COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 17 May 2005

CPGE (2005) 06

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

CONFERENCE OF PROSECUTORS GENERAL OF EUROPE
6TH SESSION

organised by the Council of Europe
in co-operation with the Prosecutor General of Hungary

Budapest, 29 – 31 May 2005

House of Parliament
Hotel Margitsziget Termál

THE RELATIONSHIP BETWEEN PUBLIC PROSECUTORS AND THE POLICE

SWISS CONTRIBUTION
by Mr Valentin Roschacher, Prosecutor General of the Confederation

I. General remarks

In the system common to the countries that follow the French tradition, it rests with the public prosecutor to institute criminal proceedings and to conduct the police investigation. This shows how central the issue of prosecutor-police relations is to all considerations of effectiveness in criminal law enforcement according to this tradition, whatever developments it may have undergone through time and despite the fact that the phase of gathering evidence, initiated by the prosecutor, is completed by the investigating judge.

In one form or another, the statutes in force in these countries all lay down that *the police department is under the prosecutor's control* for all acts of criminal investigation which it performs.

Whether acting under the authority or at the instigation of the prosecutor, it does not follow that this relationship of subordination would paralyse the police and completely remove its own active capability as soon as there was a likelihood of criminal proceedings being instituted on the basis of the facts brought to light by the police. Subordination does not signify the subservience or passiveness of the investigating authorities.

Human, material and technical resources for investigation are in the hands of the police, while the prosecutor has sole authority to commence prosecution. Being placed in this context, the relationship between the police and the prosecutor is entirely centred on mutual exchange and support. As much as to say that in practice the subordination intended by the letter of the law is expressed in terms of interdependence rather than dependence.

To illustrate this assertion, 3 categories of criminal police action can be cited as examples: expedited or "crime scene" investigation, action on a complaint, and own-initiative work. These are constant tasks in which the link with the prosecutor as a superior cannot possibly be either an impediment to or an interference with their conscientious and effective performance, nor is it perceived as such.

So it goes in investigations "on commission of a crime", or those opened at the instigation of a third party, most often the victim of an offence. In such situations the police naturally acts of its own motion – that is without needing to request or await the prosecutor's prior permission, though on the condition that the steps taken and the initial findings must be reported to the prosecutor without fail.

Likewise, the question of subordination of the criminal police to the prosecutor quite obviously raises no obstacle to own-initiative police work, ie unprompted detection of offences and culprits. In that respect, the subordination of the criminal police to the prosecutor has a connotation that is not strictly one of command. According to the construction placed on it here, the prosecutor's control paves the way, in the area of own-initiative work, for real crime policy directives enabling the police to envisage temporary or sustained specialisation of its activity and resource planning, hence judicious deployment of the means at its disposal. In other words, subordination is a means of guiding the own-initiative work of the criminal police. Thus the police is less dependent on its own resources when setting priorities. In this area, the subordination of the police to the prosecutor affords mutual advantages.

In each of these 3 examples, the fact that the prosecutor has to be in possession of the facts at some stage in no way prevents the police from continuing its investigation thereafter, acting on the prosecutor's instructions. The prosecutor's opinion is intended rather to aid the decision to institute criminal proceedings than to relieve the police of authority to carry on investigations. I stress this point, because this ability to delegate acts to the police *after* the commencement of prosecution is not unanimously accepted.

The issue of the prosecutor's authority or initiative is more appreciable when we turn from the 3 situations outlined above to those that may arise when the prosecutor himself opens the investigation. Here, there is less room for predetermined "standard procedures" or directives. Indeed, such "standard procedures" or directives are no longer the sole factors contributing to the success of the investigations. Investigative *strategy* comes into play, as do the respective contributions of each investigator to the due completion of the enquiry, ie collecting sufficient evidence to have the culprit punished by a court.

In our continental systems, it is thus widely accepted today that the tasks are apportioned as follows: immediately the investigation opens, the prosecutor is responsible for the choice of investigative measures and for the order in which they should be carried out (the prosecutor says "what"); then the police decide on their own account as to the means to be applied and the extent thereof (the police has the choice of "how").

But the borderline between these two spheres of activity is not impermeable. These two necessary and inseparable agencies of investigation must each be allowed to make suggestions. Their availing themselves of this possibility is not to be construed as undue encroachment by one agency on the other's preserve.

Plainly, however, the prosecutor bears responsibility for the police investigation and on that account is wholly answerable for his decisions. While not always easy, this leading role – not so much a matter of command as of responsibility, let me re-emphasise – acquires its full importance in those legal systems where the office of investigating judge is unknown. In that case, the prosecutor is the official who not only conducts the gathering of evidence from start to finish, with the co-operation of the police, but also – and most importantly – will be required to bring that evidence before the court to have the culprit found out and convicted.

To put it another way, in legal systems without the office of investigating judge; the prosecutor's cogitation and decision as chief investigator are placed in the context of the trial proceedings from the outset. Hence it is logical and consistent that the prosecutor should have the last word.

II. Brief presentation of the situation in Switzerland

1. Since 1 January 2002, the Federal authorities responsible for criminal prosecution and police (Attorney-General's Department of the Confederation, Federal Police Office and Federal Investigating Judges) have had sole competence to conduct criminal proceedings in the spheres of organised crime, money laundering and corruption at the inter-cantonal and international levels. The Confederation is also competent, though in a subsidiary capacity only, for fighting economic crime (for further details, see the website of the Attorney General's Department of the Confederation: http://www.ba.admin.ch/francais/start.php).

2. To fulfil its function, the Attorney General's Department of the Confederation has the Federal Criminal Police at its disposal. The latter is directed by the Federal Attorney General and placed under the supervision of the Complaints Division of the Federal Criminal Court (Article 17 (1) of the Federal Act governing criminal procedure, hereinafter referred to as PPF). A typically Swiss procedural feature is that the criminal police of the Confederation collaborates as a rule with the competent police authorities of the cantons and in every case informs them of its enquiries as soon as possible having regard to the object and the progress of the procedure (Article 17 (4) PPF). When the cantonal police forces are engaged in an operation headed by the Attorney General's Department of the Confederation, they apply the federal procedure and are regarded as federal police forces.

3. The Attorney General directs the federal criminal police in investigations but is not the head of the force, nor may he take coercive or disciplinary measures in respect of its members. On the other hand, it is his responsibility to rule on complaints against acts of the criminal police, and his decisions may be referred to the Complaints Division of the Federal Criminal Court. Thus, ruling on such complaints are not made by the Federal Police Office – of which the federal criminal police forms a branch – or by the Federal Department of Justice and Police (controlling the Federal Police Office), but solely by the authorities responsible for directing or where appropriate supervising the criminal police in the performance of its own tasks.

4. The very existence of a body of criminal police directly assigned to the inquiries of the prosecution is a token of collaboration in subordination, or of an effort towards interdependence as explained above. This direct subordination is an even surer guarantee of effectiveness considering that every agent in the prosecution of crime (prosecutors and police officers alike) has undergone a common 3 month training course on recruitment to forge and develop teamwork. This is further enhanced by the presence of investigating officers, direct intermediaries between the police and the prosecutors. Their task is to plan and co-ordinate

the recruitment into the police of inspectors for the various district police offices, and to manage these investigation groups in accordance with the planning and strategy worked out in agreement with the prosecutors. Members of the police are in fact systematically associated, if only through the investigating officers, with the prosecutors for the purpose of devising the operational strategy and planning, which elements are recapitulated in an internal document set out as a genuine obligatory scheme of management for all participants in criminal procedure. This is how members of the police are acquainted from the outset with the aims pursued, having been associated in their selection; as a result, they are more conversant with the sequence of operations and less prone to frustration thanks to their very direct involvement in defining the various phases and operations.

5. In the areas where the Confederation has either exclusive or subsidiary competence, engagement of financial experts and analysts is indispensable. The Attorney General's Department of the Confederation has a Centre of Expertise composed of such financial experts. They are accountable to the prosecutor in charge of an enquiry for the planning, execution and supervision of the tasks and activities relating to their specialist field, even where those activities are performed in part by criminal police investigators. In exactly the same way as the police, the financial experts are associated in defining the aims and strategy of the inquiry, and their functions and the planning of their assignments are also laid down in the obligatory scheme of management for every procedure of a certain scale. This initial association of financial experts in defining objectives and strategy is another way to achieve optimum collaboration between the prosecution and the police because, in the field of financial appraisal and analysis, it also curbs the use of identical working methods by each entity and guards against the lone ranger tactics that used to be frequently encountered in the finding of evidence.

6. These over-succinct considerations were intended as a demonstration of our endeavours, under a legal and procedural system that has not yet completely adapted to the new powers which we hold, to achieve efficient collaboration between the two entities with proper regard for each one's allotted functions. So that the subordination of the police to the prosecution may generate still more effective collaboration, it would be expedient to consider a new model that already exists in one Swiss canton, Basel City, and has proved its worth. Under this system, the cantonal criminal investigation department is directly incorporated into the machinery of the public prosecutor's office. Its subordination, administratively as well as technically, to the chief prosecutor enables the latter to draw at will upon police human, material and technical resources. The prosecutor is thereby better able to frame a proper crime prevention policy, because this arrangement makes it possible for him not only to set priorities but also to act directly and independently in committing the resources needed to achieve the priorities. This system, which may superficially appear to involve confusion of roles, is a solution which ought to be explored for achieving maximum efficiency, not to mention the fact that in systems without an investigating judge it fully attains the objective assigned to the prosecution, which is to direct the inquiry from beginning to end in order to obtain the necessary facts for pressing the charges in court.