



Strasbourg, 24 February 2009

CCPE-GT(2009)6

**WORKING PARTY OF  
THE CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS  
(CCPE-GT)**

**Report of the 3<sup>rd</sup> meeting  
Strasbourg, 16-18 February 2009**

Secretariat memorandum  
prepared by the Directorate General of Human Rights and Legal Affairs

**During this meeting, in accordance with the terms of reference received from the Committee of Ministers, the CCPE-GT agreed the structure of Opinion No. 4 on “the relationship between judges and prosecutors” to be drawn up in 2009 together with the Working Party of the Consultative Council of European Judges (CCJE-GT).**

**The CCPE-GT and the CCJE-GT held a one-day joint meeting to co-ordinate their work in these areas.**

## **I. INTRODUCTION**

1. The Working Party of the Consultative Council of European Prosecutors (CCPE-GT) held its 3<sup>rd</sup> meeting from 16 to 18 February 2009 in Strasbourg (Palais de l'Europe). The meeting was chaired by Mr Olivier De Baynast (France). The list of participants appears in Appendix I and the agenda in Appendix II to this report.

## **II. COMMUNICATION BY THE PRESIDENT, MEMBERS OF THE CCPE BUREAU AND THE SECRETARIAT**

2. Mr Olivier De Baynast informed the members of the Working Party that he had represented the CCPE at the Committee of Ministers meeting on 10 December 2008 and that the delegations had paid tribute to the work done by the CCPE. The Committee of Ministers had underlined the importance of the work already accomplished by the drafting of the Opinion No. 1 on “ Ways to improve international cooperation in the criminal justice field” and welcomed the working programme for 2009 – 2010. Special attention had been given to the co-operation with other Council of Europe bodies in view of the harmonisation of the work done by the CCPE in line with other committees and in particular to continuing to give the CDPC the opportunity to comment on CCPE opinions without delaying their transmission to the Committee of Ministers.

3. The President also informed the Bureau members that he had attended the plenary meeting of the CEPEJ on 11 December 2008, at which he had said that the CCPE was willing to assist the CEPEJ in preparing appropriate instruments to analyse the activity of public prosecutors' departments, for example with regard to alternatives to prosecution. The CCPE could envisage work along these lines and present its conclusions at the Bordeaux Conference of European Judges and Prosecutors on 30 June and 1 July 2009.

4. Following the decision taken by the Bureau, the President informed the CCPE-GT members that he will represent the CCPE at the World Summit of Prosecutors General, Attorneys General and Chief Prosecutors in Bucharest (Romania) from 23 to 25 March 2009. The theme of the Summit is “The General Prosecutor - pillar of the contemporary criminal justice system” and the aim of the event is to strengthen the partnership between chief prosecutors and other players in the criminal justice field so as to increase public confidence in the rule of law.

5. The secretariat informed the CCPE-GT members that, after consulting the CDPC, the Committee of Ministers had adopted new terms of reference for the CCPE for 2009, which contained some changes compared to the draft terms of reference adopted by the CCPE at its plenary meeting in October 2008, namely that the CDPC and the CDCJ could submit comments on the opinions adopted by the CCPE before they were forwarded to the Committee of Ministers.

6. With regard to the Bordeaux Conference of European Judges and Prosecutors, the secretariat informed the participants of the new dates negotiated with the National School of Magistrates and the members of the CCJE and the CCPE, namely 30 June and 1 July. The Bureau agreed that the Conference would be preceded by a joint meeting of the CCJE-GT and CCPE-GT in the afternoon of 1<sup>st</sup> July and the CCPE-GT will continue separately on the 2<sup>nd</sup> and 3<sup>rd</sup> July. A further meeting of the working group would be held in late September to finalise the preparation of the draft opinion prepared in the light of the conclusions of the Conference. The plenary meeting would be held in Ljubljana on 18 to 20 November 2009 on the invitation of the Slovenian authorities and would also be a joint CCJE/CCPE meeting.

7. Moreover, the secretariat informed the CCPE-GT members about the state of preparation of the Bordeaux Conference, information received during the Bureau meeting by a representative from the French delegation in charge of the organisation of the event. In this regard, the members were informed that the National School of Magistrates was looking forward to hosting the Conference, particularly in view of the fact that 2009 would be the 50<sup>th</sup> anniversary of the ENM. As a first step in the preparations, the secretariat was invited to draft invitations to this event, together with the French partners. Several delegations underlined the importance of stipulating the profile that participants were expected to have in the invitation, so as to ensure the highest possible level of knowledge and experience of the subject of the conference .

### **III. TIMETABLE FOR THE DRAFTING OF THE CCJE – CCPE JOINT OPINION No. 4 ON THE RELATIONSHIPS BETWEEN JUDGES AND PROSECUTORS**

8. For the drafting part of the Opinion, the CCPE-GT decided to appoint a judge and a prosecutor in charge of a subject/chapter. They could be advised by one or two colleagues. The various contributions should be sent to the Secretariat by the end of March and the secretariat should prepare a joint text by late May. The compiled document should be sent to both Presidents of the CCPE and CCJE for comments.

9. CCPE-GT members think the exercise to draft a joint opinion together with the judges a very challenging one, which also demonstrates the two committees' willingness to co-operate. In terms of documentation for the preparation of such an Opinion, the report written by Professor Peter J.P. Tak on the relationships between judges and prosecutors gives a comparative view of the work and role of judges and prosecutors in the different member States of the Council of Europe and can be a starting point for the drafting.

10. On the structure of the Opinion, the Working Party agreed that the drafters should have in mind the following basic principles:

- the Opinion should be short and conceptual and should follow the main duties of rendering an efficient justice within a reasonable time and with full respect of human rights;
- develop the Recommendation (2000)19 and explore other Council of Europe instruments in this area as well as international legal resources;
- recognise the variety of systems that exist in Council of Europe member States, including the common law and continental systems but also the very special role of Prokuratura in Russian Federation and other CIS countries;

11. Other issues such as the place and importance of the case law of the ECHR, the relationships with the defence lawyers, media and other judicial professions, joint training, ethics and deontology, accountability of judges and prosecutors should also be tackled in the future Opinion.

### **IV. JOINT MEETING CCJE - CCPE**

12. The CCJE-GT and the CCPE-GT held a one-day joint meeting on Tuesday 17 February 2009, which began with Professor TAK presenting his report. The first part of the report looked at the scope of the discretionary power enjoyed by prosecutors and judges with regard to prosecutions, which varied depending on whether these last were governed by the legality or opportunity principle. The expert described the various systems in place, while pointing out that

their functioning varied according to how the rules were interpreted and what exceptions applied. The second part of the report examined the level of dependence or independence, internal or external, of the prosecution service. The expert noted certain trends here, leading to significant changes in the tasks that judges and prosecutors were expected to perform. The third part focused on the relationship between judges and prosecutors through an examination of the adjudicatory function of the prosecution service and the professional status of public prosecutors and judges.

13. Both Working Parties thanked the expert for his report outlining a general approach to the status of prosecutors in Europe. The Italian members of the CCJE-GT and CCPE-GT were unhappy, however, with the subjective manner in which the expert had described the Italian system, referring to the “lack of independence” and “politicisation” and “abuses” in connection with the prosecution service (see in Appendix III to this report the Italian delegation's comments on the TAK report). Some members of the working parties would also have liked to see some examples drawn from common law systems.

14. After the discussions, the two working parties prepared a preliminary structure for the Opinion. It was agreed that members of the two Working Parties would share the drafting of the preliminary draft Opinion as follows, based on the above-mentioned structure:

#### 1) Introduction

- i) The respective roles of judges and prosecutors in society: historical basis and current context (*O. Afonso for the CCJE and C. Visart de Bocarme for the CCPE*)
- ii) Contribution to an efficient justice system that respects rights and fundamental freedoms: existing Council of Europe texts (ECHR, Recommendations, case-law of the European Court of Human Rights), etc. (*G. Reissner for the CCJE, J. M. Da Silva Miguel for the CCPE*)

#### 2) General principles

- i) Safeguards to ensure the (internal and external) independence of judges and prosecutors as a condition for impartiality and objectivity in the performance of their tasks (*P. Mafféi for the CCJE, O. De Baynast and P. McCormick for the CCPE*)
- ii) Rule of law as a condition for prosecutorial and judicial independence (*P. Mafféi for the CCJE, A. Zvyagintsev, V. Zimin and P. Polt for the CCPE*)

#### 3) Status of judges and prosecutors

- i) Ethics and deontology (*A. Arnaudovska for the CCJE, A. Giraldi and H. Range for the CCPE*)
- ii) Training (*A. Arnaudovska for the CCJE, A. Mura, A. Vercher Noguera and R. Toiviainen for the CCPE*)

#### 4) Criminal proceedings

- i) Tasks of the judge and the prosecutor before (the investigation, initiating prosecutions and coercive measures), during (the hearing) and after the trial (execution) (*O. Afonso and A. Arnaudovska for the CCJE, P. McCormick, A. Tasyurt and O. De Baynast for the CCPE*)
- ii) Exercise of the rights of the defence at every stage in the proceedings (*J. F. Cobo Saenz for the CCJE, O. De Baynast and P. McCormick for the CCPE*)

5) Non-criminal proceedings (*D. Sessa for the CCJE, P. Polt, A. Zvyagintsev, V. Zimin and J. M. Da Silva Miguel for the CCPE*)

6) Judges, prosecutors and the media (*N. Engstad for the CCJE, A. Vercher Noguera, J. M. Da Silva Miguel, A. Mura and A. Tasyurt for the CCPE*).

## **V. DISCUSSION OF THE OVERALL WORKING PROGRAMME FOR 2009**

15. The Working Party had the possibility to discuss the programme for 2009 – 2010. The President said that the CCPE was already invited to begin discussing public policies in the field of juvenile justice, particularly in the light of the resolution adopted by the 28<sup>th</sup> Conference of European Ministers of Justice and of the past activities conducted by the Council of Europe in this field. In this regard, a new group of specialist on child-friendly justice has been set-up under the authority of the CDCJ with the aim to draft, in 2009 European guidelines on child-friendly justice.
16. Mrs Sabrina CAJOLY from the Public and Private Law Unit, briefly introduced to the members of the Working Party the mandate of the newly set up Group of Specialists on child-friendly justice (CJ-S-CH) under the European Committee on Legal Co-operation (CDCJ). She pointed out that the Working Group is expected to produce guidelines which will serve as a practical tool for the member States to adapt their judicial systems to specific needs of children in criminal, civil and administrative matters and to ensure that the rights of children to information, to representation and to participation in proceedings are fully respected. The CCPE is invited to send a representative to this Group which will hold its first meeting in May.
17. The Bureau decided to ask Mr Harald Range (Germany) to represent the CCPE at the meetings of this Group.
18. On the topic related to public policies in the field of juvenile justice and with a view to providing a basis for the discussion on a possible Opinion in this field, the Working Party instructed the secretariat to draw up a list of Council of Europe texts on juvenile justice and prosecutors. Once this information had been gathered, the Secretariat would ask Mr Harald Range to prepare a questionnaire on this subject for the attention of the member States.
19. Another part of the CCPE working programme would concern the relationships between prosecutors and the prison administration in the light of the Recommendation (2006)2 on the European Prison Rules. The CCPE might be asked to draft an Opinion in 2010 on this theme. The Working Party was informed about the decision of the Bureau to make preliminary contacts with the CPT secretariat and possibly to make a presentation on the role of prosecutors in the administration of prisons at the next plenary meeting. The Working Party also asked the secretariat to undertake research into the case law of the ECHR on this subject so as to prepare a list of the questions concerning the role of prosecutors in prison administration.
20. The Working Party was informed about the discussion held by the Bureau regarding the celebration of the 10<sup>th</sup> anniversary of the Recommendation 2000(19) in 2010. The French delegation suggested holding a meeting in France with the support of the National Association of Prosecutors to present Recommendation (2000)19, as it was generally thought that little was known about it in the profession. Another solution would be to hold

regular information seminars to raise awareness of this instrument. Other possibilities, such as evaluation by peers or by the countries themselves could be envisaged. A questionnaire aimed at obtaining information from member States on the effective implementation of the Recommendation could also provide a starting point for a more detailed discussion.

## **VI. ANY OTHER BUSINESS**

21. The Working Party was informed about the discussion held by the Bureau regarding the request made by the T-CY to consider the need of specialised prosecutors in the field of cybercrime as well as appropriate training in the field. The Bureau members took note of the last report of the 3<sup>rd</sup> multilateral consultation among the contracting states to the Convention on Cybercrime (ETS No. 185) and, particularly at the request of the T-CY to the CCPE, to consider needs in terms of specialist prosecutors and training for prosecutors in this field. The CCPE Bureau felt it was necessary for prosecutors to be given specialist training in this field. Given its extremely technical nature, this training should also be accessible mainly to people who already had knowledge of and skills in information technologies. The CCPE thought the case for specialised prosecutors needed further justification. However, if this idea was taken on board, it was important that specialised technical services should also be established. The CCPE was prepared to continue discussing this subject, particularly with regard to competences, making just one court responsible for particularly types of proceedings and international co-operation in the field and proposed to continue exchanging information with the T-CY.

## **APPENDIX I**

### **AGENDA**

- 1. Opening of the meeting**
- 2. Adoption of the agenda**
- 3. Communication by the President, members of the Bureau and the Secretariat**
- 4. Timetable for the drafting of the CCJE – CCPE joint Opinion No.4 on the relationships between judges and prosecutors**

**17 February  
Joint meeting CCJE – CCPE**

- 5. Discussion of the comments received and structure of the CCJE – CCPE joint Opinion No.4 on the relationships between judges and prosecutors**
- 6. Comparative report on the relationships between judges and prosecutors in Council of Europe member States**
- 7. Conclusions of the discussion**

**18 February  
Continuation of the Working Group meeting of the CCPE /**

- 8. Discussion of the overall Working programme for 2009**
- 9. Any other business**

## APPENDIX II

## LIST OF PARTICIPANTS

DENMARK / *DANEMARK***Ms Alessandra GIRALDI**, Deputy Chief Prosecutor, CopenhagenFINLAND / *FINLANDE***Ms Raija TOIVIAINEN**, State Prosecutor, Head of the International Unit

FRANCE

(Chair/Président CCPE) (CCPE-BU)

**M. Olivier de BAYNAST**, Procureur Général près de la Cour d'Appel d'Amiens, Palais de justiceGERMANY / *ALLEMAGNE* (CCPE-BU)**Mr Harald RANGE**, Generalstaatsanwalt, Generalstaatsanwaltschaft CelleHUNGARY / *HONGRIE* (CCPE-BU)**Mr Peter POLT**, Chief Prosecutor, Head of Criminal Trial Cases, Office of the Prosecutor GeneralIRELAND / *IRLANDE* (CCPE-BU)**M. Peter McCORMICK**, Office of the Director of Public ProsecutorsITALY / *ITALIE***M. Antonio MURA**, Procureur de la République, Corte di Cassazione, Cour Suprême de Cassation

PORTUGAL

(Vice-Chair/Vice-Président CCPE) (CCPE-BU)

**M. João Manuel DA SILVA MIGUEL**, Procureur Général Adjoint, Procuradoria-Geral da RepúblicaRUSSIAN FEDERATION / *FEDERATION DE RUSSIE***Mr Vladimir ZIMIN**, First Deputy Chief, Prosecutor General's Office, the General Department of International Legal Co-operationSPAIN / *ESPAGNE***Mr Antonio VERCHER NOGUERA**, Deputy Attorney General, Fiscalía General del Estado,TURKEY/ *TURQUIE***Mr Ahmet TASYURT**, Public Prosecutor, Court of Cassation, Nevzat Tandoğan

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COUNCIL OF EUROPE'S SECRETARIAT /  
*SECRETARIAT DU CONSEIL DE L'EUROPE*



**Directorate General of Human Rights and Legal Affairs**  
**/ Direction Général des Droits de l'Homme et des Affaires Juridiques**

Mrs Anna Capello, Secretary of the CCPE, Head of Justice Division, *Secrétaire du CCPE, Chef de la Division de la Justice*

Ms Ana Rusu, Co-Secretary of the CCPE, Division of Justice, Co-Secrétaire du CCPE, *Division de la Justice*

Mme Muriel DECOT, Secretary of the CCJE, *Secrétaire du CCJE*

Mme Sandrine MAROLLEAU, Webmaster

M. Jean-Pierre GEILLER, Documentalist

Mme Emily WALKER, Assistant / *Assistante*

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**INTERPRETERS / INTERPRÈTES**

Mme MCGEORGE

Mme BOUX

Mme MARCHINI

### APPENDIX III

#### COMMENTS BY MR MURA AND MR SABATO CONCERNING THE REPORT DRAFTED BY PROFESSOR TAK

##### A. MURA, Italy (CCPE-WG)

- appreciation for Professor Tak's effort
- paper informative and interesting, as it helps to go beyond different national perspectives and to reach an overall view of the main (judicial, but mainly prosecutorial) models existing in Europe
- but Prof. Tak's Report leaves the objective approach when it deals with the Italian system, expressing comments that – although authoritative – are personal opinions of the Author and appear quite far from the points of views widely shared by judges and public prosecutors in Italy
- the result is a devaluation of the concept that represents one of the main bases of the Italian system: the idea of independence and impartiality as fundamental characters of jurisdiction and prosecution as well. As it has been said, the lack of independence at the beginning of a process weakens meaning and relevance of independence at the end of it
- Some remarks on Prof. Tak's Report [the numbers refer to paragraphs of paper CCJE-GT(2009)4 dated February 5th, 2009]:

§ 85. "... The lack of hierarchical subordination appeared not to be beneficial for an effective fight against Mafia criminality and organised crime..."

Several aspects must be taken into account to understand manners and results of the fight against mafia and organised crime, but "lack of hierarchical subordination" in the public prosecution system appears to play no role at all in this respect.

"... Recently new legislation has been enacted to provide high ranking public prosecutors with instruments to co-ordinate the prosecution of organised crime ..."

Recent legislative reforms modified significantly the organisation of public prosecution in the country (and the Report would need to be updated with regard to them), but they have a general character and are not specifically referred to the prosecution of organised crime.

§ 98. "...in no country a guarantee exists that a political authority never can prevent a prosecution for certain offences ..."

It can be said exactly the contrary, as far as the Italian experience is concerned, thanks to the full independence of public prosecution.

§ 104. "... the independence has led to judicial activism – a political way of applying powers – that initially may have had beneficial effects in the fight against political corruption but later on has led to serious abuse of power by individual public prosecutors ..."

This is a politically oriented interpretation. Most of Italian judges and prosecutors would strongly disagree on it.

The example given on this point in the Report concerns a marginal episode and, anyway, the judicial system showed its effectiveness at this respect, too.

§ 105. “In general one may conclude that a fully independent prosecution service modelled after the situation in Italy is not a preferred option because in practice it may lead to a serious crisis in the Rule of Law State ...”

This is a personal opinion that Mr. Mura totally contests.

There can certainly be discussions on how efficient the Italian system is (as a consequence of the constitutional provisions about the mandatory criminal action and the right to appeal to the Supreme Court against any judicial decision), but to speak of a serious crisis of the *Etat de droit* as a consequence of prosecutorial independence appears absolutely misleading.

As far as the Italian system is concerned, further remarks could be referred to other paragraphs (§§ 10, 30, 45, 46, 56, 60, 92, 116, 145, 148, 149, 153). They are not raised here to allow the discussion to be concentrated on the focal points.

## **R. SABATO, Italy (CCJE-WG)**

- Prof. Tak’s report provides valuable insight into the European systems, and will be an excellent support to the CCJE’s and CCPE’s work on the topic.
- Gladly accepting Prof. Tak’s invitation to provide additional information and comments, as the report was based on insufficient information, as far as Italy is concerned, in order to complement what has been already very well noted by Mr. A. Mura, one should first of all note that, since implementation of the 1946-1948 Italian Constitution providing for elimination of competences of the executive on public prosecution, the independence recognised in Italy to public prosecution, belonging to a unified judiciary, has guaranteed the Rule of Law by ensuring that all criminal charges be evaluated by a magistrate, operating in the interest of the justice users. The alleged “politicisation” of prosecutorial activity and “abuse” of prosecutorial independence – to which unfortunately Prof. Tak’s report makes reference (§ 104) – are to be traced to statements which may be found in some political debate after the 1990’s; these statements are certainly lacking all foundation, and the issue needs a more objective approach.
- The only reference to “abuse” of prosecutorial independence, contained in the report, concerns one single investigation, led by the Chief Prosecutor of a small prosecution office of Southern Italy, having as object the gathering of information on alleged secret associations. The true cost of such investigation should be verified. It does not seem that any imprisonment was ordered.
- On the contrary, prosecutorial independence has made possible, in Italy, complex investigations on Mafia cases and corrupt practices.
- A correction of the approach taken in Prof. Tak’s report should also concern the statement according to which there is a lack of hierarchy in prosecutorial offices, which has jeopardised Mafia investigations (§ 85). On the contrary, in Italy it has always been possible, for relevant reasons, and with a reasoned ruling, both for the Chief Prosecutor and the General Prosecutor, to withdraw a case, with some guarantees under the supervision of the High Council of the Judiciary. Since 2006, furthermore, a hierarchy has been established, concentrating in the Chief Prosecutor responsibility of investigations. This not being the proper place to comment on such legislation, the High Council has issued resolutions to guarantee the smooth operation of hierarchy. One more aspect to consider is that since the 1990’s, through the operation of the National Anti-Mafia Prosecution Office, investigations on Mafia cases are dealt with only by Prosecutors sitting in the Districts’ capitals, and are coordinated by the above mentioned Anti-Mafia central

prosecution office. Therefore, the strong coordination existing in Mafia investigations, that has been reflected by systems in other countries, strongly contradicts Prof. Tak's sources of information.

- The Italian delegates in the CCJE and the CCPE will gladly provide Prof. Tak any additional information he may need to prepare a second draft report.

#### **Joint request by A. MURA and R. SABATO**

Mr. Mura and Mr. Sabato gladly took note that, during his reply to comments as above, Prof. Tak clarified that he had no intention to challenge the Italian model of independent prosecution, and that he had just reported information coming from some comments available in literature, the objectivity of which is not certain.

Therefore the two Italian experts asked Prof. Tak to kindly consider the above information in the process of further drafting his report.

In the meantime, Mr. Sabato and Mr. Mura highlighted that the examined report constitutes a relevant contribution to the debate, but it is not supposed to be the base for the joint CCJE-CCPE opinion.

They asked the Secretariat to kindly mention in the minutes the essential points clarified as above.