

# DEMOCRACY REPORTING INTERNATIONAL

## REFORMING THE PUBLIC PROSECUTOR'S OFFICE OF UKRAINE: INSTITUTIONAL ASPECT<sup>1</sup>

### INTRODUCTION

The Public Prosecutor's Office has traditionally played a significant role in the system of state power within the USSR and, subsequently, in the Post-Soviet countries. Before the reform, the Public Prosecutor's Office of Ukraine ("PPO" or "Prosecution Service") had a large scope of powers within and outside of the criminal system: investigating crimes, supervising all criminal proceedings, representing the state and citizens in courts in non-criminal cases, leading criminal charges in a Soviet-type inquisitorial criminal procedure, and supervising law-enforcement and penitentiary authorities.<sup>2</sup> It also used to exercise the so-called "General Supervision" which gave enormous powers to prosecutors in all spheres of social life and that they often abused. In addition, Ukraine had the highest number of prosecutors per capita among European countries, the prosecution was a military and centralised type of organisation working in an authoritarian style and corruption was widespread. All this required deep functional and institutional reforms of the PPO.

The current role of Ukraine's PPO, its place in the organisation of the Ukrainian state and the functional aspects of its reform have been addressed in a separate DRI briefing paper "Reforming the Public Prosecutor's Office of Ukraine: Functional Aspect." This paper is concerned with the PPO as an institution, i.e. its structure and internal functioning. The current structure of the PPO includes the Prosecutor General's Office (PGO), regional and local PPOs.

### 1. HISTORICAL LEGAL BACKGROUND

The independent Ukrainian PPO was formally created in 1991. In 1995, Ukraine became a member of the Council of Europe (CoE) and assumed the obligation to reform the country's PPO in compliance with the CoE's standards. They include such requirements as the independence of prosecutors, their freedom from political influence, specialisation, proper remuneration, social security, proper initial and continuous training, respect for the separation of powers and such other duties and obligations of both Member States and individual prosecutors.<sup>3</sup>

Although the 1991 Law on the PPO was often changed and numerous new draft laws were proposed, there was no real change. The PPO has always been used as a strong tool of influence, starting from the local level to the national, and therefore there has never been real political will to reform the PPO towards limiting its authority.

In August 2013 another draft law was officially submitted to the Venice Commission (VC), which largely assessed it positively. The recommendations of the VC were mostly taken into account, and the draft was accepted for hearing

---

<sup>1</sup> This DRI Briefing Paper has been prepared by **Natalia Dryomina-Voloc** and edited by DRI legal experts.

<sup>2</sup> For more details please see DRI briefing paper "Reforming the Public Prosecutor's Office of Ukraine: Functional Aspect."

<sup>3</sup> Council of Europe, Rec(2000)19 on the "The Role of Public Prosecution In The Criminal Justice System" and Explanatory Memorandum, <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804be55a>> (accessed 8.10.2018).

by Ukraine's parliament on 31 October 2013<sup>4</sup> and finally adopted as a Law on 14 October 2014.<sup>5</sup>

The new Law introduced numerous institutional novelties, initially aimed at de-centralising and bringing the Ukrainian PPO closer to European standards. Those innovations included a new transparent procedure of initial recruitment of prosecutors by the Qualifications and Disciplinary Commission (**QDC**). Besides, the guarantees of prosecutors' procedural autonomy were increased, measures were taken to better protect the PPO's independence from illegitimate political influences and interferences in prosecutors' work. Such measures included the establishment of self-governance bodies (the National Conference of Prosecutors and the Council of Prosecutors) and annual integrity checks by the Internal Security Unit. The lowest level of PPOs was reorganised into 178 local PPOs (listed as an Annex to the Law), instead of approximately 700 district PPOs.

Despite the existence of a clear roadmap for the reform enshrined in the new PPO Law, relevant political actors lacked a common vision of the future of the institution. Their views often differed heavily from the positions of the civil society, the international community and prosecutors. All kinds of suggestions were tabled: from an instant and radical overhaul of the entire system to delaying or even reversing the reform. There was little public understanding of the institution and its reforms.

On 2 June 2016, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to the Constitution of Ukraine (regarding the Judiciary)"<sup>6</sup> signed by the President on 28 June and officially published on 29 June. On 30 September 2016, the amendments to the Constitution entered into force. To a great extent, the amended text provides for a different status and narrower authority of the PPO. However, nothing is mentioned of the prosecutorial self-governance, unlike for courts; and in general, the amendments have practically no impact on the institutional side of the PPO, i.e. its structure and working methods.

On 23 September 2016 Draft Law No. 5177 was submitted to the parliamentary Committee on the Legislative Support of Law Enforcement to amend the legislation on the PPO according to the new Constitutional framework. However, on 10 April 2017, the Committee decided that the bill needed additional work. Currently, the text of 2014 PPO Law with patchy amendments is in force.

## 2. PROSECUTORIAL SELF-GOVERNANCE

### 2.1 POWERS OF THE PROSECUTORIAL SELF-GOVERNANCE BODIES

One of the main innovations of the new PPO Law of 2014 was the introduction of the system prosecutorial self-governance bodies (**SGB**), All-Ukrainian Conference of Prosecutors and Council of Prosecutors, and Qualifications and Disciplinary Commission.

According to Article 67 of the Law, "the All-Ukrainian Conference of Public Prosecutor's Office Employees is the highest body of prosecutorial self-governance and shall:

- 1) hear reports of the Council of Prosecutors of Ukraine on the implementation of objectives of the prosecutorial self-governance and on the state of financial and organizational support for public prosecutor's offices;
- 2) appoint the members of the High Council of Justice (Judiciary) and decide on the termination of their office according to the Constitution and laws of Ukraine;
- 3) appoint the members of the Council of Prosecutors of Ukraine and the Qualifications and Disciplinary Commission of Prosecutors;
- 4) approve the Code of Professional Ethics and Conduct of Prosecutors and Regulations for the Council of Prosecutors of Ukraine;
- 5) adopt Regulations on Procedures of the Qualifications and Disciplinary Commission of Prosecutors of Ukraine;
- 6) submit proposals to central government authorities and their officials to address working issues of public prosecutor's offices;
- 7) review other issues of prosecutorial self-governance and exercise other powers under laws."

If applied properly, the Law will provide for a transparent process in electing delegates for the Conference—by a simple majority secret vote from among freely nominated alternative candidates (six prosecutors representing the General Prosecutor's Office; three prosecutors from each regional office; and two prosecutors representing every local office). In total, it makes for around 450 delegates from PPOs of different levels.

The main goal of the Conference is to establish the Council of Prosecutors and the Qualifications and Disciplinary Commission, the latter is responsible for initial recruitment and disciplinary issues and does not formally belong to the prosecutorial self-governance.

The creation of the Council of Prosecutors (**CP**) aimed at decentralising powers within the PGO and was highly recommended by the CoE. CP should consist of thirteen persons of whom two prosecutors represent the Prosecutor

<sup>4</sup> Draft Law on the PPO (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 8.10.2018).

<sup>5</sup> Verkhovna Rada of Ukraine, Law No. 1697-VII of 14 October 2014 on the PPO (in Ukrainian), <<http://zakon3.rada.gov.ua/laws/show/1697-18>> (accessed 8.10.2018).

<sup>6</sup> Verkhovna Rada of Ukraine, Law No. 1401-VIII of 2 June 2016 on Amendments to the Constitution of Ukraine (regarding the Judiciary), (in Ukrainian) <<http://zakon3.rada.gov.ua/laws/show/1401-19>> (accessed 8.10.2018).

General's Office, four represent regional offices, five represent local offices and two non-prosecutors (respected academics) are to be appointed by the congress of higher educational establishments and scientific institutions.

The Law authorises the CP to:

- 1) make recommendations on appointing and dismissing prosecutors from administrative positions in cases prescribed by the Law (Deputy PGs, heads/deputy heads of regional and local PPOs);
- 2) take measures to ensure independence of prosecutors, improve the organisation of offices' work;
- 3) study issues of legal and social protection of prosecutors and their families, and make respective decisions;
- 4) review reports of prosecutors and other information regarding any threat to the independence of prosecutors and act upon such information (notifying respective authorities of the grounds for criminal, disciplinary or other legal responsibility; initiating protection (security) measures for prosecutors; informing the public on behalf of the PPO of instances of violation of prosecutorial independence; notifying international organizations of the same, etc);
- 5) accept reports of inappropriate performance of administrative duties by a prosecutor holding an administrative post;
- 6) submit proposals on activities of the PPO to central and local authorities;
- 7) control the implementation of decisions made by bodies of prosecutorial self-governance;
- 8) exercise other powers according to the Law.

One of the most revolutionary aspects of the Law is the right of the CP to recommend candidates to be appointed by the PG to top administrative positions within the whole PPO system. Even though formally the authority of the CP is restricted to only *recommending* PG candidacies, implying the non-binding character of such recommendations, the particular wording of Article 39 of the PPO Law actually renders such recommendations mandatory:

"A prosecutor shall be appointed to the administrative positions specified in items 2, 3, 6-8, 11 of the first paragraph of this Article [*i.e.* Deputy PGs, heads/deputy heads of regional PPOs, heads of local PPOs] by the Prosecutor General of Ukraine *upon the recommendation* of the Council of Prosecutors of Ukraine. A prosecutor shall be appointed to the administrative position specified in items 4 and 5 [*i.e.* (deputy) heads of a detail in the Special Anti-Corruption Prosecutor's Office] of the first paragraph of this Article *by the Prosecutor General.*"

This obligation of the PG to appoint candidates recommended by the CP was among the main issues of the acute debates between representatives of the PGO, civil society and international community when the draft law was being prepared for final adoption in 2014. The traditional right of the first person to bring in his team was being fiercely defended until some consensus was found authorising the PG to solicit the CP for a different candidate. The consensus was enshrined in the following provisions:

- 1) Section six of same Article 39 of the Law:

"The refusal of the Prosecutor General of Ukraine to appoint to an administrative position the public prosecutor

recommended by the Council of Prosecutors of Ukraine, shall be motivated in writing. A copy of the relevant decision by the Prosecutor General of Ukraine shall be submitted to the Council of Prosecutors of Ukraine and to the public prosecutor whose appointment to an administrative position has thus been denied. The prosecutor whose appointment to an administrative position has been denied by the Prosecutor General of Ukraine, has the right to appeal against this decision to the Qualifications and Disciplinary Commission of Prosecutors";

- 2) section nine of Article 71 ("The Council of Prosecutors"):

"In the event that he does not agree to the candidate recommended by the Council and denies appointment, the Prosecutor General of Ukraine shall suggest another candidate for the Council's consideration."

Following simple logic, these provisions read together may lead in practice to deadlocks without any agreement between the PG and CP on suitable candidates in sight, in which case the Law gives no final word to anyone, neither does it authorise anyone (the QDC for instance) to decide on the issue. However, this very power of the CP was the reason why the establishment of the whole system of prosecutorial self-governance had been postponed several times. This reason was most sensitive especially given that several PGs were appointed in the short course of three years and that it actually required *clear reasons for appointing/dismissing top officers to be presented* by the CP and PG.

According to the Law, the QDC shall consist of eleven members, all citizens of Ukraine with university degrees in law and at least ten-year work experience in the same field. The members include: **1)** five prosecutors appointed by the All-Ukrainian Conference of Public Prosecution Employees; **2)** two individuals (scholars) appointed by the congress of representatives of law universities and academic institutions; **3)** one individual (an attorney) appointed by the congress of attorneys; and **4)** three individuals appointed by the Parliamentary Commissioner for Human Rights of Ukraine following an approval by the Verkhovna Rada committee responsible for the organization and operations of public prosecutor's offices. *The decisions, therefore, are not made by the prosecutorial majority (5/12).*

The QDC is a collective body authorised to verify the professional skills of individuals willing to become prosecutors, decide on the responsibility, transfer and dismissal of prosecutors.

The powers of the QDC include:

- 1) keeping the register of positions within the PPO, including (temporal) vacancies;
- 2) recruiting candidate prosecutors;
- 3) arranging transfers of prosecutors;
- 4) reviewing reports of disciplinary offenses committed by prosecutors and conducting disciplinary proceedings;
- 5) disciplining prosecutors of the PGO, regional or local PPOs or dismissing them from offices;
- 6) exercising other powers established by law.

Besides the organisation of the initial recruitment of prosecutors, one of the main functions of the QDC consists in deciding on disciplinary issues. The deprivation of PPO Heads of the right to single-handedly fire unwanted prosecutors was and remains one of the main legal safeguards against illegitimate pressure.

## 2.2 AN ALTERNATIVE VISION OF THE PPO GOVERNANCE

In early 2016, a group Members of Parliament (MPs) made an alternative suggestion for the temporary governance of the PPO. It could be summarised as follows: Ukraine was not yet ready for the prosecutorial self-governance the way provided by the PPO Law; the system lacked new prosecutors, so at least for a transitional period, the functions of the QDC and CP should be entrusted to a new body called “International Council of Prosecutors” composed of international (“*American, European, Canadian*”) prosecutors/experts.

From the initiators’ point of view, the reform of regional PPOs needed to start ASAP because the renewal of all levels of PPOs—both ordinary and commanding—was at stake. The open competition model was not suitable for the appointment of heads of regional PPOs as it would allow political players to infiltrate their people into the PPO at the level of oblasts (regions).

To validate the suggestions, amendments to the PPO law were suggested to:

- establish the International Council of Prosecutors / International Selection Commission,
- lower the requirements for candidates to regional PPOs and the PGO (in particular, eliminate the requirement of professional experience in the system of public prosecution, which was indeed done later on).

These new suggestions, including the International Council of Prosecutors to replace the CP and QDC, were perceived as controversial. Most of international partners expressed the opinion that the expected goal could be achieved through the proper application of the existing legislation without the additional expenditure and international involvement.

## 2.3 ESTABLISHMENT OF PROSECUTORIAL SELF-GOVERNANCE BODIES

Given the sheer amount of the preparatory work necessary to properly implement all the legislative innovations, the full entering into force of the Law was postponed for half a year after its adoption. Therefore initially, the system of self-governance should have been established at the moment of the whole Law’s expected coming into force—25 April, 2015.

As discussed above, the powers of the CP significantly influence the PG’s scope of authority, leading to real decentralization of the PPO if applied appropriately.

The establishment of SGBs within the PPO, strongly advocated by the professional civil society, was nevertheless challenged in March 2015. The main argument

was that traditionally centralised and hierarchical PPO was not able to ensure really independent votes to elect delegates for the Conference thus compromising subsequent appointments of CP and QDC members.

It was therefore decided to prioritise reducing the number of prosecutors through re-evaluation and subsequent partial replacement of the staff in order to guarantee that prosecutors expected to create the SGBs in the near future, would not have participated in old corrupt arrangements.

As a result, on the 21 April 2015, four days before the whole Law’s expected coming into force, the parliament shifted the date to 15 July 2015<sup>7</sup>. On 2 July 2015, the Verkhovna Rada adopted a new comprehensive Law “On the peculiarities of applying certain provisions”,<sup>8</sup> drastically changing the concept (temporarily, it was promised) of the existing PPO Law. The establishment of the self-governance was once again postponed for another year—until 15 April 2016.

On 26 April 2016, as provided by the amended Law, the first All-Ukrainian Conference of Prosecutors was held, which elected members of the QDC and CP; the latter started functioning immediately. All needed documents (Rules of Procedure of the Conference, Rules and Procedure of the QDC, Code of Ethical Conduct, etc.) were speedily adopted. Two weeks later, on 12 May 2016, the parliament adopted new comprehensive Law No. 1355-VIII,<sup>9</sup> which *inter alia* postponed the establishment of the already created SGBs yet again—till 15 April 2017. This actually amounted to retroactive application of legal rules and as such was criticised by professional lawyers. All related recruitments, appointments, disciplinary proceedings, etc., which had initially been expected to be performed by the SGBs, were also halted.

Several postponements with starting the SGBs were at first explained by the PGO’s failure to do the necessary preparations but were finally justified by the failure to get into the PPO system new people who would then form the progressive SGBs to be trusted with a large scope of powers.

However, by that time, local PPOs had already been staffed, the ordinary prosecutors had been appointed upon testing which was considered as fair and transparent. Heads and deputy heads (no matter whether they had had career within the PPO) would not be able to control the secret vote. The same applies to the regional level and PGO; moreover, their delegates will constitute around 19% of Conference delegates: local PPOs have more than 80% of delegates at the Conference (6 from the PGO / 75 from regional PPOs / 310 from local PPOs, approximately). Moreover, *prosecutors holding an administrative positions were not eligible* as members of the CP and QDC.

It is also worth mentioning that some media and civil society actors exaggerated potential abuses by SGBs:

- 1) as mentioned above, the Law authorises the PG to disagree with candidacies to top administrative positions recommended

<sup>7</sup> Verkhovna Rada of Ukraine, Law No. 335-VIII of 21 April 2015 on Postponing the Entry into Force of the PPO Law (in Ukrainian) <<http://zakon2.rada.gov.ua/laws/show/335-19>> (accessed 8.10.2018).

<sup>8</sup> Verkhovna Rada of Ukraine, Law No.578-VIII of 2 July 2015 on the Enhancement and Peculiarities of Applying Certain Provisions of the PPO Law (in Ukrainian), <<http://zakon2.rada.gov.ua/laws/show/578-19>> (accessed 8.10.2018).

<sup>9</sup> Verkhovna Rada of Ukraine, Law No.1355-VIII 12 May 2016 on Amending Certain Laws of Ukraine related to the Activities of the PGO (in Ukrainian) <<http://zakon2.rada.gov.ua/laws/show/1355-19>> (accessed 8.10.2018).

- by the CP and submit other candidates to the Council;
- 2) any criteria to be followed by the CP (e.g. testing) may be introduced in the Regulation of the CP;
  - 3) the CP's right to approve the budget plan cannot be dangerous as the size of each prosecutor's salary is determined by the PPO Law (Art. 81) while the final overall budget is adopted by the Cabinet of Ministers and is not subject to the discretion of the CP (or PG);
  - 4) the CP's powers to protect the independence of prosecutors are declarative, unfortunately, as no mechanism of their implementation is provided;
  - 5) the QDC is not a SGB and is concerned, on one hand, with the initial recruitment (qualification exams, testing, checks, candidate pool) and, on the other, with disciplinary proceedings; however, once again, its composition is not dominated by prosecutors.

There was a difference between the professional community of prosecutors and the interested part of the civil society in how tenacious their attitudes were as to introducing prosecutorial self-governance as recommended by the CoE. By 2016, many actors of professional civil society, among them the authors of the relevant provisions of the 2014 Law, had been convinced of the inability of the prosecutorial self-governance staffed with members of "the old system" to act independently and, therefore, supported the postponement.

However, "members of the old system" would have greatly preferred to scrap the whole idea and continue with the centralised system. It was evident during the negotiations on the initial PPO draft law in 2014 when representatives of the old system did their best to keep as many powers as they could in the hands of the PG. The same goes for the QDC: with its establishment, the recruitment and disciplinary procedures were expected to become open and reasoned.

In their turn, ordinary prosecutors were at first distrustful towards the SGBs as something fictitious, unnecessary and imposed by "foreign experts"; however, with each turn of discussion and postponement, it slowly shone upon them that the reform would in fact greatly enhance their independence and a majority of them became strong supporters of such a system.

It may be said that because of the SGBs, losing the traditional complete control over the prosecution has become an issue for a larger group of players beyond the "old" prosecutorial system. That provoked hectic attempts to discredit self-governance through criticism and certain manipulations.

The latest postponement of SGBs was accompanied by other amendments to the Law which require the knowledge of the political context to be properly understood. Among

such amendments concerned the eligibility requirements for the PG (Art. 40): the requirement to have "higher legal education... and... 10 years of professional experience in the sphere of law" was replaced with "having higher education and professional experience in the sphere of law, or in a law-making and law enforcement body of not less than 5 years."

Such an amendment was justified by the need to implement the VC recommendation (para 118): "...the requirement in paragraph 2.3 that eligibility for appointment as Prosecutor General of Ukraine is dependent upon holding one of the positions listed in Article 15—all of which are Higher Public Prosecutor positions—means that it will not be possible to appoint persons from outside the public prosecution service but a documented professional background in the prosecution system, notwithstanding the potential desirability of drawing on such outside experience, which could be especially valuable where a significant change in the role of public prosecutors is being effected by the provisions of the Draft Law." Thus, it was stressed by the authors of the amendments that the Law must provide an opportunity for an external candidate without any prosecutorial experience to be appointed as a PG.

This, however, was misleading as the above-mentioned recommendation had already been implemented in the 2014 Law, the initial text of which did not require prosecutorial experience for a PG appointment: "Article 40. A citizen of Ukraine fulfilling the following requirements is eligible for appointment to the office of the Prosecutor General of Ukraine: 1) higher legal education; 2) experience in the field of law for at least ten years; 3) proficiency in the state language; 4) absence of circumstances specified in Article 27, paragraph 5, of this Law (corruption related); 5) high moral, professional and organizational qualities." Elimination of higher legal education as an eligibility criterion could not be explained by anything but political reasons given that, according to the Code of Criminal Procedure, PPO Law and other legislation, a PG is actually an acting prosecutor who has concrete procedural duties and powers to perform in certain situations.<sup>10</sup>

Other amendments to the PPO Law included:

- a) a very detailed procedure for appointing prosecutors of the Anti-Corruption PPO, along with the proviso that Head, Deputy Head and prosecutors of the Special Anti-Corruption PPO should be appointed according to the procedure which preceded the Law's coming into force, so that prosecutors could be appointed without delays and speedily proceed to supervising operative and search activities and pre-trial investigations conducted by the newly established National Anti-Corruption Bureau;
- b) the prolongation of the temporary recruitment to local PPOs through obligatory testing of all candidates at the district level as well as a possibility of recruiting outsider applicants who were

<sup>10</sup> *Criminal Procedure Code of Ukraine*, Art. 36 (in Ukrainian; <<http://zakon2.rada.gov.ua/laws/show/4651-17/page2>>, accessed 8.10.2018).

- to meet general requirements, pass the test and take internship (i.e., without the previously required two years of professional experience and initial training in the National Academy of Prosecutors);
- c) the continued possibility to appoint and dismiss prosecutors (including those at top administrative positions) without the CP or QDC;
- d) disciplining prosecutors according to the procedure established by the old Disciplinary Statute.

Legislative innovations were supplemented with detailed Transitional Provisions, so the appointment to administrative positions did not require any recommendation of the CP, the sole power of the PG to dismiss and appoint prosecutors to top positions within the system was prolonged for a year. Within a year almost all Deputy PGs, heads/deputy heads of regional PPOs were dismissed and replaced with new officers people. The decentralisation and de-politisation of the PPO, as recommended by the CoE, were the main goals of the whole reform, however, these latest amendments could hardly be seen as designed with these goals in mind.

Finally, on 26 April 2017, a second “first” All-Ukrainian Conference of Prosecutors assembled at the PGO. The Conference elected members to the CP and QDC as well as adopted all needed regulations and documents. The level of independence of the new system will soon be tested.

### 3. INITIAL RECRUITMENT PROCEDURE

The 2014 PPO Law vested the QDC with the initial recruitment of prosecutors, including anonymous qualification exams, one-year basic training at the National Academy of Prosecutors, special anti-corruption clearance of candidates and keeping record of vacancies. The original idea of the career management was to recruit and train prosecutors at the lowest (local) level with the possibility for promotion to higher levels after successful service of three years for the regional PPOs and five years for the PGO and succeeding the competition. The latest amendment to the PPO Law changed this, allowing external candidates to be appointed as prosecutors at all levels, only depending on the duration of their overall professional experience.

In 2015, following the Order on the Creation of Local PPOs, 638 district PPOs were merged into 178 local PPOs (or 155 without those located in the occupied territories).

Between April 2015 and April 2017, local level PPOs were manned according to the temporary procedure. According to the legislative amendments of 2 July 2015, during the reorganisation of district PPOs, all appointments were preceded and determined by an open competition (testing)<sup>11</sup>. In practice, the reorganisation meant concentration as several (5–7) district PPOs were substituted with a larger local one, which resulted, firstly, in the dismissal and re-appointment of ordinary

prosecutors and, secondly, appointment of heads and deputy heads of new offices.

In total, over 10 100 prosecutors were competing for some 6500 positions. The procedure was designed to minimise the human factor and apply clear criteria and HR policies. The competition lasted about six months and resulted in the PG appointing heads and deputies of local PPOs in December 2015.

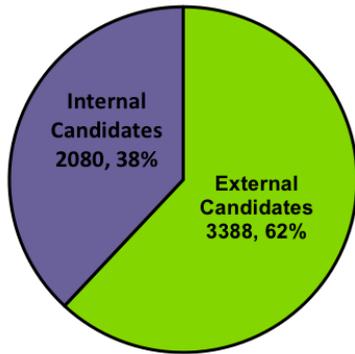
The procedure was seen as a transitional measure and included two parallel tracks. While for ordinary prosecutors it consisted of testing their professional knowledge and general skills, for potential heads and deputies of local (only!) PPOs it also included a psychological assessment and interviews.

The initial plan was to announce an open competition for heads and deputies of the oblast (regional) PPOs as well—some 125 positions—so that the testing could have been completed before the newly established CP finally took over the function of recommending candidates for such positions. However, the competition procedure for heads of regional PPOs and PGO prosecutors was abandoned. Such an approach did not find support of many important international partners, and the whole process was halted. On numerous occasions, the need to continue holding competitions for the top administrative positions at the regional PPOs and PGO was highlighted. Nevertheless, the provision suggesting “an open competition mechanism for other administrative positions”, had been removed from the draft amendments one day before they were adopted by the parliament (2 July 2015).

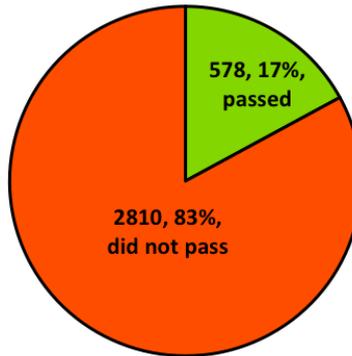
The reorganization of the lowest level of PPOs also resulted in reducing their staff complement. This was done, perhaps for the first time in the history of Ukraine’s PPO, in a transparent and fair fashion. 5890 prosecutors were

<sup>11</sup> Initiated by then-deputy PG Davit Sakvarelidze and supported by the EU Project “Support to Justice Sector Reforms in Ukraine.”

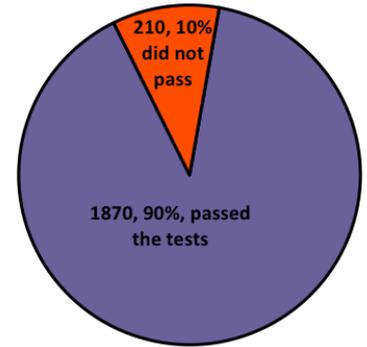
**Information on candidates who applied to top administrative positions**



**External candidates who passed the tests**



**Internal candidates who passed the tests**



selected out of the total number of 7500 candidates exclusively based on the results of their tests. The testing was streamlined and observed by representatives of the international community and civil society. Over 1800 prosecutors (24%) failed to pass the tests.

In total, 5468 candidates, including 3388 external candidates, applied to top administrative positions at new local PPOs. After the first two stages of the competition (testing of professional knowledge and general skills), 578 external candidates were shortlisted for interviews. 83% of all external candidates did not pass the tests.

Following the competition, from approximately 650 successful candidates, 18% of former heads of district PPOs were appointed as the heads or deputy heads of new local PPOs and almost 500 dismissed. 154 heads of local PPOs were appointed by the PG while and heads of respective regional PPOs appointed deputies to such local offices.

Not a single external candidate was appointed head of a local PPO; 2 from 57 external candidates were appointed 1<sup>st</sup> deputies and 20 as deputies (in general, 39% of externals recommended by the competition commissions). The small number of external candidates appointed to administrative positions at local PPOs caused rather negative assessment of the reform's results.

However, it is worth mentioning that the evaluation of the competition should have taken into account the positive experience of the first staff reduction in the history of the Ukrainian PPO following the results of transparent testing.

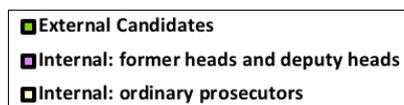
Moreover, in 2015, the average monthly salary of a local prosecutor was around UAH 5000 (some EUR 200) which had a significant negative impact on the professional level of external applicants.

The staff reduction started with the reorganisation of local PPOs and resulted in the decrease of the total number of prosecutors in 2016 to approximately 11 000 from initial 12800 (approximately). According to the PPO Law, by 1 January 2018, 10 more percent of prosecutors were subject to reduction, leaving 10 000 prosecutors as the maximum for all levels of the system.

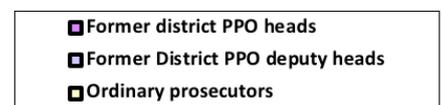
Between December 2015 and April 2017, the recruitment for local PPOs was conducted according to the temporary test-based procedure, as the permanent recruitment mechanism through the QDC was put on hold along with the prosecutorial self-governance. According to Transitional Provision 5(1) of the PPO Law, until all of the Law's provisions come into force, the appointment procedure for local PPOs should remain the same as the one used for the staffing of newly created local PPOs (i.e. open test-based competition). The difference consisted in the possibility for the external applicants to participate in the competition: according to Ukraine's labour law no "vacancies" might be opened during staff reductions; as the staff reduction (where PPO employees had priority) was over, the task then was to fill up vacancies.

During this period, the Staff Department of the PGO faced the challenge of filling vacancies at the local level: within only 10 days after local PPOs started functioning, more than

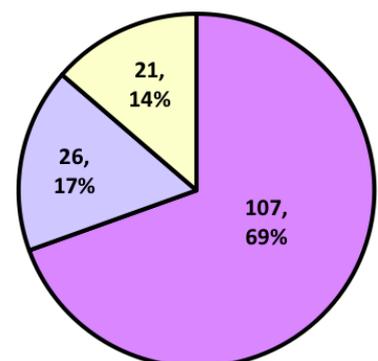
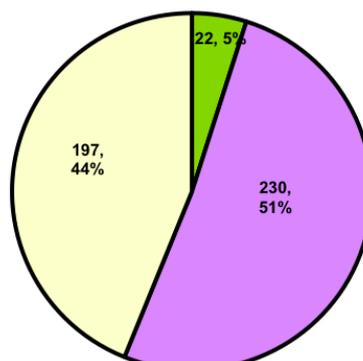
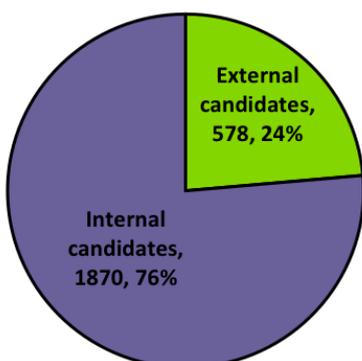
**Candidates appointed as local PPO deputy heads**



**Candidates appointed as heads of local PPOs**

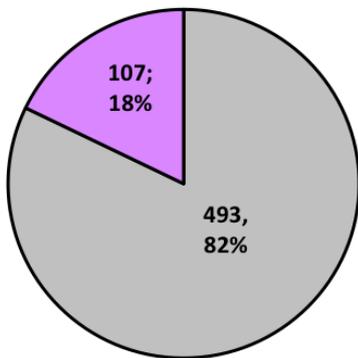


**Candidates invited to the interviews**



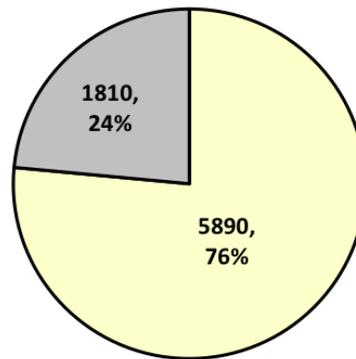
**Career development of former district prosecutors (heads)**

- Former Heads dismissed
- Former Heads re-appointed



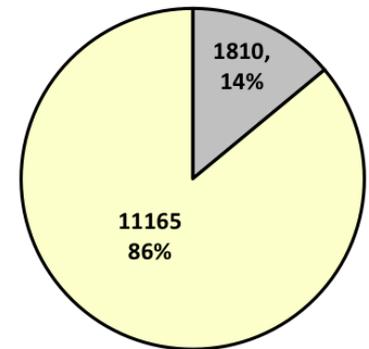
**Career development of ordinary prosecutors of former district PPOs**

- Ordinary prosecutors re-appointed
- Ordinary prosecutors cut



**Total number of prosecutors cut**

- Prosecutors cut
- Prosecutors remained



100 of newly appointed ordinary prosecutors resigned for various reasons such as low salaries, lack of facilities for the new PPOs (i.e., excessive distances between PPOs with no electronic workflow mechanism), lack of social protection, permanent criticism of the system by the media, lack of clear prospects for the future. By the end of 2016, over 700 ordinary prosecutorial positions as well as nearly 50 administrative positions were vacant. The absence of the QDC and prolongation in July 2015 of transitional provisions necessitated the continuation of the financial support by the international community: once again, the EU Project agreed to finance the additional tests to fill out the vacancies.

The high employee turnover at the local level and new eligibility requirements for higher level appointments make new sustainable recruitment procedure urgent. Among other things, the Law requires the CP to recommend candidates to be appointed heads of local PPOs by the PG.

## 4. OTHER INSTITUTIONAL REFORMS

### 4.1 ANNUAL INTEGRITY CHECK

In the course of reforms, it was mostly the PGO that underwent structural changes, including the creation of the General Inspection Office and the Department of Reforms. Among other duties, the Security Unit (a part of the Office) is responsible for the annual integrity checks of all prosecutors according to Article 19 of the PPO Law.

This in fact might have been a very positive step towards securing the integrity of prosecutors were it not for the vague wording of the relevant legislative provisions that make their meaningful application impractical: “Each prosecutor shall be *under the obligation* to annually pass a *secret* integrity check.” To meet the legal requirement of secretly checking all prosecutors each year, they came up with “Declarations of Integrity” to be filled up by all

prosecutors. In practice, those simply meant that each prosecutor provided a written assurance of his/her integrity. Therefore, representatives of civil society qualified this “annual secret integrity test” as “a failure.”<sup>12</sup>

### 4.2 CREATION OF THE REFORMS COUNCIL

In late 2016 the PG ordered the creation of the Civil Society Board on Reforms—a working group on reforming the PPO. The membership included prosecutors, attorneys, scholars, a former Judge of the European Court of Human Rights, representatives of the Ombudsman’s Office, EU Project, media and civil society (e.g., Transparency International) etc.

On March 5, 2018, the Prosecutor General adopted an Order on creation of the new Working Group on Implementation of the 3<sup>rd</sup> Section of the Reforms Road Map under the Deputy Prosecutor General Anzhela Stryzhevska.

### 4.3 TRANSPARENT INDIVIDUAL EVALUATION OF EACH PROSECUTOR’S PERFORMANCE

Following the initiative supported by international partners, the Reforms Department of the PGO has been working on a system of individual Prosecutors’ Performance Evaluation (PPE). Changing the HR and career management policies was designated as a highest priority. Each prosecutor’s procedural independence as well as the overall institutional freedom of the PPO from illegitimate influences greatly depend on objective criteria for making HR decisions. Implementing a transparent system of performance evaluation for both an individual prosecutor and separate

<sup>12</sup> Lilia Hryshko, “The Failed Integrity Check of Public Prosecutors,” 24 November 2016 (in Ukrainian) <<http://www.dw.com/uk/%D0%BF%D1%80%D0%BE%D0%BA%D1%83%D1%80%D0%BE%D1%80%D1%96%D0%B2-%D0%BD%D0%B0-%D0%B4%D0%BE%D0%B1%D1%80%D0%BE%D1%87%D0%B5%D1%81%D0%BD%D1%96%D1%81%D1%82%D1%8C-%D0%B2-%D0%BF%D0%B5%D1%80%D0%B5%D0%B2%D1%96%D1%80%D0%BA%D0%B0-%D0%B2%D1%97%D0%BD%D1%96/a-36503128>> (accessed 8.10.2018).

<<http://www.dw.com/uk/%D0%BF%D1%80%D0%BE%D0%BA%D1%83%D1%80%D0%BE%D1%80%D1%96%D0%B2-%D0%BD%D0%B0-%D0%B4%D0%BE%D0%B1%D1%80%D0%BE%D1%87%D0%B5%D1%81%D0%BD%D1%96%D1%81%D1%82%D1%8C-%D0%B2-%D0%BF%D0%B5%D1%80%D0%B5%D0%B2%D1%96%D1%80%D0%BA%D0%B0-%D0%B2%D1%97%D0%BD%D1%96/a-36503128>> (accessed 8.10.2018).

PPOs would, therefore, protect from illegal pressure—both external and from higher prosecutors.

Reviewing recommendations by international experts, the PGO and National Academy of Prosecutors of Ukraine have conducted a survey involving 650 heads and deputy heads of newly created local PPOs as well as made numerous visits to local PPOs. According to the survey, 67,3% of respondents agreed with the urgency of introducing unified criteria for PPE. The massive change of attitude regarding PPE among lower level prosecutors from sceptical to favourable was explained by the practical experience of criteria-based HR policies, such as test-based appointments. Other arguments for PPE included the increased independence of prosecutors and unified approach to the organisation of their work, the need to devise general and specific criteria for PPE, various other benefits from more objective HR policies.

## CONCLUSIONS

Since the Revolution of Dignity of 2014, the PPO in Ukraine has undergone waves of institutional reforms aimed at strengthening the institution's:

- decentralisation;
- independence;
- professionalisation and
- general renewal.

These imperatives have been pursued through numerous measures. One of the most drastic and progressive step was the establishment of a self-governance body within the PPO with authority to influence appointments and human resources directly (in the case of the Council of Prosecutors) and through the Qualification Disciplinary Commission. Other measures included the introduction of annual integrity checks and performance evaluation for prosecutors with a view to retain or improve the quality of work, while cutting possibilities for pressure by superiors on individual prosecutors.

Ideally such a big, complex and vital institution would be undergoing gradual and smooth reforms along a comprehensive and well thought out strategy, but that has not been the case. The institutional transformation has been irregular. The predictable resistance of the old system was one reason but the lack of overall strategy was important too.

The PPO is not an insulated institution but an element of Ukraine's whole system of justice and all reforms of the office must take this into account, which would actually be the main recommendation. Besides, the reforms need some detailed short-, medium- and long-term planning. Particular suggestions to be included in such planning would be **a)** improved legislation, **b)** institutional optimisation and **c)** rationalisation of the HR reform.

## DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

This publication has been prepared within the project to support transparent reforms in Ukraine. The project is funded by the Federal Foreign Office of Germany. DRI and the authors are exclusively responsible for the contents of this publication which should in no way whatsoever be regarded as reflecting the views and positions of the Federal Foreign Office of Germany.



Federal Republic of Germany  
Foreign Office