

OPINION

on the draft Law amending Law no. 3/2016 on the prosecutor's office (enforcement of the Decision of the Constitutional Court no. 13/2020)

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Addressed to: Radu FOLTEA, State Secretary, Ministry of Justice (radu.foltea@justice.gov.md)
Lilia RUSU, chief of analysis, monitoring and evaluation of policies Department, Ministry of Justice (lilia.rusu@justice.gov.md)
Adriana Dodon, Consultant, Department of Legal Drafting, Ministry of Justice (adriana.dodon@justice.gov.md)

Presented by: Institute for European Policies and Reforms (IPRE, www.ipre.md), contact persons: Iulian RUSU (iulian.rusu@ipre.md) and Iulian GROZA (iulian.groza@ipre.md)

Legal Resources Centre from Moldova (CRJM, www.crjm.org), contact persons: Vladislav GRIBINCEA (vladislav.gribincea@crjm.org) and Ion GUZUN (ion.guzun@crjm.org)

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This opinion is submitted as a response to the request from the Ministry of Justice for an opinion on the draft law amending certain normative acts in the context of the enforcement of the Decision of the Constitutional Court no. 13/2020 regarding the control of the constitutionality of some provisions of Law no. 3/2016 of February 25, 2016 on the prosecutor's office, sent to IPRE and CRJM on July 4, 2020 (letter no. 03/4962).

Our conclusion is that the draft law goes beyond the initially declared area of regulation and intervenes on a series of new areas, which did not constitute the subject of constitutionality control by the Constitutional Court and set out in Decision no. 13/2020. Also, the proposed changes to the appointment of the Interim Prosecutor General need to be reviewed. We consider absolutely necessary to return to a comprehensive functional analysis before promoting changes related to the mode of access to office, transfer, reinstatement of special degrees, as well as other issues addressed in the draft law, and inclusion of additional provisions related to how to organize the contest for the position of Prosecutor General, including the scorings of candidates and their publication.

1. Area of regulation of the draft law

The draft law provides for amendments to the following aspects that have been reviewed and declared unconstitutional by the Constitutional Court by its Decision no. 13/2020:

- a) Exclusion of the provisions from article 11, paras. (21) and (22) of Law no. 3/2016 related to the appointment of the Interim General Prosecutor and the transfer of competencies to the Superior Council of Prosecutors (SCP) for the appointment of the Interim General Prosecutor - completion of article 17 with paras. (15) and (16).
- b) Returning to the qualification conditions for the position of General Prosecutor at the version of Law no. 3/2016 before the amendments operated by [Law no. 128/2019](#), norms of which were declared partially unconstitutional by the [Decision of the Constitutional Court no. 13/2020](#). Thus, Article 17 of Law no. 3/2016 is proposed in the wording of Law no. 3/2016 before the amendments operated by Law no. 128/2019, with some exceptions:
 - In Article 17 para. (4) the term "competition" has been replaced by the phrase "the process of candidate selection";
 - In Article 17 para. (7) the obligation to pass the polygraph test was excluded;
 - In Article 17 para. (10) the criteria for evaluating candidates for the position of Prosecutor General are detailed - "including according to the professional abilities and skills, integrity and other personal qualities of the candidates".
- c) The exclusion of the provisions related to the dismissal of the Prosecutor General at the initiative of the Ministry of Justice or of the President by repealing article 58 paras. (7), (8) and (9).

In addition to the norms that were declared unconstitutional by Constitutional Court Decision no. 13/2020, the draft law also has amendments that **were not the object of the control of the Constitutionality by the Constitutional Court**.

These include:

- a) Return to the criteria for access to the position of Prosecutor General, including the exclusion of the possibility to participate as a candidate for the position of Prosecutor General for judges, if they have at least 5 years of experience or for lawyers and criminal investigation officers if they have at least 8 years of experience;
- b) Extending the possibilities of access the position of prosecutor without taking the exam before the Graduation Commission of the National Institute of Justice for candidates who have at least 10 years of experience as a prosecutor, whose position ceased for reasons not attributable to them before expiration of 4 years until the date of announcing the contest - completion of article 20 para. (1) with letter e¹);
- c) Tightening the conditions to apply for the position of prosecutor in the specialised prosecutor's offices, being equivalent to the positions of prosecutor in the General Prosecutor's Office and their chief and deputy prosecutors in the territorial prosecutor's offices and in the subdivisions of the General Prosecutor's Office - amendment of article 20 para. (4) and the repeal of para. (4¹);
- d) The extension of the term in which the candidate who wants to be promoted was evaluated from 2 years to 4 years for the positions of prosecutor and from 1 year to 2 years for the positions of chief prosecutor and his deputies - amendment of art. 22 para. (4);

- e) Reintroduction of qualification degrees, which were valid in Law no. 294/2008 on the Prosecutor's Office - introduction of article 28¹;
- f) Simplification of the transfer procedure of the prosecutor, by examining the request directly by the CSP - amendment of article 22, para. (5) lit. b), article 54 para. (1);
- g) Exclusion of the restriction for the members of the SCP to run for the position of prosecutor, including the General Prosecutor within 6 months after the expiration of the mandate - amendment of article 75 para. (2), **which contradicts the provisions proposed for Article 17 para. (1) lit. e)**, which imposes this restriction on the members of the SCP when applying for the position of General Prosecutor;
- h) Clarification of the right of the SCP member after the expiration of the mandate to return to the previous position or to another vacant position of at least the same administrative level - completion of article 75 with para. (3);
- i) Clarification that among the members of the boards of the SCP cannot be the Prosecutor General, his deputies, as well as the persons assimilated to the deputies of the General Prosecutor - the chief prosecutors of the specialised prosecutor's offices – completion of article 83 with para. (11);
- j) Setting the sanction of termination of mandate when the member of the SCP becomes the General Prosecutor, his deputy, as well as the head of the specialised prosecutor's office, but also when exercising the interim function - completion of article 83 para. (7). This rule may be too harsh in the case of the interim function, which in the case of deputy chief prosecutor of the specialised prosecutor's office can be appointed only for a short time by order of the Prosecutor General, and then be completed by competition established for that position, giving the possibility to the Prosecutor General to exclude from the composition of the SCP an unwanted member. The establishment of the obligation to suspend the position of member of the SCP is much more proportionate.
- k) Assimilation at the level of monthly increase for the qualification degree for prosecutors with judges - amendment of Annex no. 2 of Law no. 270/2018. The change is not complete, as not only the title Qualification grades for judges and prosecutors needs to be changed, but also subsequent lines, by setting qualification grades from 1 to 5 for prosecutors, following the example of prosecutor grade 1-5 or higher. These changes require an adjustment in the light of the procedures conferring these qualifications, and the option set out to introduce Article 28¹ is to be supplemented by provisions relating to the competences of the Qualification Board. Leaving it to the discretion of the SCP to decide on the conferment of degrees, without establishing some general provisions in the Law, confers too much margin of discretion to the Council.

2. Analysis of the provisions of the draft

2.1. Area of regulation of the draft law

The area of regulation of the draft Law **exceeds the area initially stated by the Ministry of Justice** - the adjustment of Law no. 3/2016 to the provisions of the Decision of the Constitutional Court no. 13/2020. Thus, the draft law also intervenes in some areas related to the career of prosecutors, including access to the position of prosecutor based on seniority, introduction of qualifications, composition of members of the boards within the SCP, etc.

On the other hand, some of the proposed amendments that go beyond the findings of the Constitutional Court are unjustified, and some are even dangerous. Thus, the reintroduction of

the condition for the Prosecutor General to have experience as a prosecutor is contrary to the Opinion of the Venice Commission, which in 2019 did not criticise the exclusion of this condition¹.

The possibility of candidates to compete for the position of prosecutor for former prosecutors with over 10 years of experience, without participating in the NIJ exam, contradicts the entire system promoted in the last decade of standardising the admission process in courts and prosecutors' offices. It is not justified in any way, especially considering that the competitions for the position of prosecutor are organized by the SCP several times a year, as well as the examinations at the NIJ. It seems that this change is dictated by opportunities provided by the current arrangements.

The draft excludes the special requirements to be appointed prosecutor in specialised prosecutor's offices (art. 20 para. (4¹)). This change is not motivated in any way in the justification to the draft law. The amendment of art. 20 para. (4¹), in the part referring to the criminal investigation officers is reasonable. However, the total exclusion of paragraph (4¹) cannot be accepted, because the prosecutors from the specialised prosecutor's offices are assimilated to the prosecutors from the General Prosecutor's Office. Appointment to such positions can only be made by transfer and only for prosecutors with a few years of experience.

According to the Law on the Prosecutor's Office, the transfer of the prosecutor, regardless of the level, is done through a competition. Any prosecutor can participate in this contest. The transfer of the prosecutor from a hierarchically superior prosecutor's office to a lower-ranking prosecutor's office, or at the same level without competition would distort the entire transfer system. This would in fact give a greater share to prosecutors in hierarchically superior prosecutor's offices, which is not correct. Moreover, the completion essentially provides that a special procedure will be introduced for such transfers (amendment of art. 54). It can only erode the independence of prosecutors and strengthen the role of the Prosecutor General. Such an amendment is contrary to the concept underlying the Law on the Prosecutor's Office, which sought to dilute the powers of the Prosecutor General.

The exclusion of the ban of SCP members to participate in competitions within 6 months after the expiration of the mandate is problematic. It aims to exclude conflicts of interest and to guarantee the fairness of promotion competitions. A similar ban was introduced in 2018 for SCM members. This change is not justified in any way. On the other hand, art. 75 para. (3) of the Law on the Prosecutor's Office is amended so that, at the end of the term, the SCP member is reinstated in the position he held until the election to the SCP or in a similar position, including management. This change is odious, nullifying the rule that management positions are held only by competition, and at the time of election to the SCP the management positions held by elected members of the CSP are brought out to competition. This change will introduce chaos into the system, given the influence that SCP members have under the law. It can only be justified by current interests, especially considering that, according to the current law, the members of the SCP, from the expiration of their mandate, can choose any vacant position of prosecutor in the system.

The qualifications of judges are honorary and are reminiscent of the Soviet system. Their existence at the moment is not justified in any way and must be excluded. Special ranks of prosecutors were excluded in 2016, in order to increase the independence of prosecutors and put more emphasis on assessing their performance. The reintroduction of special ranks is justified only by additions to the remuneration of prosecutors. During low budget revenues, such a change, in addition to being unconvincing, can be detrimental. On the other hand, it cannot be said that, compared to the average salary in the economy, prosecutors in the Republic of Moldova are paid

¹ For more details, please consult: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)034-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)034-e)

worse than the European average. On the contrary, the salaries of Moldovan novice prosecutors are 25% higher than the Council of Europe average².

We consider that any aspect not related to the decision of the Constitutional Court requires a very thorough analysis and a systemic approach. For this reason, we strongly recommend excluding them from the draft law and returning to their analysis in a separate draft law. Also, the haste with which these changes are promoted is not justified, as these changes have not been subjected to a process of institutional analysis within the prosecution bodies, and the changes are not based on plausible arguments to support the them.

2.2. Relevant provisions in the sense of the Decision of the Constitutional Court no. 13/2020

The draft law offers the following legal solutions for the 3 issues examined by the Constitutional Court:

2.2.1. The Ad interim of the Prosecutor General it is established by the SCP, having the entire margin of discretion in organising the selection process among the incumbent prosecutors and based on the requirements established for the position of Prosecutor General.

In essence, the solution offered by the provisions of article 17 paras. (15) and (16) involve a process of selecting the candidate for the position of interim Prosecutor General. In this regard, taking into account that the SCP must initiate the competition for the vacant position of Prosecutor General, **we consider it inappropriate to entrust the SCP with the function of launching another selection process for the position of interim Prosecutor General**, especially if the terms of election of an interim Prosecutor General **could coincide or be only slightly shorter** than the actual selection of the Prosecutor General.

The legal solution offered by the draft law could delay the selection of the interim Prosecutor General until the selection and appointment of the Prosecutor General himself.

Analysis of available alternative options

Currently, the provisions of article 11 par. (2) of Law no. 3/2016 stipulate that the General Prosecutor appoints deputies within 3 months from his/her appointment, establishing their areas of competence, as well as the order of substituting his/her functions in case of absence or impossibility to exercise the functions. Article 11 para. (2) does not offer a legal solution to the status of the Deputy Prosecutor General in case the position of General Prosecutor becomes vacant.

On the other hand, the provisions of article 11 par. (21) and (22) are not applicable by virtue of the Decision of the Constitutional Court no. 13/2020.

Potential available solutions

1. Empowering the General Prosecutor with the function of establishing the succession of the interim in case of vacancy of the position of General Prosecutor

The first solution, the simplest from a legislative point of view, but which also ensures continuity in the process of managing the activities of the General Prosecutor's Office, is to empower the

² For details, please consult: <https://crjm.org/en/justitia-din-republica-moldova-salariile-judecatorilor-si-procurorilor/>

Prosecutor General himself with the function of establishing the succession of acting Deputy Prosecutors, if the position of Prosecutor General becomes vacant.

This solution has two major risks:

- a. The current procedure for appointing Deputy Prosecutors General does not require any verification of the integrity of the proposed deputies, which may lead to the appointment of persons who are compromised or who affect the image of the Prosecutor's Office.
- b. The establishment of the interim position of the Prosecutor General himself by the Prosecutor General may perpetuate the negative effects on the Prosecutor General's Office, especially if the Prosecutor General resigns in the face of public pressure on suspicions of lack of integrity.

At the same time, Article 18 para. (4) of the Law on the Prosecutor's Office establishes that the mandate of the deputies ends with the end of the mandate of the Prosecutor General, who are in office until the appointment of the deputies of the new Prosecutor General.

2. Adjusting the current procedure for appointing the interim Prosecutor General to the rigors established by the Decision of the Constitutional Court

The second solution is to keep the current mechanism of appointment of the interim Prosecutor General, with its adjustment to the requirements imposed by the Decision of the Constitutional Court no. 13/2020, in particular paragraphs 71, 73 and 74 of the Decision. In this sense, the second option would involve:

- a. Establishing a reasonable term for the SCP for the appointment of an Interim Prosecutor General;
- b. Exclusion of the option for the appointment of the candidate by the Parliament in case the SCP does not respect this term, in order to avoid the politicisation of the Prosecutor's Office;
- c. Establishing a sanction for the SCP for non-compliance with the terms provided by law, namely,
- d. Establishment of another entity that will ensure the selection of the Interim Prosecutor General, composed of representatives of the SCM, National Integrity Authority (NIA), Moldovan Bar Association and civil society, who will propose the candidacy of the President of the Republic of Moldova for appointment, and the SCP is required to issue an opinion on the candidate proposed by the selection committee.

This solution takes into account the arguments of the Constitutional Court related to ensuring a reasonable time for the SCP but also to excluding the influence of politics on the appointment of the interim Prosecutor General.

At the same time, the solution involves a major risk of unconstitutionality, related to non-compliance with the primary position held by the SCP in appointing the Prosecutor General, which was considered by the Constitutional Court to be equivalent to the interim Prosecutor General.

3. Adjustment of the time-limits from Law no. 3/2016 related to the procedure of appointment of the General Prosecutor in case of vacancy

A third solution, which excludes the need to appoint an interim General Prosecutor, is to establish more precise time limits in the text of the Law no. 3/2016 related to the selection and appointment of the Prosecutor General. Such a solution, coupled with the first option of establishing the interim position by the Prosecutor General himself, will exclude the need to regulate the position of interim Prosecutor General.

Law no. 3/2016 in the wording before the amendments operated by Law no. 128 of 16.09.2019 set two deadlines: (1) at least one month for candidates to submit applications and (2) a period of 20 days from the deadline for submission of applications, within which the SCP was to publish the list of candidates who will be invited for the interview. Other terms were at the discretion of the SCP, which could be provided for in the Regulation approved by the SCP.

Thus, it was apparent from the rules before the amendments, which were declared partially unconstitutional, that the competition was strictly governed by the following two time-limits:

- a) 1 month for submitting the files by candidates;
- b) 20 days for the publication of the list of candidates for the interview.

The following are not covered by terms regulated by law:

- a) As soon as the vacancy for the position of Prosecutor General, SCP announces the public competition,
- b) In what timeframe are the interviews organised, and
- c) In what term the candidate is proposed for the position of General Prosecutor to the President of the Republic of Moldova.

Thus, if a term of 15 days is set to announce the competition from the date of the vacancy of the position of General Prosecutor, and a maximum term of 7 days for organizing the interviews and a term of 3 days for submitting the candidate selected by the SCP, taking into account the terms provided in Law no. 3/2016 before the amendments of 16.09.2019, the selection process of the Prosecutor General would involve a timeframe of appointment of up to 3 months from the occurrence of the vacant position, which could be extended by almost another month if the President of the Republic of Moldova rejects the candidacy proposed by the SCP and this is repeatedly proposed.

In the event of indisputable information on the candidacy of the Prosecutor General proposed by the SCP, the terms could run again, and that could extend the selection process up to half a year, if a candidacy proposed by the SCP was rightfully not accepted by the President of the Republic of Moldova to be appointed by Presidential Decree.

The alternative solution proposed to be promoted in the bill

We consider the following legal solution to be the most reliable:

1. Completion of art. 17 with the above-mentioned time limits at each stage of the selection of the Prosecutor General, to ensure that the selection and appointment process is not delayed. According to the analysis presented above, the total term of appointment would not exceed 3 months.
2. Establishing the competence of the SCP to appoint one of the Deputy Prosecutors General as interim Prosecutor General within a reasonable time, but short enough to ensure the continuity of the activity of the General Prosecutor's Office. A reasonable time would be 5-10 days, taking into account the time required to convene the SCP.
3. In addition, during the period until the summoning of the SCP and / or in the absence of an action from the CSP, the Deputy Prosecutor General with the most extensive experience working in the prosecutor's offices, takes over the mandate of interim General Prosecutor from the moment

of vacancy of Prosecutor General. Thus, it will be ensured that the administrative decisions will be taken without delay, until the election by competition of a Prosecutor General.

In addition, in order to avoid cases where the interim Prosecutor General influences the selection process of the Prosecutor General, we suggest excluding the Interim Prosecutor General from the competition. This recommendation is based on the past experience of electing the former Prosecutor General, who before the competition held the position of interim Prosecutor General.

2.2.2. Candidates for the position of Prosecutor General

The draft law provides for the return to the process of selection and appointment of the Prosecutor General in the version of article 17 of Law no. 3/2016 before the amendments operated by Law no. 128/2019, with some adjustments. Thus, among the changes we find the exclusion of the possibility to run for the position of Prosecutor General for judges who have at least 5 years of experience and for lawyers and prosecuting officers who have at least 8 years of experience in their field.

We consider the exclusion of these categories of candidates counterproductive, as they limit from the list of potential candidates to the position of Prosecutor General. On the other hand, keeping the position only for career prosecutors involves risks of corporatism among the General Prosecutor's Office, limiting the position of General Prosecutor only for candidates who have had at least 5 years of experience in the prosecutor's office.

We **recommend** keeping the current wording of Law no. 3/2016 article 17 par. (1) lit. a): "a) has at least 10 years' professional experience in the field of law, of which at least 5 years as a prosecutor or judge or 8 years as an attorney or criminal investigation officer;"

At the same time, we **support** the changes introduced in Article 17 para. (4), (7) and (10), based on which some aspects related to the competences of the SCP are clarified - the organisation of the competition (paragraph (4)), the exclusion of the polygraph test (paragraph (7)), and the establishment of the criteria evaluation for candidates (paragraph (10)).

We recommend completing the provisions of article 17 par. (10) with the following provisions **"Each member of the Board will justify the score offered, and the disproportionate score, if it is 50% higher or lower than the average of the other scores offered, will not be taken into account. The score and justification will be made public on the website of the Superior Council of Prosecutors after the end of the competition."** These provisions are necessary to avoid cases where on the one hand the selection takes place with the application of a disproportionate score, and on the other hand, it is not always justified. We consider it essential to include these provisions, especially in the light of public competitions that have been organised in recent years in the public sector, where suspicions of intentional application of the disproportionate score and lack of justification of the score offered have persisted.

We also recommend adjusting the provisions of the draft law, as the rules proposed in Article 17 para. (1) lit. e) are contrary to those of article 75 par. (2). Thus, we recommend the exclusion of point 12 from the draft law related to the amendments to para. (2). The rule establishing a period of 6 months between the term of office of a member of the SCP and the competition for the position of Prosecutor General needs to be maintained in order to exclude the risks of influencing the competition for the position of General Prosecutor.

2.2.3. Other provisions in the draft law

The provisions of point 13 of the draft law establish a sanction which is too harsh in the case of members of the boards within the SCP - namely the proposed amendments to Article 83 para. (7). We propose the reformulation of the proposed provision: "or at the appointment in one of the functions mentioned in par. (11). In the case of ensuring the interim functions mentioned in par. (11), membership in boards shall be suspended for the duration of the interim position. "