COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 5 May 2008 CCPE-Bu (2008)4rev.

BUREAU OF THE
CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS
(CCPE-Bu)

ROLE OF THE PUBLIC PROSECUTION SERVICE OUTSIDE THE FIELD OF CRIMINAL JUSTICE

REPORT

by
Dr. András Zs. VARGA Ph. D

This report, drafted by the scientific expert Mr András VARGA (Hungary, at the request of the Bureau of the CCPE, is a synthesis of the national replies to the Questionnaire drafted by the Bureau of the CCPE (CCPE-BU(2007)13 rev) in a view to prepare an opinion to the Committee of Ministers on the role of the Public Prosecutors outside the criminal field. 43 member States replied to the questionnaire.

Report on the Role of Public Prosecutors outside the Criminal Field
by Dr. András Zs. VARGA Ph. D.[1]

I. Preliminaries

As Recommendation 19 - on the Role of Public Prosecution in the Criminal Justice System[2] does not deal with the role of the prosecutors beyond the criminal justice system, the 4th Session of Conference of the Prosecutors General of Europe (hereinafter: CPGE) in Bratislava proposed prosecutors' competencies in non-criminal matters as one of the themes to be discussed at the following conference. After the aimed first examination of the topic the Conclusions of the 5th CPGE (Celle) formulated that the Conference "decided to pursue its consideration of the matter and instructed its Bureau to submit a reflection document at its next plenary session."[3]

Following the 5th Session of CPGE in Celle, the 8th meeting of the Coordinating Bureau of CPGE decided to compile a Questionnaire[4] for prosecutors general of the Member States. The reflection document (First Report[5]) based on the answers to the four questions of the Questionnaire (hereinafter: Part I) were examined and discussed during the 6th Session of CPGE (Budapest)

That the First Report made an overview on the non-criminal-law activities of the different Prosecution Services of Europe and drew the conclusion that Member States of the Council of Europe can be divided into two groups.

a) The first group consists of those Member States in which prosecutors do not have any tasks outside the criminal field, or even if they have, their tasks are not considered important.[6]

b) In other Member States – whose replies to Part I was examined – prosecutors have tasks of high importance in the extra-penal area. In these Member States the different tasks of Prosecution Services could be classified in two main groups.

ba) Civil law tasks: the most important tasks of prosecutors are in connection with the validation and nullification of marriages, and several other procedures on family status. Some other type of tasks are appeals and motions for new trial, or nullification of court decisions, actions for protection of the rights of juveniles and persons incapable of managing their own rights, competencies linked with registration of business associations, declaration of bankruptcy and of termination of legal persons. Similar tasks can be seen in the field of registration and declaration of termination of associations and foundations. Some other tasks and measures of the prosecutor can be found in connection with labor law cases.

bb) Public (administrative and constitutional) law tasks as: measures (appeals, and other forms of legal remedy) taken by the prosecutor as special control on the legality of the operation of the adminsitration, initiation of constitutional court's procedures, disciplinary measures against the members of authorities, advisory/consultative role of the Prosecutor General.

In its Conclusions[7] the 6th Session of CPGE (Budapest) underlined that the issue must be considered at a larger stage.

II. Part II of the Questionnaire

---

[1] Associate professor at Catholic University „Pázmány Péter", Budapest; associate professor at State University "Széchenyi István", Győr; chief counselor prosecutor, General Prosecutor's Office, Hungary

[2] https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

[3] http://www.coe.int/t/dg1/legalcooperation/ccpe/conferences/CPGE/2004/Conclusions_en.pdf

[4] http://www.coe.int/t/dg1/legalcooperation/ccpe/conferences/CPGE/2005/CPGE-BU_2004_08QuestionnaireProsecutorsDuties_en.pdf

[5] http://www.coe.int/t/dg1/legalcooperation/ccpe/conferences/CPGE/2005/CPGE_2005_02docReflexionVarga_en.pdf

[6] *Austria, Denmark, Estonia, Finland, Georgia, Germany, Iceland, Italy, Moldova, Norway, Northern Ireland, Sweden, and Switzerland and in the judicial systems of the United Kingdom.*

[7] http://www.coe.int/t/dg1/legalcooperation/ccpe/conferences/CPGE/2005/CPGE_2005_16Conclusions_en.pdf

Considerations of CPGE on the Role of Public Prosecutors outside the Criminal Field were followed by the Consultative Council of European Prosecutors (CCPE), set up by the Committee of Ministers in 2006. The Questionnaire was amended with Part II (four new questions) by the Bureau of CCPE during its 3rd meeting (Popowo, Poland) in order to have a detailed study of the functions of the public prosecution service outside the field of criminal justice, taking into account the conclusions adopted by two of the previous Conferences[8] (both Parts I and II of the Questionnaire were submitted to the Member States).

The new questions of Part II are as follows:

> *5. Does the public prosecution service have a separate internal organization when it acts outside the field of criminal justice? Please specify.*
>
> *6. Which powers does the public prosecution service enjoy when acting outside the field of criminal justice?*
>
> *a. Is it vested with a specific authority or does it enjoy the same powers as the other party(ies) to the trial?*
>
> *b. Are there specific rules governing the exercise of these functions? What is the basis of such rules (the law, custom or practice)?*
>
> *c. Does it enjoy other rights and duties? Please specify.*
>
> *7. Regarding the role of the public prosecution service outside the field of criminal justice:*
>
> *a. has the European Court of Human Rights taken decisions or handed down judgements on that matter in respect of your country? If so, please indicate the number of the application and the date of the decision or judgement.*
>
> *b. in your country, has the constitutional court or another court with the authority to rule on the constitutionality of laws, taken decisions or handed down judgements on the compatibility of such a role with the constitution or the basic law? If so, please indicate the references of such decisions and their main thrust.*
>
> *8. Amongst the competences of the public prosecution service acting outside the system of criminal justice which are, in your view, the most important for the reinforcement of rule of law and protection of human rights?*

III. Answers to the Questionnaire – General Overview

The goal of this report[9] is to have a synthesis of the national replies to the Questionnaire including both Parts I and II.
Since

- there are some Member States which did not reply to Part I in 2005 but which gave answers to the amended Questionnaire,[10]
- there are only 20 replies[11] to this second Questionnaire sent until the official deadline, 7 of them communicate no tasks, 2 others only few competencies outside the criminal field,
- almost the half of the replies available only in April 2008 could be compiled only as 'extention' of this Report,

the new synthesis has to take into account the First Report. However, it is needless to repeat all the considerations of the First Report, but it is inevitable to refer to some already known arguments or conclusions.

1. Non-penal tasks of prosecutors is the Member States

[8] http://www.coe.int/t/dg1/legalcooperation/ccpe/Restricted/role/CCPE-Bu_2007_13_rev_questionnaire_en.pdf
[9] According to the instructions from the Secretariat General.
[10] *Albania, Azerbaijan, Austria, Estonia, France, Luxembourg, Malta, Romania, the Russian Federation, San Marino, Slovenia*
[11] *Austria, Croatia, Czech Republic, Estonia, Finland, Iceland, Ireland, Latvia, Liechtenstein, Malta, Monaco, Poland, Portugal, Romania, the Russian Federation, Slovak Republic, Sweden, Ukraine, the United Kingdom (England, Wales and Northern Ireland)*

Analyzing the replies to the Questionnaire we get as first observation an extended list of non-penal tasks of prosecutors of the answering Member States.

a) There are no competencies outside the criminal field in *Estonia, Finland, Georgia, Iceland, Malta, Norway, Sweden, Switzerland and in the judicial systems of the United Kingdom.*
b) Only few or very specialized competencies were communicated by *Albania, Austria, Azerbaijan, Denmark, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Moldova, San Marino, Slovenia, Turkey.*
c) Prosecutors of *Armenia, Belgium, Bulgaria, Croatia, Czech Republic, France, FYR Macedonia, Hungary, Latvia, Lithuania, Monaco, Montenegro, the Netherlands, Poland, Portugal, Romania, the Russian Federation, Slovak Republic, Spain, Ukraine* have extensive non-penal competencies.

As there are 43 Member States enlisted above, we have some information from the majority of them. This proportion makes possible to consider the next observations adequate for the whole Europe.

The grouping of States gives opportunity to two different *prima facie* conclusions which do not exclude each other:

i) Based on groups a) and b) it can be concluded that Prosecution Services in almost half of Member States did not have non-penal competencies or these competencies are declared to be not important or appear very rarely in practice.
ii) Whereas on the base of groups b) and c), it can be concluded that prosecutors in more than half of Member States have at least some non-penal competencies.

Although these two conclusions should be analyzed in more details, it is possible to state that conclusions of the 6th CPGE seem to be pertinent:

> *„6.3 Some member States do not feel any need to provide extra-penal competencies to the public prosecutor and do not consider these tasks as being within the remit of the public prosecutor. This can be considered as an acceptable approach to the role of the public prosecutor.*
>
> *6.4 At the same time, other countries consider it as an integral part of their system to grant public prosecutors competencies outside the criminal sector, giving them a role in ensuring the operation of a democratic society under the rule of law and in protecting human rights. There is no reason not to consider this as an appropriate practice as well."*[12]

Consequently, non-penal competencies of prosecutors cannot be understood as needless, however it cannot be concluded that they are unknown for prosecution services since a lot of States apply them.

A very interesting conclusion can be drawn from the lists of the examined states if they are compared with the different groupings of prosecution services in the First Report based on different fields of law where prosecutors have competencies. The First Report started from the point that non-penal competencies could concern civil law or public law. On the base of the comparision, the following matrix of competencies can be drawn)

Table 1.

Non-penal competencies	No	Few or not important	Extended
No	Estonia, Finland, Georgia, Iceland, Malta, Norway, Sweden, Switzerland United Kingdom.		
		Albania	Belgium

[12] http://www.coe.int/t/dg1/legalcooperation/ccpe/conferences/CPGE/2005/CPGE_2005_16Conclusions_en.pdf

Only civil law		Austria Azerbaijan Denmark Germany Greece Ireland Italy Liechtenstein Moldova San Marino Slovenia Turkey	France Luxembourg The Netherlands (!)
Civil and public law			Armenia, Bulgaria Croatia Czech Republic FYR Macedonia Hungary Latvia Lithuania Monaco Montenegro Poland Portugal Romania Russian Federation Slovak Republic Spain Ukraine

Classification of Member States is based mostly on replies to the Questionnaires. If no reply was received or the answers were not specific enough, some other resources had to be taken into account.[13]

In some cases, classification of a prosecution service needed special considerations.

- "Few" or "not important" labels are indefinite and the subject of these competencies is the same that was mentioned by States with only civil law competencies.
- Special attention had to be paid to *Ireland* since their reply mentioned two different non-penal competencies: one of them concerning referendum-claims and election-claims (public law task), the other concerning disqualification of directors of companies (civil law task). Taking into account that the first competence has never been applied and it was the Director of Public Prosecutions who suggested this competence to be transferred to another body, it could be considered that the Irish prosecution service deals only with civil law cases outside the criminal field. This consideration leads *Ireland* to be enlisted in the group of States having only civil law competencies.

The matrix of competencies demonstrates that the most important border-line runs not between prosecution services *with* or *without* non-penal tasks but between those *with exceptional (no/few/not-important)* or *extended* competencies.

This consideration should be examined more precisely later.

2. Special internal organization of Prosecution Services for non-penal tasks

Member States with Prosecution Services having no non-penal competencies naturally have not organized any special internal organization *(Estonia, Finland, Iceland, Malta, Sweden, Switzerland,*

[13] Directory of Prosecution Services, International Association of Prosecutors – Kluwer Law International, The Hague, 1999., and homepages of the prosecution services.

United Kingdom). Member States with few, not important or very special competencies reported mostly the same situation *(Albania, Austria, Germany, Ireland, Liechtenstein, San marino, Turkey).*

The situation of those Prosecution Services that have larger non-penal competencies is different.
Some of Member States replied that

- they have not organized special departments, sections or other internal organizations to deal with non-penal cases *(France, Monaco, Spain),* or
- special departments are not general but can be organized *(Portugal),* or
- these tasks are carried out by prosecutors appointed by the heads of their units. However, depending on the number of cases, these prosecutors can be excluded from conducting criminal law proceedings *(Luxembourg, Poland).*

Other Prosecution Services have special organizations within their different organizational structure, dealing with non-penal tasks:

- Civil-Administrative Department as one of two basic departments, the other is Criminal Department *(Croatia, Slovenia)*,
- non-criminal division, sub-division, department, section or specially appointed prosecutor at different levels *(Armenia, Czech Republic, Hungary, Moldova, Montenegro, Romania, the Russian Federation, Slovak Republic),*
- Department for Protection of Rights of Persons and State *(Latvia).*

The implicit consideration could be that special organizations for non-penal tasks are distinctive for the Prosecution Services that have extended non-penal competencies.

3. Specific powers, rules or rights of prosecutors

Situation of the Member States regarding the existence of special powers, rules or rights of prosecutors when acting outside the field of criminal justice differ in function of the nature of their tasks and it seems to be independent of the extent of these competencies. The replies do not show “extra” powers, rules or rights when prosecutors are acting in civil law cases but some special ways of activities appear in administrative law jurisdiction.

a) Prosecutors and other parties in civil law cases

Before the presentation of the replies a methodological consideration must be mentioned. Some of the Member States mentioned administrative law competencies of their prosecution services which are limited to court-actions against decisions of different administrative authorities. Such 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. Prosecution services did not report any special powers or authorities when prosecutors take part in *civil court proceedings* as petitioners. They have the same powers as other parties *(Albania, Austria, Croatia, Czech Republic, France, Germany, Hungary, Liechtenstein, Monaco, Poland, Portugal, Romania, the Russian Federation, Slovak Republic, Ukraine),* their role is not exclusive, the proceedings may be started by other interested persons as well *(Ireland).* 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. Consequently, this kind of competencies fits better for civil law than administrative law field. *Germany* mentioned, that the Prosecutors Genaral have a special decision-making power in cases for compensation for damages caused by the judiciary: they decide in the question of compensation. However, their decision is not a final one, if tha party concerned is not satisfied, he/she can seek for a court decision – it means that in its nature the prosecutors “decision” is an offer, and the real decision – if the party concerned refuses the offer – is a court-competence.

Special rules are governing only the scope (aim) of action of prosecutors, the substantial legal ground of their action and in some cases limitations of their statements.

The most important aims prosecutors may take legal actions for are (with some examples):

- nullity of marriage *(Albania, Austria, France, Hungary, Luxembourg, Poland, San Marino, Slovenia, Spain, Turkey),*
- declaration of death *(Austria, the Russian Federation, Slovak Republic),*
- disqualification of directors of companies *(Ireland)* or cancellation of companies *(Czech Republic, Luxembourg, Slovak Republic, Slovenia),*

- validity of election or referendum *(Ireland, Romania, the Russian Federation)*
- property rights and interests of State, privatization *(Armenia, Azerbaijan, Croatia, Latvia, Moldova, Montenegro, Portugal, the Russian Federation, Slovak Republic, Ukraine),*
- paternity denial or dissolution of adoption *(Czech Republic, Hungary, Liechtenstein, Luxembourg, Poland, Portugal, Romania, the Russian Federation, Slovak Republic, Slovenia),*
- keeping of persons in health care institutions, limitation of legal capacity *(Czech Republic, Luxembourg, the Russian Federation, Slovak Republic, Turkey, Ukraine),*
- protection of children's rights *(Albania, Czech Republic, Hungary, Luxembourg, Portugal, Romania, the Russian Federation, Slovak Republic, Spain, Turkey),*
- representation of state authorities in proceedings for compensation of damages caused by the judiciary *(Germany, Hungary),*
- supervision of ethical behaviour of some (regulated) professionals *(France, Germany, Turkey),*
- supervision of detentions *(Czech Republic, France, Hungary, Moldova, the Russian Federation),*
- dissolution of civil associations *(Hungary, Poland),*
- declaration of violation of labor or social law regulations *(France, Hungary, Romania, the Russian Federation),*
- nature management *(Hungary, the Russian Federation).*

The competencies enlisted above were mentioned in Part II of the replies. As it was up to the Prosecution Services whether they answered the questions concisely or in details, the list of competencies is not a closed enumeration (it is rather *exemplificatio* and not *taxatio*). On the one hand it should be understood as a list of the most frequent competencies, and Member States mentioned are only examples. At the other hand some of competencies can be also well known in countries which did not point out them.

Substantial legal grounds are much more concordant than their aim. They were included in almost each answer, but in different phrasings:

- ensuring rule of law (integrity of democratic decisions, legality, a observance of law, remedy against violation of law),
- protection of rights and liberties of persons (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 (public order),
- harmonization 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).

These notions are well-known as principles of government in all legal systems. Usually, in certain situations provided by law, the participation of the prosecutor in litigation is compulsory.

Limitation of activity of prosecutors in different member States is similarly common. Almost all of them are empowered to launch new court-actions, to use ordinary and extraordinary remedies (appeals) as parties of trials. In this sphere only exceptional rules reported in some replies are to be mentioned. The most important of them are the next:

- the prosecutor has the right to submit a nullity plea, but he/she cannot file an extraordinary appeal or proposal for permission of reopening of proceedings *(Czech Republic),*
- the prosecutor is authorized to demand every civil proceeding and may take part in any ongoing civil litigation as independent party side by side with the interested party *(Hungary, Poland, Portugal, Romania, Slovak Republic),*
- the prosecutor does not have the right (generally or in special cases) to manage an agreement *(Hungary, the Russian Federation).*

b) Prosecutors and other parties in public law cases

Situations regarding public law activities are less unambiguous. Only two common peculiarities can be found which should be highlighted just for their rgeneraliity:

- firstly, 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 (NB. latter competencies were classified and treated as civil law ones),
- secondly, some replies mentioned that prosecution services have the right to formulate opinion regarding the draft-legislation on structure of judiciary, rules of procedure or

substantive law applied; we considered this opportunity as opinion of organization involved in legislation not as special competence of prosecutors.

Special competencies were given to some prosecution services against administrative decisions as (with some examples):

- providing legal opinions on draft proposals of legislation *(Croatia, France, Hungary, the Russian Federation),*
- compulsory mediation or reaching out-of-court settlement before taking any other court-action against the State *(Croatia, Germany),*
- supervision of observance of detention-rules *(Czech Republic, France, Hungary, Moldova, the Russian Federation),*
- monitoring and observing the application of legislation, warning, protest or contestation (with or without) power of suspension of execution against a decision of a certain administrative authority *(Croatia, Latvia, Hungary, Portugal, the Russian Federation, Slovak Republic, Ukraine),*
- motion based on exception of unconstituality *(Hungary, Luxembourg, Romania, the Russian Federation, San Marino, Slovak Republic),*
- attending sessions of Cabinet and membership in parliamentary investigation commissions *(Latvia).*

We must remind that this analysis is based on Part II of the Questionnaire. A similar analysis was presented in the First Report. Performance of abovementioned actions usually is based on the former *examination* of the files of an administrative case. Right of such an examination seems to be the fundamental right of prosecutors when dealing a public law case. These competencies considered specific to some prosecution services will be detailed later.

4. Judgements of the European Court of Human Rights or constitutional courts

Judgements of the European Court of Human Rights or constitutional courts give significant contribution to appreciation of non-penal activity of different prosecution services. Important implications are arising from requirements and governing principles stated in the judgements.

a) Judgements of the European Court of Human Rights

Very few replies mentioned pending cases or judgements of the European Court of Human Rights regarding rules or activity of prosecutors outside the field of criminal law.

Czech Republic reported case *PK v. Czech Republic* concerning prosecutor's competence regarding the paternity denial. The Court decided that it is not possible to state that refusal of the public prosecutor to commence proceedings concerning paternity denial resulted in the breach of the right of the claimant for respecting of his private life (the complainant did not use the six-month period for lodging of own action for paternity denial for a child after the freely determination of his paternity by an approving declaration; the prosecutor rejected his request to lodge an action due to absence of the child's interest in disproval of the assumed paternity, as no other man was interested in paternity of the child and denial of his paternity would not ensure connection of the child with its biological father; the child would probably remain fatherless, which would unnecessarily weaken its position, for example as regards maintenance).

The FYR of Macedonia reported three cases. In *Kostovska v. FYR Macedonia (no. 443535/02)* the Court considered that there was no appearance of a violation of the Convention caused by the public prosecutor who had refused an application to lodge with the Supreme Court a request for the protection of legality on the ground that the statutory time-limit had expired. In *Grozdanoski v. FYR Macedonia (no. 21510/03)* the applicant complained that the principle of equality of arms had been violated as he had not been given an opportunity to comment on the company's appeal on points of law and the public prosecutor's request for the protection of legality. The Court considered that there has been a violation of Article 6 § 1 of the Convention. In *Markoski v. FYR Macedonia (no. 22928/03)* the Court decided that the Convention was violated by the lenght of a civil proceeding, the prosecution was not mentioned in the judgenment on the merit.

Moldova also mentioned some cases. In *Roşca v. Moldova (no. 6267/02)* the Court noted that since a „request for annulment was a procedure by which the Prosecutor General's Office could challenge any final decision upon the request of one of the parties to the proceedings", and „by allowing the request lodged by the Prosecutor General under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in a final and enforceable judicial decision and thus *res judicata*" the Convention was violated. The other cases – *Asito v. Moldova (no. 40663/98), Josan v. Moldova (no. 37431/02)*[14]*, Braga v. Moldova (no. 74154/01), Nistas GMBH v. Moldova (no.30303/03), Michalachi v. Moldova (no. 37511/02) etc.* – were judged by the Court in the similar way. Due to the judgements in the Civil Procedure Code of Moldova the power of Prosecutor general to launch actions for annulment in civil law cases was cancelled.

Portugal reported three cases. In case *LM v. Portugal (no. 15764/89.)* the Court decided that participation of prosecutors in a private sitting of the Supreme Administrative Court is not conform with the Convention, since having a prosecutor present is not the only way to contribute to maintaining the consistency of the case-law. In case *GA v. Portugal* the Court made the same judgement.[15] In case *JP v. Portugal (no. 13247/87)* the Commission analyzed the regulation of civil procedure act that gives the prosecutor the right to prorogate the process.

The *Slovak Republic* reported case *P. v. Slovak Republic (no. 10699/05).* The Prosecution Service failed to submit a motion to deny paternity after excluding from paternity the father according to the DNA test while the father's paternity had been declared by a court. The Court accepted that there wasn't enough ground to reject the legal action,[16] since there was no reasonable relationship of proportionality between the aim sought to be realized and the absolute means employed in the pursuit of it.

b) Judgements of Constitutional Courts of the Member States

Some more cases tried by their Constitutional Courts were mentioned in the replies of the Member States.

The Constitutional Court of the *Czech Republic* dealt with procedures of Prosecution Service during assessment of conditions for lodging of an action concerning paternity denial, when it came to a conclusion that these conditions were not met due to the fact that paternity denial was not in interest of the child. The Constitutional Court specified that it is an absolutely exceptional authorization of a state body (Supreme public prosecutor) that can only be applied under strictly defined conditions in the interest of the child. Suspending of the proposal for filing of an action concerning paternity denial by the Supreme public prosecutor's office cannot be considered a decision, it is only notification of the claimant concerning the fact how the proposal was dealt with.

Germany mentioned that *„In several judgements, the German Constitutional Court has decided, that all the power of Prosecutors General outside and within the Criminal field have to be based on law (principle of the Rule of Law).*

---

[14] *„Legal certainty presupposes respect for the principle of res judicata (ibid., § 62), that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character..."*

[15] *„Pour le Gouvernement, la décision d'introduire ou non un recours en harmonisation de jurisprudence ne devait être prise par l'agent du ministère public qu'en raison de critères strictement juridiques, le requérant ayant accepté une telle autonomie d'action à partir du moment où il a sollicité l'assistance du ministère public."*

[16] *„...as a matter of principle, the "legitimate interest" in ensuring legal certainty and the security of family relationships and in protecting the interests of children may justify a difference in the treatment of persons with an interest in disclaiming paternity according to whether paternity has been merely presumed or whether it has been determined in a decision that has become final. However, the pursuit of this interest in the present case produced the result that, while the applicant did not have any procedure by which he could challenge the declaration of his paternity, other parties in an analogous situation did. Under the applicable legislative framework, no allowance at all could be made for the specific circumstances of the applicant's case, such as, for example, the age, personal situation and attitude of I. and of the other parties concerned."*

In *Hungary* the Constitutional Court stated the unlimited right of prosecutors' to start or join civil litigations to be unconstitutional because it violates the procedural right of persons concerned to decide upon such a trial. Prosecutors' rights must be limited by law. Another judgment required time-limitation for prosecutors' protest in administrative cases.

Latvia reported a judgement of the Constitutional Court on the role of Prosecution Office within the system of public institutions which found that the status of the Office as judicial institution is in conformity with its functions.

Portugal quoted a decision that contested the regulation of civil procedure act that gives the prosecutor the right to prorogate the process, the case concerned representation of incapable persons.

Romania reported more judgments. The Constitutional Court stated that although it is about the civil, private trials, the prosecutor is not the opponent of the court or any of the parties but, he intervenes in the trial for guarding the observance of law, Therefore, the restriction of the prosecutor's right to participate in any civil trial, in its every instance was found to be unconstitutional. Some more judgments sustained the abovementioned statement, one of them was concerning the court proceedings against decisions of administrative authorities.

In two of its judgments the Constitutional Court of the *Slovak Republic* had no objection regarding the right of the prosecutor to participate in civil judicial proceedings or regarding the empowerment of the General Prosecutor to submit extraordinary appellate review against valid court's decision.

Implications based on the abovementioned judgements will be treated later.

5. "Most important" competencies

It would have been interesting to have a comprehensive list of competencies recognized as "most important" by the different Prosecution Services. However, the replies were not certain enough to answer this question:

Some of the Prosecution Services reported all or majority of their competencies as very important *(Albania, Czech Republic, France, Portugal, Romania, the Russian Federation, Slovak Republic, Spain, Turkey, Ukraine).*

Croatia mentioned a competence just abrogated by latest amendments as "very effective", namely the *motion for the protection of legality "*by which State Prosecution was in position to intervene against any verdict or procedure which, in its essence, breaches human rights or challenges the principle of rule of law." Unfortunately the reason of abrogation was not communicated. While this competence was abrogated in Croatia, some other replies such as those form *Czech Republic, Poland, Portugal* mentioned it with appreciation.

Other competencies listed among „most important" ones are

- supervision of imprisonment, detentions, protective education *(Azerbaijan, Czech Republic, Hungary),*
- participation in the civil proceedings due to social and legal protection of children or of incapable persons *(Czech Republic, Latvia, Monaco, Portugal, Romania),*
- participation in bankruptcy proceedings *(Czech Republic, Luxembourg, Monaco),*
- participation in auction validity proceedings *(Czech Republic),*
- supervision of tax proceedings *(Poland),*
- appeal against unlawful legal acts of administrative authorities *(Hungary, Poland, Portugal, Ukraine),*
- contribution to maintaining the consistency of the case-law of courts *(FYR Macedonia, Moldova, Montenegro, Poland, Portugal, Romania, Slovenia),*
- participation in disciplinary cases of regulated professions *(France, Germany).*

6. Basic principle of non-penal competencies

It was evident even before preparing the First Report that some Member States consider unnecessary to empower their prosecution services with non-penal competencies, some others were given only civil law tasks, and some prosecutions services have extended competencies outside criminal law field. The most important groups of competencies presented in the First Report, the special circumstances of practice of these competencies can be specified due to answers on Part II.

Detailed knowledge of rules of proceeding and circumstances of activity is inevitable if we want to understand the reason of non-penal competencies. Besides this knowledge it helps to get to know the different fundamental principles which influenced the Member States to develop their regulation.

France indicated as background of non-penal competencies ist history of judiciary, growth of technical regulations, and strenghtening of administrative intervention in everyday life of the people. Opinion of the prosecution service empowered to aplication of law and protection of rights and liberties is important in all the basic questions of the society.

In *Ireland* – a Member State with few and specific non-penal competencies – the statutory independence of the Office of the Director of Public Prosecutions "would seem" to be the rationale.

The Constitutional Court of *Latvia* found that when decided on status of the Prosecution Office, has based on considerations of historical succession and usefulness.

The *Russian Federation* mentioned a similar historical background: *"The prosecutor's office established by Peter I in 1722, was meant to 'serve as a 'sovereign's eye' in observance of laws and instructions of the central power, exposure of embezzlement of public funds and bribing, permissiveness of magnates and bureaucratic noblemen, protecting the country safety'. Almost three centuries already the Russian prosecutor's office, having experienced the change of different political regimes, serves as a stronghold of the legality and law order…"*

IV. Evaluation and Observations regarding the non-penal competencies of prosecutors

1. Adjusted matrix of competencies

The present examinations point out that there is a definite difference between European countries according to the existence and extension of non-penal competence of prosecutors. To understand this difference we should return to the matrix of competencies presented in *Table 1.* The matrix can be fined on.

The first possible refinement is given by law-families. Unfortunately this refinement does not help as some Member States belong – as is well known – to one or other law family, but others cannot be enlisted without a comprehensive study of their law system. However, a rough conclusion can be drawn: all of the "great" fields of the matrix of competencies contain Member States pertinent to French (Roman) and German law families. Common law family is an exception: there is no common law Member State which has extended non-penal competencies. Consequently, pertinence to one or other law family is not of primary relevance, it does not explain itself the difference of competencies.

Therefore, it helps to adjust the matrix of competencies by sorting Member States with extended non-penal competencies by the way of proceeding: prosecution services with competencies which let them act only (or mostly) in courts (by legal actions) are separated from those which are empowered to use also extra-court (direct, own-power) measures. The outcome of this sort is presented in *Table 2.*

Table 2.

Non-penal competencies		No	Few or not important	Extended
No		Estonia, Finland, Georgia, Iceland, Malta, Norway, Sweden, Switzerland United Kingdom.		
Only civil law			Albania Austria Azerbaijan Denmark Germany Greece Ireland Italy Liechtenstein Moldova San Marino Slovenia Turkey	Belgium France Luxembourg The Netherlands (!)
Civil and public law	**Mostly court-actions**			Czech Republic Monaco Poland Portugal Romania Spain
	Court-actions and extra-court (direct, own-power) measures			Armenia, Bulgaria Croatia FYR Macedonia Hungary Latvia Lithuania Montenegro Russian Federation Slovak Republic Ukraine

The adjusted matrix of competencies is to be handled with some reservation due to sorting of Member States based mostly on replies on the Questionnaire. The different replies contain the concrete tasks and instruments of prosecutors in various details. Some prosecution services can be "labeled" without concern when some other "labels" can be improper. Even so, the refinement is necessary since the replies with detailed descriptions indicate beyond any doubt that there is a significant difference between prosecution services with non-penal competencies acting only in courts and those having extra-court powers.

Based on the adjusted matrix of competencies the former competencies are to be reconsidered. The important fields of the matrix among "border-lines" change as follows:

- prosecution services *without* non-penal tasks,
- prosecution services with few, not important or special *civil law* tasks,
- prosecution services with both civil law and administrative law competencies to start *court-actions*,

- prosecution services having also extra-court (direct, own-power) administrative law competencies besides civil law and administrative law competencies to start *court-actions*.

Whereas this new specification shows not only the quantitative growth of non-penal tasks of the different groups of Member States, but it expresses also intensity of non-penal role of the different prosecution services, one of the most important questions could be whether there are other common features among prosecution services in the same groups (fields of the matrix) characterized by the same intensity of non-penal role.

2. Common features of groups of states and their possible rationale

It was mentioned above that pertinence of the Member States to the different groups of law families was significant only in the case of common law Countries. This statement should be corrected as follows: lack of non-penal competence of prosecutors is significant only for common law and Scandinavian Countries *(Estonia, Finland, Georgia, Iceland, Malta, Norway, Sweden, Switzerland, United Kingdom)*. This common feature is strengthened by *Estonia,* and it is not weakened by the fact that two other countries belonging to other law families, *Georgia* and *Switzerland* did not mention non-penal tasks as well.

A similarly strong but not exclusive common feature can be considered in the case of French (Roman) and German law families. Their prosecution services have more or less non-penal task but they can proceed only (or mostly) through court-actions *(Albania, Austria, Azerbaijan, Belgium, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Moldova, Monaco, the Netherlands, Poland, Portugal, Romania, San Marino, Slovenia, Spain, Turkey).* However, this last consideration is to be completed with the remark that there are countries of other law families *(Greece, Ireland, Turkey)* which were grouped among countries of French (Roman) and German law families due to their non-penal tasks. It is not without importance to considerate that a great number of Member States – half of them – belongs to this group.

It could be surprising that the group of countries with extended and intensive non-penal tasks is not predetermined by pertinence to law families: *Armenia, Bulgaria, Croatia, FYR Macedonia, Hungary, Latvia, Lithuania, Montenegro, the Russian Federation, Slovak Republic, Ukraine.* At the same time other common feature of these countries can be considered, namely all of them belonged to Soviet sphere of interest during the second half of the XXth century. However, more post-communist countries can be found in the group of only court-action prosecution services: *Czech Republic, Poland, Romania,* and in the case of two other countries of the group of only court-action prosecution services, *Portugal* and *Spain* the post-communist feature is absent, but both of them had to face a long authoritarian government during the XXth century.

A summarized conclusion can be that **existence and intensity of non-penal tasks of prosecutors depends mostly on historical and cultural heritage of the different nations. Pertinence to one of law families is relevant but intensity of tasks is much more influenced by authoritarian experience of the countries.**[17]

It is noticeably that the abovementioned conclusion does not give a full explanation of the phenomenon. It is not explained why Member States belonging to different law families as *Armenia, Bulgaria, Croatia, FYR Macedonia, Hungary, Latvia, Lithuania, Montenegro, the Russian Federation,*

[17] Role of authoritarian experience in detailed regulation (legislation) of public institutions and their activity is not unique. Analyzing the historical and political background of the different military law systems Georg Nolte and Heike Kriger found that there is a significant difference in regulation of three categories of states: small traditional democracies (Belgium, Denmark, Luxembourg, the Netherlands), large traditional democracies (France, United Kingdom) and "post-authoritarian" democracies (*"the notion "post-authoritarian" do not imply a value-judgement (...) merely serves to emphasize that the military law system of a particular state has at some point been consciously reformed in the light of significant experiences with a domestic non-democratic regime"*). Within the last category of states legislation on military law is focusing emphasized on rights and constitutional checks. See: Georg NOLTE – Heike KRIEGER: European Military Law Systems – Summary and Recommendations, in: Georg NOLTE (ed.): *European Military Law Systems,* De Gruyter Recht, Berlin, 2003, p. 23-30. Our observations regarding non-penal tasks of prosecutors point out that the *Nolte-Krieger criteria* is also valid in particular regulations of competencies of prosecutors.

Slovak Republic, Ukraine sustained intensive non-penal prosecutorial competencies after the fall of authoritarian regimes.

3. A possible explanation of extra-court (direct, own-power) administrative law competencies

One of the possible reasons to sustain intensive non-penal competencies of prosecutors is not unknown in the legal-literature of the countries of Central-Eastern Europe, and it can be found among the answers to Part II of the Questionnaire. In section III. 6. it the explanation of *the Russian Federation* to competencies of its prosecution service was mentioned. Its prosecution system – the „sovereign's eye" – can be traced back to Peter I. And it is a generally known fact that Peter I performed a reform of the State institutions after his study-tour in other European countries. Among these countries we find Sweden and its institution of *Iustitiekansler* – a „predecessor" of *Iustitieombudsman* – set up in 1713-ban.[18] It is conceivable that the Soviet regime received the prosecution service of Peter I, and this model was "exported" after the Second World War to the countries of its sphere of interest of the Soviet Union.

However we need some more reasons explaining why those countries which "had" the prosecution model strange from their former system sustained it after the democratic transition. A possible answer can be again the institution of ombudsmen. This institution was present for centuries only in Sweden, its wide-world spread happened only in the second half of the XXth century. The first recipient was Finland in 1920 followed by Denmark in 1955, Norway in 1952-ben, Germany in 1959-ben, the United Kingdom in 1967-ben and so on.[19] It should be highlighted that the institution of ombudsmen is also very popular in countries with no non-penal competencies of prosecutors (e.g.: in the British Islands the same tasks dealt by a few officers in other countries are solved by so many ombudsmen that they operate their own Association[20])

A need for a new, impartial parliamentarian or judicial institution contributing to maintenance of ordré public and rule of law in connection with public administration or contributing to harmonized court jurisdiction seems to be current in the last centuries in Europe. The need was continent-wide, the institutional model was also common, but it appeared in different forms in the law families or in the groups of States with same historical experience. Common law countries trusted the democratic tradition of their institutions and stress the political (parliamentary) control of administration, the Roman and German law families give more or less tasks to their prosecution services ensuring legal protection and harmonization of court jurisdiction. The latter way is strengthened by the experience of authoritarian regimes in Central-Eastern European Countries.

Consequently, it is nothing surprising if we see that the model of prosecution services with large civil and administrative law tasks survived the transition from the communist decades. This model of prosecution system answered just those pretences which also appeared in Western Europe although in different way. The experience that prosecution services were able to control administrative bodies in the frame given by law is a proper consequence of requirements of prosecution services as crucial actors of the system of criminal justice.

Obviously, after the graft of the institution of ombudsmen to the prosecution services, the Central-Eastern European Countries faced a direct reception of the ombudsman-idea. Co-existence of the two institutions with the same roots was studied in Poland, where the Proesecutor General is entitled to

[18] See: *Ibrahim AL-WAHAB: The Swedish Institution of Ombudsman*, LiberFörlag, Stockholm, 1979, p. 20., and *Bengt WIESLANDER: The Parliamentary Ombudsman in Sweden,* The Bank of Sweden Tercentenary Foundation and Gidlunds Bokförlag, 1994. p. 14-16.

[19] See: *European Ombudsman/National Ombudsmen or Similar Bodies*, People's Europe Series, W-6., European Parliament, Directorate General for Research, January 1995, *Gerald CAIDEN, (ed.): International Handbook of the Ombudsman I-II.* Greenwood Press, Westport, Connecticut, 1983, *Linda C. REIF (ed.): The International Ombudsman Yearbook,* 1997, Vol. 1.

[20] Some examples: Northern Ireland Police Ombudsman (created by: Police/Northern Ireland/ Act 1998.), Legal Services Ombudsman for England and Wales (created by: Legal Services Act 1990.), Commissioner for Local Administration in Scotland (created by: Local Government /Scotland/ Act 1975.), HM Inspectorate of Constabulary, Scotland (created by: Police /Scotland/ Act 1967.), Police Complaints Authority (created by: Police and Criminal Evidence Act 1984.), The Commission for Local Administration in England (Local Government Act 1974.). L.: *Northern Ireland Police Ombudsman, "Modernizing Justice" … Modernizing Regulation? Annual report of the Legal Services Ombudsman 1998/99, Local Government in Scotland, Local Government Ombudsman, Annual Report 1998/99*.

represent the interests of the community as opposed to the ombudsman protecting the human rights and liberties. The latest goal of the two institutions is common, only their ways of proceeding are different.[21]

It seems that four important roots of non-penal tasks of prosecutors and especially extended administrative powers can be identified:

a) the original – pre-modern – institutions of *procurators of the treasury* (or of the interests of the Crown); *San Marino* just holds this ancient denomination: *Procuratore del Fisco,* but the institution was known in the majority of the continantal countries;
b) the institution of *procureur* in *France*, which can be considerest as the mother-institution of the modern prosecution systems of the continental Europe;
c) the institution of *ombudsman* of *Sweeden* as a specific modell of non-decision-making institutions;
d) and finally the *tzarian procurator* of *Russia,* which combined the three main roots and had a decisive influence on Eastern and Central Europe.

4. Requirements of non-penal competencies

The survey of institutional models can be followed by formulation of special requirements of activity of prosecutors in civil and administrative law cases.

The First Report was closed with a list of principles governing non-penal activities of prosecutors (see: Annex 1.). Of course, not each of these principles is to be taken into account with similar importance for the different competencies.

a) Court-actions in civil or administrative cases

The First Report presented the substantial legal bases of the different competencies in details *(State's property claims and their enforcement, Protection of public interest, Protection of human rights)*, and some aspects were examined which could not be ignored while exercising these competencies *(Measures of the prosecutor and principle of separation of powers, Measures of the prosecutor and principle of "equality of arms*", *Measures of the prosecutor and principle of non-discrimination)*. Conclusions of the First Report are validated by answers to Part II, namely by judgements of ECHR and of the constitutional courts mentioned in the replies.

The judgements affirm that competencies regarding court-actions are well-known in majority of European countries. However, some circumstances are to be examined profoundly.

Firstly, there is no clear answer whether competencies of prosecutors should be regulated in details or it is appropriate to start court actions or to join pending litigations by giving a general mandate. Some Member States were explicitly cut down the range of activity and formulated a detailed regulation. Others are maintaining without any discussion the general competence or just the former "short list" of competencies was overruled. There is neither a common requirement nor an opportunity to formulate it based only on replies to the Questionnaire. However, the answer should be grounded on the consideration that the prosecutor acts as a state authority. Unlimited civil law competences of the prosecutors would breach the right of the interested person to start an action to protect his/her own interests or not. It seems to be more appropriate if competencies of prosecutors are limited to goals proportional with right of disposal.

Secondly, competencies – limited or not – should not be discretional. Neither public order, nor protection of rights of persons is enough ground to let prosecutor act on uncontrolled considerations. Even in the case of the most general competencies as proceeding for paternity denial action for protection of one of the interested persons (child) – has influence on the rights of other person (father) and vice versa. Appearance of arbitrary proceedings can be avoided only if the reasons of actions are clear and availble for the interested parties. It is much more in accordance with right of disposal of the interpreted person if he/she has the right to claim and to start legal action against the proceeding of the prosecutor.

[21] See: *Tadeusz ZIELINSKI: The Ombudsman — Possibilities and Delimitations for Action*, Biuro Rzecznika Praw Obywatelskich, Warsaw, 1994, p. 50.

Thirdly, the competence of prosecutors to cooperate in consolidation of case law of the courts seems to be widely accepted. There is no imperative reason to exclude prosecutors from these procedures. However their position of being *amicus curiae* should not mean unlimited or uncontrollable opportunity of influence.

a) If the outcome of the proceeding is strictly a proper interpretation of law – even though it is compulsory for lower courts –, it could be sufficient to make the position of the prosecutor public. Even in this case there is no reason to let prosecutor participate in the final decision-making council of judges.
b) Equality of arms is to be added to requirement of publicity if the judgement for consolidation of case law has a direct effect on a pending case, since such a judgement has influence on the interests of the adverse party (parties).

b) Extra-court (direct, own-power) administrative law competencies

As it was presented, prosecutors are given extra-court (direct, own-power) administrative law competencies (warning, protest etc.) in rather few Member States, but these States find them necessary. Requirements of direct administrative competencies are less clear that those of court-actions (since the latter ones are similar – consequently well known – to rules governing the activity of private parties). Principles of mechanisms controlling public administration bodies are not uniform, even though the most important principles were dealt in the Handbook of the Directorate of Legal Affairs.[22]

The origin and the general reasons of direct – extra-court – actions were already presented in this Report. It should be examined whether there is enough ground – besides the historical reason – to maintain these specific competencies.

Last year the Human Rights Commissioner of the Council of Europe formulated that: "*Without attracting much publicity, an important development has taken place in Europe in recent years – the ombudsman idea has spread, and the institution has been set up in almost all countries"*[23]. Reading this opinion the following question cannot be by-passed why did the ombudsman-like institutions become so popular, almost obligate among control-forums of public administration? Why is an institution necessary which may formulate only unenforceable recommendations, which is not empowered to make decisions declaring the "truth" in its jurisdiction besides legislation that takes into account judgement of the European Court of Human Rights, besides executive branch acting through efficient, quick and simple decisions, and besides judiciary that is able to judge a case by a meticulous, final and enforceable resolution?

Answers to these questions will also give the reason of the special competencies of prosecutors due to the close relationship between the two institutions. The common answers could be supposed since all of the Member States concerned had definitely stated that their prosecutors have no powers to make enforceable decisions. Parallelism between the institutions of ombudsmen and prosecutors ombudsman can be observed not only in their "origin" but also in their powers of action. To answer the abovementioned questions two surveys are necessary:

i) first of them is concerning duties and instruments of the executive branch,
ii) secondly, we need an overview of mechanisms of control over the activity of public administration bodies – understood as prescriptions addressed to particular persons or institutions or understood as activity of executive power outward its hierarchy.

ad i) The first survey shows that the executive branch is less and less able to exercise its governmental power through traditional administrative instruments – it cannot converse its power into individual decisions of public authorities. New forms of activity are concentrating on regulation of services assured by private enterprises and on discovering of new territories to be administrated. One of the consequences of this new approach of public administration is that public law liability of leaders of administration should be distinguished from political accountability. Public law liability (or its traditional form, the ministerial responsibility) is more and more evaporating while political

[22] *Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons*, Council of Europe, Directorate of Legal Affairs, Strasbourg, 1996.
[23] Thomas *HAMMARBERG*: *Human Rights in Europe: Mission Unaccomplished,* CoE, Strasbourg, 2007, p. 51.

accountability is still validated by elections and different forms of referendum. Due to changes of forms of its activity, the executive branch has more powers than it is prima facie recognizable from constitutional texts. Public power is formally based on institution of government, but its roots are to be sought in relations between the institutional structure and people as political body. Political order anticipates the constitutional order formulated in texts (or in law). The reaction of constitutional law to this new situation is seeking for more legal guaranties and restrictions.[24]

ad ii) Regarding the mechanisms of control, its domain of interpretation should be determined as extensively as possible. Term of *control over public administration* should cover all the proceedings of examination, estimation or affection of activity of a public administration body by another administrative or other public law institution. Control – understood in this broad domain of proceedings – can be political or legal since activity of state institutions is differentiated by these two points of view. *Political control* over public administration covers all those proceedings which lead to strategic governmental decisions (regulations) on trends, instruments, methods and structure of public administration. Mechanisms of *legal control* are not vested with powers of strategic decision-making, the goal of these mechanisms is to examine and to estimate regularity of activity of public administration bodies. One form of legal control over public administration is *legal remedy* which is formal (governed by meticulous procedural rules) and can lead to change or annul an administrative decision. *Other forms of legal control* don not have direct effect on the examined administrative procedure or decision, their outgoing is only criticism or initiation of legal remedy. Replies on the Questionnaire make clear that direct (extra-court, own-power) competencies of prosecutors – as well as ombudsmen proceedings – belong to the latter group, that is to the institutions having *non-remedy* forms of legal control.

One of the observations based on the two surveys presented above is that sublimation of the boundaries between public and civil law, strengthening of role of public services against the traditional proceedings of public administration bodies is sharpening the need for new forms of control (and of protection of rights) since the different instruments of legal remedy of the administrative law does not suit civil law relations and civil law court actions are not quick enough to correct the different mistakes of the administration. Value of mechanisms of control without decision-making power is growing. This kind of control can be handled by ombudsman focusing on human rights or by prosecutors protecting public order. After all the outcome is analogous.

However, even if the role of direct (extra-court, own-powered) competencies of prosecutors fits the mentioned forms of control, these competencies must not be unlimited. The accurate limitations cannot be drawn up by replies to the Questionnaire, but some of the rough requirements are as follows:

Firstly, it is beyond any doubt that impartiality and fairness of prosecutors acting for public order or for other aim defined by law should be ensured, taking into account criteria of Recommendation 19. (as consequences of administrative law activity can be commensurable to those of criminal law activities).

Secondly, definition of parameters of administrative law competencies of prosecutors should be regulated by law as precisely as possible. Reasons of this requirement are similar to those presented above regarding court activities.

Thirdly, obligation of prosecutors prescribed by law to reason their actions and to make these reasons open for persons or institutions involved or interested in the case seems to be a must – as it was seen regarding court-actions.

Fourthly, measures prescribed by prosecutors can be compulsory only after revision by court. Any kind of decision-making without opportunity of being argumented by the court is hardly acceptable, even if the goal of warning, protest and similar actions of prosecutors could be protection of rights or redress of injuries by a quick and simple procedure. In other words, measures of prosecutors can be enforceable only by consent of courts. However, some very few and limited cases – like protection of

[24] These conclusions are based on two researches published in the last years: Nicholas BAMFORTH – Peter LEYLAND (ed.): *Public Law in a Multi-Layered Constitution,* Hart Publishing, Oxford and Portland, Oregon, 2003, and Paul CRAIG – Adam TOMKINS (Ed.): *The Executive and Public Law. Power and Accountability in Comparative Perspective,* Oxford University Press.

state secrets or actions by other authorities bounded to consent of prosecutors as a guarantee of rights – could be exempted.

Fifthly, opportunity for persons or institutions involved or interested in the case to claim against measure or default of prosecutors is necessary.

V. Summarized observations and proposals

First Report examining replies to the Questionnaire (Part I) revealed the most important aspects of competencies of prosecutors outside criminal field of law. Its observations are fined in this Second Report based on Part II of the Questionnaire. Presentation of the judgements of the European Court of Human Rights and those of constitutional courts of the Member States had an important contribution to the new observations.

By replies on the Questionnaire essential questions have been answered and relevant requirements have been detected regarding non-panel competencies of prosecutors. However, the answers and requirements can be accepted as exhaustive description mostly in connection with court-actions. Other questions, especially those regarding the direct (extra-court, own powered) competencies have not been answered yet, and new questions are arisen from the observations. These questions cannot be answered on the base of questionnaires. In other words, limits of knowledge based on questionnaires have been reached. This method of gathering information is ipso empiric, its results are at least of statistical nature. Real mechanisms of activity, effectiveness of competencies in case, respect of principles and requirements cannot be revealed in this way. However, these questions need to be answered since motives why CPGE and CCPE paid attention to this field of activity are still valid.

In order to formulate general, detailed and compulsory regulation of non-penal activity of prosecutors which can be accepted and enforced by all the Member States, a new, multi-stage approach is inevitable.

A coordinated scientific research of activities of prosecutors outside criminal law field with participation of the Member States could serve as a first step. Different projects of the Council of Europe – e. g. HELP Program focusing on training of judges and prosecutors – could give a great advantage to the new research.

A theoretical cross-section of the activities based on the output of the research could be an appropriate ground for a draft of a new recommendation. Undertaking the new research CCPE would significantly contribute to achieve the fundamental objectives which is guiding the Council of Europe and its Member States: democracy, protection of human rights, rule of law.

A. Zs. VARGA

Annex 1

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

Member states of the Council of Europe contribute and maintain as a common root the democratic operation of the society by respecting entirely the principle of rule of law and the protection of human rights and basic freedoms without any conditions. We could have seen that a part of member states do not feel absolutely necessary to ensure competencies for the prosecutor in extra-penal area and do not consider these tasks a basic requirement. In spite of these circumstances we can not say that those member states, which prosecutors are not empowered to act in non-criminal area have an inappropriate practice or should reconsider changing their system of prosecution.

At the same time we can also see that other countries consider an integral part of their constitutional system to have prosecutors with the competencies outside the criminal area in order to ensure the operation of the democratic society and protect human rights. There is no reason for saying that these member states have an inappropriate practice or should reconsider changing their system of prosecution.

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

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

1. On contrary to the essential role played by prosecutors in criminal justice system the member states of the Council of Europe may ensure the participation of the prosecutor in the civil and administrative area due to historical, efficiency and economic reasons but their role should always be exceptional *(principle of exceptionality).*
2. The role of the prosecutor in the civil and administrative procedures should not be dominant and primary; the intervention of the prosecutor can only be accepted in case its aim of his procedure can not otherwise/or can hardly/ be ensured *(principle of subsidiarity)*.
3. The participation of the prosecutor in the civil and administrative area should be limited and must always have a well-founded, recognizable aim *(principle of specialty).*
4. States can entitle prosecutors to claim the interest of the state *(principle of protection of state interest).*
5. Prosecutors can be entitled to initiate procedures or to intervene into on-going procedures or to use various legal remedies to ensure legality *(principle of legality).*
6. In case public interest /legality of decisions/ requires (e.g. in cases of protection of environment, insolvency etc.) the participation of the prosecutor can be justified *(principle of public interest).*
7. Protecting the rights and interests of disadvantaged groups of the society not able to exercise their rights can be an exceptional reason for the intervention of the prosecutor *(principle of protection of human rights).*
8. If co-operation of prosecution services and other subjects of public law – the executive, the legislative, organizations of self-government seems to be inevitable, member states can provide prosecutors general to attend consultation with the representatives of mentioned organs *(principle of consultative co-operation).*
9. The principle of separation of powers should also be ensured in connection with the prosecutors' tasks outside the criminal sector *(principle of separation of state powers).*
10. Prosecutors' activity outside the criminal field can not influence the sovereignty of the legislative *(principle of sovereignty of the legislative).*
11. The assistance of the prosecution into the decision-making of the executive should not cause the responsibility of the prosecution for the executive's decisions *(principle of responsibility of the executive).*
12. The participation of the prosecution in court procedures should not influence the independence of the courts *(principle of independence of the courts).*
13. Prosecutors should not have decision–making powers when taking measures outside the criminal field or more rights than other parties before courts *(principle of equality of arms).*
14. Prosecutors should not discriminate person when protecting their rights and can only intervene upon well-grounded reasons *(principle of non-discrimination).*

15. If the prosecutor is entitled to take measures in the civil and administrative law area , he/she also exercise the rights and guarantees listed in Rec 19(2000) in connection with the criminal jurisdiction, such as the professional decision-making without influence *(principle of impartiality of prosecutors).*