

Digest: The law on the Prosecutor's Office needs to be improved, but not without complying with international standards and the requirements of the legislative technique

On November 9, 2021, the Parliament of the Republic of Moldova registered the Draft Law amending Law no. 3/2016 on the Prosecutor's Office (Project no. 334/2021)¹. The draft was submitted as a legislative initiative by a group of MPs from the Parliamentary Faction "Action and Solidarity Party"² and proposes the amendment of several provisions of the Law on the Prosecutor's Office, provisions related to:

- The conditions to be met by the persons running for the position of General Prosecutor and the interim General Prosecutor, as well as the manner of termination of the interim position of General Prosecutor - art. 17;
- Register of candidates for filling vacancies - art. 22;
- The competition for the selection and career of the prosecutor and the filling of vacancies - art. 24;
- Appointment as chief prosecutor of the specialized prosecutor's office - art. 25/1;
- Transfer, promotion, delegation and secondment of the prosecutor - art. 54;
- The competencies of the College for the selection and career of prosecutors - art. 87.

It should be noted that the Law on the Prosecutor's Office is often amended. Since 2016, the law has been amended 19 times, with several amendments being controversial and criticized by both national civil society organizations³ and international bodies. This is also the case of the most recent amendments, operated by Law no. 102/2021 and by Law no. 103/2021. Some of these changes are to be reviewed by the Moldovan authorities from the perspective of the Council of Europe's European Commission for Democracy through Law (Venice Commission)⁴.

The frequent amendments to the provisions of the Law on the Prosecutor's Office, without a convincing substantiation, seem to be conjunctural, the only effect being the substitution of some persons with others in important positions. Thus, with regard to the frequent changes in the rules of the Superior Council of Prosecutors (CSP), the Venice Commission found that they give the impression of attempts by each parliamentary majority to change in its favour the balance of power within the CSP. Legislative changes should not be *ad hominem*, in other words - they should not seek to replace incumbents under the pretext of institutional reform⁵.

In the following, we will refer to the proposed changes, through Project no. 334/2021, to the provisions related to the Attorney General.

¹ Parliament of the Republic of Moldova, Draft law amending Law no. 3/2016 on the Prosecutor's Office, <https://www.parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/5725/language/ro-RO/Default.aspx>

² The authors of the Project are the deputies: Stamate Oleseă, Grădinaru Vasile, Argeorghiesei Gheorghe, Jacot Vitalie, Cătănoi Artemie, Popa Boris, Roșca Veronica.

³ Transparency International - Moldova, Public Policy Observer: Opinion on the Draft Law amending Law no. 3/2016 regarding the Prosecutor's Office (no. 181 of 10.08.2021), no. 32, August 2021, http://www.transparency.md/wp-content/uploads/2021/08/TI_Moldova_Observator_32.pdf

⁴ CDL-AD(2021)047-e, Opinion on the amendments of 24 August 2021 to the law on the prosecution service, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)047-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)047-e)

⁵ In this context, the Venice Commission suggests, in order to reduce the risk of such arbitrary changes, to regulate the composition of the CSP by constitutional provisions, recognizing that, in the absence of a qualified majority, this recommendation has no prospect of implementation, CDL-AD (2021) 047-e, Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §103.

The Attorney General must be qualified

According to the amendments proposed in art. 17 of the Law on the Prosecutor's Office, for the position of General Prosecutor, persons with at least 10 years of professional experience in law, obtained in the jurisdiction of the Republic of Moldova or foreign jurisdictions, including international organizations, of which at least 5 years in the position of prosecutor, judge or lawyer.

Regarding the extension of the list of potential candidates and those who have experience abroad, without going into the issue of equivalence of qualifications, it is worth noting the *difficulties that the Intelligence and Security Service will face in verifying candidates*. Or, the candidates for the position of General Prosecutor are to be subject to verification under the conditions of Law no. 271/2008 on the verification of incumbents and candidates for public office. In the same vein, *another problem would be the inability to effectively control wealth and income abroad*.

Moreover, *the conditions related to the candidates' experience are disproportionate to the responsibilities of the Prosecutor General*. With regard to the appointment of the Prosecutor General, the Venice Commission states: "... the nomination of the candidate should be based on his qualifications and objective legal experience, following clear criteria [...] a candidate for such a senior position to be subject to the general qualification requirements that exist for any other position of prosecutor; The duties of the Prosecutor General require special skills and experience. [...]"⁶ Likewise, the Venice Commission suggests: "[...] *the qualification required of candidates for the post of Prosecutor General must be similar to that required for appointments to senior judicial positions*. [...]"⁷

What is certain is that one of the *conditions for applying for the position of General Prosecutor should be the one provided by art. 20 para. (1) lit. e) of the Law on the Prosecutor's Office* - the candidate should prove that he / she has completed the initial training courses for prosecutors within the National Institute of Justice (NIJ) or, in the case of the person with the necessary seniority to be appointed in that case, *he passed the examination before the NIJ Graduation Commission*.

In other words, *the General Prosecutor cannot be less qualified than a lower hierarchical prosecutor*, and the conditions for access to this position must be proportional to the complexity of his / her duties.

The Attorney General must be honest

Surprisingly, the requirement imposed by art. 20 para. (1) lit. g / 1) of the Law on the Prosecutor's Office. The candidate for the position of General Prosecutor should not have, in the last 5 years, in the criminal record regarding professional integrity, entries regarding the negative result of the professional integrity test for the violation of the obligation provided in art. 7 para. (2) lit. a) of Law no. 325/2013 on the assessment of institutional integrity⁸.

⁶ CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §19-20, 27, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)039-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)039-e)

⁷ CDL(1995)073e-rev-restr, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p. 7, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(1995\)073rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1995)073rev-e)

⁸ The cited provisions oblige public agencies not to admit manifestations of corruption.

It must not be possible for the General Prosecutor to be suspended arbitrarily

Under the conditions of art. 55/1 of the Law on the Prosecutor's Office, the mandate of the General Prosecutor in respect of which the criminal investigation was initiated under the conditions of art. 270 para. (7) of the Code of Criminal Procedure⁹ is suspended by law during the criminal investigation period. The President of the Republic, on the proposal of the CSP, shall appoint an interim Attorney General during the period of suspension.

In its recent opinion, the Venice Commission¹⁰ has agreed that, in principle, the suspension of the Prosecutor General from office, if he is being prosecuted, is not incompatible with the presumption of innocence. However, the retention of the Prosecutor General, despite the serious allegations made against him, could affect the public's trust in the Prosecutor's Office. However, *procedural safeguards must be applied so that the suspension mechanism is not used arbitrarily*. In this respect, the legal suspension is inappropriate, and the CSP will examine the substance of the accusation and decide whether the evidence against the General Prosecutor is sufficiently convincing and whether it could lead to the suspension of the incumbent.

The interim General Prosecutor must be selected on the basis of clear criteria

In the proposed wording of art. 17 paragraphs (16) to (18) of the Law on the Prosecutor's Office, in the event of a vacancy in the office of General Prosecutor or the suspension of the Prosecutor General's office in connection with the initiation of criminal proceedings against him, the CSP, within 5 days to announce the date of the convening of the meeting for the appointment of an interim Attorney General¹¹. The interim General Prosecutor is to be selected by the CSP from among the prosecutors in office, who meet the conditions provided for the position of General Prosecutor. The selected candidate is proposed to the President of the Republic to be appointed interim General Prosecutor, applying accordingly the provisions of art. 17 paragraphs (11) and (12) of the Law on the Prosecutor's Office. The term of office of the General Prosecutor may not exceed 12 months. The term of office of the General Prosecutor shall cease on the date of appointment by the President of the Republic and of a Prosecutor General, as well as on the date of expiry of the maximum term of 12 months for the term of office. If, after the expiration of the maximum term of office, no new General Prosecutor has been appointed, the CSP will select and propose to the President of the Republic another prosecutor to ensure the interim position of General Prosecutor. The interim position of Attorney General may end by decree of the President of the Republic at the proposal of the CSP.

With regard to these proposals, it would be important to:

- *clarify the way (including criteria) in which the CSP selects the candidate for the position of interim General Prosecutor;*
- *enumerate all grounds on which the term of office of the General Prosecutor ceases to exist;*
- *at the proposed wording of art. 17 para. (18) of the Law on the Prosecutor's Office, it is necessary to replace the words "may cease" with the word "cease", otherwise the rule will be discretionary.*

⁹ According to art. 270 para. (7) of the Code of Criminal Procedure, the criminal investigation against the General Prosecutor is initiated by the prosecutor appointed by the CSP.

¹⁰ CDL-AD(2021)047-e, Opinion on the amendments of 24 August 2021 to the law on the prosecution service, §§ 89-90.

¹¹ According to the cited norms, the President of the Republic may reject once the candidacy proposed by the CSP in case of finding indisputable evidence of incompatibility of the candidate with the respective position, violation by the candidate of the legislation or violation of the legal procedures for his selection. Refusal of appointment must be justified and must be made within 15 working days of receipt of the proposal. At the repeated proposal of the same candidate, made with the vote of 2/3 of the members of the CSP, the President of the Republic issues, within 5 working days, the decree regarding the appointment of the candidate in office.

Even if the interim General Prosecutor must meet the conditions of the position, *he must not engage in a competition for the position*. This is a suitable solution to ensure the functionality of the Prosecutor's Office for a short period - the period of organizing and conducting the competition to fill the position of Attorney General. However, the solution becomes *dangerous for the independence of the Prosecutor's Office, if the interim position can last indefinitely*, even if it is exercised by different people of one year each. In this regard, the Venice Commission suggests that the rules be revised so that one of the Deputy Prosecutors-General, selected by the CSP, temporarily exercises the functions of the Prosecutor General¹². Obviously, in this sense, amendments to art. 18 of the Law on the Prosecutor's Office, which contains provisions regarding the Deputy Prosecutor General.

Conclusions

The law on the Prosecutor's Office needs to be improved, but not without complying with international standards and the requirements of the legislative technique. In this regard, national authorities should re-examine their recent amendments in the light of the recommendations of the Venice Commission.

Regarding the norms related to the Prosecutor General, proposed by Project no. 334/2021, it would be opportune:

- the reconsideration of the qualification conditions imposed on candidates for the position of Prosecutor General - these should be similar to those required of SCJ judges;
- the implementation of the requirements provided by art. 20 para. (1) letters e) and g / 1) of the Law on the Prosecutor's Office in relation to the candidates for the position of General Prosecutor;
- the revision of the rules on the suspension of the Prosecutor General - CSP should have the power to decide on the suspension, and the suspension of the Prosecutor General should not automatically end the term of office of deputies, one of whom could be empowered by the CSP to temporarily serve Suspended Attorney General;
- the clarification of the way (including criteria) in which the CSP selects the candidate for the position of interim Attorney General;
- the enumeration of all grounds on which the term of office of the Attorney General ceases to exist;
- the substitution, at the proposed wording of art. 17 para. (18) of the Law on the Prosecutor's Office, of the words "may cease" with the word "cease".

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¹² CDL-AD(2021)047-e, Opinion on the amendments of 24 August 2021 to the law on the prosecution service, § 100.