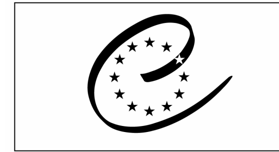

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http://www.coe.int/prosecutors/

CONFERENCE OF PROSECUTORS GENERAL OF EUROPE
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PROSECUTORS' COMPETENCIES OUTSIDE THE CRIMINAL FIELD IN THE MEMBER STATES OF THE COUNCIL OF EUROPE

REFLECTION DOCUMENT
by Mr. András Zs. VARGA, Deputy Prosecutor General of Hungary

I. Introduction

On 6 October 2000, the Committee of Ministers of the Council of Europe adopted Recommendation Rec (2000)19 on the Role of Public Prosecution in the Criminal Justice System. This Recommendation specifies the situation of the public prosecutors and public prosecution services in the criminal justice system and their basic principles of operation, but it does not deal with the role of the prosecutors beyond the criminal justice system.

As in several European countries public prosecution services' tasks outside the criminal field are of fundamental importance, the 4th Session of the Conference of the Prosecutors General of Europe (hereinafter: CPGE) organised in Bratislava from 1 to 3 June 2003 proposed "prosecutors' competencies in non-criminal matters" as one of the themes to be discussed at the following conference.[1] Thus, the 5th Session of the Conference of Prosecutors General of Europe organised in Celle (Lower Saxony, Germany) from 23-25 May 2004 conducted a first examination of this topic.

In his Introductory Memorandum Mr. Marc Robert, Prosecutor General of Auvergne, Court of Appeal, Riom (France), former Chairman of the Co-ordinating Bureau of CPGE, set out the most important questions on prosecutors' powers in non-criminal matters:

- On what grounds is the prosecution service, a public authority, entitled to intervene and interfere in relationships falling under private law?
- Is the supervision of the administration carried out by the prosecution service in conformity with the principle of separation of powers and non-interference with the competence of the executive power?
- How do prosecution services act in such matters?[2]

In his Introductory Report for the Celle session of the CPGE, Mr. Silvij Sinkovec, Supreme State Prosecutor of Slovenia, examined the basic characteristics, significance and scope of these functions and the role of public prosecutors' offices in the light of the general orientations of the Council of Europe. Although the report by Mr Sinkovec took into account Rec. 1604(2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, adopted by the Parliamentary Assembly of the Council of Europe[3], it based its considerations more on the explanatory memorandum of the Recommendation Rec (2000) 19, which explained the exclusiveness of the role of public prosecution in the criminal justice system, but emphasised that public prosecutors could have important roles in individual countries in other legal areas as well, for example in commercial or civil law

> ("… although public prosecutors may also in some countries be assigned other important tasks in fields of commercial law…").

The Report concluded that "*Any discussion on the role and powers of public prosecution outside criminal prosecution can not simply be a discussion on prosecution as a body which is perhaps no longer suitable for the implementation of those numerous and various powers entrusted to it in the history of the development of the institution. As a public body that ensures the implementation of laws in the name of society and in the public interest, it enables the direct operation of the judicial branch power through the exercise of these powers where the principle of the individual protection of rights and of direct access by an individual to the court does not ensure this – no different to the protection of society from criminal offences. We are therefore discussing the operation of a state governed by the rule of law whose guarantor must also be public prosecution. Given this, it is not a question of which powers he or she has but, rather, of how he or she exercises and realises them. Here only those acts*

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[1] Conference of Prosecutors General Of Europe, 4th session, organised by the Council of Europe in co-operation with the Prosecutor General of the Slovak Republic, Bratislava, 1-3 June 2003,CONCLUSIONS, see:http://www.coe.int/prosecutors

[2] Introductory Memorandum to the topic on:" Prosecutors' duties outside the criminal sector „by Mr Marc ROBERT, Prosecutor General of Auvergne, Court of Appeal, Riom (France), Chairman of the Co-ordinating Bureau, see:http//www.coe.int/ prosecutors

[3] The Recommendation stated that the differing obligations of state prosecutors that do not belong to the area of criminal law are among certain particular features in the national regulations of member states that arouse concern with regard to their compatibility with the basic principles of the Council of Europe; enforcement of the principle of separation of powers, prevention of a conflict of interest and, in particular, prevention of the obstruction of the individual from independently exercising his/her right to the protection of his/her rights, it was recommended that member states restrict prosecutorial powers and responsibilities to the prosecution of criminal offences and to a general role as defender of the public interest in the criminal justice system, and that they establish separate and appropriately placed and efficient bodies for the implementation of all other functions.

count that defend and ensure the rule of law and, in a system of the separation of powers, protect human rights to every extent and in each of their particular characteristics."[4]

After this first examination of the topic, the Conclusions of the 5th CPGE (Celle) formulated that "*Given the importance of this issue for the public and the lack of any international guiding principle, it decided to pursue its consideration of the matter and instructed its Bureau to submit a reflection document at its next plenary session. In any case, the criminal sphere could only be justified on account of its general task to act 'on behalf of and in the public interest, [to] ensure the application of the law" as it is reflected in the Recommendation (2000) 19, and that such functions could not call into question the principle of the separation of powers of the legislature, the executive and the judiciary, or the fact that it was ultimately for the competent trial courts, and them alone, to settle disputes, after hearing both parties*." [5]

II. The questionnaire

Following the 5th session of CPGE in Celle, the Coordinating Bureau of CPGE - in preparation of CPGE in Budapest 2005 - decided, to prepare a questionnaire for prosecutors general of the Member States. The questionnaire consists of seven questions:

1. *Does the prosecution service of your country have any competencies outside the criminal field?*
2. a. *If so, what are these competencies (with regard to, for example, administrative, civil, social and commercial law and / or the functioning and management of the courts)?*
   b. *Please indicate the background explaining their existence.*
   c. *Please indicate the role played by the public prosecutor in exercising these competencies: advisory role - ex officio or upon request -, supervisory role or decision-making role.*
   d. *Where public prosecutors have decision-making powers, can their decisions be challenged by any legal remedy? Please indicate the legal remedies provided for.*
3. *Please give an indication (statistics, if available) of the effective use of these competencies and the workload they entail for the prosecution service as a whole.*
4. *Does your country envisage any reform in the above-mentioned competencies of the public prosecutor?*

Although it is possible to make a comparative analysis of the answers received to the questionnaire, it has not been possible to make a more thorough analysis as several member states have not replied and unfortunately the missing answers could not be replaced by information received from other sources (e.g. from the information on websites of the prosecution services of Member States, or the Directory of Prosecution Services[6] or other additional documents).

III. Answers to the questionnaire

A) General overview on prosecutors' competencies outside the criminal field

On the basis of answers to the questionnaire, Member States of the Council of Europe can be divided into two groups. The first group consists of those Member States in which prosecutors do not have any tasks outside the criminal field, or even if they have, their tasks are not considered important. This is the situation in the following countries (listed in alphabetical order): *Denmark, Finland, Georgia, Germany, Iceland, Italy, Norway, Sweden, and Switzerland* and in the judicial system of *Northern Ireland.*

Nevertheless, it must be noted that *Denmark* mentioned one task which belongs to the non-criminal sector:

> "…due to the double function of the chief constable (…) he and his legal staff play a role in a few cases outside the criminal field e.g. cases concerning compulsory

[4] Powers of public prosecutors outside the criminal field – introductory report, Conference of Prosecutors General of Europe, CPGE (2004), Celle, Germany, 23-25 May 2004, see: http://www.coe.int/prosecutors

[5] Conference of Prosecutors General of Europe, 4th session, organised by the Council of Europe in co-operation with the Prosecutor General of Lower Saxony (Germany), Celle, 23-25 May 2004, CONCLUSIONS

[6] Directory of Prosecution Services, International Association of Prosecutors –Kluwer Law International, The Hague, 1999

> detention in a mental hospital…the regional prosecutors also consider and decide on questions concerning the conduct of police officers when on duty".

Less important tasks of the prosecutor were mentioned by *Finland*, too:

> "Such matters include declaring a person legally dead, acting as notary public in property transactions and using the right to speak on behalf of the State regarding compensation payable to a person wrongfully detained unless specific counsel has been appointed. A prosecutor may also apply for a restraining order".

Germany made a similar remark:

> "…participation of the prosecution service in proceedings to declare a marriage null and void was cancelled…However, General State Prosecutors are appointed to investigate and charge severe violation of professional conduct by lawyers and tax consultants at special avocation courts. Furthermore they are appointed to act for the State when actions for damages are brought to civil law courts."

Further information shows that prosecutors are not empowered to take any measures in the non-criminal field in: *Austria, Estonia, England and Wales*.

Moldova mentioned also one task of the prosecutor outside the criminal field when initiating a civil law procedure against the accused/the defendant or any other person who is materially responsible for the action of the accused/the defendant or for the damaged interests of the victim. In spite of this fact, *Moldova* can be placed in the first group of states, as the mentioned competence is clearly connected with the role of the prosecutor in the criminal jurisdiction.

Scotland mentioned similar tasks as well. As it is shown in the website of Director of Public Prosecutions, prosecutors in *Ireland* have competencies in connection with the matters of election and referendum.

In all the other Member States - which gave its reply to the questionnaire – prosecutors have tasks of high importance in the extra-penal area, which will be examined hereafter.

B) <u>Nature of prosecutors' tasks outside the criminal field</u>

If we look at tasks outside the criminal field in the Member States, it can be seen that tasks of the prosecutor could basically be classified in two main groups. Civil law tasks - including commercial and labour law competencies as well - belong to the first group, while the second group consists of administrative law tasks. On the basis of the answers to the questionnaire the main tasks are the following:

In the area of civil law the most important tasks of prosecutors are in connection with the validation and nullification of marriages, and several other procedures on family status.

Another type of prosecutors' tasks are related to decisions of civil law courts: Prosecutors usually can take the following measures: to lodge appeals and motions for new trial, initiate judicial procedures including actions before the supreme court (or supreme court of cassation) for the nullification of court decisions.

Furthermore, in several countries prosecutors are empowered not only to participate in on-going procedures before courts, but also to start new judicial procedures on their own initiative, such as bringing actions for the nullification of court decisions.

Mention must be made of the different competencies of prosecutors which exist in a number of countries and are related to the protection of the rights of juveniles and persons incapable of managing their own rights.

The civil law tasks of the prosecutor involve commercial law related tasks as well, such as competencies linked with registration of business associations, declaration of bankruptcy and of termination of legal persons. Similar tasks can be seen in the field of registration and declaration of

termination of associations and foundations. Some other tasks and measures of the prosecutor can be found in connection with labour law cases.

The other main group of prosecutorial tasks outside the criminal field includes different measures of the prosecutor which serve as a special control on the legality of the administration's operation from a constitutional point of view. A number of possible measures could be taken by the prosecutor in connection with this area: in some countries the supervision of decisions of several administrative authorities, appeals, and other forms of legal remedy could be used by prosecutors. Moreover important powers are provided to prosecutors, such as the supervision of constitutional requirements of domestic law and of course the power to initiate constitutional court procedures. In other countries there are prosecutorial competencies connected to disciplinary measures against the members of administrative authorities, judges, prosecutors, police officers and other persons working in public service.

Finally, participation of the prosecutor general with an advisory/consultative role is ensured in the work of the government and of the legislative power in most of the member states.

In those countries where prosecutors' work covers not only over the criminal jurisdiction, but also civil law jurisdiction, different court procedures on family status (typically an action for declaring a marriage void) can be started. In these cases prosecutors have competence as well to bring an action for declaring the nullification of the marriage, for the termination of adoption and for bringing an action for/against paternity. These tasks are fulfilled by prosecutors even in those countries where their extra-penal activities are more limited *(France, Liechtenstein, Spain)*. As historically the aforementioned tasks are the oldest ones outside the criminal sector, it may be supposed that even in countries which have not replied to the questionnaire these measures linked to family status could be taken by the prosecutor too.

As regards civil law, fewer measures of the prosecutor are provided for than we have seen in the administrative area.

In civil law cases before courts, for example the appointed prosecutors may intervene into the on-going procedures by appeals, other types of legal remedy, and requests for the reopening of the case in *Belgium, France, Hungary, Latvia, Lithuania, Monaco, Montenegro (Serbia and Montenegro), Poland and Portugal.* With regard to the prosecutors' power to start a procedure on their own initiative, it must be mentioned that far less measures may be taken by them *(Belgium, Croatia, Czech Republic, Hungary, Liechtenstein, Lithuania, Monaco, Montenegro (Serbia and Montenegro), Poland, Portugal, Slovakia and The former Yugoslav Republic of Macedonia)*. Of course, these two powers - intervening into a procedure and initiating a new procedure - are linked together, since in cases where the prosecutor may initiate a procedure, later she/he may also appeal at a later stage.

There are various tasks where the prosecutorial competence in proceedings is not generally granted within the field of civil law, but where certain (particular) procedures may be subject to their review. In this way one notes that in several countries prosecutors are entitled to take part in procedures of commercial law related to the registration of companies and other legal persons and furthermore in procedures relating to their solvency, bankruptcy and liquidation *(Belgium, Czech Republic, France, Hungary, Ireland, Monaco, Netherlands, Poland, Portugal, Montenegro (Serbia and Montenegro), Spain, The former Yugoslav Republic of Macedonia)*. Similarly, where prosecutors have tasks in connection with legal disputes relating to labour law, their possibilities for intervention are limited to collective labour disputes, particularly in cases of strikes or other extraordinary situations *(Belgium, Czech Republic, Hungary, Latvia, Portugal, Spain)*.

Relating to general civil law procedures the prosecutors of certain member states are given procedural competence because of the special situation of the parties in the procedure.

They can intervene in cases relating to the activities of juveniles or of persons in disadvantaged situations, such as persons living in an unidentified location or incapable or with restricted capacity to defend their own rights *(Belgium, Czech, Hungary, Latvia, Lithuania, Netherlands, Portugal, Monaco, Montenegro (Serbia and Montenegro), Slovakia, Spain)*.

Unlike civil court procedures that are essentially based on similar principles and organisational systems in the member states, it is more difficult to separate homogenous groups in the case of prosecutorial tasks relating to administrative and public law. In the different member states centralised state bodies or local administration bodies operate in different ways and within specific organisational systems and procedural rules, consequently the prosecutorial tasks are differentiated accordingly.

There are countries where the prosecutor is empowered to apply instruments of appeal (legal remedy) in connection with the decisions of administrative courts *(Croatia, Latvia and Poland)*. In other countries these competencies are given to the prosecutor during judicial and administrative procedures *(Armenia, Czech, France, Hungary, Slovakia)*. There are cases, of course, where the prosecutorial measures can be applied either against the decisions of administrative authorities or in the court procedures (Bulgaria, Montenegro (Serbia and Montenegro)).

The applicable instruments may change according to the different types of bodies against whom they are applied. In this way the classical measures, such as objection, action for annulment, and appeal can be applied against court decisions too. Other instruments can be used against the executive authorities such as caution, warning and protest. Protest is a special tool and the prosecution of some member states explained it as a prosecutors' tool which can be used before the decision is made by the administrative body *(Armenia, Hungary, Portugal and Slovakia)*. Some prosecution services in member states have been provided with wider competencies, so they can also examine the legality of the operation of the administrative authorities during and after the procedures *(Armenia, Bulgaria, Hungary, Portugal, Slovakia, The former Yugoslav Republic of Macedonia, Ukraine)*; in some countries where these competencies are not provided for the prosecutors are only involved in cases where the human rights of persons are concerned *(Spain)*.

The possibility for the prosecutor to play a role relating to public and constitutional law can be put into none of the two fields of law mentioned above, but it is closer to administrative law. The prosecutors of certain member states are explicitly entitled to supervise the constitutionality and coherence of acts, in particular the conformity of legal norms with the Constitution. This competence may be exercised in two ways: one of them is when the Prosecutor General or a prosecutor working in the office of the Prosecutor General can take part in the preliminary process of legislation *(in Bulgaria, Hungary, Ireland, Slovakia, Spain, Ukraine)*, in these countries they are entitled to give their opinion relating to the draft of the law. In other countries the representative of the prosecution – characteristically the Prosecutor General or the Deputy Prosecutor General – can take part in either both the session of the Cabinet and the Parliament or only in the session of the Parliament. The other tool of guaranteeing the constitutionality is the possibility to address a proposal to the Constitutional Court. This competence can be provided to all prosecutors or only to the head of the prosecution service *(in Bulgaria, Hungary, Portugal and Spain)*.

Other competencies in the field of public law are provided to prosecutors of certain member states who have the possibility to give their opinion or to make proposals in connection with the procedures relating to citizenship *(Bulgaria, Latvia)*.

C) <u>The background and legal ground of the prosecutorial activities outside the criminal field</u>

The legal grounds for prosecutorial activities outside the criminal field can be examined from two points of view:

- according to a *formal criterion* of the legal sources that regulate these competencies, or
- according to the *substantive legal bases* of the prosecutors' intervention into cases of civil and administrative law.

Where the formal legal basis is the ground for prosecutorial activities the member states concerned can be divided into several groups. According to the answers given to the questionnaire this competence can be guaranteed by Constitution, the highest ranked legal source *(Armenia, Bulgaria, Croatia, Hungary, Lithuania, Montenegro (Serbia and Montenegro), Slovakia, Spain, Turkey, Ukraine)*. Obviously, this solution characterises those countries where the prosecution is an independent institution.

In other countries not the Constitution but the Act on Public Prosecution Service provides these competencies *(Belgium, Czech, Netherlands, Poland, and Portugal)*. The countries whose Constitution refers to regulation of these competencies, can obviously be added to this category since the detailed rules can not be found directly in the Constitution.

Lastly there are countries where not the Act on Public Prosecution Service but the Civil Procedure Code or in other countries the law relating to administrative procedures contains these rules *(Belgium, Ireland, Liechtenstein)*. This last solution characterises the countries where the prosecutors have fewer competencies outside the criminal law.

Where the substantive law forms the basis of prosecutorial activity outside the criminal field, one can distinguish three different types among the answers of the member states (these answers do not exclusively appear in the regulations of the member states but they can mainly be attached to certain competencies).

The reference to the state interest is the most obvious among the substantive legal bases. This appears when the prosecution of the member state has expressed competence for enforcement of (defending) the claim of the state – first of all its claims relating to property *(Armenia, Bulgaria, Croatia, France, Latvia, Lithuania, Monaco, Netherlands, Poland, Portugal, Montenegro (Serbia and Montenegro), Scotland, Slovakia)*.

The protection of public interest is another characteristic referential basis for prosecutors in the cases of competencies outside the criminal sector. According to the answers given to the questionnaire, the "protection of public interest" can have several meanings relating to the regulations for prosecutors. It is the synonym of legality in some cases and accordingly the prosecutor should intervene in procedures of administrative or civil law if the laws of the given country were seriously infringed, e.g. if an unlawful administrative decision is made, an invalid contract is binding private parties or if a court decision violates the law in a way that the situation cannot be left without (legal) remedy.

In other cases the protection of public interest is closer to the protection of human rights and this serves as a legal basis for prosecutorial intervention in the case of certain social groups *(Belgium, Bulgaria, Hungary, Lithuania, Latvia, Monaco, Poland, Portugal, Slovakia, Spain, The former Yugoslav Republic of Macedonia and Ukraine)*. In some countries the intervention of prosecutors is allowed only – and exclusively – if it is necessary for the protection of human rights of particularly disadvantaged social groups *(Lithuania, Monaco, Latvia, and Spain)*.

It should be emphasised that different substantive legal bases of prosecutorial activities outside the criminal law can be combined in some member states *(protection of the state interest and of the public interest are a combined basis for activities of prosecution services of Bulgaria, Lithuania, Monaco, Poland, Portugal, Montenegro (Serbia and Montenegro), and Slovakia)*.

D) Status of prosecutors in the area of civil law and their decision-making competencies

After the questions regarding the prosecutors' areas of activity outside the criminal sector, the affected areas and applicable measures, the questionnaire focuses on the prosecutors' procedural position and decision making competence. We get an extremely varied picture on the basis of the answers given to the questionnaire.

Prosecutors' procedural role and their contribution to the decision making in the course of certain procedures, depends on the aim of the prosecutorial measures in different fields of law. We have examined prosecutors' procedural position in the following classification (to keep things simple):

- expressing opinion,
- competence to initiate procedures,
- interventions in pending procedures (including appeal and proposals to nullify decisions),
- effective decision making competence.

The possibility of expressing an opinion can be experienced first of all in the case of prosecutorial activity in public/constitutional law. The Prosecutor General has the possibility in several countries to participate in the sessions of the government and parliament, and he can formulate an opinion on draft

legislation. *(Latvia, Portugal, Slovakia, Hungary)*. In other countries, the Prosecutor General also has an advisory competence, without the right to vote in procedures ensuring the unity of law of the supreme courts *(Bulgaria, Hungary)*. There are countries where the prosecutor has a wider competence either upon the request of the court or ex officio to express his opinion in a judicial case *(Belgium, Croatia, Poland, and Montenegro (Serbia and Montenegro))*.

Regarding the competence to initiate procedures, similarly to the advisory competence, constitutional and civil law tasks can not be separated. The prosecutor has the competence to initiate procedures in all cases, where he or she represents the state interest. This kind of competence exists even in the cases, where the substantive law basis to initiate procedures is not state interest but public interest in general, or the protection of rights of special social groups. Most public prosecutions – that have tasks outside the criminal sector – have the competence to initiate procedures in one form or another. If a prosecutor has only civil law competence, he can bring a case to court or initiate a non-litigious judicial procedure according to the nature of the case. In countries where the prosecutor has a procedural role as regards administrative procedures, he has this competence sometimes before the court, by initiating judicial supervision of the decisions taken by administrative authorities, sometimes by the right to initiate an administrative procedure.

Finally, in those countries where the prosecutor also fulfils a constitutional role the Prosecutor General has the competence to initiate a procedure at the Constitutional Court. As mentioned above, it is normal, that if the prosecutor has the power to initiate a procedure, he shall have the procedural competencies in the course of procedure at the side of the party, or in other cases as a party. In this way he can make proposals, draw up/formulate notes, use instruments of extraordinary legal remedy. He also has the competence in certain cases to initiate supervision of a decision adopted by the highest judiciary body.

It should also be underlined that in certain countries, prosecutors have the possibility to conduct an investigation on their own initiative so as to consolidate their point of view before initiating a procedure with another authority, or the court. This occurs typically in the context of administrative procedures *(Portugal, Hungary, Slovakia etc.).* In these cases the prosecutor may decide on his own, whether he initiates a court procedure against the administrative decision or a new procedure with the competent administrative body (which had made the decision). In certain cases the prosecutor has the right to go to court only after he initiated an administrative appeal against the decision with the decision making authority.

According to the answers given to the questionnaire, in certain countries the prosecutor has no competence to initiate a new procedure, but he may intervene in pending procedures, typically he may propose an appeal against decisions taken *(Croatia, Hungary, Lithuania, Monaco, The Netherlands, Portugal, Slovakia)*.The answers given to the questionnaire did not enable me to describe the competencies of certain prosecution services to initiate procedures, to intervene in pending procedures and the scope of effective applicability in full details. On the basis of available data the conclusion can be drawn, that prosecutors may initiate administrative and judicial procedures in certain cases and under certain conditions. Prosecutors can intervene in other cases, which have already been initiated or even decided. A special form of this intervention can be the range of tools not available for private persons but only for the prosecutor, for example protest, warning, making a remark, objection and in case of a decision taken by the highest judiciary power, a special legal remedy in the interest of legality.

Regarding decision making competencies of the prosecutor outside the criminal sector, it has to be underlined that they contribute to the content of the decision in one form or another. At least they influence - in the course of exercising competencies of appeal – which authority takes the final decision and according to their nature they will have an effect on the content of the decision. At the same time according to the answers given to the questionnaire none of the countries' public prosecution services has the competence to take the final decision on the merits of civil law or administrative law cases.

This seems to be in line with the nature of civil law cases. Civil law cases are for the court to decide, and the prosecutor may only initiate this judicial decision/judgement/, or may take part in the decision making, but none of the countries mentioned a case, in which they may assume this judicial competence.

According to the answers given to the questionnaire, this also applies to administrative cases. Prosecutors do not exercise the power of an administrative decision making authority, they never take a decision on the merits of the case. Another question is what kind of effect they have on the final decision. When they intervene in a pending procedure with their ordinary or extraordinary instruments of appeal, decisions are indirectly influenced by them. In a way the situation is different, if they can initiate the supervision of the decision taken by the administrative authority or by the court. In this case a decision has already been taken, which is binding for the parties, and that can seem to be a final decision on the merits of the case. The intervention of the prosecutor may lead to the modification of this final decision. In this case the prosecutorial procedure gets closer to an effective decision making procedure, but also in this case the addressee of the intervention, the administrative authority or the court has to take a new decision, which will be the final one.

If we sum up the foregoing, then we can say that the prosecutor takes part in the procedures outside the criminal sector

- as a party or
- at the side of the party or
- ex-officio, although exercising the party's rights or
- he can not exercise the rights of a party; his competence is limited only to initiate and resume a procedure, and to initiate supervision – in the public interest.

It can be observed in all four cases, that the decision making procedures of the prosecutor concerns only his/her own activity, namely whether he/she intervenes in pending procedures ex officio or upon request and whether he/she initiates resumption of procedures in a closed case. This decision obviously has its importance for the continuation of the procedure, and for its outcome, at the same time it can not be considered as a decision on the merits of the case.

E) Effectiveness of the activity of the prosecutors outside the criminal sector and planned reforms

It clearly follows from the previously examined questions, and the answers given to the questionnaire, that prosecutors' activities outside the criminal sector in the countries concerned are not comparable with each other from a statistical point of view. Generally speaking, criminal law activity is dominant in all public prosecutions, and therefore, in comparison activities outside the criminal sector concern fewer cases. The only clear data that can be established concerns the number of applicable rules, the legal basis of the prosecutors' powers and the actual number of cases dealt with. It is obvious that in those countries where prosecutors have a wide range of powers outside the criminal sector, more cases will be handled than in those countries where prosecutors have limited powers.

It is not possible to draw objective conclusions on the effectiveness of these competencies, neither on the basis of the answers given to the questionnaire, nor by the analysis of the powers of the different prosecution services. It can be said nevertheless, that in those countries where prosecutors accomplish such tasks, these are necessary to defend state interests, to defend the public interest and to protect human rights. Prosecutors fulfil these tasks de facto, exercise their competencies and the countries concerned are not preparing any change in this field; the judicial reform concentrates on necessary changes in the criminal sector.

It needs to be stressed that the justification of a legal institution and of certain procedures outside the criminal sector can not be based solely on the frequency of their application. It is not an unknown phenonomen in a legal system, that certain institutions are available only as possibilities, by matter of principle. As an example it is enough to refer to the provisions of criminal codes, which are rarely applied (espionage, battlefield looting), but where the issue of deregulation can not be raised seriously.

It should be added that in those countries, where prosecutors do not have any power outside the criminal sector it is not envisaged to invest them with this kind of this power.

IV. Evaluation of prosecutors' competencies outside criminal field

When we make an overview of prosecutors' activities, their main types, possible measures, competencies and tasks outside the criminal field in the different member states of the Council of Europe, we can give an answer to the question as to whether it is inevitable and correct that prosecutors - in addition to their outstanding role in criminal jurisdiction - have also tasks in the civil and administrative law area.

We will be able to reply to these questions by a thorough preliminary examination to find out whether entitling prosecutors to proceed outside the criminal field is in conformity with principles governing democratic societies, such as the principle of separation of powers, the rule of law, and non-discriminative protection of human rights. (N.B: These questions were also raised at the 5th Session of CPGE in Celle by Mr. Marc Robert in his Introductory Memorandum, as well as in the Report by Mr. Sinkovec.)

First of all, an analysis has to be made of the characteristics of those principles which are considered to be the legal ground for prosecutors' non-criminal tasks in certain member states. On the basis of the above mentioned preliminary examination of answers to the questionnaire we can find three legal grounds: the protection of state interests, the protection of the public interest and the protection of human rights.

Before I enter into further details, I wish to draw your attention to two different interpretations of "state interest". Firstly, some countries (such as Lithuania) indicate that the "interest of the state" is undoubtedly equal to the public interest. This opinion, however, can not completely be shared. Of course, everyone agrees that, in general, the state is basically interested as well in protecting the public interest, ensuring the rule of law and the absolute respect for human rights, which means that in theory one can say that public interest is almost equal to state interest. However, consideration should also be given to the fact that under certain circumstances a civil law subject, in particular the state as the possessor of civil law rights and obligations – has a direct interest in the settlement of certain legal cases/disputes. Those countries - which define state interest and the enforcement of state's claim as the legal basis of prosecutors' activities outside the criminal jurisdiction – use the expression 'state interest' in the latter sense, and empower prosecutors with such competencies in order to enable them to proceed directly on behalf of the state's property claims.

Secondly, it also has to be pointed out, that even within one country there can be numerous and different legal grounds for entitling the prosecutor to act in different legal areas. It is not excluded - and this appears from the analysis of specific answers to the questionnaire - that the legal basis for certain measures concerns the enforcement of the direct property claim of the state, while other measures have their legal basis in the protection of human rights or the public interest.

A) Legal grounds in civil law

A1) States' property claims and their enforcement

An analysis of legal grounds of prosecutors' duties outside the criminal field can be made with reference to the above-mentioned two interpretations. Undoubtedly, the prosecutor must have competency to protect and enforce the state's property claim, as the state always has direct civil law claims. Furthermore, it should be noted that the state - as one of the possible subjects of civil law – must always be entitled to enforce its claims before the court, even when these claims are against the interest of other natural or legal persons, as the equality of parties cannot be otherwise ensured.

One of the most important duties of the state is criminal jurisdiction and of course, the prosecutor is the main legal actor, or "subject number one" to enforce criminal law claims on behalf of the state (for punishment). The state can provide further legal proceedings for the enforcement of criminal law claims to the victim as subject "number two" (in addition to the proceedings initiated by the prosecutor before the court): private prosecution and supplementary private prosecution. While the earlier one - in case of certain crimes - gives an opportunity to the victim to act directly before the court, the latter legal instrument serves as a guarantee for the victim to do so, in case the prosecutor has failed to prosecute.

A very similar situation exists when the state's civil law claims are not enforced by a different authority but, explicitly by the prosecution service. Let me mention some examples: state as successor, subject

of land property claims. Many other questions belong to this area, in which the state appears as subject of civil law and acts contrary to the interest of other subjects (natural or legal persons). In all these cases the prosecutor acts as a "defence lawyer" of the state – i.e. acts on behalf of the state and necessarily before the court with the same rights as any other party before the court, without any further authority. So for these reasons there is not any room for doubts in connection with the respect for the independence of the court, the equality before the law, or the equality of arms.

A2) Protection of the public interest

Protection of the public interest, as another possible legal ground of prosecutors' competencies outside the criminal jurisdiction requires a more sophisticated analysis. This is due to the difference in the characteristics of the two legal grounds: the state property and the public interest. Whilst for example, a state property claim can often be expressed in factual claims; the public interest is much more an abstract matter. Because of this, in case of public interest – at least in theory – there is a higher level of danger that a prosecutor can intervene - by referring to the public interest - into other legal relationships between different parties, administrative authorities, and persons.

A detailed examination from a theoretical point of view of the concept of "public interest" would exceed the remit of this reflection document; moreover it would require other considerations, which could not be completed merely with the help of the answers to the questionnaire. Fortunately those countries which consider public interest to be a legal ground for prosecutors' activities outside the criminal field have referred to the rule of law principle, to the observation of law, and finally to the restoration of a lawful situation. Therefore, I will use 'the concept of public interest' hereinafter as the synonym of 'the observation of the law'. This simplification – hopefully – will help us to make a general overview to be applied to most of the member states and will encompass different legal grounds of the prosecutors' non-criminal competencies.

While examining the expression of "observation of the law", our starting point should be the fact, that this means "equal to the enforcement of the rule of law" in certain administrative or civil law procedures. The principle of the rule of law is not only an essential criterion in the constitutions of certain countries - member states of the Council of Europe – but a principle which has to be effective in all state activity. This is always the case, when persons or authorities take measures on behalf of the state, or when so invested by state power, against other legal subjects. Observing the law means that all authorities are obliged strictly and consistently to observe laws – substantive and procedural laws – during decision making procedures.

We may suppose reasonably – also in everyday experience -, that in many unique/special cases, in which measures are taken by administrative authorities and courts on behalf of the state, there are mistakes, wrong decisions, and it occurs that laws are not properly applied. All this is not desirable, but probably inseparable from the operation of law. Just because of that, every state's legal order – in the case of judicial decisions – provides for appeal procedures to the highest judiciary , and enables revision of administrative decisions by an appeal to higher administrative authorities or through judicial supervision of administrative decisions, (we can even add the legal protection by the ombudsman[7]). Merely empirically, disregarding dogmatic analysis, it can be said, that there can be a wide variety in breaches of the law.

Where minimal breaches of the law occur – the courts or administrative authorities are able to propose a remedy through their normal procedures. Also not too serious breaches of law may occur, for which no remedy can be offered in the course of certain procedures. In all these cases there is no effect on the judgement on the merits/decision. It is also possible that when the breach of law has no legal remedy in a given case it may be significant for the aggrieved party but nevertheless the judgement on the merits/decision is correct. Finally there are breaches of law, which have a meaningful influence on the merits of the case, and which would lead to a severe violation of the rule of law without any remedy. This would naturally hurt the affected parties' interests as well.

We can examine certain breaches of law from another point of view. Breaches can be favourable for the parties in certain cases and unfavourable in others. We may *presume* that an unfavourable decision for the client doesn't remain without remedy (if there is a possibility at all) because the party

[7] Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons, Council of Europe, Directorate of Legal Affairs, Strasbourg, 1996.

which considers the decision prejudicial will appeal against the decision by means of available rules of legal remedy. We may presume in the case of a favourable decision for the party, that the situation is the same, granted that there is an adverse party. Namely in such a case favourable breach of law for one of the parties can be only unfavourable for the other one. Naturally, this occurs for the greater part not in civil law, but in administrative law procedures.

An excellent example may be the so called ’not so serious offences’, misdemeanours, and so called ’petty offences’ in other countries, because in many countries these cases are not judged as criminal cases by criminal law authorities, but in specific administrative procedures by administrative authorities. It may easily happen in these cases, that the authority’s application of the law leads to a breach of law which is favourable to the person concerned, and in such a case it can not be expected from the person that he/she would seek to remedy the breach of law. It is imaginable in the case of other official procedures, of course, such as in the case of issuing certain permits, licenses or failing to apply certain prohibitions. In all such cases, when the decision in breach of the law has a bearing on the merits of the case – and if it can not be corrected through ordinary legal remedy (in particular for personal reasons) – there is a violation of the rule of law, of the confidence placed in laws and finally of the public order.

Consequently no objection can be made against the ambition of certain countries to ensure extraordinary legal remedies against this kind of breaches of the law. Having regard to this situation, which is actually similar to the prosecutors’ powers ensured in the interest of the legal order, no objection can be made against prosecutors’ extraordinary intervention powers; which are extraordinary in that given case, but provide for a restricted (in time, before the court) possibility for legal remedy in the interest of the legal order.

The analysis has taken examples from procedures of administrative authorities but there are similar examples relating to civil law procedures of the courts, first of all in the cases when there is no conflicting interest between the parties. The procedures relating to commercial law can be placed into the case of civil law. It is obvious that the establishment and the dissolution of legal persons are decisions of high importance for the state. It is no accident that several countries rely on the courts when establishing economic associations with legal persons; in other countries the court registration of established associations, of legal persons with a stipulated capital and of foundations is mandatory. Similarly it is necessary to have court decisions for the dissolution of a legal person.

In the case of legal persons operating in business life there are interests of high importance that these legal persons proceed according to the regulations applying to them during their operation, because in a given case this may affect a large number of other persons. It is cannot be excluded that it can affect the economic situation of a country beyond a certain economical weight and it can even expand the effect to other countries. So the competence of the state is evident when it concerns paying attention to the establishment and dissolution of legal persons and to insolvency and bankruptcy of economic organisations.

This is supported by the criminal codes of the second half of the 20th century that paid increasing attention to prosecution of undesirable phenomena relating to economic legal persons. It is enough to think of the regulations against money laundering, fraudulent bankruptcy, transactions performed by having confidential information and receiving illegal economic advantages. Consequently it seems to be appropriate to guarantee certain procedural competencies to state organs in the procedure of other authorities first of all in the court procedures. Consequently there can be no objection if in certain countries the prosecutors are entrusted with these tasks on the basis of the similarities mentioned above. As a matter of fact the same considerations can be applied relating to labour law procedures that concern several persons.

In the cases of prosecutorial measures based on public interest there are also competencies for prosecutors to guarantee the formal integrity of the law and order. In line with the above there are competencies for prosecutors general to initiate procedures before the Constitutional Court so as to establish the unconstitutionality of certain laws or to remedy an unconstitutional situation or competencies to give an opinion in procedures initiated by others.

Relating to the protection of public interest, it can be summarised that prosecutors can have competencies in the course of procedures, that they can initiate procedures before other authorities, in

particular before the courts but that these competencies can only be exercised under the conditions determined by the law and in the existence of a clearly unlawful situation.

All of this can also be said in the case of prosecutorial competencies relating to civil law marital procedures or procedures for establishing family status. The frequency of these procedures makes that they are important activities for prosecutors.. But in these cases the referential basis of public interest is combined with the defence of the rights of the persons who are unable to protect their own rights.

Evidently all states pay much attention to safeguard the regulations relating to the determination of paternity and to the validity of marriages. From the Roman law through the European legal history the interest of the state has always been strong in this field of law. Consequently all that was written above on prosecutorial measures relating to administrative and civil law can be applied to the procedures dealing with marital and civil status. In these cases the legal status of the children, family relations, adoptions, the validity of marriages can not be regarded exclusively as an individual interest of the persons concerned. Prosecutors should be given the possibility to intervene in the cases determined by law, to initiate court procedures in order to guarantee the respect of the law or to contribute in other ways to the final decision-making.

A3) Protection of human rights

The third principle which could serve as a legal basis for the prosecutors' duties outside the criminal area is the protection of human rights. In theory, one can not doubt that all clerks, authorities, organisations of the state have an obligation to respect, defend and encourage the inviolability of human rights. But at the end of the 20th century a question whether the state is obliged to protect human rights in case the other party is also a private person has been raised. In other words the question is whether the state is responsible for the protection of human rights only in cases where the state itself a party in the legal relationship or whether it has a general obligation to guarantee the respect of human rights in the legal relationships between natural persons' as well.

The essence of this problem can be seen easily by raising the following question: Has the state an obligation to protect the private persons' rights even against their will? Of course the correct reply to this question is *'No'* or *'Only with exceptions'*. 'On-going discussions on this issue were mentioned among the answers of several countries. Some have replied that constitutional courts consider that state intervention is only admissible if there is a requirement to protect the rights of private persons in a dispute concerning the protection of natural persons (and within that framework of course their human rights) and this also includes the exceptional intervention of the prosecutor.

Obviously in the most serious cases of violation of human rights the state has the absolute obligation to intervene into other persons' business by starting an ex officio criminal procedure against the person who violated another person's human rights and thus should be punished in accordance with the penal code. And of course the same obligation exists if the person asks the state for the protection of her/his rights by starting a civil or administrative procedures.

Thus the area where the possibility (not the obligation!) for prosecutors to protect the human rights of individuals exists is that (I think we should accept this without controversy) without the request of the interested person – by presuming either her/his will or interest, or with reference to the general obligation of the state for the protection of rights of the persons – intervention is admissible only in exceptional cases (stipulated by law, and when this is otherwise highly reasonable).The conditions under which the state – or the prosecutor on behalf of the state - is entitled to initiate or to intervene into a procedure are clearly shown by the replies of several countries.

Children and juveniles belong to the first group of private persons whose rights could be protected by different measures of the prosecutor. Taking into consideration the international requirements[8], the protection of the rights of children by the state, it could be said that the activity of the prosecutor is an efficient way for ensuring human rights. The duty of the state for human rights' protection for mentally disabled persons in psychiatric wards is another very good example. In countries where the decisions

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[8] Convention on the Rights of the Child (New York, 20th of November 1989).

concerning the freedom of mentally-disabled persons are under regular control, the prosecutor is usually entitled to make a proposal on the deprivation of liberty.

There is another typical measure provided for the prosecutor to protect property claims of persons with unknown residence if their rights cannot otherwise be ensured. (Let me give an example to explain the justification of such a measure. In case a civil law procedure – for expropriation, purchase or for any other reasons - is initiated against a person with unknown residence, the intervention of the prosecutor is not necessary, as a fiduciary would usually be appointed by the court to protect the rights of the person concerned. There could be cases however where the rights of the above mentioned person needs to be protected by starting a civil procedure on behalf of him/her. The court is not allowed to start it ex officio. For this reason another state authority is empowered to start it.)

B) <u>Competencies of the prosecutor and principles of public law</u>

The next question to be answered is whether the measures provided for the prosecutor in the civil and administrative law field are in conformity with the constitutional requirements of the rule of law. Former analysis on prosecutors' duties outside the criminal sector, in particular the Report in Celle, the country remarks, and the questions and problems considered by the Co-ordinating Bureau at its meetings, refer to the fact that these competencies of the prosecutor are in connection with the principle of separation of state powers, independence of the courts, and of equality of parties (equality of arms) and of non-discrimination. Let us examine them.

B1) Measures of the prosecutor and principle of separation of powers

While competencies of the prosecutor ensuring the property claims of the state can not be against principles of public law (as in these relations the prosecutor acts on behalf of the state – as I mentioned earlier acts as the "defence lawyer of the state"), other competencies in the administrative law area are not without problems.

The administration of the state and the imposition of administrative decisions on other persons are an integral part of the executive power. The competencies given to the prosecutor to ensure the legality of administrative decisions must not deprive the executive from these powers and must not be against them. For this reason the intervention of the prosecutor into administrative procedures must not reduce/or deprive/ the decision-making power of the executive. The competencies of the prosecutor in this field should therefore be exceptional and defined by law, and they should not be exercised as a regular and general control of the executive. The answers received to the questionnaire show clearly that countries providing such competencies to prosecutors are aware of the need to limit the application of these prosecutorial measures.

The independence of courts should also be examined in connection with the prosecutorial measures and the principle of separation of powers. Obviously the prosecutor or other state institutions must not be an obstacle to the competence of the courts to make (final) decisions impartially, without any influence, based on the facts. Because of this in administrative law cases the prosecutor has exactly the same rights as other parties, and during the procedure he/she can act as one of the parties. It can not be excluded however, that in certain exceptional cases the prosecutors are allowed to use extraordinary legal remedies, while other parties are not (we may find some references to that in the answers). In all these cases a legal remedy should be provided.

Finally, questions rise in connection with the separation of state powers if the General Prosecutor of a country can attend the meetings of the Cabinet. According to the answers to the questionnaire, this could happen if the prosecution service of a country is not subordinated to the government, but operates as an autonomous constitutional institution. In this case the prosecution service must not be directly influenced by the executive/or the legislative, but the General Prosecutor is involved in the work and decision-making of the executive or the Parliament. This is of course a well-balanced relationship between the mentioned state-organs. The Cabinet or the Parliament can express its general requirements on the operation of the prosecution service, and on the other hand the prosecutor general can take the opportunity to give his/her opinion on the legality of decisions to these state-organs.

If this system works correctly and is well-balanced (by strictly defined rules) there is no room for influence on the professional tasks of the prosecution service. It can be stated that this system works correctly if the conditions mentioned in Rec (2000) 19 are entirely fulfilled. (The recommendation states that in case the prosecution service is not subordinated to the government, the methods of co-operation between them should be regulated in laws.)

B2) Competencies of the prosecutor and the principle of "equality of arms"

If we have a look at the relationship between the prosecutors' competencies outside the criminal area and the principle of equality of arms before the court, we are confronted with the "quasi- party" status of the prosecutor, which is a basic requirement to prevent the prosecutor from proceeding as a state-authority and exercise more 'additional' competence than the ordinary parties usually have. On the basis of the answers it can be stated that before courts prosecutors may proceed only as a party.

The situation is quite different if the prosecutor is also empowered to intervene into on-going procedures and can apply measures of warning, complaint or protest. In this situation no relationship is established between the prosecutor and the other party (person), but between the prosecutor and the other authority of the state. That is why we can not speak about the "equality of arms" in this example.

However it could also happen that upon the intervention of the prosecutor, the administrative authority changes its former decision, or the legal dispute between the prosecutor and the administrative authority continues before the court and later will have the same result. In such a case the client of the administrative authority must have the right to a legal remedy of the new (changed) decision.

B3) Measures of the prosecutor and principle of non-discrimination

In all those cases where there are two parties and the intervention of the prosecutor is made on behalf of one party, there is always a possibility of breaching the non-discrimination principle or the illegitimate preference of one party over the other. We saw that –theoretically - no objection could be made against the intervention of the prosecutor when protecting the rights of certain groups of persons. But the other person not represented by the prosecutor may feel discriminated against as he/she has to act alone before the authorities without a legal professional of the highest education, and he/she can also feel that he/she has to protect his/her rights against his/her own country.

In order to minimize the possible illegal intervention of prosecutors, there should be a strict list of conditions under which the prosecutor could be entitled to intervene. In fact the participation of the prosecutor on behalf of or instead of one of the parties must always be exceptional and strictly limited to those cases in which there are no adverse parties. Only in well-grounded and strictly restricted cases could ensured be a justification for the intervention of the prosecutor. The institutionalised intervention of the prosecutor in civil law disputes can counterbalance the disadvantaged position of the suffering party, but can never serve the whole.

V) Principles to be taken into consideration by the prosecutor while taking measures outside the criminal field

After having replied to the above-mentioned questions, we can now take a decision on the necessity to empower prosecutors to take measures outside the criminal jurisdiction.

Member states of the Council of Europe promote and safeguard their common values such as the democratic functioning of the society, the rule of law and the protection of human rights and fundamental freedoms.. We have seen that some member states do not feel any need to provide extra-penal competencies to the prosecutor and do not consider these tasks as basic requirements. We cannot say that member states where prosecutors are not empowered to act outside the criminal field have an inappropriate practice or should consider a change in their system of prosecution.

At the same time we can also see that other countries consider it as an integral part of their constitutional system to have prosecutors with competencies outside the criminal sector in order to ensure the operation of the democratic society and to protect human rights. Again, there is no reason

for saying that these member states have an inappropriate practice or should reconsider their system of prosecution.

Comparing these two groups of member states and the requirements on the prosecutors' activities, it can be stated that prosecutors' non-criminal tasks are not indispensable, but where they exist they are useful and reasonable.

In case prosecutors are provided with competencies outside the criminal sector, member states have to ensure the rule of law and within that framework, the respect of other basic principles and human rights governing all democratic societies.

1. In addition to the essential role played by prosecutors in the criminal justice system, some member states of the Council of Europe provide for the participation of the prosecutor in the civil and administrative sectors for historical, efficiency and economic reasons but their role should always be exceptional *(principle of exceptionality).*
2. The role of the prosecutor in civil and administrative procedures should not be predominant; the intervention of the prosecutor can only be accepted when the objective of this procedure cannot, or hardly be ensured otherwise *(principle of subsidiarity)*.
3. The participation of the prosecutor in the civil and administrative sectors should be limited and must always have a well-founded, recognisable aim *(principle of speciality).*
4. States can entitle prosecutors to defend the interest of the state *(principle of protection of state interest).*
5. Prosecutors can be entitled to initiate procedures or to intervene into on-going procedures or to use various legal remedies to ensure legality *(principle of legality).*
6. In case it is required for reasons of public interest and/or the legality of decisions (e.g. in cases of protection of the environment, insolvency etc.) the participation of the prosecutor can be justified *(principle of public interest).*
7. Protecting the rights and interests of disadvantaged groups of the society unable to exercise their rights can be an exceptional reason for the intervention of the prosecutor *(principle of protection of human rights).*
8. If co-operation between prosecution services and other subjects of public law – the executive, the legislative, local government entities - seems indispensable, member states can allow prosecutors general to consult with the representatives of the mentioned authorities *(principle of consultative co-operation).*
9. The principle of separation of powers should also be ensured in connection with the prosecutors' tasks outside the criminal sector *(principle of separation of state powers).*
10. Prosecutors' activities outside the criminal field should not affect the sovereignty of the legislative power *(principle of sovereignty of the legislative).*
11. The participation of the prosecution service in the decision-making by the executive should not engage the responsibility of the prosecution service for the executive's decisions *(principle of responsibility of the executive).*
12. The participation of the prosecution in court procedures should not affect the independence of the courts *(principle of independence of the courts).*
13. Prosecutors should have no decision–making powers outside the criminal field or be given more rights than other parties before courts *(principle of equality of arms).*
14. Prosecutors should not discriminate among persons when protecting their rights and should only intervene upon well-grounded reasons *(principle of non-discrimination).*
15. If the prosecutor is entitled to take measures in the civil and administrative law area , the rights and guarantees listed in Rec 19(2000) in connection with the criminal jurisdiction also apply, such as the duty to carry out their functions fairly, impartially and objectively *(principle of impartiality of prosecutors).*