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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON ACT CLXIII OF 2011
ON THE PROSECUTION SERVICE
AND
ACT CLXIV OF 2011
ON THE STATUS OF THE PROSECUTOR GENERAL,
PROSECUTORS AND OTHER PROSECUTION EMPLOYEES
AND THE PROSECUTION CAREER**

OF HUNGARY

**on the basis of comments by
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I. Introduction

1. By letter of 1 February 2012, the Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, Mr Herkel, asked the Venice Commission to provide an opinion *inter alia* on the Hungarian laws on the prosecution system.

2. This Opinion deals with the prosecution system, as regulated by Act CLXIII of 2011 on the Prosecution Service (CDL-REF(2012)015) and by Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career (CDL-REF(2012)016). The Commission invited Mr Hamilton, Mr Sorensen and Ms Suchocka to act as rapporteurs on this issue.

3. On 4 April 2012, a delegation of the Commission, composed of Mr Hamilton and Mr Sorensen, accompanied by Mr Dürr, visited Budapest. The delegation met with (in chronological order) Mr Péter Polt, Prosecutor General of Hungary, Mr Artemon Matécsa, President of the National Association of Prosecutors, the Minister of State for Justice, Mr Répassy, the Constitutional, Judicial and Standing Orders Committee of Parliament, as well as with NGOs. This Opinion takes into account the results of this visit. The Prosecutor General and Deputy Prosecutor General have also provided written explanations and replies to questions. The Venice Commission is grateful to the Hungarian authorities for the excellent co-operation in the organisation of this visit and for the explanations provided.

4. *The present Opinion was adopted by the Commission at its ... plenary session (Venice, ...).*

II. Preliminary remarks

5. This Opinion should be seen in the context of the Opinion on the new Constitution of Hungary¹ and the Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary².

6. The present Opinion is based on an English translation of Act CLXIII of 2011 on the Prosecution Service (hereinafter "APS") and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career (hereinafter "ASPGPOPEPC"). The translation may not accurately reflect the original version on all points and, consequently, certain comments may be due to problems of translation.

III. Standards on the prosecution service

7. A number of international documents are relevant for the organisation of prosecution systems. To cite but a few:

- Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System,
- the 1990 United Nations Guidelines on the Role of Prosecutors,
- the 1999 IAP (International Association of Prosecutors) Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors,
- the Bordeaux Declaration of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on "Judges and Prosecutors in a Democratic Society"
- the European Guidelines on Ethics and Conduct for Public Prosecutors (Council of Europe, "Budapest Guidelines", 2005).

¹ CDL-AD(2011)016, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

² CDL-AD(2012)001, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012).

8. The Venice Commission has set out applicable standards in its Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service.³

9. The European Committee on Legal Co-Operation of the Council of Europe (CDCJ) is preparing a recommendation on the "Role of Public Prosecutors outside the Criminal Justice System".

IV. Constitutional basis

10. The constitutional basis for the prosecution is the Fundamental Law of Hungary (CDL-REF(2011)019), in particular its Article 29 but also its Articles 1.2.e, 7 and 9.3.j. The Transitory Provisions to the Fundamental Law, adopted on 30 December 2011 also have to be taken into account, in particular Articles 11.4 and 13 (see also the Preamble, paragraph 2.i and 5 and Article 2). The Venice Commission has learned that currently the nature of the Transitory Provisions as constitutional law is challenged before the Constitutional Court of Hungary.

11. Compared to Chapter XI of the previous Constitution, Article 29 of the Fundamental Law reflects an evolution in the approach of the role of the prosecutor's office. While the previous Constitution seemed to establish, as a primary function of the Chief Public Prosecutor, the protection of rights, the new Constitution focuses on the contribution of the Supreme Prosecutor and prosecution services to the administration of justice. In its opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, the Venice Commission found that:

"17. [...] The general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. It should be better realised by an ombudsman than by the prosecutor's office".⁴

12. Article 29.2 of the Fundamental Law provides that the Prosecutor General and the Prosecution Services shall "exercise rights in conjunction with investigations; represent public accusation in court proceedings and supervise the legitimacy of penal enforcement". This approach is in line with the views of the Venice Commission as expressed in the Report on European Standards as regards the Independence of the Judicial System, Part II⁵.

13. However, Article 29.2 of the Fundamental Law contains also a very general provision that **prosecutors shall exercise other responsibilities and competences defined by law**. Such a formulation gives more flexibility to the legislative authority. However 'other' competences regulated by law should be in line with the position of the prosecutors regulated by the Fundamental Law in general. It seems that the constitutional position of the prosecutors service is well focused on criminal law whereas the cardinal acts add much wider powers outside the criminal law fields.

14. The principle of independence (autonomy) of the prosecution service is not expressed directly but in an indirect way. As per Article 29.4 of the Fundamental Law, the Supreme Prosecutor shall be elected for nine years by Parliament on the recommendation of the President of the Republic. The election of the Supreme Prosecutor shall require a two-thirds majority of the votes of all Members of Parliament, which is a highly qualified majority. This

³ CDL-AD(2010)040, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).

⁴ Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009), CDL-AD(2009)048, paragraph 17.

⁵ CDL -AD(2010)040

provision provides a longer mandate than under the previous Hungarian Constitution (six years). The Prosecutor General has to report annually to Parliament (Article 29.5).

15. The Fundamental Law does not enter into detail and remains laconic as regards the legal status of prosecutors. However, this was also the case in the previous Constitution. The Fundamental Law refers to a cardinal act for the detailed rules of the organisation and operation of prosecution services, the legal status and remuneration of the Supreme Prosecutor and prosecutors (Article 29.7).

16. Article 29.3 of the Fundamental Law provides that “[t]he organisation of the Prosecution Service shall be headed and directed by the Prosecutor General, who shall appoint public prosecutors.” The prosecution system is thus established as a hierarchical body, headed by the Prosecutor General. This is in line with European standards. This opinion examines whether the cardinal Acts contain sufficient checks and balances to ensure that the activities of the prosecution service are exercised in line with democratic standards.

I. Cardinal Law status

17. A large part of the APS and ASPGPOPEPC have “cardinal” law status. Section 42 APS declares Sections 1-30, 40, 41 and 43.a-c APS as cardinal under Article 29.7 of the Fundamental Law and Section 49 APS as cardinal under Article 46.6 of the Fundamental Law. Section 159 ASPGPOPEPC declares that its “Chapter I, Chapters III to XIII, Sections 151 and 152, Sections 154 to 157, Section 158.2, Sections 160 to 165 of and Annexes Nos. 1 to 3 and Annex No. 7” shall qualify as cardinal.

18. According to Article T.4 of the Fundamental Law, cardinal acts must be adopted by the Hungarian Parliament with a two-thirds majority. In its Opinion on the new Constitution of Hungary, the Venice Commission had acknowledged that a “certain quorum may be fully justified in specific cases, such as issues forming the core of fundamental rights, judicial guarantees or the rules of procedure of the Parliament.”⁶ The Commission, however, also recommended restricting “the fields and scope of cardinal laws in the Constitution to areas where there are strong justifications for the requirement of a two-thirds majority.” On the basis of Article 3 of the first Protocol to the ECHR, the Venice Commission argued: “When, not only the fundamental principles but also very specific and “detailed rules” on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk. This also increases the risk, for the future adoption of eventual necessary reforms, of long-lasting political conflict and undue pressure and cost for society.”

19. Both Acts examined in this Opinion contain very detailed rules on every aspect of the organisation and administration of the prosecution system. In order to avoid the above-mentioned problems, the Venice Commission is of the opinion that **the “cardinal elements” in these laws should have been restricted to fundamental principles and important rules on the issue and that the merely technical details should have been regulated on the level of ordinary law**, which can more easily be amended by a simple majority in Parliament. This is even more true for the prosecution than for the judiciary.⁷

⁶ CDL-AD(2011)016, para. 24.

⁷ See Chapter IV of the opinion on the Judiciary – CDL-AD(2012)001

II. Act CLXIII of 2011 on the Prosecution Service

A. General Provisions (Chapter I)

20. Section 2.1.h APS calls upon the prosecution to give special attention to combatting crimes committed by and against minors, in compliance with the special rules of procedure of administrative and criminal proceedings instituted against juveniles; to participate in enforcing the rights of minors and launch proceedings to have the necessary child protection measures taken in the cases provided for by law. **The defence of minors should foremost be a task for parents and social services.**

21. Section 3.5-7 APS provide the Prosecutor General and prosecutors with the same level of immunity as members of Parliament. Such wide immunity clearly goes too far. In its report on the prosecution service, the Venice Commission stated that “Prosecutors should not benefit from a general immunity, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.”⁸ The Prosecutor General informed the delegation of the Venice Commission that in practice immunity for prosecutors is systematically waived. Notwithstanding such a practice, **the immunity of prosecutors should be reduced to a functional immunity only** also at the legislative level.

22. Section 4.1 APS provides that “[e]veryone shall ensure that prosecutors may exercise the rights granted to them by law without interference”. While indeed there ought to be a prohibition against interference in the work of prosecutors, a positive obligation for everyone – including individuals and private entities – to “ensure” that prosecutors can exercise their powers – goes too far.

23. According to Section 4.3 APS, **business entities and other organisations have to provide data and documents to the prosecutor** within a deadline set by the prosecutor. Such a general statement certainly **goes too far**. In the field of criminal law, Section 4.3 limits these powers through the Code of Criminal Procedure. It seems however that no such limitation exists in non-penal matters.

24. Section 4.4 APS gives prosecutors the power to enter various premises and rooms simply by presenting their identity cards. It seems that these powers extend even to private persons (“premises or rooms at the disposal of the organ or person affected by the procedure”). During the visit to Budapest, the Venice Commission delegation was informed that provisions of this nature could not be read alone but needed to be seen in the context of detailed provisions in criminal procedure legislation. **Entry into private premises (and of course searches) against the will of the owner of the premises should be possible only on the basis of a court warrant.**⁹

25. According to Section 5.1 APS, prosecutors shall initiate proceedings when they become aware of breaches of the law. The - presumably public – “addressee” of such initiatives shall immediately return to the prosecutor a copy of its ruling on the substance of the case. The obligation to rule “immediately” does not seem to be realistic and could even endanger a fair procedure before these bodies, during which the parties concerned should have the right to be heard.

⁸ CDL-AD(2010)040, para. 61.

⁹ Such constraints should apply to all state bodies, including the Counter-Terrorism Centre, the activity of which does not seem to be controlled by the prosecution service (<http://ah.gov.hu/english/html/tek.html>).

26. The Commission welcomes the obligation to give explanations to victims and applicants (Sections 5.3 and 26.5 APS), as well as the possibility to request a review of negative decisions (Section 26.5 APS)

27. The Venice Commission welcomes also that the APS provides for a duty to co-operate with national and international bodies, including human rights organisations (Section 7.2.a APS).

B. The Organisation of the Prosecution Service, the Legal Status of Prosecutors (Chapter II)

28. As a positive sign of openness of the prosecution system, the APS provides for the publication of instructions (Section 8.4 APS) and circulars (Section 9.3 APS).

29. **The participation of the Prosecutor General in sessions of the full Curia** (Section 11.2.a APS) should relate to public hearings only and **cannot extend to deliberations in individual cases**. The definition “in advisory capacity” is not clear either. When he or she is a party to the proceedings, the Prosecutors General should present his or her view on the case but what kind of advice can the Prosecutor General give to the independent Curia?

30. The Prosecutor General has a right to take over the investigation from any investigation service without specifying criteria. When a specialised investigation service has been established, which is in charge of proceedings, this competent service should remain in charge and investigation should be taken over only in exceptional circumstances (Sections 11.2.b and 17.1.b APS).

31. In chapter VI.6 of the opinion on the judiciary¹⁰, the Venice Commission has criticised the fact that – as a body in charge of judicial administration - the President of the National Judicial Office can initiate the uniformisation procedure by which the Curia elaborates general guidelines on the interpretation of law. Section 11.2.d and 11.2.j APS provide that the Prosecutor General can initiate such a procedure as well. In its Opinion, the Commission questioned the need for such a procedure.

32. The constitutional history and legal traditions of a given country may justify some specific solutions as long as they do not contradict democratic principles. In Hungary, the uniformisation procedure seems to have a long tradition, dating back to the 19th century. The powers of the Prosecutor General are a consequence of the competence of the Curia to perform uniformity proceedings. To the extent that this procedure is deemed necessary, the Prosecutor General seems in a better position than the President of the NJO to decide to initiate such proceedings.

33. Section 11.2.h APS empowers the Prosecutor General to bring an “individual complaint” to the Constitutional Court in cases when the parties are unable to do so. On this point see paragraph [29] of the Opinion on the Act CLI of 2011 on the Constitutional Court of Hungary, which is prepared in parallel to this opinion.

34. Section 13.1 APS provides that superior prosecutors may take over cases from junior prosecutors or assign cases to other junior prosecutors. However, the Act does not provide any criteria under which cases can be removed from junior prosecutors. Without such criteria, the removal of cases can be arbitrary. **There should be criteria for taking away cases from junior prosecutors.**

¹⁰ Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, CDL-AD(2012)001, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012).

35. As per Section 13.3 APS, when acting on an instruction, the person instructed shall notify their immediate superiors, unless the instruction was issued by the superior or the instruction pertains to processing a case from which the superior has been excluded. It is unclear at that this point how a superior can be excluded from a case dealt with by a junior prosecutor.

C. Prosecutorial Activities Relating to Penal Law (Chapter III)

36. The Commission welcomes that Section 19.3 APS obliges prosecutors to present all the facts, pieces of evidence and arguments in court. **The law should furthermore also require prosecutors to give advance disclosure of all relevant evidence to the accused person.**

37. Section 20.1 APS entitles prosecutors to review a decision or a measure *ex officio* within the statutory period of limitation specified in the Criminal Code for the specific crime. This provision does not make a distinction between finally decided and on-going cases in such *ex officio* reviews.

38. Under Section 22 APS, the prosecutor can give instructions to the prison administration “concerning legal compliance and the conditions of imprisonment”. According to the information provided, these powers are intended to secure the lawful treatment of prisoners and the protection of the rights of inmates. The person in charge in the prison administration can “file a submission via its superior organ with the superior prosecutor against the instruction issued by the prosecutor within 15 days, which shall not have a suspensory effect”. This appeal thus lies with the prison administration, not with the inmate. Only in particular cases, e.g. hearing appeals submitted against the disciplinary punishment of isolation, the inmates can make an appeal to court against decisions made by the prison administration. These powers, which are not exercised under the control of a court, date back to Act XXXIII of 1871.

D. The duties of the Prosecution Service relating to the protection of the public interest (Chapter IV)

39. Section 27.1.b and 27.4 APS give the prosecutor **wide powers to interfere in relations between private parties** (“prosecutors ... may use their powers to take action in lawsuits between other parties”, “prosecutors shall have the right to seek redress even if they were not party to the proceedings”). Such wide supervisory powers change the nature of prosecutors from criminal prosecution into a general supervisory power. These **supervisory powers should be reduced.**

40. Section 28.4 APS empowers prosecutors to “dissolve or wind up” a legal entity if it is in “contravention” of the “Fundamental Law and any other legal regulation”. There are many violations of a law, which do not warrant a dissolution of a legal entity (e.g. minor infringements of tax legislation). A dissolution of an entity in such a case is likely to violate the freedom of association. **The law should specify which violations of law justify dissolution.**

41. A common goal of the majority of the new democracies was to deprive the prosecutor's office of its extensive powers in the area of general supervision which should be taken over by courts (the ordinary and administrative as well, the Constitutional Court) as well as by the ombudsman. The direction in which the Venice Commission supports the Recommendation of the Parliamentary Assembly of the Council of Europe which states that “the power 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 function.”

42. This should of course not be taken as a dogmatic statement to which no exceptions are possible. There are no objections to limited powers of prosecutors, for example as regards the status of persons or in disciplinary proceedings against the legal profession. Moreover it is also possible to entrust the prosecutor's office with the task of defending the state interest in court proceedings outside the field of criminal law. However, a general supervisory power of the prosecutor both over the state administration and the court system is not in line with the principles of separation and the division of powers which are found in democratic constitutions.

43. The new Hungarian regulations try to follow this view and to refrain from following the old *prokuratura* system and its classical instruments like the *nadzor*. However, the powers of prosecutors derived from Chapter IV, especially Section 29 APS remain very extensive. Section 29.1 APS states that "prosecutors shall verify the legality of individual decisions made and administrative measures taken by administrative authorities and other bodies applying the law other than courts, whether binding or final, provided the courts have not overridden such decisions". This means that the **prosecutors can intervene in any administrative procedure by issuing "reminders"** upon which "[t]he addressee of the reminder shall immediately terminate enforcement until the case is decided" (Article 29.3 APS). If these reminders fail to have their effect, the prosecutors shall contest the measure in court (Article 29.5 APS). In addition to their functions in the criminal law field, **this turns the prosecution system into a general supervisory body of all the administrative actions of the state. These strong powers of the prosecutors system are not balanced with sufficient elements of accountability.**

44. Section 30.6 APS seems to override the *res iudicata* effect of final court decisions: "Prosecutors may seek a legal remedy against final court decisions". However this competence is "subject to a separate act with reference to reasons and in the cases defined by law". Such a provision would need to be narrowly circumscribed and be available only in exceptional circumstances.

E. Data management at the Prosecution Service (Chapter V)

45. Pursuant to Section 31 APS, the prosecutors have extremely wide powers in the field of data gathering: "the Prosecution Service may operate central, regional and local data management bodies within its organisation to manage personal and special data of the scope specified in a set of instructions issued by the Prosecutor General." This means that the Prosecutor General can accumulate and centralise all personal data held in public registers¹¹ according to instructions established by him or herself. Upon request, the prosecution service may transfer data to national (Section 32.6 APS) and international (Section 32.9 APS) bodies. Personal data held in connection with penal law can be connected with other pools of data "with a view to the interests related to crime prevention, law enforcement and national security, provided that the requirements governing the data management shall be fulfilled in respect of each item of personal data." (Section 32.10 APS). These arrangements tend to contribute to a sense that the prosecution office is having overarching powers in controlling a large variety of matters. **The prosecution system should of course be able to access public data required for the investigation of crime but its powers in data accumulation should not go further than that.**

¹¹ For instance: "data supplied by the register of personal particulars and residence, by the central register of administrative offences, by the central register of road transport; by the registers of persons subject to limitation of travelling outside the country and passports, by the system of criminal records operated under a separate statute, by the register of wanted persons and objects; by the company register, by the property register, by the register of inmates of the prison system, by the border registration system, by the system processing customs registration and customs declarations and information systems operated by individual investigative authorities to support investigations" (Article 36.3.a APS).

46. Section 32.3 APS states that in relation to data management **instructions issued to the investigative authority in a specific case may only be made public upon the final completion of criminal proceedings**. However, it is possible to envisage a case in which such instructions might be relevant to the trial and offer assistance to the defendant. Presumably in such a case the Prosecutor General would exercise his functions under Section 32.4 APS to deviate from these provisions and **to disclose these instructions** but it would be preferable that he or she be under **an express duty to do so**.

F. Final Provisions (Chapter VI)

47. The special rules for the Hungarian Intellectual Property Office as stated in Sections 45, 46, 50, 53 and 56 APS seem unclear. Section 27.2 of Act XXXVIII of 1991 on the Protection of Utility Models is amended to provide that the decisions of the Hungarian Intellectual Property Office shall not be open to appeal, the reopening or review of procedures or prosecutorial reminders. Why should there be such a specific exception for the Hungarian Intellectual Property Office?

III. Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career

48. The Act on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career is written in a coherent manner and includes a number of positive elements. European standards are taken into account, especially as concerns objections by junior prosecutors against instructions by superior prosecutors. The representation of collective rights is well established in Sections 4.6, 6.4.b, 7.2, 89 and social protection is provided for in Sections 27.3, 36.5, 95.2 ASPGPOPEPC.

A. Prosecution Bodies (Chapter II)

49. Two types of councils relating to the prosecution are established by the ASPGPOPEPC: councils of prosecution employees mainly represent the general interests of prosecutors as employees (Section 4.3 ASPGPOPEPC), whereas prosecutors' councils are competent to provide their opinion on individual appointments of prosecutors (Section 7.3 ASPGPOPEPC).

50. The powers of both types of council remain limited and they are advisory only. In addition, Section 7.2 ASPGPOPEPC explicitly exempts the Prosecutor General and Deputy Prosecutor General from the competence of the prosecutor's council.

51. Under Section 14 ASPGPOPEPC, it is the Prosecutor General who appoints prosecutors, first for three years and then for an indefinite term. During the visit to Budapest, the Prosecutor General informed the Commission's delegation that the prosecutor's council is only consulted in relation to the first (three year) appointment whereas the Prosecutor General alone decides whether they should be appointed for an indefinite time. However, the Commission was also informed that in practice such indefinite appointments occur almost invariably.

52. The difficulty with the law is that it confers very wide powers on the Prosecutor General which in the hands of the wrong person could be abused. Laws should be drafted so far as possible to guard against the possibility of abuse and recognising that good people are not always appointed to important positions of state. In other words, there is a necessity for greater safeguards with respect to the Prosecutor General's administrative and managerial control over his office. For example, the law requires consultation with the various prosecutor's councils but

it does not require that their advice be followed although the Commission's delegation was informed that, in practice, it invariably is.

53. If the Prosecutor General is to override such advice it should be on the basis of a reasoned decision and the fact that advice is being overridden should be disclosed.

There are other possible means by which safeguards could be built into the system without unreasonably fettering the Prosecutor General's power to run his office effectively. For example, some jurisdictions have introduced the concept of an Inspectorate which carries out an examination of the way in which an office has been run and decisions taken and certifies that these decisions were properly made or alternatively makes recommendations for what should happen in the future.

54. The councils established by ASPGPOPEPC are composed of prosecutors only and there is no forum which would give a voice to the "users" of the prosecutions system – defence lawyers and civil society or even judges. The issue of external advice is dealt with in the Commission's report on prosecution¹² in paragraph 48:

"In view of the special qualities required for prosecutors, it seems inadvisable to leave the process of their appointment entirely to the prosecution hierarchy itself. Various methods can help to remove the danger that within a monolithic prosecution system instructions from above count more than the law. In order to prepare the appointment of qualified prosecutors, expert input will be useful. This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason."

55. The Venice Commission thus in principle accepts "external" as well as "internal" advisory bodies. The choice of model should depend on an overall assessment of the nature of the relevant prosecution system. The Prosecutor General should have an advisory board, possibly consisting of some of his own senior officials and with appropriate outside participation, to whom he would report and from whom he could seek advice, without at the end of the day putting him in a situation where he cannot reject that advice where appropriate.

56. The advantage of establishing a body with a mixed composition would be that it allows prosecutors to receive regular feedback from society about their work. Such a body could also provide valuable external advice or input to Parliament. It would therefore seem **prudent to arrange for a prosecutors' council with at least some external representation, for example in relation to appointment of prosecutors above a certain level.** This would (and should) not compromise the power of the Prosecutor General to make the final decision in appointment matters.

57. In Section 6.6 ASPGPOPEPC, it is stated that for the purpose of determining whether the meeting is quorate, prosecutors who are "unable to earn a living" shall be disregarded. This term remains unclear, at least in the English translation.

58. The exemption (dismissal) of members of the prosecutors council without any criteria is problematic. As per Section 9.2 ASPGPOPEPC more than one half of the valid votes cast shall be required for exemption from membership. The council can dismiss one of its members by simple majority. **The cases when a member of a prosecutor's council can be dismissed should be specified in the Act.**

¹² CDL-AD(2010)040.

B. Establishment and Alteration of Prosecution Service Relationships, Mandate and Appointment of Senior Personnel, Cessation of Appointment and Mandate of Senior Personnel (Chapter III)

59. The Commission welcomes that the oath of prosecutors obliges them to act impartially and without bias (Section 16.3 ASPGPOPEPC).

60. Under Section 22.2.a ASPGPOPEPC the Prosecutor General will, after the expiry of his or her mandate, continue to exercise his powers until the beginning of the mandate of the new Prosecutor General.

61. Apparently the extension of the Prosecutor General's mandate from six to nine years has been controversial in Hungary since it means that a new Parliament will have to accept, for some time at least, a Prosecutor General appointed by the previous government. It would be difficult however for the Venice Commission to criticise this arrangement. Under the Commission's standards, the Prosecutor General should be "appointed permanently or for a relatively long period without the possibility of renewal at the end of that period", and the "period of office should not coincide with Parliament's term of office"¹³.

62. There is, however, a transition problem when the mandate of the Prosecutor General expires. Section 22.2.a ASPGPOPEPC means that 1/3 plus one member of Parliament can effectively keep him or her in office by blocking the election of a new Prosecutor General and they could thus extend his or her mandate indefinitely. It is not clear to what extent this question was considered in detail when the Fundamental Law and the ASPGPOPEPC were passed. However, the Fundamental Law lays down a long mandate of nine years of service for the Prosecutor General and it would seem unacceptable that a minority of the members of Parliament can in fact keep him or her in office indefinitely by creating a deadlock in the election of a successor.

63. In its report on the prosecution system, the Venice Commission stated: "The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. However one would need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock."¹⁴ While this statement is aimed at the risk of the non-election of a (new) Prosecutor General rather than avoiding the indefinite extension of the mandate of the current Prosecutor General, the problem remains the same in principle.

64. There may be various solutions. One possibility may be to prescribe a deadline - in the Fundamental Law or the ASPGPOPEPC - within which Parliament must have elected a new Prosecutor General. Another solution might be simply to repeal Section 22.2.a ASPGPOPEPC, so that the mandate of the Prosecutor General automatically expires after the termination of his or her mandate. Both solutions of course create the problem that there may be a period without a formally elected Prosecutor General but this may put the necessary pressure on Parliament to elect the successor. What needs to be avoided as well is that the same blocking 1/3 minority can indefinitely extend an interim period under the Deputy Prosecutor General, who was appointed by the outgoing Prosecutor General..

65. The problem is similar to that of the interim period of the President of the National Judicial Office which was dealt with in the opinion on the judiciary acts.¹⁵ While in that case the National Judicial could play a role, a Prosecutors Council could be entrusted to contribute to an interim solution in the present case.

¹³ CDL-AD(2010)040, paragraph 37.

¹⁴ CDL-AD(2010)040, paragraph 36.

¹⁵ CDL-AD(2012)001, paragraph 31.

66. In Section 23.2 ASPGPOPEPC it is set forth that, based on the recommendation of the President of Republic, Parliament may exempt (dismiss) the Prosecutor General from office if the Prosecutor General is unable to fulfil his or her duties arising from the mandate for reasons beyond his/her control. Similarly, as per Section 23.7 ASPGPOPEPC, based on the recommendation of the President of Republic, Parliament shall pronounce the Prosecutor General's forfeiture of office in a decision if the Prosecutor General fails to fulfil his/her duties arising from his/her mandate for reasons falling within his/her control or commits a crime established in a final and absolute judgment or otherwise becomes unworthy of his/her office. **The Prosecutor General should have a right to be heard before exemption or forfeiture from office.**¹⁶

67. Section 24.2 ASPGPOPEPC states that, based on the recommendation of the Prosecutor General, the President of the Republic may at any time, without stating his or her reasons, exempt the Deputy Prosecutor General from office. Also, pursuant to Sections 25.1 and 128.1 ASPGPOPEPC managerial appointments falling within the Prosecutor General's competence shall be valid for an indefinite term and may be revoked at any time without justification and the managerial appointment of an official may at any time be revoked without justification. **The revocation of managerial appointments should require to be justified.**

68. According to Section 28.5 ASPGPOPEPC, the Prosecutor General shall exercise disciplinary powers in respect of prosecutors transferred to the Ministry in accordance with the provisions of Chapter X, with the proviso that the Minister responsible for justice may initiate the institution of disciplinary proceedings. The Minister has thus a very weak position in relation to prosecutors working in the Ministry. This arrangement is however not contrary to standards.

C. Conflict of Interests (Chapter V)

69. Prosecutors cannot be involved in any political activity and this is clearly regulated by Hungarian law which follows European practice. Section 44.1 ASPGPOPEPC states that "Prosecutor may not be a member of Parliament, Member of the European Parliament, local municipality board representative, mayor or state leader."

70. Hungarian law contains also anti-corruption rules which are welcome (financial disclosure rules in Section 44.2 et al. ASPGPOPEPC). As per Section 45 ASPGPOPEPC, prosecutors may not be the senior officers or members obliged to participate in business associations, cooperation companies and cooperatives, or the members of the supervisory boards (members with unlimited liability) of the above mentioned institutions and the members of individual businesses.

D. Assessment (Chapter VI)

71. Even though there is an appeal to a court against erroneous or untrue assessments (Section 52.4 ASPGPOPEPC), which is positive, Section 51.2 ASPGPOPEPC provides for an automatic call to resign within 30 days after an 'ineligible' grade without a right to an internal appeal. This seems too harsh.

E. Performance of Work (Chapter VII)

72. The possibility to make a request to commit an instruction in writing and the suspension of the instruction until the instruction is written is welcomed (Section 53.2 ASPGPOPEPC).

¹⁶ CDL-AD(2010)040, paragraph 40.

73. Section 53 ASPGPOPEPC regulates the issue of instructions from senior to junior prosecutors. They are in line with current Council of Europe standards: "At the prosecutor's request, an instruction shall be committed to writing (...) The prosecutor shall (may) refuse to execute an instruction if, (3) by virtue of the execution thereof, he/she were to commit a crime or contravention, (4) (may refuse) if the execution thereof were to directly and grossly endanger his/her life, health or physical state." This guarantee is welcomed.

74. According to paragraph 5, "if the prosecutor finds the instruction incompatible with a rule of law or his/her legal conviction, he/she may request exemption from the administration of the given affair in writing with a view to his/her legal position. Any such request may not be refused; in this case, the administration of the given affair shall be entrusted to another prosecutor or the superior prosecutor may withdraw the given affair within his/her own competence." This regulation is fully in line with Recommendation Rec(2000)19. Nonetheless, the Venice Commission is of the opinion that "[a]n allegation that an instruction is illegal is very serious and should not simply result in removing the case from the prosecutor who has complained. Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction."¹⁷

F. Remuneration (Chapter VIII)

75. In view of avoiding corruption in the prosecution service, it is welcome that Section 58.1 ASPGPOPEPC provides for remuneration in accordance with the dignity of the profession.

76. Pursuant to Section 71 ASPGPOPEPC, prosecutors are entitled to benefits listed in Section 71.1 as "cafeteria benefits". This term remains unclear.

77. Section 73 ASPGPOPEPC provides for other benefits for prosecutors like scholarship grants, pay advance, settlement aid etc. are laid down. However, criteria for awarding such benefits are lacking.

G. Disciplinary Liability (Chapter X)

78. Chapter X on disciplinary liability is very detailed. The conditions for disciplinary liability, which are stated in Section 82.1 ASPGPOPEPC, are however described in a too general way.

79. Disciplinary power is exercised by prosecutors at different levels. In its report on the prosecution system, the Venice Commission stated that "[T]he system of discipline is closely linked to the issue of the hierarchical organisation of the prosecutor's office. In such a system, disciplinary measures are typically initiated by the superior of the person concerned. In disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. In systems where a Prosecutorial Council exists, this council, or a disciplinary committee within it, could handle disciplinary cases. An appeal to a court against disciplinary sanctions should be available."¹⁸ An appeal to court needs to be provided therefore.

80. Such a right to appeal to a court is guaranteed in Section 94.3 ASPGPOPEPC. "The prosecutor subjected to the proceedings and his/her counsel may turn to a court against the Prosecutor General's decision within fifteen days of the service of the decision". This solution is in line with the Venice Commission's report, even if it is expressed in a laconic manner, without providing for a specific procedure.

¹⁷ CDL-AD (2012)040, paragraph 59.

¹⁸ CDL-AD(2010)040, paragraph 52.

81. The Commission welcomes the possibility to request the issuing of a warning in writing to be able to appeal against it (Section 82.4 ASPGPOPEPC).

82. The Commission also welcomes that there is no possibility to “keep” infringements longer than 3 months as this prevents that secret files are built up against a prosecutor and used at an appropriate moment to put pressure on the prosecutor (Section 83.1 ASPGPOPEPC).

83. According to Section 86.1 ASPGPOPEPC, disciplinary proceedings shall be ordered by the person exercising disciplinary powers as mentioned in Section 85.1 in a reasoned, written order. As per Section 148.f ASPGPOPEPC, the person authorised to exercise the employer’s rights shall be entitled to establish disciplinary liability and may delegate this right to the prosecutor heading the district prosecution office. However, **disciplinary measures should not be decided by the superior who is thus both accuser and judge, like in an inquisitorial system. A prosecutorial council would be more appropriate for deciding disciplinary cases.**

84. Pursuant to Section 87.1 ASPGPOPEPC, the prosecutor is subjected to disciplinary proceedings and his/her counsel may submit an appeal against the decision regarding suspension within eight days and as per Sections 94.3 and 148.h ASPGPOPEPC within 15 days. These deadlines to appeal against disciplinary sanctions are tight. It seem difficult to prepare a defence within 8 days and 15 days for an appeal to court.

85. In Section 87.3 ASPGPOPEPC the prosecutor is entitled to a salary of an amount that is equal to the total of his/her basic salary and regular supplements for the duration of suspension. **Fifty per cent of this amount may be withheld until the termination of suspension.** There are no criteria when 50 per cent of the salary can be retained. This could be used to put pressure on the prosecutor. **Discretion should be removed in this case.**¹⁹

86. The Commission welcomes that the accused prosecutor has to be heard in disciplinary proceedings (Section 88.2 ASPGPOPEPC).

87. According to Section 92.3 ASPGPOPEPC, an objection filed on the grounds of bias against the Prosecutor General as the person exercising disciplinary powers shall be assessed by the Prosecutor General himself, while an objection filed on the grounds of bias against any other person with disciplinary powers shall be assessed by the relevant superior. **An objection against bias of the Prosecutor General should not be assessed by the Prosecutor General him/herself but by a prosecutor’s council.**

H. Prosecution Service Relationships of Officials, Clerks and Blue-Collar Employees (Chapter XV)

88. Pursuant to Section 139.2 ASPGPOPEPC, the “[e]mployer may raise the basic salaries of officials and clerks for a fixed or indefinite term, with regard to the standard of their work, by maximum thirty per cent to the debit of the budget of payments to personnel allocated for priority purposes as determined in the budget chapter of the Act on the Central Budget relating to prosecution, or may determine their salaries at a rate reduced by maximum twenty per cent.” It seems that there are no criteria for such **pay rises and, even more importantly, for pay reductions.** Such measures **should be linked to the assessment procedure or disciplinary measures and not remain at the discretion of the employer.**

¹⁹ See also CDL-AD(2012)001, paragraph 84, raising the same problem in relation to judges.

IV. Transfer of cases

89. According to Article 11.4 of the Transitory Provisions of the Basic Law of Hungary (entered into force on 1 January 2012), the Prosecutor General has the right to give an instruction to allocate a case to a different court having the same jurisdiction. According to information provided by the Prosecutor General to the delegation of the Venice Commission, the problem seems to be the same as dealt with by the Venice Commission in the opinion on the judiciary acts in relation to the President of the NJO²⁰. The Commission raised serious concerns about the possibility for the President of the National Judicial Office to transfer cases to other Courts. The Venice Commission recommended that “court presidents and the President of the NJO should not have the discretion to decide which cases should be transferred or to select the ‘sending’ or ‘receiving’ courts” and that in “any such case allocation should be subject to review”.²¹ The Commission insisted that “a system of transferring cases should be avoided altogether, even if it is completely objective”²² and recommended general measures such as the redesigning of court districts or voluntary transfer of judges to the capital to overcome the problem of case-load.

90. The fact that, in this context, it is the Prosecutor General and not the President of the NJO who allocates the cases does not diminish the problem, on the contrary. In addition to the arguments raised in the opinion on the judiciary acts, as a party to proceedings, the prosecution can have an interest in choosing a court, which might be known for a tough stance on certain types of crime. Leaving the choice of the court to the accusing party is a serious violation of the adversarial principle and gives an unfair advantage to the prosecution. **The possibility to select the court should be withdrawn from the Prosecutor General.**

V. Conclusions

91. Taking into account the variety of possible models for the organisation of the prosecution system in Europe, the general principles for the operation of prosecutors are in line with applicable standards for prosecutors in a democratic society. Act CLXIII of 2011 on the Prosecution Service (APS) and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and Other Prosecution Employees and the Prosecution Career (ASPGPOPEPC) provide for an autonomous body with a hierarchical organisation, enable non-political activity of prosecutors and contain important anti-corruption rules. In both the APS and the ASPGPOPEPC, the Venice Commission found numerous positive aspects, which are set out in this opinion.

92. The main issue, which the Commission identified in these Acts is the high level of independence of the Prosecutor General, which is reinforced by his or her strong hierarchical control over all other prosecutors. Such a wide independence and a hierarchical model are not contrary to European standards. However, they need to be complemented by sufficient checks and balances, which are not yet sufficiently developed in the Hungarian system. The main element of accountability of the Supreme Prosecutor is the duty to present an annual report on his or her activities to Parliament. Individual acts are in most cases under the control of a court. However, there is no prosecutorial council, which could effectively exert an influence on the exercise of the Prosecutor General’s extremely wide powers within the prosecution system.

93. It is important to note that most of the issues identified do not stem from the revision of the Acts under the new Fundamental Law but are remnants from the overarching powers, which the prosecution held before the democratic transition in Hungary.

²⁰ CDL-AD(2012)001, paragraph 86 seq.

²¹ CDL-AD(2012)001, paragraph 91.

²² CDL-AD(2012)001, paragraph 94.

94. The major points which need revision in the APS include:
1. The defence of minors should be a task for parents and social services (Section 2.1).
 2. Prosecutors should benefit from a functional immunity only (Section 3).
 3. The obligation for business entities and other organisations to provide data and documents to the prosecutor goes too far (Section 4).
 4. Entry into private premises against the will of the owner of the premises should be possible only on the basis of a court warrant (Section 4).
 5. The participation of the Prosecutor General in sessions of the full Curia should relate only to public hearings or specific meeting with the Prosecutor General (Section 11.2.a).
 6. There should be criteria under which cases can be taken away from junior prosecutors (Section 13).
 7. In order to allow for an effective defence of the accused, prosecutors should be obliged to give advance disclosure of all relevant evidence (Section 19.3).
 8. The general supervisory powers allowing the prosecutors to interfere in lawsuits between private parties should be reduced (Section 27).
 9. The dissolution or winding up of a legal entity should only be a measure of last resort and not be provided in case of contravention of 'any other legal regulation' (Section 28).
 10. The general supervisory role of prosecution in all administrative procedures is too wide (Section 29).
 11. The prosecution system should be able to access public data required for the investigation of crime but its powers in data accumulation should not go further than that.
95. The major points which need revision in the ASPGPOPEPC include:
1. There should be clear criteria for taking away cases from junior prosecutors (Section 13).
 2. Prosecutors should be obliged to give advance disclosure of all relevant evidence to the accused person (Section 19).
 3. The supervisory powers, interfering in relations between private parties and contradicting the *res iudicata* principle need to be reduced (Section 27).
 4. The Prosecutor General should be able to override advice from the prosecutor's council only on the basis of a reasoned decision and the fact that advice is being overridden should be disclosed.
 5. A prosecutors council with at least some external representation should be established, for example in relation to the appointment of prosecutors above a certain level.
 6. The cases when a member of a prosecutor's council can be dismissed should be specified in the Act (Section 9.2).
 7. The Prosecutor General should have a right to be heard before exemption or forfeiture of his or her office (Section 23).
 8. The revocation of managerial appointments should be justified (Sections 24, 25).
 9. In case of an assessment resulting in an 'ineligible' grade, an internal appeal should first be provided - instead of a call to resign within 30 days - followed by the possibility to appeal to a court (Section 51.2).
 10. Disciplinary measures should not be decided only by the superior who is in a position of both accuser and judge. A prosecutorial council would be more appropriate for deciding disciplinary cases (Section 148.f).
 11. Discretion in the decision to retain up to 50 per cent of the salary of a suspended prosecutor needs to be removed (Section 87).
 12. An objection against bias of the Prosecutor General should not be assessed by the Prosecutor General him/herself but by a prosecutor's council (Section 92).
 13. Pay rises and pay reductions should be linked to the assessment procedure or disciplinary measures and should not remain at the discretion of the employer (Section 139).

96. These problems can be remedied by amendments to the cardinal Acts. In addition it is necessary to revoke Article 11.4 of the Transitory Provisions, which gives the Prosecutor General the possibility to choose the court of trial.

97. The Venice Commission remains at the disposal of the Parliamentary Assembly and the Hungarian authorities for further co-operation.