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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE DRAFT LAW OF UKRAINE AMENDING THE CONSTITUTIONAL PROVISIONS ON THE PROCURACY

on the basis of comments

by

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I. Introduction

1. On 28 April 2006 the Office of the Prosecutor General of Ukraine requested the assistance of the Council of Europe for the reform of the prosecution service in this country. It was agreed that, as a first step, the draft constitutional amendments on the public prosecutor's office prepared by the Office of the Prosecutor General (CDL(2006)032) should be examined by the Venice Commission with the assistance of an expert of the Directorate General of Legal Affairs. Subsequently, the new draft law on the public prosecutor's office should be examined by the Directorate General of Legal Affairs with the assistance of a member of the Venice Commission. Ms Hanna Suchocka (Poland) and Mr James Hamilton (Ireland) were appointed as reporting members by the Venice Commission and Mr Pierre Cornu (Switzerland) as expert by the Directorate General of Legal Affairs. Their comments on the draft amendments to the Constitution appear in documents CDL(2006)040, 041 and 042.

2. A first discussion on the basis of these comments took place at the 67th Plenary Session of the Venice Commission in Venice on 9 June 2006. It was continued during a visit of the rapporteurs to Kyiv on 2 to 3 October 2006. The Office of the Prosecutor General also replied in written form to the comments of the experts. *<The present Opinion was adopted by the Venice Commission at its 68th Plenary Session in Venice on 13 to 14 October 2006>.*

II. Previous developments

3. The Prosecutor's Office has been the subject of previous opinions of the Venice Commission, most recently in its Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor of 8-9 October 2004 (CDL-AD(2004)038).

4. As set forth in earlier Opinions, the existing law establishes the Prosecutor's Office as a very powerful institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic, law-abiding state. In effect it provides for a Soviet-style "*prokuratura*". By contrast, the Constitution adopted in 1996 described, in Article 121, the functions of the procuracy as follows:

- *(a) Prosecution in court on behalf of the State;*
- *(b) Representation of the interests of a citizen or of the State in court cases determined by law;*
- *(c) Supervision of the observance of laws by bodies that conduct detective and search activity, inquiry and pre-trial investigation;*
- *(d) Supervision of the observance of laws in the execution of judicial decisions in criminal cases, and also in the application of other measures of coercion related to the restraint of personal liberty of citizens.*

5. The 1996 Constitution also contains a transitional provision in the following terms:

> *"The procuracy continues to exercise, in accordance with the laws in force, the function of supervision over observance and application of laws and functions of preliminary investigation, until the laws regulating the activity of state bodies in regard to the control over the observance of laws are put into force, and until the system of pre-trial investigation is formed and the laws regulating its operation are put into effect."* (Chapter XV, para. 9)

6. It was intended, therefore, when the 1996 Constitution was enacted, that the functions of supervision over observance and application of the laws generally (apart from the cases referred to in Article 121 (c) and 9 d) of the Constitution) and the function of preliminary investigation would only remain with the procuracy in the short term. Since the Transitional Provisions preserved the current procedures for arrest, remand in custody and detention of suspects and for examination and search of a dwelling place or other possessions for a five year period (Chapter XV.13) it would seem that these powers were not intended to remain with the procuracy for more than five years.

7. In 2004 a new clause was added to Article 121, which conferred a fifth function on the Prosecutor as follows:

> *"to supervise over the observance of human and citizens' rights and freedoms, and the observance [of] laws on these matters by bodies of state power, local self-governments, their officials and functionaries."* (Article 1(5) of the draft law)

8. In its opinion in 2004 (CDL-AD(2004)038) on a similar provision in the law on the public prosecutor's office the Venice Commission was highly critical:

> *"This function, which does not constitute an executive regulation to the Constitution, is unacceptable. It reflects a proposal to amend the Constitution which was put before the Verkhovna Rada of Ukraine in 2003 but which hitherto failed to get the required majority. In its opinion on the draft amendments to the Constitution (CDL-AD(2003)19) the Venice Commission urged the Verkhovna Rada not to adopt this amendment and in its opinion on the same draft amendments the Constitutional Court of Ukraine questioned its compatibility with the principle of separation of powers. Nevertheless it is proposed in the draft law to confer this function on the Prosecutor's Office. If this is done it will represent the making permanent of a considerable element of the Prosecutor's function which, according to the transitional provisions of the Constitution, was intended to be temporary only.*
>
> *Furthermore, while transitional provisions envisaged that the Prosecutor-General would no longer carry out pre-trial investigation but merely supervise it, the provisions of the new draft envisage a control by the Prosecutor's Office over pre-trial investigations which goes far beyond mere supervision. Under Articles 37-39 of the draft law it is clear that the Prosecutor-General can give binding instructions to the bodies of pre-trial investigation.*
>
> *The draft Law therefore provides the procuracy with powers beyond those envisaged by the Constitution and has to be regarded as an attempt to reverse the decision taken when adopting the constitution in 1996 to reduce the powers of the Prokuratura over a period of five years."*

9. Nevertheless, the proposal to amend the Constitution was adopted despite the strongly-expressed opinion of the Commission. In its Resolution 1466(2005), the Parliamentary Assembly of the Council of Europe called on the Ukrainian authorities "*regretting the step back in the reform of the Prokuratura marked by the December 2004 constitutional amendments, to modify the role and functions of this institution as required by Assembly Opinion No. 190 (paragraph 11.vi) and paragraph 9 of the transitory provisions of the 1996*

Constitution of Ukraine and in line with Assembly Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law;". The present draft is a reaction to this criticism by the Council of Europe and is intended as a first step towards the fulfilment of the commitments of Ukraine to the Council of Europe to reform the *Prokuratura*. It contains three main elements:

- It defines the public prosecution service as a part of the judicial power;
- It redefines the functions of the public prosecution service;
- It modifies the rules on the appointment and dismissal of the Prosecutor General and the organization of the prosecution service.

III. The position of the procuracy in the system of state authorities in Ukraine

10. Public Prosecution is defined in the draft as a unified independent system of judicial authority. The text thus shows a tendency to break with the undemocratic tradition of the Soviet *Prokuratura*. The new wording of Article 121 is also more precise than the wording of the 1996 Constitution. It makes it clear that the prosecutor's office is not a separate (fourth) pillar of state power, as was the case previously in the Soviet system. The new wording thereby diminishes the risk of returning to the system of *Prokuratura*.

11. In Europe there is no uniform standard as to the position of the prosecution service. Recommendation (2000) 19 of the Committee of Ministers of the Council of Europe explicitly provides for the possibility of a prosecution service as part of the executive or as part of the judicial power. If the prosecution service is dependent on the executive, the safeguards of para. 13 of Recommendation (2000)19 have to be complied with. If it is independent and part of the judicial power, para. 14 of the Recommendation requires that the nature and scope of its independence be established by law.

12. With respect to the specific situation of Ukraine, the option in favour of an independent prosecution service in the framework of judicial power seems welcome, provided the general power of supervision is no longer conferred upon the procuracy. Subordinating the prosecution service to the executive would make it even more difficult to achieve the de-politicisation of the prosecutor's office and to protect prosecutors from undue interference into their work, which has to be based on the law and not on political expediency.

13. The Venice Commission therefore welcomes the proposed option in favour of an independent prosecution service as part of judicial power. It underlines, however, that it is by no means sufficient to establish this principle in the Constitution, but that it will be imperative to draw the necessary conclusions from this choice when drafting the law.

14. This means that the situation of individual prosecutors in Ukraine has to change fundamentally. At present, prosecutors in Ukraine have no job security and some of the predecessors of the present prosecutor general have, upon taking office, dismissed a considerable number of prosecutors not only from their position, but also from the prosecution service as a whole. Under such circumstances prosecutors will not be able to work professionally on the basis of their interpretation of the law but are obliged to curry favour with the Prosecutor General of the moment. While in European countries prosecutors are not protected like judges against a transfer against their will, they should enjoy security of tenure until their retirement.

15. The present situation in Ukraine clearly contradicts para. 5 of Recommendation (2000)19 which provides as follows:

> *"States should take measures to ensure that :*
> *a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status;*
> *b. the careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience;*
> *c. the mobility of public prosecutors is governed also by the needs of the service;*
> *d. public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law;*
> *e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review;*
> *f. public prosecutors have access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status is affected;*
> *g. public prosecutors, together with their families, are physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their functions."*

16. Many countries operating a judicial model have a system under which individual prosecutors are attached to particular courts and operate independently of other prosecutors in the same way the individual judge in his or her own court is independent of other judges. There are, however, also examples of states where the prosecution is both organised in a hierarchical structure and a part of the judicial branch – for example, in the Netherlands. Nevertheless, in the case of a hierarchical and unified system of prosecution, para. 10 of Recommendation (2000) 19 has to be respected. It provides that

> *"All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement."*

17. If the Prosecutor's Office is to be a part of the judicial branch it is necessary to establish a clear distinction between the prosecutors and court judges. Paragraph 17 of the Council of Europe's Recommendation (2000) 19 on the Role of Public Prosecution in the Criminal Justice System provides as follows:

> *"State should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular, states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge."*

18. The danger of confusion between the role of public prosecutors and court judges is increased where the prosecutor is conferred with functions of supervision (see below).

IV. The competencies of the public prosecutor's office in Article 121

The deletion of sub-section 5 on the supervisory power of the *Prokuratura*

19. It has to be strongly welcomed that the new wording no longer provides for the general power of supervision introduced by the constitutional amendment of December 2004. This is a positive step showing that the intention is to break with the Soviet model of *Prokuratura*. However, some of the rephrased provisions of Article 121 raise concerns whether this break will be fully realised (see below). Powers of supervision remain under other headings.

Sub-section 1 on criminal prosecution

20. The new sub-section 1 of Article 121 provides that the prosecution service is entrusted with "*criminal prosecution in pre-trial proceedings and prosecution in court on behalf of the state*". This phrase has to be read in conjunction with the proposed Point 9 of the Transitional Provisions: "*The Public Prosecution of Ukraine shall continue to perform the function of pre-trial investigation under the acting legislation, unless the system of pre-trial investigation is formed, as well as the laws regulating its performance are introduced*". It refers to the core competence of any prosecution service and does not warrant any further comment.

Sub-section 2 on protection of human rights, state and public interest

21. The proposed new wording of sub-section 2 of Article 121 would add to the existing task of "*representation of the interests of a citizen or of the State in court cases determined by law*", the task of "*Protection of human and citizens' rights and freedoms, state and public interest*". This is a very broad and ill-defined competence. When commenting on a draft of the Constitution in 1996, the Venice Commission already stated (CDL(1996)015):

> *"It is recommended that this representation should be limited to cases where the public interest is involved and where there is no conflict with the fundamental rights and freedoms of the individual. It is up to the individual himself to decide whether to ask for State assistance or not."*

22. In this context the Venice Commission recalls that Article 55 of the Constitution of Ukraine provides that "*Human and citizens' rights and freedoms are protected by the court*" and that "*Everyone has the right to appeal for the protection of his or her rights to the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine*." These provision reflect the European approach to human rights protection. It is up to each individual to decide in which manner and to which extent he or she wishes to protect his or her rights and then to defend these rights in court with the assistance of an independent lawyer and not a state body. In addition, in many European states the individual may call upon the services of a truly independent Ombudsman whose task is to defend the rights of individuals and not to protect the public interest.

23. By contrast, the procuracy- which, while carrying out its tasks in the field of criminal law, obviously has to ensure that the rights of individuals are respected- seems a body ill equipped to actively protect the rights of individuals. It has as a main task to protect the state and public interest and will always be tempted to give preference to the public interest and not to the interest of the individual. Moreover, it is involved in criminal prosecution and has ties with the police. These are particularly sensitive areas for the protection of human rights

and the procuracy is bound to be faced by conflicts of interest. These concerns are expressed in para. 7.v.a) of Recommendation 1604(2003) of the Parliamentary Assembly:

> *"as to non-penal law responsibilities, it is essential that any role for prosecutors in the general protection of human rights does not give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights."*

24. In principle, the Venice Commission considers the best solution would be to limit the role of the procuracy to criminal prosecution. This is in line with the approach of the Parliamentary Assembly as set forth in para. 7.v.c) of Recommendation 1604:

> "*that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions."*

25. However, the Venice Commission is also conscious of the fact that it will not be possible for Ukraine to immediately abandon any role of the prosecutor's service in the protection of rights of individuals. In accordance with the Soviet tradition, the *prokuratura* in Ukraine receives a large number of complaints by citizens about the violation of their rights and may at present be the most effective body to address such issues. People are not yet used to defend their rights themselves, access to a lawyer may be difficult and there is no developed system of legal aid. The court system is not yet sufficiently developed and the organisation of the administration does not sufficiently ensure that the administration respects the rights of citizens. While there is a human rights representative of the Verkhovna Rada, the staff and resources at the disposal of this institution are in no way comparable to the resources of the procuracy[1]. In practical terms, the deletion of this role of the procuracy would therefore leave a gap.

26. The solution would therefore seem two-fold. On the one hand the protective role of the procuracy should be defined in a more restrictive manner, indicating that the procuracy should not be the main body of human rights protection in Ukraine. The wording should, in particular, ensure that there is no encroachment upon the powers of the courts and that the procuracy does not intervene against the will of the individual concerned. It is true that the proposed wording already leaves it to the legislature to define the protective role of the procuracy and that such limitations could be introduced by law. Nevertheless, having regard to the strong tradition of the *Prokuratura* system in Ukraine, it seems indispensable to explicitly provide for limitations in the text of the Constitution itself.

27. Moreover, it should be made explicit that this limited role of the procuracy has a transitional character and should be subject to further review. The proposed draft contains a Transitional Rule on the role of the public prosecutor's office in pre-trial investigation. The role of the office in the protection of human rights should also be the subject of a Transitional Rule.

[1] The number of prosecutors in Ukraine is much higher than in Western European countries. According to the 2002 Report on European Judicial Systems of the European Commission for the Efficiency of Justice there are 4.2 prosecutors in Ukraine per 20.000 inhabitants, as compared to 1.5 in Germany, 0.8 in Italy and 0.5 in France. For judges the situation is quite different: Ukraine had 15.52 judges per 100.000 inhabitants, Germany 25.30, Italy 11.72 and France 10.37.

Sub-section 3 on supervision of criminal and pre-trial investigation

28. Under sub-section 3 of Article 121 the public prosecutor's office supervises *"over observance of laws by authorities conducting criminal and pre-trial investigation."* This provision seems unobjectionable.

Sub-section 4 on the supervision of the execution of judgments

29. Under the proposed rewording of sub-Section 4, the present power of the public prosecutor's office to supervise the execution of judgments would be extended to civil and administrative cases. This change is motivated by the important problems Ukraine is facing in ensuring the execution of judgments. The public prosecutor's office would have the necessary resources for this task. Nevertheless, in accordance with the general aim of limiting the tasks of the public prosecutor's office to the field of criminal law, the Venice Commission would prefer to move the required resources from the public prosecutor's office to another body instead of amending the Constitution in order to reflect the present allocation of resources.

Sub-Section 5 on other functions prescribed by law

30. The newly proposed provision enabling "*other functions prescribed by law*" to be conferred on the prosecutor is far too wide. Presumably even without such a clause other functions could be conferred on the prosecutor provided there was no constitutional obstacle to doing so, but the problem with the draft provision is that it seems to authorise the conferring of any function on him or her without any limitation whatsoever. In its reply to the comments by the experts, the office of the Prosecutor General indicated its readiness to delete this draft provision.

V. Article 122 on the appointment and dismissal of the Prosecutor General

Section 1 on the appointment of the Prosecutor General

31. Section 1 of this Article provides for the appointment of the Prosecutor General by the President with the consent of the Verkhovna Rada This seems, in principle, an appropriate solution. However, in addition, it would be desirable to have an input from a technical, non-political body. In its opinions CDL-INF(1996)2 and CDL(1995)73 at II.11 the Venice Commission observed as follows:

> *"It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the government. ..."*

Section 2 on the personal conditions required to become Prosecutor General

32. The proposed Section 2 of this Article sets out the personal conditions required to become Prosecutor General. The requirements of Ukrainian citizenship, a minimum age of 40

years, a law degree and of knowledge of the national language seem justified. By contrast, it is less obvious why a candidate should need 10 years of uninterrupted residence in Ukraine prior to appointment. This might exclude candidates having acquired valuable experience abroad. It seems also questionable why the 15 years of professional experience have to be acquired within the public prosecutor's office itself. In most cases the Prosecutor General will presumably come from within the service. However, there seems no reason to exclude, from the outset, the possibility of appointing for example an experienced judge. The possibility of appointing an outsider seems particularly important with regard to the need for a profound reform of the service.

Section 3 on the term of office of the Prosecutor General

33. Under the proposed Section 3, the term of office of the Prosecutor General would be extended from 5 to 7 years. This longer term should diminish the politicisation of the office and could be a guarantee of the impartiality of the Prosecutor General. It seems, therefore, a step in the right direction. It would seem even better to provide that the Prosecutor General may stay in office until reaching the age of retirement or, if a limited term of office is preferred, to exclude the possibility of reappointment, as is the case for constitutional judges under Article 148 of the Constitution. Otherwise, the Prosecutor General may be unduly influenced in his or her decisions by the desire to be re-elected.

Section 4 on the pre-term dismissal of the Prosecutor General

34. The proposed Section 4 of Article 122 would provide for a pre-term dismissal of the Prosecutor General by the President with the consent of not less than two-thirds of the constitutional composition of the Verkhovna Rada, replacing the present vote of no confidence in the Prosecutor General by the Verkhovna Rada. The grounds for such dismissal would have to be prescribed by law. This is a welcome improvement, strengthening the independence of the Prosecutor General from political pressure, particularly taking into account that until now none of the prosecutors general following independence has been able to serve a full term of five years. The Venice Commission would prefer to go even further by providing the grounds for a possible dismissal in the Constitution itself. Moreover, there should be a mandatory requirement that before any decision is taken, an expert body has to give an opinion whether there are sufficient grounds for dismissal.

Section 5 on reporting to the President and the Verkhovna Rada

35. The introduction of an obligation for the Prosecutor General to present an annual report to the President and the Vekhovna Rada is also welcome.

VI. Conclusions

36. In conclusion, the Commission welcomes the draft as an important step in the right direction. The Commission, in particular, fully supports the provisions of the draft making the Prosecutor General's office more independent from political pressure, including the definition of the public prosecutor's office as part of the judicial power and the better protection of the Prosecutor General against unjustified dismissal. While the Commission would encourage the Ukrainian authorities to go even further in this respect, the proposed amendments are already an important step forward. The law to be subsequently adopted will have to ensure that not only the Prosecutor General, but all prosecutors are better protected with respect to their personal status.

37. As regards the powers of the Prosecutor General's office, the proposed reform seems to be a step forward, but is too timid. In addition to the deletion of the provision on the conferring of other powers to the Prosecutor General's office- a step already accepted by this Office-, in particular sub-Section 2 of Article 121 on the protection of human rights and state and public interest has to be redrafted, narrowing down the scope of this competence and to be made subject of a Transitional Provision. While it seems impossible at the moment to completely abandon the role of the procuracy in protecting the rights of citizens, it should be made clear that in the future this role should be given to other bodies or exercised by the individuals themselves, with the assistance of lawyers of their choice.