Conference of Prosecutors General of Europe
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« Discretionary powers of public prosecution: opportunity or legality principle - Advantages and disadvantages »

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Why this theme?

Recommendation No. R (87) 18 adopted by the Committee of Ministers of the Council of Europe on 17 September 1987 on *"the simplification of criminal justice"* called for the principle of discretionary prosecution to be introduced or applied more extensively in member states, wherever their historical or institutional background made this possible. The recommendation further specified the scope of this principle and the conditions under which it should be applied.

The recommendation suggested that member states which applied the principle of mandatory prosecution introduce or extend the use of measures which were comparable to discretionary prosecution, such as initiating proceedings only in certain specified circumstances or enabling judges to suspend or terminate proceedings subject to specific conditions.

According to the explanatory memorandum, the reasons for advocating the principle of discretionary prosecution were based on the need for states to:

- reduce the pressure on the judicial apparatus
- avoid initiating criminal proceedings in cases which did not serve the public interest
- provide an appropriate and speedy means of dealing with minor offences in the light of the circumstances in question, in the interests of both the accused and the victim
- make optimum use of available resources.

Thirteen years later, *Recommendation Rec (2000) 19 on "the role of public prosecution in the criminal justice system"* chose not to break any new ground on this question, but merely referred to the previous recommendation (cf paragraph 3 of the explanatory memorandum*)*, although it called for the definition of general principles and criteria which could be used as references for decisions in individual cases in order to guard against arbitrary decision-making (cf guiding principle 36a).

In the meantime, and in line with the 1987 Recommendation, the vast majority of states had sought to increase alternative approaches to enable the criminal justice system to deal with the rising case-load, restricting hearings to the most serious cases. Responsibility for these alternative approaches was entrusted either to the prosecution service (cf the increase in "alternatives to prosecution") or the courts.

In parallel, the differences between systems based on the "discretionary prosecution" and the "mandatory prosecution" principles became partly blurred, given that the former began ensuring that their legislation stipulated the relevant discretionary criteria and set out the corresponding guarantees in the interests of all the different parties involved.

Nonetheless – and often this has occurred as part of large-scale institutional or statutory reforms either to strengthen the autonomy of the prosecution service or to limit their powers judged to be too extensive – several countries which previously operated under the principle of discretionary prosecution have adopted a mandatory prosecution system, thereby reducing prosecutors' scope for discretion.

It is now time to look at the advantages and disadvantages of each system in the light of the 1987 recommendation and bearing in mind the common guiding principles drawn up in 2000.

The CELLE Conference will therefore need to consider the following questions:

- Given that it is impossible for criminal justice systems to be able to bring all offences reported to them to trial, what is the most appropriate and the most effective system in terms of not only speed and consistency, but also prevention of reoffending and protection of the victim?
- Is the principle of discretionary prosecution not at variance with the necessary independence of the prosecution service or is it, in contrast, one of the consequences of such independence? More specifically, given the hierarchical structure of the prosecution service and the existing links, in many cases, with the executive or the legislative powers, does the principle of discretionary prosecution entail a risk of arbitrary measures and injustice?
- Is the clear distinction between the roles of judge and public prosecutor – which according to the case law of the European Court of Human Rights is an essential guarantee for those who come into contact with the justice system – compatible with the authority given to judges to decide on an alternative to prosecution? Is there not a risk of his or her becoming both judge and party? Similarly, how can one ensure that the principle of mandatory prosecution does not result in a corresponding strengthening of the police’s discretionary powers when deciding whether or not an offence has been committed in the light of guiding principle no. 21?