

# REFORMING THE FUNCTIONS OF UKRAINE'S PUBLIC PROSECUTOR'S OFFICE: NEW CONSTITUTIONAL PROVISIONS AND THEIR (PENDING) IMPLEMENTATION<sup>1</sup>

## EXECUTIVE SUMMARY

Until 2016, the scope of powers of Ukraine's Public Prosecutor's Office (PPO) was based on the old Soviet model under which that Office enjoyed broad powers of 'general supervision' of legality over all actions of state bodies and private persons. Rather than the limited sphere of criminal investigation that lawyers elsewhere associate with the term 'public prosecution', the Soviet-style prosecutor ('prokuror') could control and investigate any state body, any private body and any individual at any point at his or her own discretion.

This Soviet concept of the office cut across the separation of powers and in a corrupt environment became a tool of abuse: no better way to blackmail political opponents than unleashing the prokuror and no easier way for his office to collect bribes from someone than to threaten them with legal proceedings.

Ukraine's Parliament made a big step forward when it abolished this power of 'general supervision' in the constitutional amendments of 2016 despite the stiff resistance from the PPO itself and some politicians. The resistance to these changes is now carried out through the drafting of ordinary legislation, which may reverse progress at the constitutional level through the adoption of laws that do not reflect the constitutional text.

The PPO now has three functions :

- 1) pleading criminal charges;
- 2) organising and procedurally managing pre-trial investigations, deciding on other legally determined issues during criminal proceedings, and supervising covert and other investigative and search activities conducted by law enforcement agencies; and
- 3) representing State interests in exceptional cases and under the procedure defined by law.

According to the transitional provisions of the Constitution, the PPO temporarily retains some supervisory (those concerned with the deprivation of personal liberty) and investigative functions until they are overtaken by other competent authorities that are yet to be created.

The abolishment of the "general supervision" is a breakthrough but the battle is not yet won. The new constitutional provisions need to be implemented with more legal detail in ordinary laws (especially the law on the PPO and the Criminal Procedures Code) and applied by the state.

In particular, the ambiguous language of the PPO's function to "organise and procedurally manage" pre-trial investigations opens the door for an expanded scope of authority of the PPO as long as they remain at least tenuously related to pre-trial investigations.

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The amendments to these laws is the next big challenge in limiting the PPO's role to what is strictly necessary. The draft law no. 5177, registered with Parliament in September 2016, includes proposals on how to change ordinary legislation to implement the constitutional amendments. Its content alarmed analysts as it seemed to add to the powers of the PPO beyond the spirit and text of the constitutional amendments and the recommendations of the Council of Europe.

Therefore, it is of crucial importance that the legal developments in the technical sphere of procedural law be closely monitored by civil society actors, experts and the international community.

## 1. BACKGROUND

The Public Prosecutor's Office of Ukraine was created in 1991 when Ukraine gained its independence. That year, Ukraine's first Law on the PPO was adopted. Following the Soviet tradition, it established a wide scope of prosecutorial powers.

Until 2014, the PPO enjoyed the function of the so-called "general supervision": "Supervision of the compliance with law" by all public authorities, as well as legal entities and individuals. Article 1 of the 1991 Law on the PPO described the main task thus:

The public prosecutor's supervision of observance and the correct application of the Laws by the Cabinet of Ministers of Ukraine, the ministries and other central executive bodies, bodies of state and commercial governance, the Council of Ministers of the Autonomous Republic of the Crimea, local councils, their executive bodies, military units, political parties, public organisations, grass-roots movements, companies, institutions and organisations, irrespective of their form of ownership, subordination and appurtenance, officials and citizens, shall be performed by the Prosecutor General of Ukraine and subordinated prosecutors.<sup>2</sup>

This function gave the PPO practically unlimited powers and thus was the main tool of influence at all levels. A prosecutor could initiate a "prosecutorial inspection" of any entity, enter any organisation or enterprise and check documentation, etc. without a court warrant, just by showing a prosecutorial ID. As a result, a prosecutor could issue the so-called "document of the prosecutor's reaction" or "improvement notice" which needed no approval by a court and required immediate compliance. A prosecutor could issue a notice imposing sanctions of non-criminal character, to the extent of closing a business.

Furthermore, the PPO could initiate an administrative or criminal case based on the results of such inspections and then submit all gathered information, materials, and

documents as evidence, even though they had been collected outside of an official procedure and without any court warrant.

Under Article 9 of the 1991 Law on the PPO, the Prosecutor General and his/her deputies had a right to participate in meetings of Ukraine's Parliament and its bodies, the Cabinet of Ministers of Ukraine and other public and municipal authorities, which was obviously at odds with the principle of separation of powers.

The general supervision function turned the PPO into a tool of corruption, usually connecting law-enforcement, local/regional administrations, courts and big businesses, in which regional PPOs played a leading role under the supervision of the Prosecutor General. Throughout Ukraine's history, prosecutors have been key figures in such schemes. Therefore, it is hardly surprising that the function of general supervision was doggedly defended both by the PPO and many politicians.

In 1995, Ukraine joined the Council of Europe (CoE), *inter alia* assuming the obligation to reform the PPO in compliance with the CoE standards. Ukraine committed to curtail the PPO's functions significantly and deprive it of its powers concerned with criminal justice but did not follow through on these commitments.

The adoption of Ukraine's Constitution in 1996<sup>3</sup> with a separate Chapter "On the Public Prosecutor's Office" did not represent progress, as the general supervision clause was reformulated but not changed substantially.

In 2013, the Ukrainian government presented a Law on the PPO that marked progress and was overall positively reviewed by the Venice Commission (VC). The recommendations of the VC were mostly taken into account and on 31 October the draft was accepted for further work by Ukraine's Parliament, the Verkhovna Rada (VR).<sup>4</sup> On 14 October 2014, after long consultations and under the reform pressures of the Maidan revolution, the significantly amended bill was finally adopted and signed into law.<sup>5</sup> The 2014 law did not include 'general supervision'.

On 2 June 2016, Ukraine's Parliament adopted the Law of Ukraine "On the Amendments to the Constitution of Ukraine (Regarding the Judiciary)" that entered into force on 30 September 2016. The amendments predominantly concerned Ukraine's courts and judges, however, they also touched on the PPO's competences and abolished its general supervision function.

To follow the constitutional changes, numerous respective laws have to be revised, namely laws on the PPO, judiciary, Criminal Procedure Code, etc. On 23 September 2016, a draft law no. 5177 suggesting changes to certain laws to bring them in line with the 2016 constitutional amendments

<sup>2</sup> Verkhovna Rada of Ukraine, "Law of Ukraine on the PPO," 5 November 1991 (in Ukrainian) <<http://zakon2.rada.gov.ua/laws/show/1789-12>> (accessed 03.07.2018).

<sup>3</sup> Verkhovna Rada of Ukraine, "The Constitution of Ukraine," 28 June 1996 (in Ukrainian) <<http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>> (accessed 03.07.2018).

<sup>4</sup> Verkhovna Rada of Ukraine, "Draft Law on the PPO," 5 November 2013 (in Ukrainian) <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=3541&skl=8](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=3541&skl=8)> (accessed 03.07.2018).

<sup>5</sup> Verkhovna Rada of Ukraine, "Law of Ukraine on the PPO," 14 October 2014 (in Ukrainian) <<http://zakon3.rada.gov.ua/laws/show/1697-18>> (accessed 03.07.2018).

was submitted to the parliamentary committee. On 10 April 2017, the committee decided to return the draft for further revision. The draft has been heavily criticised for going beyond the necessary changes, adding to the powers of prosecutors in criminal proceedings, and contradicting recommendations of the VC.

## 2. CONSTITUTIONAL REFORM OF 2016 AND ITS IMPLEMENTATION

The main changes in 2016 to the constitutional provisions on the role and function the PPO, are the following:

- deleting a separate Chapter “On the PPO” and moving respective provisions to the “Judiciary” Chapter;
- abolishing the function of representing citizens' interests in courts (*recommended by the VC*);
- abolishing the supervision over the observance of laws in the execution of judicial decisions in criminal cases and also in the application of other measures of coercion related to the restraint of personal liberty of citizens (*not a part of VC recommendations*); and
- abolishing supervision over the respect for human and citizens' rights and freedoms and over the observance of (human rights) related laws by public (national and municipal) authorities (*recommended by the VC*).

The current version of Ukraine’s Constitution vests the PPO with three functions:

- 1) support of public prosecution in courts;
- 2) organisation and procedural management of pre-trial investigations, deciding on other legally determined issues during criminal proceedings, and supervision over covert and other investigative and search activities conducted by law enforcement agencies; and
- 3) representation of state interests in exceptional cases and under the procedure defined by law.

### 2.1 PROVISIONS ON THE PPO IN THE JUDICIARY CHAPTER OF UKRAINE’S CONSTITUTION

To delete the separate chapter in the constitution on the PPO and place the respective provisions in the chapter on judiciary was a rather symbolic, but nonetheless important, change. For a while the Ukrainian expert community called for depriving the Prosecution Services of its assumed “fourth branch” status and placing it either as part of executive branch (within the Ministry of Justice) or as part of judiciary. By defining the PPO as a part of the judiciary, law-makers also aimed to emphasise that the PPO should not be mistaken for a law-enforcement agency.

### 2.2 PPO’S REPRESENTATION OF STATE INTERESTS

According to the new constitutional provisions the PPO can represent the state interests in exceptional cases and under the procedure defined by law. Such exceptions and procedure are now envisaged in the draft law no. 5177. It suggests amending Article 23 (“Representation function”) of the PPO Law to include such representation in cases

when “*a public interest protected by the state*” is violated, in particular when international obligations are threatened.

The suggestion was criticised by the CoE as exceeding the proper scope of representing the state. However, in this case there are hardly any reasons to suspect any corrupt or abusive agendas behind the suggestion. It should rather be regarded as an attempt to fill the legal gap which appeared after the PPO was denied the supervision of places of deprivation of liberty (*see below*). It aims to give a prosecutor the right to act in cases not covered by the future mechanism of double penitentiary inspections (as will probably be the case with orphanages, psychiatric hospitals, social care homes, centres for holding foreigners under the alien legislation, etc). As the only practical possibility at issue consists of filing a lawsuit, the proposed “public interest” provision does not seem to create any serious risk.

The draft law no. 5177 also proposes amendments to the Code of Administrative Offences to partially regulate the participation of a prosecutor in certain administrative proceedings (trials of minor offences, not leading to criminal record), by way of “representing state interests” in the court. Previously, this involvement had been included within the scope of the supervision power. Technically, participation in hearings on administrative (minor) offences does not fall within the representation of state interests. However, the Code, as well as several other laws, including the Law on Fighting Corruption, *require* that prosecutors take part in certain trials, for instance where courts consider administrative responsibility for accepting gifts, failing to resolve a conflict of interest, etc. There is a legal uncertainty here. As no corruption risks can relate to interpreting state representation in this way, the mentioned legislative extension of the PPO’s powers may be acceptable.

However, another provision of the draft law no. 5177 suggests reinstating a prosecutor’s right to represent state companies in courts, which is clearly against the grain of what the Venice Commission has recommended. Quite predictably, this suggestion has drawn much criticism as compared to other provisions of the pending implementation bill.

### 2.3 SUPPORT OF PUBLIC PROSECUTION IN COURTS

The only change in this function is semantic: the term “state prosecution in court” (literal translation) was replaced with “public prosecution in court.” The exact purpose of this change is not clear, given that in Ukraine the state has the legal monopoly on pressing criminal charges. This minor change is inconspicuous for those who use the English translation of the Ukrainian Constitution (for instance, the Venice Commission), as “public prosecution” has always been the standard translation for the relevant provision before and after the discussed constitutional amendments and could not presumably imply any wrong meaning.

However, the change of this one word necessitates:

- extensive legislative amendments to the Criminal Procedure Code (CPC) and all other laws related to criminal proceedings, investigation, operative and search activity, etc. as the old term (“state prosecution”) is used in all of them;

- a clear-cut definition of “public prosecution,” given the glimmering discussions on introducing the institute of “community” or even “private prosecutors”; and
- sorting out the terminological confusion relating to a prosecutor’s duty to prove a suspect’s guilt in a court (what “support of accusation” actually means in the Constitution) as opposed to some specific aspects of criminal procedure which differentiate “private/public charges.”

## 2.4 ORGANISATION AND PROCEDURAL MANAGEMENT OF THE PRE-TRIAL INVESTIGATION, DECIDING ON OTHER LEGALLY DEFINED ISSUES IN THE COURSE OF CRIMINAL PROCEEDINGS, AND SUPERVISION OVER COVERT AND OTHER INVESTIGATIVE AND SEARCH ACTIVITIES CONDUCTED BY LAW-ENFORCEMENT BODIES

### - *Organisation and procedural management of pre-trial investigations*

The very vague wording of prosecutors’ new function, “organisation and procedural management of pre-trial investigations”, in fact creates the possibility to modify the actual scope of prosecutors’ powers related to criminal investigations by amending laws. The ambiguous constitutional provision may be read as potentially vesting the PPO with *de facto* investigative powers. The draft law no. 5177 has made use of this wording to substantially expand the capabilities of prosecutors in pre-trial investigations. The legislator invented the concept of “procedural management” and, pretending there was no big difference between “managing” and “supervising,” suggested to expand the investigation and supervisory powers of the PPO. For example, the draft law no. 5177 proposes adding a new paragraph 7 to Article 36 of the Criminal Procedure Code (CPC), regulating the status of the prosecutor, giving the heads of the PPOs and prosecutors the prevailing right to:

- 1) request inspections of criminal proceedings, documents, materials and other information on criminal offenses committed, the course of the pre-trial investigation, and identification of culprits;
- 2) revoke illegal and unjustified resolutions of investigators and prosecutors;
- 3) collect explanations from citizens, state officials, functionaries of any enterprise, institutions and organisations concerning received claims and reports, revealed facts of offences, and participants of criminal proceedings;
- 4) initiate disciplinary proceedings against any investigator, prosecutor or other law-enforcement official; and
- 5) check the application of requisite legal routines related to receiving, registering and reacting to claims and reports of committed or continuing crimes.

Formally, this suggestion is in line with the vague new notions of the “organisation of pre-trial investigation” and “deciding on other legally defined issues in the course of criminal proceedings” (see below). In substance, the suggested amendment seems to grant heads of prosecution offices unreasonably broad powers which,

furthermore, are very general in scope and not limited to ongoing investigations. This drawback is exacerbated by the obligation of public servants to comply with legitimate requests of prosecutors as provided in the Code of Administrative Offences. At the same time, citizens are not required to comply with such requests. The suggested amendment may also seriously impair procedural independence of investigators and cause excessive centralisation.

### - *Deciding on other legally defined issues in the course of criminal proceedings*

Placed separately, outside the new function of procedural management, another new power, “to decide on other issues in the course of criminal proceedings as defined by law”, is so unclear that, in fact, it risks destroying the positive effect of eliminating the supervisory competences of the PPO, in particular the “*supervision of the observance of laws by bodies conducting investigative and search activities, inquiries and pre-trial investigations.*” The wording of the new constitutional provision can be interpreted in an infinite number of ways to give prosecutors whatever powers as long as one can think of at least tenuous links to criminal proceedings. Moreover, this choice of words can be read as encompassing the execution of sentences and thus, reinstating some supervision over the penitentiary system.

The draft law no. 5177 actually confirms these assumptions. It suggests amending the CPC (article 3, part 1, para. 10) to include the execution of sentences into the definition of criminal proceedings along with the pre-trial investigation, public accusation and other movements of a criminal procedure. On the one hand, the CPC does include articles related to the execution of sentences, hence it might be formally regarded as a part of criminal procedure. On the other hand, it is obvious that the true purpose of the suggestions is to retain the penitentiary system within the PPO’s purview, at least partially. Furthermore, the draft law no. 5177 aims to amend Article 26 of the PPO Law by literally repeating the powers that prosecutors used to have for supervision of the penitentiary system. The legislator is so brazen in their attempt at keeping the supervisory function of the PPO that they have included these amendments in the draft law despite its complete lack of bona fide compliance with the new text of the Constitution.

### - *Supervision of covert and other investigative and search activities conducted by law-enforcement agencies*

The previous formulation of this function was “supervision of the observance of laws by bodies that conduct investigative and search activities, inquiries and pre-trial investigations.” The new wording is more precise. However, the substitution of the “supervision over observance of laws by bodies” with the “supervision over activities of bodies” may cause additional uncertainty.

Furthermore, the reason for separating “covert” activities among other investigative operations is unclear. The only reason one can think of would be the political will to retain covert activities within the PPO’s purview in a situation when the proper use of this tool is being debated. In any case, it makes no sense: the Constitution already

prescribes prosecutorial supervision for all investigative and search operations whether covert or open.

The goal of introducing the novel term of “law enforcement agencies” instead of the previous term “bodies that conduct detective and search activities, inquiries and pre-trial investigations,” is unclear. The CPC enumerates all investigative bodies. This insignificant amendment necessitates revision of *all* legislation related to detective activities (the CPC, Law on Operative and Search Activity, laws on police, Security Service, etc.). There is a need for a clear legal definition, especially in the situation when various national militia formations are multiplying and claiming protection of law and order in Ukraine.

The draft law no. 5177 suggested wider interpretation of what pre-trial bodies are supposed to do, adding, besides, search and detective actions, *checking the information written in crime reports* (amendment to the Article 41 of the CPC). While it is true that a large number of such reports are at least inaccurate, it must be highlighted that the law permits checking such information only after the report of a crime has been registered with the Unified Register of Pre-Trial Investigations; otherwise, this provision will be at odds with the CPC. The duty of immediately registering each report in a single register was indeed one of the main ideas of the 2012 CPC, which fundamentally changed the post-Soviet way of investigating crimes, introducing more adversarial elements and accountability into the criminal procedure. The duty means that all procedural actions should be conducted in the course of a registered proceeding and under judicial control.

Going further, draft law no. 5177 suggests the right of an informant to receive confirmation of the acceptance and registration of his crime report and of *“the decision made upon the results of the verification of the information indicated in the report”* (amendment to Article 60 of the CPC, para 1). As the one mentioned above, this suggestion contradicts the principle of the immediate registration of all crime reports before taking any investigative measures.

These risks may be exacerbated by otherwise innocuous suggestions to Article 93 of the CPC (“Collection of Evidence”): if implemented, these suggestions taken together may authorise the use of evidence collected prior to the registration of criminal proceedings. Without the suggested amendments to the Articles 41 and 60, there seems to be no problem with the latter. However, if evidence is expanded with the “results” of verifying crime reports *before* registering them, the whole progressive concept behind the 2012 CPC will be undermined.

## 2.5 INTERIM “SUPERVISION” OF PLACES OF DEPRIVATION OF LIBERTY

This function charged prosecutors with regularly inspecting all penitentiary institutions or other places of detention and granted them the right of issuing “notices of immediate release” should they find that a person had been detained unlawfully. The constitutional amendments eliminated this function allowing the PPO to “continue performing, in accordance with standing laws, the function ... of the supervision over the observance of laws in the enforcement of judgments delivered in criminal cases, as well as in the application of other coercive measures related to the

restraint of personal liberty of individuals – until the law on the establishment of the double system of regular penitentiary inspections enters into force” (Transitional Provisions, Part 9 of the Constitution of Ukraine).

Although not a requirement of the VC, the removal of this function can be viewed as a progressive step towards limiting the powers of the PPO in general, provided that the relevant responsibilities will be duly transferred to the properly functioning double system of regular penitentiary inspections. However, the future penitentiary inspections are not supposed to control places of detention for minors, psychiatric wards, social care homes, detention centres for irregular migrants and some other detention places that also require supervision. The Ombudsman’s Office has emphasised this legal gap on numerous occasions. This function had never been “lucrative” for prosecutors but had really benefited detainees as penitentiary institutions always had to be ready for random prosecutorial inspection. Therefore, at the moment, it is hard to predict whether the elimination of this function will lead to any positive results. The latter seem to completely depend on the efficiency of the future non-prosecutorial mechanism for controlling the penitentiary establishments.

## 3. DELIMITATION OF INVESTIGATIVE POWERS: STATE OF PLAY

Before the 2012 CPC, the PPO had the power to directly investigate criminal cases. This function was heavily criticised, as it was combined with the function of supervising investigations conducted by other agencies. The Prosecutor General’s Office (PGO) and regional PPOs still enjoy the power to investigate crimes in accordance with the Transitional Provisions, Part 9, of Ukraine’s Constitution: “The Public Prosecutor’s Office shall continue performing, in accordance with standing laws, the function of the pre-trial investigation until the corresponding bodies, which will take over these functions, start operating...”. This provision is explicated in the CPC, Article 216, which regulates the investigative jurisdiction, and the Transitional Provisions of the CPC.

Article 216 confers investigation of crimes upon the National Police, Security Service, tax authorities, National Anti-Corruption Bureau of Ukraine (NABU) and State Bureau of Investigation (SBI).

According to the Transitional Provisions of the CPC, the PPO should be deprived of any investigative jurisdiction from the day when the SBI starts working but not later than five years after the CPC enters into force, which was 20 November 2017.

It was expected that the SBI, responsible for investigating any crimes committed by the highest officials, judges, or law enforcement officers, would have become functional long before the end of 2017. The SBI was finally established in late November 2017 and the highest officials of the new body were appointed according to the results of open competition. In December the Cabinet of Ministers adopted the structure of the body whose activity is finally, if slowly, unfolding.

At that same time, the Transitional provisions of the CPC provide that *after* the SBI takes over the investigation of crimes, the PPOs will still be competent to carry on with the pre-trial investigations they have started, but no longer than for two years. After the two-year deadline expires, such investigations are also supposed to be transferred to the SBI. This practically means that the General Prosecutor's Office and regional PPOs can exercise the investigative powers for the ongoing proceedings until 20 November 2019.

Another problem, albeit less critical, is the scramble for jurisdiction between the PPO and NABU. Currently, the CPC ascribes disputes on jurisdiction for the resolution by either the "General Prosecutor (PG) or his/her deputy" (Article 218). Under law, the Head of the Specialised Anti-Corruption PPO, which supervises the NABU, has the status of Deputy PG and, therefore, is competent to distribute criminal cases just like any other of the PGs, in particular the one responsible for the Main Investigation Department. Recently, there have been numerous collisions between resolutions issued by different Deputy PGs regarding the investigative jurisdiction of either the NABU or PGO. Two factors mainly account for this. Firstly, the rules on the NABU's pre-trial jurisdiction are complex with wide possibilities for varying interpretations; besides, the NABU's work necessarily has a pronounced political component, on the one hand; on the other, the Bureau also investigates crimes related to the provision of public services and business. Secondly, there are transitional rules very similar to those connected with the SBI: prosecutors are permitted to proceed with what they have already started even though such investigations normally belong to the NABU.<sup>6</sup>

Draft law no. 5177 addresses this situation by suggesting such provision: "disputes on investigative jurisdiction shall be decided by the PG or Acting PG." The latter means the 1st Deputy PG - or another Deputy if the 1st Deputy is absent - who performs the functions of the PG when the PG is on leave.

This might look like limiting powers of Deputy PGs. However, the PPO Law (Article 17) provides that the PG stands higher to his deputies and his instructions are mandatory for them. Therefore, there seems to be no risk here of changing the distribution of powers as the PG is already legally vested with the final say. The CoE, additionally, commented that, in the vertical organisation of the PGO, the PG is anyway supposed to have his final word in deciding such issues, so there is no need to amend Article 218.

The political battle between the PPO and NABU is apparent in other amendments of draft law no. 5177. For instance, the suggested amendments to Article 545 of the CPC aim to exclude the duty of the PGO and Ministry of Justice to send "to the NABU within 3 days the information received in the course of international mutual legal assistance, related to financial and corruption offences, in the form of an

information note," which would empower the NABU to use mutual legal assistance independently in cases it investigates. The suggested amendment to Article 551 of the CPC ("Request for mutual legal assistance"; part 3) requires that the *NABU inform the PGO of the NABU's requests for international legal assistance*; if adopted, this will mean limiting the procedural independence of the NABU, which is hardly desirable. These and some other provisions manifestly purport to curtail the NABU's ability to use international legal assistance.

To sum up, the PPO seems to be losing its investigative powers, although reluctantly. For this reason, the completion of this part of the functional reform totally depends upon political will and strong pressure by the international community and civil society, which should jointly support the recently established SBI and better the co-operation between the NABU and PGO, which were engaged in a kind of public political struggle throughout 2016 and 2017, with brave statements and numerous press conferences, mutual accusations, and even trolling.

## 4. CONCLUSIONS

Overall it is fairly clear that due to the recent reforms the Ukrainian PPO has significantly lost its political weight and strength. While becoming weaker as a law enforcement agency, it has become somewhat more centralised. The question remains whether the true goal of the reform was simply to weaken this institution or to make it independent, efficient, competent and able to perform its functions in a modern European way.

The 2016 constitutional reform shows the commitment of the Ukrainian authorities to decrease the previously enormous influence of the PPO. The complete abolishment of the general supervision is a major step forward which has long been requested by Ukrainian society and recommended by the Venice Commission. Now, the progressive steps require proper legislative implementation. Currently there is a legal gap because the basic law for the functioning of the PPO has regrettably yet to be adopted. At the same time, the draft law no. 5177, aimed to implement new constitutional provisions on PPO, risks to hold back much of the progress achieved: it contains numerous controversial suggestions and goes far beyond what is required by the constitutional reform. It also conflicts with the opinions of the CoE and civil society.

The abolition of general supervision has been marred by exceedingly blurred new provisions on the role of the PPO in investigations of crimes and similar pre-trial activities. The highly technical sphere of criminal procedure has become a battlefield for power games. Without the general supervision, powers concerned with criminal investigations remain the most obvious (if not the only) way to use the PPO as a political tool. Hence this sphere, although complex and

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<sup>6</sup> There is a similar two-year deadline which is supposed to expire earlier since NABU has already been functional for some time.

arcane, should be closely followed by civil society. The difficulty with this is that the proper role of the PPO in criminal investigations and pre-trial activities is not as straightforward as the previous common disapproval of the general supervision. The PPO should not investigate crimes. Beyond this proposition, however, there remains much place for consensus building on what it should do at the pre-trial stage of criminal prosecutions (if anything).

The main recommendation would be to intensify consultations and secure the immediate legislative implementation of the relevant constitutional amendments. This should be done pursuant to a comprehensive concept of reforming the entire system of justice to make it efficient, professional, and free of corruption and political influences.

It should also be borne in mind that the materialisation or non-materialisation of many risks caused by various arrangements of the PPO's functions and powers largely depends upon the quality of the PPO as an institution and on the quality of individual prosecutors, especially of those in commanding positions. A possible weakness of the passed cardinal reform of the PPO on the constitutional level is the lack of legislative coordination and of institutional readiness to cope with the resulting challenges. The institutional aspect of the reform deserves special attention and will be analysed in a separate DRI briefing paper.

## DEMOCRACY REPORTING INTERNATIONAL

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