

CCPE: Opinion on the Practical Independence of Prosecutors



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News

On 25-26 November 2021, the Consultative Council of European Prosecutors (CCPE) adopted [Opinion No. 16 \(2021\) regarding the implications of decisions of international courts and treaty bodies on the practical independence of prosecutors](#). The Opinion is designed to guide States' judicial and prosecutorial reforms regarding the legislative framework for organisational autonomy of the prosecution services, the process of appointment, evaluation and dismissal of prosecutors, their term of office, the non-interference into their work and other important aspects relating to their career.

It underlines that the independence and autonomy of prosecutors and prosecution services should be encouraged and guaranteed by law, at the highest possible level, in a manner similar to that of judges.

With regard to the independence of the judiciary in general and of prosecution services/prosecutors in particular, the Opinion, *inter alia*, takes stock of the relevant case law of international courts (the ECtHR, the CJEU and the Inter-American Court of Human Rights), and relevant decisions of the United Nations treaty bodies. The case law of the international courts includes elements that contribute to strengthening the institutional independence of the prosecution authorities as well as the functional independence of the individual prosecutors. The main features in this regard include the following:

- The right to an independent and impartial tribunal as a core value of the rule of law. This guarantees the respect for human rights and fundamental freedoms and is crucial for public confidence in the judicial system in a democratic society. As the independence and autonomy of prosecuting authorities is a sine qua non for the independence of the judiciary, the indications contained in the relevant international judgments/decisions on the independence of the judiciary may, to a certain extent, also apply to prosecution authorities;
- Criminal justice systems rooted in different legal cultures differ across Europe. However, independence of law enforcement authorities as a prerequisite for the rule of law and independence of the judiciary has emerged as a factor of convergence in recent years;
- The ECtHR case law underlined that both the courts and the investigating authorities must remain free from political pressure in a democratic society. Thus, it is in the public interest to maintain confidence in the independence and political neutrality of a state's law enforcement agencies;
- Those in charge of the investigation must have no hierarchical or institutional connection to those being investigated and must also have practical independence – conditions for an effective investigation;

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- Legal systems of those Member States in which prosecutors of higher rank have authority over prosecutors of lower rank, must foresee adequate arrangements to ensure the efficiency and independence of the bodies responsible for criminal investigations;
- The CJEU held that a prosecutor can be considered the issuing judicial authority for a European arrest warrant under certain conditions, in particular because the decision is subject to judicial review;
- The Inter-American Court of Human Rights, in line with the jurisprudence of the ECtHR, stated that one of the principal purposes of the separation of public powers is to guarantee the independence of judges and this should also be applied to prosecutors based on the nature of the duties performed by them.

The opinion notes that the legal framework for the organisational autonomy of prosecution authorities (procedures for appointing, evaluating and dismissing prosecutors, their tenure, non-interference in the work of prosecutors and other important aspects related to their careers) can benefit from these case law. It also highlights that the following key elements of independence of prosecutors and prosecution services were established in previous CCPE opinions:

- Prosecutors must be free from unlawful interference in the exercise of their functions and from political pressure or undue influence of any kind, including when acting outside the criminal law field;
- Similar to the judiciary, a corresponding legal framework should be in place that regulates the status, independence, recruitment, tenure of office and career of prosecutors on the basis of transparent and objective criteria;
- Prosecutors should have a career until retirement, as appointments for limited periods with the possibility of re-appointment bear the risk of prosecutors making biased decisions depending on the priorities of the appointing authorities;
- The external and internal independence of prosecutors and prosecution services should be ensured by an independent body such as a Prosecutorial Council;
- External and internal instructions given to prosecutors and law enforcement authorities should be based on guidelines that contain specific guarantees, e.g. the legality and transparency of instructions;
- The status, remuneration and treatment of prosecutors, as well as the allocation of financial, human and other resources to prosecutors, should be regulated according to the importance of their mission and work and in a manner comparable to that of judges;
- Prosecutors and, where appropriate, members of their families and livelihood, must be protected when carrying out their functions.

The opinion also takes a look at the decisions of national courts that strengthen the practical independence of prosecutors. Despite legal diversity, the following topics are discussed across several jurisdictions:

- Constitutional status and independence of the public prosecutor's office, its position and independence as well as autonomy, admissibility and limits of hierarchy within the prosecution service;
- Appointment and dismissal of prosecutors and prosecutor-generals, the transfer of chief prosecutors;
- Instructions, interference into the activity of public prosecution and the relation to the executive and legislative power;
- Salaries of prosecutors;
- Reporting on the activities of the public prosecutor's offices by the prosecutor-general;
- The position of the prosecutors in criminal proceedings and outside the field of criminal law.

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