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(VENICE COMMISSION)

POLAND

OPINION

**ON THE ACT ON THE PUBLIC PROSECUTOR'S OFFICE
AS AMENDED**

**Adopted by the Venice Commission
at its 113th Plenary Session
(Venice, 8-9 December 2017)**

on the basis of comments by:

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I. Introduction

1. By letter of 4 May 2017, the Chairman of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested the Venice Commission to prepare an opinion on the Act on the Public Prosecutor's Office, as amended (CDL-REF(2017)048).

2. The Commission invited Mr Nicolae Esanu, Mr Johan Hirschfeldt, Mr Jean-Claude Scholsem, Ms Katerina Šimáčková and Mr Jorgen Steen Sørensen to act as rapporteurs for this opinion.

3. On 25-26 October 2017, a delegation of the Commission, composed of Mr Esanu, Mr Hirschfeldt, Mr Scholsem and Ms Šimáčková accompanied by Mr Schnutz Rudolf Dürr and Mr Ziya Caga Tanyar from the Secretariat, visited Warsaw and met with representatives of the Ombudsman's office, the National Council of the Judiciary, the Senate, the Sejm, the Supreme Court, the Bar Association, representatives of the Chancellery of the President and of the Prosecutor General's office as well as representatives of associations of prosecutors (Lex Super Omnia and Ad Vocem) and civil society organisations. The Venice Commission is grateful to the Polish authorities for the excellent organisation of this visit.

4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of an official translation of the Act of 28 January 2016 on the Public Prosecutor's Office. Inaccuracies may occur in this opinion as a result of incorrect translations. On 5 December 2017, the Polish authorities provided Remarks on the draft opinion which are reflected in this Opinion.

5. This opinion primarily focuses on the *Act of 28 January 2016 on the Public prosecutor's Office*, as amended (hereinafter, "the Act"), since the request by the Monitoring Committee of the Parliamentary Assembly explicitly refers to it. However, due to the connection between this Law and other legal acts, such as the Legal Regulations to Implement the Act - Law on the Public Prosecution of 28 January 2016 (*ustawa Przepisy wprowadzające ustawę – Prawo o prokuraturze*) (hereinafter, "the implementing regulation") or the Law on Common Courts Organisation, the opinion also refers to these acts, when it was deemed necessary to do so in order to gain a better understanding of the legal context.

6. This opinion was discussed at the Sub-Commission on the Judiciary on 7 December 2017 and following an exchange of views with Ambassador Janusz Stańczyk, Permanent Representative of Poland to the Council of Europe, was adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017).

II. Historical background of the Polish Public Prosecution

7. Following the amendment of the Constitution of the Polish People's Republic on 29 December 1989 and the subsequent changes made to the 1985 Act on Prosecuting Authority¹, the existing quasi-independent position of the public prosecution towards the executive was ended and the public prosecution was linked to the executive power. Since then, the power of the Public Prosecutor General was exercised by the Minister of Justice, to whom the public prosecution was subordinated.

¹ Act of 22 March 1990 amending the Act on the Prosecution Service of the Polish People's Republic, the Code of Minor offence procedure and the Act on the Supreme Court (Journal of Laws, 1990, issue 20)

8. Even after April 1990 (i.e. after the entry into force of the amendments to the 1985 Act on Prosecution Authority), the public prosecution formally continued to act as an independent constitutional authority which, according to Article 64(1) of the former, so-called Small Constitution, *shall safeguard the people's rule of law; shall watch over the protection of social property; shall ensure that the rights of citizens be respected*. In practice, however, the Ministers of Justice, who alternated in the function since the elections in 1991, reportedly identified themselves with the position of the Public Prosecutor General and allegedly tended to interfere with particular criminal cases.²

9. The Constitution of 1997 represented a major change to the legal status of the public prosecution. The authors of the newly adopted constitution did not consider it necessary to maintain public prosecution as a constitutional body. Removal of the constitutional provisions concerning public prosecution followed the logic that the prosecution power was considered a public power derived from the executive power. Currently, the only references to public prosecution in the Constitution are Article 103(2), which provides that no public prosecutor shall exercise the mandate of a deputy and Article 191(1), which establishes *locus standi* of the Public Prosecutor General before the Constitutional Tribunal.

10. The amendment of the 1985 Act on Prosecuting Authority in 2009, contributed to increasing the independence of the public prosecution from the executive power. With these amendments, the office of the Public Prosecutor General and the office of the Minister of Justice were separated and the Public Prosecutor General became the chief authority of the public prosecution as an authority ensuring legal protection. It appears that the separation of both offices was perceived as a means to exclude any possibility of political influence on the prosecutorial service. In Article 10(a)(5) of the 1985 Act, the term of office of the Public Prosecutor General was set to six years as of the date of the oath and according to paragraph 6 of the same provision, after the end of the term of office, the Public Prosecutor General may not be appointed to the same position again (no possibility for renewal). The appointment system of the Public Prosecutor General, put in place by Article 10(a)1 of the 1985 Act, also concerned involvement of self-governing bodies for prosecutors in the procedure: the Public Prosecutor General was appointed by the President of the Republic from among candidates nominated by the National Council of the Judiciary and the National Council of the Prosecuting Authority.

11. The 1985 Act also established high professional qualification standards for the candidates for the office of the Public Prosecutor General, which could only be held by a person who is a professionally active public prosecutor of a common or military organisational unit of the prosecuting authority or a professionally active judge (of the criminal or military chamber of the Supreme Court or of a common or military court) with at least ten years' professional experience (Art. 10(a)3 of the 1985 Act). Moreover, the 1985 Act as amended in 2009, contained safeguards against abusive dismissal of the Public Prosecutor General before the end of his/her term, since, according to its Article 10(e)6, s/he may be dismissed by a resolution of the Sejm enacted by a qualified majority of two-thirds of the votes, with at least half of the statutory number of Sejm deputies present, and only in case the annual report presented by the Public Prosecutor General were rejected by the President of the Council of Ministers. The grounds and conditions for pre-term dismissal of the Public Prosecutor General by the President of the Republic were defined clearly in Article 10(d) of the 1985 Act.

12. The 2009 amendments to the 1985 Act also increased the independence of ordinary public prosecutors in the conduct of preparatory proceedings as, according to Article 8(2) of the 1985 Act, the orders, guidelines and instructions given by a superior public prosecutor that the public prosecutor is obliged to implement, could not be related to the content of procedural actions (same principle, in Article 10(2) of the 1985 Act). In addition, considerable powers, especially in

² PALOVSKÝ, Tomáš. Prokuratura v Polsku. *Státní zastupitelství*. 2012, No. 4, p. 9 et seq.

the area of the nomination of candidates for different positions in the public prosecution, were entrusted to the self-government authority – the National Council of Public Prosecutors. Overall, the changes adopted in 2009 contributed to an increased independence of the public prosecution as a whole and of individual public prosecutors.³

13. In the Report on European Standards as regards the independence of the Judicial System (Part II)⁴ of the Venice Commission, the Polish prosecution system, as established by the 2009 amendments (separation of the role of the Minister of Justice from that of the Prosecutor General), was cited as an example of a widespread tendency in Europe to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive.

14. On 24 December 2015, the draft Law on Public Prosecutor's Office was submitted by a group of deputies. Following two readings at the Sejm respectively on 14 January 2016 and on 27 January 2016, the draft Law was adopted by the Sejm at the third reading on 28 January 2016 and by the Senate, on 30 January 2016. It was signed by the President on 12 February 2016 and came into effect on 4 March 2016.

15. According to a position paper on the draft Act on the Public Prosecutor's Office provided by the Polish authorities⁵, *"the basic goal of the Deputies' bill on the Act on the public prosecutor's office is to restore a personal union between the Minister of Justice and the Public Prosecutor General. Once this goal is achieved, the Public Prosecutor General should reclaim his strong position both with respect to the prosecutors he oversees and to external authorities"*. The reason for this major amendment in the prosecution system, according to the position paper, is the necessity to strengthen the Public Prosecutor's General's position so that the public prosecutor's office as a whole can properly execute the tasks assigned to it by the legislator. The existing regulations (i.e. prior to the entry into force of the Act of 28 January 2016) *"have made it difficult, or even impossible, for the Public Prosecutor General to manage in real terms the institution he oversees and for which he is accountable"*. Thus, the major novelty of the new Act is the re-introduction into the Polish prosecution system of the rule that the office of the Public Prosecutor General is held by the person who serves as Minister of Justice.

16. During the meetings in Warsaw, the authorities justified the new system of merging of the office of the Public Prosecutor General and of the Minister of Justice on the basis of an analysis of the shortcomings and malfunctioning of the previous system, which was in force between 2010 and 2016. First, the status of the prosecutorial office was uncertain: although the independence of the prosecutorial office was the underlying principle of the 2009 reform, in the absence of any constitutional regulation for the prosecutorial office, the latter appeared as a separate power from all the traditional state powers, i.e. legislative, executive and the judiciary without a constitutional basis and without accountability. The merger of the Prosecutor General's office and that of the Minister of Justice put an end to the ambiguity as to the legal status of the prosecutorial office, which is now unequivocally linked to the executive power.

17. Secondly, although the 2009 amendments emphasised the principle of independence of the prosecutorial office, the system that was put in place had not provided the Public Prosecutor General with the legal tools to ensure efficient management – including the budgetary

³ MAZUR, Dariusz, ZUREK, Waldemar. "Dobrá změna" v polské soudní moci." *Státní zastupitelství*. 2016, No. 6, p. 8 et seq.

⁴ CDL-AD(2010)040 Report on European Standards as regards the independence of the Judicial System: Part II – the Prosecution Service, Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), p. 6.

⁵ The Government of the Republic of Poland's position paper on the draft Act on the public prosecutor's office (Sejm paper no. 162) and the bill on implementing regulations to the Act on the public prosecutor's office (Sejm paper no. 163).

management of the whole prosecutorial system and to implement the criminal and security policy of the government. In particular, the powers of the Public Prosecutor General *vis-à-vis* subordinate public prosecutors were too weak.

18. Moreover, according to the Polish authorities, the formal independence of the prosecution service from the government turned out to be illusory and had not provided for an accountable functioning of the prosecutorial system and guarantees in order to prevent political pressure on the prosecutorial office. The annual reports, which had to be presented by the Public Prosecutor General to the President of the Council of Ministers, were not approved by the latter for months in order to exert political pressure on the former. However, this practical accountability of the Public Prosecutor General before the President of the Council of Ministers did not have any legal basis and was not transparent and contributed to the politicisation of the public prosecution, since the Public Prosecutor had to seek the backing of the ruling political party during the approval procedure.

III. Applicable Standards

19. The Venice Commission examines the Act on the Public Prosecutor's Office in the light of the European standards that are of relevance to legislation dealing with the operation of public prosecution services, as well as of existing good practices in the field, as available in particular in:

- Recommendation CM/Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system;
- Recommendation CM/Rec(2012)11 of the Committee of Ministers to member states on the role of public prosecutors outside the criminal justice system;
- The Opinion No. 3(2008) of the Consultative Council of European Prosecutors on 'The Role of Prosecution Services Outside the Criminal Law Field'
- The 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" ('the Bordeaux Declaration');
- Opinion No. 9(2014) of the Consultative Council of European Prosecutors ('the Rome Charter');
- CDL-AD(2010)040 Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010);
- CDL-AD(2016)007 Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

IV. Act on the Public Prosecutor's Office

20. The major change introduced in the Polish prosecution system by the Act on the Public Prosecutor's Office is the merger of the office of Public Prosecutor General and that of the Minister of Justice. According to Article 1§2 of the Act "[t]he public prosecutor general is the chief prosecutorial body. The office of the Public Prosecutor General is held by the Minister of Justice". The merger of both offices is accompanied by important competences of the Public

Prosecutor General (i.e. the Minister of Justice) in the management of the prosecutorial system, even if some of these competences already existed under the 1985 Act.

- Orders concerning the content of individual cases: “A public prosecutor is obliged to enforce dispositions, guidelines and orders of a superior public prosecutor” [including the Public Prosecutor General, i.e. the Minister of Justice] and orders concerning the content of an act in court proceedings is given by a superior public prosecutor in writing and, if requested by the public prosecutor, with a statement of reasons (Article 7§2 and 3 of the Act);
- Changing or revoking a decision of a subordinate public prosecutor: “A superior public prosecutor has the right to change or revoke a decision of a subordinate public prosecutor. A change or revocation of the decision must be made in writing and be included in the dossier of the case” [case file] (Article 8§1 of the Act – Article 8(a) of the 1985 Act);
- Handling of the case by the superior public prosecutor: “A superior public prosecutor may assume the handling of a case handled by subordinate public prosecutors and administer their acts unless the provisions of the law stipulate otherwise” (Article 9§2 of the Act – Article 8(b)(2) of the 1985 Act);
- Bringing action in civil cases: “Bringing action in civil cases, as well as submitting motions and participating in court proceedings in civil cases relative to the labour and social security law if the protection of law and order, social interest, or citizens’ property rights requires it” (Article 3§2) and “appealing to courts against unlawful administrative decisions and participating in court proceedings relative to such decisions’ conformity with the law” (Article 3§7 of the Act – Article 3(1)2 and 6 of the 1985 Act).
- Relations with the media and communication of information to “other persons”: “The Public Prosecutor General, the National Public Prosecutor or other public prosecutors authorised by them may present to public authorities, and to other persons in duly justified cases, the information concerning the Public prosecutor’s office’s operations, including the information concerning individual cases, provided that such information may be of importance to the state’s security or its correct functioning” (Article 12§1 of the Act). “The Public Prosecutor General and heads of prosecutorial bodies may transmit information to the media (...) with regard to preparatory proceedings pending or to the Public Prosecutor’s Office’s operations, with the exception of confidential information, out of consideration for an important public interest” (Article 12§2 of the Act);
- Appointment of provincial, regional and district public prosecutors: those prosecutors are appointed, after presenting their candidacy to the relevant public prosecutor’s assembly, and dismissed by the Public Prosecutor General upon a motion of the National Public Prosecutor (Article 15§1 of the Act – Article 13(2), 13(a) and (b) of the 1985 Act);
- Appointment of public prosecutors of universal prosecutorial bodies⁶: “public prosecutors of universal prosecutorial bodies are appointed to prosecutorial positions by the Public Prosecutor General upon a motion of the National Public Prosecutor” (Article 74 of the Act) from among those candidates who fulfil the requirements listed under Article 75 of the Act.

⁶ Under Article 1§3 public prosecutors of universal prosecutorial bodies include public prosecutors of the National Public Prosecutor’s Office, provincial public prosecutor’s offices (*prokuratury regionalne*), regional public prosecutor’s offices (*prokuratury okręgowe*) and district public prosecutor’s offices (*prokuratury rejonowe*).

- Appointment to vacant positions – without conducting a competition: Under Article 80 of the Act, “should a position of a public prosecutor of a district public prosecutor’s office be created or vacated, the Public Prosecutor General appoints the candidate to the position by means of a competition”. However, according to the same provision, “in particularly justified cases” the Public prosecutor General makes the appointment without conducting the competition procedure.
- Delegation: “The Public Prosecutor General may delegate a public prosecutor of a universal prosecutorial body to the Ministry of Justice or any other prosecutorial body subordinate to the Minister of Justice. Delegating for a period of more than 6 months a year is only possible with the public prosecutor’s consent” (Article 106§1 of the Act). According to the information provided by the authorities, as of 31 October 2017, 949 officials (931 public prosecutors and 18 assessors) were delegated to other organisational units of the prosecution service. Moreover, the number of public prosecutors delegated for military affairs is 16.
- The National Council of Public Prosecutors is presided over by the Public Prosecutor General (i.e. the Minister of Justice) (Article 42§3 of the Act).

21. Moreover, the Act of 28 January 2016 Implementing Provisions – Law on Prosecuting Authority introduced provisions concerning the transfer of prosecutors to another official position within the prosecutorial service. According to Article 36§1 of this Law, the Prosecutor General shall transfer the prosecutors of the Prosecutor General’s office and the prosecutors of the Chief Military Prosecutor’s office, who were not appointed to the National Prosecutor’s office, to another official position within the public organisational units of the prosecution service. S/he shall transfer the prosecutors of the former appellate prosecutor’s office, whom s/he did not appoint to the regional prosecutor’s office, to another official position in the public organisational units of the prosecution service (Article 39§1).

22. Although the current Opinion concerns the Act on Public Prosecutor’s Office, the very strong position of the Minister of Justice *vis-à-vis* court presidents in the Law on Common Courts Organisation should be underlined: within 6 months following the adoption of the Law, the Minister of Justice may dismiss and replace the current court presidents under certain circumstances. In view of the substantial powers of the court presidents, this means that one party in proceedings, the prosecution (in criminal and civil cases) can, albeit indirectly, influence the situation of the judges.⁷ Moreover, in the Draft act amending the Act on the Supreme Court, the Public Prosecutor General has the power to lodge a request for “extraordinary control” of final judgments before an extraordinary chamber of the Supreme Court.⁸

23. On 18 April 2016, the Commissioner for Human Rights of Poland challenged a number of provisions of the Act on the Public Prosecutor’s Office before the Constitutional Tribunal. The Commissioner in particular claimed that the provisions setting out new competences to the Minister of Justice (as the Public Prosecutor General), i.e. Article 7§2-5 (orders concerning the content of individual cases), Article 8§1 (changing and revoking a decision of a subordinate public prosecutor), Article 9§2 (handling of the case by the superior public prosecutor) and Article 12§1 and 2 (communication of information to the media and to “other persons”) were in

⁷ In parallel to this opinion, the Venice Commission prepares an Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the act on the Organisation of Ordinary Courts (CDL-AD(2017)031).

⁸ See, CDL-AD(2017)031.

breach of Article 2 (State ruled by law), Article 149(1) (Ministers' tasks)⁹, Article 47 (private and family life) and Article 51(2) (acquiring, collecting or making accessible information on citizens) of the Constitution. The Commissioner argued, in particular, that the principle of objectivity and preservation of political neutrality should be the guiding principles of the prosecution service, the political neutrality, however, is "*not guaranteed by a politician leading prosecution, equipped with extensive rights to interfere in the contents of procedural actions undertaken by particular prosecutors*". The case is pending before the Constitutional Tribunal.

V. Analysis

A. Legislative Procedure

24. During the meetings in Warsaw, civil society organisations and associations of prosecutors expressed concern over the lack of public consultation prior to the submission of the draft Law to Parliament. The Venice Commission is aware that in Poland the rules applicable to the legislative process differ depending on the author of the draft Law and that drafts submitted by members of Parliament, unlike those submitted by the Government, do not require public consultation. The Act under examination was tabled as a private members' bill. Although the Venice Commission was informed by the Public Prosecutor General's Office that during the legislative work the Sejm obtained opinions from, in particular, the Supreme Court, the National Council of Prosecution and the National Council of the Judiciary, this fast track procedure resulted in the exclusion of meaningful public consultation prior to the adoption of the Act, which is regrettable. The Venice Commission recalls that one of the benchmarks of the rule of law is the legality principle, which requires that the process of enacting a law is transparent, accountable, inclusive and democratic. Particularly, the proposed legislation should be debated in depth by Parliament and adequately justified and the public should have a meaningful opportunity to provide input¹⁰.

B. Merger of the office of the Public Prosecutor General and the office of the Minister of Justice

25. As already mentioned, the new merging of the function of Minister of Justice and of the function of the Public Prosecutor General appears to be the most important aspect of the new prosecution system established by the Act on the Public prosecutor's Office and as a complete reversal of the model adopted in 2009 (split of both positions - amendments made in the 1985 Act on Prosecution Authority).¹¹

26. During the meetings in Warsaw, the authorities insisted that apart from the period 2010-2016 during which the former 1985 Act as amended in 2009 was in force, the merging of the functions of the Public Prosecutor General and of the Minister of Justice was a legal tradition in Poland, aiming at increasing the accountability and the efficiency of the prosecutorial system. They pointed to a number of European countries, which established a prosecution system with a subordination of the prosecution service to a member of the government. In particular, Austria and Denmark, where the General Public Prosecution Offices are subordinated to the Minister of Justice, and Germany, where the Federal Prosecutor General is bound by the instructions of

⁹ Ministers shall direct a particular branch of government administration or perform tasks allocated to them by the Prime Minister. The scope of activity of a minister directing a branch of government administration shall be specified by statute.

¹⁰ CDL-AD(2016)007 Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), para. 49, II. A. 5. iv.

¹¹ Article 1§2 of the Act "[t]he public prosecutor general is the chief prosecutorial body. The office of the Public Prosecutor General is held by the Minister of Justice".

the Federal Minister of Justice and his/her activity is supervised by the latter, were cited as examples.

27. In its 2010 Report on European Standards as regards the Independence of the judicial System (Part II – The Prosecution Service), the Venice Commission considered that systems of criminal justice vary throughout Europe and the different systems are rooted in different legal cultures and there is no uniform model for all states. After having observed that the Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe allows for a plurality of models, including models where the public prosecution is part of or subordinate to the Government, it found that 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*” (Austria, Denmark, Germany and the Netherlands are examples referred to in the Report). The Commission further noted that there was a widespread tendency to allow for a more independent prosecutor’s office rather than one subordinated or linked to the executive, and the former 1985 Act of Poland on prosecutor’s office as amended in 2009, which had separated the offices of the Minister of Justice and of the Public Prosecutor General, was cited as an example of this tendency.¹²

28. The Venice Commission reiterates that the independence or autonomy of the prosecutor’s office is not as categorical in nature as that of the courts. Prosecutorial systems where the public prosecution is part of or subordinated to the government are in line with European standards, provided that effective measures to guarantee the independence and autonomy of the prosecution office and safeguards against in particular government intervention in individual cases are in place. The Remarks on the draft opinion by the Polish authorities compare the Polish system notably to the situation in Austria. However, in Austria possible abusive instructions were seen as a problem and therefore, since 2016, the Minister of Justice has to submit the instructions to subordinate prosecutors to an “Instruction Council”¹³. Nevertheless, it should be emphasised that unlike the examples referred to by the Polish authorities during the discussions in Warsaw and also by the 2010 Report on the Independence of the Judicial System, the system that was restored in Poland by the 2016 Act appears to be rather unique among the Council of Europe member states, since it does not only subordinate or link the prosecution office to the Minister of Justice, but the latter *becomes* the chief prosecutorial body. This means a perfect mixing and merging of a politically appointed office (the Minister of Justice, a member of the government) and the prosecutorial system itself.

29. This could be a mere question of attributing an additional title to the Minister of Justice and indeed at the meeting in Warsaw the prosecution authorities pointed out that the day to day business of the prosecution service was managed by the National Public Prosecutor, the deputy of the Public Prosecutor General. However, the system should be assessed with regard to the powers of the Minister of Justice, as the Public Prosecutor General, *vis-à-vis* the entire prosecution service and safeguards provided by the legislation against the intervention of the political office in individual cases (see Section C below, Powers of the Public Prosecutor General). However, the merger of both offices raises some specific issues, notably as concerns the incompatibility between public prosecutor’s office and a political office (1), criteria for the appointment and dismissal of the Public Prosecutor General (2), and his/her professional qualifications (3).

1. Incompatibility between public prosecutor’s office and a political office

30. According to Article 103(2) of the Polish Constitution “[n]o judge, public prosecutor, officer of the civil service, soldier on active military service or functionary of the police or of the services

¹² For a recent overview of the structure of prosecutorial systems, see Challenges for judicial independence and impartiality in the member states of the Council of Europe (SG/Inf(2016)3rev).

¹³ *Weisungsrat*.

of State protection shall exercise the mandate of a Deputy". Similarly, according to Article 97§1 of the 2016 Act, "[d]uring the time of holding his/her position, a public prosecutor cannot belong to a political party nor participate in any political activity".

31. At the meeting in Warsaw, the representatives of the Public Prosecutor's Office pointed out that two provisions of the Act (i.e. Articles 132§1 and 135§1) refer to the Public Prosecutor General and public prosecutors as separate categories and insisted that the Public Prosecutor General cannot be considered a "public prosecutor" within the meaning of Article 103 of the Constitution and Article 97 of the 2016 Act. However, other provisions refer to the Public Prosecutor General as a prosecutor as for instance, Article 31(1) which provides that "*Public prosecutors who are the immediate superiors are: (1) the Public Prosecutor General – towards the National Public Prosecutor (...)*". It is not clear how those prohibitions can be applied to the Office of the Public Prosecutor General, which is held by an active politician, the Minister of Justice, who is moreover a member of the Sejm.

32. In their Remarks on the draft opinion, the Polish authorities inform that, in practice, only the National Public Prosecutor actually directs the prosecution activities. Even if this may be the case in day to day work, this is not reflected in the Act, which gives the Public Prosecutor General powers to intervene directly in individual cases (see below). In addition, the National Public Prosecutor him/herself is appointed in a political manner.

2. Appointment and dismissal of the Public Prosecutor General

33. The merging of the offices of the Minister of Justice and of the Public Prosecutor General also raises issues concerning the standards related to the appointment and dismissal of the Public Prosecutor General. It is a well-established principle that the method of appointment of the Public Prosecutor General should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. The Venice Commission therefore always recommends that in the procedure of appointing a Prosecutor General, advice on the professional qualification of candidates be taken from relevant persons, such as representatives of the legal community (including prosecutors) and of civil society.¹⁴

34. In countries where the Prosecutor General is elected by Parliament, the danger of a politicisation of the appointment process could be reduced by providing for the preparation of the election by an expert committee. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to promote a broad consensus on such appointments.¹⁵ Contrary to what the Polish authorities assert in their Remarks, the Venice Commission does not see the election of prosecutor general by Parliament with a qualified majority as the only viable model. Other solutions, such as independent expert input in the selection process are perfectly valid as well.

35. Moreover, the Venice Commission puts an emphasis on the requirement that the Prosecutor General should not be eligible for re-appointment, as 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. In the same vein, the Venice Commission also recommended that the Law should clearly define the conditions of the Prosecutor General's pre-term dismissal.¹⁶ It even went further by requiring that the grounds for pre-term dismissal be listed in the Constitution itself and that an expert body give an opinion on

¹⁴ See, for instance, CDL-AD(2010)40 Report on European Standards as regards the independence of the Judicial System: Part II – the prosecution Service, paras. 34 *et seq.*

¹⁵ *Ibid.*, paras. 34 *et seq.* and 87.

¹⁶ *Ibid.*, para. 39.

whether there are sufficient grounds for dismissal. There should be a fair hearing in dismissal proceedings, including before Parliament.¹⁷

36. In a prosecutorial system, where the office of the Public Prosecutor General is held by the Minister of Justice, politically accountable before Parliament and appointed and dismissed by Parliament in a political procedure, those standards related to the appointment and dismissal of the Public Prosecutor General cannot be fulfilled. Under Article 154 of the Constitution, concerning the formation of the Council of Ministers, the President of Republic shall nominate a Prime Minister, who shall propose the composition of a Council of Ministers and submit a programme of activity of the Council of Ministers to the Sejm, together with a motion requiring a vote of confidence. The Sejm shall pass such a vote of confidence by an absolute majority of votes in the presence of at least half of the statutory number of deputies. This is an ordinary model of appointment of members of the Council of Ministers in a classical parliamentary system, and is not as such adapted (or even adaptable) to the specificities of the office of the Public Prosecutor General and his/her appointment.

37. The sovereign power of Parliament in the appointment of the ministers of the government who depend on its confidence is limited neither by an opinion of an expert body nor by a parliamentary committee concerning the qualification of the candidates, nor by requirement of a qualified majority in the appointment procedure. As the only criteria in the appointment to and dismissal from political offices is the “confidence” which the holder of the political office inspires to Parliament, the grounds for dismissal of the Minister of Justice (i.e. the Public Prosecutor General) cannot be shaped and be clearly listed in legislative or constitutional provisions. Moreover, for the same reasons, the same person may be re-appointed or re-elected as Minister of Justice and consequently as Public Prosecutor General, since the power of the Prime Minister in the formation of the cabinet and that of the *Sejm*, in passing the vote of confidence for the cabinet, are not and cannot be limited by a prohibition of re-appointment of the same person as Minister of Justice.

38. Thus the standards concerning the appointment and dismissal of the Public Prosecutor General are not fulfilled precisely because of the political nature of the office of the Minister of Justice, who holds the office of the Public Prosecutor General. One additional disadvantage of this model is that frequent changes in the office of the Minister of Justice (because of, for instance, possible political instability) could also damage the continuity and harmonious operation of the prosecution system. In their Remarks on the draft opinion, the Polish authorities insist that continuity is ensured by the National Public Prosecutor replacing the Public Prosecutor General (Article 13(4)). However, the appointment and dismissal of the National Public Prosecutor has a political character too and the method of appointment clearly suggests a relationship of trust between the Public Prosecutor General and the National Public Prosecutor. Even if an approval from the President of Poland is required, the likelihood of a change in both positions within a short period of time is high if the President values the need of trust between these two positions.

3. Qualifications of the Public Prosecutor General

39. The unification of the offices of the Minister of Justice and the Public Prosecutor General is accompanied by a significant decrease of qualification requirements for the office of Public Prosecutor General, presumably in order to facilitate appointment of active politicians to the double position. The qualification requirements for the appointment of public prosecutors are set out in Article 75§1(1-8) of the 2016 Act. These requirements also apply to public prosecution trainees (*asesor prokuratury*). Nevertheless, under Article 1§2 of the 2016 Act, the Public Prosecutor General has to meet only part of these requirements and it is sufficient for the candidate for the Public Prosecutor General – to be exclusively a Polish citizen exercising full

¹⁷ *Ibid.*, para. 40.

civil and citizen rights, and to not have been finally sentenced for an intentional crime; - to be of impeccable moral character; - have graduated in law in Poland and obtained a Master degree, or have graduated in law abroad and have his/her education recognised in Poland; - not have been under the previous regime a collaborator of the State Security authorities or a judge who embezzled the judicial independence, confirmed by a final judgment.

40. Compared to Article 10(a)(3) of the 1985 Act concerning the qualification requirements for candidates for the Public Prosecutor General's office, the 2016 Act abandoned the requirement that the candidate should be an active public prosecutor or judge with at least 10 years' professional experience. The fact that a candidate for the Public Prosecutor General's office does not need to meet any higher professional standards (apart from a law degree) entails the paradoxical consequence that the person who heads the prosecution service can be much less qualified than the persons the nomination and promotion of whom he or she will have to decide upon. The Remarks by the Polish authorities compare this situation to countries where the Minister of Justice can give instructions to the prosecutor general. However, the Polish case clearly differs from these systems because of the powers of the Public Prosecutor General to directly intervene in each individual case without the need to have instructions passed down the prosecutorial hierarchy (see below). In such countries, this hierarch can fill in required prosecutorial expertise in passing on the instruction down to lower prosecutors.

41. During the meetings in Warsaw, the representatives of the Public Prosecutors Office argued that the office of the Public Prosecutor General is in practice managed by the National Public Prosecutor, who is the deputy of the General Prosecutor, and the criticism towards the amalgamation of the office of the Public Prosecutor General and of a political office should thus be limited, since the National Public Prosecutor would meet all the conditions to be a prosecutor under Article 75 and not only some of them. However, even the appointment and dismissal of the National Public Prosecutor is of a political character as s/he is appointed and dismissed by the President of the Council of Ministers upon a motion of the Public Prosecutor General. The President of Poland is consulted on the appointment and has to give his approval for dismissal. However, no input from civil society or an expert body is required in the appointment procedure and the grounds for dismissal are not stated in the Law.

42. In its 2010 Report on the Independence of the Judicial System, the Venice Commission pointed to a widespread tendency to allow for a more independent prosecution office, rather than one subordinated or linked to the executive. This observation has been confirmed by the 2014 Rome Charter¹⁸ which states that "*the independence and autonomy of the prosecution service constitute an indispensable corollary to the independence of the judiciary. Therefore the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged*". The merger does not only go against the European trend but goes much deeper than the mere subordination of the prosecution system to the Minister of Justice. Even if there are a few systems where the Minister of Justice can give instructions¹⁹, the Polish system stands out because of the competence of the Public prosecutor General to act personally in each individual case of prosecution (see below). The Venice Commission is of the opinion that the above-mentioned problems²⁰ are a direct result of the amalgamation of both offices, which are of a fundamentally different character, political and prosecutorial.

¹⁸ Opinion no. 9(2014) of the Consultative Council of European Prosecutors (Rome Charter).

¹⁹ See notably the Austrian case where all instructions have to be submitted to an "Instruction Council".

²⁰ Concerning the incompatibility between the public prosecutor's office and political functions, the appointment and dismissal of the Public Prosecutor General and the required qualifications for the office of the Public Prosecutor General.

C. Powers of the Public Prosecutor General

43. The applicable standards such as the Recommendation Rec(2000)19 of the Committee of Ministers, Opinion no. 9(2014) of the Consultative Council of European Prosecutors (Rome Charter), the Report of the Venice Commission on the Independence of the Judicial System (Part II) and also Opinion no. 4(2009) of the Consultative Council of European Prosecutors (Bordeaux Declaration) indeed provide standards for prosecutorial systems structured in a hierarchical way where the Public Prosecutor General has the possibility to give instructions to subordinate public prosecutors in individual cases and where a decision of a prosecutor may be overruled by a senior prosecutor.²¹

44. The assessment on whether the merger between the positions of the Public Prosecutor General and of the Minister of Justice should be made in light and against the background of the powers of the Minister of Justice, as the Public Prosecutor General, *vis-à-vis* the entire prosecution service and safeguards provided by the legislation notably against the intervention of the political office in individual cases.

1. Powers with regard to individual cases

45. Article 7§1 of the 2016 Act guarantees the independence of the public prosecutors when administering the acts specified by laws. This provision sets out, however, two important exceptions to the principle of independence of public prosecutors: first, according to paragraph 2 of Article 7, a public prosecutor is obliged to “enforce” dispositions, guidelines and orders of a superior public prosecutor. Secondly, under paragraph 3 of the same provision, “*an order concerning the content of an act in court proceedings is given by a superior public prosecutor in writing and, if requested by the public prosecutor, with a statement of reasons (...). The order is included in the public prosecutor’s own documentation of the case.*”

46. As according to Article 13§2 of the Act “*the Public Prosecutor General is the superior of public prosecutors of universal prosecutorial bodies (...)*”, the Minister of Justice is a competent authority to give written instructions to all the public prosecutors concerning the content of any individual case they are dealing with. The fundamental difference from the 1985 Act is that the latter legislation, while it obliged the public prosecutors to implement orders, guidelines and instructions of their superior public prosecutor, excluded unequivocally any possibility for superior public prosecutors to give instructions related to the contents of procedural actions.

47. Under Article 7§4 of the 2016 Act, in case a public prosecutor does not agree with an order concerning the content of an act in court proceedings, s/he can either request the order to be changed or him/herself to be excluded from administering the act or from participating in the case.

48. In addition, Article 8 of the Act gives the superior public prosecutor the right to change or revoke a decision of a subordinate public prosecutor. A change or revocation of a decision must be made in writing and is included in the dossier of the case. The fundamental difference from the former 1985 Act is that the previous Article 8(a) gave the competence to change or set aside a decision of a public prosecutor, only to the *directly* superior public prosecutor of the prosecutor, who took the decision. The change is significant since, by virtue of Article 13(2) of the 2016 Act²², the Minister of Justice is a competent authority, as superior public prosecutor, to

²¹ See for instance, CDL-AD(2010)040 Report on the Independence of the Judicial System (Part II), paras. 53 *et seq.*; Recommendation Rec(2000)19 of the Committee of Ministers on the Role of Public prosecution in the Criminal Justice System, point 13; Bordeaux Declaration “Judges and prosecutors in a Democratic Society”, point 9.

²² “*The Public Prosecutor General is the superior of public prosecutors of universal prosecutorial bodies (...).*”

change or revoke decisions taken by all public prosecutors. In their Remarks on the draft opinion, the Polish authorities point out that even under the 1985 Act an instruction would end up on the desk of the lowest level prosecutor. This argument ignores that the direct instruction cuts out senior level prosecutors who are more likely to protest against illegal instructions than a junior prosecutor who might fear for his career if s/he were to refuse such an instruction.

49. Another competence of the superior public prosecutor is provided under Article 9 of the 2016 Act. A superior public prosecutor (which also includes the Minister of Justice by virtue of Article 13(2) of the Act) may entrust subordinate public prosecutors the administration of acts falling under his/her scope of action (paragraph 1), or may assume the handling of a case handled by subordinate public prosecutors and administer their acts unless the provisions of the law stipulate otherwise (paragraph 2).

50. Last, but not least, under Article 57§3 the Public Prosecutor General can request operational and exploratory activities to be undertaken by competent authorised bodies provided that they remain directly pertinent to the preparatory proceedings under way. The Public Prosecutor General may inspect the materials collected in the course of such activities.

51. This means that a politician, the Minister of Justice, cannot only give direct instructions in each prosecutorial case file in Poland, s/he has also full access to the material in all prosecutorial files in the country.

52. In systems where the prosecution system is linked to the executive and where the Public Prosecutor General may give instructions, a number of safeguards are required in order to guarantee the autonomy of the public prosecution within the State structure and the transparency of its functioning and to protect it against political influence.²³ Such safeguards are absent or weak according to the system established by the Act. In their Remarks, the Polish authorities point out that the Council of Ministers and its Chairman cannot give instructions to the Prosecutor General. But this does not solve the problem since the Prosecutor General/Minister of Justice him/herself is a political position.

53. Under the 2016 Act, the order concerning the content of an act in court proceedings (Article 7) or the decision of a superior public prosecutor to change or revoke a decision of a subordinate public prosecutor (Article 8) should be in writing, which is *a priori* in conformity with international standards.²⁴ Nonetheless, the following observations should be made:

54. Under Article 7§3, the statement of reasons of an instruction by a superior public prosecutor in individual cases is not mandatory and the reasons are provided only if requested by the subordinate public prosecutor.

55. No statement of reasons at all is required under Article 8 concerning the decisions by a superior public prosecutor on changing or revoking a decision taken by a subordinate public prosecutor, even if the junior prosecutor requested it. For the Venice Commission, any instruction to reverse the view of a junior prosecutor should be reasoned.²⁵ At the meeting in Warsaw, the representatives of the Public Prosecution Office argued that there is no need for

²³ See, in particular, CDL-AD(2010)040 Report on European Standards as regards the independence of the Judicial System (Part II), para. 53 *et seq.*; Consultative Council of European Prosecutors (CCPE), Opinion No. 9(2014) on European norms and principles concerning prosecutors ("Rome Charter"), paras. 45-50; CDL-AD(2016)007, Rule of Law Checklist, adapted by the Venice Commission at its 106th Plenary Session, para. 91 *et seq.*

²⁴ See, for instance, Consultative Council of European Prosecutors (CCPE), Opinion No. 9(2014), para. 47; CDL-AD(2016)007, Rule of Law Checklist, para. 90, d) iii.

²⁵ See, for instance, CDL-AD(2012)008, opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the prosecutor General, prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, paras. 67-69.

such reasoning, because the change or revocation of acts will be under the scrutiny of a judge. However, reasoning is necessary precisely in order to enable a meaningful review by a court. Moreover, no such judicial scrutiny is possible in case of an instruction by a superior public prosecutor not to prosecute in a specific case.

56. An order concerning the content of an act in court proceedings should be included in the *public prosecutor's own documentation of the case* (Article 7§3 *in fine*). Article 8 uses a different wording and provides that a change or revocation of a decision must be included in the *dossier of the case* (Article 8§1 *in fine*). During the meetings in Warsaw, the delegation of the Venice Commission was informed by the authorities and civil society organisations about the possibility of the parties to a case to have access to the “prosecutor’s own documentation of the case” (Article 7) and to the “dossier of the case” (Article 8) in order to be informed about the content of instructions given by a superior public prosecutor. It was claimed that although the parties have access to the dossier of the case under Article 8, they are not given this opportunity under Article 7 (prosecutor’s own documentation of the case). The avenue through the freedom of information act is not a practical one. It can be pursued only if there is a suspicion of existence of such an instruction in the first place but in most cases the parties will not be aware that instructions were given and that their revelation could be enforced. The Venice Commission opines that, whatever wording is used under both provisions, the parties to the case should in any case, without infringing the secrecy of preliminary proceedings, have access to the instructions given by a superior public prosecutor for the sake of transparency and fair trial.²⁶

57. According to Article 7§4, should a public prosecutor not agree with an order concerning the content of an act in court proceedings, s/he can request the order to be changed or him/herself to be excluded from administering the act or from participating in the case. In this situation, the exclusion is decided by the public prosecutor, who is the immediate superior of the public prosecutor, who has given the order. The provision seems to follow the Committee of Ministers’ Recommendation Rec(2000)19, which sets out that where the public prosecutor believes an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available, which may lead to his or her eventual replacement.²⁷

58. The Venice Commission recalls that already in its 2010 Report on the Independence of the Judicial System (Part II), it considered the safeguards indicated under point 10 of Recommendation Rec(2000)19 not to be adequate and needing further development. 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. In case of an allegation that an instruction is illegal, a court or an independent body such as a prosecutorial council, should decide on the legality of the instruction. Article 7§4 should therefore be amended to provide the subordinate prosecutor with the possibility to refer the allegedly illegal or groundless instruction to a court or an independent body.²⁸ The same recommendation is also valid in the context of Article 8 of the Act on the power of the superior public prosecutor to change or revoke a decision taken by a subordinate public prosecutor.

59. Article 9§2, which provides that a “superior public prosecutor may assume handling of a case handled by subordinate public prosecutors and administer their acts unless the provision of the law stipulate otherwise” effectively excludes the internal independence of public prosecutors. No criteria are indicated which would provide guarantees against abuse and limit the scope of this provision. Without such criteria, this provision may indeed lead to abuse, especially taking into consideration that the Public Prosecutor General as a superior

²⁶ See, 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, para. 13 d).

²⁷ Recommendation Rec(2000)19, point 10.

²⁸ CDL-AD(2016)007, Rule of Law Checklist, para. 90, d) iv.

public prosecutor is an active politician.²⁹ This provision is even more dangerous than the right to give instructions to subordinate prosecutors because the superior prosecutor acts directly in the case and there is no safeguard similar to the right of the subordinate prosecutor to complain against illegal instructions. The Law should indicate clear criteria on when superior prosecutors may assume the handling of a case and any such act should be recorded in the case file and this information should be available to the parties.

60. Article 57§3 which confers to the Public Prosecutor General the power to request the carrying out of operational activities directly linked to on-going preparatory proceedings (e.g. operations such as control of the content of correspondence or mail, telephone wiretaps) and to get acquainted with materials collected in the course of such activities, does not provide for any requirement regarding the permissibility of such actions to be initiated directly by the Public Prosecutor General. Such powers in the hands of an active politician performing the office of the Minister of Justice pose a real risk for abuse. The provision should clearly set out the limited circumstances under which any such powers can be used by the Public Prosecutor General. In any case, such acts should be recorded in the case file and be available to the parties.

2. Functions of the Prosecution Service outside the Criminal Justice System

61. The tasks related to prosecuting crimes and “maintaining law and order” (“guards the rule of law” according to the translation provided in the Remarks) under Article 2, are executed by the Public Prosecutor General, the National Public Prosecutor and the Public prosecutor’s other deputies as well as public prosecutors subordinate to them by means of “*bringing actions in civil cases, as well as submitting motions and participating in court proceedings in civil cases relative to the labour and social security law if the protection of law and order, social interest, or citizens’ property or rights requires it*” (Article 3§1(2) of the 2016 Act) and “*appealing to courts against unlawful administrative decisions and participating in court proceedings relative to such decisions’ conformity with the law;*”. In addition, under Article 66, “*a public prosecutor has the right to make appeals and moves for legal remedies against court judgments.*”

62. The Venice Commission acknowledges that, in some countries, the public prosecutor has functions that are wider than those of criminal prosecution only and it has stated that such powers are legitimate if certain criteria are met.³⁰ The competences outside the criminal field should be carried out in such a way as to respect the principle of the separation of powers, including the respect for independence of the courts, the principle of subsidiarity, the principle of speciality and the principle of impartiality of prosecutors. Moreover, the Venice Commission insists on judicial control over every decision of a public prosecutor which interferes with the fundamental rights and freedoms of any person, including activities carried out in the course of supervisory functions or other functions outside the sphere of criminal prosecution.

63. Under Article 2 of the Act, the public prosecutor’s office has two main tasks: prosecuting crimes on the one hand, maintaining law and order on the other. The Venice Commission is of the opinion that the formula “maintaining law and order” is too broad and in a wide interpretation, may even be understood as encompassing the old Soviet *prokuratura* model of general supervision powers. Even if the task of “maintaining law and order” has to be read in conjunction with the list of functions of the prosecution service listed under Article 3§1, Article 2 gives the power of maintaining law and order to the prosecution office without any conditions as to its interpretation and implementation.

²⁹ The Remarks on the draft opinion point out that such a provision was part of the 1985 Act (Article 8b). However, before 2016 there was a strict separation between the Public Prosecutor General and the Minister of Justice.

³⁰ CDL-AD(2013)025 Joint Opinion on the Draft Law on the Prosecution Service of Ukraine, paras. 16 *et seq.*

64. According to Article 3§2, public prosecutors may bring actions in civil cases, as well as submitting motions and participating in court proceedings in civil cases relative to the labour and social security law if the protection of law and order, social interest, or citizens' property or rights requires it. The prosecutor has the right to appeal and bring motions for legal remedies against court judgments.

65. Again, these provisions are too broad and vaguely formulated and are open to arbitrary application and interpretation. The public prosecutor thus has the ability to participate in any legal proceedings where – according to the prosecutor – the citizen's rights and social interest requires it, regardless of the wishes of the individuals who are parties to civil cases. This is problematic given that the main task of the prosecutor is to represent the interests of the state and the general interests and a prosecutor may not be considered the most appropriate person to undertake the function of protecting human rights, which is better suited to an ombudsman. These provisions do not require justification from the public prosecutor to intervene in civil cases and this intervention is not submitted to the authorisation or acceptance by the civil court.

66. Moreover, under Article 66, the power of the public prosecutors to challenge any court decision is not at all limited and may include civil, administrative and commercial cases, regardless of whether or not the prosecutor has been involved in any proceedings leading up to those judgments.

67. In their Remarks on the draft opinion, the Polish authorities insist that these powers are only secondary to the powers in the criminal field and that according to Article 67 they are exercised only on the basis of other legal provisions, notably:

- Article 191 of the Constitution of the Republic of Poland, pursuant to which the Prosecutor General is one of the entities authorised to file motions to the Constitutional Court;
- provisions of Chapter IV of the Code of Administrative Procedure;
- provisions of the Act of 30 August 2002 – on proceedings before administrative courts (Journal of Laws of 2012, it. 270);
- provisions of the Code of Civil Procedure (especially Article 7 and Articles 55-60);
- provisions of the Act of 24 August 2001 – Code of procedure in matters of misdemeanors (Journal of Laws of 2013, it. 395 as amended).

68. The Remarks also point out that these powers are exercised on the basis of the principle of opportunity. This means that there is a wide measure of discretion in this field. Especially in view of the political nature of the Public Prosecutor General/Minister of Justice, such discretion should be limited by the law.

69. The general function of the public prosecutors to “maintain law and order” is too broad and should be repealed since the specific functions of public prosecutors are in any case listed under Article 3§1. Decision by public prosecutors to participate in civil proceedings should be reasoned and submitted to acceptance by the respective court.

3. Transmission of Information to Media and to “other persons”

70. Article 12§1 confers on the Public Prosecutor General, the National Public Prosecutor or other public prosecutors authorised by them, the right to “present to public authorities, and other persons in duly justified cases, information concerning the Public Prosecutor's Office's operations”. This information may include information concerning individual cases, “provided that such information may be of importance to the state security or its correct functioning”. Under paragraph 2 of the same provision, the information with regard to preparatory proceedings pending or to the Public prosecutor's office's operations may be transmitted to the

media by the Public Prosecutor General and heads of prosecutorial bodies (in person or by authorising another public prosecutor to do so), with the exception of confidential information, out of consideration for an important public interest. Both above-mentioned competences do not require the approval of the public prosecutor in charge of the case (paragraph 3). The provision of Article 12 does not mention any obligation to respect the limitations that arise from the Code of Criminal Procedure and the Press Act when transmitting such information.

71. During the visit to Warsaw, the delegation of the Venice Commission was told by several interlocutors that this provision, which is formulated in a general manner, intended to allow a practice of the Public Prosecutor General to inform the leader of a political party about on-going investigations. The delegation could not ascertain this claim and therefore it analyses this provision in an abstract manner.

72. The idea of organising the relationship between prosecution and media is not itself a bad idea. However, the transmission of information should always be handled in a very cautious and restrained manner in order not to infringe upon the basic rights of privacy of individuals and their right to presumption of innocence. It is true that Article 6§2 of the European Convention on Human Rights cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary, if the presumption of innocence is to be respected.

73. The Venice Commission recalls that in the case of *Garlicki v. Poland*³¹, in the context of a statement made by the Minister of Justice during a press conference in February 2007 concerning the applicant who was charged with a criminal offence, the European Court of Human Rights (hereinafter, "ECtHR") considered that the opinions expressed by a public official must not amount to declarations on the applicant's guilt, which would encourage the public to believe him or her guilty and prejudice the assessment of the facts by the competent judicial authority. In addition, in this case at the end of the criminal procedure, the Regional Court held that there had been no grounds to support the charge (of homicide) against the applicant. Even if it is true that in this case, the ECtHR had not found a violation of Article 6§2 ECHR, because of the lack of victim status of the applicant, as the domestic courts had already acknowledged the violation and afforded redress for the breach of the right to presumption of innocence of the applicant³², this case is pertinent for the examination of Article 12§1.

74. Legal safeguards are required which aim at preventing officials from making statements on the guilt of the accused³³ and against a breach of the principle of the presumption of innocence when informing the media or other entities. The Commission recommends first that the rights to presumption of innocence and to privacy should be explicitly referred to in Article 12 which should state that the transmission of information by the competent authorities must not breach those rights.

75. Secondly, as was the case in the *Garlicki* case, the civil courts in Poland are in a position to award pecuniary or non-pecuniary damage and order the publication of an apology by the competent authority when they find that the presumption of innocence of an individual was breached as a result of statements by public officials. However, it would be important to provide in Article 12 for a judicial review of this type of information transmission. If such a judicial review is provided for in another law, such as the press law, a clear reference could be made in Article 12 of that law.

³¹ ECHR, *Garlicki v. Poland*, Application no. 36921/07, 14 June 2011.

³² The applicant was awarded by the civil courts a non-pecuniary damage and an apology was published by the Ministry of Justice for the breach of the applicant's right to presumption of innocence

³³ CDL-AD(2016)007 Rule of Law Checklist, para. 103, II. E. 2 b. iii.

76. In their Remarks, the Polish authorities insist that in its judgment in *Garlicki vs. Poland*, the European Court of Human Rights did not find a violation of the Convention and, as a consequence, no legal guarantees need to be introduced. This argument overlooks that in *Garlicki vs. Poland* a settlement was found in the individual case. This does not mean that no general legal safeguards should be adopted in order to avoid similar cases in the future. The Remarks point out that the power to disclose information is a discretionary power. Again, it is problematic to attribute such wide discretionary powers to the Prosecutor General/Minister of Justice who is a politician. The possibility of bringing a libel action, as pointed out in the Remarks, cannot be a remedy against non-public disclosure of information, for instance to a Member of Parliament.

77. Thirdly, Article 12§3 provides that in the cases indicated in the first two paragraphs of Article 12, the approval of the person handling the preparatory proceedings (i.e. the prosecutor in charge of the case) is not required. However, it would be important that this prosecutor be heard at least prior to the transmission of information in order not to jeopardize proceedings.

78. Lastly, the provision of Article 12 appears to be a decisive exception to the principle of the secrecy of instruction enshrined in Article 102 of the Act. Therefore, the provision should be foreseeable as to its effects and must be formulated with sufficient precision and clarity as to the scope of transmissible information and also as to the addressees of the information. In this respect, according to Article 12§1, the information may be transmitted to public authorities and to "other persons". The total discretion on the choice of these "other persons" is clearly excessive. At least specific categories of persons should be defined and political parties must be excluded from those categories, unless the recipient can show a specific interest in receiving such information (e.g. information to an MP about an impending or prevented terrorist attack on him/her).

79. In their Remarks, the Polish authorities insist that Article 12(2) does not exclude Article 13 of the Press Act of 26 January 1984, which provides for limitations on the transmission of information, and transgression of the Press Act entails criminal and/or disciplinary liability. However, it seems that, as formulated, Article 12(2) is the rather exception to the limitations of the Press Act.

80. Moreover, the information may be transmitted to public authorities and to other persons "in duly justified cases" (paragraph 1) and to the media "out of consideration for an important public interest" (paragraph 2). The Venice Commission is of the opinion that in such an important matter as the transmission of information about the on-going prosecutions, which may jeopardize different rights including the right to presumption of innocence, the relevant provision should avoid using open wording which may be subjected to a large interpretation. The provision should clearly determine the persons to whom the information may be transmitted and under which conditions and such transmission should be subject to judicial control.

4. Appointment of Public Prosecutors

a. Expert advice on appointments

81. Under Article 74§1 of the Act, public prosecutors of universal prosecutorial bodies are appointed to prosecutorial positions by the Public Prosecutor General upon a motion of the National Public Prosecutor. Under paragraph 2 of the same provision, before the appointment the Public Prosecutor General *may* seek the opinion of a competent public prosecutor's office's board³⁴ on the candidate for a prosecutorial position. It appears that the appointment of public

³⁴ Under Article 48 of the Act, a provincial public prosecutor's office board is composed of 6 or 9 members, two-thirds of whom are elected by the public prosecutors assembly and one third of whom are appointed by the provincial public prosecutor from among prosecutors of the provincial public

prosecutors is in the hands of the Public Prosecutor General (upon a motion of the National Public Prosecutor), who is not obliged to, but has the possibility of seeking an opinion of the competent public prosecutor's office board. In addition, the competent public prosecutor's office board gives its opinion within 30 days from the date of receipt of the request and, should no opinion be given within that deadline, it is assumed that the opinion is positive.

82. As the Venice Commission considered in its 2010 Report on the independence of the Judicial System (Part II), in view of the special qualities required for prosecutors, it seems ill-advised to leave the process of their appointment entirely to the prosecutorial hierarchy alone. The Venice Commission has consistently recommended that, in order to prepare the appointment of qualified prosecutors, expert input should be sought. This could be done ideally within the framework of an independent body, such as a democratically legitimised prosecutorial council or a board of senior prosecutors.

83. However, according to the 2016 Act, the participation of the board of prosecutors in the appointment procedure is extremely limited, almost inexistent, as it can provide its opinion only if requested by the Public Prosecutor General. In addition, the latter does not have the obligation to follow the opinion of the board and to put forth reasons to override such an opinion. In its Report on the Independence of the Judicial System, the Venice Commission considered that the expert body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person, but only with good reason.³⁵

84. If the current system in Poland where the Public Prosecutor General has the right to make the final decision on the appointments, were maintained, then it is recommended that the Act be amended so as to introduce at least the obligation for the Public Prosecutor General to provide a reasoned decision to override such advice from the advisory expert body and the fact that the advice was overridden should be disclosed.³⁶

b. Requirements for appointments and competition procedure

85. It appears that under Article 80, the Act establishes the procedure of appointment of public prosecutors on the basis of a competition only in case of appointment of the district public prosecutor and only for the first appointment to the prosecutorial position. However, no competition is foreseen for promotions. This method is not the best as the procedure for promotion is not less important than the first appointment in order to ensure the independence of prosecutors. Competitions should be held also for promotions and for appointments of all prosecutors.

86. In their Remarks, the Polish authorities point out that the competitions provided for in the previous Act resulted in vacancies being unfilled for many months and that the applicants waited sometimes several years to assume office. The Venice Commission thinks that such a state of affairs would call for a more efficient organisation of competitions, possibly including the

prosecutor's office, regional and district public prosecutor's offices in the area of operations of the provincial public prosecutor's office. A regional public prosecutor's office's board, under Article 50, is composed of 6 or 9 members, two-thirds of whom are elected by the public prosecutors' assembly of the regional public prosecutor's office and delegates of public prosecutors of district public prosecutor's offices, and one-third of whom are appointed by the regional public prosecutor from among public prosecutors of the regional public prosecutor's office and district public prosecutor's offices in the area of operations of the regional public prosecutor's office.

³⁵ CDL-AD(2010)040 Report on European Standards as regards the independence of the Judicial System (Part II), para. 48.

³⁶ See, for instance, CDL-AD(2012)008 Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, prosecutors and other prosecution Employees and the prosecution Career of Hungary, para. 48.

establishment of reserve lists from where applicants could be recruited, rather than abandoning competitive selections.

87. In addition, even for first appointments, the Public Prosecutor General has the possibility of appointing to a position the candidate indicated in the National Public Prosecutor's proposal without conducting a competition "in particularly justified cases".³⁷ This wording can hardly be considered a limitation to the discretionary power of the Public Prosecutor General in this matter, in particular taking into consideration that the Law does not provide for a possibility to challenge the decision not to hold a competition for appointment.

88. Moreover, it seems that Articles 81-90 do not contain any provision that ensures that the Public Prosecutor General will appoint public prosecutors in conformity with the results of the competition. The introduction of a clear provision in this respect is recommended.

5. Disciplinary Liability of Public Prosecutors

89. "A public prosecutor is liable to disciplinary action for service related misconducts, including a manifest and glaring infringement of the law and impairments of the dignity of office (disciplinary misconducts)" (Article 137§1). Paragraph 2 of the same provision introduces a rather ambiguous exception to the disciplinary liability of public prosecutors: "a public prosecutor's action or omission performed exclusively in public interest is not a disciplinary misconduct". Although this provision does not exclude the criminal liability for such conduct, it is still in breach of the standard that the grounds for disciplinary measures should be clearly defined. Abuses cannot be excluded since a decision taken exclusively *in the public interest*, but without any grounds and even in breach of the provisions of the law, would not lead to disciplinary sanctions. This is not an appropriate guarantee to protect human rights and freedoms against infringement. It is recommended that this provision be repealed.³⁸

90. The Remarks insist that this provision is to protect the public prosecutor from disciplinary liability in the event of refusal to execute an unlawful instruction of a superior. This is certainly a valid motive for excluding disciplinary liability but then the legislator should state this clearly in the law rather than adopting an overbroad regulation which can easily lead to abuse. The Remarks also point out that this derogation from disciplinary liability can be appealed against at the appellate disciplinary court. However, in appeal too, the unclear criterion of "public interest" can lead to the same problems as in first instance.

91. The right of the Public Prosecutor General, under Article 169, to "inspect the activities of disciplinary courts" and his/her ability to "reprove transgressions found" to "request explanations and remedying the transgression's effects" is highly problematic as it seriously undermines the independence of these courts and therefore of prosecutors. The members of the disciplinary courts are themselves prosecutors and in the light of the wide powers of the Public Prosecutor General over the career of prosecutors, the last sentence of this provision that "those acts cannot impinge on the sphere in which members of disciplinary courts are independent" does not change this situation.

92. The Remarks point out that this provision is intended not to refer substantive grounds but only to procedural issues, such as late starts of hearings, for instance. If this is so, the law should provide for clear criteria what this inspection may cover. As for other provisions examined here, the fact that a similar article existed in the previous Act and that this was not criticised in doctrine, does not mean that such an unclear provision should not be improved.

³⁷ According to the information provided by the Prosecutor General's office in 2016, 123 persons and in 2017, 82 persons were appointed for a position in district public prosecutor's offices with the omission of the competition procedure under Article 80.

³⁸ According to the information provided by the authorities, this provision has not been applied so far.

6. Conclusions on the Public Prosecutor General's Powers

93. None of the applicable European standards anticipate a situation in which the Public Prosecutor General is not only subordinated to the Minister of Justice, but the Public Prosecutor General *is* indeed the Minister of Justice. The recommendations concerning the instructions by superior public prosecutors in individual cases, contained in those documents apply therefore *fortiori* in the current situation of merger of the offices of the Public Prosecutor General and the Minister of Justice. They may however fall short to assess the current situation. Although the Commission accepts that in hierarchical prosecution systems, the intervention of the Prosecutor General, under certain conditions, is possible in order to ensure consistency of approach to the cases as well as a coherent application of principles and guidelines, this does not mean that a Minister of Justice may arbitrarily interfere with the investigation of specific cases. When the independence of the prosecution system from the executive is not fully guaranteed, it is even more important that the appointment of the Prosecutor General be depoliticised.

94. Moreover, although the merger of offices by the 2016 Act appears to follow a tradition in Poland (with the exception of the period of 2010-2016), the merger in 2016 was accompanied by an important increase in the competences of the Public Prosecutor General (i.e. the Minister of Justice) to give instructions in individual cases compared to the system which was in force before 2009. The claim that the 2016 Act is merely a return to the system in force before 2009 cannot be sustained.

95. In addition, the problems related to the merger of the positions of the Public Prosecutor General and of the Minister of Justice are exacerbated by the entry into force of the Act on the Organisation of Common Courts, which gives the Minister of Justice the right to dismiss and replace the court presidents.³⁹ The Commission refers also to its above conclusions and recommendations concerning other important powers of the Minister of Justice-Public Prosecutor General, i.e. his/her widely formulated powers outside the criminal justice system (maintaining law and order) and his/her powers related to transmission of information to media and to other persons and to the procedures concerning the appointment of public prosecutors and their disciplinary liability.

96. Therefore, a de-politicisation of the prosecutorial system should be aimed for and any political functions exercised by the Public Prosecutor General should be clearly separated from the investigation of individual cases.

97. Even if the current Public Prosecutor General (Minister of Justice) may not have misused his competencies⁴⁰, since the entry into force of the 2016 Act, a system with such wide and unchecked powers is unacceptable in a state governed by the rule of law as it could open the door to arbitrariness.

98. The Venice Commission therefore recommends that, given the extensive powers of the Public Prosecutor General in particular to intervene in individual cases in the current Act, the offices of the Public Prosecutor General and of the Minister of Justice be separated. In addition,

³⁹ See Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the act on the Organisation of Ordinary Courts (CDL-AD(2017)031).

⁴⁰ According to the information provided by the Prosecutor General's office, written instructions are given rarely and the Public Prosecutor General himself has never given such instructions. In the period from 4 march 2016 to 30 September 2017, the Polish prosecution service conducted a total of 1 497 995 criminal proceedings and written instructions covered by Article 7§3 were issued in a total of 83 cases. The number of cases in which the superior public prosecutor amended or revoked a decision of a subordinate public prosecutor under Article 8§1 during the same period, amounted to a total of 42 cases. The Public prosecutor General personally never used these powers.

the provisions concerning the powers of the Public Prosecutor General to intervene in individual cases should be reduced and safeguards should be provided: any instruction to reverse the view of a junior prosecutor under Articles 7 and 8 of the Act should be reasoned and the parties to the case should have access to any instruction given by a superior public prosecutor, including the Public Prosecutor General. The Law should provide a possibility for the subordinate prosecutor to refer the allegedly illegal or groundless instruction to a court or an independent body. Article 9§2 should indicate clear criteria for the handling of a case by the superior public prosecutor and any such act should be recorded in the case file available to the parties of the case. Under Article 57§3, the limited circumstances under which the Public Prosecutor General may request operational activities directly linked to on-going preparatory proceedings and to get acquainted with materials collected in the course of such activities, should be clearly indicated.

99. If the current system of merger of offices were maintained, then any competence of the Public Prosecutor General (i.e. the Minister of Justice) to intervene in individual cases should be excluded and his/her competences should be limited to giving general regulations and guidelines to the subordinate prosecutors in order to prevent any risk of political manipulation by an active politician of individual cases.

D. National Council of Public Prosecutors

1. Competences

100. The National Council of Public Prosecutors guards the public prosecutors' independence (Article 43§1). As the Law does not make a distinction between internal and external independence, it can be assumed that the Council is also the guardian of internal independence of the public prosecutors, which is welcome. The following observations, however, must be made:

101. First, the task of ensuring the internal and external independence of the prosecutors can hardly be achieved in a situation where the National Council is presided over by the Public Prosecutor General who is, in the current Law, the Minister of Justice (Article 42§3).

102. Secondly, the Act appears to insist on a purely advisory role of this institution. According to Article 43§2, the Council gives opinions on matters raised on its own initiative or presented by the Public Prosecutor General on matters indicated under paragraph 2 of Article 43. It gives opinions on candidacies of members of the Curricular Council of the National School of Judiciary proposed by the Public Prosecutor General and on requests for permission to continue to hold the position of a public prosecutor after turning 67 years old. The Law does not provide for any obligation for the Public Prosecutor General to consider these opinions.

103. As the Venice Commission considered in its Report on the Independence of the Judicial System (Part II), a system of direct effect of the decisions of the prosecutorial council on prosecutors is preferable to a system where the decisions of the council are merely of advisory nature because the former system takes away the discretion on the implementation of these decisions from the Ministry and leaves less opportunity for political interference in the prosecutors' careers.⁴¹

2. Composition

104. Under Article 42§1, the National Council is composed exclusively of public prosecutors. There is no place for external experts, be it practicing lawyers or judges specialised in criminal

⁴¹ Para. 67.

law, university professors and researchers and other members of civil society. Therefore, the National Council is a closed structure which resembles a corporatist body.

105. According to Article 42§6 (4) the mandate of an elected member of the National Council of Public Prosecutors expires before the end of the term of office - in case of “dismissal by the body who elected the member”. The provision does not require any justification for the dismissal, which is left to total discretion of the electing body. This situation undermines the independence of the members of the Council and does not provide for conditions enabling them to efficiently exercise their mandates.

106. The Venice Commission is of the opinion that the Council, as established by the Act, appears to be a corporatist body that lacks real independence, even though its main purpose is to “guard the public prosecutors’ independence” (Article 43§1). It is not, as in many countries, a tool for an opening of the prosecution to the claims and ideas of other segments of society.

3. Conclusion on the National Council of Public Prosecutors

107. Bearing in mind that the main recommendation for the political office of the Minister of Justice and the office of the Public Prosecutor General, who presides the National Council, be separated, the following recommendations apply to the National Council of Public Prosecutors:

- The purely advisory role of the National Council should be changed and direct effect of the decisions of this Council, at least in some matters, should be recognised;
- The composition of the Council should include prosecutors from all levels, but also other external actors, such as lawyers, legal academics or civil society representatives;
- The dismissal of a member of the Council by the electing body before the end of the term of office should only be possible on the basis of reasonable grounds that are clearly indicated in the Law.

108. In their Remarks, the Polish authorities correctly point out that there is no single European model as concerns the establishment or powers of a prosecutorial council. However, the above recommendations have to be seen in the light of vast powers of the Public Prosecutor General/Minister of Justice. The weak powers of the National Council of Public Prosecutors show that there is an absence of checks and balances, which are constitutional standard and an important element of the rule of law.⁴²

VI. Conclusion

109. The merger of the office of the Minister of Justice and that of the Public Prosecutor General appears to be the most important aspect of the new prosecution system established by the Act on the Public Prosecutor’s Office of 28 January 2016 and in this respect as a complete reversal of the model adopted in 2009 (split of both positions). The amalgamation between the political office and the office of chief prosecutor is accompanied by an important increase in the powers of the Public Prosecutor General in the management of the prosecutorial system, including new competences enabling the Minister of Justice to directly intervene in individual cases.

110. The Venice Commission accepts that the aim of increasing the accountability and the efficiency of the prosecutorial system is a legitimate one, since this would contribute to ensuring the rule of law, especially by a fair, impartial and efficient administration of justice. The amalgamation between political and prosecutorial functions generates however a number of

⁴² CDL-AD(2016)007, Rule of Law Checklist, para. 39.

insurmountable problems as to the separation of the prosecution system from the political sphere (as required by Article 103 of the Constitution).

111. Contrary to a system in which the Minister of Justice gives instructions to the Prosecutor General, this merger falls short of international standards as to the appointment of the Prosecutor General and to his/her qualifications. Furthermore, the main problem concerns the attribution of extensive powers to the Prosecutor General-Minister of Justice by the 2016 Act, notably with regard to direct intervention in individual cases. This, in addition to the very broadly formulated power of the Public Prosecutor General of "maintaining law and order" which appears as a sort of general supervisory power commonly found in "*prokuratura*" type systems, creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed by the rule of law. The problems related to the merger of the positions of the Public Prosecutor General and of the Minister of Justice are exacerbated by the entry into force of the Act on the Organisation of Common Courts, which gives strong powers to the Minister of Justice in particular the right to dismiss and replace the court presidents.⁴³

112. The Venice Commission is of the opinion that the prosecutorial system should be depoliticised and that the offices of the Public Prosecutor General and that of the Minister of Justice be separated. In addition to this separation:

- Any instruction reversing the acts of a subordinate prosecutor should be reasoned;
- the Law should clearly establish that the parties to the case have access to the instructions given by a superior public prosecutor;
- The subordinate public prosecutor should have the possibility to contest the validity of the instruction on the basis of its illegal character or its improper grounds before a court or an independent body;
- the limited circumstances under which the Public Prosecutor General may request operational activities directly linked to on-going preparatory proceedings and to get acquainted with materials collected in the course of such activities, should be clearly indicated.

113. If the current system of merger of offices were maintained, then the competence of the Public Prosecutor General (i.e. the Minister of Justice) to intervene in individual cases should be excluded and his/her competences should be limited to giving general regulations and guidelines to the subordinate prosecutors in order to prevent any risk of political manipulation of individual cases by an active politician.

114. In addition, the following main recommendations are made:

- Concerning transmission of information to the media and to "other persons", the rights to presumption of innocence and to privacy should be clearly guaranteed in Article 12 and judicial review of this type of information transmission should be provided for. The provision should clearly determine the persons to whom the information may be transmitted and under which conditions;
- The purely advisory role of the National Council of Public Prosecutors is to be reconsidered and direct effect of the decisions of this Council, at least in some matters,

⁴³ Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court, proposed by the President of Poland, and on the act on the Organisation of Ordinary Courts (CDL-AD(2017)031).

should be recognised; its composition should include prosecutors from all levels but also other external actors, such as lawyers, legal academics or civil society representatives; the dismissal of a member of the Council by the electing body before the end of the term of office should only be possible on the basis of reasonable grounds that are clearly indicated in the Law;

- The provision excluding the disciplinary liability for decisions taken exclusively in *public interest* should be repealed.

115. Taken together, the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary (Act on the Organisation of Common Courts) and the weak position of checks to these powers (National Council of Public Prosecutors) result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland.

116. The Venice Commission remains at the disposal of the Polish authorities and the Parliamentary Assembly for further assistance in this matter.