

WEBINAR
**FUNCTIONAL INDEPENDENCE OF PROSECUTORS IN EASTERN
AND CENTRAL EUROPE**

2 September 2020

ODIHR Meeting Report



Warsaw, May 2021

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WEBINAR

FUNCTIONAL INDEPENDENCE OF PROSECUTORS IN EASTERN AND CENTRAL EUROPE

MEETING SUMMARY

Objective

The webinar on functional independence of prosecutors was organized by ODIHR with the aim of:

- Presenting the ODIHR Needs Assessment Report on Strengthening Functional Independence of Prosecutors in Eastern European participating States.¹
- Assisting the participating States from Eastern and Central Europe in fulfilling their OSCE commitments related to prosecution by reinforcing functional independence of prosecutors in their respective justice systems.
- Encouraging participants to discuss functional independence of prosecutors in their legislation, sub-legal acts and practices with a view to identifying points for amelioration.
- Discussing how functional independence of prosecutors has been affected by the COVID-19 pandemic in Eastern and Central European participating States.

Introduction

Head of the Democratization Department of ODIHR, **Mr. Marcin Walecki**, opened the webinar by giving an introduction to ODIHR and its activities in the field of functional independence of prosecutors. He emphasized that OSCE participating States have made commitments to clearly define powers in relation to prosecution and the measures preceding and accompanying prosecution.² Prosecutors should be individuals of integrity and ability who always maintain the honour and dignity of their profession and respect the rule of law.³ Furthermore, he posited that prosecutors should play a key role in ensuring and protecting the independence of the judiciary. He stressed that the independence of prosecutors is a growing field of study within the rule of law community and that we would likely see more attention paid to this subject in the future. He thanked the Nordic Council of Ministers who funded ODIHR's needs assessment study and report.

Presentation by Nikolai Kovalev

During an initial presentation, **Mr. Nikolai Kovalev**, Associate Professor at Wilfrid Laurier University, outlined the main findings of ODIHR's Needs Assessment Report, paired with research on the same topic in Central European participating States. He mentioned that most of the participating States in Eastern and Central Europe are characterized by a lack of institutional independence of the prosecution services, highly centralized prosecution agencies, and judicial bias in favour of the prosecution. He emphasized that legislation, without exception, guarantees some form of functional independence of prosecutors in the concerned participating States, but in practice there are often problems. He underlined the culture of subordination and dependency

¹ Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report, <https://www.osce.org/odihr/447859>.

² Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), paragraph 5.14.

³ Brussels Declaration on Criminal Justice Systems of the Ministerial Council, 5 December 2006.

as particularly problematic, where subordinate prosecutors heavily rely on informal orders and instructions from their superiors before making key decisions in individual cases.

Panel Discussion 1: Standards and Practices

During the first panel discussion, the panellists discussed standards, practice and recent developments in the area of functional independence of prosecutors. **Mr. José Santos Pais**, President of the Consultative Council of European Prosecutors, gave an introduction to the work of his organization. He referred to the Bordeaux Declaration⁴ and explained that judges and prosecutors have complementary roles when it comes to ensuring the rule of law. He underlined that different legal traditions have different ways of organizing the prosecution service. Irrespective of their status under domestic law, prosecutors must enjoy complete functional independence in the discharge of their legal roles. **Mr. Gary Balch**, General Counsel of the International Association of Prosecutors, gave an introduction to his organization. He explained that independence of prosecutors plays a key role in the standards issued by the International Association of Prosecutors.⁵ He emphasized that prosecutors should be able to perform their professional duties without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. Prosecutors and their families should be physically protected from threats and attacks against them. He also posited that the COVID-19 pandemic had caused a reallocation of resources from prosecution and caused a backlog of cases in many jurisdictions. He stressed that during states of emergency, prosecutors should not be used as tools for oppression.

Mr. Gert Johan Kjelby, Professor at the University of Bergen, spoke about how functional independence of prosecutors is regulated in Norway. He emphasized that in Norway, the independence of prosecutors stemmed from tradition rather than statute until 2019, when the European Court of Justice ruled that the Norwegian Prosecution Service, and several other comparable institutions throughout Europe, were not sufficiently independent to issue European arrest warrants.⁶ This initiated a legislative initiative to protect the independence of prosecutors also in law. Furthermore, he said that there is a tradition whereby when a junior prosecutor and his or her superior disagree on a procedural action in a case, the junior prosecutor can hand the case over to their superior. The superior prosecutor will thereby have to take responsibility for the decision. During the question and answer session, **Mr. Nikoloz Chinkorashvili** of the Prosecutor General's Office of the Republic of Georgia clarified that not all the deficiencies identified in the ODIHR report are attributable to all the surveyed participating States. He stated that in Georgia, performance assessment is based on objective criteria and not on conviction rates, and there is no tradition of prosecutors investigating judges when they disagree with judgements. Mr. Chinkorashvili also asked whether the speakers would favour abolishing the practice of junior prosecutors seeking advice and guidance from senior colleagues, as a way to stifle the culture of informal orders and instructions in Eastern and Central Europe. Several speakers clarified that it would not be ideal to abolish the practice but that such advice and guidance should always respect the established principles of functional independence.

⁴ Opinion No.12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No.4 (2009) 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.

⁵ For instance, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors Adopted by the International Association of Prosecutors on The Twenty Third Day Of April 1999.

⁶ See for instance Joined Cases C-508/18 OG and C-82/19 PPU PI and case C-509/18 PF.

Panel Discussion 2: Impact of the COVID-19 Pandemic

During the second panel discussion, panellists discussed the impact of the COVID-19 pandemic on functional independence of prosecutors. **Ms. Alessandra Giraldi**, Member of the Bureau of the Consultative Council of European Prosecutors, spoke about a survey that her organization had undertaken among prosecutors in Council of Europe member States to take stock of the impact of the pandemic. The CCPE is also working on an opinion of the role of prosecutors during states of emergency.⁷ She mentioned that derogation from the normal division of powers may place legislative powers in the hands of the executive during states of emergency. Such powers may be abused to affect the functional independence of prosecutors. **Mr. Andrii Kukharuk**, Anti-Corruption Analyst, Organisation for Economic Co-operation and Development (OECD), made reference to a thematic study on independence of prosecutors that the OECD would release shortly. He mentioned that the pandemic slowed down the process of collecting evidence which often made it difficult or impossible for prosecutors to process cases. In several jurisdictions, prosecutors had to prioritize between cases, and this sometimes negatively impacted the functional independence of prosecutors. He noted that orders from superior prosecutors on prioritization of cases must be based on law or other clear and objective criteria.

Ms. Mariarosaria Guglielmi, Vice-President, Magistrats européens pour la démocratie et les libertés, gave an introduction to the work of MEDEL. She mentioned that it is not a good practice to merge the positions of Prosecutor General and Minister of Justice. The role of heads of prosecution offices is important and should always be exercised with respect for functional independence. She mentioned that in order to have true functional independence of prosecutors, it is necessary to have a culture of defence of human rights within the prosecution service. She posited that in nearly all countries, the balance of power had shifted towards the executive during the pandemic. MEDEL is working on a set of minimum standards for prosecutorial independence.

The three speakers all mentioned that increased financial constraints had a significant impact on the functional independence of prosecutors during the pandemic.

Mr. Nikolai Kovalev summarized the following **recommendations**, based on the discussions during the webinar:

1. It should be acknowledged that functional independence is an evolving principle. Standards regarding functional independence in Europe are in the process of development.
2. Functional independence should be strengthened at different levels, domestically and internationally and through soft and hard law. Countries should also strengthen the legal culture of prosecutorial independence.
3. Prosecution services in the OSCE participating States should conduct audits of guidelines and rules with regards to functional independence.
4. Instructions to subordinate prosecutors should be minimized and given only in writing. Instructions not to prosecute should be forbidden. There should be a system of appeal of illegal instructions.
5. Functional independence should not be interpreted as an invitation to arbitrariness by the prosecutors. Prosecutors should provide reasoned explanations for their decisions.
6. Both domestic and regional standards should explicitly prohibit using conviction and acquittal rates as factors for assessing performance of individual prosecutors.

⁷ <https://rm.coe.int/opinion-no-15-ccpe-en/1680a05a1b>.

7. OSCE participating States should share good practices and knowledge regarding functional independence of prosecutors.
8. International organizations such as the Consultative Council of European Prosecutors should develop guidelines for prosecutors on how to act during states of emergency based on the experiences of the COVID-19 pandemic.
9. It should be acknowledged that prosecutors are under enormous pressure from both the society and the Government regarding investigation and prosecution of criminal cases delayed due to the pandemic.
10. Prosecutors should be expected to play a more active role in protecting rights of citizens from arbitrary decisions of the government.
11. A pan-European survey of the impact of COVID-19 on the prosecutorial practices should be conducted.
12. OSCE/ODIHR should consider the inclusion of other countries, e.g. Central Asian participating States in the discussion of functional independence.

During his concluding remarks **Mr. Ghenadie Barba**, Chief of Rule of Law in ODIHR, concluded that it is key to strengthen sub-legal acts related to functional independence of prosecutors within the concerned participating States. He also emphasized the importance of building capacity and changing mentalities. He declared that ODIHR would be keen to support those participating States that are committed to undertaking reform measures to reinforce functional independence of prosecutors.

ANNEX 1: LIST OF PARTICIPANTS

Organizers / Speakers

Marcin Walecki	ODIHR
Ghenadie Barba	ODIHR
Ola Quarnstrom	ODIHR
Nikolai Kovalev	Wilfrid Laurier University, Canada
Jose Pais	Consultative Council of European Prosecutors
Gary Balch	International Organization of Prosecutors
Gert Johan Kelby	Bergen University, Norway
Mariarosaria Guglielmi	Magistrats européens pour la démocratie et les libertés
Andrii Kukharuk	Organisation for Economic Co-operation and Development
Alessandra Giraldi	Consultative Council of European Prosecutors

Representatives of Prosecutors General of the OSCE participating States

Mher Mkrtchyan	Armenia	Deputy Head of the Department of Organisation, Supervision and Legal Assistance of the General Prosecutor's Office
Arezou Zeynalabdiyeva	Azerbaijan	prosecutor of the Department of International Legal Cooperation of the Prosecutor General's Office
Jiri Pavlik	Czech Republic	Deputy to the Prosecutor General
Nikoloz Chinkorashvili	Georgia	Head of the Unit of European Integration and Cooperation with International Organizations, the Office of the Prosecutor General of Georgia
Augusztá Domán	Hungary	Public Prosecutor, Department for International and European Affairs Office of the Prosecutor General of Hungary
Iurie Perevoznic	Moldova	Deputy of the General Prosecutor
Adrian Bordianu	Moldova	Member of the Superior Council of Prosecutors
Barbora Hubertova	Slovakia	Prosecutor Criminal Department General Prosecutors Office of the Slovak Republic
Ivan Brailo	Ukraine	Prosecutor of the Public Support Unit, Department of Public Prosecution
Oleh Troian	Ukraine	Head of the Public Prosecution Unit, Department of Public Prosecution in Court

Representatives of international organizations and civil society

Denis Arcusa	OSCE Field Office in Moldova
Jacek Bilewicz	Lex Super Omnia
Dinara Dildabekova	ODIHR
Grigory Dikov	Venice Commission
Anna Melikyan	Protection of rights without borders
Artashes Melikyan	Consultative Council of European Prosecutors
Maise Bjørn Jørgensen	Nordic Council
Haengjin Lee	International Center for Criminal Justice in South Korea
Diane Reynders	EUAM Ukraine
Karine Simonsen	ODIHR
Gvantsa Tsulukidze	East-West Management Institute, Inc. (EWMI)
Katarzyna Szczypka	Open Dialogue Foundation

ANNEX 2: AGENDA



WEBINAR – Functional Independence of Prosecutors in Central and Eastern Europe

2 September 2020, 11:00 CET

10:45 – 11:00	Registration of participants
11:00 – 11:10	Opening remarks Mr. Marcin Walecki, Head of Democratization Department, ODIHR
11:10 – 11:30	Presentation of the ODIHR report “ <i>Strengthening functional independence of prosecutors in Eastern European participating States: Needs Assessment Report</i> ,” Mr. Nikolai Kovalev, Associate Professor, Wilfrid Laurier University
11:30 – 12:00	Panel 1 - International standards and practices <ul style="list-style-type: none">- Mr. Jose Santos Pais, President, Consultative Council of Prosecutors- Mr. Gary Balch, General Counsel, International Association of Prosecutors- Mr. Gert Johan Kjelby, Professor, University of Bergen
12:00 - 12:30	<i>Questions and answers</i>
12:30 - 12:40	Health break
12:40 – 13:10	Panel 2 – Impact of COVID 19 pandemic on functional independence of prosecutors <ul style="list-style-type: none">- Ms. Alessandra Giraldi, Member of the Bureau of the Consultative Council of Prosecutors- Mr. Andrii Kukharuk, Anti-Corruption Analyst, Organisation for Economic Co-operation and Development- Ms. Mariarosaria Guglielmi, Vice-President, Magistrats européens pour la démocratie et les libertés
13:10 – 13:30	<i>Questions and answers</i>
13:30 – 13:50	Summary and recommendations - Mr. Nikolai Kovalev, Associate Professor, Wilfrid Laurier University
13:50 – 14:00	Wrap up Mr. Ghenadie Barba, Chief of ODIHR Rule of Law Unit