

# NEEDS ASSESSMENT REPORT

Strengthening functional independence  
of prosecutors in Eastern European  
participating States



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## Strengthening functional independence of prosecutors<sup>2</sup> in Eastern European participating States<sup>3</sup>



1 This report is part of the project “Strengthening the independence and accountability of judges and prosecutors: Enhancing the rule of law in Eastern Partnership countries”, funded by the Nordic Council of Ministers and implemented by ODIHR. The views expressed in this report do not necessarily represent the official views of ODIHR, the donor, any government or organization.

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3 The study covered the following project beneficiary participating States in Eastern Europe: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

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## I. EXECUTIVE SUMMARY

OSCE participating States have made a number of commitments pertaining to the rule of law and role of legal practitioners. They underlined in Moscow (1991) that “[...] the development of societies based on pluralistic democracy and the rule of law are prerequisites for a lasting order of peace, security, justice and co-operation in Europe.” Participating States committed in Copenhagen (1990) to respect the independence of legal practitioners. In the Brussels declaration (2006), participating States made commitments to pay due attention to the integrity and professionalism of law enforcement agencies and prosecution authorities.

Prosecutorial independence is defined in international documents, jurisprudence, and by academics as entailing two aspects: (1) structural or institutional and (2) individual, practical, procedural or functional.

This study examines functional independence of prosecutors the concept from a practical perspective. The measure of the “functional” or “procedural” independence of prosecutors is their capacity to lead the investigation and/or prosecution and make key pro-

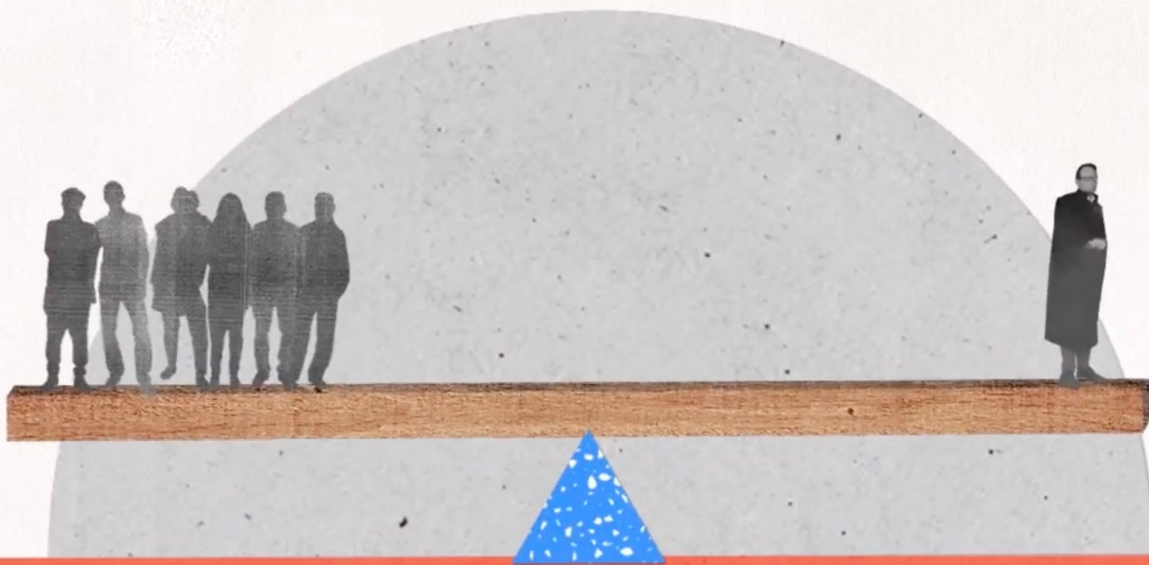
cedural decisions based on law, circumstances of the case and their personal conviction, without any improper interference. Prosecutorial independence is not as categorical as that of judicial independence. Prosecutors' decisions and activities may be subject to the hierarchical control of senior prosecutors other than general prosecutors. However, public prosecutors must be provided with clear and transparent guidelines as regards the exercise of their prosecution powers.

This report first sets out the rights and duties that constitute the elements of functional independence of prosecutors. It then sets out safeguards of functional independence of prosecutors, including issues of functional immunity and the various standards for these as set out by the Council of Europe, the United Nations, and the International Association of Prosecutors.

The report then reviews models of prosecutorial independence in different European participating States as to their relative levels of institutional and functional independence, and on the basis of their authority to make decisions whether to prosecute. After a review of the legislative framework regulating functional independence of prosecutors in the participating States surveyed, it reviews the structure of prosecution services and the level of functional independence of subordinate prosecutors from their superiors. It offers examples from each of the participating States assessed, and elaborates on the level or lack of sufficient functional independence of prosecutors. It then reviews the culture and history of prosecutorial independence in Eastern Europe, from the era of the Soviet Union through its collapse, and discusses the impact of that culture on prosecutorial independence, using reference to legislation as well as interviews.

Self-governance bodies are evaluated next, and the major types of self-governance bodies are discussed. The importance of, and obstacles to, independent decision-making process of these bodies, including through financial and structural independence of some prosecutorial self-governance bodies, and how this relates to independence are explored throughout the assessed participating States.

The report then compares the report systems, official or unofficial, of assessing the performance of prosecutors. A discussion of the formal and informal systems of assessing quantitative data such as acquittal rates as the main factor in performance assessment of prosecutors is compared with the qualitative factors of performance, such as the substantiation of prosecutorial documents and legal writing skills, ability to work using case management software, quality of representation in courts and workload of the prosecutor. After a review of other observations on factors affecting prosecutorial independence, the report briefly touches on training on prosecutorial independence, and reviews good practice examples internationally and in the region. Finally, the report discusses the role of the prosecutor in supporting judicial independence, and makes key recommendations for improving prosecutorial independence along the course of the themes it has discussed.



## II. INTRODUCTION

### A. Background and purpose of the research

1. In a democratic society, the rule of law is guaranteed by the fair, impartial and effective administration of justice. Such administration of justice requires independent and impartial judges and public prosecutors who ensure that individual rights and freedoms are guaranteed, and public order is protected. “The independence of prosecutors is a [...] safeguard in maintaining the independence of judges; it is crucial in a democratic society and is an essential condition for independence of the entire justice system.”<sup>4</sup>

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4 “Joint report on challenges for judicial independence and impartiality in the member states of the Council of Europe”, Bureau of the Consultative Council of European Judges and (CCJE) and the Bureau of the Consultative Council of European Prosecutors (CCPE) 24 March 2016, para. 35, <https://rm.coe.int/168066d624>.



2. OSCE participating States agreed in the Brussels Declaration on Criminal Justice Systems (2006) that prosecutors should be individuals of integrity and at all times respect the rule of law. Although the prosecutorial systems in the OSCE region are different, they all have one thing in common. Prosecutors should be independent in their decision-making and should perform their duties free from external pressure or interference, respecting the principles of separation of powers and accountability. Only in this way can prosecutors effectively fight major societal threats such as corruption, organised crime, and terrorism. Only in this way can prosecutors contribute to the independence of the entire justice system by prosecuting undue interference with judicial independence.
3. Many participating States in the OSCE region, and in particular in Eastern Europe, face several common challenges. One of these challenges is excluding possible political interference in the appointment of the judiciary, and fighting against corruption and lack of accountability of some public officials, including within the judicial and prosecution systems.<sup>5</sup> Another challenge is low public trust in democratic institutions, including in judges and prosecutors. In some participating States, instances of prosecutors initiating controversial and allegedly politically motivated criminal cases or disciplinary proceedings against the judiciary existed. Such practices undermine people's access to justice and the rule of law itself. Finally, there were additional concerns in Eastern European participating States in relation to the way that the influence of senior prosecutors limits the independence of their subordinate prosecutors.
4. Having in mind the strong link between the judicial and prosecutorial independence and these possible challenges, in 2018 ODIHR initiated a study to assess the existing situation in OSCE participating States in Eastern Europe in order to identify the challenges to prosecutorial and judicial independence, their causes, and possible solutions to these challenges. The study focused on two key issues: a) functional (internal) independence of prosecutors to prosecute cases without undue interference, and b) prosecutors' role in strengthening judicial independence.
5. The study is presented in this report and is aimed at developing policy recommendations to support the strengthening of independence and accountability of prosecutors and to clarify prosecutors' role in strengthening judicial independence. The implementation of policy recommendations should facilitate independent and impartial prosecution and adjudication of criminal cases, including of high-profile cases.

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5 "Fourth Evaluation Round—Prevention of corruption in respect of members of parliament, judges and prosecutors", website of the Group of States against Corruption, 22 April 2019, <https://www.coe.int/en/web/greco/evaluations/round-4>.

## B. Concept of functional independence of prosecutors

6. According to international and regional standards<sup>6</sup>, prosecutorial independence entails two aspects: (1) structural or institutional and (2) individual, practical, procedural or functional. Institutional independence means “independence of the prosecution as an institution from other organs of society” such as the executive branch of power, judiciary, and parliament. The prosecutor’s offices are often referred to as ‘autonomous’ and individual prosecutors would be referred to as ‘independent.’<sup>7</sup> The OSCE have declared in the Brussels (2006) commitments that “[T]he office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges”.
7. There is no commonly accepted definition of functional independence of prosecutors that applies to prosecution systems across the OSCE region. Nevertheless, recognised regional and international instruments specify several elements and safeguards in relation to prosecutorial functional independence which allowed this study to define functional independence of prosecutors as their *capacity to take key procedural decisions including in relation to initiation of criminal prosecution, dismissal of the case, and appeal of the case to a higher court based on the legislation, accumulated evidence, and their personal conviction, without prior approval of their superiors*.
8. From this perspective, “functional” or “procedural” independence of prosecutors is the capacity to freely make decisions on key procedural actions. *Prosecutors should enjoy some guarantees of non-interference from their hierarchical superior<sup>8</sup> and from any other actors*.
9. The concept of prosecutorial functional independence is not as categorical as that of judicial independence. As opposed to judges, prosecutors’ decisions and activities may be subject to the hierarchical control of senior prosecutors.<sup>9</sup> In order to ensure their accountability, and to prevent proceedings being instituted in an arbitrary

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6 See *infra* section III.A.i Definition, regional and international standards, and models related to functional independence.

7 “Report on European Standards as Regards the Independence of the Judicial System: Part II—The Prosecution Service”, the Venice Commission, Strasbourg, 3 January 2011, para. 29, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)040-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e).

8 *Ibid.*, para. 31.

9 Venice Commission standards concerning prosecutors, *op. cit.*, note 7, para 28.

or inconsistent manner, public prosecutors must be provided with clear and transparent guidelines as regards the exercise of their prosecution powers.<sup>10</sup>

10. For example, instructions from hierarchical superiors concerning the conduct of the investigation and the gathering of evidence are commonly accepted as an acceptable level of involvement in the prosecution of criminal cases. However, such instructions should always be issued in writing, be reasoned and in line with legislation, and be included in the criminal file so that a defendant's access to such instructions is ensured. Prosecutors should have the right to challenge illegal instructions from their superiors and the right not to be removed from the case without reasons.<sup>11</sup>
11. In the participating States assessed, neither the executive nor the legislative branches may formally issue instructions to prosecutors in individual cases. And generally, even in criminal justice systems which still allow the executives to give instructions in individual criminal cases, there are requirements that such directions be made in a transparent manner.<sup>12</sup>
12. It should be stressed that the functional independence of prosecutors should not be treated as a privilege. The capacity of prosecutors to take decisions independently, free from political interference, should permit them to prosecute effectively and objectively all possible criminal cases, including high profile and sensitive cases, ensuring in this way access to justice and fairness of the proceedings.
13. International<sup>13</sup> and regional standards<sup>14</sup> recommend that states should provide sufficient safeguards, in some cases comparable to those provided to judges,<sup>15</sup> so that prosecutors can reach their decisions independently. These standards safeguard the budget of the prosecution services, salaries, and conditions of service; they

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10 "Opinion no. 12 of the Consultative Council of European Judges (CCJE) and Opinion no. 4 of the Consultative Council of European Prosecutors (CCPE) to the attention of the Committee of Ministers of the Council of Europe on the relations between judges and prosecutors in a democratic society" or "Bordeaux Declaration" Strasbourg, 8 December 2009, para 29-31 of Explanatory Note, cited *infra* section III.A.i.

11 Venice commission standards concerning prosecutors, *op. cit.*, note 7, para 26 and 58, cited *infra* section III.A.i.

12 Opinion No. 13 of the Consultative Council of European Prosecutors (CCPE) to the attention of the Committee of Ministers of the Council of Europe on "the Independence, accountability and ethics of prosecutors", Strasbourg, 23 November para 36 and footnote 11.

13 "Standards of professional responsibility and statement of the essential duties and rights of prosecutors", the International Association of Prosecutors, 23 April 1999, [https://www.iap-association.org/getattachment/5f278b49-dd58-49ee-97d0-3d2d51a1af37/IAP\\_Standards.aspx](https://www.iap-association.org/getattachment/5f278b49-dd58-49ee-97d0-3d2d51a1af37/IAP_Standards.aspx).

14 Council of Europe Committee of Ministers Recommendation Rec(2000)19 "The Role of Public Prosecution in the Criminal Justice System" 6 October 2000, <https://rm.coe.int/16804be55a>.

15 CCPE Opinion no. 13 *op. cit.*, Note 12, para 14.

ensure objective recruitment, evaluation of performance, and promotion, adequate training, objective discipline and transfer mechanisms.

## C. ODIHR project on functional independence of prosecutors

14. ODIHR activity in the field of judicial and prosecutorial independence is based on the relevant OSCE commitments made by the participating States, which confirmed that they should “support and advance those principles of justice which form the basis of the rule of law” (Copenhagen 1990), and that judicial independence is a “*prerequisite to the rule of law and [...] a fundamental guarantee of a fair trial*” (Brussels 2006). OSCE states declared that prosecutors should act as “*individuals of integrity and ability, with appropriate training and qualifications; [and] at all times maintain the honour and dignity of their profession and respect the rule of law*”, (Brussels 2006).
15. This study was part of a regional project funded by the Nordic Council of Ministers and implemented by ODIHR between January 2018 and January 2019.<sup>16</sup>
16. The project envisaged cooperation with the Prosecution Services from six OSCE participating States from Eastern Europe—Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine—in order to raise the awareness about the challenges related to prosecutorial independence and separation of powers, and to identify challenges to strengthening the functional independence of prosecutors.
17. The current study was developed based on the information accumulated through missions to participating States, including through interviews with legal professionals and civil society, and through desk research.<sup>17</sup> The findings and draft recommendations were discussed in July 2018 at an expert meeting in Warsaw, in which representatives from the beneficiary participating States participated. The findings and recommendation were then further developed and incorporated in this report.<sup>18</sup>

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16 ODIHR Project on “Strengthening the independence and accountability of judges and prosecutors: Enhancing the rule of law in Eastern Partnership countries” undertook the following activities: needs assessment study on functional independence of prosecutors, study visit to Prosecution Service of Norway, expert meeting in Warsaw to discuss the findings and recommendations of the study, and production of a video-clip on separation of powers and judicial and prosecutorial independence, see more information on <https://www.osce.org/odihhr/411665>.

17 More information is provided in the methodology annexed to this study.

18 Expert meeting gathered the following participants: prosecutors, lawyers, and representatives of the judiciary, civil society, academia and international organizations, see more on <https://www.osce.org/odihhr/386468>.

18. The study presents the challenges and recommendations from a regional perspective without attributing identified shortcomings to specific participating States. This feature of the methodology is for the purpose of encouraging the beneficiary participating States to cooperate for the development of the study and implementation of policy recommendations.

## D. Main findings and recommendations

19. The results of the study reveal that functional independence within prosecution services is weak and presents a significant challenge for the development of criminal justice systems in the assessed participating States of Eastern Europe. Although both international and national laws on prosecution services in the participating States of the Eastern Europe describe various guarantees for the independence of prosecutors, the study reveals that many of these guarantees are not implemented or are neglected in practice.
20. Legislation in most of the assessed participating States allows subordinate prosecutors to take some key procedural decisions without the approval of senior prosecutors on many criminal cases. However, in practice, consultation on key procedural decisions with senior prosecutors is common and their informal “approval” is often perceived as being necessary to proceed with a case. The practice of senior prosecutors issuing verbal (unwritten) instructions and guidance to subordinate prosecutors is also common. Distribution of cases in prosecutors’ offices is done by senior prosecutors based on their discretionary decisions. Prosecutors have limited training on how to exercise their discretion.
21. One of the general findings in the assessed region is that the heads of the prosecution service maintain a strong influence down the chain of command, including informal influence, which is the legacy of the previous system in the Soviet Union. Besides, all prosecutors are generally dependent on the individual at the head of the prosecution service for their career development, salaries and rewards, evaluation of performance, and sanctioning.
22. For example, the study found that even when self-governing bodies have the role of selecting and appointing of senior prosecutors, in practice, the heads of the prosecution service still maintain significant influence over the process. Furthermore, the study identified examples when hierarchical superiors have the primary role in deciding on the evaluation of performance, remuneration, and promotion of subor-

ordinate prosecutors. International good practice recommends objective<sup>19</sup>, unbiased assessment, undertaken by collegial bodies<sup>20</sup> with the participation of civil society based on objective criteria such as competence and experience<sup>21</sup> in order to limit the influence of senior prosecutors on the outcome of individual cases.

23. Due to the factors above, criminal justice systems in the assessed participating States have the features of centralised systems, which may allow senior prosecutors, including the heads of the prosecution service, to influence, including informally, key procedural decisions such as the initiation of criminal prosecution, dismissal of cases, or appeal of judicial decisions to a higher court. Such hierarchical criminal justice systems become vulnerable to possible external influences (for example, from political leaders) through the chain of command, particularly due to the possibility of informal, non-transparent, and unaccountable influence on subordinate prosecutors and their decisions in individual criminal cases. This vulnerability increases in political systems which lack solid traditions of separation of powers.
24. The study identified several factors which explain the strong influence of senior prosecutors, including the heads of the prosecution service, on subordinate prosecutors: (1) a long standing hierarchical tradition in the prosecutor's offices where important decisions are seldom made by subordinate prosecutors without informal consultations and instructions from their superiors; (2) performance assessment of prosecutors is tied to clearance and conviction rates without meaningful qualitative component; (3) lack of experience, training and confidence among subordinate prosecutors; (4) salaries based on the non-transparent decisions of heads of prosecutor's offices; (5) non-existence of self-governing bodies or lack of independence of these bodies; (6) mechanisms of selection, appointment, promotion, evaluation of performance, and sanctioning of prosecutors are not transparent, objective or based on merit.
25. At the same time, the study found that not all these factors are equally present in all participating States of the region. Some of the participating States have implemented legislative and structural reforms, which have strengthened functional independence. The introduction of self-governance bodies is one example. However, these only have a positive impact when they have financial and structural independence from the executive and legislature. There are also examples of changes in prosecutors' performance assessment mechanisms introducing qualitative criteria

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19 "Standards of professional responsibility and statement of the essential duties and rights of prosecutors" *op. cit.*, Note 13, 6.5–6.7.

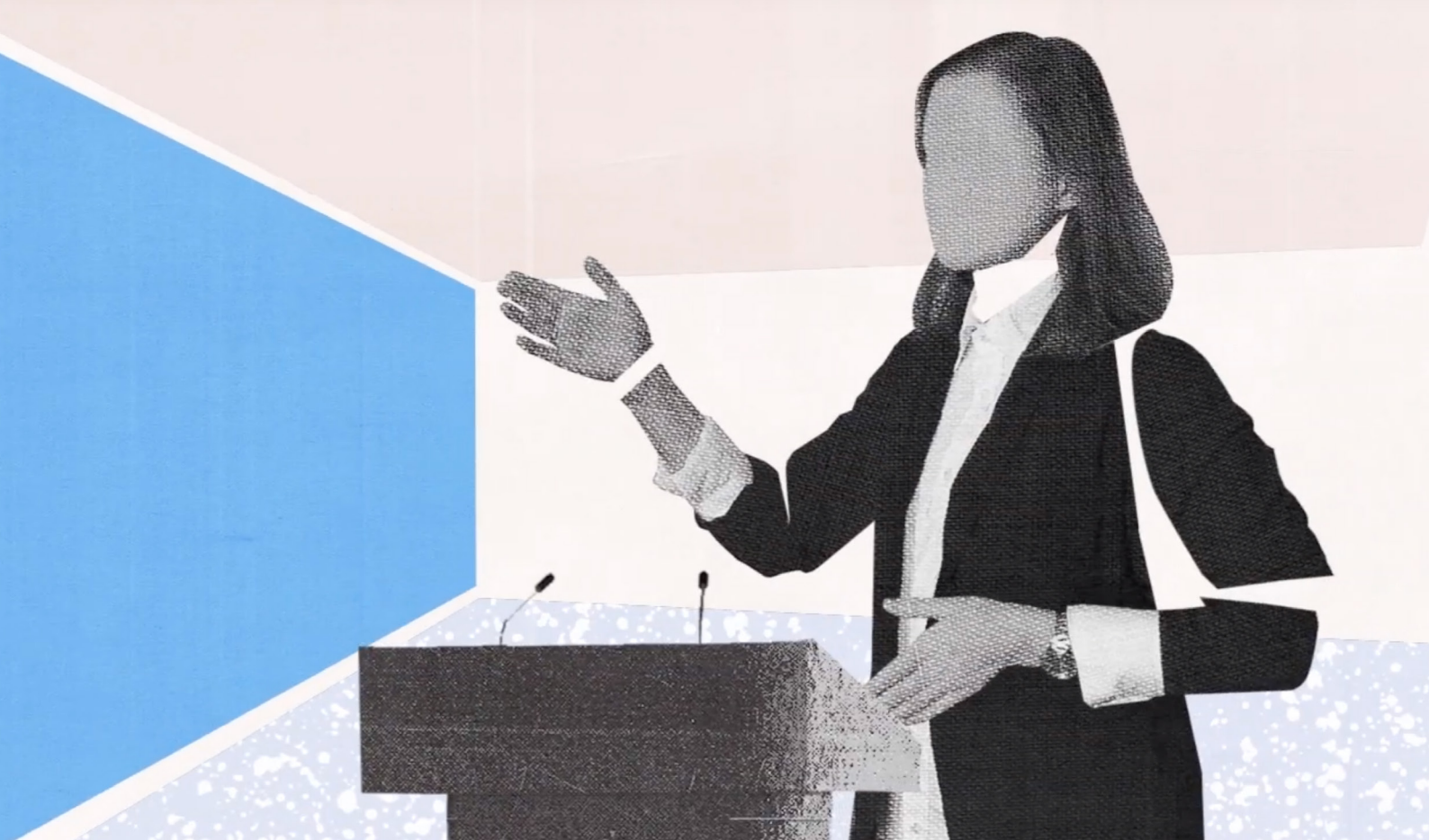
20 See *infra* III.A.ix on Good practice examples.

21 "The Role of Public Prosecution in the Criminal Justice System", *op. cit.*, Note 14.

beyond quantitative metrics in certain participating States. However, even in participating States with a track record of improvements, prosecutors' structural and financial independence from the executive branch and the office of the head of the prosecution service is still not always ensured.

26. Based on the findings two sets of recommendations are provided to address these challenges: the first aim to strengthen the functional independence of prosecutors; and the second clarify the prosecutors' role in strengthening judicial independence. These recommendations are provided to inform potential policy changes and encourage further analysis of the domestic legislation in the assessed participating States of Eastern Europe.
27. The needs assessment study has also identified examples of good practices, which may be used as models for further reforms aiming to strengthen functional independence of prosecutors in participating States of Eastern Europe.





## III. ANALYSIS

### A. Functional Independence of Prosecutors

#### i. Definition and standards of functional independence

28. Prosecutorial independence is defined in international documents, jurisprudence, and by academics as entailing two aspects: (1) structural or institutional and (2) individual, practical, procedural or functional.<sup>22</sup> Institutional independence means

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<sup>22</sup> E.g., Loammi Wolf, “The prosecuting discretion: a power under administrative law or criminal law?” *Journal of South African Law*, 2011, No. 703,2011;

“Joint Opinion on the Draft Law of the Prosecution Service of the Republic of Moldova”, Venice Commission, Council of Europe Directorate General of Human Rights and Rule of Law and OSCE/ODIHR, adopted in Venice, 20–22 March 2015;

*Kolevi v. Bulgaria*, no. 1108/02, § 142, ECHR 2009;

“Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017”, Bureau of the Consultative Council of European Prosecutors (CCPE-BU), Strasbourg, 7 February 2018 <https://rm.coe.int/ccpe-bu-2017-6e-report-situation-prosecutors-2017/1680786f96>.



“independence of the prosecution as an institution from other organs of the state”<sup>23</sup> such as the executive branch of power, judiciary, and parliament. The prosecutor’s offices are often referred to as ‘autonomous’ and individual prosecutors would be referred to as ‘independent’.<sup>24</sup>

29. Although regional or international legal instruments lack a commonly<sup>25</sup> accepted definition of functional independence of prosecutors, this study examines the concept from a practical perspective. The main premise is that only prosecutors who can reach important procedural decisions independently can be objective and effective in combating corruption and abuse of power, organized crime, and other serious offences.
30. From this perspective, the measure of the “functional” or “procedural” independence of prosecutors is their capacity to freely make decisions on key procedural actions including initiation of the criminal case; presentation of charges; forwarding the case to criminal court for charges; reaching plea agreement with the defendant; dismissal of the case, and appeal of the case to a higher court. These decisions should be reached by prosecutors in a neutral, non-political and non-arbitrary manner.
31. The Council of Europe’s Venice Commission proposed the following definition of “internal” or “individual” independence of prosecutors: “Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees of non-interference from their hierarchical superior.”<sup>26</sup>
32. Independence of prosecutors is not an end in itself; nor is it a prerogative or privilege. It is a guarantee in the interest of a fair, impartial and effective justice that

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23 “The independence of judges and prosecutors: perspectives and challenges”. Venice Commission, Unidem Campus Trieste Seminar page. 2. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT\(2011\)008-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT(2011)008-e).

24 “Report on European Standards as Regards the Independence of the Judicial System: Part II—The Prosecution Service”, *op. cit.* Note 7.

25 While there is a general tendency to provide for more independence of the prosecution system, there is no common standard that would call for it, see in Venice Commission standards concerning prosecutors, *op. cit.*, note 7 and para. 86.

26 Venice Commission standards concerning prosecutors, *op. cit.*, Note 7, para. 31.

protects both public and private interests<sup>27</sup>. Independence of public prosecution is an indispensable corollary to the independence of the judiciary.<sup>28</sup>

33. The Council of Europe's Consultative Council of European Prosecutors (CCPE) stated in its Rome Charter that the general tendency to enhance the independence and effective autonomy of prosecution services should be encouraged: Prosecutors should be autonomous in their decision-making and perform their duties free from external pressure or interference having regard to the principles of separation of powers and accountability.<sup>29</sup>
34. Another perspective on functional independence of prosecutors has been recently offered by a Canadian prosecutor and representative of the International Association of Prosecutors (IAP): "[...] the terms 'functional measure of independence', refers to a universally accepted code of conduct pursuant to which concerned individuals, especially decision-makers, govern themselves and act accordingly'.<sup>30</sup> Using Canada as an example, she explained that "prosecutorial decisions made by the Attorney General, or counsel acting on his [or her] behalf, must be devoid of any partisan or other improper considerations" such as "taking directions from [...] any government official, in exercising his [or her] prosecutorial discretion".<sup>31</sup>
35. As this study will show later, in the OSCE region, the prosecution systems are different. In some systems, lower-ranking prosecutors have the mandate to make key procedural decisions without the formal approval of their hierarchical superiors. In other systems, only senior prosecutors can make these decisions. Despite these differences, all prosecution systems should have one thing in common—those empowered by law to lead the investigation and/or prosecution and make key procedural decisions should be able to do so based on law, circumstances of

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27 "Bordeaux Declaration" of 8 December 2009 explanatory note, para 27, see also Venice Commission standards concerning prosecutors, para 86.

28 Bordeaux Declaration, Explanatory Note, *op. cit.*, Note 10, para 10.

29 "Opinion no. 9 of the Consultative Council of European Prosecutors (CCPE) to the attention of the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors" Strasbourg, 17 December 2014, Rome Charter, point IV and V.

30 Speech of Ms. Manon Lapointe at the Conference "Contemporary Challenges to the Independence of Judges and Lawyers from a Global Perspective", 9–11 February 2019, New York, USA.

31 *Ibid.*

the case and their personal conviction, without any improper interference<sup>32</sup> either from inside the prosecution system (their hierarchical supervisors) or from outside (e.g. governments, private persons etc.).<sup>33</sup> It is the duty of each participating States to establish effective mechanisms and safeguards to protect this free decision-making by prosecutors.

36. The concept of prosecutorial independence is not as categorical as that of judicial independence. As opposed to judges, prosecutors' decisions and activities may be subject to the hierarchical control of senior prosecutors other than general prosecutors.<sup>34</sup> In order to ensure their accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must be provided with clear and transparent guidelines as regards the exercise of their prosecution powers.<sup>35</sup>
37. This study makes a distinction between the elements of functional independence of prosecutors and safeguards contributing to such independence. The following elements can be mentioned: the right and obligation to take decisions only based on the law, circumstances of the case, and personal conviction;<sup>36</sup> the obligation to

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32 Council of Europe's instruments characterize interferences as being an "improper interference" when it is unlawful, external—exercised from outside the Prosecution Service, and politically motivated, see for instance CCPE Opinion No. 13, paras 3–4, 15, 31. Similarly, see para. 42 of Explanatory Note to CCPE Opinion no. 9, Rome Charter, which states that "*non-interference means ensuring that the prosecutor's activities, in particular in trial procedures, are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system.*"

33 See more on European tendency to limit the powers of executives to intervene in individual cases in Venice Commission standards concerning prosecutors, paras 26–27., also point 8 of the Bordeaux Declaration.

34 Venice Commission standards concerning prosecutors, *op. cit.*, note 7 para 28.

35 Bordeaux Declaration CCPE Opinion no. 12 (2009), *op. cit.*, Note 10, para 29–31 of Explanatory Note: "[...] Whatever their status, public prosecutors must enjoy complete functional independence in the discharge of their legal roles, [...] in order to ensure their accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must provide clear and transparent guidelines as regards the exercise of their prosecution powers.[...] Directions to prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria".

36 CPGE(2005)05 "European guidelines on ethics and conduct for public prosecutors", or "Budapest Guidelines" Budapest, 31 May 2005, section II Professional conduct in general, point "...d) Exercise their functions on the basis of their assessment of the facts, and in accordance with the law, free from any undue influences; g. Perform their duties fairly, and without fear, favor of prejudice.", and Section III Professional conduct in the framework of criminal proceedings, "... o. Take decisions upon an impartial and professional assessment of the available evidence", see on <https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5>.

comply with legal instructions of senior prosecutors;<sup>37</sup> the right of prosecutors to challenge the instructions;<sup>38</sup> and the right not to be removed from the case without reasons.<sup>39</sup>

38. Many legal systems do not have full functional independence of prosecutors. Hierarchical superiors (and in some cases even the executives in participating States such as Germany, the Netherlands, Denmark, Austria, although this power is not used in practice)<sup>40</sup> can intervene in investigation and/or prosecution of cases by issuing instructions. There may be two types of instructions: a) those which concern the undertaking of (additional) procedural actions and correction of procedural omissions; and b) those which instruct what specific decision to take in a case. Most criminal justice systems use the first type of instruction. In general, guidance on making the investigation more comprehensive and addressing various shortcomings is acceptable. The second type of instructions, however, affects the personal conviction of prosecutors. If the legislation permits this type of interferences with the activity of prosecutors, it should also allow prosecutors to choose not to follow such instructions if that goes against their personal conviction.<sup>41</sup> In general, all instructions should be reasoned,<sup>42</sup> issued in writing<sup>43</sup> and should be legal.<sup>44</sup> If these conditions are not met, prosecutors should have the right to challenge the instructions either in court or before an independent body.<sup>45</sup>
39. Instructions by the executive concerning specific cases are generally undesirable. However, in criminal justice systems which allow the executives to give instructions

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37 Venice commission standards concerning prosecutors, *op. cit.*, note 7 para 31.

38 Venice commission standards concerning prosecutors, *op. cit.*, note 7 para 58: “Consequently, where a prosecutor other than the prosecutor general is given an instruction, he or she has the right to have the instruction put in writing [...]. The prosecutor is also entitled to initiate a procedure to allow for his or her replacement by another prosecutor where an instruction is believed to be illegal or contrary to his or her conscience.”

39 *Ibid.* paras. 58 and 59.

40 *Ibid.* para 26.

41 *Ibid.* paras 58 and 87, point 15.

42 *Ibid.*, para 87, point 15: “[...] Any instruction to reverse the view of a subordinate prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.”

43 Bordeaux Declaration, *op.cit.*, Note 10, point 9 “[...] Directions to individual prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria.”, see on <https://rm.coe.int/1680747391>.

44 Standards of professional responsibility and statement of the essential duties and rights of prosecutors, *op. cit.*, Note 13, in para 6 (i) also states that prosecutors should be entitled: “[...] to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics”.

45 Venice Commission standards concerning prosecutors, *op. cit.*, Note 7 para. 59.

to prosecutors, such instructions should always be transparent.<sup>46</sup> In such systems, instructions not to prosecute must be prohibited and instructions to prosecute must be consulted in advance with the prosecutors and such consultation should be part of the case file.<sup>47</sup>

40. At the same time, free decision-making by prosecutors should be encouraged by appropriate safeguards. The Bureau of the Consultative Council of European Prosecutors' Report on the independence and impartiality of the prosecution services emphasizes that the proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, salaries, discipline and transfer.<sup>48</sup>
41. The Council of Europe's Recommendation Rec(2000)19,<sup>49</sup> provides the following safeguards for functional independence of prosecutors by placing responsibility on governments to take effective measures to ensure: i) the recruitment, the promotion<sup>50</sup> and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status; ii) the careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience; iii) the mobility of public prosecutors is governed also by the needs of the service; iv) public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law; v) disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review; vi) public prosecutors have access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status is affected; vii) public prosecutors, together

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46 In systems where the executives can give instructions on individual cases, they should be made transparent, Venice Commission standards concerning prosecutors, para 23.

47 CCPE Opinion No. 13 (2018), para 36 and footnote 11.

48 Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017, *op. cit.* See also in CCPE Opinion no. 13 (2018), para 14: "Taking into account the proximity and complementary nature of the missions of judges and prosecutors, as well as of requirements in terms of their status and conditions of service prosecutors should have guarantees similar to those for judges".

49 The Role of Public Prosecution in the Criminal Justice System, *op. cit.*, Note 14.

50 CCPE Opinion no. 9 (2014), Rome Charter, para 53.

with their families, are physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their functions; viii) public prosecutors have an effective right to freedom of expression, belief, association and assembly; ix) public prosecutors have appropriate education and training,<sup>51</sup> both before and after their appointment; x) assignment and re-assignment of cases is made on the basis of impartiality and independence; and xi) prosecutors enjoy the right to request that instructions addressed to them be put in writing. Where they believe that an instruction is either illegal or runs counter to their conscience, an adequate internal procedure should be available which may lead to their eventual replacement.

42. Council of Europe standards also envisage that prosecutors should not benefit from general immunity, which could lead to corruption, but should have functional immunity for actions carried out in good faith in pursuance of their duties.<sup>52</sup> States must ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.<sup>53</sup>
43. It is important for their independence that prosecutors enjoy at least partial immunity. In particular, prosecutors should not be disciplined, sued or criminally punished for their statements in court or procedural decisions. Exceptions from this rule should be limited to cases of corruption, discriminatory or malicious prosecution or any other criminal offence.
44. Alongside with the Council of Europe standards, there are the following international instruments on functional independence of prosecutors: the UN Guidelines on the Role of Prosecutors,<sup>54</sup> and the International Association of Prosecutors' (IAP's) Standards of professional responsibility and statement of the essential duties and rights of prosecutors.<sup>55</sup>
45. For example, IAP's Standards of professional responsibility and statement of the essential duties and rights of prosecutors provides a list of safeguards for prosecutors to carry out their professional responsibilities independently: (a) to perform their

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51 See also in CCPE Opinion No. 12 (2009) Bordeaux Declaration, *op. cit.*, Note 10, point 10, and CCPE Opinion no. 9 (2014), Rome Charter, para 57–64.

52 Venice Commission standards concerning prosecutors, para 61.

53 See also Rome Charter, para 36.

54 "Guidelines on the Role of Prosecutors", adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

55 Standards of professional responsibility and statement of the essential duties and rights of prosecutors, *op. cit.* Note 13.

professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability; b) together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions; c) the right to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished; d) the right to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases; e) the right to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures; f) the right to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards; g) the right to objective evaluation and decisions in disciplinary hearings; h) the right to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status; and i) the right to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.<sup>56</sup>

## ii. Models of prosecutorial independence outside the assessed participating States

46. There are various models of public prosecution services existing in the world. These models are shaped by a variety of legal traditions and historical models of public prosecutors which evolved in different regions of Europe.<sup>57</sup> For example, in terms of the relationship between public prosecutors and political authority, legal scholars identify at least three models: (1) institutional dependence and functional autonomy (English system); (2) institutional dependence and functional subordination (French, Belgian and German systems), and (3) institutional independence and functional autonomy (Italian and Irish systems).<sup>58</sup>
47. Under the English system, although the Crown Prosecution Service (CPS) is by law hierarchically attached to the executive, in practice it enjoys functional autonomy.

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56 *Ibid.* articles 2 and 6.

57 See more on historical models of public prosecution in England, the United States, France and the Netherlands, Gwladys Gilliéron, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany*, Springer (2014), pp. 39–61.

58 Antoinette Perrodet, *The Public Prosecutor*, in Mireille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures*, Cambridge University Press (2002), pp. 416–431.

Under the French system, a prosecutor is under the authority of the executive power in the form of the minister of justice. The Italian system grants full institutional and functional independence to their prosecutors similar to judicial independence, and matters of promotion and recruitment are entirely out of the hands of the executive.<sup>59</sup>

48. Prosecution systems in the world also vary on the basis of their authority to make decisions whether to prosecute. One prosecutorial model is based on the *principle of legality*, where prosecutors are under a legal duty to prosecute. Another model is based on the *principle of opportunity or principle of expediency*, where prosecutors have wide discretion to prosecute. Systems based on the mandatory prosecution principle can be found in some civil law jurisdictions such as Italy and Finland. Systems based on the principle of opportunity can be found both in common law (Canada, England, Ireland, and United States) and civil law (Belgium, Denmark, France, and Norway) jurisdictions. Due to convergence of systems, some jurisdictions which had traditionally and historically applied the principle of legality later introduced exceptions to the principle of legality in their criminal procedure legislation. These changes were made to address overloaded criminal justice systems. For instance, in 1975 Germany introduced this principle in their legislation for less serious offences with the judge's agreement. This includes cases where the accused agrees to pay the victim damages, or pay a sum of money to a public body or the State, do community service or pay someone a pension.
49. Other jurisdictions, which recently introduced a moderate principle of opportunity are Sweden and Switzerland. In Sweden, some offences may be prosecuted only if it would be in the public interest.<sup>60</sup> The Swedish law also state that offences shall not be prosecuted if they are insignificant. These rules can be used to discontinue an already ongoing prosecution. Swedish prosecutors may also waive (refuse to initiate) prosecution on the following grounds: (a) the offence is not a serious one, so the suspect may be penalized with a fine or conditional sentence; (b) the suspect has committed other, more serious crime(s) that are prosecuted simultaneously; and (c) the suspect is subjected to psychiatric or other special care.<sup>61</sup>
50. In conclusion, the currently existing standards, especially under various Council of Europe mechanisms, elaborate on the elements of functional independence particularly emphasizing the need to protect prosecutors from external political interference in individual cases and against illegal instructions from senior prosecutors. However, there is a lack of commonly accepted standards in this sense and further

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59 *Ibid.*

60 Josef Zila, *Prosecutorial Powers and Policy Making in Sweden and the Other Nordic Countries*, in Erik Luna and Marianne L. Wade (eds.) *The Prosecutor in Transnational Perspective*, Oxford (2012) pp. 242–243.

61 *Ibid.* p. 243.



work on crystalizing such standards may be needed. At the same time, international and regional standards are more explicit in respect of the safeguards which encourage prosecutorial independence such as conditions of tenure, remuneration, protection etc. This report will make an analysis of the existing safeguards in the assessed region and make some suggestion for reinforcement in Section IV.

### iii. Legislative framework on prosecutorial independence in Eastern Europe

51. All of the assessed Eastern European participating States are civil law jurisdictions. The work of prosecutors in criminal proceedings and their powers are regulated by separate laws on prosecution services<sup>62</sup> and Codes of Criminal Procedure.<sup>63</sup>
52. All six jurisdictions share a similar structure of prosecution services. The head of prosecution services is the Prosecutor General. In Armenia, the Prosecutor General is elected by the National Parliament by constitutional majority of three fifths of the votes.<sup>64</sup> In Moldova, the candidate for the position of the Prosecutor General is selected by public contest which includes two stages: 1) a pre-selection of candidates by a committee set up by the Ministry of Justice followed by 2) the selection of candidate by the Superior Council of Prosecutors and then appointed by the Pres-

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62 See Law of the Republic of Armenia on the Prosecutor's Office of 1 December 2017 No. HO-198-N; Law of the Republic of Azerbaijan on the Prosecutor's Office of 7 December 1999 No. 767-IQ (with amendments as of 14 February 2014); Law of the Republic of Belarus on Prosecutor's Office of 8 May 2007 No. 220-Z (with amendments as of 18 July 2016); Organic Law of Georgia on the Prosecutor's Office of 30 November 2018 No. 3794-I, published on 13 December 2018; Law of the Republic of Moldova on the Prosecutor's Office of 25 February 2016 No. LPM3/2016; Law of Ukraine on the Prosecutor's Office of 14 October 2014 No. 1697-VII (with amendments as of 3 July 2018).

63 Criminal Procedure Code of the Republic of Armenia, adopted 1 September 1998 (with amendments as of 1 January 2016) (hereinafter CPC of Armenia); Criminal Procedure Code of the Azerbaijan Republic, adopted 14 July 2000 (hereinafter CPC of Azerbaijan); Criminal Procedure Code of Belarus, adopted 16 July 1999 (with amendments as of 17 July 2018) (hereinafter CPC of Belarus); Criminal Procedure Code of Georgia, adopted 9 October 2009, No. 1772-II (hereinafter CPC of Georgia); Criminal Procedure Code of the Republic of Moldova, adopted 14 March 2003 No. 122-XV (with amendments as of 28 July 2016) (hereinafter CPC of Moldova); Criminal Procedure Code of Ukraine, adopted 13 April 2012 (with amendments as of 18 October 2018) (hereinafter CPC of Ukraine).

64 Law of the Republic of Armenia on the Prosecutor's Office, Art. 35.

ident.<sup>65</sup> In Azerbaijan,<sup>66</sup> Belarus<sup>67</sup> and Ukraine<sup>68</sup> the Prosecutor General is appointed by the President with consent of the respective national Parliaments. Prosecutor General of Georgia is elected by the Parliament following the selection and nomination of a candidate by the by the Prosecutorial Council.<sup>69</sup>

53. In some participating States, the heads of the prosecution service have wide powers over appointment of other prosecutors. In Azerbaijan, the Prosecutor General proposes candidates for the most senior prosecutorial positions to the President for appointment: e.g. Deputies of the Prosecutor General, prosecutors heading specialised republican prosecutor's offices. All other prosecutors are appointed by the Prosecutor General himself with the consent of the President of Azerbaijan.<sup>70</sup> In Armenia<sup>71</sup> Belarus<sup>72</sup>, and Georgia<sup>73</sup> the heads of the prosecution service appoint all subordinate prosecutors. In Moldova, the Prosecutor General appoints only his or her deputies<sup>74</sup>. All other prosecutors are selected through a competitive process by the Superior Council of Prosecutors.<sup>75</sup> In Ukraine, the Prosecutor General appoints prosecutors to the administrative positions.<sup>76</sup>
54. Prosecution services in the assessed participating States of Eastern Europe are independent from the executives and other public or private interests at the investigation and prosecution of individual criminal cases. The governments do not have legal powers to issue instructions on individual criminal cases<sup>77</sup>. Jurisdictions including Armenia, Azerbaijan, Belarus, Moldova and Ukraine rely on the principle of legality in criminal proceedings.<sup>78</sup> Georgia, however, has introduced the principle of opportunity in the Code of Criminal Procedure: "when making a decision to ini-

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65 Constitution of the Republic of Moldova, Art. 125(1) and Law of the Republic of Moldova on the Prosecutor's Office.

66 Constitution of the Republic of Azerbaijan, Art. 133(III).

67 Law of the Republic of Belarus on Prosecutor's Office, Art. 18.

68 Constitution of Ukraine, Art. 131-1.

69 Law of Georgia on the Prosecutor's Office, Art. 16 (3)(4)(5)(6).

70 Constitution of the Republic of Azerbaijan, Art. 133.

71 Law of the Republic of Armenia on the Prosecutor's Office.

72 Law of the Republic of Belarus on Prosecutor's Office, Art. 23.

73 Law of Georgia on the Prosecutor's Office, Art. 15 (A).

74 Law of the Republic of Moldova on the Prosecutor's Office, Art. 18.

75 Law of the Republic of Moldova on the Prosecutor's Office, Art. 24-26.

76 Law of Ukraine on the Prosecutor's Office, Art. 9.

77 For instance, the Law of the Republic of Moldova on the Prosecutor's Office, art. 3, (3) regulates that prosecutors service is independent from the legislative, executive and judicial powers and from any political party and that any interference in the activity of prosecutors is prohibited.

78 See CPC of Armenia, Art. 27, CPC of Azerbaijan, Art. 38, CPC of Belarus, Art. 27, CPC of Moldova, Art. 28, CPC of Ukraine, Art. 214.

tiate or terminate a criminal prosecution, a prosecutor shall exercise discretionary powers and take into consideration the public interests”.<sup>79</sup> At the same time, the discretionary powers of prosecutors in making such decisions are not unlimited. For example, the law allows victims to appeal decisions of the prosecutor to terminate an investigation and/or criminal prosecution to a superior prosecutor.<sup>80</sup>

55. In all six participating States, legal provisions stipulate for some level of functional independence of subordinate prosecutors from their superiors. In reality, however, the law describes powers of superior prosecutors to provide instructions and cancel decisions of subordinate prosecutors.
56. For example, Armenian legislation states that “[d]uring the exercise of his/her powers at the proceedings of criminal case the prosecutor is independent and submits only to law. He/she shall execute the legitimate instructions of the superior prosecutor. If the subordinate prosecutor considers the instruction illegitimate, he/she appeals it to a superior prosecutor without executing it.”<sup>81</sup> Armenian prosecutors have wide powers according to legislation. They can, *inter alia*, (a) institute and carry out criminal prosecution and start proceedings of cases instituted by the body of inquiry, the investigator, cancel the decision of the body of inquiry and the investigator on suspension of a case, institute a criminal case based on court motion, cancel the decision of the body of inquiry and the investigator rejecting the institution of a criminal case and institute a criminal case; (b) withdraw from the inquirer and transfer to the investigator or subordinate prosecutor any criminal case, transfer the criminal case from the investigator to the subordinate prosecutor or vice versa, transfer the criminal case from one body of inquest to another, or from one investigator and subordinate prosecutor to another, or accept the criminal case for his/her proceedings: in order to ensure the comprehensive, full and objective investigation; (c) give written instructions to subordinate prosecutor, investigator, and the body of inquiry on the decisions passed and on implementation of investigatory and other procedure actions; (d) resolve objections, prescribed by this Code, brought by the body of inquiry and its employee, the investigator, who disagree with the instructions of subordinate prosecutor, conducting the procedure management of the investigation; (e) cancel illegitimate and ungrounded resolutions of the subordinate prosecutor, the investigator, the body of inquiry, and its officer and also the instructions of the subordinate prosecutor; (f) resolve the appeals against the decisions and actions of the subordinate prosecutor, investigator and the body of inquiry, with the exception of appeals the consideration of which is in the competence of

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79 CPC of Georgia, Art. 16.

80 CPC of Georgia, Art. 106(1–1).

81 CPC of Armenia, Art. 52(3).

the court; (g) dismiss subordinate prosecutor, the investigator, and the officer of the body of inquiry from further participation in the implementation of criminal proceedings on that case, if they have violated the law during the investigation of the case; (h) dismiss criminal prosecution against the accused.<sup>82</sup>

57. Similar powers of superior prosecutors exist in the Criminal Procedure Codes of Azerbaijan,<sup>83</sup> Belarus,<sup>84</sup> Georgia,<sup>85</sup> Moldova<sup>86</sup> and Ukraine. The main source of similarities in the legislation of these participating States was the CIS Model Code of Criminal Procedure which was used for drafting of new legal provisions.<sup>87</sup>
58. The Code of Criminal Procedure of Georgia was drafted later than in other participating States with input from experts from the United Kingdom and the United States.<sup>88</sup> However, provisions in the Georgian Code regulating the powers of prosecutors are very similar to provisions of other codes.
59. Legislation of all of the assessed participating States, except Ukraine allows superior prosecutors to give mandatory written instructions to subordinate prosecutors. For example, CPC of Armenia states that subordinate prosecutors shall execute the legitimate instructions of superior prosecutors. If, however, a subordinate prosecutor considers the instruction illegitimate, he or she may appeal it to a superior prosecutor without executing it.<sup>89</sup> In Azerbaijan, subordinate prosecutors generally have to follow the instructions of their superiors.<sup>90</sup> However, in cases when they disagree with the instructions, they may submit a motivated objection to their superior. In such event, the superior prosecutor has two options: either to agree with the arguments provided in the objections and withdraw his or her instructions or dismiss the objections and forward the case to another subordinate prosecutor. Belarusian legislation obliges subordinate prosecutors to follow the instructions of their superiors without a possibility to appeal it.<sup>91</sup> Similarly, in Georgia superior prosecutors

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82 *Ibid.* Arts. 53–54.

83 CPC of Azerbaijan, Art. 84.

84 CPC of Belarus, Art. 34.

85 CPC of Georgia, Art. 33.

86 CPC of Moldova, Arts. 51–53.

87 Model Code of Criminal Procedure for member states of the Commonwealth of Independent States, adopted by the Inter-Parliamentary Assembly of the CIS member states on 17 February 1996, Arts. 83–85.

88 See, e.g. Vogler R. “Report on the 2009 Draft Criminal Procedure Code of Georgia Prepared” on Behalf of the Directorate General of Human Rights and Legal Affairs of the Council of Europe, Strasbourg (2009).

89 CPC of Armenia, Art. 52(3).

90 CPC of Azerbaijan, Art. 84.8.

91 CPC of Belarus, Art. 34(5)(6).

may give binding instructions to subordinate prosecutors during the investigation.<sup>92</sup> The Moldovan Code stipulates that “[t]he prosecutor shall also execute the written orders of a higher-level prosecutor related to elimination of violations of law and omissions admitted during the performance and/or management of criminal investigation.”<sup>93</sup> However, instructions given by a higher-level prosecutor may be appealed by the prosecutor to the Prosecutor General and his/her deputies. The Prosecutor General and his/her deputies shall decide on the appeal by a reasoned order within up to 15 days.<sup>94</sup> In Ukraine, legislation does not authorize<sup>95</sup> superiors to give orders or instructions to subordinate prosecutors, but there is no prohibition to do so. In Armenia, the prosecutor exercising oversight of the investigation shall be obliged to execute the instruction issued by the superior prosecutor with the exception of cases when he/she considers such an instruction unjustified or illegal. In such cases, the prosecutor exercising oversight is obliged to submit a written objection to the superior prosecutor of the prosecutor having issued the instruction.<sup>96</sup>

60. Legislation of some participating States of Eastern Europe permits superiors to override decisions of subordinate prosecutors and even remove and/or transfer cases from their jurisdiction. The Armenian legislation allows superior prosecutors to re-assign cases from one prosecutor to another when certain conditions are met.<sup>97</sup> In Belarus, superior prosecutors may remove a subordinate prosecutor from the case and forward the case to another prosecutor if the subordinate prosecutor violated the law during the investigation.<sup>98</sup> In Georgia, the Prosecutor General or another authorized prosecutor has the power to remove a subordinate prosecutor from the procedural guidance over the investigation and assign his/her functions to another prosecutor.<sup>99</sup> The Moldovan law is detailed regarding grounds when a superior prosecutor may withdraw the case

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92 CPC of Georgia, Art. 33(6)(c).

93 Code of Criminal Procedure of Moldova, Art. 51.

94 *Ibid.*

95 CPC of Ukraine does not contain any provisions allowing superior prosecutors to give instructions to subordinate prosecutors.

96 Law of the Republic of Armenia On the Prosecutor’s Office Art. 32(2).

97 This may for instance be when the prosecutor is dismissed, the prosecutor recuses themselves, the prosecutor is on vacation or business trip, the powers of the prosecutor are suspended or the prosecutor is taking part in training courses or is ill to the extent that they cannot fulfill their duties, Law of Armenia on the Prosecutor’s Office Art. 32(7).

98 CPC of Belarus, Art. 34(5)(12).

99 CPC of Georgia, Art. 33(6)(a). On 28 February 2019, the General Prosecutor of Georgia issued the Order on defining principles for the case distribution to prosecutors, which provides that a superior prosecutor is to ensure a fair and transparent distribution of cases in the unit under his/her supervision, taking into consideration the number of cases, their difficulty and volume, as well as the specialization, competences, experience and skills required to prosecute and/or investigate the case. Prosecutors should reason the decisions to remove a case from a subordinate prosecutor.

from one subordinate prosecutor and transfer it to another prosecutor. These include: (1) transfer, delegation, secondment, suspension or dismissal of a prosecutor according to the law; (2) absence of a prosecutor, should there be objective reasons justifying the emergency and preventing from his/her appearance; (3) unjustified failure to undertake necessary actions in the criminal case for more than 30 days; (4) statement, ex officio or following a complaint, of a serious violation of the rights of the persons participating in the criminal proceeding or in case of admission of irreparable omissions in the course of managing evidence.<sup>100</sup> In Azerbaijan the Prosecutor General can decide to transfer the case from one investigative authority to another in certain cases.<sup>101</sup> Legislation in Ukraine is silent on this issue.

61. Legislation of the assessed participating States of Eastern Europe does not specify which level of the prosecutor (Prosecutor General, regional prosecutor, city or district prosecutor, or their deputies) can independently make the most important decisions on the case, including initiation of a criminal prosecution, forwarding the case to court or dismissing the case. It is only stated in legislation that a “prosecutor” can make these decisions,<sup>102</sup> but it does not identify the level of the prosecutor responsible for these decisions.
62. Both in theory and in practice, in the assessed participating States of Eastern Europe these decisions could be made by a prosecutor at any level. First of all, when the law refers to a prosecutor, it implies inclusion of the Prosecutor General, who embodies the entire prosecutorial system and the ultimate authority. On the other hand, the Prosecutor General entrusts his or her powers to all prosecutors within the system, unless there are certain functions which are within the exclusive jurisdiction of the Prosecutor General or specific senior prosecutor.
63. All other powers, which are not in the exclusive jurisdiction of the Prosecutor General or other senior prosecutor, belong to any subordinate prosecutor; the legislation, with some exceptions, does not require a formal approval from the senior prosecutor to make such decisions. However, the study shows that subordinate prosecutors seek the advice and formal or informal approval from their superiors on all important decisions. There are a few cases, however, when the law specifically requires a subordinate prosecutor to obtain a formal approval from the superior prosecutor. For example, the Ukrainian legislation states that “If as a result of trial, public prosecutor arrives at the conclusion that it is necessary to drop public prosecution, change charges, or bring additional charges, he shall be required to concil-

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100 CPC of Moldova, Art. 53–1(3).

101 CPC of Azerbaijan, art. 215.7.

102 See, e.g., CPC of Armenia, Art. 53 and 54; CPC of Belarus, Art. 34.

iate the appropriate procedural documents with the head of the public prosecutor's office where he is employed".<sup>103</sup>

#### iv. Culture of functional independence in Eastern Europe

64. Guarantees of functional independence established in the legislation, are not always implemented in practice. The following sections will elaborate more on the possible causes of lack of sufficient functional independence of subordinate prosecutors. One of the causes is the tradition of a strictly hierarchical, almost military-style subordination within prosecutor's offices in the assessed participating States of the Eastern Europe.
65. The six participating States share a similar historical and legal background since they all used to have the Soviet model of prosecution—the Office of the Procurator. Scholars described the Soviet prosecution system as a “unique institution as compared with prosecutor's offices found in Western criminal justice systems”.<sup>104</sup> It was a highly centralized agency that embraced a unity of purpose.<sup>105</sup> The Prosecutor General was extremely powerful in the Soviet Union, but did not enjoy genuine institutional or functional independence from the executive represented by the Politburo of the Communist Party and its Chair.<sup>106</sup> During 1930-1940s the Prosecutor General submitted lists of suspects to Stalin to sanction conviction and executions.<sup>107</sup> One way to influence prosecutors was through the Commission of Party Control (CPC of the Soviet Union). The CPC of the Soviet Union adjudicated disciplinary cases of prosecutors, including Prosecutor General. For example, in 1952 the CPC of the Soviet Union recommended

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103 CPC of Ukraine, Art. 341(1).

104 Richard J. Terrill, *World Criminal Justice Systems: A Comparative Survey*, 9th ed. Anderson (2016), p. 407.

105 *Ibid.*

106 According to Soviet Union legislation in 1930–1950s the Prosecutor General (Prosecutor of the Soviet Union prior to 1946) was appointed by and accountable to the Central Executive Committee of the Soviet Union. See, Regulation on Procuracy of the Soviet Union, approved on 17 December 1933, art. 1–3. Between the 1950s and 1990s, the Prosecutor General was appointed by and accountable to Supreme Council of the Soviet Union. See, The Law of the Soviet Union on Procuracy of the Soviet Union, adopted 30 November 1979 No. 1162-X, Art. 6. Prior to appointment the candidate should have been approved by the Central Committee of the Communist Party the Soviet Union. See more on lack of independence and interference with the work of prosecutors by party leaders and organizations: A.J. Kodintsev (2013). *Party Management of Justice of the Soviet Union in the 1950s*, *Vestnik Ural'skogo instituta ekonomiki, upravleniia i prava*, 3(24), pp. 85–89; A.G. Zviagintsev and P.G. Orlov, *Zalozhniki vozhdiei: rossiiskie i sovetskie prokurory XX v. 1954–1992 gg.* Rosspen (2006); A.G. Zviagintsev and P.G. Orlov, *Prigovorennnye vremenem: rossiiskie i sovetskie prokurory XX v. 1937–1953 gg.* Rosspen (2001).

107 Margarita I. Varfolomeeva (2008). *Osobennosti repressivnoi politiki sovetskoj vlasti v kontse 1930-h godov*, *Nauchnye vedomosti Belgorodskogo gosudarstvennogo universiteta*, 1(41) 2008, pp. 103–109.



to dismiss Prosecutor General Grigory Safonov.<sup>108</sup> Local and regional level politicians regularly ordered prosecutors to refrain from some prosecutions while directing them to pursue others.<sup>109</sup>

66. Although the Soviet State Procuracy introduced by the Bolsheviks' Government in May 1922 replaced the pre-revolutionary predecessor, it contained many features of the Tsarist institution. Butler suggests that the original Soviet model combined elements of the Petrine and Alexandrine versions. Peter the Great had ideas that the Procuracy was to be independent of all local authorities and that it would supervise the legality of acts of all State agencies, enterprises and citizens through its powers of protest, proposal and prosecution. Alexander II's policies inspired placing the Soviet Procuracy within the People's Commissariat of Justice and making the Commissar simultaneously the Procurator of the Republic.<sup>110</sup>
67. Between 1924 and 1933, the office of the prosecutor existed within the Supreme Court of the Soviet Union. In 1933, the Procuracy was reorganized and it was separated from the Supreme Court. Until 1936, however, prosecutors had dual subordination: to the Soviet Union Procurator and to the Council of People's Commissars of their respective republic. In 1936, the Soviet Government once again reorganized legal agencies; this reform resulted in separation of regional procuracies from the justice commissariats and in increasing the power of the Procuracy.<sup>111</sup> In 1946 the Procurator of the Soviet Union was renamed the Procurator General of the Soviet Union.<sup>112</sup>
68. By mid-1930s, the Soviet Procuracy obtained unprecedented powers within the criminal justice system of the Soviet Union. As Solomon observes: controlling the preliminary investigation, with broad power to supervise the legality of criminal proceedings while prosecuting cases, and with the right to appeal decisions of courts at any time, prosecutors stood above trial judges in power and prestige.<sup>113</sup> The Procurators also enjoyed high political status within the structure of the Soviet Government. Procurators on the district, city and regional levels developed close relationships with local and regional political groups. They even had a formal right to attend sessions of the executive committees and provide advice.<sup>114</sup>

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108 A.J. Kodintsev (2013). *Party Management of Justice of the Soviet Union in the 1950s*, Vestnik Ural'skogo instituta ekonomiki, upravleniia i prava, 3(24), P. 86; A.G. Zviagintsev and P.G. Orlov, *Zalozhniki vozhdiei: rossiiskie i sovetskie prokurory XX v. 1954–1992 gg.* Rosspen (2006).

109 Peter H. Solomon, *Soviet Criminal Justice under Stalin*, Cambridge University Press, (1996), p. 290.

110 William E. Butler, *Russian Law, 3rd ed.*, Oxford University Press, (2009), p. 192.

111 Solomon, *op. cit.*, Note 109, p. 173.

112 Butler, *op. cit.*, Note 110, p. 192.

113 Solomon, *op. cit.*, Note 109, p. 175.

114 *Ibid.* p 175–176.



69. At the same time due to the strict hierarchical nature of the institution subordinate prosecutors were fully dependent on their hierarchical superiors in day-to-day practice.
70. The hierarchical system of the Soviet Procuracy consisted of the Procurator General of the Soviet Union, his deputies and lower prosecutors subordinate to the Procurator General. The heads of prosecutor's offices held enormous powers. The Procurator General was appointed by the Supreme Council of the Soviet Union.<sup>115</sup> In turn, all heads of the procuracies of the republics and regions were appointed by the Procurator General.<sup>116</sup> All other prosecutors were appointed by the Procurators of the Union's republics, but approved by the Procurator General. The Procurator General and all lower procurators were appointed for the period of five years. The Procurator General, his deputies and regional procurators were responsible for "strict interpretation and observance of socialist law by all governmental and nongovernmental organizations, officials and citizens."<sup>117</sup> The vast majority of prosecutors were members of the Communist Party.<sup>118</sup> Among the main tasks of prosecutors were supervision of the execution of laws (general supervision), the activities of preliminary criminal investigations, the legality and justification of judgments, the execution of judgments, and the places of confinement. Even judgments of courts were under constant scrutiny by prosecutors. For this and other reasons, Soviet courts were biased towards the prosecution. In the context of a strict hierarchical system where all law enforcement agencies, including prosecutor's office, aimed to achieve one purpose - to fight criminality - conviction rates were extremely high at 99%.<sup>119</sup> Although subordinate prosecutors, at least in theory, had authority to withdraw charges against the accused, in reality all major decisions were approved or sanctioned by those prosecutors' superiors.
71. After the collapse of the Soviet Union, some countries significantly reformed their system of the prosecution service by adopting new legislative acts, changing the role of the prosecutor in the criminal justice system, recruiting and training prose-

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115 The Law of the Soviet Union on Procuracy of the Soviet Union, adopted 30 November 1979 No. 1162-X, Art. 6.

116 *Ibid.* Art. 7.

117 Richard J. Terrill, *op. cit.*, Note 104, p. 407.

118 *Ibid.* Galina T. Kamalova, G.T. (2009). *Ideologicheskie osnovy stanovleniia Sovetskoi modeli pravookhranitel'noi sistemy (1921-1929 gg.)*, *Vestnik Tomskogo Gosudarstvennogo universiteta*, 2009, p. 109-112.

119 Acquittals disappeared gradually in the Soviet criminal courts. The campaign against "unfounded prosecutions" or acquittals launched by the procuracy with the support of regional party officials in 1949-1951 reduced acquittal rates for all crimes from 9.9% in 1946 to 7.5% in 1952 and 4.6% in 1956. See, Solomon, *op. cit.*, Note 109 p. 393. The pressure to avoid acquittals at trial and on appeal increased in the following decades. During the 1960s the rate of acquittal in trials declined from a level of 2-3% to an average for the Soviet Union of about 1%. See, Peter Solomon (1987) *The case of the vanishing acquittal: Informal norms and the practice of soviet criminal justice*, *Soviet Studies*, 39:4, 531-555.

cutors based on new standards. Although the culture of prosecutorial functional independence within the prosecutor's offices also evolved it did not change as quickly as legislative acts. According to some respondents interviewed during missions to participating States, some prosecutor's offices in several participating States in the region still have a weak culture of functional prosecutorial independence. There are several factors that may explain such lingering weakness in functional independence of prosecutors in the assessed participating States of Eastern Europe: (1) a long standing hierarchical tradition in the prosecutor's offices where important decisions are seldom made by subordinate prosecutors without consultations and instructions from their superiors; (2) the existing assessment system depends on clearance and conviction rates; (3) the lack of experience, training and confidence of subordinate prosecutors; (4) that salaries are based on decision of heads of prosecutor's offices; (5) non-existence or lack of independence of self-governance bodies. These factors are discussed below in more detail.

*'Independence of subordinate prosecutors does not exist. For them [prosecutors] it is a common thing, but for us, lawyers, who are neutral observers, it is obvious.'*

72. Overall, the degree of hierarchical dependency and functional independence among the assessed participating States of Eastern Europe varies. Some respondents indicated that there is no functional independence at all. One former prosecutor who now works as a defence lawyer observed: "Independence of subordinate prosecutors does not exist. For them [prosecutors] it is a common thing, but for us, lawyers, who are neutral observers, it is obvious. Subordinate prosecutors are not able to do anything without approval from their superiors. If you apply to the prosecutor to withdraw the charges or reclassify the offence in favour of the accused, the prosecutor would ask you for a week-long extension to report about this application to his or her superior, and then the superior would report to his or her superior and then to another one up the chain, up to the Prosecutor General. I have never seen a prosecutor in court who would stand up and tell the judge that he or she decided to withdraw the charges."<sup>120</sup>
73. Another prosecutor shared that even if the law enables the subordinate prosecutor to make a decision and withdraw charges without consultations with their superiors

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120 Anonymous interview No. 1.

there is a real risk that such decisions would have some negative consequences in the form of disciplinary action for a “wrong” decision or reduction of bonuses or salaries.<sup>121</sup> In other words, the respondents pointed to lack of effective guarantees of functional independence of prosecutors.

74. Yet, some respondents suggested that in recent years subordinate prosecutors received more functional independence to make their own decisions. For instance, one of the prosecutors stated: “Currently, senior prosecutors act like administrative managers of prosecutor’s offices. There are, however, situations prescribed by law when a subordinate prosecutor needs to consult with his or her superior in order to make a particular decision, for instance, in relation to dropping the charges in cases, which are already in court and in relation to plea bargaining agreements.”<sup>122</sup>

*‘If someone says that verbal instructions do not exist, that’s not true.’*

75. Instructions from heads of prosecutor’s offices are given to subordinate prosecutors either formally in the form of a written resolution (*poruchenie* or *ukazanie*) or informally at meetings between the subordinate prosecutor, investigator and head of prosecutor’s office. In some offices, these meetings are frequent, especially if they involve high-profile cases. At the meetings subordinate prosecutors must report to the head of prosecutor’s office regarding the status of investigation or prosecution. Sometimes, those meetings are requested by investigators as a way to put pressure on the subordinate prosecutor who for some reasons disagrees with the course of investigation. Some respondents suggested that the practice of regular meetings depends on the approach chosen by the head of the prosecutor’s office or department. Some heads of prosecutor’s offices do not organize regular meetings and communicate through group chats via applications such as Viber or WhatsApp, but other heads of prosecutor’s offices hold more formal meetings with subordinate prosecutors regularly. One prosecutor expressed criticism regarding this practice: “Some heads of prosecutor’s offices enjoy such meetings and conduct them almost daily. Fortunately, we do not do these senseless things [planning meetings] in our office and I don’t even remember when the last planning meeting in our department took place.”<sup>123</sup>

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121 Anonymous interview No. 2.

122 Anonymous interview No. 3.

123 Interview No. 4.

76. Sometimes instructions to subordinate prosecutors are not given as clear orders or directions, and may be given more informally. As one of the respondents—a former prosecutor—explained: “If someone says that verbal instructions do not exist, that’s not true. In reality, these are not given as instructions but only opinions. This is your [subordinate prosecutor] decision, but your decision can be reviewed [by the supervisor]. There are some criminal cases which go through a review: grave and especially grave crimes.”<sup>124</sup> In other words, in some offices prosecutors may be reluctant to make their own decisions, and often seek advice from their superiors, both in order to avoid a review of their case, and to avoid any negative consequences, such as a disciplinary investigation, lack of promotion or bonuses, if they make a “wrong” decision.

*‘The caseload is allocated manually. If a subordinate prosecutor is disobedient, the head of the office can pile on the prosecutor so many cases that he physically would not be able to manage.’*

77. One of the factors which affects the functional independence of subordinate prosecutors is the authority of heads of prosecutor’s offices to arbitrarily allocate caseload and specific types of cases among subordinate prosecutors. Several respondents indicated that some heads of prosecutor’s offices can assign relatively easy and strong cases to loyal subordinate prosecutors and assign complex or weak cases to subordinate prosecutors who are viewed as being less dependable. For example, one of the former prosecutors observed the following: “The caseload is allocated manually. If a subordinate prosecutor is disobedient, the head of the office can pile on the prosecutor so many cases that he physically would not be able to manage. The head of the office will not get in trouble. However, the subordinate prosecutor will mess his cases up and will be held accountable for his failure.”<sup>125</sup> Subordinate prosecutors may not be able to appeal against this biased and arbitrary case allocation, because there are often no standards or process on how cases should be distributed. Cases may be given to subordinate prosecutors on the eve of the trial, leaving them without time to prepare or even decide whether the case has any prospect of conviction and is supported by credible and admissible evidence.

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124 Interview No. 7.

125 Interview No. 9.

## v. Prosecutorial Self-Governance

78. As observed by the Venice Commission, self-governance bodies such as prosecutorial councils are “becoming increasingly widespread in the political systems of individual states.”<sup>126</sup> During recent reforms in Eastern Europe, national governments created new self-governance bodies in order to strengthen independence and impartiality of individual prosecutors.<sup>127</sup> Generally, in Eastern Europe, these bodies and sometimes their sub-bodies decide on promotion, selection, disciplinary sanctions for prosecutors. If these bodies are within significant control of senior prosecutors, or the Office of the Prosecutor General, they cannot effectively fulfil their duties to protect functional independence of prosecutors. The introduction of self-governance bodies is promoted by various international organizations such as the Consultative Council of European Prosecutors (CCPE).<sup>128</sup> However, not all assessed participating States of Eastern Europe created prosecutorial self-governance bodies. For example, legislation of Azerbaijan and Belarus does not contain any references to self-governance bodies, with the exception of collegiums,<sup>129</sup> which has consultative functions and is affiliated with the Office of the Prosecutor General.
79. There is a variety of definitions used in the legislation, but there are overall three major types of self-governance bodies.
80. The first type of self-governance bodies, such as the Superior Council of Prosecutors in Moldova and the Council of Prosecutors in Ukraine are an executive representative body of prosecutors, which consists of representatives elected members from the prosecution service as well as representatives from other branches of power and civil society.
81. Another type of self-administration organs is a conference of all prosecutors, such as the Conference of Prosecutors in Georgia, General Assembly of Prosecutors in Moldova, and the Conference of Prosecutors in Ukraine.

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126 Venice Commission, Report on European Standards as Regards the Independence of the Judicial System: Part II—The Prosecution Service, *op. cit.*, Note 7, para. 64.

127 Some countries such as Albania and Croatia, and Moldova created separate Councils for Prosecutors, but some other countries, including Belgium, Bosnia and Herzegovina, Bulgaria, France, Italy, Romania, Spain and Turkey, have a joint Council for Judges and Prosecutors. *Ibid.*, para. 32.

128 Report on the independence and impartiality of the prosecution services in the Council of Europe member States in 2017, *op. cit.*, Note 48, para. 23.

129 Law on Prosecutor’s Office of Azerbaijan, Art. 11, and Law on Prosecutor’s Office of Belarus, Art. 21.

82. The third type of self-governance bodies are special boards or commissions, which are responsible for selecting candidates for prosecution services or disciplinary actions against prosecutors. Examples are the Qualification and Disciplinary Commission in Ukraine, Ethics and Qualification Commissions in Armenia,<sup>130</sup> or Board on Selection and Career of Prosecutors, Board for Performance Evaluation of Prosecutors in Moldova, and Discipline and Ethics Board.
83. The composition and method of formation of self-governance bodies vary in participating States. Some are composed exclusively of public prosecutors, such as the General Assembly of Prosecutors in Moldova<sup>131</sup> or Conferences of Prosecutors in Georgia and Ukraine. Other bodies are composed of the majority of prosecutors: such as the Council of Prosecutors of Ukraine (11 prosecutors and two non-prosecutors).<sup>132</sup> In some bodies, prosecutors constitute a minority such as in Qualification and Disciplinary Commission of Prosecutors of Ukraine (five prosecutors and six non-prosecutors).<sup>133</sup> The Superior Council of Prosecutors of Moldova until recently had a majority of Prosecutors. Following legislative amendments, prosecutors are now a minority of seven out of fifteen members.<sup>134</sup>
84. One of the debated factors, which might undermine the self-governing nature of the prosecutorial bodies described above, is the inclusion of government officials as voting members in self-governance prosecutorial bodies. For example, the Venice Commission, DGI, and ODIHR suggested in their 2015 Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova that the Minister of Justice of Moldova and the President of the Superior Council of Magistracy of Moldova should not have voting rights in the Superior Council of Prosecutors of Moldova.<sup>135</sup> GRECO has called upon Moldova to abolish the ex officio participation of the Minister of Justice and the Prosecutor General in the Superior Council of Prosecutors.<sup>136</sup>

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130 Law on Prosecutor's Office of Armenia, Art. 23.

131 Law on the Prosecution Services of Moldova Art. 66.

132 Law on the Public Prosecutor's Office of Ukraine Art. 71.

133 Law on the Public Prosecutor's Office of Ukraine Art. 74.

134 Law on the Prosecution Service of Moldova, as amended by the Law no 128 of September 16, 2019, Art. 68.

135 Venice Commission and OSCE/ODIHR "Joint Opinion No. 791/2014 & CRIM-MOL/266/2015 on the draft law on the Prosecution Service of the Republic of Moldova", Strasbourg/Warsaw, 23 March 2015, Para. 131, <https://rm.coe.int/16806f1d9f>.

136 Group of States Against Corruption, Fourth Round Evaluation Report Corruption prevention in respect of members of Parliament, judges and prosecutors Republic of Moldova, 2016, <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168075bb45>.

85. Similar concerns were voiced by the Venice Commission, CCPE and ODIHR in relation to the role of the Minister of Justice of Georgia in the Prosecutorial Council. Specifically, the joint opinion suggested that the Minister of Justice should not him- or herself be a member of the Prosecutorial Council, but rather an official of that Ministry should be a member.<sup>137</sup> It should be noted that following some recent recommendations of the Venice Commission<sup>138</sup>, the new law on Prosecutors Office of Georgia<sup>139</sup> excluded the Minister of Justice from the Prosecutorial Council and replaced this position with a person nominated by the Minister of Justice and elected by the Parliament of Georgia. It can be argued that participation of high-level representatives of the executive branch of power in prosecutorial self-governance organs may hamper the independent decision-making process of these bodies, as it provides the executives with more opportunity for political interference in prosecutors' careers, including their promotion, dismissal, and disciplinary proceedings brought against them.
86. Another critical observation made by international experts and respondents during this research is lack of financial and structural independence of some prosecutorial self-governance bodies from the office of the Prosecutor General. For instance, the Venice Commission and DHR in their joint opinion indicated that the Qualifications and Disciplinary Commissions "are regarded as something merely auxiliary to the Public Prosecution Service rather than the key element in its regulation and self-governance. In this connection, it is particularly surprising that these Commissions [...] do not have the status and other attributes of a legal entity. No separate budgetary arrangements have been made for the Qualifications and Disciplinary Commission and the absence of these will necessarily undermine their independence"<sup>140</sup>
87. It should be noted, however, that the final version of Ukraine's Law on Prosecutor's Office rectified these omissions. It currently states that "The Qualification and Dis-

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137 Venice Commission, CCPE and OSCE/ODIHR, "Joint Opinion 811/2015 & CRIM-GEO/272/2015 on the Draft Amendments to the Law on the Prosecutor's Office of Georgia", Strasbourg/Warsaw, 4 November 2015, Para 39, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)039-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)039-e).

138 Venice Commission, "Opinion on the Provisions on the Prosecutorial Council in the Draft Organic Law on the Prosecutor's Office and on the Provisions on the High Council of Justice of Georgia in the Existing Organic Law on General Courts", Strasbourg, 17 December 2018, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)029-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)029-e).

139 Law on Prosecutors Office of Georgia, nor. 3794-I, of 30 November 2018, article 19, 2. D), <https://matsne.gov.ge/ka/document/view/4382740?publication=1>.

140 Venice Commission and the Directorate on Human Rights, Joint Opinion on the Draft Law on the Public Prosecutor's Office on Ukraine, Strasbourg, 23 March 2015, para. 161, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)007-e).

disciplinary Commission of Public Prosecutors is a legal entity, has the seal with the National Emblem of Ukraine, legal name, independent balance sheet and accounts with the State Treasury of Ukraine”<sup>141</sup>

88. Some respondents suggested that members of prosecutorial self-governance bodies, who are elected from among prosecutors, are practically dependent on the Prosecutor General. For example, one prosecutor mentioned that although members of self-governance bodies are officially elected by the conference of prosecutors, in reality the election is a mere formality. He explained that in his experience, the conference was presented with a list of candidates only three days prior to the conference, without alternatives, and all candidates were elected as a group and not individually.<sup>142</sup>
89. Several respondents indicated that in their participating States, the independence of self-governance bodies is undermined by other bodies, which are auxiliary to the Office of the Prosecutor General, such as the General Inspectorate of the Office of the Prosecutor General. Despite the fact that the new laws on prosecution services created new self-governance bodies, such as prosecutorial council and qualification and disciplinary commissions, which are in charge of investigating and disciplining prosecutors, general inspectorates duplicate their powers and can initiate disciplinary proceedings against prosecutors. For example, one of the respondents indicated that the General Inspectorate of the Prosecutor General Office was created by a by-law of the Prosecutor General, and not authorized by the new law on prosecution services.<sup>143</sup> Another respondent, who is a member of one of the prosecutorial self-governance bodies, suggested that the General Inspectorate should be abolished because its internal investigations violate the lawful process of disciplinary proceedings and undermine the independence of prosecutors.<sup>144</sup>

## vi. Performance assessment system

90. One of the issues that has caused the most concern among the research interlocutors is the system, official or unofficial, of assessing the performance of prosecutors.
91. In some participating States, performance assessment is based primarily on quantitative data, in particular clearance and conviction rates. For example, one former

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141 Law on the Public Prosecutor’s Office of Ukraine, Art. 73.

142 Anonymous Interview No. 2.

143 Anonymous Interview No. 4.

144 Anonymous Interview No. 5.



prosecutor who became a defence lawyer described the consequences of an acquittal for a prosecutor: “When the verdict is about an acquittal the prosecutor is turning all black. It is like he is losing something. He is getting restless because he must report back to his superior for the fact that he approved the indictment, forwarded the case to court for trial, the case was heard in court for two years, so much public resources were spent on the case and all of a sudden it turned out that the accused is innocent. That is the worst-case scenario for the prosecutor. Even if the accused is totally innocent, prosecutors are trying so badly to pin something on the accused and get a conviction on at least some counts. Acquittals definitely affect prosecutors’ ratings and affect their promotions.”<sup>145</sup>

92. In some participating States, acquittal rates are considered as a black mark against the prosecutor, and lead to automatic initiation of disciplinary proceedings against the prosecutor. In other participating States, acquittals are divided into two categories: acquittals due to an error on the part of the prosecutor, and acquittals without an error. Here is how one of the prosecutors explains this distinction: “If, for instance, a prosecutor has made a legal error, which resulted in exclusion of evidence and an acquittal, then there will be disciplinary proceedings initiated against that prosecutor. If, however, the prosecutor has not violated any legal rules, he will not be disciplined, but will only lose part of his salary [*premiál'nye* or *bonuses*].”<sup>146</sup>
93. At the same time, according to respondents, other participating States no longer use acquittal rates as the main factor in performance assessment of prosecutors. Instead, the focus is primarily on the qualitative factors of performance, such as the substantiation of prosecutorial documents and legal writing skills, ability to work using case management software, quality of representation in courts and workload of the prosecutor. Also, in some participating States, salaries no longer depend on performance of prosecutors in individual cases, and bonuses are only paid for extra hours.<sup>147</sup>

## vii. Other observations on safeguards of functional independence

94. Safeguards of independence of prosecutors, including functional independence, are described both in international and national documents.

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145 Anonymous interview No. 1.

146 Anonymous Interview No. 2.

147 Anonymous Interview No. 3.

95. National laws on prosecution services in the assessed participating States of Eastern Europe also set out various guarantees for independence of prosecutors.<sup>148</sup> According to respondents interviewed during this research study, not all of these guarantees are implemented in practice.
96. First, it was noted that in some participating States the Office of the Prosecutor General does not always comply with the requirements for the process of selection and appointment of prosecutors described in the law. Although the law may stipulate that each vacancy should be advertised, and that the special commission should consider all applicants, the Office of the Prosecutor General gets around this requirement by creating a new department and simply transferring prosecutors to the newly created department, and then disbanding the old department. Even if the vacancies are advertised, the process of selection may lack transparency and decisions regarding candidates for the positions of the heads of prosecutor's offices are made informally by the Office of the Prosecutor General and then formally approved by self-governance bodies.
97. Second, some respondents observed that salaries, which are guaranteed by law, are not paid as a base salary, but in the form of bonuses. The main difference between the base salary and bonuses is that the former is guaranteed by the legislation and the latter can be granted, reduced or even cancelled by the superior. In some participating States, the proportion of the bonuses in the total salary constitutes up to 50%. The government and the Office of the Prosecutor General use this salary mechanism as a tool for controlling subordinate prosecutors who, in turn, are aware that the significant portion of their salaries is made of bonuses determined single-handedly by heads of prosecutor's offices. Thus, the size of the bonus may be used to influence prosecutorial independence. It was suggested by some of the respondents that this can be done in order to influence decisions on the initiation or outcome of criminal investigations or prosecutions.
98. It should be noted that not all participating States are confronted with such challenge. According to respondents, some participating States either abolished the system of bonuses or reduced them to a significantly smaller proportion in relation to the base salary.
99. Third, in some states the respondents were very critical regarding independence of self-governance bodies and noted that members of these bodies were handpicked by the Office of the Prosecutor General and delivered decisions consistent with

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148 See, for example, Law on Prosecutor's Office of Armenia, Articles 64–70 and Law on Prosecutor's Office of Ukraine, Articles 16 and 17.

the interests of the Prosecutor General. Some other respondents indicated that self-governance bodies include representatives of the executive branch of power, which may prejudice decisions in favour of the executive branch. Thus, it can be argued that bodies with the mandate to protect functional independence of prosecutors are sometimes incapable or restricted in their powers due to their membership/structure, and member selection methods. Therefore, self-governance bodies may require further reforms to prevent undue influence from the government.

100. Fourth, in those participating States where performance assessment of prosecutors is not based on qualitative factors but depend mainly on quantitative measurements such as the number of convictions, the assessment system may threaten both security of tenure and the ability to get promotion within the prosecution service. Prosecutors who do not secure convictions in all or most of their cases are not promoted, and can be even discharged from the office for reasons of incompetence. This is a remnant of the Soviet legal tradition in which the criminal justice system rejected principles of the presumption of innocence, equality of arms of parties and adversarial trial.
101. Fifth, some respondents indicated that current legislation of some participating States regarding disciplinary responsibility of prosecutors does not guarantee a fair disciplinary process. In particular, several respondents stated that the law stipulates for a rather limited scale of disciplinary sanctions, which do not always permit to impose an effective and fair disciplinary measure in relation to a prosecutor. Another issue indicated by the same respondents is the fact that the law only contains a limited and general list of disciplinary offences. Some of the offences are too broadly stated such as, for example, “neglect of professional duty” (*nevypolnenie sluzhebnykh obiazanostei*). In the opinion of these respondents, who have experience in considering disciplinary cases, some of the disciplinary offences should be further detailed and clarified in the legislation.
102. In some participating States, disciplinary matters may be initiated and investigated by general inspectorates and not by self-governance bodies as required by law. On the one hand, general inspectorates may help identify crimes such as corruption among prosecutors. On the other hand, some respondents perceived them as bodies which serve to exert influence on prosecutors by the Office of the Prosecutor General. In some instances, general inspectorates may initiate disciplinary cases on petty and spurious grounds. In one cited example, a prosecutor failed to indicate the amount of his daughter’s university scholarship in his income tax return<sup>149</sup>.

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149 Anonymous Interview No. 8.

## viii. Training on prosecutorial independence

103. All the assessed participating States of Eastern Europe have training programs for candidates and acting prosecutors. These training programs include issues related to prosecutorial independence. At the same time, none of the respondents interviewed during this project indicated that a module specifically be dedicated to prosecutorial independence.

## ix. Good practice examples

104. Issues of prosecutorial independence, both structural and functional, exist in all legal systems and all countries of the world. However, the level of independence and ways to ensure independence vary significantly. The purpose of this report is not to provide an exhaustive list of good practice examples which could be implemented by the six participating States of Eastern Europe. Rather, it is to provide considerations for improvements and strengthening of functional independence.

105. *Greater discretion granted to subordinate prosecutors.* One of the main issues of functional independence of subordinate prosecutors in many Eastern European participating States is the lack of discretion to make their own decisions without the approval from supervisors, or the reluctance of supervisors to respect the functional independence of subordinate prosecutors. Participating States interested in granting greater functional independence to subordinate prosecutors may consider the model used in some common law jurisdictions. For example, in England, Canada, Ireland and the United States, subordinate prosecutors enjoy a high degree of professional functional independence. At the same time, their discretion is not absolute; written guidelines promote consistency and impartiality in decision-making.<sup>150</sup>

106. For example, in the United States, there are four categories of such guidelines: internal standards adopted by the prosecutorial offices, model standards, legislative guidelines, and ethical rules.<sup>151</sup> In exercising the discretion to prosecute or withdraw the charges, which is often referred to as the principle of opportunity, subordinate prosecutors are directed by specific legal tests or standards.

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150 Jacqueline S. Hodgson, *Prosecutors in England and Wales and France*, in Maximo Langer and David Alan Sklansky (eds.), *Prosecutors and Democracy: A Cross-National Study*, Cambridge (2017), p. 98; Gwladys Gillieron, *op. cit.*, Note 57, p. 79.

151 At the federal level these guidelines include the Principles of Federal Prosecution of the Department of Justice, the American Bar Association Standards for Criminal Justice Relating to the Prosecution Function and the American Bar Association Model Rules of Professional Conduct, see more in Gwladys Gillieron, *op. cit.*, Note 57, p. 79–89.

107. English prosecutors must apply the evidential and the public interest tests in deciding whether to prosecute.<sup>152</sup> According to the Code for Crown Prosecutors, the evidentiary stage of the test requires that “Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidentiary stage may not proceed, no matter how serious or sensitive it may be.”<sup>153</sup> If the prosecutor is satisfied that there is sufficient evidence to justify a prosecution, prosecutors should proceed with the prosecution unless it is not in the public interest to do so. When deciding the public interest, prosecutors should consider each of the factors listed in the Code. These factors, along with other factors set out in other relevant guidance or policy issued by the prosecutor’s office, enable prosecutors to form an overall assessment of public interest. The list of the Code factors includes the following questions: (a) How serious is the offence committed? (b) What is the level of culpability of the suspect? (c) What are the circumstances of and the harm caused to the victim? (d) Was the suspect under the age of 18 at the time of the offence? (e) What is the impact on the community? (f) Is prosecution a proportionate response? (g) Do sources of information require protecting?<sup>154</sup> Similar rules and standards are found in other common law jurisdictions.
108. Civil law jurisdictions also authorize subordinate prosecutors with broad decision-making powers. In France, subordinate prosecutors may refuse prosecution in cases where they decide that it is not in the public interest to bring a prosecution, if it is a minor offence which did not represent a threat to society, or where popular sentiment in favour of prosecution is weak.<sup>155</sup> The power to decide how to proceed in an individual case belongs to the subordinate prosecutor. The superior may disagree, may attempt to convince the subordinate prosecutor to change his or her opinion and provide the opposite instructions. In this case, however, the decision of the subordinate prosecutor is not invalidated.
109. The discretionary power of French prosecutors is not unlimited. First, in cases where prosecutors decide to refuse prosecution, they must provide victims and complainants with legal and factual reasons for why they decided not to prosecute.<sup>156</sup> Sec-

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152 Antony Duff, *Discretion and Accountability*, in Maximo Langer and David Alan Sklansky (eds.), *Prosecutors and Democracy: A Cross-National Study*, Cambridge (2017), p. 20.

153 The Code for Crown Prosecutors, para. 4.4, available at [https://www.cps.gov.uk/sites/default/files/documents/publications/code\\_2013\\_accessible\\_english.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf).

154 *Ibid.* para. 4.12.

155 Gwladys Gillieron, *op. cit.*, Note 57, p. 296.

156 Code of Criminal Procedure of France, Art. 40-2, available at [https://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code\\_34.pdf](https://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code_34.pdf).

only, the complainant may ask that the decision be reviewed by a superior prosecutor.<sup>157</sup> If the superior feels that the appeal is well grounded, he may instruct the prosecutor to initiate a prosecution. The instruction is in writing and attached to the case file.<sup>158</sup> Third, in common law jurisdictions discretion is regulated not only by legislation, but also by guidelines. Specifically, criminal policy is promoted through circulars issued by the Minister of Justice. The circulars may be general or address specific issues or provide guidance on the interpretation of new legislation.

110. *Stronger Prosecutorial Councils.* Several Eastern European participating States have established various self-governance bodies including Prosecutorial Councils: Georgia, Moldova and Ukraine. Some other OSCE participating States, such as Croatia and Serbia, also adopted a model of separate Councils for Prosecutors. In some jurisdictions, there is a joint Council for Judges and Prosecutors.<sup>159</sup> The main reason for the two models to exist is that in some participating States, prosecutors are considered to be a legal profession separate from the judiciary, while in other both judges and prosecutors are considered to be members of the magistrates' profession. Both models should be considered as good alternatives for strengthening the independence of prosecutors. Prosecutorial and magistrates' councils may have a variety of functions and tasks including appointing prosecutors, considering appeals against evaluations marks of prosecutors; hearing and deciding on disciplinary cases; approving transfers of prosecutor etc.
111. One of the examples of separate prosecutorial councils is the Croatian State Attorney's Council (*Državnoodvjetničko vijeće*), which consists of 11 members: seven prosecutors, two law professors and two members of the Croatian Parliament. Prosecutors represent municipal, county, and the Prosecutor General's offices.<sup>160</sup> Members of the Council among prosecutors are elected in direct elections by all prosecutors and deputy prosecutors. The members of the Council who are law professors are elected based on proposals of faculty councils by all professors of faculties of law across the participating State.<sup>161</sup>
112. An example of a joint Council consisting of both judges and prosecutors is the Superior Council of Magistracy of Romania (*Consiliul Superior al Magistraturii*). It consists of 19 members: (a) nine judges and five prosecutors, elected within the general assemblies of judges and prosecutors, who shall make up the two sections of the

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157 *Ibid.* at Art. 40–3.

158 Gwladys Gillieron, *op. cit.*, Note 57, p. 297.

159 These include Belgium, Bosnia and Herzegovina, Bulgaria, France, Italy, Romania, Spain and Turkey.

160 Joint report on challenges for judicial independence and impartiality in the member states of the Council of Europe, *op. cit.*, Note 4, p. 21, para. 48.

161 Website page of the Croatian State Attorney's Council <http://www.dorh.hr/DOV>.

Council, of which one is for judges and one for prosecutors; b) two representatives of civil society, specialists in the field of law elected by the Senate; c) The President of the High Court of Cassation and Justice, as a representative of the Judiciary, the Minister of Justice and the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation.<sup>162</sup>

113. *Unions of prosecutors.* International standards and guidelines on the role of prosecutors stipulate that prosecutors are “free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.”<sup>163</sup> Some authors suggest that unions may foster prosecutors’ functional independence from their internal hierarchy.<sup>164</sup> French *magistrats*, which as a class include both judges and prosecutors, may join one of the several unions.<sup>165</sup> French unions “have been particularly active in pushing for greater prosecutorial independence both at the individual and collective level.”<sup>166</sup> Unions can assist prosecutors threatened with discipline, which is particularly crucial given prosecutors’ exposure to being disciplined for insubordination.<sup>167</sup> Some unions lobbied and acquired broader rights in disciplinary proceedings, such as for example, a right of the prosecutor accused of professional misconduct to obtain a copy of their file during the pre-trial phase. It is also suggested that unions provide a number of benefits, such as opportunities for prosecutors to meet and discuss issues of common interest. French unions publish critical reports “denouncing the government’s political appointment of high-level prosecutors close to the presidential camp” and condemning the dismissal and forced transfer of prosecutors who had either refused to follow executive orders or criticized governmental policies.<sup>168</sup>
114. *Assessment systems.* Some assessed participating States in Eastern Europe use solely or predominantly quantitative indicators for performance evaluation. This practice departs from the position of the Consultative Council of European Prosecutors (CCPE). In its opinion, the CCPE pointed out that “quantitative indicators as such (number of cases, duration of proceedings) should not be the only relevant criteria to evaluate efficiency, either in the functioning of the office or in the work of an in-

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162 The Law on Superior Council of Magistracy, No. 827, 13 September 2005, available at [http://rai-see.org/wp-content/uploads/2015/08/Law\\_on\\_the\\_Superior\\_Council\\_of\\_Magistracy.pdf](http://rai-see.org/wp-content/uploads/2015/08/Law_on_the_Superior_Council_of_Magistracy.pdf).

163 *Guidelines on the Role of Prosecutors, op. cit.*, Note 55, para. 9.

164 Mathilde Cohen, *the French Prosecutor as Judge*, in Maximo Langer and David Alan Sklansky (eds.), *Prosecutors and Democracy: A Cross-National Study*, Cambridge (2017) pp. 134–136.

165 Some of the leading unions are: *Union syndicale des magistrats, Syndicat de la magistrature and Force Ouvriere Magistrats, ibid.* at 134–135.

166 *Ibid.* p. 135.

167 *Ibid.*

168 *Ibid.* p. 136.



dividual prosecutor. [...] “quality” of justice should not be understood as a synonym for mere “productivity” of the judicial system”.<sup>169</sup> The Venice Commission has maintained a similar position: “[s]ome of the proposed sub-criteria, in particular the quantitative ones [...] would need careful consideration, to ensure that measuring quantity of work will not be done merely by counting cases without due regard to their weight. The number of ‘convicting’ judgments should in no circumstances be a criterion. No prosecutor should have a personal interest in securing a conviction. [...] Similarly, success on appeal should not be a criterion.”<sup>170</sup>

115. Some of the Eastern European participating States have already introduced assessment systems, which focus on both qualitative and quantitative factors. For example, the Superior Council of Prosecutors of Moldova recently developed new assessment system.<sup>171</sup> According to this system, prosecutors are evaluated by the Board for Assessment of Prosecutors’ Performances consisting of seven members. Regular evaluations are conducted every four years.
116. The evaluation of prosecutors’ skills in Moldova includes four stages: (a) the prosecutor’s self-assessment; (b) the prosecutor’s assessment by a rapporteur member of the Board; (c) the interview before the Board; and (d) the prosecutor’s assessment by the Board. This evaluation is based on the following criteria: (a) the quality of the prosecutor’s work in general; (b) the prosecutor’s work at the prosecution stage; (c) the prosecutor’s work at the trial stage for criminal cases; (d) the prosecutor’s readiness in his/her professional work; (e) compliance with the institutional rules of the Prosecutor’s Office; (f) integration and communication skills; (g) reputation and integrity.<sup>172</sup>
117. *Disciplinary offences can be more specific.* Respondents in this study were concerned that the list of specific disciplinary offences is rather fragmented and too general. In some participating States, legal scholars categorized prosecutorial misconduct into several types. For instance, U.S. academics identify 13 different categories of misconduct: abuse of charging function, nondisclosure of evidence, misuse of media, misconduct in plea-bargaining process, unnecessary delay, prosecutorial

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169 CCPE, Opinion No. 11 (2016) of the Consultative Council of European Prosecutors, *on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organized crime*, Strasbourg 8 November 2016, para. 38.

170 Venice Commission, *Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro*, Strasbourg, 15 December 2014, paras. 86–88.

171 *Regulation on the organization and functioning of the Board for Assessment of Prosecutors’ Performances and the method of assessment of prosecutors’ performances*, as approved by Decision No. 12-256/16 of 22 December 2016 of the Superior Council of Prosecutors.

172 *Ibid.* 7.1.



abuses in jury selection, misconduct in presenting evidence, forensic misconduct, misconduct in sentencing, misconduct in grand jury, abuse of process, prosecutorial-provoked mistrials, convictions, and double jeopardy.<sup>173</sup>

118. *Disciplinary sanctions should be of increased range and specified types.* Some respondents in this study suggested that the national laws on prosecution services stipulate for a rather limited scale of disciplinary sanctions, which do not always permit to impose an affective and fair disciplinary measure in relation to a prosecutor. Legislative acts of some participating States provide a more elaborate list of sanctions. For instance, the French Magistrates Status Act stipulates eight different sanctions: (1) a reprimand recorded in the prosecutor's file; (2) transfer to a different location; (3) withdrawal of functions; (4) demotion in rank; (5) temporary suspension from office for a maximum of 1 year with total or partial withholding of salary; (6) demotion in position; (7) compulsory retirement; and (8) removal from office with or without a right to a pension.<sup>174</sup> A similar list of disciplinary sanctions is available in Switzerland: (1) warning; (2) a reprimand; (3) a fine; (4) a reduction of salary; (5) temporary suspension from office; (6) demotion in rank; and (7) dismissal from office.<sup>175</sup>
119. In the United States, sanctions against prosecutors found liable for prosecutorial misconduct can be issued either by courts or bar associations. Courts may hold the prosecutor in contempt, suspend prosecutor from practice, impose fines and costs of proceedings upon the prosecutor, or reprimand the prosecutor in a published opinion that identifies the prosecutor by name.<sup>176</sup> Bar association grievance committees are investigating complaints against prosecutors and could impose the following disciplinary sanctions: censure, suspension from practice, and disbarment.<sup>177</sup>

## B. The prosecutorial role in strengthening judicial independence

120. The Soviet system used prosecutors to supervise judge's decision making. This undermined the independence of the judiciary. According to the Venice Commission's report, "in a few countries remnants of this system linger on; and there is a danger

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173 See, e.g., Bennett L. Gershman, *Prosecutorial Misconduct*, 2nd ed. Thomson Reuters (2018) and Joseph F. Lawless, *Prosecutorial Misconduct: Law, Procedure, Forms*, 4th ed., LexisNexis (2008).

174 Gwladys Gillieron, *op. cit.*, Note 57, p. 310–311.

175 *Ibid.*, p. 256.

176 *Ibid.*, p. 140.

177 *Ibid.*

that an over-powerful prosecution service becomes a fourth authority without accountability [...]"<sup>178</sup>.

121. International standards and national legislation require prosecutors to strictly respect the independence and impartiality of judges. For example, the Council of Europe Recommendation stipulates that prosecutors "shall neither cast doubts on judicial decisions nor hinder their executions, save where exercising their rights of appeal or invoking some other declaratory procedure"<sup>179</sup>. The Venice Commission has insisted that: "judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal."<sup>180</sup> The same report also observes that "[w]hile [...] this principle seems to be generally observed, the experience of the Venice Commission and the case law of the ECHR indicate that the supervisory powers of the Prokuratura in post-Soviet states often extend to being able to protest judicial decisions no longer subject to an appeal."<sup>181</sup>
122. Some prosecution offices in the participating States reviewed do not comply with this principle in practice. For example, some respondents mentioned that when prosecutors do not agree with the decision of the judge, they may not appeal such a decision using only a regular appellate mechanism, but also indicate the judicial decision as "illegal" in a special register.<sup>182</sup> According to these respondents, such classification and registration of judicial acts as "illegal" is a form of interference with the judicial power. The respondents also cited some examples when judges were summoned to the Office of the Prosecutor General to provide explanations for their "illegal" decisions.<sup>183</sup>
123. One of the explanations for this practice can be found in the national criminal legislation. In several of the Eastern European participating States, criminal statutes still contain an offence prohibiting unjust judicial acts. For example, Article 375 of the Criminal Code of Ukraine prohibits "delivery of a knowingly unfair sentence, judgement, ruling or order by a judge (or judges)".<sup>184</sup> Criminal Codes of Armenia, Azerbai-

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178 Venice Commission, Report on European Standards as Regards the Independence of the Judicial System: Part I—The Independence of Judges, 12–13 March 2010, para. 72.

179 "The Role of Public Prosecution in the Criminal Justice System", *op. cit.*, Note 14, para. 19.

180 Report on European Standards as Regards the Independence of the Judicial System: Part I—The Independence of Judges, *op. cit.*, Note 178, para. 67.

181 *Ibid.* para 66.

182 Interview No. 8.

183 *Ibid.*

184 Criminal Code of Ukraine, adopted on 5 April 2001, No. 2341-III Art. 375.

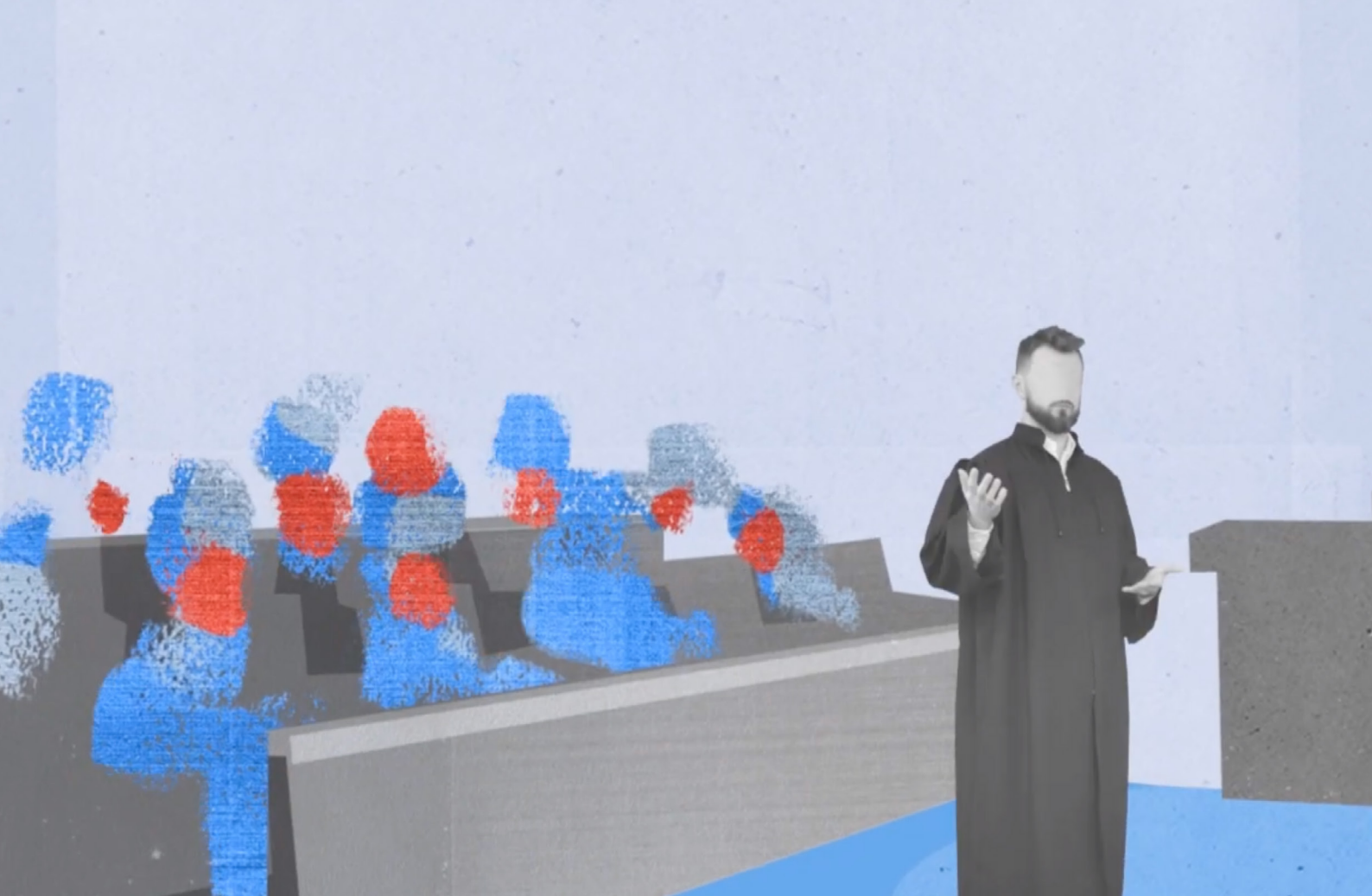
jan, Belarus and Moldova contain similar or identical provisions.<sup>185</sup> It appears that only Georgia has abolished this offence in the criminal law.

124. These ambiguous provisions of the criminal legislation often allow prosecutors to initiate criminal proceedings against judges in cases where prosecutors disagree with judges. It should be noted, however, that not all participating States have this or similar provisions in legislation, and not all participating States allow prosecutors to initiate criminal investigation against judges in all cases. In some participating States, criminal code provisions prohibiting unjust judicial acts were repealed. In other participating States, where such provisions still remain, criminal cases against judges can be initiated only after their judicial decisions are quashed by the Court of Appeal and after the disciplinary investigation against judges resulted in a finding that judges violated the code of ethics.<sup>186</sup> In some participating States, the provision criminalizing the delivery of a “decision contrary to the law” became a subject of constitutional litigation. For example, in 2017 the Supreme Court of Justice of Moldova submitted an application to the Constitutional Court of Moldova asking to rule whether Article 307 of the Criminal Code, which was used to prosecute a high-ranking judge from the Court of Appeal of Chisinau. The Constitutional Court found the provision of Article 307 constitutional. Such outcomes may have as a chilling effect on many judges and undermine their independence by making them compliant with prosecutors’ demands in criminal and other cases.

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185 Criminal Code of Armenia, adopted 29 April 2003, No. AL-528 Art. 352; Criminal Code of Azerbaijan, adopted 30 December 1999, No. 787-IQ Art 295; Criminal Code of Belarus Art. 392, adopted 9 July 1999 No. 275-3; Criminal Code, adopted 18 April 2002, No. 985-XV, Art. 307.

186 Interview No. 7.



## IV. Key Recommendations

### A. Relationship between heads of prosecutor's offices and subordinate prosecutors

125. Participating States should ensure that heads of prosecutors' offices have primarily managerial functions and may act as senior prosecutors (assigned to more serious cases). As a rule, head prosecutors should not intervene in the investigation and prosecution of individual criminal cases to which subordinate prosecutors are assigned. Senior prosecutors can be entitled to play an active role in very important cases, especially those involving issues of legal principle. Such cases should normally be identified in advance. The law can also allow using teams of prosecutors in major cases in which the head of the team would have the decisive say (although not without canvassing the opinions of junior prosecutors).
126. The law in participating States may permit both the accused (suspect) and victim appeal decisions of subordinate prosecutors to their superiors and in some cases,

the law should allow the superior prosecutor to set their decision aside and/or replace it.

127. In participating States where the law specifically permits heads of prosecutor's offices to intervene in the investigation and/or prosecution of individual criminal cases to which subordinate prosecutors are assigned, head prosecutors should be required to issue a written and reasoned decision when they overrule the decision of a subordinate prosecutor.
128. Participating States should ensure that if a head of prosecutor's office disagrees with the decision of a subordinate prosecutor on a case, the head of prosecutors' office can allow the subordinate prosecutor to continue with the case, reassign the case to themselves, or transfer it to another subordinate prosecutor. If the decision of a prosecutor is overturned by a hierarchically superior prosecutor, further investigation or prosecution of the case should stay with the same subordinate prosecutor only if this prosecutor accepts the validity of this decision.
129. Participating States should ensure that prosecutors' offices keep detailed records of periodic mandatory meetings in which subordinate prosecutors who are in charge of individual cases must report to heads of prosecutors' offices on progress of their investigation or prosecution and receive instructions on how to continue with the prosecution. Ensure that any instructions obtained by subordinate prosecutors from heads of prosecutors' offices are provided in writing and recorded in formal meeting minutes. In giving their instructions, senior prosecutors should respect functional independence of subordinates in making procedural decisions. No oral or written instructions should be given with regards to the final outcome of a case, for example, forwarding a case to court or dismissing it. Instructions should only relate to corrections of procedural shortcomings, decisions, which are wrong in law or not supported the available evidence, human rights violations and undertaking additional investigative proceedings.
130. Participating States should ensure that, as a general rule, during investigation of criminal cases (initiating criminal investigation, putting forward charges, dismissing a case, approving the indictment and sending the case to court) all major decisions should be taken by prosecutors independently without a formal or informal approval from the head of the prosecutor's office. There is a particular need to ensure the independence of individual prosecutors in cases involving influential and powerful individuals (businesspeople or politicians), or where the forces of the state engaged in wrongful practices such as torture, inhumane or degrading treatment or acts of corruption. All exceptions and criteria for when an approval of a more senior prosecutor is required should be clearly stipulated.

131. Participating States should consider developing and implementing an objective and unbiased mechanism for allocation of cases in which each new incoming case is assigned randomly to a specific prosecutor with consideration of his or her specialization, caseload, workload and experience. This process can be computerized or based on a simple registry with an alphabetic list of names of prosecutors who are assigned a number at the beginning of the year. Any case coming under that number will automatically go to a certain prosecutor. Prosecutor's offices should encourage specialization of prosecutors.
132. As a further enhancement of the mechanism for allocation of cases, participating States should consider developing electronic document management system (EDMS) or prosecution case management system. The system will convert paper-based processes into digital processes including all decisions, proceedings conducted by subordinate prosecutors and all communications between subordinate prosecutors and heads of prosecutors' offices. An additional benefit of an EDMS would be its capability to record and generate quantitative information regarding prosecutors' workload and performance, which can be used for their performance assessment. At the same time, the system should not be used as a vehicle for control of subordinate prosecutors. Careful consideration should be given to implications of a document management system for disclosure of material to the defence.

## **B. Internal guidelines and policies on functional independence of prosecutors**

133. The prosecution services of participating States should develop and strengthen culture of functional independence at all levels. The Prosecutor General and heads of regional prosecutors' offices have a key role in evolving the culture of functional independence by setting the "tone from the top", policies and day-to-day practices.
134. Participating States should undertake a policy audit on functional independence of prosecutors in order to assess the legislation, internal policies, training curriculum and practices in prosecutors' offices.
135. Participating States should consider introducing or improving existing guidelines and policies on functional independence of prosecutors by the Office of Prosecutor General (or Chief Prosecutor). Such policies and guidelines should clearly explain the relationship between subordinate prosecutors and their supervisors and heads of prosecutor's offices, including, but not limited, to the question of who is in charge of investigation or prosecution of cases.

136. Participating States should ensure that policies and guidelines related to other aspects of prosecution services are consistent with specific policies and guidelines on functional independence. Any provisions in other policies and guidelines which may undermine or be in conflict with functional independence should be modified or removed.
137. In order to ensure compliance with internal policies on functional independence, participating States should provide in the legislation a clear definition of accountability established for all levels of prosecutors, including disciplinary actions. It is essential, however, to ensure that prosecutorial decisions made in good faith should not form the basis for disciplinary liability in the absence of gross negligence. In general, disciplinary liability should only relate to improper conduct as a matter for performance assessment, rather than poor performance.

### **C. Performance assessment of prosecutors**

138. Participating States should develop and implement a performance assessment system which is not based on clearance rates or acquittal rates. Instead, performance assessment should focus on prosecutors' skills, including factors that may be professional (knowledge of law, ability to present evidence in court, capacity to write motions and other procedural documents), personal (ability to cope with the workload, ability to make independent decisions), and social (ability to work with colleagues, respect for court, defence party and the victim). For possible promotion to an administrative position, leadership skills should be also identified and assessed.
139. Prosecution Services of participating States should conduct performance assessments periodically, for example once every four years, by a board of prosecutors from the same and other prosecutors' offices. The head of prosecutors' office and hierarchical supervisors should not have the sole decisive role in the performance assessment of subordinate prosecutors. Participating states should ensure that the results of the performance assessment is made available to the prosecutor. The prosecutor should have the right to submit observations regarding the results of the assessment and right to legal redress where appropriate.
140. Participating States should ensure that prosecutors whose cases resulted in acquittals are not subjected to disciplinary investigation and/or proceedings unless there is a reason to suspect improper conduct such as corruption. Bonuses of prosecutors should not depend on clearance and acquittal rates.



## **D. Prosecutorial self-governance bodies**

141. Participating States should consider establishing or strengthening self-governance bodies of prosecutors (Prosecutorial Councils and/or Qualification and Disciplinary Commissions). The main functions of these self-governance bodies should include, inter alia, transparent selection of candidates for prosecution service, promotion of prosecutors, and consideration of disciplinary matters in relation to prosecutors.
142. There should be a strong element of elected prosecutors and some outside representation, including representation from the civil society in self-governance bodies. Participating States should refrain from political appointments. Participating States should ensure that self-governance bodies are independent from the Office of the Prosecutor General and the Ministry of Justice, both structurally and financially.

## **E. Disciplinary responsibility and procedures**

143. Prosecution services of participating States should eliminate the practice of initiating disciplinary proceedings against prosecutors in cases where the trial resulted in a not-guilty verdict or a sentence lower than the one the prosecutor asked for. Prosecutors should not be disciplined for not obtaining a conviction.
144. Participating States should introduce a progressive and well-elaborated scale of disciplinary measures that can be applied to prosecutors engaged in professional misconduct. The progressive scale should include a more comprehensive list of disciplinary offences.

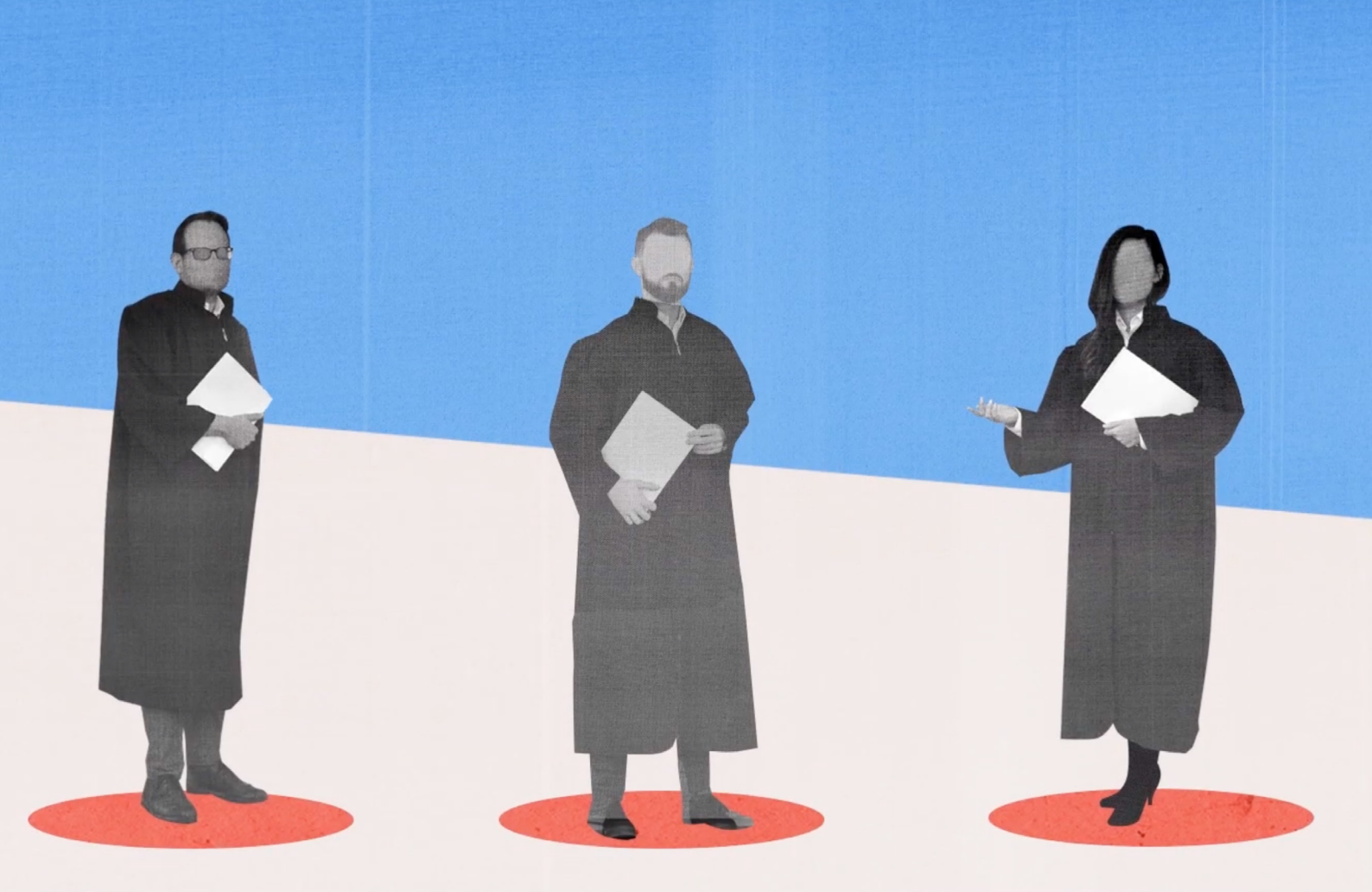
## **F. Education on prosecutorial independence**

145. Participating States should develop and introduce special modules on functional independence of prosecutors as part of curriculum for the education system, for example, at prosecution academies and continuing education for prosecutors. The modules should have both theoretical and practical components and should be offered on an ongoing basis to both new and experienced prosecutors.



## G. Prosecutorial role in strengthening judicial independence

146. Participating States should end the practice of prosecutors registering or initiating criminal proceedings against judges who deliver allegedly illegal decisions or decisions with which prosecutors are not satisfied. Prosecutors should challenge the judgements and decisions perceived to be illegal primarily through appeals. Prosecutors should initiate criminal investigations against judges only in cases of malice or intentional abuse of power.
147. Participating States should consider removing from the Criminal Code ambiguous provisions which are related to “unjust” judicial acts.
148. Participating States should promote the role of prosecutors in safeguarding judicial independence through continuing legal education of prosecutors.



## V. ANNEX: Methodology

### A. Key assessment areas

149. This report is developed within the ODIHR Project “Strengthening the independence and accountability of judges and prosecutors: Enhancing the rule of law in Eastern Partnership countries”, funded by the Nordic Council of Ministers which was running between January 2018 and January 2019. The project had as beneficiaries six participating States of Eastern Europe: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. The main objective of the project is to assess the current state of functional independence of prosecutors and role of prosecutors in protecting judicial independence.
150. The report highlights concerns and challenges in relation to prosecutorial functional independence and judicial independence and provides recommendations and follow-up actions which will assist beneficiary participating States in addressing these challenges. The observations made in this report are not specific to any par-

ticipating State; they are generalized and aggregated into themes based on similarities in practices.

151. The project entailed the following activities: review of safeguards for procedural independence of prosecutors within respective legal frameworks; assessment of practical application of safeguards through desk research and three visits in Armenia, Georgia, and Ukraine. In May and July 2018 a study visit to the Norwegian Prosecuting Authorities and an expert consultative meeting in Warsaw were conducted to review identified challenges and good practices and develop regional recommendations for beneficiary participating States. The project also involves production of a video clip promoting judicial and prosecutorial independence and educating the public on the need for strong safeguards.
152. This study looked into issues pertaining to functional independence of prosecutors such as the relationship between subordinate prosecutors and their superiors; guarantees of functional independence; performance appraisal of prosecutors; continuing education and training; disciplinary responsibility of prosecutors.

## **B. Research questions**

153. The study aimed to answer the following research questions:
154. What are the major concerns and challenges for prosecutorial independence in the participating States of Eastern Europe;
155. What are the trends and practical aspects in the work of prosecution services in participating States of Eastern Europe in terms of number of prosecutors, number of prosecutions, caseload of prosecutors, their salaries and system of benefits, number of dismissed charges, acquittal and conviction rates, appellate rates and other statistical information collected by prosecution services or courts;
156. What are the views of prosecutors, judges and defence lawyers regarding potential changes in the legislation regulating prosecution services; and
157. How can functional independence of prosecutors be strengthened?

## **C. Data collection, validation and sampling**

158. Prior to collecting field data, desk-based research was conducted, which examined national legislation of six participating States of the Eastern Europe on prosecution

services, international standards on prosecutorial independence, as well as opinions of organizations such as OSCE/ODIHR, European Commission for Democracy Through Law (Venice Commission), Consultative Council of European Prosecutors (CCPE), and other sources of secondary data.

159. Empirical data were collected through semi-structured interviews with lawyers, judges, acting and former prosecutors, representatives of Ministries of Justice, academics, representatives of prosecutorial self-governance bodies and High Councils of Justice in three participating States of the Eastern Europe: Armenia, Georgia and Ukraine during April and May 2018. In total, interviews were conducted with 36 professionals, among whom 11 were women. The approach to selection of respondents depended on the organization they represented. For example, respondents among prosecutors were selected by the Offices of the Prosecutor General in all three participating States.
160. On 14–15 May 2018 the OSCE/ODIHR team and representatives of prosecutors' offices and self-governance bodies from five participating States of the Eastern Europe (Armenia, Belarus, Georgia, Moldova, and Ukraine) conducted a study visit to Oslo, Norway. The purpose of the study visit was to provide an opportunity for representatives from the five participating States and the OSCE/ODIHR experts to learn about how prosecutorial integrity and independence is safeguarded in the Norwegian prosecution system and how investigations are conducted in high-profile cases.
161. During this two-day study visit prosecutors from the Eastern European participating States met with attorneys from the Office of the Director of Public Prosecutions of Norway (*Riksadvokaten*), an attorney and an investigator from the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (*ØKOKRIM*), legal scholars from the University of Oslo and the University of Bergen.
162. Through presentations and question and answer sessions, representatives of participating States learned about institutional culture within Norwegian prosecution services, current and proposed legislative safeguards for functional independence, the Code of Conduct for Prosecutors, legal education and vocational training regarding potential risks of interference with prosecutors' decisions in individual criminal cases, professional interaction between senior and junior prosecutors, nationwide evaluations of specific type of cases (e.g. rape and domestic violence cases in 2017 and cases of violence in 2018), examples of high-profile cases investigated and prosecuted in recent years in Norway. Information obtained during the visit assisted in drafting recommendations in this study.

163. Key findings and recommendations of the needs assessment study were presented, discussed and supported by experts at the expert consultation meeting, which took place in Warsaw on 2–3 July 2018. The expert meeting was attended by acting and former prosecutors and civil society experts from participating States of the Eastern Europe, including Armenia, Belarus, Georgia, Moldova, and Ukraine, and experts of Austria, Ireland, and Romania as well as several international organizations such as UNODC, CCPE and Council of Europe. The final report included additions and revisions proposed by participants of the expert consultation meeting.

