, Article 42i of the draft Law provides for certain powers of the Council which are relevant, for example: nomination of the candidates for the position of the Prosecutor General; requesting the disciplinary court to hold the Prosecutor General liable for disciplinary offences. However, all in all, these powers appear to be insufficient to act as a proper counterweight. The Venice Commission recommended above that the role of the National Prosecution Council in the appointment of the Prosecutor General should go beyond merely nominating candidates alongside other bodies. Instead, the Council should be granted the authority to provide expert input on the merits of all candidates, select (and shortlist) them for the appointing body. Furthermore, the Council could also be entrusted with responsibilities related to the career of the other prosecutors. The proposed regulation currently falls short of the role of the Council as set out in Article 42a of the draft Law, according to which the Council *"shall guard the independence of public prosecutors"*.

73. In the light of the foregoing, the Venice Commission recommends strengthening the role of the National Prosecution Council – provided that its composition is modified as recommended above – in the draft Law by granting it broader powers, notably as concerns its expert role in the selection of the candidates for the position of Prosecutor General as well as the appointment, career and discipline of the other prosecutors, in order to effectively fulfil its role as a guardian of prosecutorial independence.

2. Social Council

74. The draft Law envisages the establishment of the Social Council to the Prosecutor General. According to the Explanatory Report, *"the establishment of this body is an expression of the desire to socialise the processes of managing the sphere of public and ensure the participation of civil society representatives in the exercise of power. The establishment of an auxiliary body of a civic (social) nature, with consultative and advisory powers, can also be seen as the introduction of a balancing element in the operation of a public institution, which enjoys legally sanctioned independence from other public authorities."*

[51] See the 2017 Opinion, § 114.
[52] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 65.

75. The Social Council has a mixed composition, including persons designated by the National Bar, the National Council of Legal Advisers, the Ombudsman, the General Council for Science and Higher Education, the Social Dialogue Council, and the Council of Public Benefit Activities.

76. During the country visit, the delegation of the Venice Commission was informed that the idea behind creating the Social Council is to honour civil society's role, strengthen public trust, and enhance transparency. The function of the Social Council will be to express opinions on important matters concerning the organisation and operation of the public prosecutor's office (draft Article 13r § 2). Yet, the description of its tasks in the draft Law is rather short and vague. The draft Law does not specify the methods that the Social Council will use to fulfil its tasks, such as access to information. This may lead to tensions with the tasks of other authorities, namely the National Prosecution Council. In any event, the Social Council's mandate must not extend to the domain of law enforcement, where it would be inappropriate for it to intervene in individual cases and investigation, thus interfering in the exercise of powers by the public prosecutor's offices.

77. In addition, there is reason to question whether the Social Council effectively guarantees the legitimate influence of civil society, or whether such influence would be more effectively achieved through the composition of the National Prosecution Council.[53] Nonetheless, given the important role civil society plays in upholding the rule of law, it may be appropriate to strengthen the relationship between the public prosecution service and civil society by establishing a specific body for this purpose.

3. Interaction of the Prosecutor General with the Executive

78. Draft Article 10a stipulates that the Prosecutor General shall undertake analytical work concerning the organisation and functioning of the public prosecutor's office, in cooperation with the Minister of Justice. This provision appears to seek consistency with the constitutional mandate of the Council of Ministers, which, under Article 146 § 4(7) of the Constitution, is responsible for ensuring the internal security of the State and maintaining public order.

79. The cooperation between the Prosecutor General and the Minister of Justice, as referred to in draft Article 10a, may be further improved by the introduction of a duty on the part of the Prosecutor General to adequately inform the Minister of Justice regarding the general state of affairs within the prosecution service.

4. Interaction of the Prosecutor General with the Parliament

80. The draft Law provides that the Prosecutor General shall submit to the Sejm and the Senate, annually, a report on the activities of the public prosecutor's office (draft Article 13p § 1). The report shall be public (draft Article 13p § 2). These provisions are intended to serve as an instrument of democratic accountability[54] and contribute to the transparency of the actions by the Prosecutor General ensuring public trust in his/her performance and the service that s/he leads.

81. However, the regular reporting should not extend to an obligation to report to the Parliament on the details of individual cases[55]. The Commission considers that the most natural consequence of the annual reporting would be a parliamentary debate and any ensuing policy

[53] See for similar observations in Venice Commission, CDL-AD(2024)018, Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland, § 72.
[54] See, for example, Report from European Conference of Prosecutors, Palermo, 5-6 May 2022, Thematic session I – prosecutorial independence, autonomy and accountability: different models, common challenges in protection of human rights, CDL-PI(2022)033, § 24.
[55] See Venice Commission, CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, § 25.

decision within the ambit of the Parliament's prerogatives. In the event that the application of that procedure discloses issues of legal liability of the Prosecutor General, such matters would have to be examined separately within the other mechanisms for ensuring a fair hearing.

E. Hierarchy, instructions and related issues

82. It is clear that the draft Law wishes to maintain a hierarchical model of the prosecution service with the Prosecutor General at the top of that hierarchy as the "chief prosecutorial body" (draft Article 1 § 2). It maintains the hierarchical model in which instructions may be given to subordinate prosecutors (see, *inter alia*, the proposed amendments to Articles 7, 13 and 34 of the Law).

83. In countries where the prosecution service is regarded as part of the executive, it is not uncommon to find a hierarchical model. A hierarchical system leads to uniformity of procedures, both nationally and regionally, and can thus bring about legal certainty.[56] Therefore, according to the Venice Commission's standards[57], the hierarchical model is acceptable and some form of hierarchical control over the decisions and activities of prosecutors is allowed. In a system of hierarchical subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. It is important to make a distinction between general instructions and case-by-case instructions: in a hierarchical system, not only general instructions but even case-by-case instructions may be allowed, provided that relevant safeguards are put in place (see below).

84. In its assessment of the 2016 reform of the public prosecution in Poland, the Venice Commission provided detailed analysis of the defective legal framework within which the internal individual instructions can be given to the subordinate prosecutors.[58] It concluded that the law *"effectively exclude[d] the internal independence of the public prosecutors"*[59]. Although the present draft Law does not aim to implement a comprehensive reform of the prosecution service, leaving this ambitious objective for a later stage, it remains pertinent to highlight certain key elements previously discussed in the 2017 Opinion, which the authorities are encouraged to address in their forthcoming comprehensive reform.

85. With regard to the case-by-case instructions, it is important to note that certain safeguards must be in place in order to protect the internal independence of the prosecutorial office [60]: (i) all instructions given by a senior prosecutor in a specific case must be reasoned[61] and in writing; (ii) in case of doubt as to the legality of an instruction, the lower prosecutor should have the right to initiate a review by a court or an independent body such as a prosecutorial council; (iii) the law should clearly establish that the parties to the case have access to the instructions given by a superior public prosecutor.[62]

86. Article 7 § 3 of the current Law stipulates that instructions concerning the content of the procedural action need to be given in writing or need to be confirmed in writing without delay. The

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[56] Venice Commission, CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, § 15.
[57] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§ 28, 30 and 31.
[58] The 2017 Opinion, paragraphs 45-60
[59] Venice Commission, 2017 Opinion, § 59.
[60] Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, § 92; CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, notably paragraphs 57-60. See also the Recommendation CM/Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system; Report from European Conference of Prosecutors, Palermo, 5-6 May 2022, Thematic session I – prosecutorial independence, autonomy and accountability: different models, common challenges in protection of human rights, CDL-PI(2022)033, §§13-14.
[61] Venice Commission, the 2017 Opinion, § 55.
[62] Venice Commission, the 2017 Opinion, § 112.

provision also stipulates that the order shall be included in the case file, so the parties to the case should be able to take note of any instruction being given. However, the law does not stipulate explicitly that an instruction needs to be reasoned, nor does it allow the lower prosecutor to initiate a review by a court or an independent body such as a prosecutorial council of an instruction which is deemed to be illegal. The law merely states that a prosecutor who does not agree with an instruction may request that the order be amended or that he may be excluded from the execution of the action or from participating in the case.

87. Apart from the issues of individual instructions, the Venice Commission has criticised Article 12 of the current Law which provides an exception to the principle of the secrecy of investigations, allowing the prosecutors to disclose information on specific cases on particularly broad grounds to unlimited and unspecified addressees.[63] Despite the proposed amendments to Article 12, the criticism remains valid. The wording used in Article 12 § 1 would still be too broad permitting the prosecutors to disclose information "*if such information may be important for state security or its proper functioning*". The Venice Commission has observed that "*in such an important matter as transmission of information about the on-going prosecutions, which may jeopardise different rights including the right to presumption of innocence, the relevant provision should avoid using open wording which may be subjected to a large interpretation*"[64].

88. In addition, issues remain regarding the hierarchical model of appointment in draft Article 74 § 1, promotions without a competition[65], and the lack of sufficient safeguards regarding the disciplinary liability of prosecutors. Also, during the country visit, the delegation of the Venice Commission was informed that while the prosecutors' tenure is secured against arbitrary dismissal, there have cases of abuse of the powers in the transfer or secondment of prosecutors.

89. In this context, it should be noted that the draft Law provides for transitional measures in view of the establishment of the new Office of the Prosecutor General and the abolition of the office of the National Prosecutor's Office (final provisions, Articles 40 and 44 of the draft Law). During the country visit, some interlocutors argued before the delegation of the Venice Commission that there had been cases of abuse in the appointment of prosecutors to the National Prosecutor's Office during the previous government, and that the screening of the staff in that office had been necessary. These transitional measures were seen as a part of more general action plan on the restoration of the rule of law. In this context, there are two aspects which need to be addressed: (i) transfer of the current prosecutors who are covered by the security of tenure and (ii) selection of the "new" prosecutors of the Prosecutor General's Office.

90. As regards the transfers, sufficient safeguards against abuse are particularly relevant.[66] In this respect, the draft Law specifies several factors that the Prosecutor General must take into account when making the decision about transfer. Those factors refer, inter alia, to the qualifications and experience, including the period of secondments to higher positions and the scope and nature of the performed tasks; when the transfer implies relocation of the place of work, the drat Law requires that the personal situation of prosecutor be taken into account (final provisions, Article 44 §§ 3 and 4). The draft Law provides that such transfers must be reasoned and that they are open to judicial review (final provisions, Article 44 §§ 5 and 9). Introducing a judicial remedy is a welcome step, securing an important procedural safeguard. However, certain interlocutors expressed doubts about the effectiveness of this remedy in view of possible delays in the determination of such disputes. While the proposed regulation appears to provide a number of safeguards, it remains to be seen how these provisions will be applied in practice.

[63] Venice Commission, the 2017 Opinion, §§ 70-80.
[64] Venice Commission, the 2017 Opinion, § 80.
[65] Venice Commission, the 2017 Opinion, § 85.
[66] Venice Commission, CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, § 149.

91. As regards the selection of the "new" prosecutors for the Public Prosecutor General's Office, the Venice Commission, as mentioned above, generally stresses the role of the expert input and competition procedure for promotions.[67] Yet, the transitional arrangements do not refer to the role of the National Prosecution Council or offer any other constraining and checking elements within the process. Accordingly, the authorities should give further consideration on ensuring additional safeguards for transfers and appointments within these transitional arrangements.

IV. Conclusions

92. At the request of the Minister of Justice of Poland, the Venice Commission has assessed the draft amendments to the Law on the Public Prosecutor's Office.

93. The Venice Commission welcomes the proposed separation of the offices of the Prosecutor General and the Minister of Justice, which addresses a key concern expressed by the Venice Commission in its 2017 Opinion that the merger of these offices had undermined the independence of the prosecution service. However, designing a new system in which the Prosecutor General and the Minister of Justice are separate, is a highly complex objective.

94. The draft Law sets out a procedure for the appointment of the Prosecutor General, establishes clear eligibility criteria for candidates, and involves both chambers of the Parliament in the election of the Prosecutor General, with the Sejm electing the Prosecutor General by an absolute majority. The proposed modalities are designed to ensure, to the extent permitted by the current political climate, a broader consensus in the selection process, while seeking to avoid the risk of deadlock in the appointment.

95. Furthermore, the draft Law introduces changes to the renamed National Prosecution Council to provide some counterbalance to the powers of the Prosecutor General and establishes a Social Council to the Prosecutor General, aimed at enhancing the transparency of the office.

96. The draft Law does not address all the recommendations of the 2017 Opinion of the Commission, notably those concerning the revision of the excessively broad powers of the Prosecutor. The Venice Commission is aware that this draft Law is considered by the authorities as an initial and urgent step in the larger reform process, with the understanding that the remaining issues will be taken up in the next phase of comprehensive reforms of the public prosecution system in Poland. The Commission underlines nevertheless the importance of such future, comprehensive reforms.

97. At the same time, the Venice Commission has identified a number of issues in the proposed amendments, in particular regarding the procedures for the appointment and accountability of the Prosecutor General, as well as the composition and powers of the National Prosecution Council. The Venice Commission therefore encourages the authorities to give careful consideration to these issues in their further work on the draft law, taking into account the recommendations set out in this Opinion.

98. In particular, the Commission makes the following key recommendations:

(i) As concerns the selection of the candidates for the position of Prosecutor General, the National Prosecution Council instead of being tasked to submit three candidates to the Sejm, could be entrusted (provided that its composition is modified as recommended) to carry out itself the selection and possibly the shortlisting of the candidates (after a public call) on the basis of the criteria established by the law;

[67] Venice Commission, the 2017 Opinion, §§ 82 and 85.

(ii) At any rate, if the system of nominating entities is maintained, the political groups in the Parliament should not be given the power to submit candidates for the position of Prosecutor General; the Bar Association and the National Council of Legal Advisers could be included in the list of nominating entities; the modalities of nomination of a candidate by representatives of civil society should be determined;

(iii) The eligibility criteria for the position of Prosecutor General could be further refined to ensure that candidates possess the necessary competencies for this high-level organisational role, including managerial skills;

(iv) The competence of the Speaker of the Sejm to veto the candidates should be removed;

(v) The provisions concerning the early removal of the Prosecutor General on grounds such as “breach of oath” or “dignity of office” should be removed or substantively revised as they provide overly broad discretion and present a risk of abuse; procedural guarantees against the unfair dismissal of the Prosecutor General should be provided;

(vi) The draft Law should refer to the functional immunity of the Prosecutor General and it should indicate relevant criteria for lifting her/his immunity and inviolability; the involvement of the Parliament in these decisions should be removed;

(vii) A mechanism that ensures an independent process for conducting criminal investigations into credible allegations against the Prosecutor General should be designed;

(viii) Greater input from external experts should be ensured through the composition of the National Prosecution Council by, *inter alia*, clarifying eligibility criteria of lay members; at the same time, the draft Law should ensure that the prosecutorial component of the Council represent all levels of the prosecution service;

(ix) The National Prosecution Council could be entrusted with the appointment, career and discipline of the other prosecutors, to effectively fulfil its role as a guardian of prosecutorial independence;

(x) In line with the 2017 Opinion, the authorities should introduce additional safeguards to limit the powers of the Prosecutor General and other senior prosecutors in issuing instructions to lower-ranking prosecutors, as well as in the transmission of information on criminal cases.

99. Considering that this draft Law is a crucial element of the larger reforms to Poland's justice sector, the Commission recommends broad public consultations before proceeding to its adoption.

100. The Venice Commission remains at the disposal of the Polish authorities for further assistance in this matter.