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OPINION ON THE DRAFT CONSTITUTIONAL LAW OF THE REPUBLIC OF KAZAKHSTAN ON THE PUBLIC PROSECUTION OFFICE

KAZAKHSTAN

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Based on an unofficial English translation of the Draft Law commissioned by the OSCE Office for Democratic Institutions and Human Rights.

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EXECUTIVE SUMMARY

ODIHR welcomes the efforts of the legislator to reform the prosecution service and ensure the necessary guarantees of prosecutorial activities in the Republic of Kazakhstan. A properly functioning prosecution service is one of the key institutions to ensure the rule of law. It is an important prerequisite for an effective and functional justice system and for delivering criminal justice in particular. Having an appropriate legal framework in place, is essential to this effect.

At the same time, the prosecution service of the Republic of Kazakhstan is still construed as an organ of general supervision rather than as an organ whose functions are limited to criminal investigation and prosecution. While such supervisory functions are envisioned in the Constitution, ODIHR reiterates its past recommendation to fundamentally reassess the role of the prosecution service within the government and criminal justice system. In order to bring the prosecution service in better compliance with the current international standards and principles, the legislator should exclude some functions that are currently outlined by the Draft Constitutional Law on the Public Prosecution Service of the Republic of Kazakhstan (Draft Law), such as oversight over compliance with laws and their execution; and representing the State and vulnerable persons in legal proceedings, leaving these functions to other competent bodies, such as, for instance, the general supervision of legality to the judiciary and human rights protection to the national human rights institution. The wide powers accorded to the prosecution service relating to the criminal investigation and prosecution should also be more strictly circumscribed.

In any case, the Draft Law should be significantly amended to include some fundamental aspects that are paramount for establishing an independent, impartial and competent public prosecution service in the country. In particular, provisions related to the eligibility requirements for appointment as a prosecutor, Prosecutor-General and his/her Deputies should be enhanced, while the selection process for candidates for the public prosecutor's offices should be more transparent. The promotion of prosecutors should be clearly regulated and the grounds for dismissal defined more clearly and explicitly to avoid potentially discretionary and arbitrary application. The Draft Law should also include necessary arrangements concerning disciplinary offences and sanctions and related procedures, as well as provide for the establishment of an independent self-governing body in order to avoid any undue political influence on the implementation of the prosecution service's activities. The status, principles, organization, role and powers of prosecutors and prosecution service should be provided by law, including solid guarantees for ensuring and upholding the necessary independence and autonomy of prosecutors in decision-making, free from any undue influence. Other issues that should be better regulated concerns accountability of prosecutors.

Lastly, legislative reforms aimed at ensuring the necessary guarantees of prosecutorial independence and autonomy in decision-making should be preceded by broad, transparent, inclusive and meaningful public consultations involving the wide legal community and civil society, among others.

More specifically, ODIHR makes the following recommendations to improve the Draft Law's compliance with OSCE commitments and international human rights standards:

A. With respect to the powers of the prosecution service:
    1. To remove the general supervisory powers from the prosecution service, and to confine its competence to the field of criminal prosecution; [para. 18]
    2. To remove the competence to represent private entities and to submit applications for protection of the rights and legitimate interests of private business, as well as to revisit the power to file lawsuits to protect the rights of those who cannot defend themselves; [paras.22-23]
    3. To avoid ambiguous wording in Article 2 of the Draft Law, which broadly refers to "*other regulatory legal acts of Kazakhstan*" regulating the operation of the prosecution service and provide instead an exhaustive list of regulatory acts applicable to the operation of the prosecution service in this Draft Law to ensure legal certainty and transparency; [para.25]

B. On the independence and autonomy of prosecutors and of the prosecution service:
    1. To clarify the meaning of "accountability [to the President]" in Article 3(1) of the Draft Law so as to exclude any possibility for the President to intervene in individual cases, without precluding overall accountability for the functioning of the prosecution service; [para.31]
    2. To include an explicit provision regarding the functional independence of individual prosecutors under Article 3 of the Draft Law; [para.32]
    3. To include a provision specifying that prosecutors may refuse to carry out instructions from higher-level prosecutors that are contrary to the law and that such refusal should not be met with any sanction, in particular, the subordinate prosecutor should not be removed from the case without a reasoned decision, and that any instructions received by subordinate prosecutors from the heads of prosecution offices shall be provided in writing, be reasoned, and recorded in the official minutes of meetings; [para.40]
    4. To indicate that the ability to give instructions to a lower-level prosecutor may involve only general instructions and where instructions are provided in individual cases, that these should not touch on the final outcome of the case and could be issued only in very limited circumstances, such as for the correction of procedural deficiencies, in case of decisions that are improper in law or not supported by available evidence, in case of human rights violations or for undertaking additional investigative steps; [para.40]

C. To consider establishing by law an independent prosecutorial self-government body to protect and enhance the independence of prosecutors, which will function on the basis of strong legal regulations that grant this body considerable authority over prosecutorial appointments, promotions, and disciplinary proceedings; [para.47]

D. On selection, appointment and dismissal:
    1. To specify the eligibility requirements and objective selection criteria for becoming the Prosecutor-General and Deputies as well as clarify in the Draft Law the latter's term of office; [para.50]
    2. To provide clear and objective criteria as well as transparent and fair procedures for the dismissal of the leadership of the Prosecution Service,

including the right to challenge such a decision before an impartial and independent court; [para.53]

3. To provide clear and objective eligibility and selection criteria and that the selection and appointment of prosecutors to office is made on the basis of a fair, transparent, impartial and competitive selection process, based on criteria of professional competence and integrity; [para.56]
4. To supplement the Draft Law with provisions ensuring that gender equality considerations are taken into account throughout the selection and appointment process); [para.64]

E. To specify in the Draft Law the duration of appointments of prosecutors, preferably for life; [para.60]

F. To clarify the scope of immunity in the Draft Law and generally guarantee functional immunity for actions carried out by prosecutors in good faith in the course of their duties; [para.75]

G. To regulate in the Draft Law disciplinary actions against prosecutors, which should be governed by clear, objective and transparent criteria, in compliance with fair, transparent and impartial procedures, excluding any discrimination and allowing for appeal procedures, while ensuring that the grounds for dismissal are clearly defined; [para.83] and

H. To reconsider entirely the prerogatives of the Prosecutor-General under Article 9 of the Draft Law to request clarifications from the Supreme Court, unless these are clearly non-binding, and to suspend the enforcement of judicial acts, which should usually exclusively be reserved to courts. [paras. 89-90]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE human dimension commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 23 July 2022, the Commissioner for Human Rights of the Republic of Kazakhstan (hereinafter "the Commissioner") sent a request for a legal review of the Draft Constitutional Law on the Public Prosecution Service of the Republic of Kazakhstan (hereinafter "Draft Law") to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR").
2. On 2 August 2022, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of the Draft Law with international human rights standards and OSCE human dimension commitments.
3. This Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[1]

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers the Draft Law submitted for review. This legal review is limited as it does not constitute a full and comprehensive analysis of the entire legal and institutional framework regulating the prosecution service and justice system in Kazakhstan.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the Draft Law. The ensuing legal analysis is based on international and regional human rights and rule of law standards, principles and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality* and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective. [2]
7. The Opinion is based on an unofficial English translation of the Draft Law, which is attached to this document as an annex. Errors from translation may result. The Opinion is also available in Russian. However, the English version remains the only official version of the Opinion.

1 See in particular *OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area* (2008), point 4, where the Ministerial Council "*[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]*".

2 See the *UN Convention on the Elimination of All Forms of Discrimination against Women*, adopted by General Assembly resolution 34/180 on 18 December 1979; and the *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

8. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the future.

9. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the public prosecution service or in other fields.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

10. All prosecution services operate as an essential element of the criminal justice system. As such, their operation ought to be governed by the requirement not to violate those human rights and fundamental freedoms that are especially relevant for such systems, namely, the rights to liberty and security, a fair trial and respect for private life, prohibition on retrospective penalties and double jeopardy, and freedom from discrimination, as guaranteed respectively by Articles 9, 14, 15, 17 and 26 of the *International Covenant on Civil and Political Rights (ICCPR)*[3].

11. Prosecutors play a central role in criminal proceedings. However, international instruments do not provide many references to prosecutors, in comparison to judges or defence lawyers. Nevertheless, there are a series of international documents, which set a framework of standards and recommendations specifically related to the work, status and role of the prosecution service. These documents include the *1990 UN Guidelines on the Role of Prosecutors,*[4] which aim at assisting UN Member States in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. Other important principles are contained in the *1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*.[5] Further standards are outlined in Article 11 of the UN Convention against Corruption,[6] which calls upon States Parties to take measures to strengthen the integrity of prosecution services and prevent opportunities for their corruption, bearing in mind their crucial role in combating corruption. The *UNODC Article 11 Implementation Guide and Evaluative Framework* (2015) provides detailed information on the implementation of Article 11 in relation to prosecutorial integrity.[7]

3 *UN International Covenant on Civil and Political Rights* (ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Kazakhstan ratified the ICCPR on 24 January 2006.

4 Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

5 International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, approved by the International Association of Prosecutors on 23 April 1999. These Standards were annexed to resolution 2008/5 of the Commission on Crime Prevention and Criminal Justice of the UN Economic and Social Council on "Strengthening the rule of law through improved integrity and capacity of prosecution services", which also requested States to take these Standards into consideration when reviewing or developing their own prosecution standards.

6 *UN Convention against Corruption* (UNCAC), adopted by resolution 58/4 of the UN General Assembly on 31 October 2003, entered into force on 14 December 2005. The Republic of Kazakhstan acceded to this Convention on 18 June 2008.

7 See UNODC, "*United Nations Convention against Corruption: Article 11 implementation Guide and Evaluative Framework*", chapter 4.

12. Certain principles related to the prosecution service can also be found in OSCE commitments, such as the *1990 Copenhagen Document*, which provides that "*the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution*".[8] More recently, through the *2006 Brussels Declaration on Criminal Justice Systems*, members of the OSCE Ministerial Council stated that *"[p]rosecutors should be individuals of integrity and ability, with appropriate training and qualifications; prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law*" and that *"[t]he office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges*".[9]

13. While the Republic of Kazakhstan is not a Member State of the Council of Europe (CoE), the European Convention on Human Rights and Fundamental Freedoms (ECHR)[10] and other CoE instruments may serve as useful reference documents from a comparative perspective. In particular, the CoE's Committee of Ministers, but also the Parliamentary Assembly of the CoE and the Conference of Prosecutors General of Europe, formulated fundamental principles concerning the role of the public prosecution service.[11] Some elaboration of the respective standards, together with guidance on their application in specific contexts that takes into account good practices from specific jurisdictions, are also available in the opinions of the Consultative Council of European Prosecutors (CCPE).[12] Further, CCPE Rome Charter (2014) proclaims the principle of independence and autonomy of prosecutors, and the CCPE recommends that the "*[i]ndependence of prosecutors […] be guaranteed by law, at the highest possible level, in a manner similar to that of judges*".[13] Thus, "*prosecutors should be autonomous in their decision making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interferences from the executive power or the parliament, having regard to the principles of separation of powers and accountability*".[14]

14. The Opinion will also make reference to other documents of a non-binding nature, elaborated at the regional and international levels, which provide more detailed and elaborated guidance, especially the various publications of UNODC,[15] reports of the UN Special Rapporteur on the Independence of Judges and Lawyers,[16] and the opinions,

8 OSCE, *OSCE Copenhagen Document 1990*, par 5.14.
9 OSCE, *2006 Brussels Declaration on Criminal Justice Systems* (MC.DOC/4/06).
10 The ECHR was signed on 4 November 1950, and entered into force on 3 September 1953, especially Articles 5, 6, 7 and 8 of the ECHR and its Seventh Protocol (Article 4) and Protocol 12 provide guarantees similar to Articles 9, 14, 15, 17 and 26 of the ICCPR.
11 See e.g., Council of Europe (CoE), Committee of Ministers, *Recommendation Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System* (6 October 2000); and *Recommendation CM/Rec(2012)11 on the Role of Public Prosecutors outside the Criminal Justice System* (19 September 2012). See also Parliamentary Assembly of the Council of Europe (PACE), *Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law* (27 May 2003). See also the *European Guidelines on Ethics and Conduct for Public Prosecutors* ("Budapest Guidelines"), CPGE (2005)05, adopted by the Conference of Prosecutors General of Europe organized by the Council of Europe on 31 May 2005.
12 Kazakhstan was granted observer status with the Consultative Council of European Prosecutors (CCPE) in 2015. The opinions of the CCPE are available at <https://www.coe.int/en/web/ccpe/opinions/adopted-opinions>. In particular, see the Joint Opinion of the CCPE and the Consultative Council of European Judges (CCJE) on *"Judges And Prosecutors In A Democratic Society"* (2009) (*Bordeaux Declaration*), the *Opinion No. 9 (2014) on European norms and principles concerning prosecutors* (*Rome Charter*); *Opinion No. 13(2018) "Independence, accountability and ethics of prosecutors"*; and *Opinion no. 3 (2008) on the "Role of prosecution services outside the Criminal Law Field"*.
13 *Ibid.*, CCPE, *Rome Charter – Opinion no. 9 (2014) on European Norms and Principles concerning Prosecutors*, para. 33.
14 *Ibid.*, para. 34 (2014 CCPE Rome Charter).
15 In particular, the *Guide on the Status and Role of Prosecutors* (2014) and the *Criminal Justice Assessment Toolkit – Prosecution Service* (2006) of UNODC and the International Association of Prosecutors.
16 Available at: <https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/annual-thematic-reports>, especially the *2020 Report on the Impact of Corruption on Public Prosecution Services* and the *2012 Report on the Independence and Impartiality of Prosecutors and Prosecution Services*.

reports and publications of ODIHR[17] and of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, of which Kazakhstan is a member.[18]

15. There exists no one single model system applicable for all states and one cannot definitely speak of "*harmonization around a single concept [of a prosecutor's office]*".[19] Thus, while acknowledging that there can be some diversity in the way that prosecution systems are organized, there are a number of key principles and standards in the OSCE region, outlined in the above-mentioned instruments and documents, which should guide the establishment and implementation of prosecution services in a given country and that stem from the need for a criminal justice system to operate in accordance with the rule of law and to respect and protect human rights and fundamental freedoms. It is also essential that the contemplated reform of the prosecution service ensures autonomy from the political branches and functional independence of prosecutors.[20] This is essential to contribute to the overall fairness of trials and guarantee access to justice.

2. General Role of the Prosecution Service and Applicable National Legal Framework

16. Article 83 of the Constitution and Article 1 of the Draft Law, setting out the main role of the Prosecutor's Office, state that this body *"supervises the observance of legality on the territory of the Republic of Kazakhstan, represents the interests of the state in court, and carries out criminal prosecutions on behalf of the state"*. Thus, in defining the purpose of the Prosecutor's Office in Kazakhstan, these provisions specify three functions, out of which only the last one concerns criminal prosecution. The other two are to supervise the observance of the law and to represent the interests of the State in court. The three functions are further detailed in other provisions of the Draft Law.[21] These provisions reveal that the prosecution service is still construed as an organ of general "supervision".

17. As a preliminary observation, the role and status of the prosecution service has been one of the most contentious issues in the process of legal reform undertaken by many post-communist democracies.[22] While a "supervisory" prosecution model was prevalent among a number of them,[23] many have sought to limit their prosecutor services' extensive powers in the area of general supervision, by transferring such prerogatives over to courts and/or to national human rights institutions.[24] The rationale behind such

17 See in particular e.g., ODIHR Needs Assessment Report, *Strengthening functional independence of prosecutors in Eastern European participating States* (2020); and DCAF-ODIHR-UN Women, *Gender and Security Toolkit – Tool 4: Justice and Gender* (2019). See also ODIHR legal reviews on the prosecution service here.

18 European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Commission Opinions and Reports Concerning Prosecutors*, CDL-PI(2022)023; *Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service*, CDL-AD(2010)040; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016. See also related Venice Commission's legal opinions on the prosecution service.

19 See the CoE CM *Recommendation Rec(2000)19*, Explanatory Memorandum, p. 11.

20 See e.g., ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, page 52.

21 The supervisory functions are further detailed in Article 2(4)(7), Articles 4 and 6(1), Article 9 (18)-(20), Article 10(1) and 10(2), Articles 17-21, Article 26(2)-(15), as well as Articles 28, 29, 32-38 and 40-44. The representation of the interests of the state and of certain individuals is further addressed in Articles 6(2), 10(1)(4), 22, 24(1) and 39.

22 See e.g., ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report (2020)*; and DCAF-ODIHR-UN Women, *Gender and Security Toolkit – Tool 4: Justice and Gender* (2019).

23 See e.g., ODIHR, *Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic*, 18 October 2013, para. 13; and *Comments on the Law on Countering "Extremism" of the Republic of Uzbekistan* (2019), para. 57.

24 ODIHR, *Opinion on the Key Legal Acts Regulating the Prosecution Service in the Kyrgyz Republic*, 18 October 2013, para. 13. Moldova also abandoned the general supervision system, see the relevant legislation in Russian: <https://www.legis.md/cautare/getResults?doc_id=131217&lang=ru#>. See more about the legislative developments in that respect in

reforms was to prevent an overly powerful and largely unaccountable prosecution service which could potentially be used for political goals and for pressuring other state bodies, including the judiciary, as had happened in the Soviet system.[25] ODIHR and the Venice Commission have supported such reform efforts,[26] since "*[m]aintaining such far-reaching competences and related powers would result in the prosecution service remaining an unduly powerful institution, posing a serious threat to the separation of powers in the state and to the rights and freedoms of individuals*".[27] Indeed, in many OSCE participating States, the responsibility for overseeing the implementation of laws and their enforcement is not generally vested in prosecution services.[28]

18. In light of the foregoing and bearing in mind that this would require an amendment to the Constitution, **it is advisable to remove the general supervisory powers from the prosecution service, so that its competence is confined to the field of criminal prosecution.[29]** This would not only align the service with international standards and good practices but would also help decrease its workload and increase its efficiency.

19. The CoE Committee of Ministers' *Recommendation on the role of public prosecutors outside the criminal justice system* provides in this regard that limits should exist on the powers the public prosecutor may have outside the criminal law field.[30] At the same time, the Venice Commission stresses that this "*should not be seen as recommending that prosecution services should have such powers*".[31]

20. With regard to the function of the Prosecutor's Office relating to the representation in court, Article 1 of the Draft Law states that the prosecution service represents the interests of the State in court, though other provisions in the Draft Law go beyond that scope and provides that the prosecution service also acts in the interests of those individuals who may be unable to defend themselves on their own (see Articles 6(2), 10(1)(4), 22 and 39).

21. On several occasions, ODIHR and the Venice Commission have emphasized, as a central issue in the context of prosecutorial reforms in post-communist countries, the necessity to remove powers outside of the criminal law field from the prosecutor's competences and transfer the task of human rights protection to the national human

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ODIHR-Venice Commission, *Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova*, CDL-AD(2015)005, paras. 30-31.

25 See e.g., ODIHR-Venice Commission, *Joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" in the Kyrgyz Republic*, CDL-AD(2016)025, para. 98;. *ODIHR Comments on the Law on Countering "Extremism" of the Republic of Uzbekistan (2019)*, para. 57; ODIHR, *Opinion on the Key Legal Acts Regulating the Prosecution Service in the Kyrgyz Republic*, 18 October 2013, para. 13. See also Venice Commission's *Compilation of Venice Commission Opinions and Reports Concerning Prosecutors*, CDL-PI(2022)023, Section III.B.3; and UN Special Rapporteur on the independence of judges and lawyers, *2019 Report on Uzbekistan*, A/HRC/44/47/Add.1, para. 75.

26 See ODIHR-Venice Commission, *Joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" in the Kyrgyz Republic*, CDL-AD(2016)025, para. 98, which emphasized that "*Maintaining the prosecution service as it is in the Constitution could mean retaining a system where vast powers are vested in only one institution, which may pose a serious threat to the separation of powers and to the rights and freedoms of individuals. The maintenance of such wide prosecutorial supervisory powers has been repeatedly criticized by international and regional organizations, among them OSCE/ODIHR and the Venice Commission. In numerous opinions on this topic, including specifically on the legal framework regulating the prosecution service in the Kyrgyz Republic, the OSCE/ODIHR and the Venice Commission have recommended, for the abovementioned reasons, that the supervisory role of prosecutors be abandoned and that their competences be restricted to the criminal sphere.*"

27 See ODIHR-Venice Commission, *Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova*, (CDL-AD(2015)005), para. 42.

28 See, e.g., Council of Europe, *Performance of the Functions of Oversight of Compliance with Laws and their Execution in Council of Europe Member States where this Function is not Entrusted to the Prosecution Service*.

29 See the same recommendation made by ODIHR in its *ODIHR Urgent Comparative Note on Some of Supreme Court's Proposed Priorities for Judicial Reform in Kazakhstan*(22 August 2022), paras. 56-57. See also e.g., ODIHR, *Preliminary Opinion on the Draft Amendments to the Legal Framework "On Countering Extremism and Terrorism" in the Republic of Kazakhstan* (6 October 2016), para. 51; and UN Committee against Torture, *Concluding Observations on Kazakhstan* (2014), CAT/C/KAZ/CO/3, paras. 15-16.

30 See CoE Committee of Ministers, Recommendation *CM/Rec(2012)11 on the role of public prosecutors outside the criminal justice system*, 19 September 2012.

31 See Venice Commission, *Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (CDL-AD(2012)019)*, para. 99.

rights institution.[32] Article 22(2) provides that public prosecutors' offices "*may file an application to court or on their own initiative intervene in the process at any stage thereof, if this is required to protect human and civil rights of individuals who cannot protect themselves independently, as well as to protect legally protected interests of society or the state"*. As mentioned above, that exercise of such competence should be subsidiary to others who might act on behalf of the mentioned individuals and pursuant to the latter's wishes. Indeed, this would be essential to ensure that the right of access to court of such persons under Article 14(1) of the ICCPR is respected. It would be recommended that the persons that fall under Article 22(2) or other persons entitled to represent them be able to challenge the representation by the Prosecution Service in court. Representation by the Prosecution Service should only occur in cases where such intervention on their part is genuinely required. Thus **it is recommended to elaborate this provision so that a public prosecutor can represent the interests of an individual only after having presented justification for her/his intervention and after the acceptance of these grounds by the respective court.** If such amendments are made, Article 39(2)(1)-(3) will also need to be revised along the lines of the same revisions recommended for Article 22(2).

22. Article 24(1)(3) of the Draft Law reads that public prosecutors can consider applications "*to protect rights and legitimate interests of private business entities in case state, local representative and executive bodies, institutions, local authorities, quasi-public entities, and their officials interfere with their activities*". This provision allows for the applications for protection of the rights and legitimate interests of private business entities even though those legal entities would be able to bring legal proceedings themselves against the authorities concerned. **The legal drafters may consider to delete such a competence of the prosecution service.**

23. Moreover, while it may be necessary for someone to file lawsuits to protect the rights of those who cannot defend themselves, it is obvious that a potential conflict exists between the performance of this function of the prosecution service and the function to represent the State, particularly because interference with the rights of those individuals may result from acts or omissions on the part of the State. Thus, it may be more appropriate that this function be performed by a specialized body that has no particular responsibility for representing the interests of the state, such as the national human rights institution. **The legal drafters may decide to reconsider such a competence of the prosecution service.**

24. The oversight powers are extensive, extending not only to legal compliance by all forms of public authorities but also to "*other organisations, regardless of their form of ownership*", as provided in Article 6(1) of the Draft Law. It is questionable whether there is a need for the oversight function, if retained, to apply to "other organisations, regardless of their form of ownership", insofar as these are private entities. This is because the general civil and criminal law and procedure should be sufficient to enable those who are affected by such rights to vindicate their interests through civil proceedings or the reporting of a criminal offence with a view to prosecution. **The legal drafters may consider to delete this aspect of the oversight competence of the prosecution service.**

25. Finally, Article 2 of the Draft Law contains a somewhat ambiguous provision regarding the legal framework for regulating the operation of the public prosecution service. It provides that in addition to the Constitution, this Draft Law and international treaties

32 See, for instance, *Joint ODIHR-Venice Commission Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova*, CDL-AD(2015)005, paras. 42-43; see also -*Venice Commission Opinion on the Draft Law on the Public Prosecutors Office of Ukraine* (CDL-AD(2012)019), paras. 8 and 17.

ratified by Kazakhstan, the operation of public prosecutors' offices is regulated by "*other regulatory legal acts of Kazakhstan*". This provision does not clearly delineate which types of regulatory acts can determine powers and obligations of the public prosecution services and thereby, may lead to legal uncertainty. Thus, **it is recommended that the legislator avoids ambiguous wording in Article 2 and for the sake of transparency and legal certainty, provides an exhaustive list of regulatory acts applicable to the operation of the prosecution service in this Draft Law.**

RECOMMENDATION A.1

To remove the general supervisory powers from the prosecution service and confine its competence to the field of criminal prosecution.

RECOMMENDATION A.2

To remove the competence to represent private entities and submit applications for protection of the rights and legitimate interests of private business, as well as to revisit the power to file lawsuits to protect the rights of those who cannot defend themselves.

RECOMMENDATION A.3

To avoid ambiguous wording in Article 2 of the Draft Law, which broadly refers to "other regulatory legal acts of Kazakhstan" regulating the operation of the prosecution service and provide instead an exhaustive list of regulatory acts applicable to the operation of the prosecution service in this Draft Law to ensure legal certainty and transparency.

3. INDEPENDENCE OF THE PROSECUTION SERVICE AND OF PROSECUTORS

26. Article 3 of the Draft Law outlines the principles of organization and operation of prosecution offices. In particular, Article 3(1) states that "*[t]he Prosecution Service shall carry out its powers based on the principles of legality, independence from other state bodies and officials, and accountability only to the President of the Republic of Kazakhstan*". Article 3(4) of the Draft Law further provides that *"[t]he Prosecution Service shall constitute a unified centralized system of public prosecutors' offices based on subordination of lower-level prosecutors to higher-level prosecutors and to the Prosecutor-General*". These two provisions mirror the content of Article 83(2) of the Constitution.[33] Article 3(4) of the Draft Law further details the hierarchical arrangement of the relationship between higher-level and lower-level prosecutors.

27. Article 3 specifically refers to the independence of the prosecution service, which is welcome, but the reference to independence is explicitly made only in the context of independence of the prosecution from interference of other state organs (or "institutional independence"). At the same time, unlike judges, prosecutors' decisions and activities may be subject to a certain hierarchical control by senior prosecutors (see Sub-Section 3.2 *infra*).[34] In any case, while the institutional and functional independence of prosecutors from the executive and legislative branches of government should be strengthened, public prosecution services should be strictly separated from

33 See *Constitution of the Republic of Kazakhstan*, Article 83(2), which provides that the Office of the Public Prosecutor of the Republic consists of "*a single centralized system with the subordination of the lower level prosecutors to the higher and to the Prosecutor-General of the Republic",* which *"exercises its authority independently of other state bodies and officials, and is accountable only to the President of the Republic."*

34 See Venice Commission, *Compilation of Venice Commission Opinions and Reports concerning Prosecutors*, note 7, para. 28.

judicial functions and prosecutors should respect the independence and impartiality of judges.

3.1. Institutional Independence and Autonomy of the Prosecution Service

28. Prosecution systems can be part of or separated from the executive branch. Where the public prosecution is institutionally part of the government/executive, appropriate safeguards should be in place to ensure its independence. Regardless of the model chosen, the autonomy of prosecution services and their effective independence from any undue pressure or interference, particularly from the executive, are indispensable to the independence and autonomy of the prosecution service.[35]

29. At the international and regional level, prosecutorial independence is understood as covering two aspects: first the structural or institutional independence of the prosecution service as a whole, vis-à-vis external actors; and second, the functional independence of individual prosecutors.[36]

30. While the reference to legality principles in Article 3(1) of the Draft Law raises no questions, it is not quite clear what "*accountability [of the Prosecution Service is] only to the President of the Republic of Kazakhstan*" implies in practice. In particular, it is unclear whether this provision vests the President with a right to give instructions concerning individual cases to the Prosecutor-General and/or any other prosecutor.

31. Standards of the International Association of Prosecutors (IAP) on the professional responsibility of prosecutors explicitly provide that in cases where prosecutorial discretion is permitted, it must be exercised independently and be free from political interference.[37] While prosecutors may receive instructions from non-prosecutorial authorities, such instructions must be transparent, consistent with lawful authority and subject to guidelines to guarantee both the reality and the perception of prosecutorial independence.[38] General instructions as to the need to prosecute particular categories of crimes or to do so in an expedited manner may be given, but allowing the President to instruct prosecutors on individual cases, whether to prosecutor or not, should be prohibited as it would be inconsistent with the principles of independence contained in the above-mentioned standards for prosecutorial decision-making.[39] Thus, **the meaning "accountability [to the President]" in Article 3(1) of the Draft Law requires further clarification so as to exclude any possibility for the President to intervene in individual cases, without precluding overall accountability for the functioning of the prosecution service** (see Sub-Sections 3.2 and 4.6 *infra*).

35 See *UN Guidelines on the Role of Prosecutors* state that "*4. States shall ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability*"; and "*17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.*"

36 See e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova*, (CDL-AD(2015)005), para. 42; Venice Commission's *Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service*, CDL-AD(2010)040, Venice, 17-18 December 2010, para. 31. Bureau of the CCPE, Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017, 7 February 2018, <https://rm.coe.int/ccpe-bu-2017-6e-report-situation-prosecutors-2017/1680786f96>.

37 See *IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, para. 2.1.

38 *Ibid.*, para. 2.2.

39 See Opinion No. 13(2018) of the CCPE on «Independence, accountability and ethics of prosecutors», para. 36; and ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, para. 39.

RECOMMENDATION B.1.

To clarify the term "accountability [to the President]" in Article 3(1) of the Draft Law so as to exclude any possibility for the President to intervene in individual cases, without precluding overall accountability for the functioning of the prosecution service.

3.2. Functional Independence of Prosecutors

32. Naturally, the work of prosecutors requires a certain reasonable margin of discretion, which should also "*be exercised independently and be free from political interference*".[40] The Draft Law does not seem to provide for the functional independence of individual prosecutors, which presents a significant omission in the proposed legislation. Though there is no commonly accepted definition of functional independence of prosecutors,[41] international[42] and regional guidance[43] generally recommend that states should provide sufficient safeguards to prosecutors, in some cases comparable to those provided to judges,[44] so that prosecutors can take decisions independently. **It is therefore recommended to include an explicit provision regarding the functional independence of individual prosecutors under Article 3 of the Draft Law**.

33. The Draft Law contains provisions requiring prosecutors' offices to keep detailed records of periodic mandatory meetings at which subordinate prosecutors leading individual cases should report to the heads of prosecutor's offices on the progress of investigations or proceedings and receive instructions on how to proceed (see Article 6(1), Article 9(1)(22) and Article 10(1)(25)).

34. A series of essential elements are necessary to safeguard the functional independence of individual prosecutors. These include but are not limited to the existence of transparent and fair rules and clear and objective criteria for their selection and appointment, performance evaluation, promotion, mobility, accountability, transfer, dismissal and remuneration.[45] In addition, such rules should also exist for case management and safeguards should exist for adequate and non-arbitrary budgetary funding and all necessary resources so that prosecutors could properly perform their functions. These aspects are dealt with in the subsequent sections of this Opinion. The internal organisation of prosecutor's offices is also a relevant factor for determining the independence of prosecutors.

35. The operational independence of prosecutors is especially valuable in particularly high-level corruption cases or other cases of abuse of power by high-level public officials, as it enhances the credibility and impartiality of the prosecution. As provided by the CoE Recommendation (2000)19, *"[w]ith respect to the organisation and the internal operation of the Public Prosecution, in particular the assignment and re-assignment of*

40 See *IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, para. 2.1.
41 See e.g., ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, paras. 29-45.
42 See e.g., International Association of Prosecutors (IAP), *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, 23 April 1999.
43 CoE, *Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System.*
44 See CCPE, *Opinion No. 13(2018) on the "Independence, accountability and ethics of prosecutors".*
45 *Ibid.*, para. 14 (Opinion No. 13(2018) of the CCPE), which provides "*Taking into account the proximity and complementary nature of the missions of judges and prosecutors, as well as of requirements in terms of their status and conditions of service prosecutors should have guarantees similar to those for judges*". See also, ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, para. 40.

cases, this should meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter".[46] Further, *"[w]ith a view to promoting fair, consistent and efficient activity of public prosecutors, states should seek to: – give prime consideration to hierarchical methods of organisation, without however letting such organisational methods lead to ineffective or obstructive bureaucratic structures*".[47]

36. Although a prosecution service may follow a hierarchical structure, prosecutors should be independent when making decisions on the assigned cases. It is worth noting that there is no prohibition as such on instructions given by superiors. While prosecutorial decisions are usually subject to review by higher prosecutors or courts, it is important to strike a balance between these powers of review and respect for prosecutors' autonomous decision-making powers. In a broader context, it is important to have a set of safeguards in place to avoid any undue pressure or interference in the work of prosecutors by superiors. Some relevant principles in this regard include "*the right and obligation to take decisions only based on the law, circumstances of the case and personal conviction; the obligation to comply with legal instructions of senior prosecutors; the right of prosecutors to challenge the instructions; and the right not to be removed from the case without reasons*."[48]

37. The Draft Law does not seem to address the issue of discretion *per se*. The reference to the "*subordination of lower-level prosecutors to higher-level prosecutors and to the Prosecutor-General*" and the hierarchical arrangement detailing the relationship between higher-level and lower-level prosecutors in Article 3(4) of the Draft Law should not be interpreted to exclude any discretion for lower-level prosecutors. According to the 2016 Venice Commission Rule of Law Checklist, prosecutors should not be submitted to strict hierarchical instructions without any discretion and should always be able to refuse applying an instruction that contradicts the law.[49] That being said, to ensure consistency of prosecutorial acts with prosecutorial policy, a certain degree of hierarchical interference may be legitimate, if combined with appropriate rules and guarantees.[50] No verbal or written instructions should be given as to the final outcome of an individual case. The instructions should relate only to the correction of procedural deficiencies, decisions that are improper in law or not supported by available evidence, human rights violations or requirements to undertake additional investigative steps.

38. The need for instructions allowing discretion and the possibility of refusing to comply with unlawful instructions is equally applicable to the provisions of Article 13(3)(2) and Articles 14-16(2)(2) of the Draft Law, which concern the orders and instructions of the Chief Military Prosecutor, the Chief Transport Officer and Regional and District or equivalent prosecutors.

39. The Draft Law may provide that where the heads of prosecution offices intervene in the investigation and/or prosecution of individual criminal cases that have been assigned to lower-level prosecutors, the chief prosecutors should be required to issue a written and reasoned decision when they overturn the decision of a lower-level prosecutor. The law may also guarantee that if the chief prosecutor disagrees with the decision of a lower-

46 See CoE Committee of Ministers, *Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System*, para. 9.
47 *Ibid.*, para. 36(a).
48 ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, para. 37 and footnotes 36-39.
49 See e.g., Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, para. 92.
50 See e.g., ODIHR-Venice Commission, *Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova*, CDL-AD(2015)005, para. 107.

level prosecutor in a case, the chief prosecutor may allow the lower-level prosecutor to continue the case, reassign the case to him/herself, or transfer it to another lower-level prosecutor, in which case such decisions should always be reasoned and part of the criminal file.[51] If a prosecutor's decision is overturned by a higher prosecutor, further investigation or management of the case should remain with the same lower prosecutor only if that prosecutor recognizes the validity of the decision.

40. The legal drafters should thus **consider adding provisions indicating that the ability to give instructions to a lower-level prosecutor may involve only general instructions. Where instructions are provided in individual cases these should be in limited circumstances only, such as for the correction of procedural deficiencies, in case of decisions that are improper in law or not supported by available evidence, in case of human rights violations or for undertaking additional investigative steps. These instructions may not touch on the final outcome of an individual case. It is further recommended to include a provision in the Draft Law specifying that prosecutors may refuse to carry out instructions from higher-level prosecutors that are contrary to the law and that such refusal should not be met with any sanction, in particular the subordinate prosecutor should not be removed from the case without a reasoned decision. It is recommended to include in the Draft Law provisions that stipulate that any instructions received by subordinate prosecutors from the heads of prosecution offices shall be provided in writing, be reasoned, and recorded in the official minutes of meetings**. It is also important that both the Draft Law and criminal procedure law, as appropriate, reflect the independent decision-making competences of **line prosecutors**.[52]

41. In addition, prosecutors should be protected against arbitrary actions by superiors, such as the transfer of cases without explanation, the unjustified reduction of seniority or pay scales, the initiation of disciplinary proceedings or the forced transfer to a prosecution service in another region without operational necessity and without regard to the personal circumstances of the prosecutor (see Sub-Sections 4 and 5 *infra*).[53] Such actions can infringe on the independence of the prosecutor and negatively impact on the morale of the individual prosecutor, which may ultimately impact the effectiveness of the prosecutor's office.[54] **It is recommended that all criteria based on which superior prosecutors may take action against lower-ranking prosecutors need to be clearly set out in the Draft Law and comply with the principle of independence of prosecutors. In particular, the transfer of a prosecutor to another prosecution office should only be allowed when their respective office has closed or with the consent of the prosecutor involved.**

42. Another safeguard should be provided through specific rules of case management.[55] Thus, **it is recommended that the Draft Law or other relevant legislation introduces an objective and impartial mechanism for assignment of cases: each new case should be assigned to the prosecutor at random, taking into account his or her specialization, the number of cases under his/her jurisdiction, caseload and experience.** Both the assignment and reassignment of cases should follow clear and transparent pre-established rules.[56]

51 ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, p. 20, footnote 39.

52 See Venice Commission, *Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service*, CDL-AD(2010)040, Venice, 17-18 December 2010, para. 31.

53 UNODC-IAP, *Guide on the Status and Role of Prosecutors* (2014), paras. 31-32.

54 See UNODC-IAP, *Guide on the Status and Role of Prosecutors* (2014).

55 UNODC-IAP, *Guide on the Status and Role of Prosecutors* (2014), paras. 31-32.

56 See *Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System*, pars 9 and 36.a

RECOMMENDATION B.2.

To include an explicit provision regarding the functional independence of individual prosecutors under Article 3 of the Draft Law.

RECOMMENDATION B.3.

To include a provision specifying that prosecutors may refuse to carry out instructions from higher-level prosecutors that are contrary to the law and that such refusal should not be met with any sanction, in particular the subordinate prosecutor should not be removed from the case without a reasoned decision, and that any instructions received by subordinate prosecutors from the heads of prosecution offices shall be provided in writing, be reasoned, and recorded in the official minutes of meetings.

RECOMMENDATION B.4.

To indicate that the ability to give instructions to a lower-level prosecutor may involve only general instructions and where instructions are provided in individual cases, that these may not touch on the final outcome of the case and could be issued only in very limited circumstances, such as for the correction of procedural deficiencies, in case of decisions that are improper in law or not supported by available evidence, in case of human rights violations or for undertaking additional investigative steps.

3.3. System of Self-Governance of Prosecutors

43. An important factor for increasing the independence of the prosecutor's office is the existence of an independent self-governance body of prosecutors. This body could be endowed with important powers and competencies with respect to the appointment of prosecutors, disciplinary proceedings, and other crucial issues. Its existence can also serve to mitigate the power of the Prosecutor-General and reduce the risk that an excessively powerful individual will exert disproportionate influence, which in some cases may amount to an abuse of power.

44. Article 30 of the Draft Law provides for the existence of boards within prosecutors' offices. The board meetings are supposed to consider issues related to the activities of the prosecutor's office, as well as other issues related to detected violations of the law, which at the discretion of the Prosecutor-General and the heads of prosecution offices require a collective review with the participation of interested persons. At the same time, the Draft Law does not clearly define their jurisdiction and composition. Thus, **it is recommended that the Draft Law be supplemented in this respect.**

45. It should be noted that international standards and national practices do not offer a uniform model for the system of prosecutorial self-governance. As the Venice Commission notes, self-governing bodies, such as prosecutorial councils, "*are becoming increasingly common in the political systems of individual states*".[57] As part of recent reforms in Eastern Europe, some national governments have created new self-

57 See Venice Commission (2010), *Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service*, para. 64.

governing bodies to strengthen the independence and impartiality of individual prosecutors.[58]

46. The existence of a self-governing body for prosecutors is not a mandatory international standard. However, such a body could prove to be an appropriate mechanism to protect prosecutors from external interference and pressure, and to ensure transparency in the appointment, career and even disciplinary procedure of prosecutors, similar to Judicial Councils. **It is recommended that legal drafters and other relevant decision-makers assess, in light of the national context and ongoing reforms, whether to introduce in the Draft Law a prosecutorial self-governance body** (independent body of prosecutors). **Its core functions could include, inter alia, a transparent process for the selection of candidates for the public prosecutor's offices, the promotion of prosecutors and the handling of disciplinary matters concerning prosecutors.** [59] Moreover, **it is recommended that the composition of the self-governing body and the appointment of its members be regulated by law in order to avoid any undue political influence on the implementation of its activities.** This will enable prosecutors to strengthen their ability to resist undue institutional interference.

47. It should be noted that the rules underlying the appointment and the composition of self-governance bodies are crucial for ensuring their independence from political interference and avoid undue interference in the work of the Prosecution Service. They are advised to consist of elected prosecutors and representatives of other agencies, including civil society.[60] For the sake of impartiality and integrity, this Draft Law may explicitly rule out any political appointments to such independent bodies and guarantee both their structural and financial independence from the Office of the Prosecutor-General. Thus, **the appropriate authorities should consider establishing by law an independent prosecutorial self-government body to protect and enhance the independence of prosecutors, which will function on the basis of strong legal regulations that grant this body considerable authority over prosecutorial appointments, promotions, and disciplinary proceedings.**

RECOMMENDATION C.

To consider establishing by law an independent prosecutorial self-government body to protect and enhance the independence of prosecutors, which will function on the basis of strong legal regulations that grant this body considerable authority over prosecutorial appointments, promotions, and disciplinary proceedings.

4. APPOINTMENT, CAREER, LIABILITY AND DISMISSAL OF PROSECUTORS

48. As mentioned above, the rules governing prosecutors' appointment, career, promotion and dismissal may impact their independence. Recruitment, promotion and dismissal influenced by political factors can undermine the autonomy and functional independence

58 Ibid, para. 32; also see OSCE/ODIHR Needs Assessment Report *Strengthening functional independence of prosecutors in Eastern European participating States*, Chapter v. Prosecutorial Self-Governance.

59 For instance, Albania, Azerbaijan, Bosnia and Herzegovina, Kyrgyzstan, Latvia, Lithuania, Moldova, Montenegro, Poland, Romania, Serbia, Slovenia, Ukraine, and Uzbekistan have created systems of self-governance of prosecutors, such as Prosecutorial Councils and other bodies (Azerbaijan, Latvia and Lithuania are among the countries which have set up particular bodies with specific powers within the offices of the Prosecutor-General.).

60 See, for example, Venice Commission, *Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, CDL-AD(2014)008, paras. 41 and 42.

of both individual prosecutors and the prosecution service as a whole. As the UN Guidelines on the Roles of Prosecutors stress, "*2. States shall ensure that: (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned…4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability...*" and that *"6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations….7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures…"* and that *"21. Disciplinary offences of prosecutors shall be based on law or lawful regulations..."*[61]

4.1. Appointment and Dismissal of the Prosecutor-General and Deputies

49. Article 8 of the Draft Law provides that the Prosecutor-General is appointed by the President of the Republic with the consent of the Senate, i.e., the Upper Chamber of the Parliament, for a five-year period. Article 8(3) of the Draft Law further provides that "*[t]he First Deputy Prosecutor-General and Deputy Prosecutors General shall be appointed and dismissed by the President of Kazakhstan as nominated by the Prosecutor-General*". The Draft Law does not specify criteria for the appointment of the Prosecutor-General and his/her Deputies, as well as the duration of the latter's terms of office.

50. The Draft Law does not refer to any eligibility requirements nor selection criteria, especially relating to the level and nature of professional experience and managerial expertise considered necessary for each of the positions concerned, including the position of the Prosecutor-General.[62] From the wording of the Draft Law, it is not evident that the Prosecutor-General even needs to be a prosecutor and have appropriate managerial experience. Candidates to such essential posts need to meet not only requirements relating to legal competence, but the position requires also high standing and good character in an objectively verifiable manner. **The eligibility requirements and objective selection criteria for becoming the Prosecutor-General and Deputies as well as the latter's term of office should be explicitly provided in the Draft Law.**

51. The appointments of the Prosecutor-General by the President of the country upon recommendation of the Senate and of the Deputy Prosecutor-Generals directly by the President are not necessarily inconsistent with international standards. Nevertheless, in order to ensure public trust in the selection and appointment process, **the selection must be based on merit, following pre-determined objective criteria set out in the Draft Law, and clear, open, transparent and inclusive procedures**. Good practices in OSCE participating States indicate that it would be better if nominations of potential

61 See 1990 *UN Guidelines on the Role of Prosecutors*. See also *IAP*, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, para. 6(e), and *Council of Europe, Recommendation Rec(2000)19*, para. 5(a). See also CCPE, *Opinion No. 13(2018)* on "Independence, accountability and ethics of prosecutors", para. 14, that provides "*Taking into account the proximity and complementary nature of the missions of judges and prosecutors, as well as of requirements in terms of their status and conditions of service prosecutors should have guarantees similar to those for judges*". See further, ODIHR, *Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report*, 4 March 2020, para. 40.

62 See similar concerns raised in e.g., ODIHR-CCPE-Venice Commission, *Joint Opinion on the draft Amendments to the Law on the Prosecutor's Office of Georgia*, CDL-AD(2015)039, para. 27.

candidates are provided by relevant persons, such as representatives of the legal community (including prosecutors) and civil society, when selecting candidates for such positions, or by an independent body of prosecutors, such as prosecutorial councils.[63] A more pluralistic approach to the selection process helps ensure the openness, fairness and impartiality of such procedures,[64] as set out in the Standards of the International Association of Prosecutors, while reducing the risk of political influence and ensuring a merit-based selection process. Thus, **it is recommended that the relevant provisions be revised in light of these requirements and good practices in order to prevent any risk of political considerations in the process of selection, which could ultimately impact its institutional independence and appearance thereof, and ensure a merit-based approach to the appointment to the leadership positions of the Prosecution Service.**

52. Further, the Prosecutor-General's five-year term of office, as envisaged by Article 8, appears to be rather short, especially when comparing it to the Senate's six-year term of office. As the Venice Commission points out, a Prosecutor-General should ideally be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period, while ensuring that the period of office does not coincide with Parliament's term in office.[65] Thus, **the legal drafters should consider extending the term of office of the Prosecutor-General, while specifying that it is non-renewable so as to avoid the risk of political partisanship of a candidate seeking re-appointment.**

53. Article 8 of the Draft Law is also silent regarding the grounds for the dismissal of the Prosecutor-General and of his/her Deputies. The specification of such grounds is important as a safeguard against unjustified interference with individual decision-making and undue political pressure in the operation of the prosecution service, and helps assess whether a dismissal is indeed well-founded and not arbitrary. **It is recommended that the Draft Law establish clear and objective criteria as well as transparent and fair procedures for the dismissal of the leadership of the Prosecution Service in Kazakhstan** (and other prosecutors, see below)**, including the right to challenge such a decision before an impartial and independent court.**

54. Finally, it appears that the Prosecutor-General may be dismissed by the President, without any involvement of any professional, non-political bodies. Given the importance of maintaining the Prosecutor-General's independence from the political institutions such as the executive, it is recommended that prior to any decision on dismissal being taken, an **independent expert body is consulted to give an opinion on whether the presented grounds are sufficient for dismissal**.[66] This should be reflected in the Draft Law. In any case, **the Prosecutor-General and his/her Deputies should have the right to make a defence before the competent body[67] prior to the dismissal decision being adopted.**

63 For instance, the Prosecutor-General of Romania is appointed by the President upon the proposal of the Minister of Justice, following the advisory opinion of the Section for Prosecutors of the Superior Council of Magistracy (Law 303/2004 of Romania, Article 54); in Slovenia the appointment is made by Parliament, on a reasoned proposal of the State Prosecutorial Council following the preliminary acquisition of the opinion of the government (State Prosecutor's Office Act of Slovenia, Article 111 para. 1).

64 See *IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, para. 6.5.

65 See Venice Commission (2010), *Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service*, para. 37

66 For instance, Article 63 of the Law on the Prosecutor's Office of Armenia defines the criteria for the early termination of powers of the .Prosecutor-General. These grounds are, among other things (such as loss of citizenship or physical incapability to carry out the mandate, resignation, and incompatibility) related to criminal convictions, the termination of a criminal prosecution instituted against him/her on a non-acquittal ground, or violations of the law or the rules of conduct of prosecutors which impair the reputation of the Prosecutor's Office. Similar regulations have been established in Bosnia and Herzegovina, Estonia, Georgia, Lithuania, and Mongolia.

67 See e.g., Venice Commission, *Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia"*, CDL-AD(2007)011, para. 61.

RECOMMENDATION D.1.

To specify in the Draft Law the eligibility requirements and objective selection criteria for becoming the Prosecutor-General and Deputies as well as the latter's term of office should be explicitly provided in the Draft Law.

RECOMMENDATION D.2

To provide in the Draft Law clear and objective criteria as well as transparent and fair procedures for the dismissal of the leadership of the Prosecution Service in Kazakhstan, including right to challenge such a decision before an impartial and independent court.

4.2. Selection, Appointment and Dismissal of Prosecutors

55. The Draft Law stipulates that the Prosecutor-General appoints prosecutors (Article 9). At the same time, the Draft Law does not provide any details on how candidates for those positions are selected. The Draft Law is equally silent on the eligibility requirements and selection criteria for appointing individual prosecutors, apart from the more general requirement that they need to be citizens of Kazakhstan (Article 45(2)). One may assume that such eligibility requirements and selection criteria may be dealt with in the regulations on the General Prosecutor's Office. However, the Draft Law makes no references to other instruments where these requirements/criteria may be listed. It is important for these criteria to be set out in the Draft Law.

56. It should be kept in mind that the lack of transparency and clarity in relation to selection criteria and selection process may contribute to political appointments, corruption and nepotism. **In order to promote accountability and merit-based appointments of prosecutors, the Draft Law should outline the requisite selection criteria and process.**[68] **Thus, it is recommended that the Draft Law provides for the list of eligibility and ineligibility requirements to become a prosecutor. The Draft Law should ensure that the selection and appointment of prosecutors to office is made on the basis of clear and objective eligibility and selection criteria and following a fair, transparent, impartial and competitive selection process. Further details relating to the recruitment procedure should be established and governed by law.**

57. To further enhance the transparency of the selection and appointment procedures, **the legal drafters could specify the criteria for preliminary selection and shortlisting of candidates for particular positions prior to their appointment by the Prosecutor-General**. The same consideration applies regarding the selection of the Prosecutor-General. In some countries, for instance in some *Länder* of the Federal Republic of Germany, preliminary selection of candidates for prosecutorial positions is conducted by judge selection committees.[69] Further, in many countries vacant positions of prosecutors including senior positions are advertised in the media and open for external applicants. Such procedures aim to improve qualifications for candidates for

68 It should be noted that Kazakhstani statutes on judges and lawyers contain such provisions. See for example, Article 29 of the Constitutional Law of the Republic of Kazakhstan No. 132-II (*Конституционный закон Республики Казахстан от 25 декабря 2000 года № 132-II «О судебной системе и статусе судей Республики Казахстан"*), available at <https://adilet.zan.kz/eng/docs/Z000000132> (in English) and <https://adilet.zan.kz/rus/docs/Z000000132> (in Russian). See also for example, Article 32 of the Law of the Republic of Kazakhstan On advocate activity and legal aid (*Закон Республики Казахстан от 5 июля 2018 года № 176-VI «Об адвокатской деятельности и юридической помощи»*).

69 Gwladys Gillieron, Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany, Springer (2014), at p. 264.

prosecutorial positions, as well as eliminate or reduce risks for corruption and political considerations in the appointment of prosecutors.

58. It is generally recommended that the legislation on the prosecution service foresees the same qualification requirements as those for candidates for the positions of judges and advocates. Thus, in addition to possessing a law degree, **it is recommended that the Draft Law requires candidates to pass a special qualification exam and possibly an interview**. Moreover, the Draft Law could require candidates for prosecutorial positions to undergo special preparatory training similar to what is required for judges and advocates.[70]

59. As emphasized by the Venice Commission, in order to facilitate the recruitment of qualified prosecutors, an expert body and/or outside input are generally useful.[71] The legal drafters **could consider vesting the power to appoint prosecutors in an independent body of prosecutors whose expertise will enable them to propose appropriate candidates for appointment, while involving external legal experts to participate in the selection process, or requiring the Prosecutor-General to consult with them.**

60. The Draft Law does not specify the duration of prosecutors' term of office. Appointing prosecutors for life, perhaps after a probation period, could be a good practice, as it would help avoid the risk of prosecutors making decisions driven by the desire to secure re-appointment[72] or other positions at the end of their term of office. In any case, the Draft Law **should specify the duration of appointments of prosecutors, preferably for life.**

61. Article 9 par 1 (4)-(5) and Article 22 of the Draft Law provide for the dismissal of senior prosecutors and prosecutors, respectively, but do not specify any grounds for adopting such measures. The specification of grounds for dismissal is important as a safeguard against unjustified interference with individual decision-making and undue political pressure in the operation of the Prosecution Service since this provides for assessing whether any dismissal is indeed well-founded and not arbitrary. **It is recommended to supplement the Draft Law in this respect, while ensuring that the grounds for dismissal are clear and objective to avoid arbitrary interpretation.**

RECOMMENDATION D.3.

To provide in the Draft Law clear and objective eligibility and selection criteria and that the selection and appointment of prosecutors to office is made on the basis of a fair, transparent, impartial and competitive selection process.

RECOMMENDATION E.

To specify in the Draft Law the duration of appointments of prosecutors, preferably for life.

70 In some countries, for example France, candidates can be appointed as prosecutors only after having completed a 31-month training program at the National School of Magistrates (*Ecole Nationale de la Magistrature*), which is only accessible to those who have successfully passed a competitive examination. See: *Gwladys Gillieron, Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany*, Springer (2014), pp. 289-290.

71 See Venice Commission, *Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service (2010)*; and *Compilation of Venice Commission Opinions and Reports concerning Prosecutors*, note 7, Section 3.1.2.1.

72 See*Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service* (2010), which reads that "*87. In order to provide for guarantees of non-interference, the Venice Commission recommends: (…) 12. Prosecutors other than the Prosecutor-General should be appointed until retirement*."

4.3. Gender and Diversity Considerations in the Selection/Appointment, Career and Human Resource Management of Prosecutor's Office

62. Gender balance and minority representation in justice systems are important factors in fairer justice system outcomes but also tend to trigger greater public trust in justice systems where justice sector workforces are visibly more diverse.[73] In addition, workplace diversity can help to make justice sector practitioners more sensitive to different considerations for different groups, and thus overcome implicit bias and unconscious stereotyping.[74]

63. The Draft Law does not contain a provision referring to gender balance and diversity considerations or requirements when carrying out the nomination and selection of prosecutors. Article 14 of the Constitution recognizes the equality between all individuals, while the Law on State Guarantees of Equal Rights and Equal Opportunities for Men and Women prohibit gender-based discrimination. Nevertheless, according to the CEDAW Committee, "the *legal framework on discrimination is fragmented and does not provide effective protection against discrimination in fields such as employment*".[75] The *OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life* calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies.*"[76] As the CCPE notes, "*it is particularly desirable that, while ensuring respect for gender balance, the process of appointment, transfer, promotion and discipline of prosecutors be clearly set out in written form and be as close as possible to that of judges (…) In such cases, provisions should preferably be established by law and applied under the control of an independent professional authority (…) such as a Council for the judiciary or for prosecutors, competent for the appointment, promotion and discipline of prosecutors (…)*"[77].

64. To this effect, **it is recommended to supplement the Draft Law with provisions ensuring that gender equality considerations are taken into account throughout the appointment process).**

65. The composition of public prosecution service should also seek to represent the population as a whole, including persons with disabilities. Article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD) prescribes the right to work for persons with disabilities on an equal basis with others. Persons with disabilities also have the right to participate on an equal basis in the justice system, not only as users of the system, but also as judges, prosecutors, jurors and attorneys. "Participation on an equal basis" in justice sector professions not only implies that the selection and employment criteria must be nondiscriminatory, but also that states must take positive measures to create an enabling environment to realize the full and equal participation of persons with disabilities, which means that there must be adequate conditions to facilitate the work of qualified candidates. The 2020 International Principles and Guidelines on Access to Justice for Persons with Disabilities provide further guidance and recommendations in this regard, in particular Principle 7.[78]

73 See e.g., DCAF-ODIHR-UN Women, *Gender and Security Toolkit – Tool 4: Justice and Gender* (2019), p. 13.
74 *Ibid.*
75 See UN Committee on the Elimination of Discrimination against Women, Concluding Observations on the fifth periodic report of Kazakhstan (2019), para.11
76 OSCE Ministerial Council, Decision No. 7/09, para. 20.
77 See CCPR, Opinion No. 13(2018) on "Independence, accountability and ethics of prosecutors", para. 24.
78 See the *International Principles and Guidelines on access to justice for persons with disabilities.* Principle 7 provides that "*Persons with disabilities have the right to participate in the administration of justice on an equal basis with others*."

66. The Draft Law states that disability benefits shall be made in accordance with the law (Article 47(2)). However, the current wording does not envisage any obligations or actions on the part of the State to facilitate the return of such prosecutors capable of continuing their duties and to create a suitable working environment for them. Thus, **it is recommended to supplement the Draft Law with provisions ensuring that diversity is considered throughout the appointment process, in order to facilitate the representation of persons with disabilities in the public prosecution service as well as to reasonably accommodate the possibility to return to work where an employee becomes disabled.**

67. It is also fundamental that gender and diversity considerations also apply for career advancement to ensure gender balance and diversity at all levels, also to provide the necessary support for these individuals to qualify for the recruitment process.

68. In this light, it is also important that human resources management within the prosecution system are gender- and diversity-sensitive. This should *inter alia* aim at ensuring that human resource policies are reviewed in light of gender and diversity considerations and that robust and effective disciplinary policies and procedures are in place and contain provisions which prohibit discrimination or harassment on the basis of sex, sexual orientation, gender identity or other ground.[79] In this respect, ODIHR publication on *Gender, Diversity and Justice* (2019) may serve as a useful reference document.[80]

RECOMMENDATION D.4.

To supplement the Draft Law with provisions ensuring that gender equality considerations are taken into account throughout the appointment.

4.4. Performance Evaluation

69. The Draft Law lacks any provision regarding a system for assessing the performance of prosecutors. The evaluation of prosecutors' performance is often linked to promotions and salary increase: each prosecutor can be appraised on case-by-case performances or periodically, during the entire professional career. Moreover, at the national level, performance evaluation of prosecutors contributes to the effectiveness and efficiency of the overall national judicial system and inter-institutional co-operation.

70. **It is recommended to develop and implement a system for assessing the performance of prosecutors.** Such assessment system should be based on the prosecutor's skills, including factors that may be professional (knowledge of the law, ability to present evidence in court, ability to write motions and other procedural documents), personal (ability to handle the workload, ability to make decisions independently) and social (ability to work with colleagues, respect for the court, the defence and the victim). Leadership skills should also be considered and evaluated when considering a promotion to an administrative position. However, **clearance and acquittal rates should never be part of the evaluation criteria.**[81]

79 *Ibid*. pp. 42 and 61. See also ODIHR, *Gender, Diversity and Justice – Overview and Recommendations* (2019).
80 ODIHR, *Gender, Diversity and Justice – Overview and Recommendations* (2019).
81 See Venice Commission; *Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service*, CDL-PI(2022)023, pp.70-72.

4.5. Impartiality and Conflict of Interest

71. As prosecutors must act fairly and impartially, they should not participate in cases in which they have a personal interest, and may be subject to certain restrictions intended to guarantee their impartiality and integrity or appearance thereof. In any case, prosecutors should also avoid public activities that would conflict with the principle of impartiality. At the same time public prosecutors have an effective right to freedom of expression, religion or belief, association and peaceful assembly which can only be limited in so far as this is prescribed by law and is necessary to preserve the constitutional position of the public prosecutors.[82]

72. **Further, for the sake of facilitating integrity of prosecutors, in addition to the Draft Law, it is recommended that the prosecutors develops clear ethical standards, codes of professional conduct, and/or guidance on conflict of interest applicable to all prosecutors.**

4.6. Immunity of Prosecutors

73. Article 83(3) of the Constitution provides that the Prosecutor-General "*may not be arrested, brought to trial, be subject to administrative measures imposed in court or brought to criminal responsibility without the consent of the Senate, except in cases of detention at the crime scene or committing serious crimes.*" A similar provision is included in Article 8(1)(4) of the Draft Law.

74. The Draft Law does not seem to regulate issues of accountability or functional immunity of public prosecutors, apart from the mention of "accountability" to the President (see comments in para. 30 *supra*). Moreover, Article 27 of the Draft Law only indicates that "*public prosecutors shall bear the liability stipulated by law*". This provision is overbroad and the fact that this provision does not specify which forms of liability it refers to raises serious concerns.

75. According to Article 551 of the Code of Criminal Procedure of the Republic of Kazakhstan, the Prosecutor-General enjoys certain immunities during criminal pre-trial investigations against him/her.[83] The scope of immunity should be clarified in the Draft Law and generally guarantee functional immunity for actions carried out in good faith in the course of their duties.

76. When speaking about the accountability of prosecutors, the CCPE refers to the following criteria: prosecutors should not act arbitrarily, should base their decisions on the law and provide justifications where needed, based on the principles of legality and discretion.[84] The notion of accountability also implies providing, as appropriate, reports to relevant stakeholders.[85] It should be also kept in mind that a certain degree of accountability towards the political branches of power, as well as the judiciary, the public, or within the service itself generally counterbalances the autonomy of the Prosecution Service and its wide discretion.

77. Immunity from criminal liability is an exception to the principle of equality before the law. For that reason, prosecutors should be endowed only with such immunity as is

82 See CoE, *Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System*, para. 6.
83 See *Code of Criminal Procedure of the Republic of Kazakhstan*, Article 551, titled "*Pre-trial investigation of the Prosecutor-General of the Republic of Kazakhstan*".
84 See CCPE, *Opinion No. 13(2018) titled "Independence, accountability and ethics of prosecutors"*, para. 19, issued on 23 November, 2018.
85 *Ibid.*

necessary to enable them to fulfil their functions. As a matter of principle, this requires functional immunity, that is, immunity from civil, administrative or criminal liability for acts performed in good faith while exercising one's duties.[86] As UN Guidelines on the Role of Prosecutors state, "*4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability*".[87]

78. The Criminal Code of Kazakhstan provides for a number of *corpora delicti* under which a prosecutor may be held criminally liable for certain socially dangerous acts, such as Article 413 (knowingly unlawful exemption from criminal liability), Article 415 (compulsion to testify) and Article 416 (falsification of evidence, intelligence and operational materials).[88] However, this list can be expanded. In some countries, criminal legislation also includes other offences under which a prosecutor can be charged. For instance, in several European countries, prosecutors are criminally liable for failing to conduct an impartial investigation and for withholding evidence that might be of advantage to the accused.[89] Thus, **the legal drafters could consider criminalizing these types of offenses.** This may also help address the acknowledged imbalance between the prosecution and defendants during the trial, as emphasized in the recent *ODIHR Urgent Comparative Note on Some of Supreme Court's Proposed Priorities for Judicial Reform in Kazakhstan* published in August 2022.

RECOMMENDATION F.

To clarify the scope of immunity in the Draft Law and generally guarantee functional immunity for actions carried out by prosecutors in good faith in the course of their duties.

4.7. Disciplinary proceedings

79. The legitimacy of bringing disciplinary proceedings against prosecutors is considered an enduring consequence of the requirements imposed on prosecutors in the performance of their official duties. In particular, they are expected to act with integrity[90] and impartiality.[91]

86 See e.g., CCPR, Rome Charter, *Opinion No. 9 (2014)*, which provides that "*X. Prosecutors should not benefit from a general immunity, but from functional immunity for actions carried out in good faith in pursuance of their duties*".

87 See CCPE, *Rome Charter, Opinion No. 9 (2014) Consultative Council of European Prosecutors*, which provides that "*X. Prosecutors should not benefit from a general immunity, but from functional immunity for actions carried out in good faith in pursuance of their duties*".

88 See Criminal Code of the Republic of Kazakhstan № 62-VII, available at <https://online.zakon.kz/document/?doc_id=31575252&pos=5;-108#pos=5;-108> (in Russian).

89 For instance, Article 63 para. 3 of the *Law on the Prosecutor's Office of Armenia* defines the criteria for the early termination of powers of the .Prosecutor-General. These grounds are, among other things, related to criminal convictions, the termination of a criminal prosecution instituted against him/her on a non-acquittal ground, or violations of the law or the rules of conduct of prosecutors which impair the reputation of the Prosecutor's Office.

90 See the *UN Guidelines on the Role of Prosecutors*, which provide that *"[p]ersons selected as prosecutors shall be individuals of integrity*". Further, the Venice Commission considers that "*It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone*" (see also Venice Commission, CDL-AD(2010)040, *Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution*, paras. 17, 19, 22, 61-62). See also *the Budapest Guidelines* that require that public prosecutors "*at all times exercise the highest standards of integrity*" and the IAP Standards, which require that "*Prosecutors shall … at all times exercise the highest standards of integrity and care*".

91 See CoE CM, *Recommendation Rec(2000)19*, para. 24, which specifies that "*[i]n the performance of their duties, public prosecutors should in particular: a. carry out their functions fairly, impartially and objectively*". See also the *UN Guidelines on the Role of Prosecutors* stating that: "*[i]n the performance of their duties, prosecutors shall: (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or other kind of discrimination*" (para. 13).

80. In addition to criminal liability, the Draft Law should also outline clear legal rules concerning disciplinary liability of prosecutors. As the CCPE points out, prosecutors "*are subject, where appropriate, to disciplinary proceedings which must be based on a law, in the event of serious breaches of duty (negligence, breach of the duty of secrecy, anti-corruption rules, etc.), for clear and determined reasons; the proceedings should be transparent, apply established criteria and be held before a body which is independent from the executive; concerned prosecutors should be heard and allowed to defend themselves with the help of their advisers, be protected from any political influence, and have the possibility to exercise the right of appeal before a court; any sanction must also be necessary, adequate and proportionate to the disciplinary offence*."[92]

81. However, **it is important to ensure that decisions taken by prosecutors in good faith and in the absence of signs of gross negligence would not lead to disciplinary proceedings.** In general, disciplinary responsibility should arise only in cases of misconduct and not because of the errors or mistakes or other failure of the prosecutor, which can be identified through the prosecutors' performance evaluation.[93]

82. Additionally, the power to sanction prosecutors might be leveraged in order to unduly influence their professional behaviour and impact decisions on specific cases. Therefore, the rules regulating discipline should be clearly stated in law, with clear and detailed provisions on the disciplinary grounds, related (proportionate) sanctions and clear and transparent proceedings, also offering the possibility for review of such decisions.[94] Such proceedings should be conducted by an authority independent from any political institutions.[95] It is also essential that prosecutors are granted the right to be heard and represented during disciplinary proceedings.[96] The disciplinary decision should be duly motivated in order to provide the necessary opportunity of appeal for the prosecutor undergoing the disciplinary action.

83. In order to have an adequate disciplinary framework, it is also important to be clear about the duties to be performed by prosecutors. Further, the legislator may differentiate between different cases of misconduct, including those where a disciplinary warning might be sufficient and more serious cases that should entail disciplinary sanctions. Some duties of prosecutors in Kazakhstan are specified in Article 10(2) of the Draft Law. However, this provision does not address some important aspects such as conduct which may be incompatible with the role of a prosecutor or a potential conflict of interest. In addition, evading professional training at the Law Enforcement Academy of the Prosecutor-General's Office (see Article 12 of the Draft Law) should also entail a disciplinary warning. Such actions, as outlined in Article 10(2) of the Draft Law, may involve grounds for dismissal, but the shortcomings in service would not necessarily be of such gravity as to merit such serious consequences. **It is recommended that the Draft Law regulates disciplinary actions against prosecutors, which should be governed by clear, objective and transparent criteria, in compliance with fair, transparent and impartial procedures, excluding any discrimination and allowing**

92 See CCPE, *Opinion No. 13(2018) "Independence, accountability and ethics of prosecutors"*, para. 47.

93 See with respect to judges: ODIHR *Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019*), 14 January 2020, para. 39.

94 See the *UN Guidelines on the Role of Prosecutors*, para. 21, which states that "*21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures.*"

95 *Ibid.*, para. 22: *"[d]isciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.*"

96 See the *UN Guidelines on the Role of Prosecutors*, para. 21, which provides that "*21. […] Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.*"

for appeal procedures. In particular, the grounds for dismissal should be clearly defined.

84. Whilst criteria for disciplinary procedures are not reflected in the Draft Law, Article 36(1)(2) of the Draft Law provides that disciplinary proceedings are initiated by a prosecutor's resolution. The provision seems to be vague and raises concerns. For instance, it does not provide that it should be a prosecutor of a higher position and it is not clear whether the prosecutor can also cancel disciplinary sanctions by a resolution. Anyway, for the sake of unbiased and fair procedure, **the final decision of disciplinary sanctions should not be adopted by one person but by a disciplinary board**, while **ensuring that the prosecutor in question is informed of the case, has a representative upon his/her request, and has an opportunity to make submissions and challenge adverse evidence**.

RECOMMENDATION G.

To regulate in the Draft Law disciplinary actions against prosecutors, which should be governed by clear, objective and transparent criteria, in compliance with fair, transparent and impartial procedures, excluding any discrimination and allowing for appeal procedures while ensuring that the grounds for dismissal are clearly defined.

4.8. Complaints against the Prosecution Service or Prosecutors

85. Article 25 of the Draft Law provides for complaints against decisions, acts, actions and omissions of the Prosecutor's Office and prosecutors. These complaints must be reviewed by a superior prosecutor before any of the aforementioned acts can be appealed in court. Such an appeal may have a significant impact on the conduct of criminal proceedings when, for example, the prosecutor has abused his/her authority or failed to act on behalf of the suspect in relation to the collection of evidence. In these circumstances, the twenty business days allotted for the superior prosecutor to review the complaint may be prejudicial to the suspect's interests. Furthermore, it is not clear why Article 25(2) refers only to the Code of Administrative Procedure in respect of appeals but not to the Code of Criminal Procedure and **this should be reconsidered**. **It is recommended to prescribe in this provision a much shorter period for consideration of a complaint.** The legislator could consider, for example, a period of 5 working days.

86. It would also seem appropriate to provide for the possibility to challenge in court the actions (inaction) and oversight acts of the prosecutor (Article 44). However, the Draft Law does not provide details on the procedure and deadlines for filing a complaint.[97] While these issues may be addressed in other laws, the current Draft Law does not provide any references to these laws. Thus, **it would be useful to provide clarification on the issues related to appeals to ensure that the latter presents an effective review mechanism**. Especially, it is necessary to create clear and appropriate mechanisms for

97 See *Bordeaux Declaration*, par 9, which reads that "*(…) Any review according to the law of a decision by the prosecutor to prosecute or not to prosecute should be carried out impartially and objectively, either within the prosecution service itself or by a judicial authority. In any case, due account shall be given to the interests of the victim"*

appealing the decisions of the prosecutor not to prosecute to higher prosecutors and to the court.[98]

5. FUNCTIONS OF THE PROSECUTORS' OFFICE

87. As mentioned above, the internal organization of the prosecutor's office is one of the main factors contributing to the independence of prosecutors.

5.1. Functions of Prosecutor-General

88. Article 9(1)1(16) of the Draft Law refers to the Prosecutor-General having the competence to "appeal" to the Constitutional Court pursuant to Article 72(4) of the Constitution. This new prerogative of the Prosecutor General was introduced as part of the constitutional amendments adopted by referendum in June 2022.[99] This provision allows for an official interpretation to be given on norms of the Constitution upon request of the Prosecutor-General. However, the current wording of Article 9(1)(16), granting the right to appeal to the Constitutional Court for an official interpretation, is very general, which reflects the broad supervisory functions of the Prosecutor-General, whose powers are not limited to the field of criminal law (see Sub-Section 2 *supra*)

89. In addition, it should be noted that the power under Article 9(1)(17), which provides for the appeal against "*judicial acts contradicting the Constitution, laws and acts of the President of the Republic of Kazakhstan*" is not time bound and is extensive in terms of the grounds for possible interference. It is also unclear what is meant by "*on the basis of available grounds, if any*". Thus, the current wording can lead to legal uncertainty if it means that the public prosecutor may have the power to have such judicial acts reconsidered once final, thereby running counter to the principle of legal certainty, which requires respect for *res judicata* i.e., the principle of the finality of judgments,[100] notwithstanding the reliance by private parties on the respective judicial acts. Thus, to the extent that such a right is indeed deemed necessary, **it would be more appropriate to limit the grounds of challenge to the blatant unconformity of the relevant judicial act with the Constitution**: any problems arising from the approach reflected in the relevant judicial act may be resolved in subsequent litigation.

90. Further, the current wording of Article 9(1)(18)-(20) of the Draft Law raises concerns as to its compliance with the rule of law. According to these provisions, the Prosecutor-General is vested with the right to "*18) apply to the Supreme Court with proposals for giving clarifications to courts as to the judicial practice in civil, criminal, administrative and other cases; 19) suspend enforcement of judicial acts in the manner prescribed by the criminal and civil procedural laws of Kazakhstan; 20) make proposals for depriving privileged persons of their immunity and bringing them to administrative and criminal liability;*". These provisions reflect the unduly broad scope of activities within the remit of the Prosecutor-General (see Sub-Section 2 above). Giving the Prosecutor-General the

98 See*Venice Commission (2010), Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service* which reads that "*87. In order to provide for guarantees of non-interference, the Venice Commission recommends: (…) 10. The biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy - for instance by individuals as victims of criminal acts - then there is a high risk of non-accountability.*"

99 New Article 72(4) of the Constitution states: "*The Constitutional Court, at the request of the Prosecutor General of the Republic, considers the issues specified in subparagraphs 3) and 4) of paragraph 1 of this article [i.e., 3. consider the international treaties of the Republic with respect to their compliance with the constitution, before they are ratified; 4. officially interpret the standards of the Constitution], as well as the regulatory legal acts of the Republic of Kazakhstan for their compliance with the Constitution of the Republic."*

100 See e.g., Venice Commission, *Rule of Law Checklist*, Part II, Section B (8). See also e.g., ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic* (2021), para. 92.

right to apply to the Supreme Court with proposals to provide clarifications to courts as to the judicial practice leaves the impression of the prosecution service assuming the role of higher courts and that would be inconsistent with the rule of law and respect for the separation of powers. It is unclear whether the Supreme Court's clarifications would be binding on lower courts or not. In this respect, the ODIHR Kyiv Recommendations (2010) clearly state that "*The issuing by high courts of directives, explanations, or resolutions shall be discouraged, but as long as they exist, they must not be binding on lower court judges. Otherwise, they represent infringements of the individual independence of judges*."[101] Generally, the uniformity of interpretation of the law should be developed through the means of consistent adjudication and through studies of judicial practice, however also without binding force.

91. Similar concerns are applicable in cases concerning the suspension of the enforcement of judicial acts, if this means that in practice, the Prosecutor-General may re-open a final judgment, which would again run counter to the principle of *res judicata*, and in any case should usually exclusively be reserved to courts. Thus, **it is recommended to revise these provisions to comply with the rule of law principles.**

RECOMMENDATION H.

To reconsider entirely the prerogatives of the Prosecutor-General under Article 9 of the Draft Law to request clarifications from the Supreme Court, unless these are clearly non-binding, and to suspend the enforcement of judicial acts, which should usually exclusively be reserved to courts.

5.2. Oversight Function - Legal Compliance Audits and Evaluation of Enacted Acts

92. Article 10(1)(1) of the Draft Law states that prosecutors are granted the right to "*conduct legal compliance audits and reviews as well as evaluation of acts having come into legal effect*". These issues are more substantively addressed in Articles 18-21. Article 18(2) specifies several circumstances under which legal compliance audits are conducted, but only sub-paragraph 3 specifically addresses evidence of a legal violation as a basis for initiating such a potentially serious intervention. It should be noted that the provisions in Article 18 are supposed to be applied pursuant to Article 24. Article 24(1)(4) provides that an application can be made on the basis of "*information about criminal offences being prepared or committed or about a threat to national security or public safety*". It should be noted that the wording substantiating the conduit of the legal compliance audit does not seem to afford any guarantee as to reliability of such information. Moreover, the grounds for such audit provided in Article 24(1)(5) – implementation of "*the work plan of the prosecutor's office*" is entirely unconnected with any reason to suspect non-compliance with the law. In the event a decision is made to retain the authority of prosecutors to conduct compliance audits, it would be more appropriate that **the decision to conduct compliance audits be based on credible grounds of suspicion that a violation of law has occurred or is occurring, in order to prevent undue interference in the activities of those subjected to such audits**.

[101] ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), para. 35.

93. It should be noted that the rights and obligations of audited entities envisaged in Article 19 seem reasonable. At the same time, given the potential impact on the right to privacy, such audit or search measures need to be necessary and proportional to a legitimate aim; and the authorization to conduct such searches should be subject to effective judicial control (see para. 19 *supra*).[102] More generally, there may be disagreement here as to whether access to a facility, information, and documents may be denied to the prosecutor conducting the audit or whether such access must be granted. It would appear that neither this provision nor any other provisions of the Draft Law provide for anything that explains how such collisions should be resolved. Thus, **it is recommended that the respective provisions clarify how such potential disagreements are to be settled.**

94. A legal compliance review, provided in Article 20, appears to be less onerous than a legal compliance audit due to the fact that it is conducted without a visit by prosecutors. However, out of five grounds for decisions to conduct such a review, only one actually contains a link to the issue of legal incompliance: Article 20(2)(2) provides that the review can be carried out on the basis of "*information on legal incompliance and data received by public prosecutors' offices from other sources, including applications"*. It should be noted that conducting a legal review is unlikely to be purposeful in the absence of a basis for formulating a conclusion on the existence of a concrete problem of compliance with the law. In this light, **it is recommended to revise this provision and reflect the requirement stating that there should be an evidential basis for concluding that there is a problem of legal compliance before conducting a review.**

95. Article 26(3)-(4) provide that prosecutors enjoy considerable power to request the provision of information and documents. The current wording constitutes a potential interference with the right to respect for private life as guaranteed by Article 17 of the ICCPR. Furthermore, since these provisions do not set clear limits on the subsequent use of such information and documents, there exists a potential risk that compelled disclosure could lead to self-incrimination of affected individuals, contrary to Article 14 para. 3(g) of the UN ICCPR, which reads that "*3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (…)(g) Not to be compelled to testify against himself or to confess guilt.*". In order to protect against such risks, such provisions generally require a court to authorize the imposition of the relevant obligation. Moreover, while prior authorization may not be required in cases of urgency, such as that provided for in paragraph 4, the relevant rights in such a case require that scrutiny of the relevant material cannot occur until the court can determine whether rights under the ICCPR demand that some or all of it not be disclosed. Thus**, it is recommended that Article 26(3)-(4) be revised accordingly.**

96. Further, Article 26(7) in its current wording envisages a power for prosecutors to summon and to require explanations "*as part of a legal compliance audit, review or evaluation of acts having come into legal effect, applications under consideration and the exercise of other powers…*". However, it is unclear to what extent the duty to comply with this obligation is subject to the privilege against self-incrimination and defence rights under Article 14 of the ICCPR. Article 26(7) should be reviewed in light of the observations above.

[102] See e.g., Venice Commission, *Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (CDL-AD(2012)019)*, para. 10. See also, for the purpose of comparison, ECtHR, *Gillan and Quinton v. United Kingdom*, Application no. 4158/05, judgment of 12 January 2010, paras. 80-83.

5.3. Prosecutorial Acts

97. Article 32(3) reads that "*[f]ailure to consider, also inadequate consideration, failure to execute acts of the public prosecutor's office or failure to meet the legitimate demands of the prosecutor shall entail liability established by the laws of Kazakhstan*". It should be noted that this provision does not seem sufficiently precise for the purpose of imposing a criminal penalty in light of the principle of legal certainty. Thus, **it is recommended that phrase "*inadequate consideration*" be deleted.** Further, Article 33(1) provides that "*[i]n cases prescribed by law, prosecutors shall give sanctions (consent) to perform certain actions for restricting rights or to obtain information containing secrets protected by law*". It should be noted that **this provision should be replenished to ensure that the prosecutor cannot give consent to restrict rights envisaged by the ICCPR**, otherwise such a sanction may violate fundamental rights and freedoms protected by this legal instrument.

98. Article 34(2)(2) states that prosecutors are authorized to give written instructions in relation to "*intelligence-gathering operations and covert investigative actions*". The wording sounds too ambiguous: the right to give instructions under this provision appears to extend not only to covert investigative actions, but also to search and seizure. If so, this provision falls short of meeting the requirements of Article 17 of the ICCPR,[103] which implies that such acts can be authorised only by courts and not by prosecutors. Thus, **it is recommended to revise this provision to ensure that such instructions be issued upon the receipt of the respective judicial authorisation first.**

99. The right to protest "…*against acts contradicting the Constitution, laws, international treaties ratified by Kazakhstan and acts of the President of Kazakhstan, acts having taken legal effect, decisions and actions (inaction) of state bodies, institutions, organizations, officials and other authorized persons"*, enshrined in Article 37, may lead to an obligation to comply with the requirement to repeal an illegal act or bring it into conformity with the Constitution, laws and acts of the President of Kazakhstan, as well as international treaties and normative legal acts ratified by Kazakhstan. It may not seem to be problematic, since only the conduct of state organizations is at stake. However, the possibility exists that the acts that have entered into legal force, that can be challenged, are acts that an individual or legal entity relied upon, and they may suffer damages in case of annulment of the act. Thus, it is necessary to clarify what mechanisms exist to account for the adverse effects, if any, of a repeal where the interests of an individual or organization acting in good faith may be affected. If such mechanisms are provided in other laws, references to these laws should be provided, otherwise it is advisable to include such a mechanism in this provision.

100. Article 42 of the Draft Law provides for the possibility of the prosecutor to explain to individuals and representatives of legal entities the inadmissibility of violating the law and to warn them about the liability prescribed by law. This power is aimed at preventing offenses, ensuring public safety, protecting the rights and freedoms of a person, and is also applicable in cases where the prosecutor has information about unlawful acts in preparation. It should be noted that prosecutors may give such explanations and warnings not only in writing, but also verbally or in public. Given the liability potentially involved and the fact that the nature of the explanation and warning, or even its existence, may be challenged, it would be more appropriate for all such explanations

103 See *UN ICCPR*, Article 17 that reads that "1.*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks*."

and warnings to be given in writing in all cases. T**his provision should be revised accordingly.**

101. Article 43 par 2 of this Draft Law provides for the possibility to publish in mass media prosecutorial acts on illegal actions and decisions of bodies and officials who violate constitutional and other legally protected rights and interests of man and citizen, legal persons and the state. This provision is aimed at ensuring publicity of prosecutorial activity, which is commendable in principle. **However, given that the prosecutorial acts are subject to appeal, as stipulated by Article 44, it is recommended not to publish them until the opportunity to appeal against the relevant act has been exhausted.** The failure to do so may cause unwarranted damage to a person's reputation in cases where the prosecutorial act is overturned on appeal, which would be contrary to Article 17 of the ICCPR[104]

5.4. Law Drafting

102. Article 31 regulates the participation of the prosecution service in the law drafting process. This provision allows prosecutors to make legislative proposals to improve current legislation. Although par 1 of this Article states that prosecutors' participation should be "*within their competence"*, this provision is vast, since the purpose of the proposals is to ensure that the legislation complies with "*the new needs of legal regulation of social relations*", potentially covering most aspects of what legislation can cover. Moreover, Article 31(2) sets a separate provision in relation to the coordination of "*draft normative legal acts that affect the competence and functions of the prosecutor's office"*. Reference to this function being to "ensure the rule of law" appears to be redundant, since this provision refers to amending legislation and not to eliminating the violation of a law. Based on the above, **it is recommended that this provision be limited to the harmonization of "*draft regulations affecting the competence and functions of the Prosecutor's Office"*, in line with the modern international tendencies in relation to the prosecution service.**

6. RECOMMENDATIONS RELATED TO THE PROCESS ADOPTING THE DRAFT LAW

103. OSCE participating States have committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 Copenhagen Document, para. 5.8).[105] Further, key commitments specify that *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, para. 18.1).[106]

104. Moreover, the Venice Commission's Rule of Law Checklist emphasizes that the public should have a meaningful opportunity to provide input.[107] In addition, Article 25 of the ICCPR guarantees the right of every citizen to take part in the conduct of public affairs, and the UN Human Rights Committee, the treaty body that monitors the Covenant's implementation, stated that, "*the conduct of public affairs [...] is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and*

104 Article 17 par 1 of the UN *ICCPR* reads that "*[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*."
105 See *1990 OSCE Copenhagen Document*.
106 See *1991 OSCE Moscow Document*.
107 See Venice Commission, *Rule of Law Checklist*, Part II.A.5.

the formulation and implementation of policy at international, national, regional and local levels."[108]

105. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.[109] Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation.[110] To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process*,[111] meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings).

106. It is also key that proper time be allocated for the preparation and adoption of legal amendments, especially when they concern adoption of a completely new law on the issue of high public interest. In this context, both the government and the Parliament should have sufficient time to review and evaluate the proposed Draft Law, and to take professional account of the opinions of the staff and the relevant committee and consider the views of stakeholders from different legal professions, including judiciary, prosecutors and lawyers, as well as civil society organizations and other external experts. In principle, adequate time limits should be set prior to the policy making and follow-up legal drafting process, as well as for the proper verification of draft laws and legislative policy for compatibility with international human rights standards, including a gender and diversity impact assessment, at all stages of the law-making process.[112] The benefit of public consultations on draft legislation is the fact that it is often only at this stage concerned people may start to properly understand or fully perceive what is being proposed. At the same time, it may be appropriate to hold public consultations earlier in the legislative process, when government proposals have been sufficiently crystallized for the consultation to make sense, but the policy has not yet been fully elaborated and translated into a legislative draft.[113]

107. Thus, **it is recommended that the public authorities ensure that the Draft Law is subject to transparent, inclusive, comprehensive and meaningful public consultations with involvement of representatives of the prosecution service, the judiciary and bar associations, the academia, and civil society organizations, among others.** In addition, **it is recommended that such consultations be conducted in a timely manner providing for adequate time for the stakeholders to familiarise themselves with the Draft Law and prepare constructive feedback for meaningful process.**

108. Further, it should be kept in mind that enactment of the law does not constitute the end of the legislative process, as the latter is a continuing cycle, and thereby, the adopted

108 See *General comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service* (art. 25), para. 5.

109 *Ibid.*

110 According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"* (1 September 2016), paras. 40-41.

111 See ODIHR, *Assessment of the Legislative Process in the Kyrgyz Republic* (October 2015), para. 63. See also e.g., ODIHR, *Guidelines on the Protection of Human Rights Defenders (2014)*, Section II, Sub-Section G on the Right to Participate in Public Affairs.

112 See e.g., ODIHR *Assessment of the Legislative Process in Georgia* (January 2015), pp. 6-7.

113 See , e.g. ODIHR, *Assessment of the Legislative Process in the Kyrgyz Republic* (October 2015), para. 67.

law should later be assessed and evaluated as to its effects and impacts, to see whether it properly responds to its intended goals.[114]

[END OF TEXT]

114 OECD: *Better Regulation Practices Across the European Union*, 2019, Chapter 4: Ex Post Review of Laws and Regulations Across the European Union.