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**REPORT FROM THEMATIC SESSION I –
PROSECUTORIAL INDEPENDENCE, AUTONOMY AND
ACCOUNTABILITY: DIFFERENT MODELS, COMMON CHALLENGES
IN PROTECTION OF HUMAN RIGHTS**

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1. Prosecutorial independence does not equal judicial independence but is an essential element of judicial independence.
2. Within the Council of Europe, standards on prosecutorial independence are notably provided by the case-law of the European Court of Human Rights, by the Committee of Ministers (notably CM Recommendation (2000)19), by the specialized bodies of the Council of Europe (CCPE, CCJE; joint Bordeaux declaration, CCPE Rome Charter (opinion 9(2014)), by the Venice Commission (2010 report on the independence of the judicial system part II: the prosecutors + country-specific opinions, see compilation), by the CoE monitoring bodies such as GRECO (4th round of evaluation). Relevant standards are also provided at the level of the European Union (ECJ).
3. Prosecutorial independence is not directly guaranteed by the European Convention on Human Rights, which protects judicial independence and guarantees the fairness of the criminal trial.
4. The case-law of the ECtHR is not concerned with the institutional position of the prosecutor within the institutional arrangements of separation of powers of a given country, nor with specific domestic criminal policies; it is only concerned with the role of the prosecutor as a party to a criminal trial, the fairness of which must be guaranteed together with the principle of equality before the law; the prosecutor's conduct has a direct relevance under Article 6 but also Article 5 ECHR. In this perspective, the possible subordination of the prosecution to the executive and its possible hierarchical structure require certain specific guarantees as concerns in particular the limitation to the nature, extent and modalities of the instructions which may be given to individual prosecutors by prosecutors of a higher rank.
5. As a consequence of the different nature of the roles of the judge and of the prosecutor, under the case law of the ECtHR certain judicial guarantees do not apply to prosecutors – it is so for the condition of being “established by law” which applies to the allocation of cases to judges but not to prosecutors. However, even when not a magistrate, the Prosecutor is part of the judiciary and therefore distinct from the general category of civil servants and in need of specific guarantees. Certain guarantees of the judges thus extend to prosecutors: recruitment and dismissal (with the intervention of authorities independent of the government and parliament), disciplinary matters, access to judicial review of disciplinary decisions.
6. The partisan position of the prosecutor in the criminal trial has consequences: prosecutors are not habilitated to check the legality of detention under Article 5 ECHR nor to validate a house search under Article 8. Instead, while under a limitation of freedom of speech within the meaning of Article 10 as part of the judiciary, prosecutors enjoy greater possibility of criticism. The duty of prosecutors to ensure the concrete application of the guarantees of fair trial affects the way in which its action is conducted (including the duration of the proceedings). Prosecutors also need to comply with the positive obligations which the ECHR places on the authorities for the protection of certain rights such as Articles 2 and 3 ECHR.
7. The distinct but complementary nature of the role of judges and prosecutors was underlined by the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) in the Bordeaux declaration of 2009. Their common duty is to ensure that the rule of law be guaranteed by the fair, impartial and effective administration of justice, the protection of individual rights and freedom at all stages of the proceedings and the protection of public interest. Judges and prosecutors

must both enjoy independence in respect of their functions, and also be and appear to be independent from each other.

8. The independence of the European Public Prosecutors Office (EPPO) from member states should also be guaranteed.

9. There exists a variety of institutional arrangements of the prosecution service, starting from whether it belongs to the judiciary, and whether it belongs to the executive. But further deep differences concern the manner of recruitment of prosecutors, the existence of councils of prosecutors or of justice, the nature of the relations with the Minister of Justice and with parliament, the internal, possibly hierarchical organization of the offices, the decision-making procedures, including the extent of instructions, the vertical or horizontal organization of the prosecution service, the possible specialisation of the offices (environment, terrorism, corruption), the obligatory or discretionary exercise of the criminal action, the features of the criminal system (inquisitory or accusatory or mixed).

10. Each country has to find its own institutional design which complies with the standards.

11. The core function of the public prosecutor is to exercise the criminal action. Public prosecutors must protect public interest in the application of the criminal law. Their duty is twofold: to protect individual rights but also to ensure the effectiveness of the system. In some systems, the prosecutor also carries out investigation functions and/or direct the activity of the judicial police.

12. Despite all the differences there are shared standards which apply to all systems.

13. The independence of the system as a whole does not exclude the possibility of internal subordination within the system. It is acceptable for prosecution services to be placed within the executive branch of power, and also to be hierarchically organized. In such cases, one could speak of autonomy rather than independence. Prosecutors may legitimately be subject to policy directions of a general nature coming from the executive, the legislature or both. But it would not be acceptable for prosecutors to be subject to political direction in making decisions in specific cases. Prosecutorial discretion should be free from any political interference. Strict adherence by the public prosecutor to the principle of legality and objectivity is a check on the possibility for the executive to impart instructions.

14. Standards provide that all instructions given in a specific case by a senior prosecutor must always be in writing and verbal orders must either be confirmed in writing or withdrawn. Such instructions may not relate to the non-prosecution of criminal offences. In case of doubt as to the legality of an instruction, the lower prosecutor should also have the right to ask for additional reasons, which should also be provided in writing. If an allegation of illegality of an investigation is made, a court or an independent body such as a prosecutorial council must rule on the legality of the investigation. The prosecutor also has the right to initiate proceedings to allow his or her replacement by another prosecutor when he or she believes that an investigation is illegal or contrary to his or her conscience. The possibility of replacing the prosecutor has been criticized during the conference. Finally, the prosecutor must remain free to choose the legal arguments to be presented to the court.

15. The independence of the prosecutor is not designed to benefit the prosecutors, but

to benefit the society and the individuals. Prosecution should be firmly but fairly conducted. It is designed to allow for impartial and fair decisions. The “rate of convictions” should not be used as a measure of the prosecutors’ efficiency.

16. The function of the prosecutors goes beyond the interests of the parties to a particular case, the prosecution does not represent the interests of the individuals or a group. It should ensure disclosure of relevant evidence, provide support to witnesses and victims, especially vulnerable persons etc.

17. For this reason, the independence or autonomy of the prosecution service should go hand in hand with the accountability of the individual prosecutors and of the prosecution system as a whole vis-à-vis the society.

18. In order to provide for accountability, prosecutorial councils may represent an appropriate solution. However, prosecutorial councils are exposed to two kinds of dangers: corporatism and external political pressure. The appropriate balance between independence and democratic legitimacy should be found through the composition of the Council, which includes non-prosecutorial members elected by the parliament or appointed in an independent manner. In the light of the different roles of judges and prosecutors, the features of high judicial councils should not just be replicated in prosecutorial councils. There are some common principles: constitutional entrenchment, rules on incompatibility, stability of the mandate. However, because of the increased risk of corporatism present in hierarchically organized prosecutorial systems, there should not necessarily be a majority of prosecutors on the HCP, while guarantees of representation of minorities must be provided and the council must be shielded from the control of the political majority. The council should also be protected from possible undue influence of internal groups in an ideological fashion.

19. The functions of prosecutorial councils should take in due consideration, in hierarchically organized systems, the powers of the Prosecutor General, in order to avoid overlap and possible conflicts.

20. In the absence of a prosecutorial council, there are other ways to ensure prosecutorial independence: the manner of appointment of the prosecutors, the stability of their mandate, rules on functional immunity and special procedures for lifting it; the existence of mechanisms of control of professional responsibility, the existence of inspection mechanisms; material guarantees of independence (salary, social benefits); rules of professional ethics.

21. The ultimate submission of the case to an independent court is a powerful check on prosecutorial powers.

22. Review by a constitutional court is also an important guarantee.

23. Transparency of the action of the prosecutors is essential. An appropriate understanding of the actions of the prosecution by the society is essential for its acceptance and for public trust. Prosecutorial decisions must be duly motivated and should be made available to the public.

24. Periodical reports by the Prosecutor General to parliament may be considered as an instrument of democratic accountability.

25. The media plays a role in this respect, as it may bring allegations of misconduct to

the attention to the public. Communication by the public prosecutor is important but the risk of manipulation, particularly where the media is not independent, should not be underestimated. A professional response to the media by the institution of the prosecution may help protect individual prosecutors.

26. International cooperation in judicial matters is also essential. Globalization benefits not only national economies but also criminals – hence it is important to exchange information and experiences amongst prosecutors to meet these new challenges. Cooperation requires trust.

27. The prosecution should be collaborative (relations with the partners – MPs, communities, international partners), responsive (experience of the pandemic with the remote court hearings in some cases), and adaptable to the changing nature of the crime and the need to deliver justice across borders.

28. The prosecution system should be given appropriate resources. If functions are increased, resources should be increased. The level of resources should not be necessarily correlated with the crime rates – decreasing crime rates do not justify the decrease in the budget of the prosecution system. The populist temptation to create new crimes in the code without considering the cost and practical difficulties in putting these provisions into operation should be avoided.

29. The time may be ripe to update CM Rec(2000)19 and to elaborate the standards on prosecutorial independence more in detail.