

**SUPPORT TO CRIMINAL JUSTICE
REFORM IN UKRAINE**

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**Thematic Directory
of the principles for a draft Law on the Public Prosecution Office of
Ukraine**

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1. General Provisions
2. The scope of activities and competences of the Public Prosecution Office (PPO)
3. The institutional setup of the PPO
4. The Public Prosecutor (PP)
5. The role of the PPO in international cooperation in criminal justice

The Directory provides a set of principles based on the analytical compilation of the relevant provisions of the Council of Europe (CoE) standard-setting documents, related case law of the European Court of Human Rights (ECtHR) and other international norms to be taken into account for the purposes of drafting a new law on the Public Prosecution Office of Ukraine. The list of documents reflected by the Directory includes:

- Recommendation Rec(2000)19 to member states on the role of public prosecution in the criminal justice system (Rec(2000)19);
- Recommendation Rec(2012)11 to member states on the role of public prosecutors outside the criminal justice system (Rec(2012)11);
- Opinion No. 3 (2008) of the Consultative Council of European Prosecutors (CCPE) on “The role of prosecution services outside the criminal law field” (CCPE Opinion No. 3 (2008));
- Opinion No. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) on “Judges and prosecutors in a democratic society” (“Bordeaux Declaration”);
- Part II - The prosecution service - of the report of the European Commission for Democracy through Law (Venice Commission) on European standards as regards the independence of the judicial system (Venice Commission’s 2010 report on the PPO standards);
- Opinion of the Venice Commission on the draft Law on the Public Prosecutor’s Office of Ukraine (no. 667/2012) and its preceding assessments of the (draft) legal framework on the PPO of Ukraine.

Thus, a draft law on the PPO of Ukraine is supposed to take into account or address the following principles.

1. General Provisions

1.1 Definition

1. The definition of public prosecutors must comply with the Rec(2000)19: “Public prosecutors are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system”¹.

There are a great variety of definitions in different legal systems, but the prosecution service is mainly defined by its functions, status, powers and structure. There is no need in analysing different definitions or conceptual understanding of what a prosecutor or a prosecution service is. A prosecutor is the public official who, complying with a selection and appointment procedure and qualities, carries out the functions attributed to the prosecution service as defined above. Most laws on the PPO do not include a definition. For the current purpose the definition set out in the Rec(2000)19 is sufficient.

1.2 Principles of organisation and activity of the PPO

2. Even in countries where the public prosecution service enjoys complete independence, as in Italy, the internal organisation of the PPO is usually hierarchical in the sense that the Prosecutor General publishes general instructions and guidelines. This allows a unified interpretation and application of the criminal law and common standards on procedural issues. But hierarchy does not mean that the prosecutors are subject to unrestricted orders from their superiors.
3. With respect to the organisation and the internal operation of the Public Prosecution, in particular the assignment and re-assignment of cases, this should meet the requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter².
4. The public prosecutors shall always act according to the law, in an impartial way, and according the principles of fairness, transparency, promoting equality of arms in the proceedings.
5. As the specialisation of prosecutors and prosecution units are desirable, the coordination among those units and also with other prosecutors shall be guaranteed.
6. Prosecutors shall promote the efficiency and the speediness of the proceedings.

¹ Rec(2000)19, para. 1.

² Rec(2000)19, para. 9.

1.3 Relationship between the PPO and the legislative, executive and judicial powers

7. Public prosecutors should not interfere with the competence of the legislative and the executive powers³.
8. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure⁴.
9. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and prosecutors is correctly observed⁵.
10. Respect for the above principles implies that the status of prosecutors be guaranteed by law at the highest possible level in a manner analogous to that of judges⁶.
11. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other. In the eyes of litigants and the society as a whole, there must not be even a hint of connivance between judges and prosecutors or confusion between the two functions⁷
12. The independence of the public prosecution is indispensable. The meaning of independence as non-interference is that it shall be ensured that the prosecutor's activities in trial procedures are free from external pressure as well as from undue internal pressures. Prosecutors are bound by directives, guidelines and instructions. In that sense the meaning of prosecutorial independence is different from judicial independence.⁸

³ Rec(2000)19, para. 12.

⁴ Rec(2000)19, para. 19.

⁵ Bordeaux Declaration, explanatory note, para. 10.

⁶ Bordeaux Declaration, explanatory note, para. 37.

⁷ Bordeaux Declaration, explanatory note, para. 36; Rec(2000)19, para. 17.

⁸ Venice Commission's 2010 report on the PPO standards, paras. 31-32; Bordeaux Declaration, para 8.

2. The scope of activities and competences of the PPO

2.1 Functions of the PPO

13. The **scope of functions of the PPO** has to comply with the rule of law, fair trial and other relevant fundamental principles of democratic societies, as well as interrelated obligation of ensuring to all persons within jurisdiction of member states the human rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The principle is specified in:

- Preamble to Rec(2000)19 that refers to “the rule of law; which constitutes the basis of all genuine democracies”; and “the principles enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms.”

Preamble to Rec(2012)11, which requires that “...every member of the Council of Europe has accepted the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of the human rights set out in the Convention for the Protection of Human Rights and Fundamental Freedoms”.

- With regard to the PPO functions outside the criminal justice system this imperative has been specified in paragraphs 10, 11, 23 of Rec(2012)11.
- Paragraph 18 of the Explanatory Memorandum to Rec(2012)11, prepared by the European Committee on Legal Co-operation (CDCJ), which notes that “the recommendation is silent on the tasks and competences that might be conferred on public prosecutors. It is for the member states, within their margin of discretion, to determine the mission entrusted to their public prosecutors outside the criminal justice system. However, *whatever the mission, it must always be subject to a requirement that it should be exercised in accordance with the rule of law and not in a manner contrary to the protection of human rights and fundamental freedoms.*”⁹
- The Venice Commission 2010 report on the PPO standards has specified and explained what are the aggravating factors and specific dangers which make such functions and role unacceptable in certain jurisdictions. It stresses that:
 - “71. A distinction needs to be made between the interests of the holders of state power and the public interest. . . . Ideally the exercise of public interest functions (including criminal prosecution) should not be combined or confused with the function of protecting the interests of the current Government, the interests of other institutions of state or even the interests of a political party. . . . The functioning of such a system however depends on legal culture, and especially in *younger democracies, where there is a history of abuse of prosecution for political goals, special precautions are needed.*”¹⁰

⁹ Italics added.

¹⁰ Italics added.

- “72. . . . There is a danger that an *over-powerful prosecution*¹¹ service becomes a fourth authority without accountability.”

- “73. 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*¹² 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 the *Dankevich v. Ukraine* judgment, the European Court of Human Rights (ECtHR) reiterated that effectiveness of formal remedies in the legal system of the Contracting Party concerned depends “also on the *general legal and political context in which they operate*.”¹³

14. The specifics of the Ukrainian legal, political context and other related factors suggest that additional functions and attributions of the PPO lead to a breach of the rule of law, separation of powers, checks and balances, fair trial and other overarching principles and standards and require its **PPO to be stripped of the general supervision and other functions and attributions outside the criminal justice system**. These functions should be performed by appropriate governmental or other state institutions.

- In its 2012 Opinion on the draft Law on PPO of Ukraine the Venice Commission has asserted that:

- “8. The Venice Commission acknowledges that in some countries, the public prosecutor has functions other than those of criminal prosecution and has stated that such powers were legitimate if certain criteria were met. In other words, the competencies should be carried out in such a way as to respect the principle of the separation of state powers, including the respect for the independence of the courts, the principle of subsidiarity, the principle of speciality and the principle of impartiality of prosecutors.¹⁴ This approach requires that *the prosecutor’s office be deprived of its extensive powers in the area of general supervision*,¹⁵ which should be taken over by the courts, whereas the task of human rights protection should be referred to the ombudsman.”

- “6. The Venice Commission has criticised the Public Prosecutor’s Office (. . .) in its past opinions, saying that it found the functions of this Office to considerably *exceed the scope of functions that a prosecution service should*

¹¹ Italics added.

¹² Italics added.

¹³ *Dankevich v. Ukraine*, ECtHR judgment of 29 April 2003, para. 108. It is indicative that the ECtHR found the combination of hierarchical and prosecutorial avenues existing in Ukraine ineffective and established a violation of Article 13 of the ECHR

¹⁴ See also summary of recommendations in Opinion No. 3(2008) of the Consultative Council of European Prosecutors on “the role of prosecution services outside the criminal law field”, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1608160&SecMode=1&DocId=1609216&Usage=2>, p.10.

¹⁵ Italics added.

*have in a democratic society.*¹⁶ The Commission has also reminded the Ukrainian authorities, on several occasions, that they should fulfil their commitment to change the role of the PPO in order to bring it into line with European standards.”

- The Venice Commission 2010 report on the PPO standards used the Ukrainian example to illustrate the limitation:

- “81. 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 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.*¹⁷”

15. There should be a **prohibition against** giving **other tasks** to the public prosecutor than those defined for the Prosecution Service by the Constitution of Ukraine. This could contribute to avoid bypassing the provisions of the Constitution.
16. The transitional provision of the Constitution of Ukraine regarding the supervisory function of the PPO has to cease to operate.
 - The length of application of the transitional provision has become manifestly inconsistent with its temporary nature. In paragraph 12 of its Opinion on the draft Law of Ukraine amending the Law on the Public Prosecutor (CDL (2004)038, the Venice Commission has classified it as “*the making permanent of a considerable element of the Prosecutor’s function which, according to the transitional provisions of the Constitution, was intended to be temporary only.*”
17. The new law on the PPO of Ukraine must relinquish its utter **intrusive prerogatives in exercising “supervision of adherence to and application of laws”** provided for in Articles 20, 21 and some other related provisions of Chapter 1 of Section III of the current Law, which are particularly awkward because similar powers within the framework of criminal investigations (e.g. for obtaining an access to objects and documents, as envisaged by Articles 160-166 of the CPC and so on) rightly require a judicial warrant.

¹⁶ Italics added.

¹⁷ Opinion no. 539/2009.

- The ECtHR recapitulated in its judgment *Golovan v. Ukraine* the requirements under Article 8 of the ECHR “. . . domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *C.G. and Others v. Bulgaria*, no. 1365/07, § 39, 24 April 2008). The law must moreover afford a degree of legal protection against arbitrary interference by the authorities. The existence of specific procedural safeguards is material in this context. What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 46, ECHR 2001-IX).”¹⁸

18. The supervisory prerogatives amount to the powers of pre-trial inquiries, which besides involving high risks for corruption undermine the equality of arms in the eventual criminal procedures.

- Rec(2012)11 :
 - “14. The power to pursue pre-trial inquiries should be provided for by law. Its exercise should be proportionate and not confer an unreasonable advantage on the public prosecutor.”

19. An expansion of functions of prosecution beyond the criminal justice sphere, including 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, is objectionable due to the conflict of the interest of the state, which the prosecutor represents and the interest of the individual concerned. Moreover, it is undesirable since the prosecutor’s intervention in such cases has a potential of undermining the appearances of a fair trial and the principle of equality of arms.

- The Venice Commission 2010 report on the PPO standards denotes that:
 - “ 80. . . the Commission had the 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.”
- Rec(2012)11 states that:
 - “11. The powers of the public prosecutor to initiate legal proceedings or act as a defendant should not compromise the principle of equality of arms between the parties to litigation.”

¹⁸ Judgment of 5 July 2012, para. 57.

- The ECtHR case law suggests that the prosecutor’s intervention in such cases is acceptable only in special circumstances, without which it can undermine the appearances of a fair trial and the principle of equality of arms and constitute a violation of Article 6 § 1 of the ECHR.¹⁹ The specifics of the institution easily lead to appearances or actual inequality or imbalance between the parties and the public prosecutor, undermine principles of *res judicata* and legal certainty and other aspects of Article 6 of the ECHR.²⁰

20. The PPO of Ukraine should concentrate on exercising the **monopoly on criminal prosecutions by the state and other functions in the field of criminal justice system**, including those that have been appropriately defined in the new Code of Criminal Procedure (CPC) and related auxiliary to judicial remedies function of control over legality of detention and implementation of criminal sanctions and security measures.

- The Venice Commission 2010 report on the PPO standards concludes with the following recommendation:
 - “25. The prosecution service should have its primary focus on the criminal law field.”
- The CPT has accepted the inspecting function (seen as an additional inspecting mechanism) and related prerogatives of the Ukrainian prosecutors and maintains a dialogue with regard to its improvement. Thus, its report on 2009 visit suggests that:
 - “157. The CPT considers that there is a need to develop, in addition to the existing inspections by prosecutors and visits by the Parliamentary Commission for Human Rights, a system of regular monitoring visits to penitentiary establishments by independent outside bodies (e.g. NGOs).”²¹

2.2 Responsibilities of the PPO

21. The general role and therefore responsibility of the PPO is the prosecution of **criminal offences** and defending public interest in ensuring the rule of law and other fundamental principles of democratic societies through the criminal justice system.

- 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 provides an additional emphasis and furthers the provisions of the CoE standard-setting documents quoted in the previous section. Its paragraph 7.V.c specifies:

¹⁹ See *Menchinskaya v. Russia*, ECtHR judgment of 15 January 2009, paras. 35-40.

²⁰ E.g. *F.W. v. France*, ECtHR judgment of 31 March 2005 para. 27; *Karapanagiotou and Others v. Greece*, ECtHR Judgment of 28 October 2010; *Ryabykh v. Russia*, ECtHR Judgment of 24 July 2003.

²¹ See CPT /Inf (2011)29, paras. 34, 156-157.

“ . . . 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.”

2.3 Duties of the PPO towards individuals

- 22. Public prosecutors shall carry out their duties fairly, impartially and objectively, protect human rights, abstain from discrimination on any ground, ensure equality before the law, respect the principle of equality of arms and other fundamental standards.**
- 23. Public prosecutors should seek to ensure that the criminal justice system operates as expeditiously as possible.**
- 24. Information obtained from third parties should be kept confidential unless disclosure is required in the interests of justice or by the law.**
 - Rec(2000)19 in paragraphs 24-26 and 28-36 provides for these and some specific duties of the PPO towards individuals, which have been enshrined in the new Criminal Procedural Code. Such duties include the obligation not to use evidence that they know or believe on reasonable grounds to have been obtained through recourse to methods contrary to the law; to take proper account of the interests of witnesses, particularly with respect to their life, safety and privacy etc.

2.4 Means provided to the public prosecutor for the purpose of effectively and efficiently discharging the responsibilities

- 25. The PPO should be provided with adequate legal and organisational conditions and have at their disposal the necessary infrastructure, financial (budgetary) and human resources in order to adequately fulfil its functions.**
- 26. Individual public prosecutors should be accordingly provided with reasonable conditions of service and work, remuneration and pension commensurate with their crucial role as well as an appropriate age of retirement.**
- 27. Such conditions should be established in close co-operation with the representatives of public prosecutors.**
 - The abovementioned principles are formulated on the basis of relevant provisions of Rec (2000)19. They are echoed in the Venice Commission’s 2010 report on the PPO standards:
 - “69. Like for judges, 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.”

2.5 Relationship between the public prosecutor and the judge, other actors taking part in the administration of justice and the police

- 28.** In every system, the judge’s role is different to that of the public prosecution and their respective missions remain nevertheless complementary. There should be **no hierarchic ties between the judge and the prosecutor**.
- 29.** Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.
- 30. Public prosecutors must strictly respect the independence and the impartiality of judges;** in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.
- 31.** In principle, it should be possible for the same person to perform during his or her professional career successively the functions of public prosecutor and those of judge or vice versa.
 - These are the principles stipulated in paragraphs 17-20 of Rec (2000)19 and paragraph 3 of the Bordeaux Declaration, which partially have been incorporated and ensured by the new CPC. However, there are elements that require further regulation or could be reiterated in the Law on the PPO and other relevant legislative acts.
 - The Bordeaux Declaration expands on these principles. The aspects of procedural interaction between judges and prosecutors in the course of administration of criminal justice have been dealt with in the new CPC. However, there are additional nuances could be worthwhile to address in the Law on the PPO. Thus, the Explanatory Memorandum to the Bordeaux Declaration specifies that:
 - “40. Judges and prosecutors should refrain from any action and behaviour that could undermine confidence in their independence and impartiality. They should consider cases submitted to them with due care and within a reasonable time, objectively and impartially.
 - 41. Public prosecutors should refrain from making public comments and statements, using the media, which may create an impression of putting direct or indirect pressure on the court to reach a certain decision or which may impair the fairness of the procedure.
 - 42. Judges and prosecutors should strive to acquaint themselves with ethical standards governing the functions of each other. This will enhance

understanding and respect for each other's missions, thereby increasing the prospects of a harmonious collaboration."

32. In general, **public prosecutors should scrutinise the lawfulness of police investigations** at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.
33. States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional co-operation between the public prosecution and the police.
34. In countries where police investigations are supervised by the public prosecutor, the state should guarantee that the public prosecutor may:
 - a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;
 - b. where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;
 - c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;
 - d. sanction or promote sanctioning, if appropriate, of possible violations.
 - The suggested principles are selected from the relevant section of Rec (2000)19 and adjusted to the Ukrainian model of the relationship between the PPO and police, which combines institutional independence and procedural leadership of the former.
 - The existing models are outlined in the Venice Commission 2010 report on the PPO standards. It summarises that:
 - "8. The relationship between police and prosecutor also varies. In many countries the police are in principle subordinate to the prosecutor's instructions, although often in practice enjoying functional independence. In others the police are in principle independent. In a third model the police and the prosecutor's office are integrated."

2.6 Public accountability of the PPO

35. **The PPO should account periodically and publicly for its activities** as a whole and, in particular, the way in which its priorities were carried out. Prosecutors must remain accountable to the society to ensure that they use the substantial powers conferred on them in the public interest.
36. As an instrument of accountability the Prosecutor General could be required to submit a **public report to Parliament or executive**. When applicable, in such reports the Prosecutor General should give a transparent account of how any general instruction given by them have been implemented.

37. Prosecution offices like other state organs are accountable for public expenditure through whatever **public auditing procedures** are in place and this would be so in every jurisdiction.
38. Accountability of the Prosecutor General to Parliament **in individual cases of prosecution or non-prosecution** should be ruled out. The decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature.
- These principles are to be distinguished from accountability of individual prosecutors and have been derived from the provisions of Rec (2000)19 (paragraph 11); Venice Commission 2010 report on the PPO (paragraphs 41-44 and 87).

3. The institutional setup of the PPO

3.1 *Internal organisation of the PPO and hierarchy of prosecutor's positions*

39. Alongside formal safeguards against outside intervention and appearance of it, in order to promote equity, consistency and efficiency in the activity of the public prosecution there may be a **hierarchical control** of the decisions and activities of prosecutors other than (subordinated to) the Prosecutor General.
40. With respect to the organisation and the internal operation of the Public Prosecution, in particular the **assignment and re-assignment of cases**, this should meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter.
41. Hierarchical organisation of the public prosecution service should be balanced by **independence of individual prosecutors in handling individual cases and clear distribution of competences** between structural (territorial or specialised) units of the service.
42. Consequently, where a prosecutor other than the Prosecutor General is given an instruction by a superior prosecutor he or she has a right to have the **instruction put in writing**.
43. 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**.
44. The 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.
45. There should be **general guidelines** for the implementation of policy and general principles and criteria against which decisions in individual cases should be taken. Such information should be made public.
46. In order to respond better to developing forms of criminality, in particular organised crime, **specialisation** should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. Recourse to teams of specialists, including multi-disciplinary teams, designed to assist public prosecutors in carrying out their functions should also be developed.
 - The suggested compilation of principles that should govern internal organisation and hierarchy of the PPO includes relevant stipulations developed in Rec(2000)19 (paragraphs 8,9, and 36), reaffirmed in the Bordeaux Declaration and reinforced in paragraphs 30 and 31 of the

Explanatory Note to it. At the same time it has incorporated an important development of safeguards of internal independence of individual prosecutors introduced by the Venice Commission. In 2010 report on the PPO standards it asserted that:

- “58. Consequently, where a prosecutor other than the prosecutor general 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 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 prosecutor other than the prosecutor general daring to contest the legality of the instruction given.

59. 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 court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.**”

3.2 The Prosecutor General

47. In order to counter the risk of an **appointment of the Prosecutor General** based entirely on political attachment, minimum criteria applicable to the appointee must be specified in law on the PPO (lawyer, length of preceding professional experience etc.).
48. In the **procedure of appointing** a Prosecutor General, advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society. Several candidates should be given the possibility to apply to be considered for the position of Prosecutor General.
49. The danger of a **politicisation of the appointment process** could be reduced by providing for the preparation of the election by a parliamentary committee.
50. For the same reasons **the period of the mandate** of a Prosecutor General should not coincide with the election of the President and Parliament.
51. The appointment of the Prosecutor General must be for a **lengthy fixed period, but without the possibility of consecutive reappointment**, which (if omitted in the Constitution) could be specified in the Law on the PPO.

52. The **grounds for dismissal** of the Prosecutor General must be exhaustively prescribed by law and an expert body should give an opinion whether there are sufficient grounds for dismissal. The Prosecutor General should benefit from a fair hearing in dismissal proceedings.

In view of the mixed model of appointment of the Prosecutor General with the involvement of the executive and legislative that is maintained in Ukraine (according to Article 122 of the Constitution, he or she is appointed by the President with consent of Parliament), the suggested principles have included the standards developed to safeguard him or her from undue influence and dependence on both powers.

- The relevant standards have been synthesised in the following paragraphs of the Venice Commission 2010 report on the PPO standards, which indicatively refer to the Ukrainian legal framework:

- “35.No single, categorical principle can be formulated as to who - the president or Parliament - should appoint the Prosecutor General in a situation when he or she 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. **Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.**

36. In countries where the Prosecutor General is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by **providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. 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.

37. 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.

38. **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. On the other hand, there should be no general ban on the Prosecutor General's possibilities of applying for other public offices during or after his or her term of office.

39. 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'.

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

It should be noted that, although the provisions of the Constitution of Ukraine has been criticised for some omissions and shortcomings, including a no confidence vote in the Prosecutor General by Verkhovna Rada,²² the principles highlight they can be remedied by a new Law on the PPO.

3.3 Professional self-governance of the PPO

- 53.** A contemporary PPO is to be backed by and coupled with **professional self-governing arrangements reinforcing guarantees of its external and internal independence**, as well as providing further support in securing the effective and rule of law compatible functioning of the service and criminal justice sector in general.
- 54.** For these purposes, in addition to **participating in the appointment of prosecutors, career development, training and** other aspects of professional reinforcement of the PPO, the self-governing arrangements should also play **a role in discipline including the removal of prosecutors.**
- 55.** In the systems where **the PPO is not placed under the judicial branch of state power**, a Prosecutorial Council, its disciplinary and qualification boards should be separated from relevant institutions of the judiciary.
- 56.** The **composition of a Prosecutorial Council** should include prosecutors from all levels democratically nominated by the profession balanced by members from among other legal professionals or academics preferably elected by the Parliament.

²² Venice Commission Opinion 667/2012, para. 14.

57. The decisions of the Prosecutorial Council could have a binding effect in matters concerning the formation of the profession and, possibly, disciplinary proceedings. However, its decisions should not directly interfere with the administration of the prosecution nor should it provide instructions to individual prosecutors.

58. The Prosecutorial Council shall be ensured **appropriate capacities** to deal with its functions: have its own budget, the necessary infrastructure, preferably **detached President and Chairmen of its bodies** (disciplinary and qualification boards) and support staff.

➤ The principles have been formulated on the basis of Venice Commission’s 2010 report on the PPO standards, other CoE standard-setting documents and best practices of some CoE member states.²³ The former has suggested that:

- “41. . . . Another means is control by a prosecutorial council, which cannot be an instrument of pure self-government but derives its own democratic legitimacy from the election of at least a part of its members by Parliament.”

- “52. In systems where a Prosecutorial Council exists, this council, or a disciplinary committee within it, could handle disciplinary cases.”

65. If they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, 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. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. 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.

67. The effects of the decisions of prosecutorial councils can vary. Their decisions could have a direct effect on the prosecutors or could be only of advisory nature, thus requiring their implementation by the Ministry of Justice. The former is to be preferred because it takes away discretion from the Ministry and leaves less opportunity for political interference in the prosecutors’ careers.”

➤ As far as the scope of competence of self-government bodies and the binding nature of their decisions, the relevant principle reflects the approach suggested in paragraphs 101-111 of the 2012 Opinion of the Venice Commission on the draft Law on the PPO of Ukraine.

²³ See Autheman V., Elena S. and Henderson K. (ed), Global Best Practices: Judicial Councils, IFES Rule of Law White Paper, April 2004

4. The Public Prosecutor

4.1 *Status of the public prosecutor*

59. Subordination to the Prosecutor General in a **hierarchical structure** is the system chosen by Ukraine. It is legitimate to have a system of public prosecution which is organised in a hierarchical way and in which the decision of a prosecutor may be overruled by a senior prosecutor, when it runs counter to general instructions. The independence of prosecutors is not as categorical in nature as that of the courts, but there must be guarantees for the necessary independence of the subordinate prosecutors in the law (see below on safeguards)²⁴.

4.2 *Incompatibilities of the position of public prosecutor and prohibitions*

60. The public prosecutors should be **prohibited holding official²⁵ offices** or performing other functions which would be found inappropriate for judges. They shall not be involved in public activities that would conflict with the principle of impartiality.

61. In accordance with basic principles of good governance, there should be a prohibition against a public prosecutor acting in a matter where he or she has a **personal interest**. The public prosecutor can be subject to certain restrictions aiming to safeguard his or her **impartiality and integrity²⁶**.

4.3 *Selection and appointment of the public prosecutor. Initial training/internship*

62. The duties of a public prosecutor make it necessary to employ suitable persons of high standing and good character. The **qualities required of a public prosecutor** are similar to those of a judge and require that suitable procedures for appointment and promotion be in place²⁷.

²⁴ Venice Commission's 2010 report on the PPO standards, para. 53, and Venice Commission Opinion 667/2012, para. 18

²⁵ Venice Commission's 2010 report on the PPO standards, para. 62 only talks about "state offices or perform other state functions...", but a similar risk is present for other official offices and functions.

²⁶ Venice Commission's 2010 report on the PPO standards, para. 17.

²⁷ Venice Commission's 2010 report on the PPO standards, para. 18.

- 63. The first appointments** should be based on merits and integrity, assessed in a fair, impartial, transparent procedure with open competition for prosecutor's positions through a collaborative hiring process²⁸.
- 64. An independent professional expert's input** should be secured for appointments by a Prosecutorial Council with broad representation, e.g. by prosecutors from all levels, academics, lawyers and civil society. It should be independent from other state bodies in order to, at least to some extent, shield from political influence. If these were to be elected by Parliament, preferably this should be done by qualified majority²⁹.
- 65. Training is both a duty and a right for all public prosecutors** both before their appointment and during their service. The law should therefore secure appropriate education and specialised and sufficient training to allow public prosecutors exercise their functions, including their duties, in accordance with the ECHR and the case law of the ECtHR³⁰.

4.4 Rights and obligations of the public prosecutor in relation to their responsibilities

- 66.** The public prosecutor must act in a judicial manner and should not secure convictions at all costs. The law should have provision on the obligation to **act fairly and impartially** in deciding whether to prosecute or not. He or she should be objective and fair during court proceedings³¹, present all credible evidence available to the court, safeguard the principle of equality of arms and disclose all relevant evidence and not merely the evidence which favours the prosecution case. If evidence tending to favour the accused for some reason cannot be disclosed, the public prosecutor may have the duty to discontinue the prosecution³².
- 67.** The public prosecutors must be obliged to make an annual declaration for publication on property, income, expenditures and financial obligations. Although this may be regarded as something of an intrusion into personal affairs, it is justified as a means of **reducing the risk of corruption**³³.
- 68.** Public prosecutors should have the **protection of their freedom of expression, belief, association and assembly secured**. They should however abstain from public statements and activities, which would conflict with the principle of impartiality³⁴.

²⁸ Venice Commission Opinion 667/2012, para. 73-77.

²⁹ Venice Commission's 2010 report on the PPO standards, para. 64-68.

³⁰ Rec(2000)19, para. 7

³¹ Rec(2000)19 para. 20.

³² Venice Commission's 2010 report on the PPO standards, para. 15-16.

³³ Venice Commission Opinion 667/2012, para. 68.

³⁴ Rec(2000)19 point 6.

69. In the process of the adoption of decisions on recruitment, promotion and transfer etc. the public prosecutor must be protected against any approach which favours the interests of specific groups and **against discrimination** on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status³⁵.
70. There must be **remedies for victims and claimants** to timely complaint about decisions, both to prosecute and not to prosecute.

4.5 Safeguards provided to public prosecutors to ensure their independence/autonomy

71. The law should, as detailed below, hold appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities to prosecute or not to prosecute without **unjustified interference or unjustified exposure** to civil, penal or other liability³⁶.
72. The law should respect the centralised and hierarchical structure of the prosecution service, but leave sufficient room for the **independence of the individual public prosecutor** in managing his or her cases within the framework of the general instructions and guidelines. The public prosecutor must have the right to request that instructions addressed to him or her are given in writing and are reasoned. Where he or she believes the instructions to be illegal or run counter to his or her conscience, there should be a procedure for his or her replacement, and in cases of alleged illegality for him or her to complain to a court or an independent body³⁷.
73. With respect to the organisation and the internal operation, in particular the **assignment and re-assignment of cases**, this should meet the requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualifications and specialisation devoted to each matter. The decisions on assignment and re-assignment of cases from the responsibility of a public prosecutor against his or her will must be reasoned and justified by qualifications, impartiality or independence³⁸, and there must be a possibility for appeal to an independent body³⁹.
74. In order to protect the independence of the public prosecutor his or her **appointment must normally be until retirement**. Appointments for limited periods with the possibility of re-appointment bear the risk that the PP will make

³⁵ Rec(2000)19, point 5.a.

³⁶ Venice Commission's 2010 report on the PPO standards, para. 29 – 33; Rec(2000)19 point 11, and the present PGO Law, article 7.

³⁷ Venice Commission's 2010 report on the PPO standards, para. 53-60 and 87 (15), adding further conditions to Rec(2000)19, para 10.

³⁸ Rec(2000)19, point 9,

³⁹ Venice Commission's 2010 report on the PPO standards, para. 60.

- his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her⁴⁰.
- 75. Promotions** must, in order to counter personal or political favouritism, be based on known and objective factors, in particular professional qualifications, ability, integrity and experience, and be decided upon in accordance with fair and impartial procedures⁴¹. A Prosecutorial Council with broad representation⁴² could contribute to qualifying relevant decision processes.
- 76.** A means of influencing a public prosecutor is the **transfer** without his or her consent. Threats of such transfers can be used as an instrument for applying pressure on the prosecutor. There must be a procedure with the possibility for complaint to an independent body⁴³.
- 77.** The law must secure public prosecutors reasonable conditions of service, such as **remuneration, tenure and pension**, corresponding to the important function and sufficient to counter corruption. That is not presently the case; the gross annual salary ultimo 2010 was 5232€ for a public prosecutor at the beginning of his or her career, corresponding to a net annual salary of 4116€, plus housing, special pension, reduced fees for utility services and telephone and free public transport⁴⁴.
- 78.** Public prosecutors must not be intimidated by anybody and must be given the necessary **physical protection** to enable them to carry out their duties impartially and without favour⁴⁵.

4.6 Accountability of the public prosecutor

- 79.** 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 duties⁴⁶.

⁴⁰ Venice Commission's 2010 report on the PPO standards, para. 50. The present PGO Law, article 2: "Term of office of the Prosecutor General of Ukraine and subordinate public prosecutors shall be five years"

⁴¹ UN Guidelines on the Role of Prosecutors 1990, and the Venice Commission's 2010 report on the PPO standards, para. 18.

⁴² Venice Commission's 2010 report on the PPO standards, para. 64-68.

⁴³ Rec(2000)19, para 5.b., Venice Commission's 2010 report on the PPO standards, para. 60 and Venice Commission Opinion 667/2012, para 79.

⁴⁴ Rec(2000)19 para. 5.d., Venice Commission's 2010 report on the PPO standards, para. 69 and National report of Ukraine with comments to the European Commission for the Efficiency of Justice (CEPEJ) 2012 report on "European Judicial Systems", by Senior Consultant Viktoriya Kononchuk, Ministry of Justice, Office of the Government (of 17.09.2012), based on information from the PGO.

⁴⁵ Venice Commission's 2010 report on the PPO standards, para. 63, and International Association of Prosecutors' Declaration on minimum standards concerning the security and protection of public prosecutors and their families.

⁴⁶ Venice Commission's 2010 report on the PPO standards, para. 61.

- 80.** There should be a fair system for **disciplinary proceedings** on objective and known grounds⁴⁷, establishing proper protection with a right to be heard in an adversarial procedure and the right to appeal disciplinary sanctions to an independent disciplinary committee or a court⁴⁸. Disciplinary proceedings should rather be an extraordinary measure than a daily management tool⁴⁹.
- 81.** The law should hold adequate and effective procedures, based on best European practices, for bringing a public prosecutor to **criminal liability** for criminal acts, including violations of his or her commitments according to the law and for issuing or executing an illegal order. It must take into consideration the future legislation on the National State Bureau of Investigation.

⁴⁷Rec(2000)19, para. 5.e., Venice Commission's 2010 report on the PPO standards, paras. 51-52 and Venice Commission Opinion 667/2012, paras. 83-90

⁴⁸ Venice Commission Opinion 667/2012, paras. 91-94

⁴⁹ Disciplinary proceedings were taken against as many as 602 prosecutors out of a total of 11,400, of which 24 for breach of professional ethics and 578 for professional inadequacy. 19 cases led to resignation and 583 to reprimand (National report of Ukraine with comments to the European Commission for the Efficiency of Justice (CEPEJ) 2012 report on "European Judicial Systems", by Senior Consultant Viktoria Kononchuk, Ministry of Justice, Office of the Government (of 17.09.2012), based on information from the PGO).

5. The role of the PPO in international co-operation in criminal justice

- 82.** The fight against transnational criminality requires an effective system of judicial cooperation based on mutual trust within the protection of human rights of the parties to the criminal proceedings. According to the main International Conventions on mutual legal assistance in criminal matters, made within the Council of Europe⁵⁰, **the public prosecutors can be considered as “judicial authorities” for requesting and executing requests** (save when a judicial warrant is needed) of international judicial cooperation.
- 83.** The **Public Prosecutor is a key player** in international judicial cooperation matters, together with the judges⁵¹. The law on the PPO shall consider the role of the prosecution service in the international judicial cooperation. It shall **encourage the direct contacts between prosecutors of different countries**, within the framework of international agreements. The CoE Rec(2000)19 establishes in a very detailed way how these direct contacts should be furthered: disseminating documentation, compiling list of addresses and contacts, establishing regular contacts, etc.⁵².
- 84.** With the aim of **raising awareness** of the role of the prosecution service in requesting and providing international judicial cooperation in criminal matters, the law should provide for **training in this matters, as well as training in foreign languages**.
- 85.** Within the structure of the PPO the **specialisation** of some prosecutors in international judicial cooperation in criminal matters should be considered.
- 86. Transparency** in the gathering of information and evidence through international cooperation shall be guaranteed⁵³. The law shall state that the public prosecutor shall guarantee the **full disclosure** of the elements obtained by way of international judicial cooperation.

⁵⁰ European Convention on Mutual Assistance in Criminal Matters, made in Strasbourg 20.4.1959 and the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, made in Strasbourg, 8.11.2001, following greatly the European Convention on mutual Assistance in Criminal Matters of 29.05.2000 done between the member states of the European Union. The Ukrainian CPC already provides for the role of the PPO in the international cooperation under arts. 545 and 551.

⁵¹ Bordeaux Declaration, para 12.

⁵² Rec(2000)19, paras. 38-39 and Rec(2012)11, para.27.

⁵³ Bordeaux Declaration, para 12.