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Website of the Conference: *www.coe.int/prosecutors*/

Conference of General Prosecutors of Europe
Conférence des Procureurs Généraux d'Europe

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Prosecutor General of Celle, Lower Saxony / Procureur Général de Celle, Basse-Saxe (Germany) / (Allemagne)

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Questionnaire in preparation of the Celle Conference and replies thereto from:
Andorra, Armenia, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Iceland, Italy, Latvia, Liechtenstein, Netherland, Norway, Portugal, Slovakia, Slovenia, Sweden,

Questionnaire en préparation de la Conférence de Celle et réponses en provenance de:
Andorre, Arménie, Autriche, Belgique, RépubliqueTcheque, Danemark, Estonie, Finlande, France, Allemagne, Islande, Italie, Lettonie, Liechtenstein, Pays-Bas, Norvège, Portugal, Slovaquie, Slovénie, Suède,

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QUESTION 1. **Progress of implementation of *Recommendation (2000) 19 on "The role of public prosecution in the criminal justice system.***

To take stock of implementation of Recommendation (2003) 19, which sets out guiding principles common to all prosecution services in Europe, it is important to know:

☞ what reforms and initiatives of whatever kind affecting your prosecution service took place in 2003 or early 2004, and whether they were based on Recommendation (2003) 19 as a whole or part of it

☞ what prosecution reforms or initiatives are planned.

QUESTION 1. L'état de la mise en oeuvre de la *Recommandation (2000) 19* sur *"le rôle du ministère public dans le système de justice pénale".*

Afin de permettre d'établir un bilan de la prise en compte de la *Recommandation*, qui rassemble les principes directeurs communs à l'ensemble des Ministères Publics d'Europe, il importe de connaître :

☞ les réformes et initiatives de toute nature survenues en 2003 ou début 2004 intéressant votre Ministère Public, en indiquant si elles ont pris pour base tout ou partie de la *Recommandation*

☞ les projets en la matière pour l'avenir

REPLIES / REPONSES

ANDORRE
Aucune reforme ou initiative affectant le système judiciaire andorran n'été prise en 2003 ou début 2004.

Aucune n'est en préparation.

ARMENIA
Recommendation (2000) 19 was translated into Armenian and published in a magazine for General Prosecutors. Seminars were organized at the Research - Training centre for Prosecutors and Council of Europe experts from Italy, Spain and Portugal were invited, so that a detailed study of the Recommendation's main provisions could be made. The first efforts have been made - on a practical level – in order to comply with the Recommendation's principle to provide for examinations and/or competitions.
In 2004, the General Prosecutor's Office planned to organize supplementary seminars - for prosecutors, assistants, as well as investigators - on preventing, investigating and fighting corruption and all related crimes.

The Government has already prepared the amended draft of the Criminal Procedure Code, on which the General Prosecutor's Office has expressed its opinion, with the aim to approximate the Code to the provisions of the Recommendation.

AUSTRIA
An amendment of the Austrian Criminal Procedure Code has passed Parliament and has been published recently; the preliminary proceedings system is changing fundamentally: the investigative judge is "abolished" and the public prosecutor will be entitled to lead the investigation. The law will enter into force on 1 January 2008. As a result, a reform of the prosecution service will be necessary, but details are not yet known.

CZECH REPUBLIC
Substantial changes in this respect were implemented firstly by an amendment to the Rules of Criminal Procedure, secondly by an amendment to the Public Prosecution Act. Recommendation (2000) 19 has been one of the significant sources of inspiration for these legal regulations (particularly the amendment to the Public Prosecution Act). Attention has been focused on certain critical matters such as: functions of indictment, the relationship between the Public Prosecution and executive power, as well as the relationship between the Prosecuting Attorney's Office and the Police in the Czech Republic.

There are not any reforms or initiatives envisaged in the sphere of the Prosecution Service in the Czech Republic.

DENMARK
No reforms or initiatives were carried out in 2003 or early 2004.

ESTONIA
The new Code of Criminal Procedures adopted on 12.02.2003 will enter into force on 01.07.2004. The new Code determines the role of the prosecutor in the pre-trial procedure:
1) Preliminary investigation: a number of functions currently handled by police investigation will be transferred to the prosecution; the prosecutor will be primarily responsible for the overall effectiveness of preliminary investigation; he/she will be the one to choose the type of court proceedings and to decide whether to bring a charge or not (conclude a criminal matter under the principle of opportunity).
2) Courtroom: Prosecutors will be more active players: Presentation of prosecution evidence and cross-examination of the defendant will be the duty of a prosecutor; his/her decision to drop charges will bind the Court (discontinuation and acquittal).

The Estonian Prosecutors Office has a new structure since 01.03.2004 in order to implement effectively the new Code of Criminal Procedure.

FINLAND
There have been no new initiatives in Finland to enhance the implementation of the Recommendation. At the moment there are no major reform plans pending.

FRANCE
Au plan législatif, une importante loi en date du 9 mars 2004 portant adaptation de la Justice aux évolutions de la criminalité, comprend, entre autres, trois dispositions qui concernent des questions traitées par la Recommandation. Les attributions respectives du ministre de la Justice, des procureurs généraux et des procureurs de la République, dans le souci d'une plus grande cohérence de l'action du ministère public et d'un renforcement du dispositif hiérarchique sont ainsi précisées. A tous les niveaux (police judiciaire, parquet, juge d'instruction), les droits des victimes sont confortés, notamment en terme d'information mais aussi de motivation des décisions les concernant. Des pôles juridictionnels interrégionaux sont aussi créés sur des questions spécifiques (criminalité organisée, délinquance économique

et financière, pollution maritime, santé publique), pôles qui sont dotés de moyens étoffés en magistrats et fonctionnaires de justice spécialement formés et vont bénéficier de la compétence technique d'agents administratifs de divers horizons.

Au plan pratique, la Conférence des Procureurs Généraux Français vient de mettre un terme à un important travail de réflexion et de propositions, conduit depuis 2000 notamment sur la base de la Recommandation 2000 (19) du Conseil de l'Europe et qui a donné lieu à une large consultation de l'ensemble des magistrats du ministère public. A l'issue de ce travail, a été adoptée une Recommandation de la Conférence intitulée "principes directeurs pour le ministère public français Partant d'une analyse affinée de l'évolution comme des difficultés rencontrées par la Justice et, plus particulièrement, le ministère public, la Conférence énonce une série de propositions, institutionnelles, organisationnelles, procédurales ou pratiques, portant sur : les missions du ministère public ; les fondements de son intervention et les relations avec le pouvoir exécutif ; le statut de ses membres et l'organisation hiérarchique ; l'appartenance du ministère public à l'autorité judiciaire et ses relations avec les juges ; le principe d'opportunité ; le rôle du ministère public en matière pénale, en examinant, plus spécifiquement, ses missions en terme de politique pénale et de police judiciaire ; les devoirs et responsabilités de ses membres vis-à-vis des justiciables ; son rôle en matière d'administration et de gestion des juridictions ; enfin les moyens d'action dont il devrait être doté.
Ce document va être remis aux différentes autorités ministérielles, politiques et judiciaires.

Compte tenu de l'ampleur des réformes de procédure survenues depuis 2000, aucune autre réforme importante n'est, à l'heure actuelle, annoncée.

GERMANY
No reforms or initiatives were taken, nor are there any planned.

ICELAND
No reforms affecting the prosecution service in Iceland have taken place in the years 2003 and 2004 and no reforms are planned yet.

ITALIE
Le Parlement est en train d'adopter un projet de loi modifiant en profondeur la loi de l'organisation judiciaire. Le projet statue que, toute après leur admission dans le rôle judiciaire, les jeunes magistrats doivent faire un choix, définitif pour toute leur carrière, entre la fonction de juge et de ministère public. Des concours seront introduits, permettant une accélération de la carrière. Le projet attribue aux procureurs de la République des pouvoirs vis-à-vis de leurs substituts, portant aussi bien sur la gestion des enquêtes et les relations avec la police. Le projet prévoit aussi un élargissement des pouvoirs des procureurs généraux des cours d'appel en matière d'évocation des enquêtes menées par le parquet de première instance.

LATVIA
Amendments have been made in the Law on the Prosecutor's Office since June 2003. The New Code of Criminal Procedure, which will increase the role of public prosecutors at the pre-trial investigation stage, is being currently discussed in the Parliament.

LIECHTENSTEIN
No measures were taken.

There are plans for a new law on the Liechtenstein Prosecution Service, but no concrete steps have been taken so far. The law may be drafted within the next 5 years.

NORWAY
There are no new initiatives in Norway to further enhance the Recommendation, nor are there any substantial plans for reform of the prosecution service.
In our view, it can hardly be expected that there will be much progress on the implementation of the Recommendation unless some active steps are taken by the Council of Europe and our Conference.

PORTUGAL
Il n'y a rien à signaler, au niveau national ou local, à ce sujet.

Pour l'avenir on prépare un projet sur l'organisation et la gestion des parquets régionaux et locaux, comprenant les ressources humaines et la répartition des affaires aux procureurs. En outre, des réformes ayant une incidence sur le fonctionnement du Ministère Public ont été initiées. En outre, des réformes portant amendement aux Codes Pénal et de Procédure Pénale sont en cours ainsi qu'une réforme du système pénitentiaire.

SLOVAKIA
No legislative changes were prepared. The only step taken was that the informative report attached to the Questionnaire for the 4th Pan European Conference at Bratislava was submitted to the General Prosecutor.

SLOVENIA
Amendment to Criminal Procedure Code (CPC) – June 2003
- Appointment of a defence lawyer by a court even in cases where legal representation is not mandatory, when a defendant for economic reasons cannot afford to hire one and where such an appointment is in the interest of justice;
- New rules on the exclusion of evidence in cases where CPC stipulates, certain evidence gained during the procedure must be excluded and the judgment cannot be based upon them; when a defendant is interrogated by the police, such evidence is admissible in court, if certain procedural guarantees are respected;
- New rules on arresting the alleged perpetrators and supplemental rules on the interrogation of defendant and on extradition;
- Special investigative means and methods, following bank account transactions, can be enacted for a longer period of time, with some new conditions for their application;
- Definition of prosecutorial authority while directing police (pretrial) procedure;
- Introduction of: i) investigative acts before introducing a full judicial investigation and ii) penal mandate and definition of procedure for enacting such a mandate.
CPC - April 2004
- Supplemental rules on: i) exclusion of judges, ii) the protection of defendants, when their cooperation with the investigation can lead to the exemption from penalty, iii) witness protection, iv) extradition of foreign nationals;
- Introduction of a new system of special investigative means and methods.

No further prosecution reforms or initiatives are planned, as we adopted Prosecutors Service Act in 2002 (see Report to the Bratislava Conference).

SWEDEN
Recommendation (2000) 19 is already implemented in the Swedish legislation. So the Swedish prosecution system does not have any reforms or initiatives planned in this issue.

THE NETHERLANDS
No specific reforms or initiatives have taken place in 2003 or early 2004 affecting our prosecution service, nor are there any planned for the future.

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QUESTION 2. The main theme of the Celle conference : "Discretionary powers of public prosecution"

At the request of several prosecutors general, it has been decided that the main theme will be *"Discretionary powers of public prosecution: opportunity or legality principle- advantages and disadvantages"*.

As input to discussion, it would be appreciated if each prosecutor general could speedily answer the following questions:

☞ in considering whether or not to prosecute, does your prosecution service have discretionary powers either in law or practice, or is it governed by the legality principle in the meaning that it must prosecute when an offence has been committed and the suspect is known?

☞ if it has discretionary powers, what are the different types of decision it can take in the way of diversion measures or alternatives to prosecution?

☞ if prosecution is obligatory, is the judge empowered to refrain from prosecution in the case of some offences, and if so on what conditions?

☞ if prosecution is discretionary, what safeguards do defendants have against arbitrary decisions of the prosecution service? Are there any guidelines on the implementation of the discretionary prosecution? If these are public, you are kindly requested to provide a copy.

☞ briefly state the advantages and disadvantages of your system, together with any reforms that are under way.

QUESTION 2. Le thème principal de la Conférence de *Celle* : *"les pouvoirs d'appréciation du Ministère Public"*

Sur les sollicitations de plusieurs Procureurs Généraux, il a été décidé de retenir comme thème principal *"les pouvoirs d'appréciation du Ministère Public : le principe d'opportunité ou de légalité, avantages et inconvénients"*.

Afin d'alimenter le débat, il est souhaité que chaque procureur général veuille bien répondre rapidement aux questions suivantes :

☞ lorsqu'il est question d'engager ou de ne pas engager des poursuites, votre ministère public dispose-t-il d'un pouvoir d'opportunité reconnu par la loi ou la pratique, ou est-il régi par le principe de légalité lui faisant obligation de poursuivre dès lors que l'infraction est constituée et son auteur présumé connu?

☞ s'il dispose d'un pouvoir d'opportunité, quelles sont les différents types de décision susceptibles d'être prises par le ministère public, dans le cadre des mesures de diversion et d'alternatives aux poursuites ?

☞ s'il est régi par le principe de la légalité, le juge dispose-t-il du pouvoir d'éviter les poursuites pour certaines infractions constituées et dans quelles conditions ?

☞ s'il dispose d'un pouvoir d'opportunité, quelles sont les garanties offertes aux justiciables pour éviter toute décision arbitraire de la part du ministère public ? Existe-t-il des lignes directrices sur la manière de mettre en oeuvre ce pouvoir d'opportunité ? Si celles-ci sont publiques, merci de bien vouloir les transmettre en copie.

☞ mentionner, en quelques mots, les avantages et les inconvénients de votre système, ainsi que les éventuelles réformes en cours.

REPLIES / REPONSES

ANDORRE

Le système andorran de poursuite judiciaire et fondée sur le principe de légalité.

Le juge n'a pas le pouvoir de s'abstenir de poursuivre quand une infraction a été commise et le suspect est connu.

Il convient toutefois de signaler une pratique instaurée récemment en ce qui concerne le délit de conduite en état d'ivresse sans accident et de détention de quantité minime de drogue, commis par des touristes étrangers de passage. Des instructions ont été données à la police par le Procureur Général et le gouvernement, avec l'accord des juges, pour que ces délits, lorsqu'ils sont constatés, ne fassent pas l'objet de poursuite pénale, mais de simples sanctions administratives, sous forme de contraventions payables immédiatement.

Les Andorrans sont très attachés au système traditionnel de légalité des poursuites qui a été inscrit dans la Constitution et dans la loi sur le Ministère Publique et qui leur parait assurer l'égalité devant la loi pénale et qui ne présente pas d'inconvénients majeurs. Il convient de signaler aussi que les particuliers ont la possibilité de déclencher eux-mêmes l'action publique en cas d'inaction du Ministère Public et jouissent aussi de l'action populaire inscrite dans la Constitution.

ARMENIA

Public Prosecution has a constitutional status in Armenia. The Prosecution service initiates criminal prosecutions in cases prescribed by law and in accordance with procedures provided by law.

Prosecutors have discretionary powers based on provisions of the Criminal Procedure Code. In certain cases the agreement of the defendant has to be given. The prosecutor's decisions and actions can be appealed to the superior prosecutor or to the Court.

This system has the following advantages: First of all, there is a concrete procedure for the recruitment and appointment of the prosecutors; hence, qualified experts work in the system. Moreover, functions and powers are clearly mentioned and - with some exceptions - are adequate for the execution of Constitutional tasks.

On the other hand, the functions of prosecutors have been limited as the result of legal reforms, especially in the field of economy and state service related crimes and bank secrecy. These limitations hinder the efficiency of international legal cooperation in the fight against crime. In this respect, with the assistance of international organizations and with the Prosecutors' Office initiative, we are preparing amendments and drafts on legal texts.

It can also be mentioned that a Code of Prosecutors' Ethics for Armenian Prosecutors is drafted, discussed and is in the process of approval.

AUSTRIA

Criminal procedure is characterised by a strict principle of legality.

Real exemption from the legality principle does not exist. Diversion is mandatory when the legal conditions put down in the criminal Procedure Code are met. However, diversion can take place only if the criminal act does not fall within the competence of a court, if the guilt of the perpetrator is not considered to be grave or if the criminal act did not entail the death of a person.
In case a suspect is accused of several offences, the public prosecutor my refrain from prosecution of one accusation: i) if this is not of decisive impact on the penalty as a whole; ii) if the suspect is accused of one offence in Austria and is going to be extradited to an other country because of other accusations, provided that the dropping of the Austrian case presumably does not influence decisively the outcome of the proceedings of the remaining accusations; iii) in case the offender has already been convicted for the same offence by a foreign court and an (additional) Austrian verdict is not necessary. The same applies if the proceedings against the offender abroad have been terminated thanks to "victim-offender" mediation or have been suspended under certain conditions.
Special regulations exist for refraining from prosecution of minor crimes committed by soldiers and prison inmates who have been punished by the disciplinary authorities.

The regulations of diversion are not applicable only by the public prosecutor, but also by the court during criminal proceedings. If diversion was not granted, the defendant can apply for it by lodging a complaint against the judgment/decision.

BELGIQUE

En Belgique, nous connaissons un pouvoir d'opportunité, reconnu par la loi.

Les différents types de décision, susceptibles d'être prises par le ministère public, dans le cadre du pouvoir d'opportunité, sont: La médiation pénale, régi par article 216 ter du Code d'Instruction Criminelle ; La transaction, régi par article 216 bis du Code d' Instruction Criminelle; Le classement conditionnel (reconnu par la pratique). Une décision de classement, est officieusement soumise à certaines conditions, convenues entre le ministère public et le (la) suspect(e).

Vu le pouvoir d'opportunité du ministère public, le juge ne dispose pas du pouvoir d'éviter les poursuites.

Il y a certains mécanismes de correction du pouvoir d'opportunité. Concernant la communication*:* le ministère public est obligé de motiver le classement et d'informer la personne qui a déclaré avoir subi un dommage découlant d'une infraction. Concernant les possibilités de correction par les victimes: la victime, comme partie civile, peut utiliser la citation donnée directement contre l'inculpé et contre les personnes civilement responsables du délit.

CZECH REPUBLIC

Section 2 para. 3 of the Czech Criminal Code stipulates that public prosecutors are obliged to prosecute in all cases of criminal acts of which they learn, unless an act of Parliament or promulgated international convention to which the Czech Republic is bound states otherwise. The principle of legality is a consequence of the principle of public office regarding the initiation of criminal proceedings. It does not describe a situation whereby the sole entity capable of bringing criminal prosecution is a public prosecutor, who empowers police bodies to perform individual tasks or entire preparatory proceedings, but it concerns the obligation of the public prosecutor to insist on the use of instruments provided by the law for the timely and proper prosecution of every perpetrator of a criminal offence (with a few exceptions which are given below). The principle of legality does not extend to petty offences or disciplinary violations, or to other administrative offences.

Exceptions to the principle of legality provided for under the law can be divided into three groups of cases:

a) the public prosecutor may not prosecute the person for a criminal offence due to: exclusion from the jurisdiction of law-enforcement bodies; inadmissibility of criminal prosecution due to amnesty, statute of limitations, insufficient age, impediment due to a legitimately decided case; criminal offences in which consent from an injured party with personal relations to the accused is not forthcoming, e.g. assault, theft, fraud, violence against a group or individuals and even, in certain specified kinds of cases, rape;

b) a public prosecutor may, but is not obliged to, bring prosecution to an end for a criminal offence in cases where criminal prosecution would be ineffective or in case of a settlement.

It is the public prosecutor (and at no time the police) who can suspend criminal prosecution when it is clear that the objective of criminal proceedings has been achieved, when account is taken of protection of interests which have been affected by the offence and in view of the behaviour of the accused following the commission of the act. This is clearly an element of "opportunity", or discretionary powers exclusively belonging to the state prosecutor and solely within the procedural sphere – even in this case it concerns suspension of criminal prosecution due to its ineffective nature.

c) Criminal prosecution of persons is also inadmissible when this is stipulated by a promulgated international convention, which the Czech Republic is obliged to abide by; further exceptions arise from conventions on diplomatic and consular relations.

In the Czech Republic, a material understanding of criminal offences is customary (more precisely a formal material conception). This means essentially that according to substantive law a particular act can be punishable only if it fulfils two equally important criteria: that it displays the characteristics of an offence definition established by law and that it concerns an act presenting a relevant degree of danger to society. The conditions permitting the use of more severe sentencing guidelines are linked to a greater degree of danger to society, and criminal prosecution can be "dropped" or lightened through reference to the lesser degree of danger to society. The material conception of a criminal act (or the formal material conception) sometimes involves a considerable level of uncertainty in the criteria establishing the approach to be taken by law-enforcement bodies in a particular case, even though it is true that the Czech Criminal Code contains criteria for levels of danger to society.

An amended Criminal Procedure Code will probably allow the application of the principle of opportunity. New laws can be expected in 2006 or 2007.

DENMARK

When deciding whether to prosecute or not, the Danish prosecution service has discretionary powers according to the Danish Administration of Justice Act (AJA).

The prosecution service may choose to dismiss the charges, but only in situations covered by the specified provisions of the AJA, e.g. in cases concerning juvenile offenders. Prosecution is not obligatory.

No specific guidelines have been issued. A defendant may file a complaint against a decision to dismiss the charges. Apart from the situation where the case is closed because of lack of evidence, dismissal of charges is normally only used where the defendant has pleaded guilty. Furthermore, the conditions of the dismissal, if any, must be approved by the court. The provisions are administered respecting the principle of equality.

The advantage of the system is mainly that a number of cases can be dealt with using only limited resources in the criminal justice system. There are no apparent disadvantages of the system.

ESTONIA

According to the new Code of Criminal Procedure, the Prosecutor will choose the type of court proceedings and he/she will decide whether to bring a charge or not.

More specifically, there are provisions dealing with termination of criminal proceedings and transfer of offenders to a juveniles committee: If a prosecutor finds that a person between 14 and 18 years of age, who has committed a criminal offence in the second degree, can be "influenced" without the imposition of a punishment or sanction, he makes a ruling on termination of the criminal proceedings and sends a copy of the ruling to the juveniles committee of the minor's residence together with an application to impose sanctions prescribed by the Juvenile Sanctions Act. Criminal proceedings can also be terminated because of lack of public interest in them, in case of negligible guilt or when there is a lack of proportionality between the offence and the potential sanction-punishment. In these cases the prosecutor may request the termination of proceedings from the Court but always with the consent of the suspect or accused person.

In the event of termination of criminal proceedings, the court may impose a variety of measures on the suspect, the accused or accused at trial at the request of the prosecutor and with their consent. For example, the accused can be asked to pay a fixed amount into the public revenues, to pay the expenses relating to the criminal proceedings or compensate for the damage caused by the criminal offence, or to perform 80 to 240 hours of community service. If a person with regard to whom criminal proceedings have been terminated fails to perform the obligation imposed on him or her, the prosecutor or the court, at the request of the prosecutor, shall resume the criminal proceedings by an order.

It can be mentioned that Estonia has adopted a Code of Ethics for Estonian Prosecutors, which entails rules related to Pre-trial Investigation and Court Proceedings, as well as provisions about public relations and relations among Prosecutors.

FINLAND

The prosecutor is in principle governed by the legality principle. However, there are a few exceptions to the legality principle and these exceptions are stated in law.

These grounds for non-prosecution are for example the minor significance of the offence, the young age of the defendant, the existence of circumstances that would mean that trial and punishment could be deemed unreasonable, or the fact that previous convictions would render the punishment from the offence insignificant. If these exceptions in the law are applicable, the prosecutor makes a written decision not to prosecute, where he concludes that the defendant is guilty of the offence in question but prosecution is waived on one of the above-mentioned grounds. The defendant receives no punishment.

The defendant has the right to bring the question of his guilt to the court. Also the victim of the crime has the right to bring charges against the defendant when the prosecutor has waived prosecution. In a trial brought on by the victim, there can also be a verdict and punishment to the defendant if he is found guilty. Both parties in the case can also make a complaint to the Prosecutor General about a local prosecutor's decision to waive prosecution and he has the power to turn the local prosecutor's decision around and bring charges against the defendant.

FRANCE

De tout temps, le ministère public Français est régi par le principe d'opportunité, qui résulte, outre la tradition, d'une disposition quelque peu sibylline du code de procédure pénale, laquelle prévoit que "le procureur apprécie la suite à donner aux plaintes et dénonciations".

Il y a de nombreuses alternatives aux poursuites: rappel à la loi; orientation de l'auteur d'un fait vers une structure sanitaire, sociale ou professionnelle; injonction de régularisation d'une situation ou de réparation d'un dommage causé; médiation entre l'auteur et la victime; composition pénale devant être validée par un juge et pouvant se traduire par le versement d'une amende, la remise de la chose ayant servi ou produit de l'infraction, l'immobilisation du véhicule, la rétention du permis de conduire ou de chasse, la réalisation d'un travail au profit de la collectivité, le suivi d'un stage ou d'une formation, l'interdiction d'émission de chèques, l'interdiction de paraître dans certains lieux ou de rencontrer certaines personnes, l'interdiction de quitter le territoire etc.

Malgré cet encadrement de ses pouvoirs, le ministère public apparaît bien aujourd'hui comme un véritable "juge de l'action publique", d'autant plus que, parallèlement, les modes de poursuite ou assimilés ont été diversifiés ("ordonnance pénale" en matière correctionnelle introduite en 2002, procédure de "reconnaissance préalable de culpabilité" créée par la loi précitée du 9 mars 2004).

Les garanties offertes aux justiciables résident essentiellement dans:

- La condition préalable posée à l'alternative, consistant en un consentement, tacite ou express, de l'auteur des faits à la mesure; son refus, voire l'inexécution de l'obligation entraînent à son égard le prononcé, soit d'une alternative aux poursuites de portée supérieure, soit l'engagement de poursuites.
- La validation par le juge de l'alternative (composition pénale) permettant le prononcé d'obligations de faire ou de ne pas faire qui s'apparentent, par leur nature, à des peines.
- La possibilité pour la victime de contester le classement sans suite, soit en formant un recours hiérarchique devant le procureur général, soit en engageant, elle-même mais à ses risques et périls, l'action publique (citation directe devant le tribunal, constitution de partie civile devant le juge d'instruction).

En ce qui concerne les avantages et inconvénients, on peut dire que l'opportunité est considérée, en France, comme caractérisant le mode de décision du ministère public, et pas simplement les poursuites.

Les avantages sont de plusieurs ordres: possibilité de répondre à toute infraction même dans des hypothèses ne justifiant pas des poursuites, en respectant tant la nécessaire

individualisation des décisions judiciaires que le principe d'égalité des justiciables devant la loi; rapidité et effectivité des réponses apportées, tant pour l'auteur des faits que pour les victimes; on évite des surcharges inutiles des formations de jugement pour les affaires mineures ; il y a une claire séparation entre les responsabilités qui relèvent du ministère public et celles relevant des juges.
En revanche, les dangers, plus théoriques que réels en l'état, sont les suivants: risque d'incohérence des décisions individuelles ; risque d'immixtion par substitution, si la police ou une administration omet de dénoncer au parquet toutes les infractions portées à sa connaissance; risque d'immixtion par l'autorité politique; risque de recourir au pouvoir d'opportunité pour répondre à des carences de moyens en terme de capacités de jugement : c'est un risque réel, puisque actuellement 1/3 des infractions dénoncées à la Justice reçoivent directement réponse du ministère public ; on peut même dire que la Justice pénale n'a pu faire face à l'augmentation très importante du contentieux ces dernières décennies que grâce aux nouvelles réponses mises en oeuvre par les parquets. Il ne faudrait toutefois pas que, pour des raisons de moyens, le magistrat du parquet soit contraint de se substituer au juge et à l'audience publique et contradictoire. En outre, l'assimilation de la décision du parquet à celle du juge a ses limites puisqu'il ne saurait prononcer de peines obligatoires, ni faire inscrire ses décisions au casier judiciaire sans l'aval d'un juge.

GERMANY
In general, the principle of legality governs. This means that the prosecution service has to make investigations against all criminal offences and to bring the cases with sufficient evidence to court. The prosecutor is an advocate of the criminal justice system and of the defendant ("guardian of law and legality").

There are some important elements of opportunity that supplement this principle: all breaches of administrative laws and regulations (most important: traffic offences) are prosecuted under the principle of opportunity; moreover, there are strong elements of opportunity in the Criminal Procedure Act, that allow discretion and dismissal of the case before bringing it to Court.
Discretionary powers apply in cases of: minor guilt, lack of public interest, minor cases of drug abuse, negligible offences (in comparison to other prosecuted crimes of the suspect), extradition of the culprit, informal "sanctions" (orders and measures).
The decisions may vary: compensation order, pecuniary penalty, community service, alimony payment, mediation, for juveniles: educational measures instead of criminal sanctions

If prosecution is obligatory, the judge has the power to refrain from prosecution under the same conditions as the prosecutor and under the principle of judiciary independence.

If defendants do not agree with the discretionary decision, the regular procedure takes place (dropping the case by lack of evidence or regular court trial). Victims may complain to the General Prosecutor; The General Prosecutro may confirm the prosecutor's decision or give him/her the order to reopen the investigation or bring the case to the court immediately.

Advantages: principle of equal treatment, principle of certainty both for victims and offenders, separation of powers, independence of prosecution service, maintenance of objectivity without loosing flexibility and possibilities to implement modern crime policy.
Disadvantages: Much work for the prosecution service and the police.

ICELAND

The Icelandic Prosecution Service has discretionary powers in law.

Settlement by a Commissioner of Police: When a Commissioner of Police receives a complaint concerning an offence he has the authority to prosecute. If the police catches someone in the act of such an offence and the commissioner considers that the penalty will not exceed the deprivation of a driver's license for up to one year, confiscation or fine up to a certain amount decided by the Minister of Justice by regulation following recommendations of the Prosecutor General, the Commissioner of Police can offer the accused the opportunity to conclude the case by accepting a suitable penalty as well as paying the costs of the case. If the accused accepts the penalty, the conclusion has the same effect as if concluded by the court. If the accused refuses to conclude the case in this manner, or does not reply to the offer, a decision to prosecute is taken in accordance with the general rules. If the Prosecutor General considers that an innocent person has undergone penalty or that the conclusion is otherwise absurd, he/she can annul the decision after receiving notification for it, as long as a year has not passed since its conclusion.

The list of offences has been issued and is revised regularly.

Unconditional waiver of prosecution: A decision may be taken not to prosecute in cases where the provisions of the General Penal Code on suspension of indictment may be applied. Prosecution shall also be cancelled if a suspect accepts a settlement. A decision may also be taken not to prosecute in the following cases:

a. if the offence is of a very minor nature;

b. if the suspect seems not to be responsible under criminal law, and a request for a security commitment according to the provisions of the General Penal Code is unnecessary;

c. if the offence has caused the offender himself extraordinary suffering and prosecution is not deemed important with a view to general prevention;

d. if a person is to be prosecuted in a single case on account of many offences, a decision may be taken not to prosecute him on account of offences that may be assumed to be of little or no importance for the determination of the penalty; furthermore, a decision may be taken not to prosecute if it may be assumed that no further penalty will be ordered even if the defendant is found guilty;

e. if a person has been subjected to duress or blackmail by a threat to report a punishable offence a decision may be taken not to prosecute on account of that offence, provided it is not too grave;

f. in special cases when prosecution is not deemed dictated by the public interest.

If the Prosecutor General considers that a decision should be taken not to prosecute but is not certain of his authority, he may ask the Minister of Justice to Propose to the President that the prosecution should be dismissed.

Commissioners of police may decide not to prosecute in cases where they wield the power of prosecution. If a commissioner of police considers that prosecution should not take place, but is uncertain of his authority, he/she refers the matter, with his/her proposals, to the Prosecutor General.

In practice a confession of the offence is a prerequisite for the decision not to prosecute.

Conditional waiver of prosecution: The Public Prosecutor is entitled to grant a conditional waiver of prosecution to juveniles aged 15 - 21 and to adults, if prosecution is not required by public interest and such measures are considered more suitable than prosecution. A confession of the offence is a prerequisite in all instances.

If a defendant does not accept an unconditional or conditional waiver of prosecution the alleged offence can be subject to public indictment.

ITALIE

En Italie, pour ce qui est de l'action publique, le principe de la légalité est en vigueur. A la conclusion de l'enquête le pouvoir de classer est confié à un juge.

Des mécanismes existent visant à permettre une décision sur le fond de l'affaire, sans que le juge de l'audience publique soit saisi.

Les inconvénients du système de la légalité font l'objet d'un débat. Derrière le nombre très élevé des affaires et l'impossibilité physique de tout définir se cache un risque d'arbitraire, lié à la perspective de la prescription. Les aspects positifs du principe de la légalité peuvent être identifiés par rapport au fait que le classement implique dans tous les cas l'intervention d'un juge et ceci empêche - ou au moins réduit - le risque que « les délits du pouvoir » ne restent impunis.

LATVIA

The public prosecutor in his/her activities follows the Code of Criminal Procedure, which provides that he/she may decide not to start or to dismiss a criminal case when a criminal offence does not give ground for criminal prosecution; when a settlement has taken place; when a minor committed a criminal offence, but there is information on the minor's personality which leads to mitigation of his/her liability. It has to be mentioned that in the latter case, a court can always order coercive measures of educational character to the minor.

The Prosecutor General can dismiss criminal prosecution against a person who provided help and/or evidence in order for a serious crime – more serious or dangerous that the one he/she has committed - to be discovered. This case does not apply to persons who are held criminally liable for offences for which the sanction is deprivation of liberty for more than 10 years.

Judicial proceedings too, are dismissed in the above mentioned cases, but also when a victim or his/her representative does not appear in Court in a private complaint case, or if the provisions of the Criminal Procedure Code were not followed.

The decision to refuse to initiate a criminal case can be appealed to the Head prosecutor of a Prosecutor's Office of a higher level; a decision of a prosecutor from the Prosecutor General's Office can be appealed to the Prosecutor General and a decision taken by a judge or a Court can be appealed to a higher court.

LIECHTENSTEIN

The Liechtenstein criminal law is based on the principle of legality. In the decision whether to prosecute or not, the prosecutor has very little discretion. He/She only decides whether a criminal act was committed or not, if there are doubts he/she will take the case to court. In practice, however, prosecutors will drop a case if there is a very high probability that a person will be found not guilty by the court e.g. for evidential reasons.

There are only three exceptions from the principle of legality. The prosecutor can refrain from prosecution:
i) in case a person has committed several criminal acts, if it can be expected that this will have no significant influence on the sentence (on the height of a fine or the length of a prison sentence); ii) if the defendant is about to be extradited to a foreign authority and the sentence that is to be expected in the domestic case would not be proportionate in comparison to the

punishment that is to be expected in the foreign state that is requesting the extradition; iii) in case of a crime committed in a foreign country, if the defendant has already been punished for the crime in the foreign country and it is to be expected that the domestic court will not impose a stricter punishment.

The judge is empowered to terminate proceedings in the trial stage if the crime is punished by not more than one year imprisonment and the guilt of the defendant is low, the crime has caused none or little consequences (damages) and the punishment is not necessary to deter the defendant from further criminal activity or to prevent people generally from committing crimes (art 42). There is draft legislation that will enable the prosecutor in the future to apply this article himself/herself without involving the judge, thus extending the discretionary powers of the public prosecution. Furthermore, the judge can refrain from sentencing in juvenile cases. Instead of a guilty verdict the judge can remand the delinquent or pass a conditional conviction.

The government wants to introduce "Diversion" into the criminal law by drafting legislation, which would give a wide range of discretionary powers to the Public Prosecutor to refrain from prosecution in all cases of misdemeanors and offences under certain conditions.

The advantage of a strict principle of legality is that every defendant is prosecuted equally. The disadvantage is that in petty crime cases a prosecution is obligatory even if defendant and victim have settled a dispute and the criminal activity has caused no serious consequences. Also the system of legality can lead to an unmanageable case load, especially in economic crime cases.

NORWAY

The prosecuting authority has discretionary powers to waive prosecution if, on an overall evaluation, it finds that there are reasons for not prosecuting the act.

Waiver of prosecution may be made conditional; in practice this is nearly exclusively used when the offender is very young, very old or seriously ill. The prosecuting authority may also waive prosecution in the case of concurrence of two or more felonies or misdemeanours where either no or only a minor penalty would be imposed. If the prosecution authority deems guilt to be proven it can decide that the case is referred to the Conflict Resolution Board provided that both the person charged and the victim agree. If a child (defined as less than 15 years old) has committed an otherwise punishable act the prosecuting authority may decide that the case is referred to the child care authorities.

If the person charged maintains that he is not guilty of an offence for which prosecution has been waived, he may require the prosecuting authority to bring the case before the court if the charge is not withdrawn. If a victim claims that a waiver of prosecution is a too lenient reaction, he may complain to a higher level within the prosecution service.

PORTUGAL

L'action pénale est orientée par le principe de légalité. La notification d'un crime impose toujours l'ouverture d'une enquête. Les seules exceptions sont les crimes (normalement des bagatelles pénales) exigeant une requête ou une requête et accusation de la personne lésée. Toutefois et sans mettre en cause ce principe, on admet un traitement procédural différent en ce que concerne la petite et moyenne criminalité. On observe la légalité dans le déclenchement de l'enquête, mais cette légalité est « ouverte », dans le sens où l'enquête connaît des issues autres que l'accusation et le classement sans suite.

Le Code de Procédure Pénale a adopté des mesures relatives au consensus. L'introduction du principe de l'opportunité retrouve ses racines dans cette idée et il est axé sur un double vecteur: celui de la possibilité octroyée au Ministère Public de classer l'affaire en cas d'exemption ou dispense de peine et celui de la possibilité de suspendre l'affaire lorsque les présuppositions et les conditions prévues dans la loi se trouvent remplies. Parmi ces conditions que le suspect doit respecter, on trouve entre autres des règles de conduite, le versement d'une somme d'argent, le dédommagement de la victime etc.. Le M.P. peut même déterminer la compétence du juge unique dans des cas où la compétence appartenait en principe au jury ou à un tribunal à formation collégiale, en fixant la limite de la peine à 5 ans pour un crime pour lequel le Code Pénal prévoit une peine maximum plus lourde. Il y a aussi la possibilité de conclure un accord avec le prévenu pour l'application d'une amende en cas de petites affaires, en évitant la réalisation d'une audience.

Avant de suspendre une affaire, le MP doit toutefois s'assurer que les conditions requises par la loi sont remplies. Ces mesures sont cumulatives et sont les suivantes : a) accord de l'inculpé et de l'accusateur privé (*assistante*); b) absence d'antécédents criminels de l'inculpé ; c) non imposition de mesure de contrainte d'internement ; d) degré amoindri de la culpabilité ; et e) il est à prévoir que l'accomplissement des obligations et des règles de conduite représente une réponse suffisante par rapport aux exigences de prévention déterminées par le cas en espèce.

Tout d'abord on doit dire que chaque crime, indépendamment de sa nature, lorsqu'il est punissable d'une peine privative de liberté non supérieure à trois ans ou d'une sanction autre que la privation de la liberté est éligible pour la suspension de la procédure. Les suivantes injonctions et règles de conduite sont opposables: a) indemniser le lésé; b)rendre au lésé une réparation morale adéquate; c) délivrer à l'Etat ou à des institutions privées de solidarité sociale une certaine somme; d)ne pas se livrer à certaines activités de nature professionnelle; e) ne pas se rendre en certains milieux ou lieux; f) ne pas élire domicile en certains lieux ou régions; g) s'abstenir d'accompagner, d'héberger ou d'accueillir certaines personnes; h) ne pas détenir certains objets passibles d'être usés dans la commission de nouvelles infractions pénales; i) observer toute autre conduite spécifiquement exigée par le cas en espèce.

Le juge d'instruction n'a pas le pouvoir de déclencher les poursuites. Ce pouvoir appartient au MP ; ainsi la police doit communiquer au MP le déclenchement d'une enquête, car c'est celui-ci qui en a la direction.

Il n'y a pas un principe d'opportunité strict. Il y a des possibilités d'option qui relèvent surtout de l'autonomie technique et qui obéissent toujours à des propos qui sont exclusivement de politique criminelle (jamais pour des raisons financières ou politiques par exemple). Etant donné que la décision de classement ou la suspension de procédure supposent l'accord du juge d'instruction, et l'accord du prévenu et de l'accusateur privé on croit que le système portugais établit un parfait équilibre parmi les différents intérêts à l'affaire. C'est pour cette raison qu'il n'y a pas de possibilité d'appel de cette décision. En outre, le Procureur Général de la République a établi un système de *monitoring*, surtout de nature statistique, selon lequel les parquets doivent communiquer au grade supérieur de la hiérarchie du MP les affaires dans lesquelles il y a eu une décision de suspension provisoire.

Le législateur portugais, dans l'exposé de motifs du Code de Procédure Pénale de 1987, proclamait la suspension de la procédure comme un «outil destiné au contrôle de la petite criminalité duquel on attendait de l'efficacité et célérité, sans les aspects négatifs de la stigmatisation et aussi de l'alourdissement de la conflictualité dans le contexte du procès verbal». En général on souligne les avantages de cet instrument. Toutefois, malgré les

espoirs qu'on y déposait, la pratique a démontré que l'application de la suspension de la procédure a été très limitée.

SLOVAKIA

There is a legality principle. Criminal prosecution is allowed only if an individual is the accused person.

The Code of Penal Procedure regulates the cases when the offence was committed, and the prosecutor must not prosecute (he is not allowed to) or does not have to prosecute (he is not obliged to do so). Persons possessing privileges under the law or under international law are exempt from the power of investigative, prosecuting and adjudicating bodies. The criminal prosecution must not start or, if started, it has to be terminated in the following cases: a) if the criminal prosecution is subject to limitations, b) if the person concerned is exempt from the power of investigative, prosecuting and adjudicating bodies, or if the consent of a competent body is necessary for the prosecution of the person concerned, but it has not been given, c) if the person concerned is not criminally responsible due to his/her age, d) if the person concerned is dead, e) if the person concerned has already been criminally prosecuted for the same offence and afterwards convicted/or the prosecution was legally discontinued, if that decision has not been cancelled within required proceedings, f) if the person concerned was already prosecuted and convicted by another competent body, if the decision has not been cancelled within required proceedings, g) if the a consent of the aggrieved person was necessary for the commencement of criminal prosecution, and it was not given or it was withdrawn, or h) if an international agreement by which is the Slovak Republic is bound requires so.

The investigator can temporarily postpone the accusation upon a previous consent of the prosecutor, for an indispensable period of time, if the accusation could make it difficult to a significant extent to solve the following crimes: corruption, plotting, establishing and supporting of a criminal group, terrorist group, or extremely serious premeditated crime committed by an organized group, criminal or terrorist group, or to find a perpetrator of those crimes. The postponement of an accusation can be granted to an individual who assisted in a relevant way in detecting some of the crimes above or in identifying the perpetrator. The postponement of accusation is not granted to an organizer or to an abettor of the commission of a crime the detection of which he/she participates in. The decision of an investigator to postpone the accusation is issued upon a prior consent of the prosecutor. After the cessation of the grounds for temporary postponement of an accusation (e.g. in the case of valid conviction of perpetrators) against a collaboration, the investigator is empowered to discontinue criminal prosecution or to accuse the collaborating person of having committed a crime, and afterwards, the prosecutor is empowered to discontinue the criminal prosecution.

The present legal regulation of the legality principle (given the exceptions dealt with in the previous section) is sufficient. On the one hand, it makes it possible to draw penal responsibility towards a perpetrator for having committed an offence. On the other hand, the present regulation gives the possibility to breach the legality principle, i.e. to postpone temporarily the prosecution of the collaborating person. By the regulation above the Slovak Republic endeavors to deal with sanctioning the most serious crimes and its organized structures.

SLOVENIA

Criminal Procedure Act (ZKP) provides for the legality principle but it also gives the state prosecutor a certain margin for discretion in deciding whether to prosecute, drop prosecution or order the out-of-court resolution of a criminal charge in cases of: petty offences, settlement, suspended prosecution, opportunity. In proceedings against minors after the

charge has been filed, the state prosecutor may decide to refer the case to a settlement. In some cases discretion is conditional on the consent of the suspect and the injured party.

There are two forms of out-of-court settlement of criminal cases constituting an alternative to criminal prosecution: settlement and suspended prosecution.

The judge may assess himself/herself whether the case involves a petty offence and discharge the defendant. Proceedings against minors may also take place without a request from the state prosecutor, if the panel for young offenders has decided that there is no basis for the prosecutor's request that proceedings be halted. In this case the court may simply pass an educational measure against the minor, without a fine. No out-of-court settlement is possible without the written consent of the suspect and the injured party (termination of judicial protection).

Supervision of the legality of the work of state prosecutors is carried out by the auditing department of the State Prosecutor General's Office, which has even issued General Instructions for suspended prosecution, with the purpose of making equal the criteria that form the basis for decisions on suspension and for determining tasks. The equal treatment of suspects is thus guaranteed. The possibilities outlined above are the fruit of efforts by prosecutors to change the legislation and there has been a noticeable reduction in the number of cases at courts. At the proposal of the State Prosecutor's Office, the ZKP will better regulate the possibility of ordering community service for young and adult suspects.

SWEDEN

In Sweden prosecution is mandatory. The prosecutor – with the exceptions mentioned below - has to prosecute, or rather start up the preliminary investigation when an offence has been committed and the suspect is known. If this investigation does not produce sufficient evidence, the case must be dropped.

The prosecutor has some discretion to waive the case if certain criteria, laid down by Law, are met. He may waive prosecution or dismiss a preliminary investigation, provided that no compelling public or private interest is disregarded and:
i) if it may be presumed that the offence would not result in any other sanction than a fine or that the sanction would be a conditional sentence and special reasons justify the waiver of prosecution;
ii) if the suspect has committed another offence and no additional sanction is needed;
iii) if psychiatric care or special care in accordance with the Act on Support and Service for Certain Persons with Functional Impairments is rendered.
iv) if it is manifest by reason of special circumstances that no sanction is required to prevent the suspect from engaging in further criminal activity.
The decision must be made by a director at a prosecution authority or a chief prosecutor or their deputies.

The Swedish judge is not empowered to refrain from prosecution. This is a duty solely for the prosecutor.

The advantages are that the defendants cannot have arbitrary decisions from the prosecutors. The disadvantage is that the prosecutors have too many cases to handle.

THE NETHERLANDS

The prosecution service in The Netherlands has discretionary powers according to the opportunity principle. The Public Prosecution Service has internal guideliness and directions to avoid arbitrary ruling.

The decisions, by way of diversion measures or alternatives to prosecution, that can be taken are the following:
- offer fine / penalty: this might be imposed in combination with seizure of goods that were used to commit the offence (permanent or temporary, for example a car in a traffic offence);
- no prosecution under specific conditions (probationary period);
- community service for juveniles “HALT”; if the case goes to court, prosecution can request that a punishment is not imposed.

If a criminal offence is not prosecuted or not to be continued, the person concerned can act upon article 12 code of Criminal Procedures by instigating a written complaint to the Court of appeal. Guidelines on the implemenation of the discretionary prosecution are open to public.

Advantages: the flow of courtcases becomes easier to manage; there is no clogging up of the (overloaded) system by small offences and thus more important cases are heard sooner. The approach towards a juvenile delinquent (first offender) focuses on educating the offender and preventing future offences, which is considered better than a short sharp shock technique. It should also be mentioned that there is a large annual income from the fine/penalty system going to the State.
Disadvantages: it is unclear whether or not a particular case goes to court, especially since arbitrary decisions are possible. This may lead to decisions which are not well accepted by the public opinion, especially if there is a feeling that the person has been "let off".

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QUESTION 3. The prosecutors’ duties outside the criminal sector

In preparation for more detailed work, the Celle conference will provide the opportunity to conduct a first examination of the prosecutors’ duties outside the criminal sector, which are not dealt with in Recommendation 2000 (19) and may relate to either administrative, civil, social and commercial law and/or to court functioning and management.

All contributions illustrating the position regarding your prosecution service, its advantages or disadvantages as well as any reforms under way will be very welcome.

QUESTION 3. Les attributions extra-pénales du Ministère Public

Prélude à un travail plus important, la session de CELLE sera l’occasion de conduire une première réflexion sur les attributions non pénales du Ministère Public, attributions qui ne sont pas concernées par la *Recommandation 2000 (19)* et qui ont trait tant au droit administratif, qu’au droit civil, social ou commercial ou qu’au fonctionnement et à la gestion des juridictions.

Toute contribution serait la bienvenue pour illustrer la situation que connaît votre Ministère Public, ainsi que ses avantages et ses inconvénients et les éventuelles réformes en cours.

REPLIES / REPONSES

ARMENIA

According to Article 103(4) of the Constitution, the Prosecutor's Office shall bring actions in court in order to defend the interests of the State. When the Prosecutor has information that officials or citizens violate the law, he sends them a written notification, pointing to the impermissibility of their action. The prosecutor presents a motion to the State or to local self-government bodies, organizations or their officials possessing authority to eliminate conditions and actions causing and leading to violations of the Law. These bodies or persons must report to the prosecutor within one month the results of their discussion on the motion and the measures taken. The prosecutor takes decisions to initiate administrative prosecution. Where it is provided for, he files a complaint to the Court in support of the State's interests.

CZECH REPUBLIC

Public Prosecution has a wide scope of application: it applies for instance to denial of fatherhood, motions for declaration of nullity of contract, motions of declaration of illegality of strike or lockout, motions of imposition of educational measure, order of residential care or prolongation thereof, suspension, restriction or deprivation of parental responsibility, cancellation of imposed protective care, imposition of protective care upon children. Since 1st January 2003 the new Administrative Rules of Procedure vested in the Public Prosecutor the power to file an action to the administrative court, provided that it is held that any public interest has been affected. Besides these powers relating to motions, prosecutors also dispose of the right to intervene in already commenced procedures, for instance in matters of social and legal child protection, commercial cases, matters relating to bankruptcy and the like.

DENMARK

The Danish prosecution service deals only with criminal cases.

FRANCE

Toutefois, comme pour la matière pénale, les attributions extra pénales sont fondées sur le fait que le ministère public a vocation générale à défendre l'intérêt général.
On peut noter que par voie de conséquence: le ministère public peut intervenir dans toutes les affaires portées devant les juridictions civiles, sociales ou commerciales; en matière commerciale, il intervient systématiquement en ce qui concerne les entreprises en difficulté, soit en engageant l'action, soit en prenant des conclusions, soit en interjetant appel; en ce qui concerne l'état des personnes (questions de nationalité, de nom, d'incapacités résultant de déficiences mentales) comme s'agissant de la protection des mineurs, il intervient obligatoirement et se trouve souvent à l'origine de l'action; il contrôle aussi l'application de la loi par les maires chargés de l'état-civil, surveille les hôpitaux psychiatriques etc.; le procureur général, veille à la discipline de l'ensemble des auxiliaires de justice et instruit l'ensemble des réclamations les concernant ; il procède aussi à l'instruction de l'ensemble des dossiers de ces professionnels.

ITALIE

Devant la Cour de cassation le Procureur général soumet un réquisitoire même dans les recours en matière civile ; il n'en reste pas moins que les attributions extra-pénales du ministère public sont très réduites. Les plus importantes concernent les procédures en matière

d'état civil des personnes, où il peut saisir directement le tribunal. En matière commerciale, le ministère public peut saisir le tribunal d'une requête visant à la déclaration de faillite.

LATVIA

A prosecutor in Latvia, based on the order provided by law, shall protect individuals, the rights of the State and judicial interests. The prosecutor, upon receipt of information concerning a violation of a law, shall carry out an examination, if the information contains facts regarding a crime; or if the rights and lawful interests of persons without the capacity to act, with restricted capacity to act, of disabled persons, minors, imprisoned persons or other such persons, who have limited capability to protect their rights, have been violated.

A prosecutor has the duty to take measures required for the protection of rights and lawful interests of persons and the State, if: i) the Prosecutor General or a Head prosecutor recognizes the necessity for such examination; ii) the examination of the facts regarding the violation of law is assigned by the President, the *Saeima* or the Cabinet; or iii) if other laws provide for such measures.

Civil law provides for categories of civil cases, where participation of a prosecutor is obligatory where the Court finds it necessary (for example, in cases where a person is in custody due to partial or total incapacity).

LIECHTENSTEIN

According to the Liechtenstein Civil Code if a child is born in wedlock, from a married mother, or within 302 days before divorce, separation or a declaration that the marriage is invalid, the law presumes "legality of the child", meaning that the husband is assumed to be the father. Within one year after the birth of the child the husband can ask the court to decide that he is not the father of the child. The Public Prosecutor can take such a case to the Civil Courts if the husband did not take action within one year, if the husband has died or is of unknown residence, or if the child has died but only if a decision by the court is in the public interest or in the interest of the child or in the interest of the descendants of the child. In the public interest or in the interest of the child or of its descendants the Public Prosecutor may ask a court to decide that a man who has accepted fatherhood of a child is not the real father of the child.

PORTUGAL

Au Portugal, le MP a un très vaste éventail d'attributions autres que le pénal, suivant une tradition bien établie en la matière. Même si le Statut du MP les énumère de façon très précise, la loi peut toujours ajouter d'autres compétences.

Parmi les très larges compétences dont dispose le ministère public on trouve, de manière générale : les pouvoirs de représentation, y compris la représentation de l'Etat - Administration devant les juridictions civiles et la représentation de mineurs, devant les juridictions de famille et mineurs; de patronage judiciaire; de défense d'intérêts collectifs et diffus, qui s'explique en raison de la promotion d'objectifs d'ordre social auxquels le MP est attaché et qui, récemment s'est vu accorder des compétences dans le domaine du patrimoine historique et culturel, de l'environnement, et des intérêts collectifs des consommateurs ; la défense l'indépendance des tribunaux, ce qui comprend non seulement le pouvoir d'interjeter des recours à l'encontre de décisions de justice, mais aussi le pouvoir, parmi d'autres, de proposer la modifications des textes légaux ; la promotion de l'exécution des décisions des tribunaux; la surveillance de la constitutionnalité des actes normatifs et la légalité des actes normatifs et administratifs ; la promotion de l'intérêt public, notamment dans des procédures

de faillite et d'insolvabilité; l'exercice de fonctions consultatives etc. Ayant en considération ces compétences, le MP intervient dans les juridictions du civil y compris les prud'homales, les juridictions de famille et de mineurs, les juridictions administratives et auprès de la Cour des Comptes et la Cour Constitutionnelle.

SLOVAKIA

The Public Prosecution Service is obliged to protect the rights and interests guaranteed by law to individuals, legal entities and the State. Thus, the Constitution does not limit the powers of the public prosecution only to the enforcement of the interests of the State, and that is why the Slovak Public Prosecution Service has not been transformed into Attorney's Office (representing the State).

Once a year, the General Prosecutor has to submit to Parliament an activity report informing about compliance with laws. The activity report contains the description of fulfillment of extra-penal responsibilities, under the form of both statistics and assessment of compliance with the law by the public administration bodies. The General Prosecutor has the right to attend the Cabinet sessions and cast an advisory vote; he has thus the opportunity to contribute to the adoption of measures in order to remove the breaches of law and of other generally binding regulations as well as to contribute to the improvement of the quality of the draft laws submitted.

The Prosecutor General has the right to file the following to the Constitutional Court: a motion to commence the proceeding that involves compliance with laws or that involves the interpretation of constitutional laws if a matter is disputable; a complaint against the unconstitutionality or illegality of parliamentary, municipal or presidential elections or against the results of the elections; a complaint for removing the Slovak Republic President from office and a complaint against the results of a referendum on removing the Slovak Republic President from office; a motion to review the decision about dissolving a political party or a political movement or about the suspension of its activities.

The General Prosecutor is entitled to file motions to the Supreme Court of the Slovak Republic with a view to obtaining the Supreme Court's comments and positions and thus to ensure the uniform interpretation of laws. In conformity with separate laws and under the conditions stated therein, the General Prosecutor is entitled – when fulfilling extra-penal responsibilities – to file with the Supreme Court extraordinary applications for appellate review against enforceable decisions of courts pronounced within the civil judicial procedure, as well as a proposal to dissolve a political party or political movement to suspend its activities temporarily.

The General Prosecutor is entitled to file with the Court a motion to deny paternity, after the expiration of the delay defined for the denial of paternity of one of the parents, if the public interest requires.

When acting in civil proceedings, the prosecutor acts within the scope of his/her powers stipulated by separate laws. In civil proceedings the prosecutor is entitled to: file a civil motion for the instigation of civil proceedings, join any stage of a pending case, represent the State before the courts of law and appeal against a decision made by the court.

The prosecutor is entitled to join any stage of pending cases of: legal capacity, declaration of death, recording in the Commercial Register, education of minors, guardianship, bankruptcy and composition.

The prosecutor also represents the State as an owner before the court in the cases defined in separate laws and he supervises the compliance with laws by public administrative agencies. The legal regulation concerning the prosecutors' overseeing the compliance with laws by public administrative agencies results from the fact that the protection of rights and interests guaranteed by law to individuals, legal persons and to the State could be limited to the

examination of legality of the public administrative agencies' decisions in the administrative judiciary, because that judiciary does not include all sorts of decision-making activities of the public administrative bodies. The prosecutor oversees and supervises the compliance with laws and other generally binding regulations by public administrative agencies; he/she is entitled to execute checks in the public administration agencies aimed at examining the compliance with laws; when the public administration bodies are taking decisions, he/she can cast an advisory vote.

SLOVENIA

According to the new Slovenian Constitution the state prosecutor is a body for the prosecution of perpetrators of criminal offences that also has "... other powers provided by law". General authorisations are regulated and the state prosecutor or the state prosecutor's office is entitled to file procedural acts and other legal remedies in civil and other court proceedings, as well as in administrative proceedings, if the law so provides. Key powers can be found relating to the extraordinary legal remedy of a request for the protection of legality. This is an extraordinary legal remedy which states that prosecutors are authorised to appeal against final decisions at the Supreme Court of the Republic of Slovenia. It is possible to file this extraordinary legal remedy against final court decisions issued in execution proceedings, in forced settlement, bankruptcy and liquidation proceedings, in non-litigious and land register proceedings, in proceedings pursuant to the Inheritance Act and in cases involving the register of companies.

The powers of the state prosecutor as a party capable of being sued in proceedings are regulated by a number of other laws, but they are rarely used in practice.

The state prosecutor is entitled to file a suit in an administrative dispute against a decision against which there is no ordinary legal remedy. The prosecutor's office is also the body authorised to file a proposal for the entry in the register of deaths of the death of a person who lost his/her life in post-war incidents and whose death has not witherto been entered in the register.

The precondition and guiding principle for the appearance of the state prosecutor in all the above-mentioned procedures is the "public interest". Although legal regulations do not explicitly define the term, in decisions on filed requests for the protection of legality, judicial practice has formulated a position that the purpose of the intervention of the state prosecutor to safeguard the legal order lies above all in securing the conditions for the coordination of court practice.

Safeguarding the direct interests of parties, decided on in a final decision and against which the legislator did not envisage the possibility of judicial protection in the third instance, is therefore of a subordinate nature. Every established deficiency asserted in the initiative in a specific final decision does not therefore constitute reasonable grounds for measures to be taken by the state prosecutor. On the other hand, the state prosecutor may also file, on the basis of an initiative from a party, a request for the protection of legality to the detriment of that party.

The state prosecutor's office interprets and uses authorisations to intervene in final and concluded civil-law proceedings that are defined restrictively by the primary autonomy of parties.

The new Administrative Procedure Act does not define the public benefit, which is a precondition for the participation of the state prosecutor in administrative proceedings: from

the substantive interpretation of other provisions, for example the definition of extremely urgent measures in an administrative property, it follows that the protected interest is the one defined by the public benefit, legal order, public security, morals, direct danger to life and human health, economic interests, etc. Only within such limits do we recognise the role of the state prosecutor in dealing with initiatives of parties for a review of the legality of final court decisions issued in civil proceedings.

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QUESTION 4. <u>Proposed new rules on Bureau membership</u>

The rules on election to the Co-ordination Bureau were agreed at the Bucharest conference in 2001. They provided for near total replacement of the Bureau every two years.

Experience has shown that replacing 5 out of 6 members of the Bureau at once creates problems since it prevents transfer of knowledge and working methods and thus interferes with stability and continuity.

The Bureau therefore suggests that the conference adopt the following rules, pending the possible adoption of definitive rules if the Bureau obtains an official status:

. the number of Bureau members will stay the same (six);
. two of the members will be ex-officio members, namely the prosecutors general of the countries organising the year's and the following year's plenary sessions; these two members to be members of the Bureau for two years so as to facilitate preparations for the plenaries;
. the other four Bureau members will be elected for four years and half of them will be replaced every two years, so as to ensure both a degree of continuity and fresh blood, both of which are essential if the Bureau is to function as it should;
. Bureau composition will continue to obey the principles of geographical representativeness and rotation of seats.

Applying these new rules would have the following effects:

- the Chair of the Bureau (France) and the prosecutors general of Slovenia and Slovakia would step down. They would be replaced respectively by the prosecutor general who has offered to organise the 2005 conference (term of office 2004-2005) and by two new prosecutors general elected for four years by the Celle conference (terms of office 2004-2008);
- the prosecutor general of Celle, Lower Saxony (as organiser of the 2004 session) would remain until the 2005 conference;
- the other two Bureau members (Italy and the Netherlands) would stay in office until the 2006 conference.

Each prosecutor general is invited send us any comments they have on these proposals.

QUESTION 4. <u>Le projet de réforme des modes de renouvellement du Bureau</u>

Les modes d'élection au *Bureau de coordination* ont été arrêtées, en 2001, lors de la session plénière de BUCAREST ; ils privilégiaient un renouvellement de la quasi-totalité des membres du *Bureau* tous les deux ans.

A l'usage, il est apparu que renouveler, d'un seul coup, 5 membres du *Bureau* sur 6 posait difficulté, comme ne permettant pas d'assurer le transfert des connaissances et des pratiques et donc la permanence et la continuité de la structure.

Par voie de conséquence, le *Bureau* propose à la *Conférence*, en attente des règles définitives qui pourraient accompagner son officialisation éventuelle, d'adopter les règles suivantes :

_ le nombre de membres du *Bureau* reste inchangé (6 membres)

_ 2 des membres restent membres de droit : il s'agit des procureurs généraux des Etats organisateurs de la session plénière de l'année et de celle de l'année suivante, qui sont membres du *Bureau* pour 2 ans afin de faciliter la préparation des plénières

_ les 4 autres membres du *Bureau* seraient élus pour 4 ans et renouvelables par moitié tous les deux ans, afin d'assurer et une certaine continuité, et une alternance, toutes deux indispensables au bon fonctionnement de cette instance.

_ la composition du *Bureau* devra continuer à respecter les principes de la répartition géographique et de la rotation.

L'application de ces nouvelles règles aurait les incidences suivantes :

■ Le président du *Bureau* (France), les procureurs généraux de SLOVÉNIE et de SLOVAQUIE quitteraient le *Bureau* ; ils seraient remplacés, d'une part, par le procureur général candidat à l'organisation de la Conférence de 2005 (mandat : 2004-2006), d'autre part, par deux nouveaux procureurs généraux élus par la Conférence de CELLE pour 4 ans (mandat : 2004-2008).

■ Le Procureur Général de Celle, BASSE-SAXE (organisateur de la session 2004) resterait jusqu'à la Conférence de 2005

■ Les deux autres membres du *Bureau* (ITALIE, PAYS-BAS) resteraient en fonction jusqu'à la Conférence de 2006.

Chaque Procureur Général est invité à faire savoir si ces propositions suscitent des observations de sa part.

REPLIES / REPONSES

ARMENIA
The proposed new rules on Bureau membership can be accepted.

ESTONIA
Estonian Prosecutors Office agrees with the proposals.

FRANCE
Les propositions formulées sont approuvées.

ITALIE
Nous partageons la proposition de reforme des modes de renouvellement du Bureau.

PORTUGAL
On est d'accord avec cette proposition.

SLOVAKIA
We have no observations on the project presented and we express approval of it.

SLOVENIA
We found the rules proposed adequate and appropriate to adopt and use them at the Celle Conference.

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5. Additional comments

5. Remarques supplémentaires

ARMENIA
We have the pleasure to suggest organizing the 6th session of the Conference of Prosecutors General of Europe in Yerevan, Armenia. We are ready to do our best and take all necessary steps for organizing such an important event at a high level.

CZECH REPUBLIC
We would want to present the main points of our draft Code on Ethics for Prosecutors:
Numerous rules are established forming part of the code for Public Prosecutors and proposing regulations for judges. The regulations will apply both to basic professional obligations and behaviour in one's personal life (where the position of the Public Prosecutor as one of the basic officials of justice must be manifested in their personal behaviour, too) or upon exercise of political rights. They also relate to issues of management of Prosecutors' personal property and entering into obligations of proprietary nature. The Public Prosecutor must not participate in any decision-making activities of other entities (except for the exercise of his/her own competences) or in any activity meaning the providing of legal services. Public Prosecutors have to pursue continuous education and constantly improve their skills. The Public Prosecutor contributes not only to the professional training and professional education of Public Prosecutors, but also of judges, probationers and other court employees. The law does not exclude the opportunity of Public Prosecutors to be engaged in training of other persons in the field of law within their public activity permitted by the law. However, the proper performance of the Public Prosecution is the priority.

The Public Prosecutor must not perform any other office of profit or perform any other gainful activity except for management of his own property and scientific, teaching, literary, publishing, artistic, translating activities and activity in consulting bodies of the Ministry, Government and Parliament chamber bodies, on condition that these activities are compatible with the requirements for the proper performance of the Public Prosecution.