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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PRELIMINARY DRAFT REPORT

ON

**EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE
OF THE JUDICIAL SYSTEM:**

PART II – THE PROSECUTION SERVICE

on the basis of comments by

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Table of contents

1. Introduction	3
2. Relevant texts	3
3. Level of regulation	4
4. Scope and degree of independence.....	4
5. Prosecutor general	5
5.1. Appointment and dismissal	5
5.2. Public accountability of the prosecutor's office.....	7
6. Prosecutors other than the Prosecutor General.....	7
6.1. Appointment	7
6.2. Discipline	8
6.3. Guarantees of non-interference into the work of individual prosecutors	8
7. Prosecutorial Council.....	10
8. Remuneration and training	10
9. Dangers of excessive powers of the prosecutor's office for the independence of the Judiciary.....	10
10. Conclusion [Note: to be amended in the light of upcoming discussions]	13

1. Introduction

1. By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Ms Däubler-Gmelin, requested the Venice Commission to give an opinion on “European standards as regards the independence of the judicial system”. The Committee is “interested both in a presentation of the existing *acquis* and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe”.

2. The Commission entrusted the preparation of this report to its Sub-Commission on the Judiciary, which decided to prepare two reports on the independence of the Judiciary, one dealing with judges (CDL-AD(2010)004, adopted at the 82nd plenary session, 12-12 March 2010) and the present one on prosecution, prepared on the basis of comments by Mr Hamilton (CDL-JD(2009)007), Mr Sørensen (CDL-JD(2008)005) and Ms Suchocka (CDL-JD(2008)004).

3. *The present report was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

2. Relevant texts

4. A number of international documents exist on the issue of protecting the independence of prosecutors. To cite only 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)

5. In a number of opinions, the Venice Commission had occasion to make recommendations on constitutional provisions and legislation on the prosecution office, see Part II of the Draft Vademecum on the Judiciary (CDL-JD(2008)001).

3. Level of regulation

6. Certain basic principles concerning the prosecutors office should be regulated at the constitutional level. This concerns the appointment and possible dismissal of the Prosecutor General, when applicable his or her independence and possibly the establishment of a Prosecutorial Council (where it exists). However, “[i]t is not necessary for much organisational detail to be included in the Constitution; an ordinary law of Parliament should be sufficient and would be more flexible.”¹

4. Scope and degree of independence

7. The major reference texts allow for systems where the prosecution system is not independent of the executive, and in relation to such systems concentrate on the necessity for guarantees at the level of the individual case that there will be transparency concerning any instructions which may be given.

8. Nonetheless, for years, the scope or degree of independence, which the prosecution office should enjoy has evoked discussion. That stems to a large extent from the fact that European standards allow for two different ways of resolving the position of the prosecution vis-à-vis other state organs:

*“Legal Europe is divided on this key issue between the systems under which the public prosecutor’s office enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action. As a prevailing concept, it can be seen, that in the current situation the very notion of European harmonisation round a single concept of a prosecutor’s office seemed premature.”*²

9. Consequently, Recommendation (2000) 19 allows for a plurality of models. Its paragraph 13 contains basic guidelines for those states where the public prosecution is part of or subordinate to the Government.

10. Nonetheless, only a few of the countries belonging to the Council of Europe have a prosecutor’s office forming part of the executive authority and subordinate to the Ministry of Justice (e.g Austria, Denmark, Germany, the Netherlands, Norway, Poland). The Commission notes, that there is a widespread tendency to allow for a more independent prosecutor’s office, rather than one subordinated or linked to the executive. For example, in Poland draft amendments to the Law on the prosecutor’s office are being discussed, which would separate the role of the Ministry of Justice from that of the Prosecutor General. Also, it is important to note that in some countries, subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases. Even in such systems, however, the fundamental problem remains as there are no formal safeguards against such intervention.

11. The tendency described above is visible not only among the civil law member states of the Council of Europe but also in the common law world. The federal prosecution service in Canada recently moved from the model of a service as an integral part of the Attorney General/Ministry of Justice to the model of an independent Director of Public Prosecutions (DPP). Northern Ireland has now also established its DPP’s Office as independent. England and Wales and Ireland have also all seen the gradual elimination of police powers to

¹ CDL(1995)073rev., Opinion on the regulatory concept of the Constitution of the Hungarian Republic, chapter 12.

² Recommendation Rec(2000)19, Explanatory Memorandum p.11.

prosecute, which was a traditional feature of common law systems, in favour of a public prosecutor.

12. Apart from those tendencies, there is an essential difference as to how the concept of independence is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court. The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of individual prosecutors.

13. A clear distinction has to be made between a possible independence of the prosecutor's office or the Prosecutor General as opposed to the status of lower level prosecutors who are rather 'autonomous' than 'independent'.

14. Hence, any independence of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any lower ranking prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic.

15. Such independence of the prosecution service as such has to be distinguished from any "internal independence" of individual prosecutors. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities individual prosecutors need not obtain the prior approval of their superiors nor have their action confirmed. Individual prosecutors often rather enjoy guarantees for non-interference from their hierarchical superior.

16. In order to avoid undue instructions, it is essential to develop a catalogue of such guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. Such guarantees should cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process.

17. In the following, guarantees for the Prosecutor General, individual prosecutors and some structural elements (Prosecutorial Council, training) will be discussed.

5. Prosecutor general

5.1. Appointment and dismissal

18. The manner in which the Prosecutor General is appointed and recalled plays a significant role in the system guaranteeing the independence of the prosecutor's office. In its opinion on the Regulatory Concept of the Constitution of the Republic of Hungary, the Venice Commission stated:

*"It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore **professional, non-political expertise should be involved in***

the selection process. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government.³

19. [Note: the next two paragraphs could be controversial and should be discussed in the Sub-Commission.] Also no single, categorical principle can be formulated as to who - the president or Parliament - should appoint the Prosecutor General in a situation when he is not subordinated to the Government. The matter is variously resolved in different countries. Acceptance of the principle of cooperation amongst state organs seems a good solution as it makes it possible to avoid unilateral political nominations. In such cases, a consensus should be reached. In any case, the right of nominating candidates should be clearly defined. **As a minimum standard, advice on the professional qualification of candidates should be taken from relevant prosecutors etc. to ensure that such qualifications are taken into due consideration and only a person who has been deemed to be qualified by a technical committee should be nominated. Such a technical committee could be established *ad hoc* or might be a Prosecutorial Council (including a combined Judicial and Prosecutorial Council) or some other independent organ (e.g. a college of prosecutors).**

20. The danger that an election by Parliament will lead to a politicisation of the appointment process could also be reduced by **providing for the preparation of the election by a parliamentary committee of experts. Both for decisions within this committee and for the final vote, a qualified majority for the election of the Prosecutor General should be provided for.** 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.

21. It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. **A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office.** That would ensure the greater stability of the prosecutor and make him or her independent of current political change.

22. [Note: this paragraph could be controversial and should be discussed in the Sub-Commission.] **If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment** so that again no question of attempting to curry favour with politicians arises.

23. The law on the prosecutor's office should clearly define the conditions of the Prosecutor's pre-term dismissal. In its Opinion on the Draft Law of Ukraine amending the Constitutional Provisions on the Procuracy, the Commission found that:

'The grounds for such dismissal would have to be prescribed by law. (...) The Venice Commission would prefer to go even further by providing the grounds for a possible dismissal in the Constitution itself. Moreover, there should be a mandatory requirement that before any decision is taken, an expert body has to give an opinion whether there are sufficient grounds for dismissal'⁴

³ Emphasis added, CDL(1995)073rev., chapter 11.

⁴ Emphasis added, CDL-AD(2006)029, paragraph 34.

24. In any case, **the Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament.**

5.2. Public accountability of the prosecutor's office

25. Like any state authority, including judges, the prosecutor's office needs to be accountable to the public. Various aspects come into play. For example, in the United Kingdom there is a system whereby an inspectorate examines the work of prosecutor's offices. However, this seems not to extend to second guessing individual cases. In many jurisdictions in the common law world there is some degree of accountability to an Attorney General, who although a political appointee is usually expected to perform prosecutorial functions independently of the executive.

26. Prosecution offices like other branches of Government are accountable for public expenditure through whatever public auditing procedures are in place and this would be so in every jurisdiction. The fact that so much of the prosecutor's work is subject to scrutiny by courts of law also provides a form of accountability. In many systems there is accountability to Parliament, although **accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out.** *"Not only is there a risk of populist pressure being taken into account in relation to particular cases raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature."*⁵

27. In systems where the prosecutor does not control the investigation, the relationship between the prosecutor and the investigator necessarily creates a degree of accountability. It is important to be clear about what aspects of the prosecutor's work do or do not require to be carried out independently. For example, the crucial element seems to be that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy (for example giving priority to certain types of cases, time limits, closer cooperation with other agencies etc.) seems to be an issue where the Legislature and the Ministry of Justice or Government as a whole may properly be given a role, and possibly even a decisive role.

28. Some **specific instruments of accountability** seem necessary even in cases where the prosecutor's office is independent. The **submitting of public reports by the Prosecutor General could be one such instrument.** Whether such reports should be submitted to Parliament or the executive authority could depend on the model in force as well as national traditions. When applicable, in such reports the **Prosecutor General should give a transparent account of how any general instruction given by the executive have been implemented.** Guidelines for the exercise of the prosecutorial function and codes of ethics for prosecutors have an important role in standard setting. These may be adopted by the prosecution authorities themselves or may be adopted by Parliament or by Government.

6. Prosecutors other than the Prosecutor General

6.1. Appointment

29. In order to allow them to exercise their functions independently and in accordance with the law, appropriate legal qualifications are indispensable for prosecutors.

⁵ CDL-AD(2007)011. Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", para. 25.

30. [Note: this paragraph could be controversial and should be discussed in the Sub-Commission.] While the election of the Prosecutor General by Parliament is acceptable, **[an independent body like a Prosecutorial Council should have a decisive role in the appointment of lower level prosecutors / members of the prosecution service should be sufficiently involved in the appointment process and an independent body may be useful for very senior positions.]** Such a [council / body] could act upon a recommendation from the Prosecutor General with the [council / body] having the right to refuse to appoint a person but only for good reason.⁶ As an important element of prosecutorial independence, **lower level prosecutors should be appointed until retirement.**⁷

6.2. Discipline

31. The 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.

32. **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, should handle disciplinary cases. **An appeal to a court against disciplinary sanctions should be available.**

6.3. Guarantees of non-interference into the work of individual prosecutors

33. The independence of individual prosecutors, unlike that of individual judges, is not an absolute value. There is a tension between the need to decide on the approach to the individual case on the basis of the prosecutor's conscience and the need to ensure consistency of approach and the application of the principles and guidelines which have been established. It is legitimate to have a system of prosecution which is organised on a hierarchical way, and in which a decision of a prosecutor may be overruled by a senior prosecutor when it runs counter to general instructions.

34. A key element in order to determine whether instructions to junior prosecutors in individual cases are permissible is the question of whether prosecutors have discretion not to prosecute where a prosecution is not in the public interest as in countries where the opportunity principle applies, or alternatively whether the principle of legality applies and prosecutors are obliged to prosecute cases under their competence. While common law countries invariably operate the opportunity principle both the legality principle and the opportunity principle are found in civil law systems.

35. In systems which have the legality principle, instructions not to prosecute can easily be illegal if the conditions for the termination of a case are not met. Conversely, in all systems, instructions to prosecute when the necessary elements (suspicion, proof etc.) are not met would be illegal.

36. In a hierarchical prosecution system instructions may be given at the level of an individual case provided certain safeguards are met. Point 10 of Recommendation 2000 (19) reads:

"All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs

⁶ CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 44

⁷ The Irish system of appointing solicitors and barristers as prosecutors, either on a longer term (in rural areas) or on a case by case basis, takes into account independent input from selection boards.

counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.”

37. Consequently, where an individual prosecutor is given an instruction he or she has a right to have the instruction put in writing but Recommendation 2000 (19) does not prevent the allegedly illegal instruction from being given nonetheless. The junior prosecutor is also entitled to initiate a procedure to allow for his or her replacement by another prosecutor where an instruction is believed to be illegal or contrary to his or her conscience. The wording of point 10 also leaves open the possibility of such a procedure being initiated by the hierarchical superior who might have an interest in replacing a junior prosecutor daring to contest the legality of the instruction given.

38. The Commission is of the opinion that these safeguards are not adequate and should be further developed. An 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 Prosecutorial Council or a board of senior prosecutors, acting independently in this capacity, should decide on the legality of the instruction.**

39. A means of influencing a prosecutor is his or her transfer to another prosecutor's office without their consent. Such transfers can be used as an instrument for applying pressure on the prosecutor. **Again, a Prosecutorial Council or independent board of senior prosecutors should decide in such cases.**

40. Contrary to judges who should benefit from functional immunity, **prosecutors do not need to benefit from a general immunity**, [over and above that enjoyed by lawyers generally. An over-wide immunity may lead to corruption.] which could even lead to corruption. However, they should have an immunity for what is said in court which should be the same as the immunity which lawyers generally would have for utterances in court. [Note: This paragraph probably covers a variety of issues, some of them difficult. One issue, for example, is whether specific procedures should be in place in situation where the issue is whether to prosecute prosecutors due to alleged abuses of power etc. We may need to link to what is said in chapter 6.2 on safeguards concerning disciplinary matters. This should be considered more closely in the next draft].

41. For their independence, the principle of a prosecutor's apolitical profile is important as well. A number of states prohibit membership of prosecutors in political parties. **Prosecutors should avoid public activities that would conflict with the principle of their independence. The practical consequences of this principle may, however, be quite different in different countries due to various standards on the acceptability of involvement of civil servants in political matters.**

42. Independence is closely linked to rules of incompatibility. **[A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges. / Holding of other state offices should be subject to the consent of an independent Prosecutorial Council].**

43. Another practical issue which is important both for prosecutors and for judges is the question of security. Obviously, it is important that prosecutors and judges are not intimidated by anybody and are given the necessary physical protection to enable them to carry out their duties impartially and without favour. The International Association of Prosecutors has recently adopted standards in relation to security for prosecutors.

7. Prosecutorial Council

44. A Prosecutorial Council is becoming increasingly widespread in the political systems of individual states. A number of countries have established independent prosecutorial councils but there is no standard to do so.

45. Such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors.

46. Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, this should be done by qualified majority. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot influence each others' appointment and discipline proceedings.

47. It would be difficult to impose a single model of such a council on all the states of the Council of Europe. Moreover, the existence of this Council cannot be regarded as a uniform standard binding on all European states.

8. Remuneration and training

48. Like for judges, **a remuneration in line with the importance of the tasks performed is essential for an efficient and just criminal justice system.** A sufficient remuneration is also necessary to reduce the danger of corruption of prosecutors.

49. Appropriate training should be available for prosecutors throughout their career. The importance of training for prosecutors is certainly of the same level as that for judges. Such training should include legal, including human rights, training as well as managerial training, especially for senior prosecutors. Again, **a Prosecutorial Council could play an important role in the definition of training programmes.** For reasons of cost and efficiency, synergies could be found in common training for prosecutors and judges.

9. Dangers of excessive powers of the prosecutor's office for the independence of the Judiciary

50. A distinction needs to be made between state power and the public interest. The assumption that the two are the same runs through quite a number of European systems. Ideally the exercise of public interest functions (including criminal prosecution) should not be combined or confused with the function of protecting governmental interests or the interests of other institutions of state. In many countries the function of asserting public interest, outside the field of criminal prosecution, would rest with an ombudsman or with an official such as the Chancellor of Justice in Finland. There are a number of democracies where the two functions of defending state interest and public interest are combined, as in the Attorney General model in common law countries. The functioning of such a system however depends on legal culture, and in countries where there is a history of abuse of prosecution for political goals special precautions are needed.

51. The independence of the prosecutor's office, particularly in states that emerged following the collapse of the Soviet system, is no guarantee of a democratic prosecution model. Entirely separating the prosecutor's office from Government and judicial authority may give it a rather vaguely defined position within the system of state organs. In such cases, there is a danger,

especially in former Soviet countries, that the prosecutor's office becomes a fourth excessively powerful authority, posing a threat to the democratic functioning of other state organs, especially the courts of law.

52. In the course of its work on individual countries, the Venice Commission has sometimes encountered problems with excessive powers of the prosecutor's office. In the Soviet system, the prosecutor's office was a powerful means to control the judiciary and in a few countries remnants of this system linger on. There is a danger that an over-powerful prosecution service becomes a fourth authority without accountability.

53. This issue is closely linked to the question of what powers the prosecution service should have. There is a very strong argument for confining prosecution services to the powers of criminal prosecution and not giving them the sort of general supervisory powers which were commonly found in "prokuratura" type systems. The question seems very much one of checks and balances within the system. In any case, **prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges.**

54. While it is of course normal and permissible for prosecution services to control the investigation, in some ways where the prosecutor does not control the investigation this in itself reduces the possibility for an over-powerful prosecution which can abuse that authority. While there are weaknesses in the model whereby the prosecutor and investigator are separate, one advantage of such a system is to reduce the risk of an over-powerful institution abusing its powers. On the other hand, it creates a greater risk that the police will abuse their powers.

55. Already in Part I of the present report on the Independence of Judges the Commission insisted that:

*"Judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal."*⁸

56. This excludes the Soviet system of *nadzor*, giving the prosecutor a general task to oversee legality and even to re-open cases – including in civil law between private parties - decided in final instance when the prosecutor deems that the law has been applied incorrectly. Of course, the Venice Commission's strong stance against such powers do not exclude a request to a court to re-open proceedings when new evidence has surfaced. However, the decision on re-opening a case has to remain with a court, not the prosecutor.

57. While it does not do so in absolute terms, the Venice Commission has consistently advocated that the **prosecution service should focus on the criminal law field.**⁹ It is not uncommon that prosecutors' offices do exercise other functions. However, where other functions are exercised they must not be functions which interfere with or supplant the judicial system in any way. Where prosecutors have power to question the decision of a court, they must do so by exercising a power of appeal or a power to seek a review of a decision just as any other litigant might do. It has to be acknowledged that even in private litigation there may be a public interest which requires to be defended or asserted before the court and there is no objection in principle in doing so provided that the ultimate say rests with the court.

58. In its Opinion no. 3 (2008) on the Role of Prosecution Services outside the Criminal Law Field, the Consultative Council of European Prosecutors, correctly states that "*[t]here are no common international legal norms and rules regarding tasks, functions and organisation of prosecution service outside the criminal law field*". The opinion goes on insisting that "*it is the*

⁸ CDL-AD(2010)004, paragraph 82.13.

⁹ CDL-JD(2008)001, for an overview of the European practice on this issue see the report by Mr. András Varga for the CCPE ([CCPE-Bu\(2008\)4rev](#)).

*sovereign right of the state to define its institutional and legal procedures of realisation of its functions on protection of human rights and public interests ...*¹⁰

59. While the Venice Commission fully agrees to the key importance of the respect of human rights by prosecutors, Opinion 3 seems to hint that under certain conditions the protection of “women and children”¹¹ could be a task not only for ombudspersons but also for prosecutors.

60. In its opinion on a draft law on the prosecution Service of Moldova, the Commission had opportunity to comment on the power of the prosecutor to “initiate civil proceedings to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings.” The Commission found that “[g]iven that the main task of the prosecutor is to represent the interest of the state and general interest, it may also be questioned whether the prosecutor is necessarily the most appropriate person to undertake this function.”¹²

61. Further, in its Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, the Venice Commission found that:

“In the opinion of [the] Consultative Council of European Prosecutors the constitutional history and legal tradition of a given country may thus justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with Council of Europe values. The only historical model existing in Ukraine is the Soviet (and czarist) model of ‘prokuratura’. This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards.

*17. The Venice Commission, therefore, maintains its position that **a role of the prosecutor to protect human and citizen’s rights and freedoms should be limited to specific, clearly and narrowly defined cases. [...] 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.**”¹³*

62. This is in line with Recommendation 1604 (2003) on the Role of the Public Prosecutor’s Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe, which points out that the various non-penal law responsibilities of public prosecutors “give rise to concern as to their compatibility with the Council of Europe’s basic principles” and that “it is essential ... that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function” (paragraph 7).

63. Especially, when the prosecutor has to act against the state, claiming for example social benefits on behalf of such vulnerable persons, he or she would be in a clear situation of conflict of interest between the interest of the state, which the prosecutor represents and the interest of the individual he or she is obliged to defend. This position of the Venice Commission to restrict the task of prosecutors to the criminal field however does not rule out other powers performed

¹⁰ Paragraph 31.

¹¹ Paragraph 33.

¹² CDL-AD(2008)019, paragraph 30.

¹³ CDL-AD(2009)048, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009), emphasis added.

by prosecutors, like representing the financial interests of the state where such a conflict of interests cannot be expected.

10. Conclusion [Note: to be amended in the light of upcoming discussions]

64. The independence of prosecutors is not of the same nature as the independence of judges. While there is a general tendency to provide for more independence of the prosecution system, there is no common standard that would call for it. Nonetheless, the interests of an independent judicial system require certain guarantees of non-interference as concerns the Prosecutor General, individual prosecutors and on a structural basis. In order to provide for such guarantees, the Venice commission recommends:

1. Certain basic principles should be regulated at the constitutional level. This concerns the appointment and possible dismissal of the Prosecutor General, when applicable his or her independence, and possibly the establishment of a Prosecutorial Council.
2. A Prosecutorial Council or another professional, non-political body should provide expertise in the selection of a Prosecutor General. As a minimum standard, informal advice on the professional qualification of candidates should be taken from relevant prosecutors etc. to ensure that such qualifications are taken into due consideration.
3. For the election of the Prosecutor General a qualified majority in Parliament should be required.
4. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office.
5. If some arrangement for further employment (for example as a judge) of the Prosecutor General after the expiry of the term of office is to be made, this should be made clear before the appointment.
6. The grounds for dismissal of the Prosecutor General should be prescribed by law or preferably in the Constitution. A Prosecutorial Council or another expert body should give an opinion whether there are sufficient grounds for dismissal".
7. The Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament.
8. The Prosecutor General could be asked to submit regular reports to parliament or Government but accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out.
9. [In the appointment of lower level prosecutors an independent body like a Prosecutorial Council should have a decisive role. / Members of the prosecution service should be sufficiently involved in the appointment process and an independent body may be useful for very senior positions.]
10. Lower level prosecutors should be appointed until retirement.
11. In disciplinary cases, the prosecutor concerned should have a right to be heard. An appeal to a court against disciplinary sanctions should be available.
12. Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation of an instruction to be illegal a Prosecutorial Council or a board of senior prosecutors, acting independently in this capacity, should decide on the legality of the instruction.
13. Prosecutors do not need to benefit from immunity
14. Prosecutors should avoid public activities that would conflict with the principle of their independence. The practical consequences of this principle may, however, be quite different in different countries due to various standards on the acceptability of involvement of civil servants in political matters etc.
15. [A prosecutor should not hold other state offices or perform other state functions apart from holding the position of teacher in an academic institution. / Holding of other state offices should be subject to the consent of an independent prosecutorial board].

16. It is important that prosecutors and judges cannot be intimidated by anybody and are given the necessary physical protection.
17. Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academia. If members of such a council were elected by Parliament, this should be done by qualified majority.
18. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot influence each others appointment and discipline proceedings.
19. A Prosecutorial Council could play an important role in the definition of training programmes.
20. A remuneration in line with the importance of the tasks performed is essential for an efficient and just criminal justice system.
21. In order to avoid an over-arching prosecutors' service, which could become a danger for the independence of the judiciary, the prosecutors' essentially should be competent in the criminal law field only. In particular, prosecutors should not have powers to impose a revision of final judgements.