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CCPE(2008)3

**CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS
(CCPE)**

**Opinion N° 3(2008)
of the Consultative Council of European Prosecutors**

on

“THE ROLE OF PROSECUTION SERVICES OUTSIDE THE CRIMINAL LAW FIELD”

adopted by the CCPE at its 3rd plenary meeting
(Strasbourg, 15-17 October 2008)

I. INTRODUCTION

1. The Consultative Council of European Prosecutors (CCPE) was set up by the Committee of Ministers of the Council of Europe on 13 July 2005 to prepare opinions on issues related to the prosecution service and promote the effective implementation of Recommendation Rec(2000)19 of 6 October 2000 on the role of public prosecution in the criminal justice system (hereinafter “the Recommendation”).¹
2. This Opinion has been prepared according to the Framework Overall Action Plan for the work of the CCPE adopted by the Committee of Ministers of the Council of Europe on 29 November 2006,² as the CCPE was also instructed by the Committee of Ministers of the Council of Europe to collect information about the functioning of prosecution services in Europe³.
3. The Recommendation specifies the situation of the public prosecutors and public prosecution services in the criminal justice system and their basic principles of operation, but it does not mention the role of prosecutors beyond the criminal justice system. However, in most member States this role and duties also cover, to varying extents, competencies, jurisdictional or not, outside the criminal law field.
4. A great variety of systems exist in Europe regarding the role of the prosecution services, including outside the criminal law field, resulting from different legal and historical traditions⁴. It is for member States to define their legal structures and their functioning, provided they fully respect human rights and fundamental freedoms, the rule of law principle and their international obligations, including those under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “The Convention”). The role of public prosecution services and the extent of its competences, including the protection of human rights and public interest, are defined by the domestic legislation of member States. The presence or absence and extent of non penal functions of public prosecutors are deeply rooted in the cultural heritage, the legal tradition and the constitutional history of nations⁵.
5. The CCPE in the preparation of this Opinion took as its main reference point the case law of the European Court of Human Rights (hereinafter “the Court”) and paid special consideration to the aims of the Council of Europe, the rule of law principle, and the development of Europe's cultural identity and diversity. The Court has referred to

¹ The rule of law and respect for human rights constitute basic underlying principles for public prosecutors as “...public authorities who, on behalf of society and public interest, ensure the application of the law where the breach of law carries a criminal sanction taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system. The Recommendation does not deal expressly with prosecutors' non penal tasks, but article 1, as stated in the explanatory memorandum, implicitly recognise that „prosecutors can have such missions and the explanatory memorandum clearly states that „prosecutors may also in some countries be assigned other important tasks in the fields of commercial or civil law, for example”.

² The Framework Overall Action Plan for the Work of the CCPE did not ignore this situation and it took into account that “*The functions of the public prosecutors in Europe vary considerably due to differences in their status and role in the justice systems of Council of Europe member states... possible functions of public prosecutors could be addressed, either by undertaking a study on or an enquiry into their exercise (powers and limits in law and practice) in Council of Europe member States, or by the drafting of an opinion (e.g. on the need to elaborate guidelines or standards on their exercise)*”.

³ See CCPE (2006)05 rev final.Terms of Reference of the CCPE for 2007-2008, see CCPE (2006)04 rev final.

⁴ *Ibid.* See also CPE (2008)3.

⁵ Budapest Conference: „*The Conference again underlined the variety of public prosecution systems in this field, resulting from different traditions in Europe*”, see CPGE (2005)Concl.

violations of the Convention relating to the non-penal tasks of prosecutors and emphasised the requirement for proper procedures⁶. Recommendation 1604 (2003) of the Parliamentary Assembly on the Role of the public prosecutor's office in a democratic society governed by the rule of law⁷ and the reply from the Committee of Ministers to it were also taken into consideration.⁸

6. Right from their first considerations Prosecutors General of Europe were aware that *"intervention by prosecution services beyond the criminal sphere could only be justified on account of its general task to act 'on behalf of society and in the public interest, [to] ensure the application of the law' as it is reflected in Recommendation N° R (2000) 19, and that such functions could not call into question the principle of the separation of powers of the legislature, the executive and the judiciary, or the fact that it was ultimately for the competent trial courts, and them alone, to settle disputes, after hearing both parties."*^{9 10}
7. After the conclusion of the Bratislava Conference to overview non-criminal tasks of prosecutors, the starting point was the recognition by the Celle Conference that *"...in most legal systems prosecutors had also responsibilities, sometimes substantial ones, in civil, commercial, social and administrative matters and even responsibility for overseeing the lawfulness of Governments' decisions"*¹¹. However, that Conference had also recognized the lack of any international guiding principles in this sphere and instructed its Bureau to submit a reflection document at its next plenary session.
8. Consequently, the reflection document presented at the Budapest Conference in 2005¹², summarizing and evaluating the replies to a questionnaire prepared by the Bureau served as a first examination of the activities of public prosecutors outside the criminal law field, and conclusions of the CPGE sessions based on it were the first European considerations of the topic. This Conference *"concluded that this important and complex issue deserved further consideration at a later stage"*¹³.
9. The Moscow Conference (2006) concluded that *"..... the best practices discussed during the Conference concerning the efficient protection by public prosecution services of individuals outside the criminal law field which come within their competence could be examined with a view to the possible application of this positive experience by the member states where the public prosecution services have such authority"*¹⁴.

⁶ See e.g. the cases *Brumarescu v Romania* (28342/95), *Nikitin v Russia* (50187/99), *Grozdanoski v FYR Macedonia* (21510/03), *Rosca v Moldova* (6267/02), *LM v Portugal* (15764/89), *P. v Slovak Republic* (10699/05).

⁷ Text adopted by the Standing Committee acting on behalf of the Assembly on 27 May 2003.

⁸ See doc. CM/AS(2004)Rec1604 final, 4 February 2004.

⁹ The CCPE also considered the working documents and conclusions of several sessions of the Conference of Prosecutors General of Europe (CPGE), such as the 4th (Bratislava, Slovak Republic, 1-3 June 2003) where the issue was first proposed for discussion at the following conference; the 5th (Celle, Lower Saxony, Germany, 23-24 May 2004) conducting a first examination of the topic; the 6th (Budapest, Hungary, 29-31 May 2005) where a first report on the topic was discussed, and the issue was forward to further considerations; the 7th Conference (Moscow, Russian Federation, 5-6 July 2006) and the Conference of Prosecutors General of Europe (CPE), held in Saint Petersburg (Russian Federation, 2-3 July 2008) entirely devoted to this issue

¹⁰ Celle Conference, see CPGE (2008) Concl.

¹¹ See doc. CPGE (2004) Concl.

¹² See doc. CPGE (2005)02.

¹³ See CPGE (2005) Concl.

¹⁴ See doc. CPGE (2006), 6 July 2006, para 7.

10. The Conference of Prosecutors General of Europe (Saint Petersburg, 2008) underlined *“the growing need in our societies to protect effectively the rights of vulnerable groups, notably of children and young people, witnesses, victims, handicapped persons, as well as social and economic rights of the population in general. It expressed the opinion that prosecutors may have a crucial role to play in this respect and that the growing involvement of the State in the settling of current problems such as the protection of the environment, consumers’ rights or public health, may lead to widening the scope for the role of prosecution services¹⁵.”*
11. Considerations of the Conferences of Prosecutors General of Europe were followed up by the CCPE. The former questionnaire was amended by the Bureau of CCPE during its 3rd meeting in Popowo (Poland, 4-5 June 2007) in order to have a detailed study. Based on the replies by 43 member States¹⁶ to the questionnaire as amended in Popowo (Poland, 4-5 June 2007) a new detailed report was drafted and presented at the Saint Petersburg Conference¹⁷. This Conference formulated several special requirements for non-penal competences¹⁸ which are reflected in this Opinion.
12. In addition, during the preparation of this Opinion some documents adopted by other international bodies and organizations, including the United Nations¹⁹ and Commonwealth of Independent States²⁰ were considered.
13. The aim of this Opinion is, on the basis of the work done before by the CPGE, CPE sessions and CCPE, to define status, powers, practice and fruitful experiences that prosecution services of most of the Council of Europe member States have in their activities outside the criminal law field and to make some conclusions aimed at developing and improving these activities. The drafting of the Opinion also showed the need to consider in future work the relevance of the principles of the Recommendation for the competences of prosecution services in the non criminal field.

II. THE PRESENT SITUATION

14. Taking into account the replies to the questionnaire and conclusions of CPGE, CPE sessions, the CCPE found that the present situation of European prosecution systems regarding non penal tasks can be outlined as follows.
15. Two main groups of member States may be identified: those where the prosecution services have no powers outside the criminal law field and those where prosecution services have some or extensive powers outside the criminal law field.
16. Prosecution services in the majority of the Council of Europe member States have at least some tasks and functions outside the criminal law field²¹. The areas of competence

¹⁵ Saint Petersburg Conference, see CPE (2008) 3.

¹⁶ The questionnaire considered types of non penal competencies, their background, role of prosecutors, effective use and most important ones of these competencies, reforms envisaged, special organizations of prosecution offices, special powers and possible decision-making role of prosecutors, relevant case-law of the European Court and of the Constitutional Courts of Member States.

¹⁷ See the report by Assoc. Prof Andras Zs.Varga in CCPE-Bu (2008) 4 rev.

¹⁸ See doc. CPE (2008)3, para 8.

¹⁹ See Resolution 17/2 „Strengthening the rule of law through improved integrity and capacity of prosecution service” adopted by the UN Commission on Crime Prevention and Criminal Justice (UN doc. E/2008/30) and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors approved by the International Association of Prosecutors in 1999 and annexed to that Resolution.

²⁰ See the Model Law on Prosecution Service adopted by the Inter-Parliamentary Assembly of the CIS Member States on 16 November 2006.

are varied and include, *inter alia*, civil, family, labour, administrative, electoral, law as well as the protection of the environmental, social rights and the rights of vulnerable groups such as minors, disabled persons and persons with very low income. In some Member States the tasks and workload of prosecutors in this field may even prevail over the role of public prosecution in the criminal justice system. On the other hand, prosecution services of certain States declare that their competences in this field are not very important or exercised very rarely in practice²².

17. In some member States prosecution services do not have non-penal competencies.²³
18. Civil law tasks belong to different fields of law such as civil, family, labour, commercial, environmental, social law and consists of competencies in connection, for example, with nullity of marriage, declaration of death, paternity denial or dissolution of adoption, keeping of persons in health care institutions, limitation of legal capacity, protection of children's rights, disqualification of directors or cancellation of companies, property rights and interests of State, privatisation, compensation for damages caused by the judiciary, supervision of ethical behaviour of some (regulated) professionals, dissolution of civil associations, declaration of violation of labour or social law regulations, management of the natural environment. Furthermore, in certain States prosecutors can act as legal representatives of the State to initiate actions, for example to file a lawsuit against persons who caused damage to public assets.
19. In some member States the prosecution service may not only protect legal interests and rights of one or some individuals, but react to violations affecting rights of many persons at the same time. Such competence as supervision over the application of laws and legality of legal acts, issued by bodies of state and local authority, makes the prosecution service an instrument of real protection of rights and freedoms of large groups of individuals or of the general public.
20. Two common peculiarities can be found in situations regarding public law activities. In all those countries where prosecutors have competencies to control activity of administrative authorities, prosecutors are empowered to start court actions against decisions of such bodies as well. Some prosecution services have the right to formulate opinions regarding draft-legislation on, for example, the structure of the judiciary, on rules of procedure or substantive law. Special competencies were given to some prosecution services, for example, in administrative decisions: provision of legal opinions on draft proposals of legislation, request of compulsory mediation or out-of-court settlement before taking any other court-action against the State, supervision of respect of detention-rules, monitoring and observance of the implementation of legislation, warning, protest or contest, with or without power of suspension of execution, against a decision of a given administrative authority, motion based on exception of unconstitutionality, action contesting validity of election or referendum, attendance of sessions of Cabinet and membership in parliamentary investigation commissions. In some countries public prosecutors have some consultative missions concerning civil, administrative, labour or social law field; the provision of advisory opinions may be the only task they perform.

²¹ Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, France, FYR Macedonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Moldova, Monaco, Montenegro, the Netherlands, Poland, Portugal, Romania, the Russian Federation, San Marino, Slovak Republic, Slovenia, Spain, Turkey, Ukraine.

²² Albania, Austria, Azerbaijan, Denmark, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Moldova, San Marino, Slovenia.

²³ Estonia, Finland, Georgia, Iceland, Malta, Norway, Sweden, Switzerland and in the judicial systems of the United Kingdom.

21. From the procedural law point of view, some competencies are limited to initiating court actions (this is typical for civil law tasks but it is also adequate for some public law competencies) while others, usually those regarding public law, are exercised by direct (extra-court) activities (*inter alia* protests, cautions, examinations) with the possibility for the parties concerned to go to court. In some countries – in order to avoid the overloading of tribunals – prosecutors were given powers to decide on some applications that are made by individuals, with the opportunity for the party concerned to apply to a court.
22. Court actions – irrespective of the procedural rules governing them (rules of civil proceedings or special administrative law rules) – are bound to court proceedings: prosecutors act as parties therein. Prosecution services did not report any special powers or authority when prosecutors take part in civil court proceedings as petitioners, they have the same powers as other parties. Their position is not exclusive, the proceedings may be started by other interested persons as well. In such cases prosecutors have definitely no decision-making powers regarding the merit of cases, their decisions concern only initiation of a case: submitting a petition to the civil law court.
23. Almost in all countries where prosecutors have competences in the non criminal field, prosecutors are empowered to launch new court-actions, to use ordinary and extraordinary remedies (appeals) as parties of proceedings. However some rules could be identified (prohibition of extraordinary appeal or proposal for reopening of proceedings; prohibition of settlement in the name of the party).
24. In some member States, prosecutors also have certain specialised competencies such as their role in the administration and management of the justice system, or advisory functions to the judiciary, executive and legislative powers.
25. The aims of non penal activities of prosecutors, irrespective of their substantive or procedural differences, are much more concordant: ensuring rule of law (integrity of democratic decisions, legality, observance of law, remedy against violation of law), protection of rights and liberties of persons (mostly of those incapable to protect their rights – minors, persons with unknown domicile, mentally incapables), protection of assets and interests of State, protection of public interest (or of public order), harmonisation of jurisdiction of courts (special remedies against final court decisions in the best interest of law, action as parties in such proceedings of the highest court levels).
26. Prosecution services with extended competences outside the criminal law field often have special or mixed units within their organisational structure, dealing with non-penal tasks. Some member States have no special departments, but these tasks are carried out by special prosecutors appointed according to the needs of their units, depending on the number of cases, these prosecutors may be excluded from taking part in criminal law proceedings.
27. On the other hand, the CCPE is aware of occasional improper practice of public prosecutors acting outside the field of criminal justice assessed by the Court or by certain Constitutional Courts²⁴ or criticized by other bodies of the Council of Europe. The most disconcerting events were in connection with rejection without reason of requests to start civil law court actions; intervention in court proceedings without reasonable interest (of State, of public interest or based on protection of rights) violating the principle of equality of arms; quashing of final judgment of courts violating the principle of legal certainty (*res*

²⁴ See CCPE-Bu (2008)4rev.

judicata)²⁵; participation of prosecutors in the panels of supreme courts confusing the decision-making role of judges with prosecutors tasks; unlimited right to start litigation.

28. The contribution of prosecutors to the consolidation of the case-law of the courts is a fact in many member States. The role of prosecutors in this respect should not allow them to exercise undue influence on the final decision-taking process by judges.

III. CONCLUSIONS AND RECOMMENDATIONS

29. Nowadays activities of prosecution services outside the criminal law field are determined, first of all, by the needs of society to properly ensure human rights and public interest.
30. Besides the role of courts and other institutions like ombudspersons, the role of public prosecution services in the protection of human rights defined by domestic legislation in certain member States is appreciated as very valuable²⁶.
31. There are no common international legal norms and rules regarding tasks, functions and organisation of prosecution service outside the criminal law field. At the same time in all legal systems prosecution service play an important role in the protection of human rights, in the safeguard of legality and the rule of law, in strengthening civil society. The variety of functions of prosecution services outside the criminal law field results from national legal and historical traditions. It is the sovereign right of the state to define its institutional and legal procedures of realisation of its functions on protection of human rights and public interests, respecting the rule of law principle and its international obligations. The harmonisation of “greater Europe’s” variety of systems rests upon the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, taking into account the case-law of the European Court of Human Rights.
32. There is a task for all the states of Europe to develop and strengthen the human rights potential of all its bodies, including courts and prosecution services. The successful realisation of functions on protection of human rights and fundamental freedoms might be achieved not by weakening some human rights and procedures to strengthen others, but through their simultaneous development. They all have one aim – protection of rights and freedoms of individuals, interests of society and of the state.
33. In many European states the role of the ombudsman is increasing (both of common competence and specializing in the protection of rights of individuals – for example women and children). It is necessary, that enough bodies, organizations and officials tackle the issue of protection of human rights and freedoms. People must have the right to choose the official or non-official procedure for the protection of their interests, including those procedures involving structures of the civil society.
34. In a democratic state prosecutors may have or not have competences outside the criminal law field, The CCPE calls upon those member States where the prosecution service is entrusted with functions outside the criminal law field to ensure that these functions are carried out in accordance with the following principles:

²⁵ The principle of *res iudicata* is not an absolute one, as it is stated in some judgements of the ECHR, there may be some exemptions from this principle provided for by law (see case *Ryabykh v. Russia* (Application No. 52854/99), *Pravednaya v. Russia* (Application No 69529/01), *Sergey Petrov v. Russia* (Application No 1861/05).

²⁶ Saint Petersburg Conference, see: CPE (2008) 3, see also the contributions of the Secretary General Terry Davis and the Commissioner for Human Rights Thomas Hammarberg at this Conference (www.coe.int/ccpe).

- a. the principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights;
 - b. the respect of impartiality and fairness should characterise the action of prosecutors acting outside the criminal law field as well;
 - c. these functions are carried out "on behalf of society and in the public interest"²⁷, to ensure the application of law while respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court;
 - d. such competencies of prosecutors should be regulated by law as precisely as possible;
 - e. there should be no undue intervention in the activities of prosecution services;
 - f. when acting outside the criminal law field, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms);
 - g. the action of prosecution services on behalf of society to defend public interest in non criminal matters must not violate the principle of binding force of final court decisions (*res judicata*) with some exceptions established in accordance with international obligations including the case-law of the Court;
 - h. the obligation of prosecutors to reason their actions and to make these reasons open for persons or institutions involved or interested in the case should be prescribed by law;
 - i. the right of persons or institutions, involved or interested in the civil law cases to claim against measure or default of prosecutors should be assured;
 - j. the developments in the case-law of the Court concerning prosecution services' activities outside the criminal law field should be closely followed in order to ensure that legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments.
35. Depending on the number of cases, prosecution services with competences outside the criminal law field are recommended to have specialised units or, if not possible, prosecutors, within their organizational structure and sufficient skilled human and financial resources to deal with non-penal .tasks.
 36. Prosecution services concerned are invited in their activities outside the criminal law field, to establish and develop, when appropriate, cooperation or contacts with ombudsman and ombudsman-like institutions as well as organisations of the civil society including mass-media.
 37. Circulars or guidelines summarising good practices and recommendations aimed at harmonising, if appropriate, within each system, the approach to the activities of prosecution services outside the criminal law field should be issued.
 38. Member States or prosecution services concerned should develop training of prosecutors engaged in the activities outside the criminal law field.
 39. Member States or prosecution services concerned should exchange their experiences, including best practices, acts of legislation and other normative materials.
 40. The CCPE advises the Committee of Ministers to consider elaborating common European principles on, in particular, the status, powers, and practice of public prosecutors outside the criminal law field. The issue should be considered in the light of

²⁷ Saint Petersburg Conference, see CPE(2008)3.

the importance of the protection of human rights, fundamental freedoms, the democratic principle of the separation of powers and equality of arms.

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(CCPE)**

**Opinion No.3 (2008) on
“The role of prosecution services outside the criminal law field”
adopted by the CCPE at its 3rd plenary meeting
(Strasbourg, 15-17 October 2008)**

SUMMARY OF RECCOMENDATIONS

The CCPE is of the opinion that States where prosecution services have non criminal competences should ensure that these functions are carried out in accordance with the principles governing a democratic state under the rule of law and in particular that:

- a. the principle of separation of powers is respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights;
- b. the respect of impartiality and fairness characterises the action of prosecutors acting outside the criminal law field as well;
- c. these functions are carried out “on behalf of society and in the public interest, to ensure the application of law, respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court;
- d. such competencies of prosecutors are regulated by law as precisely as possible;
- e. no undue intervention in the activities of prosecution services occurs;
- f. when acting outside the criminal law field, prosecutors enjoy the same rights and obligations as any other party and do not enjoy a privileged position in the court proceedings (equality of arms);
- g. the action of prosecution services on behalf of society to defend public interest in non criminal matters does not violate the principle of binding force of final court decisions (*res judicata*) with some exceptions established in accordance with international obligations including the case-law of the Court;
- h. the obligation of prosecutors to motivate their actions and to make these motivations open for persons or institutions involved or interested in the case;
- i. the right of persons or institutions, involved or interested in the civil law cases to claim against measure or default of prosecutors are assured;
- j. the developments in the case-law of the Court concerning prosecution services' activities outside the criminal law field is followed closely in order to ensure that the legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments;
- k. prosecution services concerned establish and develop, when appropriate, cooperation or contacts with ombudsman and ombudsman-like institutions as well as organisations of the civil society including with mass-media;
- l. member States or prosecution services concerned exchange their experiences, including best practices, acts of legislation and other normative materials;
- m. member States or prosecution services develop training of prosecutors engaged in the activities outside the criminal law field;
- n. circulars or guidelines summarising good practices and recommendations aimed at harmonizing, if appropriate, within each system, the approach to the activities of prosecutors outside the criminal field are issued

The CCPE advises the Committee of Ministers to consider elaborating common European principles on, in particular, the status, powers, and practice of public prosecutors outside the criminal law field. The issue should be considered in the light of the importance of the

protection of human rights, fundamental freedoms, the democratic principle of the separation of powers and equality of arms