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## **EXPERT REPORT**

### **Project on Strengthening Judicial Ethics in Turkey Expert Review of Relevant European Standards and Practices on Prosecutorial Ethics**

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# INTRODUCTION

## **Drafting of a Code of judicial ethics with regard to prosecutors. Methodological premise**

In the framework of the implementation of the project “Strengthening Judicial Ethics in Turkey” funded by the EU and implemented by the Council of Europe, the aim of this report is to provide an overview of the main international and European standards and practices on issues related to prosecutorial ethics in view of providing useful background and references to the process of creating a code regulating prosecutorial ethics in Turkey.

This report complements the similar report drafted under the same project on relevant European standards and practices related to judicial ethics.

As a methodological premise it is useful to recall two key principles on this issue that are common standards in Europe, even if the system of prosecution may be different in each State:

- The proper performance of the distinct but complementary role of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice (Bordeaux Declaration no. 3).
- Judges and public prosecutors share common legal principles and ethical values: this is essential for the proper administration of justice (Bordeaux Declaration, Principle 10). The qualities required of a prosecutor are similar to those of a judge (Venice Commission, Report on the prosecution service, principle 18).

The first chapter of this review will provide an overview of the main documents adopted by bodies and organizations at international and regional level about the role and the status of public prosecutors as well as principles of ethics for prosecutors illustrating in particular the principles widely accepted at the European level.

As a preliminary step to draft ethical principles for prosecutors, chapter two will provide a circumstantial review of norms and principles concerning the role and the status of public prosecutor widely accepted at European level. Without full compliance with common principles about the role and the status of the public prosecutor as well as with ECHR (art. 5 Right to liberty and security, art.6 Right to a fair trial) it is an impossible exercise to draft ethical principles.

The third chapter will present a synthetic list of most relevant principles of prosecutorial ethics drawn from existing European judicial ethics references and practices.

Chapter four will provide two examples of different approaches to prosecutorial ethics in Europe.

### **Disclaimer:**

The content of this report reflects the views of its author and not necessarily those of the Council of Europe.



# 1. MAIN INTERNATIONAL AND EUROPEAN STANDARDS ON PUBLIC PROSECUTORS

## **Ethical values shared by judges and prosecutors**

Answers to key questions to be taken into consideration when drafting judicial ethical codes can be found in *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*:

### “Chapter VIII – Ethics of judges

72. *Judges should be guided in their activities by ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves.*

73. *These principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and the judiciary. Judges should play a leading role in the development of such codes.*

74. *Judges should be able to seek advice on ethics from a body within the judiciary.”*

The above mentioned general principles on drafting codes of ethics, in the opinion of the writer of this review, apply both to judges and prosecutors.

To summarize:

- Codes of ethics should be drawn up by members of the judiciary themselves or in any case on the basis of broad consultation. The fact that ethical principles are created by judges or prosecutors themselves inspires and raises public confidence in the judiciary.
- Codes of ethics should be completely separated from disciplinary systems.

The main principles foreseen in Judges’ Codes of ethics should apply also to public prosecutors. These can be found in the *CCJE Opinion no.3(2002) on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality*:

### *“3°) Conclusions on the standards of conduct*

49. *The CCJE is of the opinion that:*

- i) *judges should be guided in their activities by principles of professional conduct,*
- ii) *such principles should offer judges guidelines on how to proceed, thereby enabling them to overcome the difficulties they are faced with as regards their independence and impartiality,*
- iii) *the said principles should be drawn up by the judges themselves and be totally separate from the judges’ disciplinary system,*
- iv) *it is desirable to establish in each country one or more bodies or persons within the judiciary to advise judges confronted with a problem related to professional ethics or compatibility of non judicial activities with their status.*

50. *As regards the rules of conduct of every judge, the CCJE is of the opinion that:*

- i) *each individual judge should do everything to uphold judicial independence at both the institutional and the individual level,*
- ii) *judges should behave with integrity in office and in their private lives,*
- iii) *they should at all times adopt an approach which both is and appears impartial,*
- iv) *they should discharge their duties without favouritism and without actual or apparent prejudice or bias,*
- v) *their decisions should be reached by taking into account all considerations material to the application of the relevant rules of law, and excluding from account all immaterial considerations,*
- vi) *they should show the consideration due to all persons taking part in the judicial proceedings or affected by these proceedings,*
- vii) *they should discharge their duties with due respect for the equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring each a fair hearing,*
- viii) *they should show circumspection in their relations with the media, maintain their independence and impartiality by refraining from any personal exploitation of any relations with the media and from making any unjustified comments on the cases they are dealing with,*
- ix) *they should ensure they maintain a high degree of professional competence,*
- x) *they should have a high degree of professional awareness and be subject to an obligation of diligence in order to comply with the requirement to deliver their judgments in a reasonable time,*
- xi) *they should devote the most of their working time to their judicial functions, including associated activities,*
- xii) *they should refrain from any political activity which could compromise their independence and cause detriment to their image of impartiality.”*

While principles *v* and *vii* clearly concern only judges, the other principles should apply also to prosecutors. How the principle of independence should apply to prosecutors will be examined further in this paper.

### **Documents adopted by bodies and organizations at international and regional level**

The role and the status of public prosecutors as well as principles of ethics for prosecutors are the issue of several documents adopted by bodies and organization at international and regionals level. A list of the most relevant international documents and national codes is provided in Appendix I.

At the UN level, the main reference is *Resolution 17/2 'Strengthening the rule of law through improved integrity and capacity of prosecution services' - UN Economic and Social Council, Seventeenth Session of the Commission on Crime Prevention and Criminal Justice, Vienna, April 2008*, which adopted the “Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors”, developed in April 1999 by the International Association of Prosecutors.

Also at the international level, the *Rome Statute of International Criminal Court (1998)* provides for the principle of prosecutor’s independence and impartiality (art. 42, art. 54).

At the EU level the “*Judicial Ethics Report 2009-2010*”, adopted by ENCJ (European Network of Councils for the Judiciary) Working Group provides principles just for judges.

Within the “*American Bar Association Standards for criminal justice: Prosecution and defence function (1993)*” we can find relevant principles on the duties of the prosecutor (Part I General standards. Standard 3-1.2: The Function of the prosecutor) showing that even in the strongest adversarial system the need for guaranteeing prosecutorial impartiality is felt.

The European Association of Judges and Prosecutors provides the first example of Code of ethics for prosecutors with its “*Declaration of principles concerning the public prosecutor*” adopted in Naples in 1996 by MEDEL – European Association of Magistrates for democracy and freedoms.

On matters of prosecutorial ethics, the Council of Europe plays a key role.

Recommendation (2000)19 of the Council of Europe’s Committee of Ministers on the role of public prosecution in the criminal justice system remains a milestone.

The legal systems of member States are characterised by great diversity, particularly as regards the tasks and roles of prosecutors. Nevertheless, they always remain under an obligation to respect human rights and fundamental freedoms as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.

Since 2000, further aspects of the public prosecution’s activities have been highlighted at the European level.

The CCJE Opinion no.12 (2009) and CCPE Opinion No.4 (2009) on the relations between judges and prosecutors in a democratic society played a leading role also because it was jointly adopted by the two Consultative Councils of European Judges and of European Prosecutors as the “**Bordeaux Declaration**”.

Among relevant documents concerning prosecutors adopted since 2000, a prominent role is played by the CCPE Opinion no. 9 (2014) on European norms and principles concerning prosecutors, “**Rome Charter**”.

## 2. THE ROLE OF PUBLIC PROSECUTORS

### **Definition of public prosecutor**

*“Public prosecutors” are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system (Recommendation CM/Rec(2000)19 ,principle 1).*

It is important to recall that codes of ethics for prosecutors should be adopted and made public because **transparency in the work of prosecutors is essential in a modern democracy** (Rome Charter principle vii).

The system of prosecution may be different in each member State. It may be based on the principle of mandatory prosecution or discretionary prosecution. In addition, the various prosecution systems have traditionally reflected either the inquisitorial or adversarial models.

There has been an evolution in recent years in Europe, particularly under the influence of the European Court of Human Rights, in bringing those models closer together in an effort to ensure both effective investigations and respect for the rights of the person concerned, with the main goal of compliance of all these systems with shared fundamental values (CCPE Opinion No. 10 (2015) nos. 5, 6).

Nowadays there are still great differences in Europe in the institutional position of the public prosecutor in terms of its relationship with the executive power of the state (which can range from subordination to independence), and with regard to the relationship between prosecutors and judges. Under some systems they belong to a single professional corps while in others they are entirely separate.

Despite such diversity of models, there are major guiding principles common to different systems and there is a widespread tendency to allow for a more independent prosecutor’s office, rather than for one subordinated or linked to the executive (Venice Commission, Report on the prosecution service, principle 10, 26).

In any case, all member States remain under an obligation to respect human rights and fundamental freedoms as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.

The role and tasks of prosecutors should be defined by law at the highest possible level and carried out in the strictest respect for the democratic principles and values of the Council of Europe (Rome Charter III).

### **Status of prosecutors**

The enforcement of the law and the protection of human rights and freedoms requires that the status of public prosecutor be guaranteed by law, at the highest possible level, in a manner similar to that of judges (Bordeaux Declaration principle 6).

The qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and promotion are in place. Of necessity a prosecutor, like a judge, will



have on occasion to take unpopular decisions which may be the subject of criticism in the media and may also become the subject of political controversy. For these reasons it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimised on account of having taken an unpopular decision (Venice Commission, Report on the prosecution service, principle 18).

In the Report CCJE/CCPE (2016)3 on "Challenges for judicial independence and impartiality in the member states of the Council of Europe" (no.6) it is pointed out that:

*“In some cases, international standards have been violated despite the introduction of constitutional and statutory safeguards. In other cases it seems that safeguards have been overlooked or eroded by the actions of the executive or legislature powers. The incidents reported and analysed in this report show that quite often it is not the absence of formal legal guarantees but rather concrete political practices in the member state that cause concern. Therefore, the CCJE and the CCPE believe that more important than formal legal rules is how the powers of state, judges, prosecutors, politicians, victims, defendants, the media and society as a whole interact in practice.*

*As valuable as they are, constitutional guarantees, formal legal rules and institutional safeguards are not in themselves sufficient if the values of independence and the separation of powers, which form the basis of such rules, are lacking. All parties concerned must act according to a culture of independence and mutual respect to create and sustain this basis. The introduction of formal legal guarantees forms the starting point, not the completion of this culture of independence and mutual respect”.*

The recruitment and career of prosecutors, including promotion, mobility, disciplinary action and dismissal, should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review (Rome Charter XII).

### **The independence of prosecutors and hierarchical structure**

Even if the independence of prosecutors is not of the same nature as the independence of judges, the independence and autonomy of the prosecution services constitutes an indispensable corollary to the independence of the judiciary (Rome Charter IV).

The autonomy of the public prosecutors is an indispensable tool for guaranteeing the independence of the judiciary and equality in front of the law (MEDEL Naples declaration no. 2).

In a democratic society the independence of prosecutors is a further safeguard in maintaining the independence of judges. Prosecutors must defend the rule of law, respect for human rights and fundamental freedoms. Such duties must be undertaken in an independent way, free from political interference (CCJE/CCPE Report CCJE/CCPE (2016)3 no.35).

The organisation of most public prosecution services in the member states is based on a hierarchical structure. Relationships between the different layers of the hierarchy should be governed by clear, unambiguous and well-balanced regulations (Rome Charter XIV).

In all hierarchical systems, it is essential to develop appropriate guarantees of non-interference to ensure that the prosecutor's activities are free from external pressure as well as undue or illegal pressures from within the prosecution system.

The organisation of prosecutors and the legal framework within which they work can make it easier or more difficult for external forces such as politicians to exert influence, thereby

undermining the necessary independence of public prosecutors. However, the traditions and culture of a member state are also important factors. A strong tradition of independence can protect prosecutors.

Within a hierarchical prosecution service, a superior prosecutor must be able to exercise appropriate control over the decisions of the office, subject to proper safeguards for the rights of individual prosecutors.

However, as directives can endanger the independence and impartiality of prosecutors, directives and instructions must be given in a transparent way, in writing, limited and regulated by law (Rome Charter, para 49; Report CCJE/CCPE (2016)3 on "Challenges for judicial independence and impartiality in the member states of the Council of Europe" no. 16,18).

All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement (COE Rec (2000) 19 principle 10).

Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability (Rome Charter V).

The risk of undue external pressures is stressed in the Venice Commission Report on the prosecution service (2010):

*“VI. Dangers of incorrect decisions and of interference*

*20. Political interference in prosecution is probably as old as society itself. In early societies, indeed, the prosecution power would usually have been entirely in the control of princes who could use it to punish their enemies and reward their friends. History provides many examples of the use of prosecution for improper or political purposes. One need look no further than Tudor England or France both before and during the Revolution and the Soviet system in Eastern Europe. Modern Western Europe may have largely avoided this problem of abusive prosecution in recent times but if this is so it is largely because mechanisms have been adopted to ensure that improper political pressure is not brought to bear in the matter of criminal prosecution. In totalitarian states or in modern dictatorships criminal prosecution has been and continues to be used as a tool of repression and corruption. The existence of systems of democratic control does not give a complete answer to the problem of politically inspired prosecutions. The tyranny of the majority can extend to the use of prosecution as an instrument of oppression. Majorities may be subject to manipulation and democratic politicians may be subject to populist pressures which they fear to resist, especially where these are supported by campaigning in the media.*

*21. There are two different but related abuses, which can be related to political interference or erroneous prosecutorial decisions. The first is the bringing of prosecutions which ought not to be brought, either because there is no evidence or because a case is based on corrupt or false evidence. A second, more insidious, and probably commoner, is where the prosecutor does not bring a prosecution which ought to be brought. This problem is frequently associated with corruption but may also be encountered where governments have behaved in a criminal or corrupt manner or when powerful interests bring political pressure to bear. In principle a wrong instruction not to prosecute may be more difficult to counter because it may not be easily made subject to judicial control.”*

Also the Rome Statute of the International Criminal Court establishes in its art 42 “The Office of the Prosecutor”:

*“2. ... A member of the Office shall not seek or act on instructions from any external source.”*

## **Protection of human rights and freedoms**

First of all it is important to stress that a system where both prosecutors and judges act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone (Rome Charter Expl. Note no.8; Venice Commission, Report on the prosecution service, principle 19).

Public prosecutors and judges ensure, at all stage of the proceedings, that individual rights and freedoms are guaranteed (Bordeaux Declaration Principle 1).

As it is for judges, the independence of prosecutors is not a privilege but a guarantee in the interest of a fair, impartial and effective justice (Rome Charter, no. 35).

Judges and public prosecutors must both enjoy independence in respect of their functions and also be, and appear to be, independent from each other. The impartiality and independence of judges and prosecutors is not a prerogative or a privilege granted in their own interest, but in the interest of the rule of law and of all those who seek and expect justice. In a democratic state, the powers of the state function as a system of checks and balances that holds each accountable in the interest of society as a whole. Judges and prosecutors must exercise their duties independently, respecting and preserving this system of checks and balances (Report CCJE/CCPE (2016)3 on "Challenges for judicial independence and impartiality in the member states of the Council of Europe" no.33).

The proper performance of the distinct but complementary role of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice (Bordeaux Declaration no. 3).

Prosecutors respect, protect and uphold the universal concept of human dignity and human rights (IAP Standards 1999 principle 1).

Integrity, independence and impartiality of prosecutors are essential prerequisites for effective protection of human rights and economic development (Strengthening the rule of law through improved integrity and capacity of prosecution services - adopted by UN Economic and Social Council, Seventeenth Session Commission on Crime Prevention and Criminal Justice, Vienna April 2008).

It is not the prosecutor's function to secure a conviction at all costs (Venice Commission. No 15).

The duty of prosecutor is to seek justice, not merely to convict (ABA Standards for criminal justice. Prosecution function 3-1.2 c).

Prosecutors should develop lines of investigation which may be favourable to the defence and gather and disclose evidence in this respect. Where the prosecutor is aware of material relevant to the issue of innocence of an accused and/or which might materially assist the defence, the prosecutor should disclose that material (CCPE Op.no 10 (2015) no. 38).

The Rome Statute of the International Criminal court: art.54.1.a. reads: “ *The Prosecutor shall: In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment oh whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally*”.

A prosecutor should not intentionally fail to make timely disclosures to the defence, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused (ABA Standards for criminal justice. Prosecution function 3-3.11 a).

A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request (ABA Standards for criminal justice. Prosecution function 3-3.11 b).

A prosecutor should not intentionally avoid the pursuit of evidence because he or she believes it will damage the prosecution’s case or aid the accused (ABA Standards for criminal justice. Prosecution function 3-3.11 c).

### 3. PRINCIPLES OF ETHICS FOR PROSECUTORS

#### **Preliminary remarks**

With reference to the procedure and the role of Codes of ethics, it is important to recall two key principles applicable both to Ethics Codes for judges or prosecutors:

- a) Code of ethics should be drawn up by members of the judiciary themselves or in any case before broad consultation. The fact that ethical principles are created by judges or prosecutors themselves inspire and raise public confidence in the judiciary.
- b) Code of ethics should be completely separated from the disciplinary system.

As regard to the content of ethics codes for prosecutors, as already mentioned, the main principles drawn in ethics codes for judges should apply both to judges and public prosecutors. In this chapter we will therefore focus solely on principles applying specifically to prosecutors.

It must be noted, once again, that drafting principles of ethics for prosecutors is helpful to rise, in a democracy, public confidence in the judiciary, within a framework of shared and practiced fundamental values on the role and the status of prosecutors and guarantees from undue pressures and political interference.

To contribute to the drafting of a Code of judicial ethics to be applicable to prosecutors, the aim of this chapter is to provide an updated synthesis of relevant principles drawn from existing judicial ethic references and practices in the European States on the basis of documents referred to above.

#### **Overview of ethical norms for Prosecutors**

##### **I. The role of public prosecutors**

1. Public prosecutors (hereafter prosecutors) on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.
2. Prosecutors contribute to ensuring that the rule of law is guaranteed, especially by the fair, impartial and efficient administration of justice.
3. Prosecutors carry out their functions fairly, impartially and objectively.

##### **II. Basic duties**

4. Prosecutors should strive to ensure that investigations have the sole aim of establishing the truth and clarifying the cases, are conducted in a lawful manner with respect for human rights and fundamental principles proclaimed, in particular, in Articles 2, 3, 5, 6 and 8 of the ECHR and are carried out in reasonable time with objectivity, impartiality and professionalism.

5. Prosecutors must defend the rule of law, respect for human rights and fundamental freedoms.
6. Prosecutors seek to ensure that the criminal justice system operates as expeditiously as possible.
7. Prosecutors should perform their duties fairly, consistently and expeditiously, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
8. Prosecutors should respect the presumption of innocence, the right to a fair trial, the equality of arms, the separation of powers, the independence of courts and the binding force of final court decisions.
9. Prosecutors should strive to be, and be seen as, independent and impartial, should abstain from political activities incompatible with the principle of impartiality, and should not act in cases where their personal interests or their relations with the persons interested in the case could hamper their full impartiality.
10. Prosecutors should uphold the right to a fair trial and take into account the legitimate interests of witnesses, victims, suspects, defendants or accused persons by ensuring that they are informed of their rights and the progress of the procedure.
11. Prosecutors should focus on serving society and should pay particular attention to the situation of vulnerable persons, notably children and victims.

### **III. Independence and autonomy**

12. Prosecutors are aware that the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary.
13. Prosecutors should perform their duties free from external pressure or interference as well as undue or illegal pressures from within the prosecution system.
14. Prosecutors are aware of the right to request that instructions and directives be given in a transparent way, in writing, according the law.
15. Prosecutors are aware that where he or she believes that an instruction is either illegal or runs counter to his or her conscience, he or she should open an internal procedure which may lead to his or her eventual replacement.

### **IV. Relations with judges**

16. Prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.
17. Prosecutors and judges both enjoy independence in respect of their functions and must be, and appear to be, independent from each other.

### **V. Relations with Courts**

18. Prosecutors must be objective and fair during court proceedings and they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.
19. Prosecutors should decide to prosecute only upon well-founded evidence, reasonably believed to be reliable and admissible.
20. Prosecutions should be firmly but fairly conducted. Prosecutors contribute to reaching just verdicts by the courts and should contribute to the effective, expeditious and efficient operation of the justice system.

## **VI. Prosecutors and Protection of Human rights**

21. Prosecutors are aware of human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention.
22. Prosecutors should abstain from 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, health, handicaps or other status.
23. Prosecutors should refrain from any statement or attitude that would contribute to violating the principle of presumption of innocence.
24. Prosecutors should monitor how the investigations are carried out and if human rights are respected.
25. Prosecutors should ensure that investigations are conducted in the most appropriate and effective way and with a continuous respect for the rule of law and procedural rights.
26. Prosecutors should scrutinise the lawfulness of investigations at the latest when deciding whether a prosecution should commence or continue.
27. Prosecutors will also monitor the observance of human rights by the police. They should use all their authority, as far as it is possible within the framework of their competence and powers, in ensuring that the investigative bodies respect the law and follow specific standards of conduct, in order to be accountable before an appropriate authority for any abuse of power or behaviour.
28. Prosecutors should refuse to use evidence against suspects reasonably believed to have been obtained through recourse to unlawful methods, in particular when they constitute a grave violation of human rights. They should seek to ensure that appropriate sanctions are taken against those responsible for using such methods or for other violations of the law.
29. Prosecutors should strive to protect, according to international and national law, all persons deprived of liberty, from improper treatment on the part of officials and other persons, and they should consider carefully the claims filed in connection therewith.

## **VII. Evidence of innocence.**

30. Prosecutors shall, in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility, and, in doing so, investigate incriminating and exonerating circumstances equally.
31. Prosecutors should disclose all material relevant to the issue of innocence of an accused and/or which might materially assist the defence.
32. Prosecutors must disclose all relevant evidence before the court and not merely the evidence which favours the prosecution case: it is not the prosecutor's function to secure a conviction at all costs.

#### **VIII. Equality of arms**

33. Prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the defence information which they possess which may affect the justice of the proceedings, for or against the accused person.

#### **IX. Protection of witnesses**

34. Public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy, or see to it that such measures have been taken.

#### **X. Management of resources**

35. Prosecutors should carry out principles and practices of organisation of work, management and human resources in a judicial context.

#### **XI. International cooperation**

36. Prosecutors should promote international co-operation and mutual trust in the field of criminal proceedings.
37. Prosecutors should treat international requests for assistance within their jurisdiction with the same diligence as in the case of their work at national level to promote and sustain genuine and effective international judicial cooperation.

#### **XII. Training**

38. Prosecutors are aware that a high level of professional skills and qualification, in particular within the framework of investigations, is a necessary condition for an effective prosecution service and for improving public trust in that service.
39. Prosecutors should follow appropriate initial education and on-going training courses with view to their specialisation, taking into account in particular the types and the development of criminality, as well as international co-operation on criminal matters.

#### **XIII. Fundamental freedoms of prosecutors. Professional association**



40. Prosecutors, as they enjoy the freedom of opinion and speech and freedom of association in the same manner as other members of the society, when making use of these rights, they must take into account the duty of discretion and be careful not to jeopardise the public image of independence, impartiality and fairness which a prosecutor must always uphold.
41. Prosecutors, as they have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights, should take in account to join or form national or international associations as a tool to promote the dignity of their profession and to share common legal principles and ethical values.

#### **XIV. Relations with the media**

42. Prosecutors should act in a transparent manner, unless legislation restricts their actions or the publicity of the documents they have drafted. They should particularly be careful to express their decisions in an understandable manner to the parties concerned and when communicating with the public and media.
43. Prosecutors should regularly inform the public, through the media, about their activities and the results thereof. The actions of prosecutors should strive to promote and preserve transparency and public trust in the prosecution service.
44. Prosecutors in the relations between the media, should respected the following principles: the presumption of innocence, the right to private life and dignity, the right to information and freedom of the press, the right to fair trial, the right to defence, the integrity, efficiency and confidentiality of investigations, as well as the principle of transparency.
45. Prosecutors should in their communications with the media demonstrate impartiality, without improperly influencing judges in any way.
46. Prosecutors, when subject to an unfair attack through the media, are entrusted with the right of having the contested information rectified or other legal remedies according to the national law. Nevertheless, in such cases, prosecutor should preferably ask for an institutional reaction to minimises the need for the prosecutor concerned to make use of his/her right of response guaranteed to every person, and the risk of excessive “personalisation” of the conflict.

#### **XV. Code of ethics**

47. Prosecutors, individually and through their associations, should promote the adoption and dissemination to the public of a code of ethics as a mean to insure the highest ethical and professional standards and the accountability to the society and to raise public trust not only in the prosecution service, but also in the justice system as whole.

## 4. EXAMPLES OF DIFFERENT APPROACHES TO PROSECUTORIAL ETHICS IN EUROPE

This chapter provides some examples of different approaches to prosecutorial ethics in Europe. The first examples (Italy, Belgium, Bulgaria, France and Romania) are chosen among Codes that apply to both judges and public prosecutors. Specific provisions for the prosecutors contained in such codes will be quoted. Other examples (Latvia, Kosovo<sup>1</sup> and Portugal) regard Codes that apply only to prosecutors.

### Italy

The “Code of Judicial Ethics” adopted in 1994 by the “Associazione Nazionale Magistrati” (ANM) of Italy includes ethical principles both for judges and prosecutors. It was adopted by the board of the ANM, following a broad consultation among judges and prosecutors.

At European level, it was the first examples of such “Codes” and since the mid-nineties a French translation circulated among working groups of the Council of Europe and the European Councils for the Judiciary.

An amendment adopted in 2010 provides new rules on the relations with media.

Obviously it is not a disciplinary code. About 90% of Italian judges and prosecutors are members of the ANM and the principles of the “Code” apply both to judges and prosecutors, but there are particular guidelines for prosecutors, e.g:

*art.13. Prosecutors duties.*

*Prosecutors carry out their functions impartially. Prosecutors investigate to establish the truth and extend the investigation to cover facts and evidence in favour of the accused and shall disclose all material relevant in favour of the accused.*

### Belgium

The document «Guide pour les magistrats. Principes, valeurs et qualités» was jointly adopted in June 2012 by the Conseil Supérieur de la Justice and the Conseil Consultatif de la magistrature (Belgium).

In the introduction it is stressed that the text is not a disciplinary code, but guidelines completely separated from the disciplinary system.

The main principles drawn in the “Guide” should apply both to judges and public prosecutors, but there are some specific provisions for the prosecutors, e.g. on the Chapter “Independence”, taking in account specificities of the hierarchical structure.

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<sup>1</sup> All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations’ Security Council Resolution 1244 and without prejudice to the status of Kosovo.

## **Bulgaria**

The document, available in English translation “Code of Ethics for the behaviour of Bulgarian Magistrates” (magistrates means both judges and prosecutors) was adopted in 2009 by the Supreme Judicial Council. There are no specific provisions for the prosecutors.

## **France**

The text “Recueil des obligations déontologiques des magistrats” (also available in English version as “Compendium of the Judiciary’s Ethical Obligations”) was adopted in 2010 by the “Conseil Supérieur de la Magistrature” (High Council of the Judiciary in France).

From the Preamble: This Compendium does not constitute a disciplinary code but rather a guide for judges and prosecutors who, in France, are all members of the same judicial corps”. Some principles concern just prosecutors, e.g.:

*a.19 If in an individual case, a prosecutor request that the Minister of Justice or Chief Prosecutor’s instructions to prosecute be recorded in writing and attached to the case file in accordance with articles 30 and 36 of the Code of Criminal Procedure, this shall not constitute insubordination or a breach of loyalty*

*c.41 In all their professional activities and particularly when directing investigations and supervising police officers’ activities, prosecutors shall endeavour to objectively seek evidence that will establish the truth.*

## **Romania**

The document, available in English translation, “Deontological code for judges and prosecutors” was adopted in 2005 by the Council of Judiciary. There are no specific provisions for the prosecutors; in any case it is useful to quote art 18 (1). “*The relations of judges and prosecutors within the collective community where they carry their duties must be fair, based on respect and good faith, regardless of their position.*”

## **Latvia**

The document, available in English translation, “Code of ethics prosecutors of Latvia”, has been approved by the Council of the Prosecutor General in 1998.

Chapter 1 “Independence” reads: *The Prosecutor shall be independent in the performance of his/her professional duties, dissociating himself/herself from any private interests or any external influence.*”

## **Kosovo**

The “Code of ethics and professional conduct for prosecutors” was adopted by the Kosovo Prosecutorial Council (KPC) in 2012.

Main relevant principles are reported below:

*Art 2.7 “The prosecutor’s duty is the search for the truth, which entails taking into account all of the evidence, whether it favors the defendant or not. All prosecutors must perform their duties and responsibilities in good faith, and must honor the presumption of innocence at all times during an investigation, court proceedings, and during appeal.”*

*Art 3.7 “Regarding the relationship between a prosecutor and his/her supervisor:*

- a) A prosecutor must be permitted to perform his/her duties and responsibilities without unjustified interference;*
- b) A prosecutor must be permitted to perform his/her duties and responsibilities without unjustified exposure to civil, penal, or other liability;*
- c) A prosecutor must respect legal instructions given by his/her supervisor according to the hierarchy;*
- d) A prosecutor enjoys the right to request that instructions addressed to him/her by a supervisor be put in writing;*
- e) A prosecutor must account periodically for his/her activities as a whole, and, in particular, the way in which he/she performed his/her responsibilities. “*

*Art.3.12 “A prosecutor shall:*

- a) Not initiate or continue prosecution when he/she is obliged not to do so under the law, or when there is no basis prescribed by law;*
- b) Not present invalid evidence that could affect the validity of the proceeding itself;*
- c) Seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties, except when otherwise provided in the law, any information that he/she possesses which may affect the just outcome of the proceedings.”*

## **Portugal**

The “ Carta de Conduta dos Magistratos do Ministerio Publico” (also available in English version as “Charter of conduct for the Portuguese Public Prosecutors”) was presented at the 10th Congress, of the association of Portuguese public prosecutors (Sindicato dos Magistratos do Ministerio Publico – SMMP) in March 2015.

The Portuguese public prosecutors, “ Magistratos do Ministerio Publico”, are magistrates as the judges, but constitute a separate body, being totally independent from the executive and other branches of Government. That peculiar status of independence of the Portuguese public prosecutors system is stressed in the introduction of the “Charter of conduct for the Portuguese Public Prosecutors”:

*“The independence of the Public Prosecution Service and the autonomy of its Public Prosecutors are preconditions of an impartial justice and the implementation of the rule of law. It is for the Public Prosecutors to defend the independence and impartiality of justice using the law and the institutional intervention, as well as by way of example and personal conduct”*

The full text of both Portuguese and English version is available on website [www.smmp.pt](http://www.smmp.pt). It is at the moment, in the opinion of the writer of this report, the reference document on prosecutorial ethics at national level in Europe.

About the adoption process:

*“The Professional Association of Public Prosecutors, taking into account the appeals made by international organizations to the Public Prosecution Service to have a Charter of Conduct started, stimulated and furthered the discussion on its need, scope and purpose.*

*To this end, the most relevant international documents, which were prepared within the scope of the regulatory intervention of universal, regional and even national institutions or organizations, such as the United Nations, the Office of the Prosecutor of the International Criminal Court, the Council*

*of Europe and the wide range of recommendations, opinions and reports issued by its several bodies, and the International Association of Prosecutors or MEDEL — Magistrats Européens pour la Démocratie et les Libertés [European Magistrates for Democracy and the Freedoms], were taken into account”*

The Charter of conduct as a work in progress:

*“The Portuguese Public Prosecutors’ professional statutes compile a comprehensive set of rules governing not only the structure, functions and intervention regime, but also the organization and status. Thus, it constitutes a legal and organizational structure which shapes their action and intervention in pursuance of the several powers vested in them with a view to implementing justice.*

*In addition to those rules, there should be a set of values and principles that are accepted by the Public Prosecutors and would constitute a standard reference source on integrity, ethics and social and professional identity. Democratically, those values and principles should be developed as the product of a debate within the Public Prosecution Service as a prerequisite for their adherence to that set of principles and values.”*

Main relevant principles include:

Chapter III Rights and duties.

*“Independence.*

*8. Public Prosecutors shall exercise their functions, in accordance with the law and their convictions, free from any direct or indirect influence or intervention, pressure or interference, by the executive and legislative powers or any other external source.*

*9. Public Prosecutors shall act autonomously from other bodies or institutions, as well as refuse and reject any intervention or attempt to practice any form of intervention intended to illegally interfere with their actions.*

*10. If Public Prosecutors are subjected to any action which is likely to compromise their independence in the discharge of their functions, they shall report this to their superiors.*

*11. Public Prosecutors shall respect the separation of powers and recognize that the autonomy granted to them for the discharge of their functions is not a privilege, but a guarantee given to citizens for the implementation of constitutional values and the safeguarding of fundamental rights.*

*Objectivity*

*23. Public Prosecutors shall always seek to establish the truth by means procedurally valid and with respect for the principles of a fair trial, irrespective of whether it is to the advantage or the disadvantage of the parties concerned or involved in the proceedings, by gathering or promoting the gathering and adducing of all the relevant evidence.*

*24. Public Prosecutors shall take into account all circumstances relevant to solving the case and reaching a just decision.*

*25. Public Prosecutors shall act in the public interest and not to protect individual or sectional interests.*

*26. Public Prosecutors must make sure that the law and the principles of a fair trial are properly applied and ensure that the citizen’s rights and guarantees are respected.*

*Courtesy*

*48. Public Prosecutors shall be open and pay attention to criticism of their decisions and professional conduct.”*

## 1. APPENDIX I

### MAIN INTERNATIONAL AND EUROPEAN STANDARDS ON PROSECUTORS

#### UN

Strengthening the rule of law through improved integrity and capacity of prosecution services - adopted by the UN Economic and Social Council, Seventeenth Session, Commission on Crime Prevention and Criminal Justice , Vienna April 2008

#### EU

ENCJ European Network of Councils for the Judiciary. Judicial Ethics. Report 2009-2010

#### **Council of Europe:**

Recommendation CM/Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies)

Conference of Prosecutors General of Europe 31 may 2005 European guidelines on ethics and conduct for public prosecutors: Budapest Guidelines

Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)

Venice Commission 85<sup>th</sup> plenary session Venice 17-18 December 2010 Report on European standards as regard the independence of the judicial system: Part II The prosecution service

#### ***Consultative Council of European Judges (CCJE)***

Opinion no.3 (2002) on the principles and rules governing judge's professional conduct, in particular ethics, incompatible behaviour and impartiality

#### ***Consultative Council of European Judges (CCJE) Consultative Council of European Prosecutors (CCPE)***

Opinion no.12 (2009) CCJE and Opinion No.4 (2009) CCPE on the relations between judges and prosecutors in a democratic society: **Bordeaux Declaration**

Report CCJE/CCPE (2016)3 prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe on Challenges for judicial independence and impartiality in the member states of the Council of Europe

#### ***Consultative Council of European Prosecutors (CCPE)***

Opinion no. 8 (2013) of the CCPE on relations between prosecutors and the media

Opinion no. 9 (2014) of the CCPE on European norms and principles concerning prosecutors:  
**Rome Charter**

Opinion no.10 (2015) of the CCPE on the role of prosecutors in criminal investigations

### **International Associations of Judges/Prosecutors:**

MEDEL – European Association of Magistrates for democracy and fundamental rights – Declaration of principles concerning the public prosecutor (Naples 1996)

IAP International Association of Prosecutors - Standards of professional responsibility and statement of the essential duties and rights of prosecutors Amsterdam 1999

### **National Associations of Judges and Prosecutors:**

ANM Associazione Nazionale Magistrati Italy Code of Judicial Ethics (1994, amendend 2010)

Sindicato dos Magistratos do Ministerio Publico SMMP ( Portugal) Carta de Conduta dos Magistratos do Ministerio Publico, also available in english version Charter of conduct for the Portuguese Public Prosecutors ( 2015)

### **Other documents that establish principles of judicial ethic:**

American Bar Association USA ABA standards for criminal justice: Prosecution and defence function Part I General standards. Standard 3-1.2 The Function of the prosecutor (1993)

ICC International Criminal Court Rome Statute of International Criminal Court Article 42 The Office of the Prosecutor; art.54 (1998)

Council of the Prosecutor General (Latvia) Code of ethics prosecutors of Latvia (1998)

Council of judiciary (Romania) Deontological code for judges and prosecutors (2005)

Supreme Judicial Council (Bulgaria), Code of Ethics for the behaviour of Bulgarian Magistrates (2009)

Conseil Supérieur de la Magistrature (France) Recueil des obligations déontologiques des magistrats / Compendium of the Judiciary's Ethical Obligations (2010)

Conseil Supérieur de la Justice / Conseil Consultatif de la magistrature. (Belgium) Guide pour les magistrats. Principes, valeurs et qualités Bruxelles (2012)

Kosovo Prosecutorial Council (KPC) Code of ethics and professional conduct for prosecutors (2012)