

Ola Quarnström, Rule of Law Officer, OSCE Office for Democratic Institutions and Human Rights (ODIHR)¹, remarks delivered at MEDEL Event “*Public Prosecution and Rule of Law in Europe*” 18 September 2020

I would like to thank Magistrats européens pour la démocratie et les libertés and the University of Florence for organizing this timely event. The OSCE is a forum for dialogue on peace and security. We have 57 participating States from Vladivostok to Vancouver. Founded in 1990, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) is one of the world’s principal regional human rights bodies. Based in Warsaw, Poland, ODIHR is active throughout Europe, the Caucasus, Central Asia and North America. The Office promotes democratic elections, respect for human rights, tolerance and non-discrimination, and the rule of law by providing support to the 57 OSCE participating States.

The OSCE is based on political commitments rather than treaty obligation. In this way, the participating states can hold each other politically accountable for fulfilling their commitments. All OSCE participating States have made political commitments to clearly define powers in relation to prosecution and the measures preceding and accompanying prosecution. Prosecutors should be individuals of integrity and ability who always maintain the honour and dignity of their profession and respect the rule of. Prosecutors should also play a key role in ensuring and protecting the independence of the judiciary.

Turning to today’s topic, one could wonder if these commitments could form the basis for a European model. I think it will be difficult to unite different models of prosecution from common law and civil law jurisdictions. We must also consider that in some states, the prosecution is considered as part of the judiciary whereas in others it may be considered as part of law enforcement, and as we learned from Ms. Chaumet today, there are also mixed systems where the prosecutors have a foot in both judiciary and one in the executive.

¹ The opinions given by Mr. Quarnström are his own and do not necessarily reflect the position or policy of ODIHR.

In some countries the prosecutor is obliged to prosecute where there is enough evidence whereas in other countries, the law only gives the prosecutor the opportunity. But maybe we can at least unite over a model where prosecutors are

- Independent
- Ethical
- Accountable

I believe that it is obligatory upon us in the legal community to emphasize these principles when it comes to the development of a European model of prosecution. It is not enough to just talk about technical issues such as professionalism and efficiency. Because if you are efficient but not ethical, you are only effectively unethical.

When it comes to the nomenclature, perhaps the language we use in the OSCE is a bit different from other speakers. It should be noted that when we talk about the independence of prosecutors we distinguish between the *autonomy* of the prosecution office, the *independence* of prosecutors in general and the *functional independence*, which generally refers to the ability of the prosecutor assigned to a case to make decisions without undue influence from superior prosecutors.

ODIHR has a proud history of working on the role of prosecutors. Earlier this year we published a report on functional independence of prosecutors in Eastern Europe². This report shows that the independence of prosecutors is often protected by law. In reality, there are often problems. These include a strong tradition of subservience of subordinate prosecutors, heads of prosecution offices maintaining a strong chain of command, weak or non-existing self-governing bodies etc. One prosecutor who was interviewed for our report said: *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*

² <https://www.osce.org/odihr/447859>.

get in trouble. However, the subordinate prosecutor will mess his cases up and will be held accountable for his failure.

Our report has also found that the system of bonuses can have a problematic impact on the functional independence of prosecutors. In some countries, salaries are often not paid as a base salary, but in the form of bonuses. The bonus can make up as much as half of the remuneration of the individual prosecutor. The bonus can be granted, reduced or even cancelled by the superior prosecutor. The bonus therefore becomes a powerful tool to control subordinate prosecutors.

The lack of independence of self-governing bodies is another problem identified in ODIHR's report. In some countries, the members of such bodies may be selected by the executive, and this can create a perception that the self-governing body is more likely to take decisions that favour the executive. In other countries, the members may be hand-picked by the Prosecutor General. In this way, the self-governing body can appear as an extension of the Prosecutor General's office and not as an independent institution.

In our report, which I encourage you to read, ODIHR makes several recommendations, including

- Conduct an audit of prosecutorial independence on a national level. This should evaluate what measures and practices are in place and how these hold up to international good practices.
- Ensure that all instructions from superior prosecutors are submitted in writing and kept in the case file. Here the independence of prosecutors is different from the independence of judges, because the international recognized soft-law sources do not forbid all instructions from superior prosecutors as long as they comply with these requirements. Such instructions from one judge to another would not be acceptable.
- Strengthen self-governing bodies.
- Implement an unbiased method for case allocation.

Another way to achieve a European model is to bring actors together. For this reason, events like this one are so important. It is commendable that MEDEL are organizing today's meeting. Thank you.