

THE ROLE OF PUBLIC PROSECUTORS OUTSIDE THE CRIMINAL JUSTICE SYSTEM



Legal instruments

Recommendation CM/Rec(2012)11
and explanatory memorandum

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

The role of public prosecutors outside the criminal justice system

Recommendation CM/Rec(2012)11
adopted by the Committee of Ministers
of the Council of Europe
on 19 September 2012
and explanatory memorandum

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Le rôle du ministère public en dehors du système de justice pénale (Recommandation CM/Rec(2012)11 et exposé des motifs)

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1. Recommendation CM/Rec(2012)11 on the role of public prosecutors outside the criminal justice system, adopted by the Committee of Ministers of the Council of Europe on 19 September 2012, was prepared by the Group of Specialists on the Role of Public Prosecutors outside the Criminal Field (CJ-S-PR)¹ under the authority of the European Committee on Legal Co-operation (CDCJ)
2. This document contains the text of Recommendation CM/Rec(2012)11 and the explanatory memorandum thereto

1. The Group was composed as follows: Members: Germany (Chair), Albania, Denmark, France, Lithuania, Republic of Moldova, The Netherlands, Portugal, Russian Federation – Substitutes: Croatia, Bulgaria, Hungary, Slovak Republic.

Recommendation CM/Rec(2012)11

of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system

*(Adopted by the Committee of Ministers on 19 September 2012,
at the 1151st meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its members, *inter alia*, for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Recalling also that every member of the Council of Europe has accepted the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of the human rights set out in the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);

Aware that in many member States, because of their legal traditions, public prosecutors also play a role outside the criminal justice system and that this role varies considerably between different national legal systems;

Noting, in particular, that in different national legal systems this role may include representing the general or public interest, providing legal support to individuals in the protection of their human rights and fundamental freedoms, representing the State before the courts, supervising public bodies and other entities, and an advisory role to courts and that, moreover, the nature of this role may vary in private and public law;

Taking account of the relevant case law of the European Court of Human Rights, in particular in the area of fair trial principles;

Recalling its Recommendation Rec(2000)19 to member States on the role of public prosecution in the criminal justice system;

Bearing in mind Opinion No. 3 (2008) of the Consultative Council of European Prosecutors (CCPE) on "The role of prosecution services outside the criminal

law field” and the conclusions of the Conferences of Prosecutors General of Europe in Budapest (29-31 May 2005) and in St Petersburg (2-3 July 2008);

Recalling the principles set out in the joint opinion of the Consultative Council of European Judges (CCJE) and the CCPE on the relations between judges and prosecutors in a democratic society (“Bordeaux Declaration”) of 18 November 2009, and, in particular, as they relate to public prosecutors who have functions outside the criminal law field;

Taking note of the 2010 report of the European Commission for Democracy through Law (Venice Commission) on European standards as regards the independence of the judicial system (Part II: The prosecution service) and of its various opinions on the subject;

Noting the absence of common international legal standards regarding the tasks, function and organisation of prosecution services outside the criminal justice system;

Convinced, therefore, of the need to establish common principles for member States on the role of public prosecutors outside the criminal justice system,

Recommends that, where public prosecution services have a role outside the criminal justice system, member States take all necessary and appropriate steps to ensure that this role is carried out with special regard to the protection of human rights and fundamental freedoms and in full accordance with the rule of law, in particular with regard to the right to a fair trial, and, for this purpose, that they take full account of the principles set out in the appendix hereto.

Appendix to Recommendation CM/Rec(2012)11

A. Scope

1. This recommendation and the principles set out in this appendix apply in all cases where the national legal system establishes a role for public prosecutors outside the criminal justice system.

B. Mission of public prosecutors

2. Where the national legal system provides public prosecutors with responsibilities and powers outside the criminal justice system, their mission

should be to represent the general or public interest, protect human rights and fundamental freedoms, and uphold the rule of law.

C. *Common principles*

3. The responsibilities and powers of public prosecutors outside the criminal justice system should in all cases be established by law and clearly defined in order to avoid any ambiguity.

4. As in the criminal law field, public prosecutors should exercise their responsibilities and powers outside the criminal justice system in full accordance with the principles of legality, objectivity, fairness and impartiality.

5. Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system should apply, *mutatis mutandis*, to public prosecutors with responsibilities and powers outside the criminal justice system so far as it relates to:

- safeguards for them to carry out their functions;
- their relationship with the executive, the legislature and the judiciary; and
- their duties and responsibilities towards individuals.

6. Public prosecution services should adopt an approach to their work that is as transparent and open as possible, while fully respecting their duty of confidentiality.

7. The conduct of public prosecutors should be governed by appropriate codes of ethics.

8. Public prosecution services should have at their disposal the necessary financial and human resources and benefit from appropriate training in order to adequately fulfil their responsibilities outside the criminal justice system.

9. With a view to harmonising policy and practice throughout the national jurisdiction, the public prosecution services may consider circulating guidelines and information on best practices outside the criminal justice system to the public prosecutors concerned.

D. Principles applicable to specific responsibilities and powers of public prosecutors outside the criminal justice system

In relation to access of the public to justice and legal remedies

10. The competences of the public prosecutor outside the criminal justice system should not be such as to restrict the right of any natural or legal person to initiate or act as a defendant to defend his or her interests before an independent and impartial tribunal, even in cases where the public prosecutor is or intends to be a party.

11. Where the public prosecutor is entitled to make a decision affecting the rights and obligations of natural and legal persons, such powers should be strictly limited, defined by law and should not prejudice the parties' right to appeal on points of fact and law to an independent and impartial tribunal. The public prosecutor should act independently from any other power and his or her decisions should be reasoned and communicated to the persons concerned.

In relation to court proceedings where the public prosecutor is a principal party

12. The powers of the public prosecutor to initiate legal proceedings or act as a defendant should not compromise the principle of equality of arms between the parties to litigation.

13. The public prosecutor should not withhold evidence relevant to the issues in dispute.

14. The power to pursue pre-trial inquiries should be provided for by law. Its exercise should be proportionate and not confer an unreasonable advantage on the public prosecutor.

15. In cases where an individual's interests are represented by the public prosecutor, that person should be entitled to be a party to the proceedings. This should not prevent the public prosecutor from remaining a party to the proceedings when the general or public interest is involved.

16. The rights of the public prosecutor to appeal or otherwise have a decision of a court reviewed by a superior court should be no different from those available to the other parties to the proceedings and also subject to the same conditions, including the time limits for lodging the appeal.

In relation to court proceedings where the public prosecutor intervenes or is joined as a party

17. The parties to the proceedings should be informed either by the public prosecutor or by the court of the decision of the public prosecutor to intervene or be joined to the proceedings.
18. Where the public prosecutor presents a written opinion before the court hearing, the opinion should be made available to all parties in sufficient time to be considered. Otherwise, the hearing may be adjourned.
19. The parties to the proceedings should have the opportunity to comment on the opinion of the public prosecutor and to submit counter-arguments.
20. The public prosecutor should neither participate in the deliberations of the court, nor give the impression of doing so.
21. The principles laid out in paragraph 16 apply under this sub-heading.

In relation to the principles of legal certainty and res judicata

22. In order to comply with the principles of legal certainty and res judicata, the grounds upon which the public prosecutor may seek a review of the final decision of a court should be limited to exceptional cases and the review processed within a reasonable time limit. Except in cases where the review does not concern the rights and obligations of the parties, as set out in the decision under review, the parties to the original proceedings should be informed of the review and, should they so wish, given the opportunity to be joined to the proceedings.

E. Role of public prosecutors as a supervisory organ

23. Where public prosecutors have a supervisory role in relation to national, regional and local authorities, and also in relation to other legal entities, for the purpose of ensuring their proper functioning in accordance with the law, they should exercise their powers independently, transparently and in full accordance with the rule of law.
24. In relation to private legal entities, the public prosecutor should only be able to exercise his or her supervisory role in cases where there are reasonable and objective grounds to believe that the private entity in question is in violation of its legal obligations, including those derived from the application of international human rights treaties.

25. The authorities or other legal entities concerned by any action undertaken by the public prosecutor in accordance with paragraphs 23 and 24 should be entitled to make representations and challenge such action before a court.

F. National and international co-operation

26. In fulfilling their mission, public prosecution services should establish and, where appropriate, develop co-operation or contacts with ombudspersons or similar institutions, other national, regional and local authorities, and with representatives of civil society, including non-governmental organisations.

27. There should be support for international co-operation among public prosecution services with similar responsibilities outside the criminal justice system and mutual practical assistance both within and beyond the framework of relevant international treaties.

Explanatory memorandum

Introduction

1. The Council of Europe has played an important role in giving international recognition to the work of public prosecution services in its member States. Recommendation Rec(2000)19 to member States on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000, is widely seen as a landmark in this process by establishing a series of guiding principles for the attention of governments of member States on how their criminal prosecution services should be organised and fulfil their role, particularly in their relations with the executive, legislature, judiciary and police. Moreover, on 13 July 2005, the Committee of Ministers established the Consultative Council of European Prosecutors (CCPE) of the Council of Europe with the task of preparing opinions on issues relating to the prosecution service and promoting the effective implementation of Recommendation Rec(2000)19.

2. While the principal action of the public prosecution service in member States of the Council of Europe lies within the criminal field and its criminal law competences, the public prosecution service does have a role outside the criminal justice system in many member States; a role that varies to a lesser or greater extent depending on the specific national legal order of each country. While the present recommendation does not specify the concrete competences outside the criminal justice system that might or might not be conferred on public prosecutors, it does establish a series of guiding principles on their role outside the criminal justice system, particularly in such areas as civil and administrative law.

3. Together, the two recommendations aim to provide a comprehensive set of principles defining the status, powers and practice of the public prosecution service for all areas of law in a modern democratic State. Whatever the nature of their responsibilities, whether they be in criminal law, civil law, administrative law or other branches of law, it behoves public prosecutors to carry them out in full accordance with the rule of law, human rights and other principles that are fundamental to all democratic societies.

What are the competences of public prosecutors outside the criminal justice system and how extensive are they?

4. More so than in the area of criminal law competences, an understanding of how the principles contained in the recommendation might apply to the competences of the public prosecution service outside the criminal justice system requires an appreciation of the diversity of the legal systems of member States. For while it is clear that some member States limit the role of public prosecutors exclusively to the criminal law field, for those that do not, the precise competences and their extent vary considerably from one State to another. Moreover, the task of comparative analysis is complicated by the differing characterisation in member States of public prosecution services, notably differences of conception and role between the public prosecutor or Attorney General's Office in common law systems, the *ministère public* in systems inspired by the French legal model and the *Prokuratura* with wide-ranging responsibilities in eastern European legal systems such as those of the Russian Federation, Ukraine and the Republic of Moldova.

5. A helpful analysis is set out in a 2008 report prepared at the request of the CCPE. This analysis draws upon the replies to a questionnaire submitted by 43 member States in 2007.² The report illustrates the diversity of the legal systems by distinguishing those member States whose prosecution services:

- “– are without non-criminal law competences, or
- have only few, not important or special civil law competences, or
- have both civil law and administrative law competences to initiate court actions, or
- have extra court administrative law competences in addition to civil law and administrative law competences to initiate court actions.”

6. Civil law competences exercised through court action are conferred on public prosecutors in more than half of the member States, those with legal systems within the French and German law families, although in some

2. *Role of the public prosecution service outside the field of criminal justice*, Dr András Zs. Varga (document CCPE-Bu (2008)4 rev).

cases the responsibilities are limited. Supervisory powers of the public prosecutor in relation to administrative bodies and other legal entities are an established feature of the Prokuratura and of those member States which have such a body, although not exclusively. In general, common law and Scandinavian systems do not include non-criminal law competences within the remit of the public prosecution service. The responsibilities it might have had outside the criminal justice system have been conferred on other specialised agencies such as ombudsmen.

7. By way of illustration, common civil law responsibilities for a public prosecution service include the validation and annulment of marriages, the protection of children or adults without legal capacity, and the registration and dissolution of associations and foundations. In commercial law, responsibilities of the public prosecution service include registration of commercial bodies, bankruptcy, insolvency and winding-up of companies. In legal systems that confer a role on the public prosecutor in respect of labour law, this concerns particularly providing legal representation to workers before the courts. Another group of competences of the public prosecutor concerns the legal control of the public administration and other legal entities in terms of ensuring conformity of their activities with the law. These include the possibility to appeal or otherwise challenge the decisions of different administrative bodies, and to verify the constitutional conformity of national law by means of an appeal to a constitutional or supreme court. In general these competences are conferred on the public prosecutor for reasons of public interest and the protection of human rights, and are usually exercised before a court.

Sources

8. The recommendation draws upon a number of sources. These include the European Convention on Human Rights (ETS No. 5, hereinafter “the Convention”) and the above-mentioned Recommendation Rec(2000)19. The work of the CCPE, including that of the Conferences of Prosecutors General of Europe that preceded it, was also an important source, particularly CCPE Opinion No. 3 (2008) on the role of prosecution services outside the criminal law field, CCPE Opinion No. 4 (2009) on the relations between judges and prosecutors in a democratic society³ and CCPE Opinion No. 5 (2010) on public

3. Joint opinion with the Consultative Council of European Judges (CCJE).

prosecution and juvenile justice – the Yerevan Declaration. Parliamentary Assembly Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law and the 2010 report of the European Commission for Democracy through Law (Venice Commission) on European standards as regards the independence of the judicial system (Part II: The prosecution service) were also taken into account.

9. Although the case law of the European Court of Human Rights (hereinafter "the Court") in these matters is not very plentiful, its well-established general principles, particularly in respect of the right to a fair trial, should serve as guidance for member States when drawing up legal standards governing the organisation and the rules of intervention of the public prosecution service. Account was taken, *inter alia*, of the following judgments and decisions (listed in chronological order): *Lobo Machado v. Portugal*, 20 February 1996, Reports of Judgments and Decisions 1996-I; *Vermeulen v. Belgium*, 20 February 1996, Reports of Judgments and Decisions 1996-I; *K.D.B. v. the Netherlands*, 27 March 1998, Reports of Judgments and Decisions 1998-II; *Brumărescu v. Romania* [GC], No. 28342/95, ECHR 1999-VII; *Yildirim v. Austria* (dec.), No. 34308/96, 19 October 1999; *Kress v. France* [GC], No. 39594/98, ECHR 2001-VI; *Blanco Callejas v. Spain* (dec.), No. 64100/00, 18 June 2002; *Göç v. Turkey* [GC], No. 36590/97, ECHR 2002-V; *Asito v. Moldova*, No. 40663/98, 8 November 2005; *Martinie v. France* [GC], No. 58675/00, ECHR 2006-VI; *Stankiewicz v. Poland*, No. 46917/99, 6 April 2006; *Paulík v. Slovakia*, No. 10699/05, ECHR 2006-XI (extracts); *Gregório de Andrade v. Portugal*, No. 41537/02, 14 November 2006; *Batsanina v. Russia*, No. 3932/02, 26 May 2009; *Korolev v. Russia* (No. 2), No. 5447/03, 1 April 2010; *Ewert v. Luxembourg*, No. 49375/07, 22 July 2010; and *Moldovan and Others v. Romania* (dec.), Nos. 8229/04 and others, 15 February 2011. See also the other judgments and decisions cited below in the commentary on the individual paragraphs of the recommendation.

Structure of the recommendation

10. Detailed principles are set out in the appendix to the recommendation which comprises four sections: common principles; principles applicable to specific responsibilities and powers of public prosecutors outside the criminal justice system; principles related to the role of public prosecutors as a supervisory organ; and national and international co-operation.

Publication and dissemination

11. Member States are encouraged to arrange for the dissemination of this recommendation and its explanatory memorandum. Moreover, in order to facilitate evaluation of its impact at national level and give follow-up to its provisions, they may wish to consider establishing indicators and other reporting mechanisms.

Commentary on individual paragraphs of the appendix to the recommendation

Introductory remarks

12. The operative part of the recommendation calls on member States to take full account of the principles in the appendix in order to ensure that where public prosecution services have a role outside the criminal justice system they carry out this role in full accordance with the rule of law. The recommendation does not oblige member States to introduce any functions for public prosecutors outside the criminal law field.

13. As the recommendation is not legally binding, any phrase that could otherwise be interpreted as an obligation of some kind imposed on member States should in fact be construed as guidance on how they should implement the principles concerned.

14. In the English version of the recommendation, “individual” denotes both natural and legal persons and translates the French term “justiciable”. Furthermore, in the French version of the recommendation, the term “ministère public” is used almost invariably to denote both the service or office of the public prosecution and individual prosecutors, whereas in the English version the distinction is maintained by using the two terms in accordance with the context.

Scope

Paragraph 1

15. Although member States may entrust entities other than the public prosecution service with tasks and competences of a similar nature to those covered by this recommendation (for example, ombudsmen), its provisions apply solely to public prosecutors and the public prosecution service.

Mission of public prosecutors

Paragraph 2

16. An overview of the functions fulfilled by the public prosecution services in Council of Europe member States (see paragraphs 4 to 7 above) brings to light their considerable diversity and the difficulty of classifying them in clear and precise categories. However, these services share many common features. It is generally accepted that, outside the criminal justice system, public prosecutors can decide whether to initiate or continue legal proceedings, support actions before the courts, and appeal or conduct appeals against court decisions.

17. In some legal systems, the public prosecutor's office is also empowered, *inter alia*, to uphold the rule of law, protect individuals' rights and freedoms, protect the assets and interests of the State, protect the public or general interest, promote harmonisation of the courts' case law and fulfil a supervisory role. In some member States (Belgium and France, for example), the public prosecutor is required, as part of its role to protect the public or general interest, to ensure the protection of the interests of particularly vulnerable persons.

18. It is to be noted that the recommendation is silent on the tasks and competences that might be conferred on public prosecutors. It is for the member States, within their margin of discretion, to determine the mission entrusted to their public prosecutors outside the criminal justice system. However, whatever the mission, it must always be subject to a requirement that it should be exercised in accordance with the rule of law and not in a manner contrary to the protection of human rights and fundamental freedoms.

Common principles

Paragraph 3

19. This principle is in accordance with the case law of the Court. It is the law, with its characteristics of accessibility, clarity, precision and certainty, that must constitute the source of the tasks and competences of the public prosecution service. It therefore follows that within national legal systems any source other than the law that assigns tasks and competences to public prosecutors in non-criminal law matters should be abandoned.

Paragraph 4

20. Paragraph 4 of the recommendation sets out the principles (legality, objectivity, fairness, impartiality) applicable to public prosecutors vested with non-criminal law powers and responsibilities. Nonetheless, in this context, the concept of impartiality requires some clarification. What is envisaged here are situations where the public prosecutor brings a legal action before the courts to defend a position in the public interest that also furthers the interests of one or more parties to proceedings. For the purposes of the recommendation, a “court” comprises all independent and impartial bodies within the meaning of the case law of the Court (see *Grievés v. the United Kingdom* [GC], No. 57067/00, paragraphs 69 to 73, ECHR 2003-XII (extracts)).

21. The impartiality of justice has an essential role for the rule of law according to the Court (see *Delcourt v. Belgium*, 17 January 1970, paragraph 31, Series A No. 11). Every measure should be taken to avoid any conflict of interest. Should, despite all precautions, a conflict occur, it should be resolved taking account of the case law of the Court on the indivisibility of the public prosecutor’s office.

22. In the non-criminal law field it is, however, necessary to clarify the general principle of impartiality of the public prosecutor which should be on a par with that required for judges, the same safeguards being applicable.⁴ For example, under some legal systems, public prosecutors have to submit claims for damages in criminal proceedings against defendants so as to compensate victims for any collateral damage they might have suffered as a result of the offence for which the defendant has been found guilty, or initiate court proceedings to determine a child’s paternity. In such cases, the public prosecutor must be impartial in its reasons for making the application to the court.

Paragraph 5

23. Paragraph 5 reminds member States that Recommendation Rec(2000)19 is an essential source of the principles that should inspire the conduct and activities of public prosecutors outside as well as inside the criminal justice system. The paragraph draws attention to those principles of Recommendation Rec(2000)19 that should be applied *mutatis mutandis*, that

4. See also Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, of 17 November 2010.

is in an appropriate manner, to the conduct and activities of public prosecutors outside the criminal justice system, namely the principles relating to their safeguards, to their relationship with the State (executive, legislature, judiciary), and to their duties and responsibilities.

Safeguards to be provided to public prosecutors for carrying out their functions

24. The relevant paragraphs of Recommendation Rec(2000)19 are 4 to 7, 9 and 10. In summary, they require that member States take effective measures to guarantee that public prosecutors can fulfil their professional duties and responsibilities under adequate legal and organisational conditions and with adequate resources (paragraph 4). These measures are outlined below.

Recruitment, promotion and transfer

- i. Fair and impartial procedures should govern the recruitment, promotion and transfer of public prosecutors. Promotion and mobility should be governed by known and objective criteria and by the needs of the service (sub-paragraphs 5.a, b, c).

Conditions of service

- ii. Pay, tenure and pension entitlement should be commensurate with the crucial role of public prosecutors (sub-paragraph 5.d).
- iii. Disciplinary proceedings should be governed by law and subject to independent and impartial review. There should be access to a satisfactory grievance procedure (sub-paragraphs 5.e, f).
- iv. Public prosecutors should have an effective right to freedom of expression, belief, association and assembly (paragraph 6).
- v. Appropriate training should be provided to public prosecutors before and after appointment (paragraph 7).

Organisation and internal operation

- vi. Impartiality should govern the organisation and internal operation of the public prosecution service (paragraph 9).
- vii. Public prosecutors may request that instructions addressed to them are made in writing (paragraph 10).

- viii. An internal procedure should be available in cases where a public prosecutor considers his or her instructions to be illegal or run counter to his or her conscience (paragraph 10).

The relationship between public prosecutors and the executive and legislature

25. The relevant paragraphs of Recommendation Rec(2000)19 are 11 to 14. They are outlined below.

Non-interference

- i. Public prosecutors should be able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. They should not interfere with the competence of the legislative or executive powers. The public prosecution service should provide periodic and public accounts of all its work (paragraphs 11 and 12).
- ii. In States where the public prosecution service is independent of the government, the nature and scope of its independence should be established by law (paragraph 14).

Public prosecution service, part of or subordinate to the government

- iii. The nature and scope of the powers of the government with respect to the public prosecution service should be established by, and exercised in accordance with, the law. General instructions to the public prosecution service should be in writing and published; and instructions in relation to a specific case should carry adequate guarantees of transparency and equity (paragraph 13).

The relationship between public prosecutors and court judges

26. The relevant paragraphs of Recommendation Rec(2000)19 are 17 to 20. In summary, they require that the independence or impartiality of court judges should not be put in doubt by the legal status, competences and procedural role of public prosecutors (paragraph 17). In particular,

- i. public prosecutors should not cast doubts on judicial decisions or hinder their execution, except when exercising their rights of appeal or invoking some other declaratory procedure (paragraph 19);

- ii. during court proceedings, the public prosecutor should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice (paragraph 20).

Duties of public prosecutors towards individuals

27. The relevant paragraphs of Recommendation Rec(2000)19 are 24 to 26 and 28 to 36. They are outlined below.

Performance of duties

- i. Public prosecutors should: carry out their duties fairly, impartially and objectively (sub-paragraph 24.a), protect human rights (sub-paragraph 24.b), abstain from discrimination on any ground (paragraph 25), ensure equality before the law (paragraph 26) and respect the principle of equality of arms (paragraph 29).
- ii. Public prosecutors should not present evidence that they know or believe on reasonable grounds to have been obtained through recourse to methods contrary to the law (paragraph 28).
- iii. Measures taken by the public prosecutor that cause an interference with an individual's fundamental rights and freedoms should be subject to judicial control (paragraph 31).
- iv. Codes of conduct should bind public prosecutors in the performance of their duties (paragraph 35).

Victims, witnesses, third parties

- v. Information obtained from third parties should be kept confidential unless disclosure is required in the interests of justice or by the law (paragraph 30).
- vi. Proper account should be taken of the interests of witnesses, particularly with respect to their life, safety and privacy (paragraph 32).
- vii. Victims whose personal interests are affected should be informed by the public prosecutor of their rights and developments in the procedure and proper account taken of their views and concerns (paragraph 33).
- viii. Interested parties should be able to challenge the decisions of public prosecutors (paragraph 34).

Internal organisation

- ix. Member States should give preference to a hierarchical organisation of the public prosecution service, define general guidelines for the implementation of policy and define general principles and criteria against which decisions in individual cases should be taken. They should also make such information public (paragraph 36).

Paragraph 6

28. The present recommendation recognises that the duty of confidentiality of public prosecutors may vary according to the different legal cultures in member States. However it seeks, in line with a general trend towards transparency and openness in the administration of justice, to encourage, where possible, greater transparency and openness on the part of the public prosecution service. Of course, information from third parties and personal data that might identify individuals or put them in danger or compromise their privacy should remain confidential. Likewise, it is not intended that procedures or proceedings be made or held in public where, in the interests of one or more of the parties or for other reasons allowed by Article 6 of the Convention, they are held in camera.⁵

Paragraph 7

29. Codes of ethics reflect the standards of professional behaviour which are expected of persons working in a particular context and provide guidance on how they should behave or carry out their responsibilities. Typically they will set standards of behaviour beyond those provided by legal obligation, although in some situations they can be incorporated into regulations governing a person's employment or ability to exercise a profession.

30. The codes of ethics referred to in paragraph 7 would include guidance to public prosecutors on how to apply the principles set out in the recommendation to the exercise of their responsibilities, particularly in relation to individuals and the public interest. The codes of ethics would also seek

5. Judgment shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice (Article 6 of the Convention).

to promote the very highest standards of integrity, professionalism and respect for the individual.⁶

31. It is not the purpose of this principle to recommend member States to adopt a specific code of ethics for public prosecutors with competences outside the criminal justice system where general codes already exist for either the legal profession as a whole or specifically for the public prosecutor's office (for example, within the framework of Recommendation Rec(2000)19, paragraph 35). However, all relevant provisions in already existing codes of ethics should be extended to public prosecutors with non-criminal law competences.

Paragraph 8

32. Justice is one of the key values and fundamental pillars of a State based on the rule of law, and it must be delivered in an appropriate manner and within a reasonable time. Paragraph 8 concerns the provision of the necessary resources to support the public prosecution service in exercising its functions outside the criminal justice system.

33. Although, institutionally, the position of the public prosecution service within the national legal framework varies depending on each member State's legal culture and tradition, where the service is entrusted with powers and responsibilities outside the criminal justice system, the relevant State authorities should make available the necessary financial and human resources in order to secure the proper performance of these powers and responsibilities. To this end, it is recommended that States, within the limits of available national resources, endow their public prosecution service with the necessary financial and human resources to allow it to fulfil its mission effectively. In this context, a particular reference is made to the need for appropriate training. Such training, both initial and in-service, might extend to the sharing of experience between member States and drawing upon each other's best practice.

34. The present recommendation does not refer to the internal organisation of the public prosecution service. It is assumed that, in general, States will separate responsibilities within and outside the criminal justice system between different units or departments within the service. However, the

6. See also Recommendation Rec(2000)10 of the Committee of Ministers to member States on codes of conduct for public officials and its explanatory memorandum.

extent to which this is done will depend on the relative importance of these respective responsibilities and the need for specialisation within the public prosecution service. For some member States, efficiency and effectiveness will be better achieved by requiring or encouraging individual prosecutors to accept responsibilities in both fields.

Paragraph 9

35. Circulars are a standard means of achieving consistency in the interpretation and application of laws, rules and policy, particularly in the context of a public prosecution service composed of many individual prosecutors working in different regional and local offices, spread over a large territorial area.

Principles applicable to specific responsibilities and powers of public prosecutors outside the criminal justice system

36. In some member States, the public prosecutor can act as a principal party (claimant, plaintiff or defendant) to the proceedings, join or intervene in the proceedings, or both. The public prosecutor may also be empowered to represent individuals in certain specified cases and will, in such cases, act as a principal party in the proceedings. In France, and in some other member States, the ability of the public prosecutor to act as a principal party and as a “joined” party is provided for by law. In other member States, the public prosecutor may need to seek the court’s leave before joining or intervening in the proceedings. The principles outlined in this section apply to both cases.

In relation to access of the public to justice and legal remedies (paragraphs 10 and 11)

Paragraph 10

37. Public prosecution services are assigned a mission outside the criminal justice system on the basis of the added value which member States consider that their involvement brings, not only for the pursuit of the State’s interests but also for the promotion and the protection of human rights. It is essential that their activity should be seen, and perceived by the public, as a factor contributing to the defence of the society’s fundamental values, which would otherwise be impaired, and to the protection of human rights, especially those of the most vulnerable individuals (for example children,

juveniles, adults without legal capacity and the elderly). However, no power conferred on the public prosecution service in the non-criminal field should have the effect of restricting an individual's right of access to a court. The purpose of paragraph 10 is to underline this point.

Paragraph 11

38. The principle in paragraph 11 applies to those exceptional situations envisaged by the "Bordeaux Declaration"⁷ where prosecutors are vested with judicial functions.

39. This paragraph concerns essentially those jurisdictions where the public prosecutor has non-contentious civil law responsibilities. In France, for example, these include a wide range of situations such as the appointment of certain members of departmental commissions for the committal of persons to a psychiatric hospital, supervising the work of bailiffs, solicitors and notaries, the creation and appointment of auctioneers, supervising the execution of disciplinary penalties against lawyers, checking the records of commercial court registrars, and inspections of labour tribunals (conseils de prud'hommes). The public prosecutor is also to be officially notified of certain acts, for example, the opening of a private school.

40. In these situations, it is crucial for the interests of a democratic society, particularly where the rights of persons are at stake, that the public prosecutor acts independently from any other power. The involvement of the public prosecutor in such matters should, in general, be strictly defined by law and under no circumstances should it prejudice – or appear to prejudice – the parties' right to appeal. In the same vein and in the interests of the transparency of justice, decisions of the public prosecutor should be reasoned and should be duly communicated to the persons concerned, in accordance with the law and/or practice of each member State. For example, this might be either on the initiative of the public prosecutor or of the court.

7. Opinion No. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors (CCPE), adopted in Brdo (Slovenia) on 18 November 2009, also called "Bordeaux Declaration". Paragraph 7 provides: "Any attribution of judicial functions to prosecutors should be restricted to cases involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants' right to a decision on such cases by an independent and impartial authority exercising judicial functions." Work began on drafting the declaration in Bordeaux (France) and was completed in Brdo (Slovenia).

In relation to court proceedings where the public prosecutor is a principal party (paragraphs 12 to 16)

41. In cases where the public prosecutor acts as a principal party (plaintiff, claimant or defendant), it does so as a party to the proceedings like any other. It may be as plaintiff where it introduces an action, bringing its adversary before the court, or as a defendant where a plaintiff directs an action against the public prosecutor's office. Like other parties, the public prosecutor may appeal against decisions that it does not consider well-founded. In some legal systems, the prosecutor may also appeal or apply for judicial review on behalf of the public interest even in cases where it has secured the result it sought, whether as plaintiff or defendant, or even as a "joined" party. In these cases, rules common to other parties will nonetheless govern the appeal of the public prosecutor.

Paragraph 12

42. The scope of the principle set out in paragraph 12 is very clear. It establishes a requirement of equality of arms between parties to the litigation. This does not imply a requirement for a geometrical equality but rather, as the Court has held on many occasions, the procedural equality of the parties. That is, one party should not be clearly disadvantaged in relation to the other(s). In any case where the public prosecutor wishes to support the arguments of one or more parties against those of another, every effort should be made to guarantee transparency and respect for the adversarial principle.

Paragraph 13

43. The principle in paragraph 13 is based, in particular, on Article 6 of the Convention and must be interpreted in the light of the principle of a fair trial and of the principles of impartiality, objectivity and transparency as mentioned in paragraphs 4 and 6 of the recommendation. The duty of parties in a case to disclose information and evidence is a key factor in the adversarial nature of court proceedings. It echoes paragraph 29 of Recommendation Rec(2000)19 which requires the public prosecutor to disclose any information which it may possess and which might affect the justice of the proceedings. However, as mentioned in the explanatory memorandum to Recommendation Rec(2000)19, an exception must be made for those cases where an overriding public interest justifies the

confidentiality of certain documents or information, for example where the law provides that certain sources of information must not be disclosed for security reasons, or for reasons of privacy of a (third) party. Such cases must remain an exception.⁸

Paragraph 14

44. In some member States, the public prosecution service has the power to pursue pre-trial inquiries, often in the form of checks or inspections (for example of a company or organisation's records). This information obtained by the public prosecutor as a result of such inquiries can form the basis of subsequent court proceedings. Paragraph 14 establishes a clear requirement that such pre-trial inquiries (whatever their nature) should be provided for by law in order to fully respect the principle of legality. Any person subject to such inquiries should be able to ascertain his or her rights and be informed of the context in which the inquiries are being conducted. Moreover, the public prosecutor should be open about its actions and not seek to secure an unreasonable procedural advantage by withholding until the last minute information obtained as a result of such inquiries.

45. As the pre-trial inquiry may have far-reaching implications for the interested parties, they should be given an opportunity to rectify misleading or incorrect information that might have been acquired or seek specialised assistance or representation. For example, where the inquiry concerns a child and his or her family life, the parents should be able to seek the help of child welfare organisations. Such safeguards can be in the general or public interest as well as in the best interests of the parties concerned. However, such safeguards should not prevent action by the public prosecutor to pre-empt the destruction or disappearance of evidence. In these cases, procedural rules should allow the court to assess the action taken by the public prosecutor at an early stage and its implications for the conduct of any future court proceedings.

46. The misconduct of pre-trial inquiries by the public prosecutor, or the appearance of such misconduct, may give rise to questions about the fairness of the proceedings and, in particular, whether or not there has been an interference with the requirement, derived from the principle of equality

8. Recommendation Rec(2000)19 and explanatory memorandum, Council of Europe, April 2001, p. 37.

of arms, that each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a disadvantage in relation to his or her opponent.⁹ In order to counter this risk, member States may wish to consider establishing rules to govern the circumstances and manner in which the public prosecutor service should conduct pre-trial inquiries.

Paragraph 15

47. The principle laid down in paragraph 15 derives from the Court's case law. Within their margin of appreciation and according to their legal traditions, consistent with rule-of-law principles, member States are free to confer on public prosecutors competences permitting them to represent before the courts those individuals for whose benefit the law grants this possibility. Nonetheless, it is for the person concerned to decide when to end this power of representation.

48. The public prosecutor is also under no obligation to continue representing a party where it deems it preferable to withdraw, on account of a court decision or for some other justified reason. Even where this individual is pursuing his or her own interests, there could be a question of principle affecting the public or general interest, in which case the public prosecutor may wish to remain in the proceedings.

49. Representation of an individual by the public prosecutor implies that he or she is properly informed by the public prosecutor of the relevant procedural steps affecting his or her interests. Likewise, should the public prosecutor decide to withdraw, the person concerned should be informed of its intention to do so in a timely manner. This entitlement to information is an essential principle underlying paragraph 15 as the public prosecutor should not act on a person's behalf without that person being properly informed.

50. Similarly to paragraph 10, the principle in paragraph 15 is worded so as to strike a fair balance between the individual's right of access to a court and the statutory rights and obligations of public prosecutors, notably those having the status of a judicial officer (for example, in France).

9. See *Bulut v. Austria*, 22 February 1996, paragraph 47, Reports of Judgments and Decisions 1996-II.

Paragraph 16

51. The purpose of the principle in paragraph 16 is to place, as far as possible, the public prosecutor on the same footing as other parties in respect of rights of appeal and review of a court's decision.

In relation to court proceedings where the public prosecutor intervenes or is joined as a party (paragraphs 17 to 21)

52. The public prosecutor's office intervenes or is joined as a party when it wishes to inform the court of its opinion on the application of the law in relation to proceedings in which it is not a principal party. In some legal systems the public prosecutor's office must be formally notified of the conduct of proceedings in certain, specified circumstances. In France and in the Netherlands, for example, these include actions relating to paternity, the guardianship of minors, the legal protection of adults, the authority to undertake psychiatric care without the patient's consent, and to insolvency and bankruptcy proceedings.

53. In these cases, the public prosecutor will not take part in the conduct of the proceedings, and might not, in some legal systems, even participate in the hearing. Instead, the public prosecutor's office will submit its opinion in writing to the court or orally, where it appears during the hearing. Here, the public prosecutor's role is not as a plaintiff or as a defendant; nor is its role to oppose one or another of the principal parties. Rather, the public prosecutor limits it to giving an opinion on the issues in dispute from the perspective of the public interest. In this respect, the public prosecutor's role might be seen in terms of acting as a legal advisor to the court or as an *amicus curiae* (see paragraphs 55 and 56 below).

54. In some countries, for example in France and in the Netherlands, the public prosecutor can take advantage of information and documents that have not been made available to the principal parties to the action or of whose existence they are unaware, provided of course that the adversarial principle between the principal parties is respected. The case law of the French Cour de cassation requires the written opinion of the public prosecutor to be made available to all parties at least on the day of the hearing and before it commences, and the judge can always adjourn the hearing in order to give the parties time to consider the opinion and reply. As a joined or intervening party, the public prosecutor cannot modify the dispute as pleaded or defended by the parties, limiting it to commenting on the legal

basis and outcome of the dispute. The public prosecutor must raise issues of public order or interest, for example the application of foreign law, even if the principal parties do not do so.

55. In some member States, the public prosecutor is entitled to present its opinion before a court without being involved in the case as a party (*amicus curiae*). This role can be compared to that of the advocates-general of the Court of Justice of the European Union who act publicly and impartially. Thus, in performance of such a role, the public prosecutor represents neither the parties of the case nor the public interest as a party.

56. Where the public prosecutor intervenes as *amicus curiae*, its role should be limited to an explanation of the legal regulations to be applied and to the expression of its opinion on how the relevant legal instruments should be interpreted. The opinion of the public prosecutor should not have any binding effect on the court. Consequently, the court is entitled to accept or reject freely the opinion of the public prosecutor. Since an opinion expressed by the public prosecutor may influence the judgment of the court, the parties involved in the case should have full knowledge of this opinion and the opportunity to comment on it.

Paragraph 17

57. This paragraph proposes that the parties to the proceedings should be informed either by the public prosecutor or by the court of the decision of the public prosecutor to intervene or to apply to be joined to the proceedings. This principle derives from the adversarial principle enshrined in Article 6 of the Convention and is aimed at preventing decisions that come as a surprise to the parties.

58. Here again, law and procedure in the member States vary. Some member States have a clear definition as to when and how the public prosecutor can intervene or join a court action (see the example of France above), whereas in other States it is practice rather than law that governs the power of the public prosecutor to intervene. However, in all cases, the general principle is that of informing the parties to the proceedings, either through the public prosecutor or through the court, of the decision of the public prosecutor to intervene or to be joined to the proceedings.

Paragraphs 18 and 19

59. Paragraphs 18 and 19 refer to the opportunity to comment on the written opinion of the public prosecutor and to submit counter arguments for the purpose of both legal clarity and transparency. Some member States have recently adjusted their legislation so as to clearly underline that such opinions are not binding on the court. In some member States, it is clearly provided that the opinion of the public prosecutor should be made available to the parties of the case and that they should have an opportunity to comment on it.

60. It should also be understood, for the purposes of this recommendation, that where the public prosecutor presents a written opinion before the court hearing, the opinion should be made available to all parties in sufficient time for it to be considered, and that, if it is not, the hearing might be adjourned.

61. In some cases, it is preferable that the public prosecutor presents a written opinion to the court supported by evidence which may encourage the parties to reach a settlement.

62. The principle in paragraphs 18 and 19 and other principles in this sub-section are based on the right to a fair trial and the right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see *Borgers v. Belgium*, 30 October 1991, Series A No. 214-B; *Lobo Machado v. Portugal*, 20 February 1996, Reports of Judgments and Decisions 1996-I; *Vermeulen v. Belgium*, 20 February 1996, paragraph 33, Reports of Judgments and Decisions 1996-I; *Nideröst-Huber v. Switzerland*, 18 February 1997, Reports of Judgments and Decisions 1997-I; *Van Orshoven v. Belgium*, 25 June 1997, paragraphs 37, 38 and 41, Reports of Judgments and Decisions 1997-III; *K.D.B. v. the Netherlands* as well as *J.J. v. the Netherlands*, 27 March 1998, Reports of Judgments and Decisions 1998-II; *Kress v. France* [GC], No. 39594/98, paragraph 65, ECHR 2001-VI; and *Fretté v. France*, No. 36515/97, ECHR 2002-I).

Paragraph 20

63. This paragraph supports the well-established case law of the Court, namely that the public prosecutor should not withdraw with the court even

if it does not actually participate in the court's deliberations. The parties to the proceedings cannot be expected to have confidence in the impartiality of the court if the public prosecutor is seen to accompany the judge or judges when they withdraw to deliberate.

Paragraph 21

64. This paragraph has the same purpose as paragraph 16. Although the public prosecutor's office is not a principal party to the proceedings, some legal systems provide the public prosecutor with the power to seek a review of a court decision where the public prosecutor considers that there is an issue of public interest at stake.

In relation to the principles of legal certainty and res judicata

Paragraph 22

65. The principles of legal certainty and of res judicata are essential in a democratic society. Paragraph 22 seeks to preserve the inviolability of these principles.

66. For the purposes of paragraph 22, a court decision is understood as being final when all appeal processes and/or domestic remedies (for example, cassation or review) available to the parties have been exhausted or the parties have allowed the time limits for lodging an appeal to lapse. The final decision of a court which has decided a case on the merits, against which no ordinary appeal lies, constitutes res judicata. Once final, judgment should be irreversible. The special prerogative of the public prosecutor to seek to have nullified a final (irreversible and perhaps executed) judgment was found by the Court to breach the right to a fair trial under Article 6, paragraph 1, of the Convention (see *Brumarescu v. Romania*, Application No. 28342/95). The Court did not exclude the possibility that a special remedy against a final judgment might serve the public interest, but maintained that a fair balance between the interests had to be ensured.

67. There are some exceptions, albeit limited, to the above-mentioned rule. In its Recommendation R (2000) 2, the Committee of Ministers recommends that member States re-examine or reopen certain cases at domestic level

following judgments of the Court.¹⁰ It is, however, emphasised that any re-examining or re-opening should be exceptional and clearly justified and should be intended to pursue the fundamental interests of the rule of law.

68. However, the interpretation of what constitutes the finality of a court decision can vary between different member States' legal systems. There are legal systems where a main distinction is made between "ordinary" legal remedies (appeal on law and facts to a superior court) and "exceptional" legal remedies (re-opening of the case on facts or motion for cassation to the highest court level on a question of law). If such a distinction is applied, the rule on finality may be limited to the exhaustion of the ordinary remedies (or to the expiration of the relevant time limit without an appeal being submitted). In this case, the "exceptional" or extraordinary legal remedies are understood as special instruments for supervising the correctness of the "final" decision. However, the right to apply for this supervisory remedy is usually granted equally to all parties to the proceedings and within the same time limits. In legal systems where no such distinction is drawn, a judgment is final once all appeal processes and/or domestic remedies (for example, cassation or review) available to the parties have been exhausted or the parties have allowed the time limits for lodging an appeal to lapse without submitting an appeal.

69. In some other member States, even where the public prosecutor has not been involved in an adjudicated case, the public prosecutor is entitled to submit a special motion to have the final judgment of the court nullified. This role is different from that of the *amicus curiae* (see paragraph 55 above) where the prosecutor is not a party and expresses only a non-binding opinion, or that of an interested party.

70. In order to have the principle of equality of arms fully observed, the recommendation requires that the parties to the original proceedings be informed of the review proceedings and, should they so wish, given the opportunity to be joined. However, in the framework of certain review proceedings, it is possible to derogate from this principle where the review does not affect the rights and obligations of the parties as determined by

10. Recommendation R (2000) 2 of the Committee of Ministers to member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, of 19 January 2000. See also Recommendation Rec(2004)6 of the Committee of Ministers to member States on the improvement of domestic remedies, of 12 May 2004 (see sub-paragraph II of the operative provisions and paragraph 7 of the appendix).

the decision under review (for example, an appeal in the interest of the law in Belgium and the Netherlands).

Role of public prosecutors as a supervisory organ

71. This section determines the principles that should govern the action of public prosecutors when they act as a supervisory organ. This role, where it exists, varies considerably from one member State to another, depending on specific legal traditions, rules and practice governing the distribution of State powers and the relationship between the executive, the judiciary and the legislature. As in other areas, the present recommendation does not attempt to define the nature of the supervisory role of the public prosecutor's office; rather it limits itself to setting general guidelines to ensure safeguards and guarantees, particularly in cases where these powers are widely drawn.

72. The functions of supervision entrusted to the public prosecutor outside the criminal justice system usually involve ensuring compliance with standards in areas such as competition, employment, public health and safety, anti-discrimination law and, more generally, human rights, management of the environment and of national resources and even the proper conduct of elections and referenda. The following national examples give some idea of the type, breadth and diversity of this supervisory action of public prosecutors in member States.

73. In Hungary, supervision by the public prosecution service may concern administrative authorities as well as civil associations and foundations (not their activity as such, but the legality of their formal functioning). For this purpose, the public prosecutor may require the production of relevant files. Where consent is refused by a private entity, the public prosecutor may apply for a court decision based simply on the entity's lack of co-operation. Administrative bodies are, in general, under a legal obligation to co-operate with the public prosecutor.

74. In the Netherlands and in some other member States, the public prosecutor has an important role with regard to civil status records. In these countries, the public prosecutor is the monitoring and supervisory organ in charge of civil registrars and, in this capacity, supervises both the civil registration services and the civil status registers that these services establish, keep and update and from which they issue documents disclosing the contents of records and registers (copies or extracts of records, family booklets, certificates, etc.). In general, civil registrars have to refer to the public

prosecutor whenever they encounter difficulties in carrying out their activities, and the public prosecutor must then provide them with any necessary instructions. This may, for instance, involve checking that the services are functioning correctly and checking the registers themselves, having errors corrected if necessary, or taking the appropriate steps to remedy them. Most often, the public prosecutor is to be consulted when it is necessary to transcribe foreign records or decisions or to assess their probative value and their consequences with regard to an individual's status. The public prosecutor also makes orders for notes to be added to the records by civil registrars. The important role entrusted to the public prosecutor in these countries is justified by the fact that civil status registers are public registers, and that civil status records are authentic documents (that is records with a very high probative value), which establish and record the events or decisions affecting an individual's personal and/or family status: birth, marriage, partnership, divorce, death, establishment of parentage, adoption, recognition, etc. Keeping civil status registers accurate, up to date and ensuring the reliability of the data they contain, is necessary in order to protect both the public interests of the State and the interests of the persons concerned. Everyone should be able to justify his or her personal and family status, and the State must have at its disposal civil status registers whose content is as accurate as possible and avoid false declarations or fraudulent records as far as possible.

75. In some member States such as the Republic of Moldova, public prosecutors have the power to demand documents, data and other information from legal entities and their officers and employees, irrespective of their type of responsibility. In these countries, the public prosecutor's office also has the power to summon public officials and private persons to appear before it and require oral or written explanations or information. The public prosecutors may also enter the offices of State institutions and public enterprises as well as of other legal entities without a court order.

76. In the Russian Federation, the public prosecutor may request any administrative body to amend or repeal any legal act adopted by it in cases where the public prosecutor deems this act not to be in compliance with the law. If this body refuses to comply with such a request within the period of time established by law, then the public prosecutor is entitled to apply to a court for an order recognising the act as null and void. The public

prosecutor may also submit proposals to the relevant public authorities, aimed at adopting a new legal normative act.

Paragraph 23

77. This paragraph restates, in the specific context of the supervisory powers of public prosecutors, the key principles necessary for the good administration of justice in a democratic State, such as independence, transparency and the rule of law. It is assumed that any action of the public prosecutor in exercise of its supervisory powers that does not pursue a public interest objective, as defined by law, should be considered unlawful. Moreover, in exercising these powers, the public prosecutor should be free from any improper interference, whether from outside or within the public prosecution service.

Paragraph 24

78. This paragraph concerns only the exercise of the public prosecutor's supervisory powers in relation to private entities because of the importance that is attached to protecting private property in a democratic State. Accordingly, in the case of private entities, simple suspicion of wrongdoing is not sufficient. Before the public prosecutor can act, there should be reasonable and objective grounds for so doing. The position of publicly held property is different and the standards of control are necessarily different.

79. In the Netherlands, for example, the public prosecutor has an explicit supervisory role regarding foundations based on the assumption that foundations can easily be misused because the requirements governing their establishment are less strict than in the case of a company. In cases where there are reasonable and objective grounds to believe that the private entity is in violation of its legal obligations, the public prosecutor is authorised to request information and carry out an inspection of the books. If the foundation does not want to co-operate and refuses to provide the requested information or give access for the inspection, the public prosecutor has the possibility (provided for by law) of applying to the court for an order. At the court hearing, the foundation is then able to make representations and challenge the public prosecutor's proposed action before the court.

Paragraph 25

80. This paragraph reaffirms one of the key principles of the rule of law, namely that the actions of public authorities and bodies (as those of any other body or person), in this case those of the public prosecutor, must be subject to judicial control. With a view to avoiding litigation where this can be done, the paragraph suggests that those concerned by the action of the public prosecutor be given the opportunity of first making representations on the reasons for their non-compliance.

National and international co-operation

Paragraph 26

81. Paragraph 26 recognises the importance in modern democratic States of authorities other than the public prosecution service with similar or related responsibilities; for example, the increasing numbers of ombudsmen with responsibility for general or human rights protection, public social and health services, and consumer and environmental protection agencies. Likewise, the role of civil society in protecting individual and collective rights is recognised.

82. This paragraph, therefore, encourages public prosecution services to establish and, where appropriate, develop co-operation or contacts with these important actors in order to better fulfil their mission as set out in paragraph 2 (represent the general or public interest, protect human rights and fundamental freedoms, and uphold the rule of law). By way of example, in the Russian Federation, the Consultative and Scientific Council at the Prosecutor General's Office includes representatives of non-governmental organisations and academic circles in order to exchange views and co-ordinate activities on protecting human rights.

Paragraph 27

83. Recommendation Rec(2000)19 includes detailed measures on the development of international co-operation between public prosecution services in the member States and the provision of mutual assistance (paragraphs 37 to 39) which can be usefully extended, as appropriate, to their work outside the criminal justice system. Steps to further direct contact between public prosecutors with similar responsibilities in different countries mentioned in Recommendation Rec(2000)19 include disseminating

documentation, compiling lists of contact points and appointing liaison officers, establishing regular personal contacts, organising training and awareness-raising sessions, training in foreign languages, developing Internet communication and organising working seminars on questions of mutual aid. Measures on mutual assistance include facilitating the transmission of requests and promoting the specialisation of some public prosecutors in the field of international co-operation. "Beyond the framework of relevant international treaties" includes arrangements and actions based on reciprocity.

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Recommendation CM/Rec(2012)11 on the role of public prosecutors outside the criminal justice system complements Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system which was adopted in autumn 2000. Together these two recommendations set European standards for prosecutorial activities with a comprehensive set of principles defining the status, powers and practice of the public prosecution service for all areas of law in a modern democratic state. Whatever the nature of their responsibilities, whether they be criminal, civil, administrative law or other, it behooves public prosecutors to carry them out in full accordance with the rule of law, human rights and other principles which are fundamental to all democratic societies.

This recommendation draws upon a number of sources as well as on the practice of the prosecution services of many Council of Europe member states that enjoy extensive powers outside the criminal justice system. A report, prepared in 2008 at the request of the Consultative Council of European Prosecutors (CCPE) of the Council of Europe, not only illustrated the diversity among legal systems but also showed that public prosecutors in most of the Council of Europe's 47 member states are vested with duties that extend beyond the criminal justice system of their countries. Such powers are based on the various branches of law, with the aim of protecting the public interest as well as the rights and legitimate interests of individuals, especially members of socially vulnerable population groups.

Overall, the recommendation represents a step forward in strengthening the protection of human rights and fundamental freedoms, as the manner in which public prosecutors exercise their role, inside and outside the criminal justice system, is crucial to the protection of these rights and freedoms.

The Council of Europe is the continent's leading human rights organisation. It includes 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.



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