



**Conference of Prosecutors General of Europe
5th Session**

**organised by the Council of Europe
in co-operation with
the Prosecutor General of Lower Saxony (Germany)**

Celle, 23 - 25 May 2004

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**« Discretionary powers of public prosecution:
opportunity or legality principle -
Advantages and disadvantages »**

**Intervention by Mr. Peter POLT
Prosecutor General of Hungary**

Dear Ladies and Gentlemen, Prosecutors General of Europe
and Dear Mr **Generalstaatsanwalt Range!**

I.

The widely-known Latin sentence "Varietas delectat" came to my mind while I was listening to the excellent presentations of my colleagues on the discretionary powers of the prosecutor in the Netherlands and in Italy.

As it was emphasised, in both legal systems - either based on the principle of opportunity or of legality - there are certain exceptions, according to those:

- prosecutor is either expressively obliged to lay an indictment before the court despite the principle of opportunity, or
- has the power not to prosecute under certain circumstances however discretionary powers are restricted by the principle of legality.

Discretionary powers of the prosecutor in Hungary are partly equivalent to and partly different from those powers which exist in the criminal procedure of the Netherlands and of Italy, so it could be stated that Hungary has found another way of executing Recommendation Number R 87 (18) of the Council of Europe on the Simplification of criminal procedure.

Hungarian legal system and of course criminal procedure law belongs to the type of continental law legal systems.

Because of this, from the very beginning all criminal procedure codes of Hungary are strictly determined by the principle of legality, however during the past 132 years, since the 1st criminal procedure code of 1871 has entered into force, some new discretionary measures of the prosecutor were gradually introduced too.

On 1st of July last year Act 19 of 1998 on the new Criminal Procedure Code entered into force which extended further the discretionary powers of the prosecutor as well.

The main purpose of the extension of discretionary powers was to reduce the work / the number of criminal cases / before the investigating authorities, prosecution offices and courts without influencing the effectiveness of criminal investigations and prosecutions.

As time limits of my presentation are strict and slightly short as well, please let me introduce the discretionary powers of the prosecutor in Hungary with the help of some Power Point slides.

These slides will give a general overview on the most important alternative measures to prosecution.

(The printed version of the slides will be distributed for all participants after the conference).

II.

First I would like to say some introductory words:

- A) on the development / changes in Hungarian criminal procedure law and then
- B) I will focus on the current powers and possible discretionary measures of the prosecutor:
- C) I am convinced that the legal expression, **the so called "material unlawfulness"** is familiar to all representatives of different Central European countries.

All of us know that the legal expression "**material unlawfulness**" has the legal effect that under some circumstances an action which is equivalent to one section of the criminal code, is not qualified a crime because of the lack of the characteristics of "material unlawfulness".

This means that the crime which has been committed is declared only slight threat to the public, and for that reason is not qualified a crime and of course the offender must not be punished.

In practice, the application of the "material unlawfulness" together with the principle of legality **gives totally the same result as the application of the principle of opportunity:**

Let me show you an example:

In those countries where the principle of opportunity is accepted and applied, it is generally recognized for non-prosecuting each offenders of crimes.

While in those other criminal procedure systems which are strictly determined by the principle of legality - after collecting all evidence and thus finishing the investigation - the prosecutor is always obliged to lay an indictment against the offender for all of his / her crimes before the court. So in principle if a crime was committed and its offender is known there is always an obligation for prosecuting him / her.

But if the principle of legality is completed / applied together / with the "material unlawfulness", it is required that an action against the law should have the characteristics of "material unlawfulness" too, otherwise the action is not qualified a crime and the offender must not be punished. So in this case, the role of the legality principle together with the legal expression "material unlawfulness" causes the non-punishment of the offender too, although is it not declared publicly.

The decision **whether an action involves the characteristics of a material offence** or not, always depends on the member of the investigating authorities/prosecution/court, so it is not an objective but **a subjective decision** and that is another point of similarity to the application of the opportunity principle.

I think emphasis must be put on **one more distinction** in connection with the consequences of the 2 principles:

On the basis of the principle of opportunity it is always recognised that a crime was committed - and within certain time limits - a possibility to make the offender responsible for his/her action later on is always provided.

But on the basis of the principle of legality, if an action (however it is against the criminal code) turns to be not "materially unlawful", then it will be always denied that the action committed is a crime.

For this reason the offender never again could be made responsible for the action committed.

III.

I think these two theoretical distinctions between the 2 principles should have been mentioned to introduce and prove that discretionary powers of prosecutors in Hungary are:

1. Either simple exceptions to the governing principle of legality, or are
2. Developments towards the application of the opportunity principle.

Let me introduce the main cases where the prosecutor has discretionary powers:

In the 1st slide I made two groups which display the characteristics and results of the following cases:

The 1st group consists of 3 important exceptions to the application of the legality principle:

- 1) reprimand by the prosecutor
- 2) postponement of laying an indictment for a time of probation
- 3) admission of guilt and application of a lighter punishment without main trial (so called: waiver of right to trial)

The common features of these measures are:

- admission of guilt and declaration of penal responsibility and
- same light punishment or preventive measures for the future.

As it is shown on the right side of the 1st slide the other group of measures are:

1. non-investigation of further minor offences
2. non-prosecution of further minor offences
3. cancelling current investigation against the co-operating accused (because he/she has valuable information/evidence for investigating other crimes of other offenders)

Applying these measures by the prosecutor has the same effect:

the accused will escape from further procedure without pleading him/her guilty, however there would have been enough evidence for laying an indictment before the court.

Why are these 3 forms pure signs of the application of the principle of opportunity?

Because there aren't any strict conditions provided by our criminal procedure code for their application: it is written only that in case of commitment of further minor crimes the prosecutor has these power (without any further restrictions!):

- during the investigation: to cancel further investigation or
- after the investigation is finished: not to lay an indictment.

From these it could be easily understood that the application of one of these measures as alternatives to laying an indictment before court has the effect of non punishment of the perpetrator.

As I have just a little time left for my lecture, I collected these 6 cases in the next slide, their effects and the guarantees when applying them as discretionary measures of the prosecutor:

Finally, in the **last slide you can see a diagram** with the last year's statistical data of the total number of different measures applied by the prosecution office in Hungary.

As I mentioned and as these data shows clearly too, this system in Hungary provides a balance between the governing principle of legality with its 6 exceptions and the reduction of the work of the authorities in such a way that until now there were only positive changes in our criminal system: most criminal procedures can be finished accurately and within a reasonable time, which is in accordance with the Recommendation N° R 87 (18) of the Council of Europe.

Thank you very much for your attention!