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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

OPINION

ON THE AMENDMENTS OF 24 AUGUST 2021 TO THE LAW ON THE PROSECUTION SERVICE

Adopted by the Venice Commission at its 129th Plenary Session (Venice/online, 10-11 December 2021)

on the basis of comments by

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I. Introduction

1. By a joint letter of 23 September 2021, Ms. A. Motuzoc, President of the Superior Council of Prosecutors, and Mr A. Stoianoglo, Prosecutor General of the Republic of Moldova, requested an opinion of the Venice Commission on the amendments of 24 August 2021 to Law no. 3/2016 on the Public Prosecution Service (see the consolidated version of the law, provided by the requesting authorities, CDL-REF(2021)024). The Ministry of Justice provided the Commission with an alternative translation of the consolidated version of the law (CDL-REF(2021)094).

2. Ms Deskoska (member, North Macedonia), Mr Santos Pais (expert, Portugal), and Ms Suchocka (Honorary President) acted as rapporteurs for this opinion.

3. On 16 November a delegation of the Commission composed of Ms Deskoska, Ms Suchocka and Mr Santos Pais accompanied by Mr Dikov from the Secretariat held online meetings with representatives of the Parliament, the Ministry of Justice, the Prosecutor General's office, the Superior Council of Prosecutors, the Constitutional Court, as well as with representatives of civil society. The Commission is grateful to the Ministry of Justice for the excellent organisation of the online meetings.

4. This opinion was prepared in reliance on the English translations of the Law, provided by the requesting authorities and the Ministry of Justice. The translations 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 virtual meetings on 16 November 2021 and the written comments on the draft Opinion submitted by the Ministry of Justice and the Superior Council of Prosecutors of the Republic of Moldova. It was examined at the joint meeting of the Sub-commissions on the Rule of Law and on Democratic Institutions on 9 December 2021. Following an exchange of views with State Secretary, Mr I. Rusu and the President of the Superior Council of Prosecutors, Ms. A. Motuzoc, it was adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021).

II. Background

A. Political context and the rationale for the reform

6. According to the authorities, despite several attempts to reform the prosecution service of the Republic of Moldova in the past years, this institution enjoyed little public trust and suffered from lack of integrity, independence, and professionalism. The stated goal of the amendments of 24 August 2021 (hereinafter – the amendments) was to remedy to those problems.[1]

7. In their joint letter to the Commission, Mr Stoianoglo and Ms Motozoc offered a different account. According to them, the real reason for amending the Law on the Public Prosecution Service has been a long-standing confrontation between Mr Stoianoglo on the one side, and the current parliamentary majority and the President of the Republic, Ms Maia Sandu, on the other. This account was confirmed by some other interlocutors.

[1] The Ministry of Justice provided an "Information Note to the Government decision on approval of the draft Law Prosecution Service of the Republic of Moldova". According to the Information Note, "the need to adopt this draft law arises from the imperative of restoring citizens' confidence in justice, an important role in this regard being played by the Prosecutor General… Regrettably, the work of the prosecution is very often criticized on the grounds of political subordination, the initiation and termination of political/controversial cases, inaction and delay of high-profile cases, and the use of the prosecution as a corporate unit to protect and defend its own interests. All these factors increase the sense of inequality, injustice, unfairness and therefore significantly detract from the image of the Prosecution."

8. Mr Stoianoglo was appointed Prosecutor General in 2019 by former President Dodon (who was the main opponent of Ms Sandu at the last presidential elections). Mr Stoianoglo's appointment had been preceded by a highly contested selection procedure.[2] The Government of Ms Sandu, then Prime Minister, tried to annul the selection procedure, but this attempt failed and resulted in a vote of no confidence in the Government.

9. On 21 May 2020 the Constitutional Court of the Republic of Moldova (the CCRM) declared that the competition procedure which had led to the appointment of Mr Stoianoglo had been contrary to the Constitution.[3] At the same time, the CCRM did not invalidate the mandate of Mr Stoianoglo.

10. On 15 November 2020 Mme Sandu won the presidential elections. In the early parliamentary elections of July 2021, her party (PAS) won in a landslide a majority of seats in the Parliament. As explained in the request for the opinion, after the parliamentary elections political attacks on Mr Stoianoglo have intensified.[4] In particular, he was accused of corruption, abuse of office and obstruction of justice in some high-profile criminal cases. An MP for PAS, Mr Lilian Carp, requested the Superior Council of Prosecutors to open a criminal investigation into Mr Stoianoglo's alleged crimes.[5]

B. Adoption of the amendments and their main elements

11. On 10 August 2021, draft law no. 181 proposing amendments to Law no. 3 of 2016 was introduced in the Parliament and published on its website. On 12 August 2021, the draft law was examined in the Legal, Appointments and Immunities Committee of the Parliament. On 13 August 2021 the draft law was adopted in the first reading. On 24 August 2021, the draft law was voted in the second reading and became Law no. 102 amending Law no. 3 of 2016 on the Public Prosecution Service. The main features of the amendments are as follows.

12. The Superior Council of Prosecutors (the SCP) has been reorganised. The Constitution does not describe the composition of the SCP, requiring only that a substantial part of its members should be prosecutors representing different parts of the prosecution system. So, in the Moldovan legal order those matters are regulated by the law. Before the amendments the SCP had 15 members:

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[2] The appointment of Mr Stoianoglo had been preceded by the amendments to the law made in 2019: the number of the members of the Superior Council of Prosecutors (SCP) had been increased from 12 to 15. The 2019 amendments had also provided for a pre-selection of candidates to the position of the Prosecutor General by a Committee under the Ministry of Justice, which would propose candidates to the SCP. Those amendments have been analysed by the Venice Commission in an amicus curiae brief for the Constitutional Court of the Republic of Moldova (CCRM) (CDL-AD(2019)034). The Commission did not object against having 15 members in the SCP – which led to a lower ratio of the "prosecutors elected by their peers" – provided that they remained a substantive part of the SCP. As to the special commission involved in the process of selection of candidates to the prosecutorial positions, the Venice Commission argued that his model could be constitutional only if it did not usurp the substantive decision-making power of the SCP to appoint or dismiss the PG.

[3] In particular, the CCRM found that the participation of the evaluation commission in the selection of candidates had been against the Constitution which entrusted this function to the SCP only.

[4] In particular, public statements concerning Mr Stoianoglo's alleged unprofessionalism and misbehaviour have been made by the President of the Republic, the Speaker, the Prime Minister and the Minister of Justice, MPs etc.

[5] In particular, politicians from the ruling PAS party accused Mr Stoianoglo of facilitating the release of Mr Platon, who was one of the main protagonists of the "Moldovan laundromat" scheme which involved money-laundering of hundreds of millions euros through Moldovan banks. Mr Stoianoglo also opened a criminal case against the former head of the Anti-Corruption Prosecutor's Office, who was behind the prosecution of Mr Platon. There were allegations of Mr Stoianoglo's wife being a beneficiary of some compagnies belonging to Mr Platon. Mr Stoianoglo denied those allegations, claiming that the accusations against Mr Platon had been fabricated.

- four members of the SCP were representatives of civil society appointed by the President of the Republic, the Parliament, the Government, and the Academy of Sciences of Moldova respectively;[6]
- five were prosecutors elected by the General Assembly of Prosecutors from among active prosecutors (one from the PG's office and four from territorial and specialised offices), and, finally,
- the SCP had six *ex officio* members: the PG, the chief prosecutor of Gagauzia, the President of the Supreme Judicial Council (the SJC), the Minister of Justice, the President of the Bar, and the Ombudsman.

13. This model – with 15 members of the SCP – was in place since 2019. Under the previously existing legislation the SCP had 12 members. The 2021 amendments again reduced the number of members of the SCP to 12. Only three *ex officio* members remained:
- the Ombudsperson,
- the Minister of Justice, and the
- President of the Supreme Judicial Council.

Three *ex officio* members were excluded:
- the PG,
- the Chief prosecutor of Gagauzia, and
- the President of the Bar.

In addition, the retirement age for the members of the SCP was reduced to 65 years. Those measures had immediate effect (on their application see below).

14. The second major change concerned the mechanisms of accountability of the PG. The amendments provided for an automatic suspension of the PG if a criminal investigation is opened against him/her. In the case of a suspension of the PG (or in any other situation where the position of the PG becomes vacant), an interim PG may be appointed for a maximum of one year, by the President of the Republic at the proposal of the SCP.

15. The amendments also provided for the possibility to conduct an *ad hoc* performance evaluations of the PG, once a year, by a specially created Evaluation Commission (EC) composed of 5 members: one proposed by the President of the Republic, one by the Ministry of Justice, one by the Supreme Judicial Council, one by the SCP, and one by the PG. A negative assessment may lead to the dismissal of the PG by the SCP with the approval of the President of the Republic.[7]

16. The PG may also be dismissed for a disciplinary violation, as a result of the proceedings which are conducted by a Disciplinary Commission (DC) composed similarly with the EC. The conclusions of the DC are transmitted to the SCP which takes the final decision and may propose to the President the dismissal of the PG.[8]

C. Events subsequent to the adoption of the amendments

17. On 3 and 21 September 2021, Mr Stoianoglo, in his capacity of the PG, lodged two complaints before the CCRM claiming that the amendments were unconstitutional. He also asked

[6] The translation of the law provided by the requesting authorities mentioned only three civil society members; however, as confirmed by the Ministry of Justice, the actual text speaks in Romanian of four members, as described in the text.

[7] See Article 39-1 (9). In respect of other prosecutors such decision is made by the Performance Evaluation College composed of 7 members: 5 prosecutors elected by their peers and 2 civil society representatives appointed by the SCP.

[8] Article 52-1 (8); again, for ordinary prosecutors the disciplinary sanction is imposed by the College for the discipline and ethics, composed similarly with the Performance Evaluation College.

the CCRM to suspend the application of the amendments pending the examination of his complaint. In parallel, similar complaints were introduced by two opposition MPs. The CCRM joined all these cases.

18. On 6 September 2021, President Sandu issued a decree which announced the termination of the mandate of one of the members of the SCP (appointed by President Dodon) who had attained by that time the retirement age of 65 defined in the amendments. A new member would be appointed in his stead by President Sandu, following a competition.

19. On 24 September 2021, the CCRM stayed the implementation of the presidential decree pending the examination of the constitutional complaint introduced by the PG and the MPs.

20. On 30 September 2021, the CRRM adopted an inadmissibility decision (case no. 198a/2021) rejecting all the complaints introduced by the PG and the MPs. The arguments of the CCRM will be discussed in more details below, in Section III of the Opinion ("Analysis").

21. On 1 October 2021, five members of the SCP requested to convene an extraordinary meeting in order to examine the allegations against the PG. On 5 October 2021 the SCP (in a new composition, including the member newly appointed by President Sandu) decided to appoint a prosecutor (Mr Furtună) to investigate these allegations. Within hours after his appointment Prosecutor Furtună ordered the arrest of Mr Stoianoglo which was implemented immediately with the assistance of the officers of the Security Service. The moment of arrest was filmed and shown on TV. Following a 72-hours' detention, Mr Stoianoglo was placed under house arrest.

22. On 6 October 2021, the SCP suspended Mr Stoianoglo and his Deputies pending criminal proceedings and elected Mr Dumitru Robu, deputy prosecutor of the Chisinau municipality, as interim PG.

23. During the meetings the rapporteurs were informed that in November 2021 President Sandu addressed a formal request to the SCP seeking an extraordinary evaluation of the activities of the PG, with reference to new Article 31-1 of the law.

III. Analysis

A. Scope of the opinion

24. Both critics and proponents of the reform agreed that the reform was closely related to the figure of the current PG, Mr Stoianoglo. This is demonstrated by the events which followed the adoption of the amendments, namely the suspension of Mr Stoianoglo as PG, his arrest following criminal proceedings brought against him, and the launching of the evaluation procedure in his respect. The political context in which the amendments were adopted and implemented is certainly important for a better understanding of their purpose and meaning.

25. However, the mandate of the Venice Commission is limited to the examination of legislative texts, and does not stretch to assessing the validity of specific accusations against Mr Stoianoglo or the question of legality of his suspension, detention, etc.

26. That being said, the Venice Commission reiterates that Mr Stoianoglo – as any other person – is entitled to a fair trial. In some European countries, the Prosecutor General, due to his or her constitutional rank, is entitled to be tried by a special judicial forum, for example a chamber of the Supreme Court. This is seemingly not the case in the Republic of Moldova, which may affect public confidence in the independence and fairness of the criminal proceedings brought against him.

27. Furthermore, despite the serious allegations put forward against him, the presumption of innocence of Mr Stoianoglo should be respected. Holders of public offices should show restraint when commenting on Mr Stoianoglo's criminal case. Nothing in the present opinion should be interpreted as prejudging the findings of the national courts and other competent bodies (disciplinary or others) about the professional record of Mr Stoianoglo or about any offence that might have been committed by him.

B. Adoption of the amendments

28. The critics of the reform maintained that the amendments had been adopted in a rushed manner: the draft law had been introduced and submitted for consideration in the first reading without any preliminary public consultations and without first obtaining the opinion of the relevant institutions and stakeholders. Some NGOs also complained that they had not been consulted in the process.

29. The proponents of the reform stressed that the reform of the prosecution service was a top priority in the political programme of the ruling party. As a result, it was one of its first legislative initiatives after the parliamentary elections of July 2021. While normally August is the time when the Parliament is in recess, several extraordinary meetings were convened, and the amendments were adopted in two readings. The original draft was duly published on the Parliament's website, and the opinions of the relevant parliamentary committees – and in particular the Legislative Committee and the Anti-Corruption Commission – were obtained and also published.[9] The opposition MPs had participated in the plenary hearings and had proposed several amendments before the law was adopted in the second reading. A representative of the PG's office also participated in the deliberations. Ten days elapsed between the adoption of the draft law in the first and in the second readings, as provided by the rules of procedure of the Parliament.

30. The legislative procedure has been examined by the CCRM in its decision of 30 September 2021. The CCRM noted its limited role in those matters and the need to respect the Parliament's autonomy in enforcing its own procedural rules. It did not find that the process of adoption of the amendments violated any explicit constitutional requirement, and it was not the CCRM's task to assess compliance of the law with infra-constitutional rules. The CCRM noted, in addition, that the parliamentary opposition had formulated several amendments to the draft law which had been in fact debated in the Parliament.

31. The Venice Commission understands that there is a strong demand in the Republic of Moldova for an effective fight against corruption and effective justice. It is only natural that a new parliamentary majority would try to launch, without delay, legislative reforms which were at the heart of its political program.

32. However, urgency should not be confused with haste. While there are no international standards on how long the procedure in the Parliament has to last, the procedure has to guarantee a meaningful political discussion both within the Parliament and in other public fora. As it has been repeatedly pointed out by the Venice Commission, democracy governed by the rule of law is also about deliberation and a meaningful exchange of views between the majority, the opposition, and the society.[10] The Venice Commission acknowledges, at the same time, that

[9] https://www.parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/5572/language/ro-RO/Default.aspx .

[10] Venice Commission, CDL-AD(2020)036, Albania – Joint Opinion of the Venice Commission and the OSCE/ODIHR on the amendments to the Constitution of 30 July 2020 and to the Electoral Code of 5 October 2020; CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code; see also Report on the rule of law, (CDL (2016)007).

the problem of rushed adoption of institutional reforms following a change in the ruling majority is not exclusive to Moldova.[11]

33. It is quite unfortunate that the draft amendments were introduced in August, which is the peak of the holidays period, and that this initiative was not *preceded* by a transparent and thorough public debate involving the main stakeholders – and in particular the SCP itself – and experts.[12] Indeed, as follows from the decision of the CCRM and the explanations of the authorities, the minimal procedural requirements were formally respected, and some discussion took place between the two readings, both in the relevant commissions and in the plenary sitting. However, for a reform which involves the restructuring of a key State institution, essential to the maintenance of the rule of law and a trusted judicial system, a more thorough deliberative process is always advisable. Complying only with the minimal procedural benchmarks affects the quality of the adopted legislation and might have been the reason for many flaws in the law identified below.

C. New composition of the Superior Council of Prosecutors

34. As a result of the amendments, prosecutors elected by their peers would represent five out of twelve members of the SCP. The other members represent different branches of power or independent institutions. As noted by the CCRM in its decision of 30 September 2021, following the amendments the prosecutors would still represent more than 40% of the total number of members of the SCP, which is a "significant part" of the total membership, as required by Article 125 1(2) of the Constitution. The CCRM noted that the prosecutors should not necessarily enjoy the same level of independence as judges, and hence the prosecutorial council should not be dominated by the prosecutors. According to the CCRM, the new composition of the SCP respects the independence of the prosecution service and, at the same time, avoids corporatist self-governance.

1. Level of regulations

35. Before turning to the essence of the amendments, the Venice Commission observes that in the past years the composition of the SCP has been changed twice - in September 2019 and in August 2021. In 2019, the number of members was increased from 12 to 15, and in 2021 it was reduced back to 12. Such frequent changes may give the impression that each respective parliamentary majority has tried to change the balance of power in the SCP in its favour.

36. The Venice Commission notes that the Constitution of Moldova does not define the composition of the SCP. It only provides that the prosecutors should represent a substantive part of its members. The law on the prosecution service was adopted as an organic one, which, in the Moldovan system, means that it needs the support of the majority of all the MPs and adoption in two readings (contrary to ordinary laws which can be adopted in one reading by the majority of the MPs present). In the context of the Republic of Moldova it might be more appropriate to regulate those questions in the Constitution, in order to avoid that each new parliamentary majority can "reshuffle" the SCP to increase its influence there.[13]

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[11] A similar situation occurred in Poland after the elections in 2015 or in Ukraine after the elections of 2019.

[12] Venice Commission, CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, paras. 74 – 77.

[13] See Venice Commission, CDL-AD(2020)001, Moldova, Republic of - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending and supplementing the constitution with respect to the Superior Council of Magistracy, paras. 50 and 68, in which the Commission recommended the constitutional

2. The new composition of the Superior Council of Prosecutors

37. In the constitutional order of Moldova, provisions on the prosecution service are included in Chapter IV of the Constitution which relates to the judiciary. The prosecution service is defined as an "autonomous" public institution "within the judicial authority" (associated with the judiciary - see Article 124 (1)). Furthermore, as transpires from Article 125-1 of the Constitution, the public prosecution service is not dependent on the Minister of Justice or the Government but is governed by the SCP. The law on the Public Prosecution Service therefore provides that the prosecution service should be "independent from the legislative, executive and judicial powers, any political party or social-political organization, as well as from any other institutions, organizations or individuals".[14] The law proclaims that the prosecutors are subject only to the law, enjoy operational discretion in performing their duties, should be free from any external interference, are entitled to adequate pay, etc. These principles apply to the prosecution service as a whole, and, indeed, to the PG as the top executive of the prosecution system.

38. Most importantly, the "autonomy" of the prosecution service is ensured at the constitutional level by the establishment of the SCP which, pursuant to Article 125-1 of the Constitution, acts as the guarantor of the independence and impartiality of prosecutors. Article 68 of the Law on the Public Prosecution Service proclaims that the SCP is an independent body which is "entitled to participate to the establishment, operation and self-management of the Public Prosecution Service system". The independence/autonomy of the SCP is achieved primarily through providing for an appropriate composition and the method of election of its members.[15]

39. Before the amendments seven members out of 15 were prosecutors (five were elected by their peers and two were members *ex officio*). After the amendments five members out of 12 represent the prosecution system (all elected by their peers). Thus, the overall proportion of the prosecutors has been slightly reduced.[16] However, it is difficult to disagree with the CCRM that the prosecutors elected by their peers still represent a "substantive part" of the SCP. This is in line with the Venice Commission's own approach in this respect. The Venice Commission always stressed that there is an important difference between standards regarding judges and prosecutors.[17] While prosecutors should be protected from political interference, and while a prosecutorial council may offer such protection, there is no requirement that such a council should necessarily be dominated by the prosecutors. The Venice 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.[18]

40. What is important is that the composition of the council is *pluralistic* enough[19] to ensure that the prosecutors cannot govern alone, and, at the same time, that the lay members whose election was secured by the votes of the majority or who represent the executive cannot easily outvote

entrenchment of the composition of the Supreme Council of Magistracy. This recommendation is applicable *mutatis mutandis* to the SCP as well.

[14] See Articles 3 (3), (4) and (5).
[15] Other important factors affecting the independence of this body are the procedure of taking decisions within the council and their legal force.
[16] 46,6 % in the "old" council; 41,6% in the new one.
[17] See the 2017 Opinion on Bulgaria, cited above.
[18] Venice Commission, CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, para. 45.
[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, paras. 33, 35 and 36.

them.[20] Where all lay members are elected by the Parliament, the Venice Commission recommended their election by a qualified majority or on the basis of a proportional system, in order to prevent political control of this body by the parliamentary majority.

41. The new composition of the SCP remains sufficiently pluralistic. Out of 12 members, the prosecutors are represented by five members and are, therefore, the biggest group. The other members are, by contrast, not homogenous and represent other branches of power and institutions. Admittedly, four lay members may be seen as affiliated with the ruling majority, but that would be the case only if they are appointed simultaneously, and only if the President belongs to the same political family as the majority in Parliament (which is the case now).[21] If those members are replaced incrementally, there is no reason to see them as a politically monolithic group. Three members represent independent institutions (the Supreme Judicial Council, the Ombudsperson, and the Academy of Science). That means that neither group can govern alone, and each group should seek alliances with other groups or individual members to pass decisions.[22]

42. This model is not without flaws. Thus, there is always a risk of behind-the-scenes political deals between the prosecutorial members and a certain number of lay members. Furthermore, independent institutions or officeholders may in practice be not as independent as they are in theory. However, any pluralist model is better than a model where the council is dominated by a single group of prosecutorial members, subservient to the PG, or a monolithic group of political appointees loyal to the ruling majority.

3. Choice of the *ex officio* members; exclusion of the Prosecutor General

43. Under the amendments, the SCP has three *ex officio* members: the President of the Superior Judicial Council (the SJC), the Minister of Justice (the MoJ), and the Ombudsperson. There are weighty arguments both for and against including these three officeholders in the composition of the SCP.

44. As regards the President of the SJC, some interlocutors noted that since the PG is not a member *ex officio* of the SJC, the President of the SJC should not be an *ex officio* member of the SCP. The Venice Commission is not persuaded that a perfect symmetry between the SJC and the SCP is needed.[23] Whether or not judges should participate in the governance of the prosecution service depends on the national context. By contrast, participation of prosecutors in the governance of the judiciary is more problematic, because of a higher standard of judicial

[20] Differently, the CCPE has advocated that the prosecutors should be in a slight majority in the prosecutorial councils.

[21] Provided that all of those members were elected by the very same parliamentary majority which controlled the Government, and that the President was of the same political colour as the parliamentary majority.

[22] The composition of the SCP has already been assessed by the Venice Commission in the amicus curiae brief for the Constitutional Court of the Republic of Moldova, where the Venice Commission pointed out that "[t]he addition of three new members to the SCP (the President of the Bar Association, the Ombudsman and a member of the civil society proposed by the Government) does not seem to threaten the independence of the prosecutors, because the composition of the SCP remains sufficiently pluralistic, the prosecutors still representing a relative majority there. The same concerns the presence of the Minister of Justice as an ex officio member of the SCP."

[23] In the 2017 Opinion on Bulgaria, Venice Commission, (CDL-AD(2017)018, Opinion on the Judicial System Act), the Venice Commission noted (para 40) that "While judges should be independent, this concept is not fully applicable to the prosecutors; it is more accurate to speak of 'autonomy' rather than full-fledged 'independence' of the prosecution service. Certain asymmetry of institutions and procedures applicable to the two branches of the judiciary is inevitable."

independence. That being said, the Venice Commission recalls that in an earlier opinion it suggested that the President of the SJC might participate in the SCP without the voting rights.[24]

45. The participation of the MoJ in the SCP is potentially more problematic. The Venice Commission has previously objected against the presence of a Minister in *judicial councils*, at least in the context when the questions of disciplinary liability of judges are decided.[25] For the *prosecutorial councils*, the position of the Venice Commission has been more flexible. In an opinion on Montenegro the Venice Commission recommended that the MoJ should not sit on the prosecutorial council but might delegate there a representative.[26] In an earlier opinion on Moldova, the Venice Commission accepted that the Minister might be a non-voting member *ex officio* of the SCP.[27] In a more recent opinion the Venice Commission did not see a problem with a MoJ sitting on the SCP with voting rights, provided that the composition of the SCP was sufficiently pluralistic.[28] In certain contexts the presence of the Minister in such a body may be not only acceptable but even useful.[29] On the other hand, it cannot be denied that the presence of a Minister reinforces the influence of the executive within the Council. The question of the presence of the Minister in a prosecutorial council may also be decided in the light of position of the prosecution service in the national legal order. It is more justified in countries where the prosecution is seen as an autonomous part to the executive, but not when it is closely associated with the judiciary, as in Moldova. In the latter case the Minister may still participate in the council but without voting rights on certain matters (like the disciplinary proceedings). [30]

46. As regards the Ombudsperson, it is quite unusual for a defender of rights to participate in the governance of the prosecution system. It is questionable whether the functions of a member of the SCP are compatible with the Ombudsperson's mandate.[31] Reportedly, in the Moldovan context, the Ombudsperson himself refused to participate in the work of the SCP. That being said, the Ombudsperson, as a politically neutral figure, may serve as an arbiter between the prosecutorial members and lay members affiliated with the Government, so his or her participation in a prosecutorial council may help avoiding deadlocks.[32]

47. GRECO has recommended abolishing the *ex officio* participation of the MoJ and the President of SJC in the SCP.[33] The Venice Commission, however, prefers not to take a firm

[24] Venice Commission, CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, paras. 131-133.
[25] See Venice Commission, CDL-AD(2007)028, Report on Judicial Appointments, para. 33; see also CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para 97.
[26] Venice Commission, CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, para. 38.
[27] Ibid.
[28] Venice Commission, CDL-AD(2019)034, Republic of Moldova: *amicus curiae*, para 36.
[29] Again, the situation is different as regards the judicial councils. See more in Venice Commission, CDL-AD(2018)011, Opinion on the draft amendments to the constitutional provisions on the judiciary, paras. 63 and 88.
[30] Ibid.
[31] See the Venice Principles (Principles for the Protection and Promotion of the Institution of the Ombudsman): " […] The Ombudsman shall not, during his term of office, engage in any political, administrative or professional activity incompatible with his independence or impartiality […]".
[32] In Venice Commission, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 60, the Venice Commission accepted that the Ombudsperson may participate in the composition of the body which conducts vetting procedures in respect of judges and prosecutors.
[33] GRECO Recommendation No. XV, 4th Evaluation Round on the Republic of Moldova.

stance on this point. As demonstrated above, there are serious arguments for and against this solution.

48. As concerns the exclusion of the PG as an *ex officio* member of the SCP, the Venice Commission agrees that these concerns are valid. It is important to avoid the transformation of the SCP into a personal fief of the PG. On the other hand, excluding the PG from taking important managerial decisions has clear downsides. It is only natural for the PG, in a hierarchically organised prosecution service, to participate in decisions about the appointments, career, and discipline of the prosecutors, to influence budgetary and organisational policies, and to participate in the development of professional standards and procedures. Indeed, the PG should not be able to take decisions alone – this is why the prosecutorial councils are created. However, completely excluding the PG from taking those decisions as an *ex officio* member, or at least not allowing him or her to participate in a non-voting capacity, is also objectionable, if the current ratio of prosecutorial and lay members (with lay members being in a majority) is to be maintained.

49. The Venice Commission observes that in an opinion on Serbia[34] it recommended to exclude the Prosecutor General from the prosecutorial council as an *ex officio* member. However, this recommendation should be seen in the light of the composition of the prosecutorial council *in Serbia* where prosecutors, under the amendments in question, would represent 5 out of 11 members. Since the Prosecutor General was the hierarchical superior of all five prosecutorial members, that made the figure of the Prosecutor General too powerful and warranted his/her removal from the council.

50. In general, participation of the Prosecutor General in a prosecutorial council should be evaluated not *in abstracto*, but in the light of several factors specific to each particular country, in particular:

- the composition of the council (whether the council is dominated by the prosecutorial or lay members);
- the organisation of the prosecutorial system (whether it is a hierarchical system with the Prosecutor General at the top, or a decentralised system where prosecutors are attached to the courts and not subordinated to the Prosecutor General from the procedural and administrative perspective);
- the competencies of the council (whether it decides on issues related to the discipline and careers of prosecutors, budgetary and organisational matters, etc., or those powers belong to other bodies);
- the powers of the Prosecutor General in the decision-making within the council (participation with the right to vote or in an advisory capacity only), and whether there are sufficient safeguards in the way how the council operates in order to counterbalance the excessive influence of the prosecutor general within the hierarchy, etc.

51. Turning to the situation in Moldova, the Venice Commission finds that the participation of the PG in the SCP is not objectionable if the PG has no voting rights or if the prosecutorial members in the reformed SCP remain in the minority, even together with the PG. If the PG returns to the composition of the SCP as an *ex officio* member with voting rights, that may require a revision of the composition of the SCP in order to preserve the balance between different groups of members. In a nutshell, it is important to avoid a situation where the PG, using his or her position vis-à-vis prosecutorial members (and even some lay members)[35] may dictate his/her will to the

[34] Venice Commission, CDL-AD(2021)032, Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, para. 84 et seq.

[35] That eventuality was discussed in an opinion on Bulgaria - see Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, para. 19.

SCP. Similarly, the executive or the President should not be in a position to dominate the SCP – it should remain a self-governing body not subordinated to any branches of the government. Thus, if the PG participates in the SCP without voting rights, the Minister of Justice may also participate there without the right to vote, in order to somehow balance the influence of the executive and the influence of the prosecutorial community within this body.

52. As regards the exclusion of the Chief Prosecutor of Gagauzia from the SCP as an *ex officio* member, the law might provide that one of the prosecutors elected by their peers should come from Gagauzia.

53. In conclusion, the Venice Commission recommends considering the return of the PG to the SCP as a member *ex officio*, while prosecutors elected by their peers should (continue to) represent a substantive part of the SCP. The return of the PG to the composition of the SCP may require a revision of its composition in order to preserve the balance amongst different groups of members, in order to exclude excessive influence of the PG within this body. One of the prosecutors elected by their peers could come from Gagauzia to compensate for the removal of the Gagauzian Chief Prosecutor as *ex officio* member.

D. New retirement age and its application to the sitting members

54. The critics of the amendments argued that the new provision providing for a mandatory retirement of lay members of the SCP who reached the age of 65 was aimed at the replacement of a particular member who had been appointed by the former President.

55. The Venice Commission notes that, as such, providing for a retirement age for a public official is not contrary to any international standard or principle. As noted by the CCRM in the decision of 30 September 2021, the idea of an age limit is not incompatible with the constitutional right to work. Such matters can be regulated by the legislature to ensure that certain office holders have the mental and physical capacity to perform their duties.

56. That being said, an age limit should not be introduced with the effect to terminate mandates of specific individuals, elected under the previously existing rules. The Venice Commission criticised such measures in an opinion on Poland,[36] and repeats this in the context of the Republic of Moldova. The Venice Commission notes that Article 76 (1) (i-1) of the law introduced the possibility of terminating the mandate of a member upon reaching the age of 65, and it was immediately put in application in September 2021.

57. Furthermore, Article 69 (4) is not consistent with Article 76 (1) (i-1) which provides for the termination of mandate of any member (lay member, *ex officio* member, or prosecutorial member).

58. Additionally, from the law is not clear whether the members whose mandate was terminated or will be terminated in the near future due to the application of the new age limit would have the right to appeal this measure before a court. The Venice Commission recalls that the right to appeal against such measures before a judicial authority may be derived from Article 6 of the ECHR, according to the case-law of the European Court of Human Rights (the ECtHR).[37] The Ministry of Justice, in their comments, clarified that the individual members who are dismissed have access to the three levels of jurisdiction, on the basis of provisions of the Administrative Code. It is unclear, however, whether this remedy would be efficient when the mandate is terminated directly by virtue of the law.

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[36] Venice Commission, CDL-AD(2017)031, Poland - Opinion on the draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the organisation of ordinary courts.

[37] See, mutatis mutandis, ECtHR, *Baka v. Hungary*, no. 20261/12, 23 June 2016

59. The Ministry of Justice, in their written comments, noted that the rule providing for the retirement of the *prosecutorial members* upon reaching the age of 65 existed under the previous rules. The August 2021 amendments only extended this rule to lay members, thus restoring the equal treatment of all members of the SCP, irrespective of their "pedigree". Thus, those amendments were not *ad hominem* and did not target specific individuals.

60. The Venice Commission is ready to accept this argument. What is problematic, however, is 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 rule. It is true that the security of tenure of members of the SCP is not guaranteed by the Constitution (which is silent on the duration of their mandate, age-limit, etc.). However, the appointment as a member of a constitutional body – which, according to the Constitution, is the main guarantor of the independence of the prosecutorial system, creates at least *some legitimate expectation* that the mandate will not be interrupted mid-term without a very good reason. The question is whether the declared goal of this amendment – putting all members of the Council on an equal footing as regards their retirement age – hampers the independence of this body and is a sufficiently strong reason for a premature termination of the mandate of some of its members. This is another argument in favour of entrenching the basic requirements to the members of the SCP and the conditions of early termination of the mandate in the Constitution.

E. Evaluation of the performance of the Prosecutor General

61. The draft amendments have introduced a new mechanism of *ad hoc* evaluation of professional performance of the PG by the Evaluation Commission (EC). The proponents of the amendments argued that before this reform the law contained no provisions allowing to hold the PG liable for underperformance. As a result, it had been impossible to remove Mr Stoianoglo despite his particularly poor professional record and instances of gross misbehaviour.

62. Ms Motuzoc and Mr Stoianoglo argued that the new procedure of evaluation of the PG's performance was detrimental to the independence of the PG. The procedure of evaluation may be initiated at the request of the President of the Republic, with the SCP playing no role in it. The grounds for the evaluation are vaguely formulated, and the negative evaluation could automatically lead to the dismissal.

63. The Venice Commission observes that the mechanism of *ad hoc* evaluations of the performance of the PG by a specially created commission, introduced by the amendments, appears to be quite uncommon in Europe. During the online meetings the authorities mentioned that they had been inspired by the Romanian experience of removal of top prosecutors; the Commission however recalls that the Romanian reforms of the prosecution service and their practical implementation were quite controversial, and were criticised both by the European Court of Human Rights (the ECtHR) [38] and by the Venice Commission itself.[39] In any event, the mechanism of "performance evaluations", as provided by the amendments, is open to criticism for a number of reasons.

1. Grounds for the performance evaluation

64. The law does not establish any indicator of "good" or "bad" performance. Those indicators – hence the possible grounds for the removal of the PG – are defined not in the law itself but in a regulation to be adopted by the SCP (see new Article 31-1 (5)). The law defines neither the scope of the evaluation nor the areas of the activity of the PG to be evaluated. It is unclear whether the

[38] See ECtHR, *Kovesi v Romania*, no. 3594/19, May 2020.
[39] See Venice Commission, CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, and the previous opinions on Romania cited therein.

EC will deal with the procedural activity of the PG (subject to provisions of the Criminal Procedure Code and other relevant laws) or rather with the managerial activity of the PG on running the prosecution service. The rapporteurs were informed that the SCP is in the process of developing the regulations on the performance evaluations of the PG. In the meantime, the President of the Republic has already requested the SCP – as provided by Article 31-1 (2) – to evaluate the performance of Mr Stoianoglo.

65. The CCRM decided that such arrangement did not contravene the Constitution. According to the CCRM, the law contained certain essential requirements of the performance evaluations (see Article 30) and delegated to the SCP the task to adopt more detailed regulations. The constitutional requirement that certain matters are to be "prescribed by law" was to be interpreted in the light of the case-law of the ECtHR which construed the concept of "lawfulness" broadly. It was thus permissible for the legislator to delegate the task of regulating these matters to the SCP, within the boundaries set in the law.

66. The Venice Commission will not argue with the CCRM regarding the constitutionality of the legislative delegation in this context, since the CCRM is better placed to interpret the national Constitution. However, from the rule of law perspective, entrusting the SCP with a virtually unlimited power[40] to define the material conditions in which the PG can be dismissed is a highly contestable approach. Such rules need to have the highest possible level of legitimacy. In the previous paragraphs the Venice Commission has already argued that the lack of constitutional entrenchment may be prejudicial to the stability of the prosecution system, and certain matters should be regulated not by an ordinary law but by an organic law adopted by a qualified majority or even in the Constitution itself. This approach applies *a fortiori* to the essence of the evaluation process. It may be necessary to keep certain rules flexible, and it is perfectly acceptable if the SCP *develops* substantive and procedural rules contained in the law. However, to give the SCP a *carte blanche* in *devising* such rules seems to be excessive.

67. The second point of criticism is related to the first one: it is difficult to understand how the performance evaluation under the amendments is different from the disciplinary liability. Both procedures (the performance evaluation procedure and the disciplinary procedure) can lead to the dismissal of the PG, although on seemingly different grounds. However, the law itself does not describe those grounds, or uses very vague formulas (such as the appreciation of the work progress and the determination as to whether the PG corresponds to the position he or she holds). Everything else is left to the regulations to be adopted by the SCP. Again, in its judgment of 30 September, the CCRM did not find any constitutional issue in respect of these amendments. For the CCRM, Article 23 of the Constitution, which contains an implicit requirement of the quality of the law which defines rights and obligations, may not be invoked *in abstracto*. As the contested provisions had not yet been applied, the CCRM declined to examine them. However, for the Venice Commission the question remains: the law does not explain what sort of underperformance may lead to the dismissal of the PG, and for the Venice Commission it is very difficult to comment on those provisions without seeing them. These provisions are at odds with the approach of the Venice Commission which noted, in a report on the European standards as regards the independence of the judicial system, that the law should clearly define the conditions of the prosecutor's pre-term dismissal.[41] In addition, there is a more general requirement of legal certainty in terms of foreseeability of the impact of the law.[42]

68. The third, and maybe most important point of criticism relates to the application of this new procedure to the suspended PG, Mr Stoianoglo. Not only has the procedure already started

[40] Article 30 (2) of the law, referred to by the CCRM, contains only very general description of how those evaluation criteria should look like.
[41] Venice Commission, CDL-AD (2010)040, (Part II: prosecution service).
[42] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para. 58.

without the evaluation indicators having been approved by the SCP, but, in all evidence, the proposal aims at applying those indicators *retroactively*. In an opinion on Turkey the Venice Commission observed that "disciplinary liability, or *any other similar measure* [italics added] should be *foreseeable*; a public servant should *understand* that he/she is doing something incompatible with his/her status, in order to be disciplined for it".[43] In principle, newly established performance indicators can only be applied to the future underperformance.

69. That being said, disciplinary liability should be distinguished from a more general assessment of integrity or professional competency of an officeholder, which can sometimes be demonstrated with the reference to the past behavior.

70. In sum, any evaluation of the past performance of Mr. Stoianoglo should not be conducted on the basis of the newly established indicators, and may only be based on such criteria of integrity and professionalism which could be uncontestably derived from the pre-existing rules or from the very nature of the mandate of the PG. It is impermissible to remove the PG for flaws in his/her performance or for a particular misbehavior if he/she could not *reasonably foresee,* at the relevant time, that he/she might be removed on account of such flaws or misbehaviour.[44]

2. Procedure for the performance evaluation and the composition of the Evaluation Commission

71. During the virtual meetings, two main issues were raised in respect of the procedure of the performance evaluation of the PG. The first concerned the composition of the EC and its relation to the SCP. The second question concerned the frequency of such evaluations. The parliamentary majority and the MoJ insisted that the SCP retained all its autonomy and independence with the proposed changes, despite the creation of bodies which were "to assist" the SCP in performing its functions.

72. On the first issue the Venice Commission observes that, according to article 31-1 (3) and (4) of the new law, members of the EC cannot be prosecutors in office nor persons subordinated to the PG. Members appointed by the President of the Republic and the MoJ cannot be public servants at all. It is thus very likely that all five members of the EC would have no prosecutorial background. It is unclear whether, in the current situation, Mr Stoianoglo – whose mandate has been suspended – would be entitled to appoint a member in this commission, or this power would pass to the interim PG.

73. Moreover, under Article 31-1 (3) the EC can function with only three members being appointed. That means that the process of evaluation may be entirely in the hands of the members appointed by the executive, who, in addition, would have no prosecutorial experience.[45]

74. In an opinion on Montenegro, the Venice Commission recommended that a performance evaluation commission should be quite independent from the Council and may include *some* lay members. The input of the outsiders may be useful since it would help to guarantee impartiality

[43] Venice Commission, CDL-AD(2016)037, Turkey - Opinion on Emergency Decree Laws nos. 667-676 adopted following the failed coup of 15 July 2016, para. 119.
[44] As stressed by the Venice Commission, the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it – see Venice Commission, CDL-AD(2016)007.
[45] The qualifications of the members of the evaluation commission should be in the field of law and public management, but no previous experience about prosecutorial work is required (Article 31-1(4)).

and independence of this body.[46] Thus, participation of the non-prosecutorial members in the work of the EC is perfectly acceptable. Similarly, the fact that the procedure of performance evaluation may be initiated by an external actor, not belonging to the prosecution system, is not, as such, objectionable. What is worrisome, however, is that in theory the EC may start functioning and take decisions without *any* member belonging to the prosecution system.

75. The CCRM found that that this procedure was not contrary to the Constitution. The Constitution did not extend all the guarantees of judicial independence to the prosecutors. Although the SCP, under the Constitution, was the main body responsible for the governance of the prosecution system, the Constitution did not exclude creation of subordinate bodies helping the SCP to perform its tasks, provided that those bodies did not usurp the substantial decision-making power of the SCP.[47] The function of the EC was to *propose* evaluation reports to the SCP, the latter retaining the ultimate power to take the decision. Such advisory function of the EC, in the context of the performance evaluation (as well as the advisory function of the Disciplinary Commission in the context of the disciplinary proceedings – on this see more below), was not contrary to the Constitution.

76. The Venice Commission generally concurs with this analysis. It recalls that in an *amicus curiae* brief for the CCRM it examined the question of the legitimacy of bodies subordinated to the SCP and assisting it in its tasks. The Venice Commission stressed that the creation of such bodies is permissible to the extent that they do not usurp the constitutionally defined role of the SCP. Thus, the composition of the EC is not that important if the EC remains an advisory body, and if the SCP is not bound by the findings of the EC but may come to a different conclusion.

77. That being said, in practice even an advisory body may have a decisive influence in the decision-making process, for example, when it has a better fact-finding capacity or a better expertise in the matter. In this case the role of the SCP may be reduced to a role of an appellate body, and that may be at odds with its constitutional role.[48] This risk is quite real, given the language of Article 31-1 (8) which provides that the SCP may not accept the proposed grading evaluation by the EC and/or return the report for a new evaluation in case of breach of procedure when that breach had a decisive effect on the results of the evaluation. It is difficult to see how the SCP may attribute a different grade to the PG if it does not do the evaluation itself.

78. Therefore, even if the final word belongs to the SCP, the question of composition of the EC is not irrelevant. The Venice Commission thus recommends providing in the law that the EC cannot function without at least some prosecutorial members being present, so that the composition of the EC mirrors, at least roughly, the composition of the SCP. Alternatively, the law might explicitly provide that the SCP is not bound by the findings of the EC and may entertain a fresh evaluation.

79. The power of the President of the Republic or of three members of the SCP to trigger the *ad hoc* performance evaluation also gives rise to concern. Most importantly, the President has a lot of influence in the whole process of evaluation: he or she may initiate the evaluation, delegate to the EC one of its members, and, finally, the President appoints one of the members of the SCP (even though this member, following the appointment, should act independently). That being said, there may be re some factors counter-balancing the possible excessive influence of the

[46] Venice Commission, CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§83-84.

[47] This part of the decision of the CCRM contains lengthy quotations from the Venice Commission's opinions on this matter.

[48] Venice Commission, CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", para. 84.

President: for example, if the final decision is really taken by the SCP in full independence, and if the decision of the SCP could be appealed against before an administrative court.

80. Moreover, the Venice Commission notes that the law does not contain any threshold requirement for opening a performance evaluation, which means that the President or three members of the EC may trigger the procedure even for very trivial reasons. The law does not provide for the possibility for the EC or the SCP to dismiss such requests as inadmissible, without engaging the full procedure of performance evaluation.

81. The Venice Commission is also concerned by the frequency of the performance evaluations. One evaluation procedure may be initiated every year. That means that the PG may be subjected to seven performance evaluations throughout his or her mandate, whereas ordinary prosecutors are evaluated every four years.[49] In the absence of specific indicators of performance evaluations (see above), it is difficult to say how demanding and burdensome this procedure might be for the PG's office. The risk is that undergoing such evaluations may distract the PG from fulfilling his or her mandate.

82. Furthermore, Article 31-1 (6) entitles the EC to seek and obtain from any person – including the PG him/herself or any subordinated prosecutor – any "data and information" which may be useful to assess the Prosecutor's performance. This clause may be used to obtain information on specific cases which the prosecution cannot disclose. In the past the PG had been repeatedly requested to provide specific information on pending cases, with reference to his membership in the Security Council (a body advising the President of the Republic on security matters). The Venice Commission finds it necessary to specify in the law that 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, for example).

83. That being said, the Venice Commission admits that there may be a need for some regular external evaluation of the PG's work. As demonstrated above, the new mechanism of *ad hoc* performance evaluations has many flaws, so the legislator might consider alternatives. For example, it should be possible to reinforce the mechanism of annual reports of the PG to the Parliament, provided by Article 11 (3) of the law, by describing the requirements to the content of such reports, the procedure of their discussion in the Parliament, and the legal consequences of the disapproval of such reports by the Parliament.

84. The Ministry of Justice, in their written comments, indicated that the legal effect of such hearings before the Parliament would be limited, since the decision on the career of the PG is in the hands of the SCP, under the Constitution. Indeed, only the SCP may propose the removal of the PG "for objective reasons" and "based on a transparent procedure" (see Article 125 (2) of the Constitution). The Venice Commission admits that the term "objective reasons" may be construed broadly. 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. However, the mechanism of performance of evaluation proposed by the amendments has too many flaws to satisfy the constitutional precept of "objective" evaluation based on the "transparent procedure". This mechanism should be reviewed: most importantly, the law should provide for more specific indicators of underperformance, the EC should include prosecutorial members, and the report of the EC should be clearly of an advisory nature.

[49] See Article 29 (2) of the law.

F. Disciplinary liability of the Prosecutor General

85. Article 52-1 of the law introduced by the amendments provides for a special procedure of removal of the PG through disciplinary proceedings, by a specially created Disciplinary Commission (DC), which is composed similarly to the EC. Unlike the performance indicators (which are to be defined by the SCP), the grounds for a disciplinary sanction are defined in the law (Article 38).

86. The procedure of opening of a disciplinary procedure and preliminary examination of a disciplinary case against the PG is identical to the performance evaluation procedure. Therefore, the recommendations formulated above – in particular, concerning the necessity to have prosecutorial members in the DC, qualifications of the members of the DC, the power of the President of the Republic to trigger the disciplinary proceedings, as well as the independence of the SCP in taking a decision on the merits – are valid in this context as well.

G. Suspension of the Prosecutor General and the appointment of a Prosecutor General *ad interim*

1. Automatic suspension of the Prosecutor General

87. New Article 55-1 provides for the suspension[50] of the PG if a criminal case is opened against him or her. This suspension is automatic, by operation of the law.

88. This provision has been examined by the CCRM, which found that the suspension of the PG and his/her Deputies did not amount to a breach of the presumption of innocence. According to the CCRM, suspending a PG who is a hierarchical superior of all prosecutors and investigators ensures an independent investigation of cases in which the PG may be implicated. In support of this conclusion the CCRM referred to the ECtHR judgment in the case of *Kolevi v. Bulgaria*. In that case the ECtHR found that Article 2 of the European Convention required that an investigation into an alleged murder implicating the then Prosecutor General of Bulgaria should not be conducted by the investigators hierarchically subordinated to the very same Prosecutor General. As to the suspension of the Deputies of the PG, according to the CCRM, they are appointed to their positions because of the personal trust of the PG in them, so their suspension would serve the same legitimate purpose.

89. The Venice Commission agrees that, in principle the suspension of the PG in a case where there is a pending criminal case against him or her is not incompatible with the presumption of innocence, for the reasons explained by the CCRM and also because maintaining the PG in office despite serious allegations against him/her could undermine public trust in the prosecution service. However, procedural safeguards should be in place to ensure that the suspension mechanism is not used arbitrarily. The Venice Commission reiterates its earlier remark that the opening of the criminal proceedings and their conduct should be accompanied by adequate procedural safeguards, and that the presumption of innocence of the defendant must be respected by every official body or officeholder commenting on the criminal case.

90. In an opinion on Bulgaria[51] the Venice Commission warned against an automatic suspension of judges: it recommended that the Judicial Chamber of the Superior Council of Magistrature "has to review the substance of the accusations and decide whether the evidence against the judge is persuasive enough […] and whether it calls for a suspension." Otherwise, the prosecutors

[50] Both English translations of the title of this Article (the one provided by the requesting authorities and the other provided by the Ministry) mention "dismissal", but, as explained to the rapporteurs, this is a translation error: the title, as well as the article itself, speak of the "suspension" and not a definitive dismissal.

[51] Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act.

would have “the power to initiate the suspension of judges for a potentially long period of time on the basis of (relatively) scant evidence”, which may endanger the judicial independence.

91. As explained to the rapporteurs, new Article 55-1 should be read together with Article 34 (5) which provides that the opening of a criminal case against the PG should be authorised by the SCP which in this case should also appoint a special prosecutor to deal with this case. Thus, the PG cannot be prosecuted – and hence cannot be suspended – without the involvement of the SCP. This should be seen, in the view of the authorities, as a sufficient safeguard of the PG’s independence.

92. However, as transpires from the opinion on Bulgaria, not every criminal investigation calls for the automatic suspension of the PG. It would be more appropriate to let the SCP decide, on the *ad hoc* basis and in the light of the seriousness of the accusations against the PG, if the suspension is needed. Automatic suspension may be reserved for the cases when the PG is suspected of a crime of a certain gravity, but even in those case the SCP should be involved to assess whether the preliminary evidence against the PG is reasonably sufficient to start a case. Indeed, the quality and the nature of the preliminary evidence gathered for the purposes of opening a case is not supposed to be sufficient to secure conviction. However, the SCP should itself verify that even such *prima facie* evidence is not clearly fabricated or irrelevant.

93. The Ministry of Justice, in their written comments, pointed out that it would be damaging for the prestige of the prosecution service and for the independence of the investigation to maintain a PG in office while there is a pending criminal investigation against him or her. This is a valid argument: the Venice Commission is not against the suspension of the PG at the moment of the opening of the criminal case, provided that the SCP is duly involved and may guarantee that the accusations against the PG are not frivolous, politically motivated, or too weak, and that the temporary suspension of the PG is necessary to protect the prestige of the prosecution service and the independence of any future investigation. No automatic suspension of the PG is admissible, and a meaningful involvement of the SCP is required to decide on the suspension.

2. Early termination of mandates of the Deputies

94. As follows from the new wording of Article 18, in case of suspension of the PG pending a criminal investigation or his/her dismissal, the mandates of all the PG Deputies are also terminated. As explained to the rapporteurs, since the Deputies are appointed by the PG (with the consent of the SCP), they would remain loyal to him even after his/her dismissal or suspension, and could therefore interfere with any criminal investigation or other procedures targeting the PG.

95. Even if this risk is real, it does not necessarily warrant the simultaneous removal of all Deputies. Such dramatic measure may impact the effective functioning of the prosecutorial system which in this situation would remain virtually “beheaded”. The collective dismissal of the Deputies, which is not related to their performance or to any fault that they may have committed, sends a wrong message to the prosecution service, namely that the position of a Deputy is totally dependent on personal loyalty to the PG. Such mass dismissal may also have a chilling effect on the prosecutors.

96. If need be, the law might provide that the Deputies who were appointed by the suspended or dismissed PG cannot intervene in any case which may potentially target the PG, or in any case which is dealt with by the prosecutor appointed by the SCP to investigate allegations against the PG. And, indeed, the appointment of the new PG, if this position becomes vacant, should not be delayed. If those conditions are met, the Deputies may remain in place until the appointment of the new PG. In any event, the *suspension* of the PG may only justify the *suspension* of his or her Deputies, and not their definite *dismissal*, as currently provided by the law.

3. Who can be appointed as an interim Prosecutor General?

97. Under the amendments, any prosecutor in office can be appointed as an interim PG. The Venice Commission recalls that there is a strong case for selecting an interim PG from the ranks of existing *top* prosecutors.[52] That being said, the appointment of an appropriately qualified outsider is not excluded either, since it might be seen as signalling a fresh start and reducing the risk of corporatism.[53] According to Article 17 (1) (a), the candidate to the position of the PG has to have 10 years of professional experience in the legal field, out of which 5 years in the position of prosecutor. The law is unclear as to whether the interim PG should correspond to all the conditions laid down in this article for the PG. Normally, the PG and the interim PG should satisfy broadly the same qualification requirements.

4. Procedure of appointment of an interim Prosecutor General

98. An interim PG is appointed when the position of the PG becomes vacant, or where the PG is suspended. Under the amendments, an interim PG is appointed by the same bodies that are involved in the process of appointment of a permanent PG - the SCP and the President of the Republic, but the procedure is somewhat simplified (it does not involve public competition and the interview). This is compatible with the urgency of the situation.

99. The mandate of an interim PG is limited to 12 months and can be extended. In an opinion on Montenegro, the Venice Commission warned against *ad interim* Prosecutor General who could hold this position *ad infinitum*.[54] Since in Moldova the procedure of appointment of an interim PG is not significantly different from the procedure of appointment of a permanent one (for example, there is no requirement to obtain a qualified majority in Parliament), the duration of such interim appointment should be limited to the time needed to elect the new PG (when the position of the previous PG became vacant). The mandate of an interim PG appointed to replace a suspended PG may be longer but should be terminated if the case against the PG is dropped or he/she is acquitted.

100. The law should also specify whether the same person can be reappointed again as an interim PG (or even as a permanent one), and what sort of procedure needs to be followed in case of re-appointment. The possibility of re-appointment affects the independence of the officeholder: [55] previously the Venice Commission recommended that the Prosecutor General should not be eligible for re-appointment but enjoys a sufficiently long tenure.[56] A scenario in which the prosecution system is governed by an interim PG, for a prolonged period of time, and where this interim PG has to seek and obtain re-appointments at regular intervals is very dangerous for the independence of the prosecutors. It would be more appropriate for one of the Deputies, selected by the SCP, to temporarily perform the duties of the PG (with the exclusions highlighted above), for the period of time necessary to complete a criminal investigation against the suspended PG or to fill the vacancy.

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[52] Venice Commission, CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service; see, in particular, Conclusions of the opinion.
[53] Ibid.
[54] Venice Commission, CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service, para. 52.
[55] Venice Commission, CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, para. 49.
[56] Venice Commission, CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, para. 117.

IV. Conclusion

101. On 23 September 2021, Ms Motuzoc, the President of the Superior Council of Prosecutors of the Republic of Moldova, together with Mr Stoianoglo, the Prosecutor General, requested an opinion of the Venice Commission on the amendments of 24 August 2021 to law on the Public Prosecution Service. Those amendments were adopted in a situation of acute political conflict between the parliamentary majority and the Prosecutor General, who was criticised for incompetence and lack of integrity. Mr Stoianoglo vigorously denied those allegations.

102. The amendments were introduced and adopted during the holiday period. Their introduction was not preceded by a public discussion, and the participation of the civil society, stakeholders, and experts in the discussions in the Parliament was reportedly quite limited. While the Constitutional Court of Republic of Moldova found that the fundamental rules of the law-making had been respected, in the opinion of the Venice Commission a more thorough and transparent process would certainly have been preferable, given the importance of the reform for the proper functioning of the prosecution service, which is defined in the Constitution as an autonomous public institution within the judicial authority.

103. The Venice Commission notes that in the past years the composition of Superior Council of Prosecutors (the SCP) was changed twice. Such frequent changes may give the impression that each respective parliamentary majority tried to change the balance of power in the SCP in its favour. Legislative changes should not be *ad hominem*, i.e. should not aim at the replacement of specific office-holders under the pretext of an institutional reform. To reduce the risk of such arbitrary changes, it would be useful to regulate the composition of the SCP in the Constitution, so as to require a qualified majority of votes for such important changes in the rules on the SCP. But this would require a constitutional amendment, and this recommendation may be only implemented in a longer perspective.

104. The key element of the reform – namely the new balance between prosecutorial and lay members in the SCP – is not as such contrary to the standards and the previous recommendations of the Venice Commission. Although two prosecutors have now been excluded from the SCP, five prosecutors elected by their peers still represent a substantive part of this body. As to the non-prosecutorial members, this component of the SCP remains pluralistic enough to ensure that neither of the three groups (prosecutors, lay members, or *ex officio* members) can govern alone. The choice of the *ex officio* members to sit in the SCP may be criticised, but there are also arguments in favour of this choice.

105. The Venice Commission invites 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 addition, some other amendments are objectionable from the standpoint of international standards and/or best practices and thus need to be revised. Most importantly, the Venice Commission makes the following recommendations:

- the legitimate expectation of the members to finish their mandate should not be perturbed without very serious reasons;
- the procedure of “performance evaluation” of the PG should be significantly revised. In particular, the law should clearly describe the nature and main indicators of the performance evaluation and clarify how it is different from the disciplinary liability. The SCP may be entrusted with the task of defining more specific regulations, but always within the framework set out in the law. The Evaluation Commission (EC) should not be able to function without prosecutorial members and the law should clearly stipulate that the EC’s recommendations do not bind the SCP;

- the SCP should have the power to decide whether the suspension of the PG in connection with a criminal case brought against him or her is justified; the suspension of the PG should not automatically terminate the mandates of his or her Deputies;
- in the case of suspension of the PG or if his/her position becomes vacant, one of the Deputies should be appointed by the SCP as interim PG for the time needed to conclude criminal proceedings and/or elect a new PG. Additional safeguards could be put in place to exclude any influence of the suspended or dismissed PG on the criminal or other proceedings against him or her.

106. The Venice Commission remains at the disposal of the authorities of the Republic of Moldova for further assistance in this matter.