19 December 2007

NORLAM COMMENTS TO THE DRAFT LEGISLATION ON THE PUBLIC PROSECUTOR'S SERVICE IN MOLDOVA

The Norwegian Mission of Rule of Law Advisers to Moldova (Norlam) would as requested in the conference 15 November 2007, like to present some comments on the draft laws on the prosecution.

LAW ON THE ORGANIZATION OF THE PROSECUTOR'S SERVICE

GENERAL REMARKS

Norlam think that the law on the organization of the prosecutor's service should concentrate on organizational issues pertaining to the prosecution and the relationship between the prosecution and the criminal investigation bodies and not deal with material powers and obligations of the citizens. The latter should be found in the criminal procedure code and in other laws regulating such powers. It is not clear if the draft law at all is aiming at introducing new powers, and if so, when this is the case.

In the English translation the term "prerogative" is used in various contexts. This is a little confusing since in English the word "prerogative" means privilege/special power/exclusive right, a common phenomena in feudal times, but now somewhat out of date. It still may be found in constitutions. The words used in the Rumanian original, however, are adequate and should rather be translated with "powers" or "competence".

Chapter I, GENERAL PROVISIONS

Norlam has no comments.

Chapter II, COMPETENCIES AND PREROGATIVES OF THE PROSECUTOR'S SERVICE
SECTION 1, Competencies and prerogatives of the Prosecutor's Service

Article 3. Competencies of the Prosecutor's Service
This article only sum up some competencies found later in this law and in other laws.

Article 4. Prerogatives of the Prosecutor's Service
This is also a summing up article but we wonder what would be the difference of the powers in Article 3 and Article 4(1)? For instance, the difference between Article 4(1)a) and b) on the one hand and Article 3a) and b) on the other is unclear. Might it be that Article 3 sum up powers found in other laws while Article 4(1) sum up the (some) powers later in this law? We think that it should be considered to merge Article 4(1) with Article 3 to avoid overlap or at least consider another systematic structure. Please consider if it really is necessary to have separate article(s) for summing up the activity of the prosecution.

It is unclear if 4(2) is meant to introduce new powers or if the powers are found in other laws and there are subject to legal safeguards as such powers should. Very wide powers of this type we believe run contrary to the transition to European standards. The European Convention on Human Rights (ECHR) Article 8 states that "Everyone has the right to respect for his private and family life, his home and his correspondence" and that "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society (…)". As no other Western European country give such wide powers to the prosecution or to criminal investigation bodies, we believe that the

ECHR court in Strasbourg will find that these provisions are not necessary in a democratic society.

SECTION 2 Conducting and carrying out criminal investigations
Article 5. on the prosecutor's role during investigations, refers to "the limits of his or her competency" indicating that this article does not introduce new competencies.

Article 6. on the prosecutor's role in carrying out criminal investigations, also is referring to the Criminal Procedure Code and "his/her competency", but in the end it states that the prosecutor "if necessary" can act "regardless of the competency established by law". In the English translation the scope of this provision might seem unclear, but we find the Rumanian original adequate.

Article 7. on the prosecutor's role in leading criminal investigations, we find very well detailed.

Article 8., 9., and 10. refer to other laws or introduce general guiding principles.

SECTION 3, Participation of the Prosecutor in the Administration of Justice
Article 11., 12., 13. and 14. seem to refer to other laws except possibly for Article 14.(2). We agree that the prosecution should have the powers to order an immediate release of any person found illegally held in pre-trial detention provided that the prosecutor in question is actually acting as the responsible one in the case. If he is not, he should refer the decision to the prosecutor that is. There should be no need to refer the case to a court of law as the court does not have the competence to keep any person in pre-trial detention against the will of the prosecution. The situation is more complicated in a penitentiary institution where the person is supposed to serve a judgement that has reached legal force. And, as pointed out by Mr James Hamilton in the conference, it is somewhat worrying if the prosecutor shall have the powers to order the release from a psychiatric hospital if he discovers "an illegal holding" of a person. The legality of holding someone in such a hospital depends according to European standards inter alia on the nature and degree of the illness. This is not a matter for a prosecutor to decide upon there and then. The standard procedure is that the question is decided upon by a court of law.

SECTION 4, Reactionary acts of the prosecutor
All these articles seem to be not new but powers found in other laws. This seems at least to be the case as for **Article 15.** on the reactionary acts of the prosecutor, as it refers to "his or her competency". This is also the case as for **Article 16**. on the prosecutor's ordinance, case-file and indictment, referring directly to the Criminal Procedure Code, the Code of Administrative Offence and the Criminal Code. **Article 17.** on the prosecutor's notification, might, however, be a new power as it in (3) puts down a time limit "within one month". **Article 18.** is in the English version of the summary named "The civil action in penal proceedings" while in the draft law itself it is named "The civil action". By the content it appears that in provision 4) (?) the prosecutor acts as a guardian who has the powers to take care of the interests of juveniles, and some other weak persons. We assume that this already is founded in other law. We understand that the prosecution in Moldova hope in some time to be revealed of these obligations and we agree that this is not what the prosecution should engage in. **Article 19.** on the recourse of the prosecutor, is somewhat unclear. Provision (1) should not apply to civil matters/cases but be restricted to criminal cases. If not we believe that Moldova will face problems in Strasbourg based upon ECHR Article 8 and even others. The rest of the article seems to give the prosecution very wide powers that we believe run contrary to the transition to European standards. We recommend that it is considered thoroughly if any of the provision in this article is necessary in a democratic society.

Chapter III – VII

In Chapter III – VII the core organizational regulation provisions of the prosecution service are found. We have only some general comments and one technical ones.

Moldova - even being a densely populated country with fairly good communications - has a very decentralized prosecution (and court system). Also the specialization is quite developed. We have counted 62 offices (the number of prosecutors being 910 and the auxiliary personnel 532). This has its advantages but also disadvantages. The main disadvantage is clearly the splitting of resources in small units requiring a lot more heads than with a moderate centralization. A moderate centralization will also facilitate for the General Prosecutor's Office the controlling and the guiding function of the subordinate levels.

We will question if it is a good idea to keep The Board of the Prosecutor's Service when the Superior Council of Prosecutor's comes into function. If such a "Board" is upheld we think it should be considered if it is better to have it as an internal body for the General Prosecutor and at least not to provide it with deciding powers. We also want to point to the 2/3 Quorum question. If the Board has 9 members, 6 have to be present. This means that a minority of 4 can block the functioning of the Board, see more comments on the quorum question below.

LAW ON THE SUPERIOR COUNCIL OF PROSECUTORS

We have no comments except from on the quorum, the voting and the appeal issues. With 12 members 8 has to be present, which means that a minority of 5 can block the functioning of the Council. This will of course normally not happen, but voting rules should also take care of states of crisis. Not the present majority in the meeting, but the majority of the Board members voting in favour of a decision should be sufficient. Voting in such a council should not be secret, but the members should take full responsibility of their voting. We believe that this runs contrary to the idea of having an autonomous prosecution and a council which - when the situation calls for it - is able to act effectively and speedily if its decisions could be appealed and thus blocked even by the unspecified group "any interested person". If someone wants to contest a decision of the council it should be done according to the (in Moldova possible) regulations on administrative civil lawsuit in the civil procedure code.

LAW ON THE STATUS OF THE PROSECUTOR

Norlam has no comments.

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