Strasbourg, 19 June 2012

CDL(2012)044

Opinion 667/2012

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REMARKS OF THE HUNGARIAN GOVERNMENT

ON THE 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

(received on 13 June 2012)

General remarks

Hungary welcomes that the Venice Commission has examined the two cardinal acts on the Prosecution Service in detail. The two acts examined in the Draft Opinion are organic parts of the Hungarian judicial system. We also welcome that the Commission has now acknowledged that the referred acts contain the very regulations which are in line with the common European principles emphasized by the Commission, such as democracy and rule of law.

We recognize the importance, which can be seen in the text of the Draft Opinion, that the objections are mostly not on the novelties of the Fundamental Act or the new cardinal law but on those regulation that were in force previously. These norms, which are objected by the Venice Commission, were examined by the European Commission in detail in 2004 and have been considered as democratic and fulfilling rule of law.[1] The novelties are only based on the development of the European legal standards and the previous opinions of the Venice Commission. Unfortunately, the Draft Opinion does not provide any reason for why the objections raised on those institutions that were fit the Copenhagen criteria, while furthermore, such legal regulations are known in Europe. Besides these, the draft remarks of the Venice Commission are to be considered.

We appreciate the Commission having spared no efforts to get to know the Hungarian legal regulations. Our legal system chiefly follows the continental, German-rooted legal concepts and system, and this is what we have been trying to thoroughly acquaint the Commission with. One main characteristic of this legal family is that it separates organizational, substantive and procedural regulations, and therefore the functioning of individual institutions cannot be understood by examining just this or that law. It is true for the Prosecution Service as well, that in several cases correct conclusions can only be drawn by knowing the cross-regulations. We are aware of the fact that the Commission has not much time to waste, and this is why we have tried – and shall do so in the future, too – to provide you with the fullest possible information.

General comments are necessary on the character of the cardinal laws. The Commission made comments in the Draft on the one hand complaining that too many detailed rules are in the cardinal law (§ 17-19). Later, the Commission argued that detailed rules should be regulated in the same act. In our opinion, this is a contradiction. With regard to the Fundamental Act and the Hungarian legal system, the aim of the cardinal law is to set the guarantee framework-rules that are not belonging to the constitution. Any further rules are to be set by lower-level sources. Therefore, the cardinal law shall be considered as a background-regulation to other relating laws.

Hungary is committed to enforcing international requirements more complete. With respect of the prosecution service, as it is set in the previously handed Background Information, especially the documents of the Council of Europe, and it's bodies such as the Consultative Council of European Prosecutors (CCPE), the Venice Commission, and furthermore, other international organizations of prosecutors were taken into account. In particular, we highlight the Network of the Prosecutors General, and equivalent institutions of the Supreme Judicial Courts of the Member States of the European Union of which presidency have been taken by Hungary recently, and the International Association of Prosecutors and its Standards of professional responsibility and statement of the essential duties and rights of prosecutors.[2]

We are convinced that the remarks and proposals suggested by the Commission will help further develop Hungarian legal regulations. In cases where the Commission was hindered due to problems of translation or any other reasons we try to provide more detailed information in order to avoid eventual misunderstandings.

---

[1] See: see COM(2002)700final on Regular report on Hungary's process towards accession *and* Comprehensive monitoring report on Hungary's preparations for membership (http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_hu_final_en.pdf)

[2] See http://www.iap-association.org/

Detailed remarks

The draft opinion acknowledges the Hungarian legislation at several points, as democratic and legitimate arrangements. However, there are comments that criticize several parts of the two referred cardinal act. A great part of the critics are to be considered, others might be based on translation error, which we try to clarify hereafter, and finally, there are remarks that need a more detailed knowledge of the Hungarian legal system that we also try to refer to. Here we attempt **to respond only to the critical points** in short (even, where is needed, we refer to the previously handed Background Information nr. Ig.186/2012/7.).

Ad 18-19. During the legislative process aiming at the adoption of the new Fundamental Act of Hungary, reiterated consideration was given to which laws and which provisions of them should be the ones requiring qualified-majority voting. Such laws and provisions have comprised, among others, certain provisions of ASPGPOPEPC, which has contributed to the further reinforcement of the independence of the prosecution service. We will take into consideration, however, that some technical rules, such as the way of salary payment, should require a simple majority voting.

Ad. 20. We agree the statement of "the defence of minors should foremost be task for parents and social services", however, we shall mention that the cardinal law's basic principle is the prosecutor shall receive an authority only when no other governmental or non-governmental bodies are able to achieve that particular aim or the prevented object needs any action by the prosecutor. These tasks are in line with the international standards, particularly the UN Convention on the Right of the Child (Article 40.3.b)[3]. The prosecutor has to take all legal measures in minor's cases to avoid criminal court procedure if the legal conditions for that are exists and also he has to *initiate proceeding* at social services to take measures for child protection. All the measures will be taken by social services, of course. During the investigation and prosecution stage of the procedure the prosecutor has a view of endangered circumstances of the minor (e.g. the crime was committed together with parents), so we agree this rule which obliges the prosecutor to initiate measures with the aim of child protection. This kind of action of the prosecutor *is well known in Western Europe* as well. In the Netherlands, for example, contemporary and on-going cases are to be mentioned where only the prosecutor can achieve public order in cases related to minors, such as preventing them from paedophiles.

Ad 21. The paragraph 14 of the Draft Opinion on the Act CLI of 2011 on the Constitutional Court [CDL(2012)037] of the Venice Commission states that the immunity of the members of the Constitutional Court is "well in line with European standards". We would like to highlight, that the functional immunity, according to the rules of the cardinal laws, *is the same for the members of the Constitutional Court and the prosecutors*. Therefore, following the practice of the Venice Commission, we may conclude that whether the regulation is in line with the European standards at the Constitutional Court the same regulation shall be considered the same way at the prosecution service.

Thus, the current, as well as the former practice related to the waiver of immunity for prosecutors *is in conformity with the opinion of the Venice Commission*. Immunity for prosecutors always remains a functional one, so does in other institutions like the Constitutional Court. (Here we would like to refer to our previously handed Background Information paper, where it is explained in detail that prosecutors enjoy limited immunity.)

We note, that laws may give several rights, as a kind of tradition, which may be rarely realized. Such can be observed in the Netherlands or Belgium where the Ministry of Justice have the

[3] Article 40.3.(b) of the UN Convention on the Right of the Child says „whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."
40.4. "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

right to order the Prosecutor General to prosecute but he never does it. By analogy, it is very similar in Hungary where the Prosecutor General has a traditional right regarding functional immunity but he never used it. Therefore, we can set that the prosecutor do not has a real irresponsibility.

Ad. 23. The draft opinion stated that APS 4.3 goes too far in non-penal matters because there is no limitation when business entities and other organisations have to provide data and documents to the prosecutor. We have to draw attention to the fact that the accurate legal text of this section contains: when the prosecutors "performing their duties in their official capacity" (in order to serve public interest) may ask for documents, which means this right can be exercised only in ongoing cases. The legal text also regulates that the connected body has to respond to such request but *in non-penal matters there is no sanction* for omitting. The prosecutor is not entitled to ask for documents connected to economic conditions of the requested business entities which general rule also one of the limitations. This right of the prosecution is *far less and more limited than* the well known administrative investigative authority of the *OLAF*. This section gives entitlement for the prosecution also to ask for full documentation the cases of contraventions if the prosecutor deems the forwarded resolution not fully complies with the relevant law. The disclosure of these, however, can also be enforced in an action in front of the court.

Ad 24. Regarding to the Section 4.4 the Draft Opinion criticized that power of prosecutor may enter into private premises without court warrant. It has to be cleared first that this entry is entirely different from the criminal (house) search. There is no doubt about the prosecutor's entitlement to enter into the prison, juvenile's correction facilities, etc. These institutions also have rooms at the disposal of employees. It does not seem any reason for prevent prosecutor from entering into these rooms. The right is about entering, where the prosecutor is not entitled to touch anything.

According to the remarks of the Commission we agree that these regulations can be restricted. We think the authority to enter into premises *should only be used in connection with public institutions.*

Ad 25. Due to a possible unfortunate mistranslation or misunderstanding, Section 5.1 of APS does not refer to an immediately passed ruling, but prescribes that once a ruling has been passed, it is immediately to be sent to the prosecutor. The rights of the parties are not injured as the case is to be adjudged in accordance with the rules of ordinary proceedings.

Ad 29. Section 11.2.a. has no connection with the rights of the Prosecutor General listed in the following regulations. In Section 11.2.b-j. of the APS, there are no cross-references among the above mentioned sub-paragraphs, these are separate rights of the Prosecutor General.

The present rules for the „session of the full Curia" are exclusively regulated in the Systemic & Operational Regulations of the Supreme Court that have not been amended since the Curia replaced the Supreme Court yet. *The sessions of the full Curia simply provide forum for discussion on general administrative and management issues* for the Curia for example the self government elections of judges or organize representative events etc.

All other forms of the Curia sessions are regulated in the cardinal Act CLXI of 2011 on Organization and Administration of Courts, (Section 24.1 on competences of Curia) and the Act XIX of 1998 on the Code of Criminal Proceedings (see: appeal and extraordinary judicial remedy proceedings). In such proceedings any prosecutor appointed may exercise the rights and duties of the prosecutor or – if the power is delegated – on behalf of the Prosecutor General provided by law. If these proceeding belonged to the session of the full Curia, it would have been contradictory, though it belongs to various chambers of the Curia.

Consequently, the full session of the Curia *has no competence to impose legally binding decisions in individual criminal or civil law cases* and it cannot create theoretical resolutions to oblige any judicial organ how to try cases in the future. Therefore the participation of the Prosecutor General in the above sessions – when he or she is affected or interested - is rather

a *matter of politeness* and expressing his or her advisory opinion, that has thus no legal nature or form of any legal motion or action, shall not interfere with the independence of the Judiciary. The presence of the Prosecutor General is rooted in the Fundamental Act that defines the Prosecutor General is a contributor to the jurisdiction. In this sense this is forum where he or she may express his experiences, remarks on the jurisdiction.

Ad 30. As the Criminal Procedure Code sets forth, the prosecutor as a public accuser orders or performs an investigation to establish the conditions for accusation (CCP, Section 28.3). The aim of the investigation and the activity of the enforcement authority is to provide the prosecutor with the necessary information to decide whether to indict or not. Consequently, the legitimacy of the investigation carried out by the law-enforcement authority is provided by the prosecutor. Simply put, the law-enforcement authority is the extended arm of the prosecutor; it is the prosecutor who is ultimately responsible for the investigation carried out by the law-enforcement authority. In practice, the taking over of an investigation occurs when the law-enforcement authority is reluctant to perform the investigation.

Ad 33. The right to complaint was primarily to *fulfil the principle of equality of arms* because the defendant does have such a right against both the decision of the court and the applied legal regulation. At the early stage of the legislation of the new cardinal acts, it seemed to be appropriate to set similar rights to the Prosecutor General as well, at least against applied legal regulation. The final text of the Act on the Constitutional Court significantly limited this right of the Prosecutor General, therefore, the regulation in force is not able to fulfil the abovementioned aims so the opinion stated in the § 29 of the Draft Opinion of the Commission on the Act CLI of 2011 on the Constitutional Court of Hungary may be considered.

Ad 34. The independence of the prosecutor is not of personal, but of organizational nature. The possibility of taking a case away derives from the strict, hierarchical nature of the Prosecution Service. In practice it may happen that the case is taken away from the competent prosecutor in case of the impartiality of the case administration should be ensured. The right to take away a case and to give instructions is inherent to the proper functioning of a hierarchical prosecution service. *The prosecutor is not a judge*, therefore, the prosecutor has no connection with the case in person, similarly has no direct personal responsibility for any error.

Please note, that the term “junior prosecutor” used in the draft may confuse the interpretation, as this person is an aspirant who awaits for being appointed as prosecutor (see APS section 40.1.a and ASPGPOPEPC Section 1.2). Here the notions “superior prosecutor” and “subordinate prosecutor” or just “prosecutor” are to be used.

Ad 35. The problem expressed in connection with Section 13.3 APS could by clarified with the following example: there is an ongoing investigation where a friend of a superior prosecutor is involved. Upon his/her notification on the impartiality, the superior prosecutor is excluded from the case by his/her superior. It should be pointed out that this exclusion does not mean that the competent prosecution office is excluded as well. In this case, the higher ranking superior prosecutor – removing the lower ranking superior prosecutor from the hierarchical chain temporarily - has a direct contact with the junior prosecutor in the same office.

Ad 36. According to the relevant provisions of the Code of Criminal Procedure (referred as CCP. Sections 193.1, 206.1, 213.3, 216.1,4) the defendant and the defence counsel shall be enabled to inspect all documents – including classified data files – that may serve as the basis of the indictment. Solely the confidential data of the witness (victim) cannot be disclosed.

Ad 37. The current Hungarian regulation concerning the ex officio review (Section 20.2 APS) makes a clear distinction between cases settled by a binding court decision and other cases. As Section 20.2 of the APS sets forth, the precondition of an ex officio review is that the newly emerged fact or circumstance should lead to an indictment. Therefore, ex officio review may be applied only for cases which were not settled by the court before, namely where the Prosecution Service has not filed an indictment yet.

Ad 39. Section 27.1.b of APS refers to the task of the prosecutor described in Section 9.1 to 3 of the separate Act III on the Code of Civil Procedure of 1952. According to this the prosecutor is entitled to act in a civil law suit if the obligee is not in the state of protecting his/her rights. Such cases seldom occur. [For example, in cases where the obligee is a fugitive and immediate action is required in order to protect his/her rights and the obligee does not have a counsellor (attorney at law).] In such extraordinary cases the Hungarian law traditionally entitles the prosecutor as the actor of the administration of justice to take action. Acting at court as one of the parties while respecting the rights of the party unable to enforce his/her rights for any reason and also lacking a counsellor (attorney at law), the prosecutor with his/her special qualification can enable the passing of a judgement. Section 27.1.b of APS is completed by the conditions specified in separate act.

The first sentence of Section 27 (4) of APS refers to legal remedy available against court decisions made with regard to the invalidity of marriage. The second sentence regulates the prosecutorial competences relating to court decisions on the presumption of death and the establishment of the fact of death by court. By specifying the traditional prosecutorial duties in accordance with the protection of public order and public interest, APS may be completed.

At last, we shall underline that *there is no "supervisory power"* of the prosecutor in this regard. It only has rather a function of "control" which is less in authority than supervision.[4] In addition, in these new acts of 2012 one of the most important transformations is the withdrawal of the former soviet-type "supervisory power" and replacing with the control of legality (See Section 26)

Ad 40. Section 3 (3) and Section 11 (4) of Act CLXXV on the Freedom of Association of 2011 specifies the cases when the prosecutor shall be entitled to initiate a lawsuit requesting the dissolution of legal entities which operate on the basis of freedom of association. The reason for the dissolution is that the exercising of the freedom of association shall not violate Article C (2) of the Fundamental Act of Hungary, nor shall it constitute a criminal offence or shall incite for the commission of a criminal offence, and it shall not result in the infringement of others' rights and freedoms, either.

Section 11. (1) of Act of the Freedom of Association also provides that *no legality control is exercised in cases where judicial or administrative procedures are otherwise applicable*. Legality control may be exercised by prosecutors only over activities based on freedom of association, which violate the law. The prosecutor may not exercise this control for example in cases of minor tax law violations, because such cases fall under administrative procedures conducted by tax authorities. APS may be revised in this regard in line with laws "requiring simple majority". At last we shall add that Section 28 can only be interpreted in line with the principles of Section 26.

Ad 41-43. The prosecutor *does not have the power of general supervision over administrative procedures.* Moreover, he may initiate the judicial review of the decisions of administrative authorities only if the authority disagrees. Should the authority change its decision as a result of the prosecutor's reminder, the person concerned shall be entitled to appeal to court against the amended decision of the administrative authority. The prosecutorial power thus not influence and does not deprive the party's right to legal remedy. Pursuant to Section 29 (1) and Section 29 (3), the prosecutor shall only be entitled to take administrative measures (reminders, actions) in cases specified by the general rules of Section 26 (2) of APS. According to this, prosecutorial measures may only be taken if, based on the data or other circumstances revealed to the prosecutor, it is reasonable to assume that serious legal violations, omissions have occurred or non-compliant conditions exist (hereinafter collectively: contravention of law). Section 26 (2) of APS may be amended to that serious legal violations resulting in the infringement of public interest, in particular decisions, activities, omissions or non-compliant

[4] According to the relevant literature it is referred in several paper that the forms (and even the level) of control shall be distinguished. See e.g. A. Zs. Varga: Alternative Control Instruments over the Administrative Procedures: Ombudsmen, Prosecutors, Civil Liability. Passau, Schenk Verlag, 2011.

states threatening the security, public order or state interest may constitute reasons for the prosecutor's procedure. Section 29 can only be interpreted in line with the principles of Section 26.

Ad 44. Section 30 (6) of APS refers to prosecutorial functions set forth by Section 128 (3) of Act II of 2012. Pursuant to the Act "requiring simple majority" it is the prosecutor who shall be entitled to file an action for re-trial if the criminal offence committed by the perpetrator was evaluated and adjudged as an administrative offence. In this regard the translation is bearing difficulties and facing us the differences between legal families. Using the international terms, the "res iudicata" in the Hungarian legal system is the court decision on the first or, mainly, the second instance. There is a regular possibility of supervision of the Curia on these decisions, which may be initiated either by the parties or the prosecutor. This is rule that the APS refers to. At the end of the Curia's (cassational) procedure results the *"final decision" where is no further possibility to remedy* nether for the parties nor the prosecutor.

Ad 45. The Prosecutor shall be entitled to manage data only upon legal authorization. Data shall be processed only for purposes specified by law (purpose-related data processing). Data processing shall comply in all stages with this legally specified purpose. Should it be revealed to the prosecutor that an individual, legal entity, body or association without legal entity has violated the law, he shall be obliged to take actions and initiate the proceeding of the competent body or authority. For this, the *prosecutor needs to obtain data in compliance with legal regulations*; therefore, he manages and transfers data to bodies entitled to proceed in the certain case, or to prosecutors and prosecution services having competence and territorial jurisdiction in the certain case. Data transfer shall always be documented.

Ad. 46. The comment of the Commission reveals a discrepancy in Hungarian legislation on the prosecution service and on criminal procedure. While the commented provision of the APS states clearly that instructions issued to investigative authority may be made public upon the final completion of criminal proceedings, provisions of the Code of Criminal Procedure (CCP) give more detailed rules, allowing to disclose such instructions in the course of criminal proceedings, if certain conditions are met.

Under the third sentence of article 186 (4) of CCP no copy of documents communicated between the prosecutor and the investigative authority under article 165 may be issued, except for those containing the legal opinion of the prosecutor or the investigative authority on the case – including particularly instructions of the prosecutor to the investigative authority to execute an act of investigation, provided that the act was executed -, if interests of the investigation suffer thereby no harm. (Article 165 applies to the relation between the prosecutor and the investigative authority, and the right and duty of the prosecutor to instruct the investigative authority.)

Thus, under CCP it is possible to disclose an instruction in the course of the investigation given by the prosecutor, provided that it contains a legal opinion on the case, and disclosure does not affect interests of the investigation. In this way the decision does not fall in the exclusive competence of the General Prosecutor, and under article 196 (1) a legal remedy is available for those affected directly by the decision.

Emphasizing that in the course of daily work prosecutors and law-enforcement personnel apply the provisions of CCP and not those of ASP, the difference between the provisions of the two acts should indeed be dissolved and the more detailed provisions of CCP should be read together with ASP.

Ad 47. The prosecutorial right to file lawsuits is ensured by the sectoral laws if public interest is infringed. Provisions of Section 61 (5) of Act XLVIII on the Protection of Designs of 2001, Section 37 (5) of Act XXXVIII of the Utility model protection on Trademarks and Topography protection of 1991, and Section 77 (5) of Act XI of 1997 are relevant here.[5] Competences related to intellectual properties protected by law shall be exercised by the Hungarian

[5] see the homepage of the Hungarian Intellectual Property Office at http://www.sztnh.gov.hu/English/hivatalrol/

Intellectual Property Office not according to the regulations regarding administrative procedures. Consequently, its decisions can be contested by the parties concerned or the prosecutor only in non-contentious procedures to be initiated in court. (The prosecutor is entitled to initiate such a procedure only in cases involving the infringement of public interest).

Ad 51. The Prosecutor General appoints a prosecutor for an indefinite term if, based on the result of the evaluation, he has duly established the prosecutor's eligibility and thus considers the prosecutor to be suitable for the position. The reason why the Prosecutor General's power is exclusive is that the structure of the Prosecution Service is hierarchical and is headed by the Prosecutor General.[6] In this regard, the liability shall also be borne by the Prosecutor General. In his decision-making the Prosecutor General is assisted by advisory bodies as it will be pointed out in §55. of the present response. In case the eligibility of the prosecutor is established, indefinite appointment automatically follows; therefore, no further participants are required to be involved in the decision-making process. In case of being not eligible, the prosecutor may apply to the court, which apply has suspensory effect on the termination of the legal relationship.

Ad 52-53. It derives from the hierarchical structure of the Prosecution Service as well as from the Prosecutor General's responsibility for the operation of the Prosecution Service that in his decision-making he shall not be bound by the opinion of the prosecutors' council. Nevertheless, we intend to take the proposal into consideration that the prosecutors' council should be notified about the reasons why its opinion was disregarded. (The wider publication of the disregarded opinion, however, would lead to unnecessary lawsuits filed by unsuccessful applicants; therefore, we do not evaluate it as appropriate.)

Ad 54-56. The practice, suggested by the Commission, primarily rooted in common law, according to which the prosecutor is appointed to a superior position upon decisions of persons not belonging to the structure of the Prosecution Service hardly fits the practice of continental legal systems. The current regulation and the international examples of more than a dozen of EU Member States resembling the Hungarian regulations were elaborated upon in the previously provided Background Information.

Ad 55. The Prosecutor General does have an advisory boards. The Prosecutor General regularly holds (i) managerial meetings, (ii) consults with his deputies, and in issues related to personnel affairs and human resources he cooperates with (iii) the prosecutors' council. The Prosecutor General regularly (iv) consults with the Former Prosecutor Generals and, furthermore, there is (v) a senior advisory beard for scientific questions statuted by the organisational and operational rules. There is no reason for involving further participants into these well-tested decision-making and pre-arrangement mechanisms.

Ad 57. With regard to this §, we also attempt bridging and resolving linguistic barriers and try to provide answers to problematic points of translation. The term "unable to earn a living" shall apply to those persons who are unable to fulfil the duties of their job for reasons of e.g. illness or epidemic quarantine. Only this circle of prosecutors shall be disregarded concerning the issue of quorum.

Ad 58. The prosecutors' council shall be elected. We agree the restriction of the revocation to be considered.

Ad 60-65. The objections raised under points 60-65 are to be considered. At the same time these strong guarantees, inherent in the Prosecutor General's person, fulfil those requirements, however, that the prosecution service should stay independent and free from any (political) influences. Even in lack of the broad consensus, in connection with the election of a new Prosecutor General, the prosecution service shall be able to work during the period without a

[6] Let us note that could the managerial decision of the Prosecutor General be revised by an autonomous body, the structure of the Prosecution Service would not resemble a democratic institution but rather the Red Army of Trotsky, where the execution of the decisions made by the person in managerial position could be prevented by a separate committee following its own ideas and concepts.

formally elected Prosecutor General whose former election was based on a previous broad consensus given at the time his election. This way keeps the prosecution service able to work at blocking of the parliamentarian minority referred by the Commission.

According to the Report on European Standards, as regards the independence of the judicial system, Part II. The Prosecution Service (CDL-AD (2010) 040) Strasbourg 3 January 2011): the Prosecutor General can be elected permanently or for a relatively long period. If this so called relatively long period does not contain sufficient elements for the functioning of the prosecutor's office, we can even accept that the Prosecutor General should be appointed either for permanent time or the restriction of prolonging period for 3 years. In this latter case the after the expiry of the 9 year term, the Prosecutor General might be in office for maximum 3 years in case of no broad consensus to elect the new Prosecutor General. In this case the period in office could reach 12 year, which is the maximum of the possible appointment in the Hungarian constitutional system (see e.g. Members of the Constitutional Court), see also the previously handed Background Information document. These suggestions, we believe, are in line with the Draft Opinion.

Ad 66. We can accept that the Prosecutor General should be heard before exemption or forfeiture from office.

Ad 67. The legal system regulating the Hungarian public personnel including government officials, state officials, prosecutors and others (except judges) differentiates the part-time and permanent employment. According to the part-time employment the revocation of (managerial) appointments are always bound to reasoning. Nevertheless, in permanent employment this revocation traditionally does not need any reasoning as other guarantees are surrounding these appointments. These regulations have been in force since the time of the accession to the EU where the European Commission did not objected as we referred in the previously handed Background Information paper. In case the Venice Commission still considers it to be revised we can also accept that the revocations of managerial appointments are to be justified to the members of the prosecutorial council.

Ad 71. Pursuant to the effective legal regulation, in the event of an “ineligible” grade, the prosecutor shall not be obliged to resign after he is called upon to do so. In this case, the employer shall take measures to exempt the prosecutor, and the prosecutor is entitled to appeal against this decision to the court. In this way, the “external” legal remedy is guaranteed, which renders “internal appeal” unnecessary.

Ad 74. The reasoning of an instruction and its review by a body is incompatible with the centralized direction and the Prosecutor General’s personal liability. The act of giving instructions in writing serves as a sufficient guarantee for the prosecutor against nonprofessional instructions. By assuming this, the Commission has also established that the Hungarian regulation is also in line with the soft law guidelines of the Council of Europe. (For a detailed explanation on this topic see the previously provided Background Information.)

Ad 76. The system of ‘cafeteria’ is a well-established form of benefit. In order to thoroughly comprehend the system we would need to quote further statutory instruments, which had not been required by the Commission. Briefly, within the limits of a certain amount of funding (in this case the funds allocated to the Prosecution Service in the Budget Act) the employee can decide for himself/herself on an advantageous benefit such as messing allowance, holiday allowance or season tickets paid by the ‘cafeteria’ system.

Ad 77. The conditions and the detailed regulations concerning other benefits provided to prosecutors (scholarship grants, pay advance, social benefit) are regulated inter alia in the Labour Code and in instructions of the Prosecutor General composed with the participation of representation organizations upon the authorization of ASPGPOPEPC. As we have previously indicated these are not to be included into cardinal laws.

Ad 78. We do not consider the rewording of the conditions for disciplinary liability to be justified, for it might lead to controversial application in individual cases. We would like to note, however,

that other acts on legal status – including Section 105 of Act CLXII of 2011 on the Legal Status and Remuneration of Judges – also provide such general wordings.

Ad 79. The issue raised by the Venice Commission is already regulated. Pursuant to Section 94 of ASPGPOPEPC the prosecutor has the right to appeal to a court against the final disciplinary decision. This appeal has suspensory effect as well.

Ad 83. We partially agree with the proposal of the Venice Commission. It should be noted, however, that apart from the judiciary we find the same regulation with regard to every other institution. Nonetheless, it is worth considering, whether decisions in disciplinary cases should be conferred to a prosecutorial board set up for this very purpose. Prosecutors' councils are not appropriate for passing final disciplinary decisions as they only represent prosecutors working at the given Prosecutor's Office.

Ad 84. We share the concern of the Venice Commission that deadlines to appeal against disciplinary sanctions are tight. We shall consider whether to prolong the time available for legal remedy to a 30-day deadline. In case of suspension of the prosecutor, however, it is justified to keep the short deadline alone due to the object of the dispute.

Ad 85. We partially agree with the proposal of the Venice Commission. In certain cases half of the salary has to be withheld, for instance when criminal proceedings have been initiated against the prosecutor for the act serving as grounds for the disciplinary procedure.

Ad 87. We agree with the proposal. It might be worth consideration whether this prosecutors' council should be the same as the council established for disciplinary reasons.

Ad 88. We agree with the proposal of the Venice Commission, according to which the reduction of the salaries of the officials and clerks should be linked to an assessment procedure alone. In case of the rise of the basic salary, however, we do not consider starting an assessment procedure justified, as this is a positive decision of the employer.

Ad 89-90. As it is noted in the draft opinion, allocating cases by the Prosecutor General to different courts is a transitional provision and *transitional possibility until the harmonized and balanced workload among the courts is ensured*. (Regarding the causes of the different workload of courts, please see our written explanation titled "Background Information".)

Both the demand for punishment of the state and the person staying under the effect of criminal procedure have the same interest, namely to finish criminal procedures within the shortest and possible period of time.

The basis of the principle of rule of law would be questioned in that case if the place of the accusation would influence the finishing of the trial, and it must be noted that the long period of the trial has to be taken as a mitigating factor at sentencing. Please see page 18-20 of the previously provided Background Information, too.

Conclusions of the draft opinion and the remarks

94. The major points which need revision in the APS include:[7]

1. The defence of minors should be a task for parents and social services (Section 2.1). [§20]

   It is the task of the social services, the prosecutor has the right to initiate a procedure only if no other institution is able to do so.

2. Prosecutors should benefit from a functional immunity only (Section 3). [§21]

   The functional immunity, according to the rules of the cardinal laws, *is the same for the members of the Constitutional Court and the prosecutors*. Therefore, following the practice of the Venice Commission, we may conclude that whether the regulation is in line with the

[7] In detail see referred §

European standards at the Constitutional Court the same regulation shall be considered the same way at the prosecution service.

3. The obligation for business entities and other organisations to provide data and documents to the prosecutor goes too far (Section 4). [§23]

   In non-penal matters there is no sanction for omitting in this regard. The prosecutor is *not* entitled to ask for documents connected to economic conditions of the requested business entities which general rule also one of the limitations. This right of the prosecution is *far less and more limited than* the well known administrative investigative authority of the *OLAF*. The disclosure of these data, however, can also be enforced before court.

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). [§24]

   According to the remarks of the Commission we agree that these regulations can be restricted. We think the authority to enter into premises should only be used in connection with public institutions.

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). [§29]

   The full session of the Curia *has no competence to impose legally binding decisions in individual criminal or civil law cases*. The presence of the Prosecutor General is rooted in the Fundamental Act that defines the Prosecutor General is a contributor to the jurisdiction. In this sense this is forum where he or she may express his experiences, remarks on the jurisdiction, therefore, it is rather a matter of politeness.

6. There should be criteria under which cases can be taken away from junior prosecutors (Section 13). [§34]

   The possibility of taking a case away derives from the strict, hierarchical nature of the Prosecution Service. The prosecutor is not a judge, therefore, the prosecutor has no connection with the case in person, similarly has no direct personal responsibility for any error. The term “junior prosecutor” used in the draft may confuse the interpretation, here the notions “superior prosecutor” and “subordinate prosecutor” or just “prosecutor” are to be used.

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). [§36]

   According to the relevant provisions of the Code of Criminal Procedure the defendant and the defence counsel shall be enabled to inspect all documents – including classified data files – that may serve as the basis of the indictment. Solely the confidential data of the witness (victim) cannot be disclosed.

8. The general supervisory powers allowing the prosecutors to interfere in lawsuits between private parties should be reduced (Section 27). [§39]

   There is no “supervisory power” of the prosecutor in this regard. It only has rather a function of “control” which is less in authority than supervision. In addition, in these new acts of 2012 one of the most important transformations is the withdrawal of the former soviet-type “supervisory power” and replacing with the control of legality (See Section 26).

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). [§40]

   Act of the Freedom of Association also provides that no legality control is exercised in cases where judicial or administrative procedures are otherwise applicable. Legality control may be exercised by prosecutors only over activities based on freedom of association,

which violate the law. Section 28 can only be interpreted in line with the principles of Section 26. APS may be revised in this regard in line with laws "requiring simple majority".

10. The general supervisory role of prosecution in all administrative procedures is too wide (Section 29). [§41-43]

The prosecutor does not have the power of general supervision over administrative procedures. Prosecutorial measures may only be taken if, based on the data or other circumstances revealed to the prosecutor, it is reasonable to assume that serious legal violations, omissions have occurred or non-compliant conditions exist. Section 29 can only be interpreted in line with the principles of Section 26.

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. [§45]

The prosecutor needs to obtain data in compliance with legal regulations; therefore, he manages and transfers data to bodies entitled to proceed in the certain case, or to prosecutors and prosecution services having competence and territorial jurisdiction in the certain case.

95. The major points which need revision in the ASPGPOPEPC include:

1. There should be clear criteria for taking away cases from junior prosecutors (Section13).

This remark is on APS. See 94.6. and § 34.

2. Prosecutors should be obliged to give advance disclosure of all relevant evidence to the accused person (Section 19).

This remark is on APS. See 94.7. and §36.

3. The supervisory powers, interfering in relations between private parties and contradicting the res iudicata principle need to be reduced (Section 27). [§44]

This remark is on APS section 30. The "res iudicata" in the Hungarian legal system is the court decision on the first or, mainly, the second instance. There is a regular possibility of supervision of the Curia on these decisions, which may be initiated either by the parties or the prosecutor. This is rule that the APS refers to. At the end of the Curia's (cassational) procedure results the "final decision" where is no further possibility to remedy nether for the parties nor the prosecutor.

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. [§52-53]

We intend to take the proposal into consideration that the prosecutors' council should be notified about the reasons why its opinion was disregarded.

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. [§54-56]

The practice, suggested by the Commission, primarily rooted in common law and hardly fits the practice of continental legal systems. There are more than a dozen of EU Member States having the same regulation as it is in Hungary (see Background Information document).

6. The cases when a member of a prosecutor's council can be dismissed should be specified in the Act (Section 9.2). [§58]

We agree the restriction of the revocation to be considered.

7. The Prosecutor General should have a right to be heard before exemption or forfeiture of his or her office (Section 23). [§66]

   We can accept that the Prosecutor General should be heard before exemption or forfeiture from office.

8. The revocation of managerial appointments should be justified (Sections 24, 25). [§67]

   These regulations have been in force since the time of the accession to the EU where the European Commission did not objected. In case the Venice Commission still considers it to be revised we can also accept that the revocations of managerial appointments are to be justified to the members of the prosecutorial council.

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). [§71]

   The prosecutor is entitled to appeal against this decision to the court. In this way, the "external" legal remedy is guaranteed, which renders "internal appeal" unnecessary.

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). [§83]

    We partially agree with the proposal of the Venice Commission.

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). [§85]

    We partially agree with the proposal of the Venice Commission.

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). [§87]

    We agree with the proposal.

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). [§88]

    We agree with the proposal.

Budapest, June 2012