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

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Prosecutors General of Europe,

Ladies and Gentlemen,

First of all I would like to express my thanks to our host, the Prosecutor-General of Celle and the Council of Europe for inviting me to speak on this prestigious occasion. It is a great honour for me to contribute to the important topic you have chosen for your conference. My paper is based on knowledge gained through my work in charge of the prosecution chapter of the European Sourcebook of Crime and Criminal Justice Statistics.1 Besides that I refer to preliminary results of a study being carried out at my chair in Göttingen. This study focuses on the function of the prosecution service in Europe and involves work with partners in England and Wales, France, the Netherlands, Poland and Sweden.2 Our research draws, amongst others, on the unpublished answers to a questionnaire on prosecution services in member states carried out by the Council of Europe in 1997 and on Recommendation R. (87) 18 and 2000 19. My thanks are due to Dr. Marianne Gras, my project co-ordinator, for her assistance in preparing this paper.

I. The Sources and Structure of the Paper

1. The European Sourcebook of Crime and Criminal Justice

At its 45th plenary session, in June 1996, the European Committee on Crime Problems commissioned the Group of specialists which had previously produced the "European Sourcebook of Crime and Criminal Justice Statistics: Draft Model" to prepare a collection of criminal justice data for the whole of Europe, presenting data for the years 1990 - 1996.3 The second edition, supported by the British Home Office, the Dutch Ministry of Justice Research and Documentation Centre (WODC) and the Swiss Department of Foreign Affairs (through the University of Lausanne) was published at the end of 2003. Work is currently in progress on the 3rd Edition which will be published in the later part of 2005.

The Sourcebook requires data to be collected by a network of national correspondents who provide data from national statistical sources. The questionnaires used to collect the figures request not only statistical data, but also require information as to legal and statistical definitions.

Despite the challenges of doing so, our expert group dedicates the second chapter of the European Sourcebook to comparing the structures of prosecution in Europe. We attempt to show the differences as well as the common features of the prosecution services of the Council of Europe member states.

2. The Project: The Function of the Prosecution Service in Criminal Justice Systems - a European Comparison

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1 The European Sourcebook of Crime and Criminal Justice Statistics 2003, WODC, The Hague. Available online under http://www.europeansourcebook.org/esb/

2 We have been very fortunate and gained financial backing from the Fritz-Thyssen Foundation in Cologne.

3 European Sourcebook of Crime and Criminal Justice Statistics - Draft Model, edited by the Council of Europe, Strasbourg, 1995

Due to our experiences working on the Sourcebook chapter, we felt that further, more detailed research was necessary. Thus our current project was born. It attempts to gain legal and factual information and data on the prosecution of crime. This, of course, involves not only the exploration of prosecution service function and power within the criminal justice system but also a deeper understanding of the role of the police and in how far a court is involved in the pre-trial stage. We are currently in the data collection process, have a closing partner meeting planned for early October of this year and hope to present our final results at an international conference in the summer of 2005.

3. Structure of this Paper

Based on the findings of these two projects, I would like to make short comments on the following issues:

- the reactions to the challenge facing criminal justice system
- decriminalisation
- diversion and discretion at police level
- discretionary powers on prosecution service level
- empirical findings about prosecution services in Europe
- closing comments related to the principles of legality and opportunity

II. Discretionary Powers of the Prosecution Service in the Framework of the Criminal Justice System

1. Reactions to the Challenge facing Criminal Justice Systems

If one looks at the numbers of offences and suspects recorded one can observe that for decades an enormous rise in crime has taken place in Western Europe. This is also true for Central and Eastern European countries for the last 15 years. In particular the so-called mass-crimes, i.e. traffic offences and thefts, have risen strongly. How does the criminal justice system react to this growth? It is obvious that the prosecution services and criminal courts cannot deal with the increased load unless the number of personnel or the working mechanisms are changed. In principle there are three possible ways of dealing with the increased number of criminal proceedings:

(1) In accordance with the principle of legality all cases are, as before, prosecuted by the prosecution service and brought to charge before a criminal court and the judge deals with all cases in an oral hearing. In this case, however, the prosecution service and court personnel will have to be considerably increased. Understandably this option, which is connected with considerable additional costs, is not the one chosen. Realistically there are only two alternatives.

(2) A decriminalisation of material law. In this case the threat of a criminal sanction is removed for less serious breaches of the law. Either minor offences, especially traffic offences, are defined as “administrative” offences and a reaction ensues by administrative proceedings and fines; this was the partial solution used, for example, in Germany and the Netherlands.

Alternatively, or in addition, minor offences in the "classical" field are decriminalised. For example a 100 Euro minimum could be introduced for thefts; only above this boundary will the theft be defined as behaviour, which has to be criminally sanctioned. Below this boundary non-criminal sanctions are made available. This option was in part chosen by the Central and Eastern European countries. In Western Europe, on the other hand, predominantly the third option was chosen:

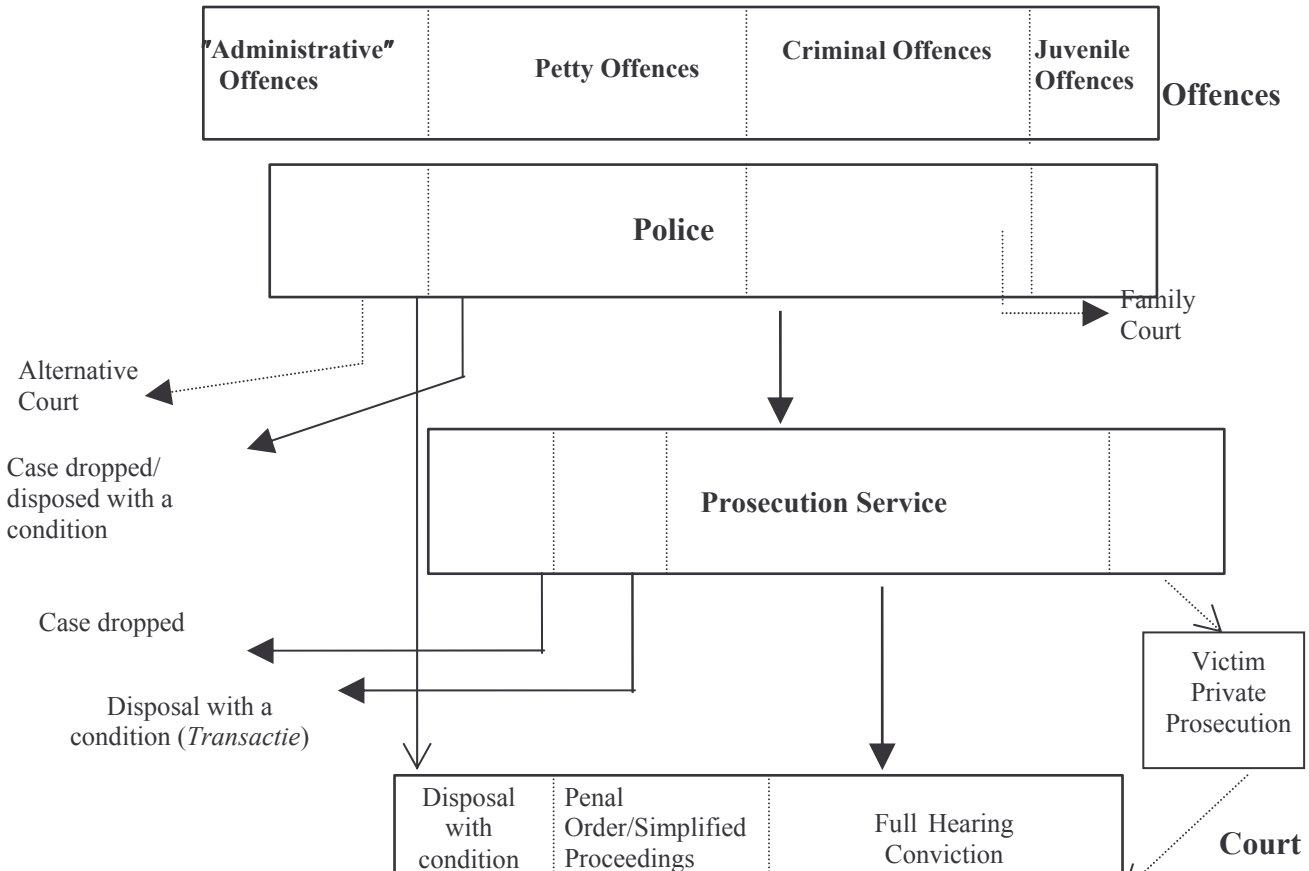
(3) Discretion used by the police or prosecution service and simplified criminal procedure rules. Today criminal proceedings can be dropped, e.g. if the suspect's guilt is of a minor nature and there is no public interest in a prosecution, without an oral hearing before a criminal court. The flood of criminal proceedings is mastered by procedural short cuts and simplifications. In this case the prosecution service often plays the central role and becomes the "judge before the judge".

Thus it is clear that prosecution services are gaining increasing importance within Europe and playing a vital role in the criminal justice systems as they are given more responsibility to decide how to deal with suspected criminals. The suggestion to create a common European prosecution agency only underlines this growing importance.

2. Criminal Justice as a coherent System

In order to understand the different national criminal justice systems and to establish a basis for comparison it is necessary not only to consider the prosecution service level, but to regard the criminal justice system as a unit and to evaluate the role and competence of the prosecution service within the system as a whole. The options available to reduce the number of cases dealt with by a court can be seen in the following model:

Model: Stages of Diversion and Discretion within the Criminal Justice System



This diagram is a fictional model made up of the various decriminalisation and depenalisation options and the possibilities of discretion at police and prosecution service level as we find them in various countries. Naturally the detail of national legal systems cannot be depicted. It is far more that the rough, ideal-type structures can be compared. The number of cases to be dealt with by the prosecution service is decisive. If a large proportion of cases is decriminalised, subject to a final decision by the police or dealt with outside of the criminal justice system, the prosecution service can concentrate on more serious offences and thus requires less discretionary powers. If - on the other hand - the police hand all offences on to the prosecution service, the criminal justice system will have to create "vents" at the prosecution level and allow considerable discretion. The Diagram differentiates between various levels.

3. Decriminalisation

Where courts are overloaded and no additional resources available, the obvious solution is to reduce the number of cases getting to the courts. But, discretion at prosecution level is not the only option available. As I mentioned previously, this can also be achieved by decriminalisation (see diagram 1 - first stage).

- Certain forms of behaviour are **decriminalised**; they are either no longer judged as necessitating a reaction by the criminal justice system at all or are defined as a special sort of offence, requiring a reaction from another system, such as an administrative authority. This often happens in relation to minor traffic offences. For example, we have the *Ordnungswidrigkeiten* (administrative offences) regulation in Germany. Similar regulations exist in many European countries.

- The same effect can, of course, also be achieved if the offences, small thefts for example, remain **technically criminal**, but are subject to **different procedural paths** and different forms of sanctions. One can count the procedures in former socialist countries to this category, which gave the so-called social courts jurisdiction over certain forms of petty offences. Today the situation requires differentiation: in part there is still the possibility to divert these kinds of cases from the criminal justice system into the jurisdiction of a special court or committee (as e.g. in the Czech Republic and Poland) and in part this system was abolished.

Another form of diversion can be seen in France. The so-called contraventions of the 1^{st} - 4^{th} class include traffic offences and very minor cases of assault and are dealt with in summary proceedings by the police and the police court. In these cases categories of punishable behaviour are diverted from the criminal justice system and its institutions as a whole or in part.

- In addition, some countries treat offences committed by **juveniles** outside of the criminal justice system. With the exception of serious crimes, the police do not hand cases over to the prosecution service, but to special (non-criminal) courts. This applies to Central and Eastern European countries in particular. In Poland the family court takes charge of the investigation and decides upon the appropriate reaction.

All of these modes of decriminalisation and diversion involve the police, but not as part of the criminal justice system. Therefore they are not usually controlled by the prosecution service in this respect.

4. Police Discretion

If the offence is defined as criminal, usually the police are strictly bound by the **principle of legality** and are required to pass all cases known to them on to the prosecution level. This is the case in almost all Central and Eastern European countries and most Western European countries. But the police may be allowed to end cases in line with the principle of legality, i.e. to drop a case regarded as evidentially insufficient etc., but not on any other grounds.

The police may additionally be allowed to end cases in line with the principle of opportunity, i.e. to make a **discretionary decision** as to whether to pass a case on or not. In England and Wales, the police can stop proceedings and attach a legal consequence to their decision not to pass on - this is called a caution which is equivalent to a conviction. This anomaly can be explained by the common law system which traditionally differed greatly from continental law in this respect. Until recently, it was the police who brought cases to court because there was no prosecution service. The Crown Prosecution Service was introduced only in the mid 1980's. It is evident that the position of the police remains strong in making decisions as to what should happen to cases, even if this happens now in co-operation with the Prosecution Service.

In the Netherlands the so-called *Transactie* system has been established. It applies to the prosecution level, but allows the police to end cases, in accordance with general guidelines of the prosecutor-generals, by imposing a condition, this being a "voluntary" fine of up to 350 Euros. Despite the prosecution service having control in a general manner, this could be seen as a sort of discretion at police level; and the police's binding to the principle of legality is loosened, at least as far as minor offences are concerned. Whether this is the right way to deal with the mass crimes is bound to be the subject of controversial discussion.

5. The Police as (part of) the Prosecution Service

The police may themselves carry out the function of a prosecuting authority for minor offences; they decide on which of these cases to investigate and which to bring before a court. In this case the police will be controlled by the Ministry of Justice. Two decades ago this was the case in the UK. Nowadays procedures of this kind exist, e.g. in Norway.

6. Discretionary Powers on Prosecution Service Level

The prosecution service's workload depends on the input from the police level. How a prosecution service can deal with the cases falling into its mandate is a subject of great variation within Europe.

In the European Sourcebook some simple categories for disposals by the prosecution service were developed and they are helpful in providing an overview of the prosecution service's potential to counter the problems facing criminal justice systems.

Three basic structures are possible:

a) Strict Principle of Legality

There are countries (e.g. Czech Republic, Croatia) in which the prosecuting authority has neither the discretion to drop a case nor the ability to impose conditions / sanctions upon an offender; in accordance with a strict principle of legality the prosecuting authority merely has the function of preparing a case for court. Here the input is identical to the output; all cases have to be brought before a court (- except evidentially insufficient cases etc. which can, of course, be dropped in accordance with the principle of legality).

b) Decision to Drop

In some European countries (e.g. Belgium) the prosecuting authority does not only drop cases in accordance with the principle of legality but additionally has discretion whether or not to prosecute (i.e. to drop a case completely if there is no public interest in prosecution). This decision cannot be combined with any form of condition or sanction. The court alone has an ability to punish or impose a condition or legal consequence. On the prosecutorial level it is only possible to end cases in one of two ways: a case can be dropped - meaning nothing more happens and no consequences ensue for the suspect - or it has to be brought before a court.

c) Conditional Disposal

In some countries the prosecuting authority has not only a discretion whether to prosecute or not, but also the ability to conditionally drop the case, i.e. to bind or sanction the suspected offender, e.g. to pay a sort of fine as in Germany and the Netherlands. This is only possible if s/he agrees to the measure (otherwise the case will go to court). As the condition is "voluntarily" fulfilled, this sort of "sanction" is not seen as a conviction.

There is of course great variation in the degree of independence granted to a prosecuting authority in exercising such discretion. Sometimes the prosecution service is allowed to make a decision of this kind independently, i.e. on its own authority. In other cases a final check or formal consent by the courts may be required. Whether this kind of control by the court is in fact exercised effectively will depend on everyday practice. Particularly where courts are overloaded, one can easily imagine judges making decisions under time pressure and thus tending to rely strongly on prosecution service suggestions.

There are of course boundaries to this discretion. Thus in Germany a conditional disposal is only possible in proceedings in which the minimum punishment is less than a year's imprisonment. The *Transactie* in the Netherlands can only be used for offences punishable with up to 6 years' imprisonment. This of course means that in Germany and most certainly in the Netherlands most mass crimes are subject to prosecutorial discretion. The considerable flexibility is reduced legislatively by unspecific legal concepts such as the defendant's guilt being of a minor nature or a lack of public interest in the prosecution. In practice, however, guidelines issued either by the Ministry of Justice or Prosecutor-General are of great importance in limiting discretion and

defining which cases may be disposed of regularly. Thus if one wishes to compare two countries one must look not only at legislation, but additionally analyse the guidelines issued.

To sum up, discretionary power on prosecution service level provides an alternative: on the one hand there are formal charges, on the other, proceedings can end on the prosecution level, with or without a condition.

d) Other Forms of Diversion

In some countries further options are available: For example, there is what is called private prosecution in Germany. If the prosecution service decides there is no public interest in a prosecution, certain types of cases can be ended leaving the victim the choice whether to pursue the prosecution personally. This demonstrates that alongside the state and the accused there is also a "third" party which should be considered. How the victim's interests can be taken into consideration varies greatly from one criminal justice system to another. It is a point which cannot be addressed here.

7. Prosecution Service Influence on Court Level

If our only concern were prosecution services' discretionary powers, we could stop here. However, if we observe the interdependencies within criminal justice systems, we must also consider the court level. This is because there are procedural forms which formally lead to a sanction prescribed by a court but which are pre-formed strongly by the prosecution service. In many ways they can be regarded as a functional equivalent of a conditional prosecution disposal.

The German *Strafbefehl* and French *ordonnance/composition pénale* are good examples. Here the prosecution service does all the preparatory work and requests a certain sanction (usually a fine). The prosecution service files for court approval in summary, i.e. written proceedings. The court can only entirely reject the application and this happens very rarely. Functionally this can be understood as a prosecution service decision which is checked and approved by the court. But unlike a conditional disposal it is formally a conviction.

In other countries there may be similar proceedings which end in a formal court sentence, but are in fact determined by the prosecution service. Simplifications such as not having an oral hearing of the accused and other witnesses will mean that the information provided by the prosecution service is decisive.4

In how far a prosecution service influence plays a role in conditional disposals/dismissals made by a court is another factor worth considering. In many cases this formal court decision may simply be "rubber stamping" a prosecution proposal. Many systems require prosecution agreement to such disposals as a minimum so that one can often reckon with significant prosecution service influence on how a significant proportion of cases are ended in court.

4 A similar effect can be achieved without special procedural forms in systems in which a guilty plea changes the content of a trial such as in England and Wales. Again the prosecution service can exert a considerable influence upon the information a court gets about a case in this way.

III. Empirical Findings

1. Data from the European Sourcebook

As I mentioned in the beginning, the European Sourcebook of Crime and Criminal Justice Statistics work included collecting data concerning the prosecution service level. But this proved to be very difficult. On the one hand, the structures are very complex and vary greatly from country to country. For this reason it was necessary to reduce the data collected to a few, simple criteria. On the other hand, the statistics available about the prosecution service are very poor in many countries. For this reason, I will report only on two aspects: (1) **The Prosecution Service Workload;** which can be quantified by the output, i.e. how many cases/proceedings are dealt with in a year. The most recent edition of the Sourcebook contained data for 1995 to 2000. In order to enable a comparison of the different countries a rate of all cases disposed of per 100.000 of the relevant population is calculated. The following can be drawn from it: the workload varies from country to country. The caseload development also differs greatly:

In many (western) countries the rates of all cases disposed of by the prosecuting authorities appear to be stable on a high level (i.e. increase or decrease in case numbers of less than 10%), in other countries there is a remarkable increase of between 10% and 50% (Armenia, Latvia, Lithuania, Moldova, Norway, Poland, Romania, Slovenia) and in some Central and Eastern European countries there is a high increase of more than 50% (Estonia, Slovakia).

So far we dealt with disposals at prosecution level as a whole. We need also to bear in mind the various forms of disposals. In order to reduce complexity, we should merely consider whether the case is brought before a court, i.e. if the disposal could lead to a formal conviction by the court or if the disposal means a formal conviction does not ensue.

The question is: What percentage of cases does the prosecution service bring before a court. My assumption is: The higher the prosecution service's workload, the more cases will be disposed of without court involvement, and less cases will therefore be brought to court. The table indicates that a relationship of this kind exists:

Percentage of cases brought before a court by rate of all cases disposed of

		Cases brought before a court per 100,000 population in 1999		
		low: below 33 % of total cases disposed of	**middle: from 33 % to under 66 % of total cases disposed of**	**high: 66 % and above of total cases disposed of**
Cases disposed of per 100,000 population in 1999	**low 33 %: below 1200**	**Slovenia**	**Albania* Croatia Slovakia**	**Armenia Czech Republic* Hungary* Latvia Lithuania**
	middle 33 %: from 1200 to under 2800	**France Moldova Romania* Poland**	**Netherlands**	**Finland (1998)** England & Wales
	high 33 %: 2800 and above	**Estonia* Germany Portugal* Switzerland**	**Austria Scotland**	

*** Cases disposed of include proceedings against unknown offenders.**
Source: The European Sourcebook of Crime and Criminal Justice Statistics 2003, p. 91

The table shows the rate of all cases disposed of and the percentage of cases brought before court in 1999. Several countries were excluded, as they could not provide this information. It illustrates the relationship between the two factors (the trend runs from the top right to the bottom left). More specifically, where a prosecution authority has to deal with a relatively low number of cases, the percentage of cases brought before a court will be high (e.g. in Hungary), while, where the total of cases disposed of is high, the percentage of cases brought before a court tends to be low (e.g. in Germany).

2. Specific Example: Prosecution Service Disposals in Germany5

The Public Prosecution Service in Germany is in many ways an interesting example, particularly because the growing importance of the prosecution stage can be recognised very easily when one considers that 40 years ago Germany was renowned as a country following the principle of mandatory prosecution, i.e. strict accordance with the principle of legality.

After cases have been processed by the police who are, at least in theory, bound strictly by the principle of legality, they are passed on to the Public Prosecution Office. The Public Prosecution Office is also informed directly about certain cases, e.g. because they are reported to it or it learns of them itself.

As it is "in charge" of the investigation proceedings, the Public Prosecution Office takes further steps to clear up the case and identify a suspect. The intention is to ascertain whether there is sufficient evidence against the accused for main proceedings to be opened, i.e. a level of suspicion which makes a subsequent conviction likely.

If the investigations provide sufficient indications to assume that a criminal act has occurred and a suspect can be named, the Public Prosecution Office will principally bring a charge against the accused before the relevant court.

If it is a simple case which can be dealt with quickly, the Public Prosecution Office can apply to the criminal judge or the *Schöffengericht* for "accelerated proceedings". In such cases, a formal charge will usually not be filed.

Otherwise in simple cases, the Public Prosecution Office can apply for a penal order without previous trial. This simplified procedure, with no oral proceedings, makes it possible to deal with uncomplicated cases quickly. However, this approach cannot be applied to "*Verbrechen*" (offences with a minimum punishment of a one year prison sentence). Also, there are limits to the level of sanction that can be imposed in such proceedings: at most, this can be either a fine or a suspended custodial sentence of up to one year.

Penal orders and accelerated proceedings are not permitted in cases involving juveniles. Instead, the Public Prosecution Office can apply for "simplified proceedings, as long as no period of custody in a young offender institution or measures to reform the offender or protect the public are likely.

If no suspect is found, if the act is not criminal or if there are other procedural impediments, e.g. if the case falls under the statute of limitations, the Public Prosecution Office will discontinue the proceedings in accordance with Section 170, paragraph 2 of the Code of Criminal Procedure. This is a drop in accordance to the principle of legality. The law requires the case to be ended. It is not a matter of prosecutorial discretion.

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5 See Jörg-Martin Jehle, Criminal Justice in Germany 2003, http://www.jura.uni-goettingen.de/privat/j-m.jehle/CriminalJustice.pdf

Discretion in line with the principle of opportunity involves another form of disposal. Proceedings can namely also be terminated if the offender's guilt is of a minor nature and there is no public interest in prosecution. This termination can involve the imposition of certain conditions, such as financial redress for the injury caused by the act, the payment of a fine, the undertaking of community service, or, as of the year 2000, offender-victim mediation. Furthermore, the Public Prosecution Office can refrain from prosecution if the crimes involved are insignificant additional offences compared with the main crime with which the accused is charged.

In the case of certain crimes (trespass, minor bodily injury, criminal damage, etc.), the Public Prosecution Office can advise that a private prosecution be pursued if there is no public interest in prosecution; the injured party must then bring a charge himself. This is not possible in cases involving juveniles.

In 2001 the Public Prosecution Office at the regional courts and the local courts dealt with 4 555 675 and at the higher regional courts with 2 081 investigative proceedings. In view of their relative rarity, the latter will not be taken into consideration during further discussion of this subject. The table shows the way the case was dealt with in terms of the number of persons.

Table 5: Number of persons investigated* and the way the cases were dealt with - Whole of Germany - **

Case dealt with by:	Number of persons	Percentage
Total	5 412 125	100.0
Public charge(s)	663 714	12.3
Application for a penal order	603 957	11.2
Conditional termination	271 663	5.0
Other disposals	3 872 791	71.6

* Only cases dealt with by the Public Prosecution Office at the regional courts and local courts; excluding those (few) dealt with by the Public Prosecution Offices at the higher regional courts.
** for Schleswig-Holstein 1997 figures only
Source: 2001 Statistics of the Public Prosecution Offices, published by the Federal Statistical Office, Wiesbaden, table 2.4.

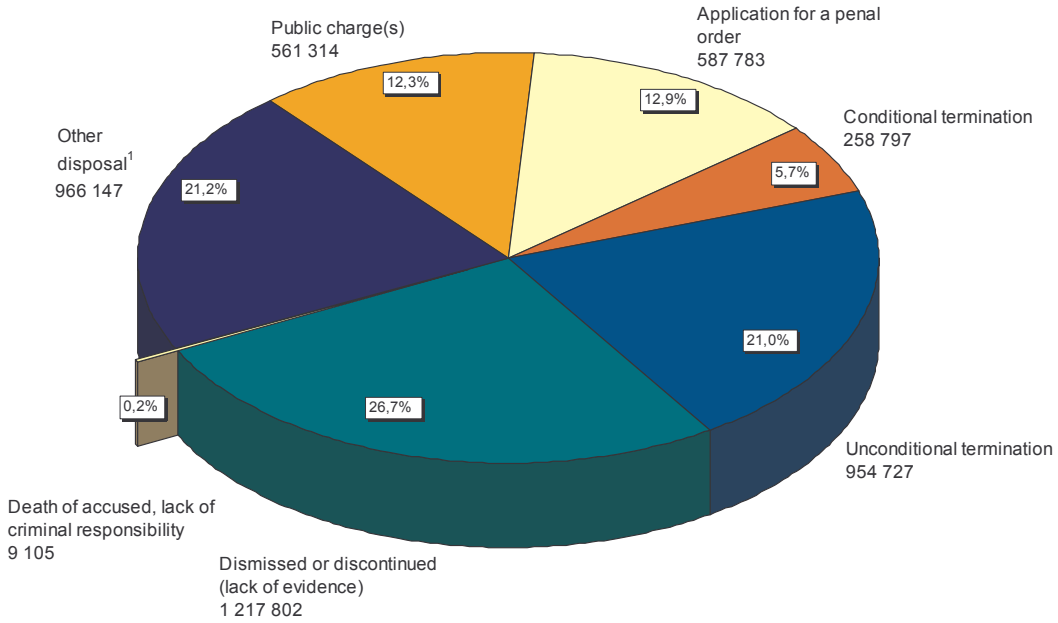
It is noticeable that less than one-third of accused persons face charges, applications for penal orders or a conditional discharge; the proceedings against all the other persons are dealt with in a different way. The only statistics available relating to these other decisions for the whole of Germany, however, refer to the number of proceedings, and not of individuals.

This diagram shows that 12 % of the proceedings dealt with by the Public Prosecution Office resulted in a charge being brought, 13 % in an application for a penal order, and 6 % in a conditional discharge. 21 % of proceedings result in unconditional terminations; these are mainly petty offences committed by adults (Section 153 of the Code of Criminal Procedure) or by young persons (Section 45, paragraph 1 of the Act on Juvenile Courts including Section 45 paragraph 2) and insignificant additional offences (Section 154, paragraph 1 of the Code of Criminal Procedure). Roughly one-quarter of the proceedings end in dismissal or discontinuation in accordance with Section 170, paragraph 2 of the Code of Criminal Procedure, particularly due to

lack of evidence about the crime or the suspect or because of an impediment to the proceedings (e.g. statute of limitations), or the conditions for continuing the proceedings are lacking. The "other" ways of dealing with the case, affecting just over one-fifth of all cases, generally involve passing the proceedings on to another Public Prosecution Office or - in the case of regulatory offences - to the regulatory authority, or the recommendation that a private prosecution be brought.

Cases dealt with by the Public Prosecution Office*
- Whole of Germany –

Total number of cases: 4 555 675



* The number of proceedings, not persons, dealt with by the Public Prosecution Office at the Regional Courts and the Local Courts are counted.

[1] Including proceedings passed on to other Public Prosecution Offices (n=191 355), to an administrative authority (regarding regulatory offences; (n=216 781), in connection with another matter (n=206 066), provisional termination (n=117 258), recommendation that private proceedings be brought (n=152 630), application for securing proceedings (n=485), applications for simplified juvenile proceedings (n=20 237), applications for summary decisions (n=35 573). Source: 2001 Statistics of the Public Prosecution Offices, published by the Federal Statistical Office, Wiesbaden, table 2.2.

IV. Closing Comments related to the Principles of Legality and Opportunity

My closing comments try to summarise the findings described above. I would, however, like to go a little beyond a pure analysis and to make my point of view clear as to the prosecution service's function with regard to the principles of legality and opportunity. I take into account the considerations contained in Recommendation No R. (87) 18 of the Council of Europe on the simplification of criminal justice and its explanatory memorandum.

1) **There is almost no country in Europe which follows the principle of legality without exception.**

Almost nowhere are all criminal offenders prosecuted in order to be convicted by a court. Mostly one finds either diversion from the criminal justice system or discretion at police and/or prosecution service level.

2) **Specific forms of deviation from the principles of legality have to be considered in the framework of national legal culture and of the criminal justice system as a whole.**

An isolated comparison of the specific prosecution service discretionary powers in any two countries is deceptive because it ignores the varying impact of the powers and any possible functional equivalents.

3) **Where possible, material decriminalisation should be preferred to procedural diversion.**

One should avoid drawing minor cases into the criminal justice system if one does not want a criminal justice response to them. The path chosen by several countries in using administrative offences and fines should be used increasingly. This would simultaneously be an important step in limiting the range of discretion in line with the principle of opportunity.

4) **The police have to be bound by the principle of legality.**

Otherwise there is a higher liability to corruption and influence by politicians and citizens. If diversion at police level is considered necessary for a functioning criminal justice system, then this must at least be restricted to very minor cases and subjected to final control by the prosecution service.

5) **On prosecution level a certain, but limited range of discretionary power is necessary.**

Where there is no public interest in prosecuting a petty offence, the "pettiness" should correspond to clear criteria. This cannot be achieved by decriminalisation exclusively, for it is difficult to define a fixed legal boundary for many criminal offences, such as theft or assault, above which criminal liability should ensue and below which a criminal consequence is not necessary. Therefore a certain amount of flexibility in the form of the principle of opportunity is required. However, discretionary decisions by the prosecution service should concern only less serious offences. They should be given a clear profile by general rules, preferably legal provisions, and be subject to examination by the court. Crimes above a medium level of seriousness must be subject to mandatory prosecution.

6) **Disposals by the prosecution service, even if connected to conditions (fines), cannot be equivalent to a conviction.**

The imposition of conditions must not be coercive for the suspect; s/he must be free to fulfil the condition voluntarily. In any case these decisions should be subject to judicial examination/agreement.

7) **Legality and opportunity are not alternatives, but two principles which limit or rather complement each other.**

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