OPINIONS OF THE CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE)



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Contents

Opinion No. 1 (2007) .....
Ways of improving international co-operation in the criminal justice field 5
Opinion No. 2 (2008) .....
Alternatives to prosecution 15
Opinion No. 3 (2008) .....
The role of prosecution services outside the criminal law field 21
Opinion No. 4 (2009) .....
The relations between judges and prosecutors 29
Opinion No. 5 (2010) .....
Public prosecution and juvenile justice 41
Opinion No. 6 (2011) .....
The relationship between prosecutors and the prison administration 45
Opinion No. 7 (2012) .....
The management of the means of prosecution services 55
Opinion No. 8 (2013) .....
Relations between prosecutors and the media 63
Opinion No. 9 (2014) .....
European norms and principles concerning prosecutors 71
Opinion No. 10 (2015) .....
The role of prosecutors in criminal investigations 87
Opinion No. 11 (2016) .....
The quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime 97
Opinion No. 12 (2017) .....
The role of prosecutors in relation to the rights of victims and witnesses in criminal proceedings 111
Opinion No. 13 (2018) .....
Independence, accountability and ethics of prosecutors 123
Opinion No. 14 (2019) .....
The role of prosecutors in fighting corruption and related economic and financial crime 133
Opinion No. 15 (2020) .....
The role of prosecutors in emergency situations, in particular when facing a pandemic 145
Opinion No. 16 (2021) .....
Implications of the decisions of international courts and treaty bodies as regards the practical independence of prosecutors 159
Opinion No. 17 (2022) .....
The role of prosecutors in the protection of the environment 175
Opinion No. 18 (2023) .....
Councils of Prosecutors as key bodies of prosecutorial self-governance 189
Opinion No. 19 (2024) .....
Managing prosecution services to ensure their independence and impartiality 203

Opinion No. 1 (2007)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

Ways of improving international co-operation in the criminal justice field

INTRODUCTION

1. The Consultative Council of European Prosecutors (CCPE) was set up by the Committee of Ministers 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. 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 in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system*[1]".

2. The Warsaw Declaration and the Plan of Action adopted by the third Summit of Council of Europe Heads of State and Government of the member states of the Council of Europe[2] highlighted, at the highest political levels, the Council of Europe's role in promoting human rights, democracy and the rule of law and its commitment to combating terrorism, corruption and organised crime and to further develop the Council of Europe's legal instruments and mechanisms of legal cooperation. The Warsaw Summit also included a commitment to strengthening cooperation and interaction with the European Union, particularly in the field of human rights[3], democracy and the rule of law.

3. Paragraphs 37 to 39 of the Recommendation Rec(2000)19 include a number of provisions on international co-operation in criminal matters, which are expanded on in the subsequent Explanatory Memorandum. In particular, the Committee of Ministers notes that "*given the number of existing international instruments and recommendations and the fact that this field is under specific scrutiny within the Council of Europe itself, the committee concentrated on identifying practical measures for improving the current situation, bearing in mind the important role normally played by the public prosecutor in international judicial co-operation on criminal matters.*" The Committee of Ministers is aware of the obstacles to international cooperation that exist in institutional practice and of the need for coordination mechanisms, above all within each country. In the Recommendation, it indicates that public prosecutors "*participate ....., either directly or by submitting memoranda, in all procedures relating to the execution of requests for mutual legal assistance*". In most national systems public prosecutors have responsibilities both as active participants in international cooperation and when their countries received requests for cooperation, whether in the form of extraditions, arrest warrants or rogatory commissions. This dual responsibility implies a range of knowledge geared to all aspects of cooperation and of the possibilities of coordination at a more general level.

4. This Opinion has been prepared according to the Framework overall Action Plan for the work of the CCPE adopted by the Committee of Ministers on 29 November 2006[4]. It aims to underline the essential elements which contribute to strengthening international cooperation in criminal matters and judicial mutual assistance from the point of view of prosecutors, as legal practitioners and main players of such cooperation.

5. The CCPE is aware that the issues of international cooperation in criminal matters are not important matters of concern only for the prosecutors. Extradition, arrest warrants and the gathering of evidence abroad are mainly the responsibility of our colleagues, the judges, who have their own representative body in the Council of Europe, the Consultative Council of European Judges (CCJE). There are other committees in the Council of Europe, like the European Committee of Crime Problems (CDPC), namely through the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal

[1] Paragraph 1 of Recommendation Rec(2000)19.
[2] Warsaw, 16 – 17 May 2005 – see documents CM(2005)79 final and CM(2005)80 final.
[3] The CCPE will address the issue of the human rights training for public prosecutors at a later stage.
[4] CCPE(2006)05 Rev final.

Matters (PC-OC) which have a pre-eminent role to play in this field[5], as well as the European Commission for the efficiency of Justice (CEPEJ).

6. Within the framework of this Opinion, the CCPE has taken into account universal and regional legal instruments, and in particular the relevant conventions of the Council of Europe which appear in the Appendix. It refers also to the Opinion N°(2006) 9 of the Consultative Council of European Judges (CCJE) on the role of national judges in ensuring an effective application of international and European law.

7. The CCPE has taken into account the work and conclusions of various fora where political and law enforcement authorities and representatives of public prosecution offices have addressed issues related to international cooperation in the field of criminal justice, and in particular the 1st pan-European Conference of public prosecutors specialised in cases relating to organised crime (Caserte, 2000)[6], the 7th European Conference of General Prosecutors (Moscow, 2006)[7] and the High level Conference of the ministers of Justice and the Interior (Moscow, 2006)[8].

8. To prepare this Opinion, the CCPE analysed, with the support of a scientific expert[9], the answers by 30 member states to a questionnaire[10] drafted for this purpose. The subsequent report was discussed at the European Conference of prosecutors on international co-operation in the criminal field (Warsaw, 4-5 June 2007)[11], in the presence of representatives of the public prosecution services of most of the member states and judicial cooperation bodies of the European Union (Eurojust and the European Judicial Network in criminal matters).

9. In its approach, the CCPE also wanted to be consistent with the Council of Europe - EU Memorandum of Understanding[12], whose "*shared priorities and focal areas for co-operation"* include *"human rights and fundamental freedoms; rule of law, legal co-operation and addressing new challenges".*

PRESENT SITUATION AND EXISTING SHORTCOMINGS

10. Strengthening international co-operation in the criminal justice field is essential as the community of states' answer to the attacks levelled at society by international crime, terrorism and corruption. Although the Resolution of the Committee of Ministers in 1997[13] was related specifically to corruption, it is worth mentioning it here because it also has a more general application: *"corruption represents a serious threat to the basic principles and values of the Council of Europe, undermines the confidence of citizens in democracy, erodes the rule of law, constitutes a denial of human rights and hinders social and economic development".*

11. The Recommendation Rec(2000)19 was enriched by a number of significant achievements in the field under consideration:

    - major conventions have been adopted within the Council of Europe, such as the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS No 182), the Convention on Cybercrime (CETS No 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS No 189), the Protocol amending the European Convention on the Suppression of Terrorism (CETS No 190), the Convention on the Prevention of Terrorism (CETS No 196), the Convention on Action against Trafficking in Human Beings (CETS No 197) or the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No 198). Moreover,

[5] See in particular the decisions by the CDPC on international cooperation in the criminal field taken at its 56th plenary meeting (Strasbourg, 18 – 22 June 2007).
[6] Organised by the Council of Europe, in conjunction with the national anti-Mafia office and Naples University II, and held in Caserta (Italy) on 8-10 September 2000.
[7] 7th session of the Conference of Prosecutors General of Europe (Moscow, 5 - 6 July 2006) organised by the Council of Europe in cooperation with the Office of the Prosecutor General of the Russian Federation on: "The role of public prosecutors in the protection of individuals".
[8] High level Conference of the Ministries of Justice and of the Interior (Moscow, 9-10 November 2006): "Improving European cooperation in the criminal justice field".
[9] Ms Joana GOMES-FERREIRA, Public Prosecutor, General Public Prosecutor's Office (Portugal). See report in CCPE-BU(2007)12.
[10] Document CCPE-Bu (2006) 06
[11] The conclusions appear in document CPE(2007)Concl1.
[12] Signed in Strasbourg on 23 May 2007.
[13] Resolution (97) 24 on the twenty guiding principles for the fight against corruption, adopted by the Committee of Ministers on 6 November 1997.

the UN Palermo Convention against Transnational Organised Crime[14], the UN Convention against corruption[15], the International Convention for the Suppression of Acts of Nuclear Terrorism[16], the Convention on Mutual Assistance in Criminal Matters between the member states of the European Union[17] and the CIS Convention on judicial assistance and legal relations in civil, family and criminal matters[18] have also served to strengthen judicial cooperation. However it must be noted that not all the states concerned have yet become party to these Conventions and some of them have not entered into force so far. This minimizes their impact and slows down their effective implementation by legal practitioners. Furthermore, shortcomings in the existing relevant Council of Europe's instruments were underlined in the above mentioned European Conference of General Prosecutors in Moscow.

- within the European Union, new instruments such as the Council's Framework Decision of 2002 on the European arrest warrant and the surrender procedures between member states of the European Union were adopted, and new bodies such as Eurojust, liaison magistrates and the European Judicial Network in criminal matters were set up, which give effect to the principle of mutual recognition.

- direct contacts in the field of judicial mutual assistance, through bilateral, regional or international agreements between judicial bodies[19] of the various member states are becoming increasingly frequent.

12. However, the real innovation lies in the further option provided for in these agreements. The agreements referred to provide for the spontaneous transmission of information from one national judicial authority[20] to that of another country. Legal instruments that are fully operative in most of the Council of Europe member states authorise national judicial authorities to report criminal offences and transmit the relevant information. This practice was advocated by the Committee of Ministers in Recommendation Rec(2000)19, according to which *"lastly, the possibility should be considered of extending existing mechanisms facilitating spontaneous exchange of information between public prosecutors of different countries"* [21]*.*

13. Consideration should now be given to the practical responses to these innovations, namely whether the international agreements concerned have led to significant changes in the member states' domestic law and practice and, at least, whether, and to what extent, public prosecutors use these new instruments and are aware of the recent changes that have taken place.

14. The preliminary study by the CCPE[22] shows that international cooperation has been improved since the nineties, sometimes thanks to pragmatic solutions implemented through cooperation and the setting up of direct contacts between the players in the process concerned. Some states underline an increased specialisation of the relevant players and smoother internal information regarding the opportunities offered within the framework of the mutual legal assistance system.

15. However, many elements are stressed as hampering he necessary development of mutual legal assistance in criminal matters and as being the cause of excessive length in international cooperation procedures today, in particular:
    - pan-European mechanisms of legal cooperation are not always in line with the today's challenges and demands;
    - the drafting of requests for assistance (e.g. too brief or with too many details, not signed or poorly researched, incorrectly translated, not precise or not following the proper procedure, etc.) can undermine the cooperation process; the lack of training, the complexity of procedures, the shortage of resources provided can mostly explain these shortcomings;
    - the transmission of requests remains too often linked only to diplomatic channels, though the European Convention on mutual judicial assistance in criminal matters (CETS N° 30) and its Second Additional Protocol (CETS N° 182) make possible direct contacts between competent judicial authorities to submit and execute requests; the lack of information (details of the competent authorities) often forces requests to go through central authorities; moreover, the simultaneous use of

[14] United Nations Convention against Transnational Organised Crime, signed at the Palermo Conference of 12-15 December 2000.
[15] Signed at the High level political Conference in Merida (Mexico) on 9 – 11 December 2003.
[16] Adopted on 13 April 2005 during the 91st plenary meeting of the UN General Assembly by Resolution A/RES/59/290.
[17] Established by Council Act of 29 May 2000, on the basis of Article 34 of the Treaty on European Union.
[18] Signed in Chisinau (Moldova) on 7 October 2002.
[19] The expression "judicial bodies" is to be taken here in the broad sense to include judges, public prosecutors and senior law enforcement authorities who are responsible for international judicial cooperation in criminal matters.
[20] Idem as in the footnote above.
[21] Commentary on recommendation 39.
[22] Report CCPE-BU(2007)12, mentioned above.

different channels of communication is a disruptive factor for the smooth implementation of the cooperation procedure;

- the increase in the number of mutual assistance requests is a factor contributing to the paralysis of the procedures, requested authorities being repeatedly bogged down by the execution of requests sometimes relating to minor cases;
- as regards the execution of the requests, the lack of a European culture of judicial cooperation and a degree of resistance in practical terms result in cooperation procedures being systematically relegated by internal procedures.

16. But serious difficulties arise from the differences between legal systems. The means by which evidence is obtained, the problem of dual criminal liability or *ne bis in idem*, the competence of the requesting authority or the system of judgments *in absentia* are main examples of concepts and procedures which would benefit from being more coherent with each other at international level to facilitate the cooperation between the systems. A better mutual knowledge of these systems would also enable to favour this cooperation.

17. Such difficulties are increased when addressing extradition. For example cases of extradition procedures aborted after political grounds were mentioned, interpretation of the same legal concept differed or the impossibility of extraditing nationals reiterated.

18. Another generally criticised negative aspect is that of delays for no objective reason. Here, one is no longer talking about structural or legal problems but simply about professional dysfunctions with no legal complications.

19. Therefore measures and tools should be developed so as to build a genuine culture of international judicial cooperation in criminal matters, both at the level of central authorities and at the level of individual players in this cooperation.

20. In that regard, the CCPE recalls that the First pan-European Conference of public prosecutors specialising in cases relating to organised crime[23] formulated recommendations in this way and proposed "*to organise contacts and exchanges of information between public prosecutors, in a more structured way*" and invited "*the Council of Europe to set up a liaison group, made up of a small number of public prosecutors, informally to organise contacts and exchanges of information between public prosecutors in general, supplementing existing arrangements, and, in particular, between public prosecutors specialising in cases involving organised crime*" while specifying that "*contacts should be established between the Council of Europe's liaison group and Eurojust (…)*".

21. Similarly, the European ministers of Justice and of the Interior who met in Moscow in November 2006[24] supported the idea that "*a network of national contact points be developed in order to facilitate contacts between those responsible for international judicial co-operation, notably in the areas of combating terrorism, corruption and organised crime, trafficking in human beings and cybercrime*".

RECOMMENDATIONS BY THE CCPE

22. The CCPE stressed the major improvements in international cooperation in criminal matters, as regards the European and international instruments adopted in the recent years, the institutional structures set up to facilitate exchanges between the players of this cooperation as well as the effective contacts developed between the practitioners. The CCPE encourages relevant bodies of the Council of Europe and member states to pursue and intensify their efforts so as to set up the institutional, normative and inter-personal conditions for the development of a genuine European legal culture of cooperation in the criminal field between the various member states, and even beyond.

[23] See above.
[24] See above.

Acting on the normative framework of international cooperation

23. To strengthen the normative framework of international cooperation and allow the improvement of the day to day work of judicial practitioners entrusted with the concrete application of mutual assistance, the CCPE recalls that it is essential that the relevant Conventions, namely those mentioned under paragraph 11 above, are swiftly ratified and effectively applied by the states concerned, and in particular the Council of Europe's member states.

24. Furthermore, the CCPE fully supports the ongoing work within the PC-OC which aims to modernise the relevant Council of Europe's instruments. Following the conclusions of the 7th European Conference of General Prosecutors (Moscow, 2006)[25], the CCPE invites the Committee of Ministers and the relevant committees of the Council of Europe to keep priority on the work of updating instruments on extradition, mutual assistance and transfer of criminal proceedings in order to set up more flexible cooperation procedures, based on mutual trust and confidence between the systems to speed up a procedure for handing persons over, by simplifying it, on the basis of the consent of the individual whose extradition is requested and whose fundamental rights would obviously remain fully guaranteed.

25. In this regard the CCPE recommends the Committee of Ministers to think about the preparation of a comprehensive Council of Europe convention on international co-operation in criminal matters.[26]

26. The CCPE also invites the legislature in the member states to study the possibility of simplifying national procedures targeted to the effective functioning of international cooperation, so that the weight of these procedures does not hamper the application of cooperation requests, in particular as regards extradition procedures. In any case, such simplified procedures would have to respect fully the rights of the persons concerned.

Acting on the quality of international cooperation

27. Relying namely on Recommendation Rec(2000)19 (in particular Article 38), on the Opinions of the Consultative Council of European Judges (CCJE) N° 4 (2003) on appropriate initial and in-service training for judges at national and European levels[27] and n° 9 (2006) the role of national judges in ensuring an effective application of international and European law[28], as well as on the conclusions of the European Conference of prosecutors in Warsaw[29], the CCPE recommends that the training of prosecutors engaged in international judicial cooperation as well as other players in such cooperation is strongly developed. Improved professional training on international cooperation should take account not only of existing conventions on the subject but also operational information collated by existing organisations and systems. It should equip practitioners with the necessary skills to better draft their requests for assistance and better understand and execute the requests that are addressed to them. Efforts for raising awareness of the international judicial cooperation players could also be undertaken in order to develop their skills so as to formulate their request for assistance more precisely and to avoid overloading third systems with misdemeanour requests.

28. It might not be necessary or even possible that every prosecutor or judge should be well aware of the relevant international instruments and channels. But it is essential that some of them are specialists on this issue and thus specifically trained. Therefore the CCPE recommends that each member state sets up an appropriate structure by which this specialisation should be guaranteed.

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[25] See above.

[26] On 18 June 2007 in his speech opening the 56th session of the European Committee on Crime Problems (CDPC) the Secretary General of the Council of Europe T. Davis suggested reviving this initiative from some ten years ago: “The aim would be to update, make more efficient and bring under a single “roof” all our existing conventions on international co-operation in criminal matters. I know that this is a long-term, ambitious and possibly also controversial project, but I do not think that we can be too ambitious when it comes to the fight against crime”. Such a draft Convention was elaborated several years ago but was put aside at that time.

[27] See in particular paragraphs 43 and 44 of Opinion N° (2003) 4 of the Consultative Council of European Judges (CCJE).

[28] See in particular paragraphs 7, 8 and 11 of Opinion N° (2006) 9 of the Consultative Council of European Judges.

[29] "*Given that the human factor is crucial in improving and making full use of international co-operation, the Conference, drawing attention to the importance which Recommendation Rec(2000)19 affords the training of prosecutors, strongly emphasises that appropriate training must be provided, in particular in order to keep pace with developments in international crime*".

29. This training focused on international cooperation in the criminal justice field must include human rights training for judges and prosecutors, as well as for defence lawyers where specifically appropriate. In addition to the general overview of the fundamental elements of human rights law, it is essential to explicitly identify those basic rights and relevant standards which concern directly individuals in criminal proceedings related to the execution of requests for international assistance in criminal matters. This should result in commentaries on each of the relevant law sources, as the applicable rights and standards differ according to the cooperation forms. Such commentaries or specialised documents should also rely on the prevailing practice and case-law.

30. This knowledge must be disseminated by appropriate means, and by training organisations, in particular judicial and prosecutorial national training institutions. The relevant European bodies for judicial and prosecutorial training such as the Lisbon Network of the Council of Europe and the European Judicial Training Network could also play a leading role in this context.

31. This training should also be completed by training in foreign languages, namely to contribute to improve direct contacts between practitioners, the quality of their assistance requests and a better understanding of the requests addressed to them.

32. Furthermore, the CCPE recommends that necessary information tools for practitioners are developed by the competent national authorities. It underlines in particular the usefulness of setting up a handbook on mutual judicial assistance containing a wide range of information on national investigation systems, like the so-called *Fiches belges*[30], which the European Judicial Network in criminal matters uses as a working tool and which facilitate the understanding of the states' legal systems. Circulars or guidelines summarising the applicable machinery, compendia of good practices and multilingual forms aimed at making uniform and facilitating the implementation of the most usual assistance measures could be developed, updated and disseminated among the practitioners, including through the Internet.

    Where appropriate, this should be done with the support of the CCPE. In this context, the CCPE recalls that the European ministers of Justice and the Interior encouraged in Moscow in November 2006[31] "*the establishment of a database of procedures in force in the member states concerning the various types of co-operation which would allow for easier access to this information*" and reiterates its support of this proposal. The above mentioned tools could be transmitted to the Council of Europe in order to enrich such a data base.

33. As regards professional training and information of prosecutors, the CCPE could also play a role in organising meetings of specialised prosecutors from member states, such as the above mentioned Caserta conference, where appropriate in cooperation with other interested bodies within the Council of Europe, and in partnership with other relevant European and international institutions and organisations.

34. The efficiency of the transmission of assistance requests and the way they are addressed depend also on the development of the transmission methods. The CCPE underlines that the opportunities offered by the new information technologies could thus be widely used to facilitate namely the exchanges through secure electronic channels provided that the principle of confidentiality and the authentication of documents are fully guaranteed.

Extending exchanges between legal practitioners

35. At the level of the Council of Europe, the CCPE invites the Committee of Ministers to reflect on the relevance of setting up structured cooperation and information exchange along the lines of the European Judicial Network in criminal matters and Eurojust, which would in particular enable the member states which are not party to such bodies of the European Union to benefit from similar services, on the basis of the relevant Council of Europe's instruments.

[30] The so-called "*Fiches belges*" give to the practitioners of mutual judicial assistance all the useful information on the legislation and organisation in the states of the European Union with which an action of judicial cooperation is envisaged.
[31] See above.

36. Based on the arguments and undertakings in the "Memorandum of Understanding between the Council of Europe and the European Union"[32], one possible approach could be to assign a formal or informal mediation role to the Council of Europe wherever problems arise concerning cooperation within the criminal justice field.

37. Without challenging the direct and decentralised ways of transmission, the member states could also consider the issue of identifying in each country, at an appropriate level according to the national legal system, a "specialised unit" entrusted with assisting to solve the difficulties met by practitioners of the requesting and requested states regarding judicial assistance requests. This unit would be entrusted in particular to deal with problems that impede or slow down assistance procedures.

38. The CCPE also calls member states to strengthen the willingness as regards international cooperation in the criminal justice field and to facilitate the full and direct participation of legal practitioners. The CCPE invites member states to compile a list of contacts and addresses giving the names of the relevant contact persons, as well as their fields of specialisation, their areas of responsibility, etc., and to publish this list on a restricted web site which might be administered by the Council of Europe. This list should be regularly updated by the states, so as to ensure the efficiency of the system. This would enable, while respecting the relevant Conventions, direct exchanges between practitioners, without going through the diplomatic channels which might be heavy procedures.

39. Moreover, the CCPE considers that the exchange of liaison judges / prosecutors between states, as encouraged by Article 38 of Recommendation Rec(2000)19, constitutes good practice which should be developed as far as possible, as it facilitates contacts between national justice systems, fosters a better mutual knowledge of these systems and therefore contributes to enhancing mutual trust and confidence between the international cooperation players.

40. The CCPE recommends that the prosecution services foster mutual cooperation also at the stage of drafting and executing requests, where appropriate.

Fostering cooperation with third countries and criminal international courts

41. Within the framework of the Council of Europe's activity, as regards international cooperation in criminal matters, an increased attention should be given to the problems arising from the cooperation with international criminal courts. Such an approach should also consider the necessary efforts for ensuring the full cooperation of member sates with international criminal courts, subject to legal recognition of the competence of these courts by the member states concerned.

42. It should also be taken into consideration more increasingly that the relevant conventions of the Council of Europe are also applicable to some non-European countries.

43. In order to widen the legal basis for cooperation of the member states with third countries, the CCPE recommends that the Committee of Ministers considers the issue of inviting some states outside Europe to accede the European Convention on Extradition and the European Convention on Mutual Legal Assistance in Criminal Matters, and the protocols thereto.

Acting on the resources allocated to international cooperation

44. The CCPE recommends that the member states' governments allocate appropriate financial, material and human resources so that international cooperation in criminal matters can be increased both in quantity and in quality, namely at the level of courts and prosecution offices. Such efforts should mostly be targeted at considering the appointment within the courts concerned specialised of judges and prosecutors for judicial mutual assistance in criminal matters. These efforts should also allow practitioners to dedicate the necessary time for addressing properly the requests, both as regards the way there are drafted and the way they are answered. Resources should finally be allocated for improving the linguistic quality of international cooperation, giving to courts and prosecution services the appropriate translation and interpretation means.

[32] See paragraph 29 of this Memorandum.

CCPE'S AVAILABILILTY TO COOPERATE WITH OTHER BODIES

45. Where appropriate, the CCPE is prepared to cooperate with any such initiative. It reiterates its full availability to work firstly together with the other relevant committees within the Council of Europe, as well as with other relevant European and international institutions and organisations. Public prosecution services that were increasingly well prepared, professionally, to deal with such matters could then become the "*custodians of the interests of international co-operation*" as it is pointed out in Recommendation Rec(2000)19[33].

SUMMING UP OF THE RECOMMENDATIONS

In order to improve the institutional, normative and inter-personal conditions for the development of a genuine European legal culture of cooperation in the criminal field, the CCPE recommends to the Committee of Ministers and the Council of Europe's member states:

- **to act on the normative framework of international cooperation in:**
  - **keeping priority on the work of updating the existing European conventions in the sphere of criminal justice, especially the European Convention on extradition;**
  - **accelerating the ratification and effective application of the relevant conventions and in seeking to simplify internal procedures to favour mutual assistance;**

- **to act on the quality of international cooperation:**
  - **in developing appropriate training of prosecutors as well as other players in international judicial cooperation,**
  - **in setting up in each member state an appropriate structure to guarantee the specialisation of some prosecutors and judges as regards international cooperation,**
  - **in issuing specialised documents or commentaries on the applicable human rights and standards in international criminal proceedings, to be regularly updated,**
  - **in giving to practitioners mutual information tools on judicial systems and procedures, including through the establishment within the Council of Europe of a data base,**
  - **in multiplying the opportunities for practitioners from the various member states to meet and exchange, namely through specialised colloquies and seminars for prosecutors,**
  - **in improving the transmission of assistance requests and the way they are addressed through new information technologies and the improvement of the quality of the request as regards their drafting and foreign language issues;**
  - **in facilitating the spontaneous and direct transmission of information;**

- **to extend exchanges between legal practitioners:**
  - **in setting up at the level of the Council of Europe structured cooperation and information exchange properly articulated with the European Judicial Network in criminal matters and Eurojust;**
  - **in setting up in each country, at an appropriate level according to the national legal system, a "specialised unit" entrusted with assisting to solve the difficulties met by practitioners of the requesting and requested states regarding judicial assistance requests;**
  - **in compiling a list of contacts and addresses giving the names of the relevant contact persons, as well as their specialist fields, their areas of responsibility, etc. and to publish this list on a restricted web site administered by the Council of Europe;**
  - **in developing the exchange of liaison judges / prosecutors;**
  - **in cooperating also that the stage of drafting and executing requests for assistance;**

- **within the framework of the Council of Europe, to foster cooperation with third countries, international criminal courts and relevant European and international institutions and organisations;**

- **to increase budgetary and human resources allocated to international cooperation in criminal matters within the courts and the prosecution offices.**

[33] See paragraph 3.

Appendix

Council of Europe's Conventions regarding legal cooperation in criminal matters

024	European Convention on Extradition
030	European Convention on Mutual Assistance in Criminal Matters
051	European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
052	European Convention on the Punishment of Road Traffic Offences
070	European Convention on the International Validity of Criminal Judgments
071	European Convention on the Repatriation of Minors *
073	European Convention on the Transfer of Proceedings in Criminal Matters
082	European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes
086	Additional Protocol to the European Convention on Extradition
088	European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle
090	European Convention on the Suppression of Terrorism
097	Additional Protocol to the European Convention on Information on Foreign Law
098	Second Additional Protocol to the European Convention on Extradition
099	Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
101	European Convention on the Control of the Acquisition and Possession of Firearms by Individuals
112	Convention on the Transfer of Sentenced Persons
116	European Convention on the Compensation of Victims of Violent Crimes
119	European Convention on Offences relating to Cultural Property *
141	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
156	Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances
167	Additional Protocol to the Convention on the Transfer of Sentenced Persons
172	Convention on the Protection of Environment through Criminal Law *
173	Criminal Law Convention on Corruption
182	Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
185	Convention on Cybercrime
189	Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems
190	Protocol amending the European Convention on the Suppression of Terrorism *
191	Additional Protocol to the Criminal Law Convention on Corruption
196	Council of Europe Convention on the Prevention of Terrorism
197	Council of Europe Convention on Action against Trafficking in Human Beings *
198	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism *

The Conventions followed by * have not entered into force so far.

Opinion No. 2 (2008)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

Alternatives to prosecution

INTRODUCTION

1. The Consultative Council of European Prosecutors (CCPE) was set up by the Committee of Ministers 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.

2. Article 3 of this Recommendation states that "*in certain criminal justice systems, public prosecutors (…) decide on alternatives to prosecution*". Article 24-c of this Recommendation also provides that public prosecutors should in particular "*seek to ensure that the criminal justice system operates as expeditiously as possible*".

3. This Opinion was prepared in accordance with the Terms of Reference given to the CCPE by the Committee of Ministers[1], taking into account the Framework overall action plan for the work of the CCPE[2] and the conclusions of the Conference of Prosecutors General of Europe held in Celle (Germany) on 23 - 25 June 2004 on the theme: "Discretionary powers of public prosecution: opportunity or legality principle - advantages and disadvantages".

4. At this Conference, the Prosecutors General of Europe noted with satisfaction a tendency for the goals pursued in Europe to be harmonised around the principles of public interest, the equality of all persons before the law and individualisation of criminal justice, in accordance with the Recommendation Rec(2000)19. The Conference of Prosecutors General of Europe called for the application of the following principles:

   a. there should be the possibility of choice between the criminal justice response and other types of response to criminal acts, whatever system of mandatory or discretionary prosecution operates, while bearing in mind that it is necessary in the public interest to punish serious offences;

   b. the need for an alternative to prosecution to be serious, credible and capable of preventing re-offending, while taking into account the interest of the victims;

   c. the need for an alternative to criminal procedure to be applied in accordance with the stipulations of the law, balancing the rights of the victims with objectively fair and impartial treatment of the offender.

5. In drafting this Opinion, the CCPE also considered the following Recommendations of the Committee of Ministers Rec(87)18 concerning the simplification of criminal justice, Rec(85)11 on the position of the victim and Rec(99)19 concerning mediation in penal matters as well as the work of the Council of Europe in the field of restorative justice[3]. It also took into account the Framework Decision of the Council of the European Union of 15 March 2001 on the standing of victims in criminal proceedings.[4]

6. To address this issue, the CCPE decided to carry out a study on alternatives to prosecution in order to identify and promote the best practices followed in the Council of Europe member states. For this purpose, it conducted a survey among the national members of the CCPE, asking them to deliver their answers in order to sustain the discussion to be held on this theme at the 2nd plenary meeting of the CCPE (Strasbourg, 28 – 30 November 2007). This Opinion takes into account the replies by 23 member states.

[1] Terms of reference adopted at the 1019th meeting of the Ministers' Deputies (27 February 2008).
[2] Approved by the Committees of Ministers at the 981st meeting of the Ministers Deputies on 26 November 2006.
[3] See in particular the Resolution N°1 adopted during the 27th Conference of the European Ministers of Justice (Yerevan 12 – 13 October 2006).
[4] 2001/220 JHA.

DEFINITIONS

7. For the purposes of this Opinion, “alternative measures to prosecution” are understood to mean measures which go together with final, temporary or conditional discontinuation of prosecution where an offence has been committed, that would otherwise render the perpetrator liable to a criminal sanction such as a suspended or unsuspended prison sentence or fine, together with ancillary penalties such as deprivation of certain rights.

8. Consequently, it is agreed that the procedure of “pleading guilty” before a court does not come within the scope of this Opinion, as it does not obviate criminal proceedings and leads to a conviction.

9. Likewise, the “discharge” that exists in some member States is not regarded as an alternative to prosecution, since it follows a conviction.

GENERAL CONSIDERATIONS

10. Recourse to alternative measures to prosecution is not in contradiction with Europe’s mainstream system of mandatory prosecution, usually to be understood in these terms: for each offence against the law there is a response, without the type of response being limited to sentencing alone; such measures are known in all systems.

11. Some member states have the discretionary prosecution system. Other member states have the mandatory prosecution system, but their codes of criminal procedure provide for such exceptions as:
    - cases where prosecution is plainly inexpedient having regard to the stated objectives, one of which is to prevent the recurrence of the offence;
    - cases where financial or other redress is made;
    - cases involving a juvenile offender.

12. In some countries, the obligation to prosecute can only be avoided for juveniles, in the context of “reformatory measures” and in very special cases concerning petty offences committed by first-time offenders, or where an offence of medium gravity is sincerely regretted.

13. The prosecuting authority in most countries is in an especially good position to propose and see to the application of alternatives validly constituting a judicial response to the offences committed. Sometimes, this is a matter of the prosecutor’s sole choice but the judge may need to assent to this arrangement to discontinue the proceedings.

14. In other countries however, the prosecutor’s role is far less significant than that of the judge, who has sole decision as to discontinuation, the prosecutor being bound to strict observance of the principle of mandatory prosecution.

15. Alternative measures have to be consistent with the goals by which the action of criminal justice must be guided, namely to prevent re-offending, assist redress of the damage incurred by society, have regard to the interest of victims, uphold the rights of the defence, form a valid response to illegal acts, and to avoid the repetition of the offence.

16. Legislation in some countries stipulates that alternative measures should be used when a criminal sanction appears unnecessary to avert repetition of the offence.

17. The concept of an act not significantly threatening society is reflected in the legislation of many countries. However, the use of alternative measures to prosecution is sometimes strictly framed as regards the most serious types of crime such as trafficking in human beings or terrorism and the serious crimes where public interest is deeply involved.

18. Alternative measures to prosecution, whose range of possibilities can be progressively enriched, illustrate an evolutionary phase in the development of society and the modernisation of justice (which is most welcome) vis-à-vis the traditional system consisting solely of suspended or non-suspended prison sentences or fines, particularly in respect of juvenile offenders or juveniles who have not previously been convicted.

19. These measures are conducive to acceptance of the judicial response by the offender and possibly the victim, if the latter is suitably associated with them. Sometimes the code provides that the victim can object to a prosecution being dropped. This is done through a review of the decision taken by the prosecution authority, either to the hierarchical superior of the prosecutor or to the higher instance court. In some member states, there is no alternative measure without the victim's agreement.

20. Alternative measures also have the advantage of not making offenders social outcasts, and instead encouraging their rehabilitation: in some countries the criminal procedure recommends the adoption of such measures when the offence seems to have been the outcome more of thoughtlessness than of disregard for laws and legal prohibitions.

21. Alternative measures often make redress more visibly meaningful to society than mere payment of money (too superficially conscience-salving) or imprisonment.

22. As alternatives to imprisonment, they lower the prison population in a Europe where many prisons are overcrowded and the prison budget often takes up a crippling proportion of the justice budget.

23. Alternative measures can reduce the workload of courts, but often present the prosecution departments with a very large amount of work in arranging them.

24. However, they are not to be regarded as measures of a better use of means; in fact they require considerable material resources – premises especially – and human resources, careful preparation, public education and information about the nature of alternative measures to prosecution, well-trained individuals of calibre to implement and follow them up (for example mediators), alongside the prosecutors; these people must receive suitable remuneration and be professionals rather than philanthropic volunteers, just as associations discharging public service functions qualify for subsidies.

25. In some member states the legislation enumerates and restricts the cases where alternative measures can be applied. In other cases, this is done through non binding legal instruments. In accordance with Recommendation Rec(2000)19[5] and with a view to promoting a fair, consistent and efficient activity of public prosecutors in this field, members states should seek to:
    - define general guidelines for the implementation of this criminal policy;
    - define general principles and criteria to be used by way of references against which decisions of individual cases should be taken, in order to guard against arbitrary decision making.

26. The public must be informed of the above-mentioned system, guidelines, principles and criteria. It is advisable that specific arrangements be drawn up aimed at giving an account of the concrete implementation of the above mentioned guidelines.

27. Before adopting alternative measures to prosecution, the economic, administrative and structural conditions should be evaluated to check the ability to implement these measures in a practical and concrete manner.

EXAMPLES OF ALTERNATIVES TO PROSECUTION FROM THE PRACTICE OF THE COUNCIL OF EUROPE COUNTRIES

28. Various good practices for implementing alternative measures to prosecution can be noticed in the member states of the Council of Europe. The CCPE wishes to draw the attention to some of them.

29. The “rappel à la loi” (judges' warning) is very frequently employed in some member states where it is called a “caution” when issued with some formality by a specially qualified facilitator, and particularly for minors: the prosecutor or any competent judicial authority holds a serious talk with the offender or his/her representative, during which the latter must be reminded of the legal provisions and the risks of punishment incurred for renewed lawbreaking. The objective is to foster realisation by offenders of the consequences of their act for society, the victim and themselves. This warning is used in the case of minor disturbances to society or to individuals committed by persons with no previous conviction. Another similar formula is applied in systems of restorative justice, which involves discussion concerning the gravity of the acts, etc.

[5] See para 36 of the Explanatory Memorandum.

30. Offenders can be referred to a medical, social or professional facility: the prosecutor or any competent judicial authority enjoins the perpetrator of the wrongful acts to contact a designated type of body, for instance an association where he/she will undergo training or instruction on a theme related to the offence; for example, in the case of traffic offences, a course which includes, in addition to driving regulations, encounters with persons severely disabled as a result of accidents, and will help offenders realise the consequences of bad driving. Another example: where the upbringing of juveniles is seriously deficient, a course in “parenting” may be offered to parents “unable to cope”. For an alcoholic offender: food hygiene services may organise sessions; for young offenders guilty of disorderly or racist or antisocial conduct, instruction in citizenship may be proposed so that the minors realises the seriousness of their acts and alter their conduct.

31. The regularisation of a situation which constitutes an offence tends to dispel rapidly and effectively the disturbance arising from the breach of the law: for example, drivers unable to produce a driving licence at a road check will be invited to do so the next day. In the field of environmental protection and town planning, restoration to the original condition is often a particularly suitable and deterrent remedy though the work that it entails.

32. The suffering caused by the acts can sometimes be redressed, whether by return of fraudulently transferred property, or by monetary compensation, or by apologies to the victim. Redress is sometimes arranged as part of a process of mediation between the culprit and the victim which ascertains the parties’ agreement on the conditions thereof and, where contact between them is likely in future, guards against a fresh offence - community work for instance.

33. Criminal reparation for juvenile offenders can be an educational action to which a minor is bound, for instance unpaid work in the home of an elderly person, a letter of apology to a victim, etc.

34. Family separation may be imposed on a perpetrator of domestic violence.

35. The person can be placed under observation with no subsequent criminal action against him/her if he/she is no longer suspected of having committed or intending to commit further offences.

36. Settlement can be proposed to the offender, who accepts a sanction which will be validated by justice: handing over the driving licence, unpaid work, being forbidden to appear in certain places, payment of a sum of money. This arrangement, validated by a judge, is very like a plea of guilty but regarded as an “alternative to prosecution” in that it does not constitute a conviction as such and is not placed on the record of convictions. In some countries the fiscal fine can be found as a kind of alternative measures.

37. Instruction can be given to drug addicts to have treatment (in some countries criminal proceedings are no longer brought for the simple use of narcotics; treatment is in fact preferred).

38. In some countries, consideration is also given to the motives for the act and to the author’s demeanour: certain motives such as racism, discrimination or gender may preclude any recourse to an alternative.

39. "Active repentance" may be applied under the following conditions: commission of the offence being not serious and for the first time; surrender of the offender with his/her full admission of the guilt: assistance in detection of the offence; the offender becomes a collaborator to the justice system: reparation of the damage incurred as a result of the offence and the offence has no more social danger due to such repentance.

40. Mediation and conciliation in criminal matters can usefully be implemented, where appropriate, together with alternative measures to prosecution.

41. If the persons concerned comply with the alternative measures, they are not prosecuted. In some countries, reference to the measure does not appear in the record of convictions. Otherwise, when the measure is not followed, prosecution and conviction may be considered by the prosecutor.

PLACE OF THE VICTIM

42. It is essential that the rights of victims be safeguarded and, in states recognising discretionary prosecution, that victims, whether individuals or officially entitled groups, are able to seek a review if the complaint has been dropped as a result of an alternative measure to prosecution. In some countries, it even rests with the victim, in certain restrictively defined cases of offences not damaging to the community, to decide whether or not a prosecution should be brought.

43. The alternative measure should moreover represent a sound response proportionate to the offence committed and to the disruption or suffering which it has caused.

44. It appears particularly desirable and effective in preventing the development of vigilante tendencies, lack of understanding towards victims and persistence of dangerous disputes, to associate victims in choosing the procedure and determining the substance of the measure (case of mediation, redress or composition).

CONCLUSIONS

45. In the light of the survey conducted among the Council of Europe member States, and in accordance with the recommendations of the Conference of Prosecutors General that preceded it, the CCPE is of the opinion that:

    a. a modern criminal justice suited to the needs of our societies should use alternatives to prosecution when the nature and the circumstances of the offences allows this and the relevant state authorities should ensure the provision of public education and information about the nature and advantages in the public interest of alternative measures to prosecution;

    b. the imposition of financial penalties and prison sentences, in itself, does not constitute a sufficiently effective and sensitive response to the lawbreaking of the early 21st century, whether to guard against re-offending, redress damage, extinguish disputes, or meet the expectations of society and victims;

    c. member states should take into account instruments and new possibilities forming suitable and various responses to crime;

    d. with a view to promoting a fair, consistent and efficient activity of public prosecutors, clear rules, general guidelines and criteria should be defined for the implementation of the criminal policy related to alternatives to prosecution; the relevant state authorities are therefore advised to adopt such provisions which will be made public in order to effectively implement such alternative measures;

    e. alternative measures must be applied fairly and consistently in accordance with national guidelines, where they exist, in accordance with the principle of equality before the law and with a view to guarding against arbitrary decision-making in individual cases.

    f. in order to guarantee transparency and accountability, prosecutors should be able to report on the reasons of using alternative measures at local, regional or national level, through the media or public reports, while not interfering unjustifiably in the independence or autonomy of the prosecutor;

    g. appropriate material and human resources should be allocated to public prosecution services and other relevant state authorities so that an efficient, relevant and rapid reply can be given through alternative measures;

    h. the introduction of alternative measures should not be guided by motives of economy but with a view to achieving high-quality justice, speedy and effective outcomes;

    i. prosecutors should initiate and where they have the necessary powers apply effectively such alternative measures; there should be no undue intervention in the activities of prosecutors when they use their discretionary powers in relation to such measures;

    j. member states and the relevant public authorities should develop relevant training structures and programmes and support associations and professional organisations capable of providing quality assistance in implementing alternatives to prosecution;

k. alternative measures must safeguard victims' interests and moreover allow them to be more fully taken into account through the quality of redress, the speed of the response, and, as appropriate the dialogue thereby opened between offender and victim;

l. alternative measures to prosecution should never deprive victims of their rights to request that their rights are safeguarded;[6]

m. alternative measures should never lead to circumvention of the rules of fair trial by imposing a measure on a person who is innocent or could not be convicted owing to procedural obstacles such as time-limits on prosecution, or when there is doubt as to the responsibility of the offender identified or the extent of the damage caused by the offence;

n. the acceptance of one alternative measure should preclude, once executed, any prosecution in respect of the same facts (*ne bis in idem*);

o. if suspects are offered an alternative measure, they should be informed whether a refusal or unsatisfactory compliance on their part renders them liable to criminal prosecution;

p. member states and the relevant public authorities provided especially by the information gathered by the CCPE could take account of good practices followed in other systems, in order to enhance the quality of their responses to crime;

q. member states may consider the issue of concluding bilateral or multilateral agreements in order to apply in the territory of another state certain alternative measures such as treatment orders, driver instruction, or parenting courses, etc.

46. The CCPE recommends that the Committee of Ministers of the Council of Europe considers the issue of alternative measures to prosecution with regard to their effective application in member states as well as to the possible elaboration of proper binding and non-binding instruments on alternative measures to prosecution and their transfrontier enforcement.

47. The CCPE wishes to invite to one of its meetings one or more prosecutors from different judicial systems, identified as having worked on the effective implementation of alternatives to prosecution, in order to receive his/her/their experience and prepare an audiovisual document for circulation to the competent authorities.

48. The CCPE is available to cooperate with the CDPC, the CCJE and the CEPEJ in order to bring the viewpoint of the prosecutors whom it represents to the proceedings of these bodies on the issue of alternative measures to prosecution.

[6] See the Recommendation N° R(85)11 of the Committee of Ministers on the position of victim in the framework of criminal law and procedure.

Opinion No. 3 (2008)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The role of prosecution services outside the criminal law field

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 Europe[3].

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 traditions[4]. 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 nations[5].

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 violations of the Convention relating to the non-penal tasks of prosecutors and emphasised the requirement for proper procedures[6]. Recommendation 1604 (2003) of the Parliamentary

[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)[2]".*

[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.

[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).

Assembly on the Role of the public prosecutor's office in a democratic society governed by the rule of law[7] 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 2005[12], 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].

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 services*[15]*."*

[7] Text adopted by the Standing Committee acting on behalf of the Assembly on 27 May 2003.
[8] ee 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.
[15] Saint Petersburg Conference, see CPE (2008) 3.

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 States[16] to the questionnaire as amended in Popowo (Poland, 4-5 June 2007) a new detailed report was drafted and presented at the Saint Petersburg Conference[17]. This Conference formulated several special requirements for non-penal competences[18] 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 Nations[19] and Commonwealth of Independent States[20] 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 field[21]. The areas of competence 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 practice[22].

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,

[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.
[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.

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. 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 Courts[24] 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 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 valuable[26].

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 though 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:

    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;

[24] See CCPE-Bu (2008)4rev.
[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 Pettrov 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).

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

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

SUMMARY OF RECOMMENDATIONS

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 is 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.

Opinion No. 4 (2009)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The relations between judges and prosecutors

This Opinion, jointly adopted by the CCJE and the CCPE contains:
- **a Declaration, called « Bordeaux Declaration » ;**
- **an Explanatory Note.**

BORDEAUX DECLARATION

"JUDGES AND PROSECUTORS IN A DEMOCRATIC SOCIETY"[1]

The Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), at the request of the Committee of Ministers of the Council of Europe to provide an opinion on relationships between judges and prosecutors, agreed on the following:

1. It is in the interest of society that the rule of law be guaranteed by the fair, impartial and effective administration of justice. Public prosecutors and judges shall ensure, at all stages of the proceedings, that individual rights and freedoms are guaranteed, and public order is protected. This involves the total respect of the rights of the defendants and of the victims. A decision of the prosecutor not to prosecute should be open to judicial review. An option may be to allow the victim to bring the case directly to the court.

2. The fair administration of justice requires that there shall be equality of arms between prosecution and defence, as well as respect for the independence of the court, the principle of separation of powers and the binding force of final court decisions.

3. The proper performance of the distinct but complementary roles of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other.

4. Adequate organisational, financial, material and human resources should be put at the disposal of the system of justice.

5. The role of judges – and, where applicable, of juries – is to properly adjudicate cases brought regularly before them by the prosecution service, without any undue influence by the prosecution or defence or by any other source.

6. The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially.

7. The CCJE and the CCPE refer to the consistent case-law of the European Court of Human Rights in relation to article 5 paragraph 3 and article 6 of the European Convention of Human Rights. In particular, they refer to the decisions whereby the Court recognized the requirement of independence from the executive power and the parties on the part of any officer authorized by law to exercise judicial

[1] This Declaration is accompanied by an Explanatory Note. This Declaration has been jointly drafted by the Working Groups of the CCJE and the CCPE in Bordeaux (France) and has been officially adopted by the CCJE and the CCPE in Brdo (Slovenia) on 18 November 2009.

power but which does not, however, exclude subordination to higher independent judicial authority Any attribution of judicial functions to prosecutors should be restricted to cases involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants' right to a decision on such cases by an independent and impartial authority exercising judicial functions.

8. For an independent status of public prosecutors, some minimal requirements are necessary, in particular:

   - that their position and activities are not subject to influence or interference from any source outside the prosecution service itself;
   - that their recruitment, career development, security of tenure including transfer, which shall be effected only according to the law or by their consent, as well as remuneration be safeguarded through guarantees provided by the law.

9. In a State governed by the rule of law, when the structure of prosecution service is hierarchical, effectiveness of prosecution is, regarding public prosecutors, strongly linked with transparent lines of authority, accountability, and responsibility. Directions to individual prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria. Any review according to the law of a decision by the public prosecutor to prosecute or not to prosecute should be carried out impartially and objectively. In any case, due account shall be given to the interests of the victim.

10. The sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice. Training, including management training, is a right as well as a duty for judges and public prosecutors. Such training should be organized on an impartial basis and regularly and objectively evaluated for its effectiveness. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality.

11. The interest of society also requires that the media are provided with the necessary information to inform the public on the functioning of the justice system. The competent authorities shall provide such information with due regard in particular to the presumption of innocence of the accused, to the right to a fair trial, and to the right to private and family life of all persons involved in proceedings. Both judges and prosecutors should draw up a code of good practices or guidelines for each profession on its relations with the media.

12. Both public prosecutors and judges are key players in international cooperation in judicial matters. The enhancement of mutual trust between competent authorities of different states is necessary. In this context, it is imperative that information gathered by prosecutors through international co-operation and used in judicial proceedings is transparent in its content and origin, as well as made available to the judges and all parties, with a view to an effective protection of human rights and fundamental freedoms.

13. In member States where public prosecutors have functions outside the criminal law field, the principles mentioned herein apply to these functions.

EXPLANATORY NOTE

I. INTRODUCTION:

a. Purpose of the Opinion

1. It is an essential task of a democratic State based on the rule of law to guarantee that fundamental rights and freedoms as well as equality before the law are fully respected, in accordance, in particular, with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as well as the case-law of the European Court of Human Rights (the Court). At the same time it is important to ensure security and justice in society by assuring effective measures in respect of criminal conduct. Security in society must also be guaranteed in a democratic state by an effective enforcement of penalties imposed for criminal conduct (Declaration, paragraph 1).

2. Thus, it is the mission of the State to set up and to ensure the functioning of an efficient justice system respectful of human rights and fundamental freedoms. While numerous actors participate in this mission, be they from the public or (as in the case of lawyers) private sector, a key role in ensuring the functioning of justice in an independent and impartial way is played by judges and public prosecutors.

3. In their previous Opinions, the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) addressed many important aspects of the efficiency of justice with emphasis on human rights and fundamental freedoms. It should be underlined that the common goal of judges and prosecutors, including that of public prosecutors who have tasks outside the criminal law field, is to ensure a fair, impartial and effective justice. The novelty of this Opinion is that it has been drafted by judges and prosecutors representing their national colleagues and it deals with matters which the judges and prosecutors have agreed on the basis of their practical experience.

4. Hence, the text focuses on essential aspects of the two missions and in particular: independence, respect of individual rights and freedoms, objectivity and impartiality, ethics and deontology, training and relations with the media.

5. The present Opinion should be considered in the context of the relations of judges and prosecutors with professional persons dealing with justice involved in the various stages of judicial proceedings, such as lawyers, judicial experts, court clerks, bailiffs, police, as suggested by the Framework Global Action Plan for Judges in Europe, adopted by the Committee of Ministers on 7 February 2001 and the Recommendation (2000)19 on the role of prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000.

b. Diversity of national systems

6. In the member States of the Council of Europe, many legal systems exist side by side:

i. the Common Law systems in which there is a clear division between judges and prosecutors and where *the criminal investigation power* is not combined with other functions;
ii. the Continental Law systems where one may observe different types in which either judges and prosecutors are part of the « judicial corps » or, on the contrary, only judges may belong to that corps

In addition, in these various systems, the public prosecution's autonomy from the executive can be complete or limited.

7. The objective of this Opinion is to identify, in the light of the Court's case law, a basis of applicable principles and approaches while taking into account common points as well as differences.

8. The guarantee of separation of functions represents an essential condition of the judge's impartiality towards the parties in the proceedings. Impartiality, as stated in Opinion No. 1 of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges (2001), is first among the institutional guarantees that define the position of a judge. Furthermore, it presupposes that the public prosecution is allocated the burden of proof and the filing of indictments, which constitutes one of the first procedural guarantees of the ultimate decision.

9. In every system, the judge's role is therefore different to that of the public prosecution. Their respective missions remain nevertheless complementary. There are no hierarchic ties between the judge and the prosecutor.

10. The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and prosecutors is correctly observed. In a democracy based on the rule of law, it is the law that provides the basis for prosecution policy (Declaration, paragraph 3).

c. Peculiarities of functions

11. Prosecutors and judges must both carry out their functions fairly, impartially, objectively and consistently, must respect and strive to protect human rights and seek to ensure that the justice system operates promptly and efficiently.

12. In carrying out their functions, prosecutors rely on either a system of discretionary prosecution (the opportunity principle) or a system of mandatory prosecution (the legality principle), but in both cases prosecutors not only act on behalf of the society as a whole, but also discharge duties to particular individuals, namely the accused person to whom a duty of fairness is owed, as well as the victims of crime to whom a duty is owed to ensure that their rights are fully taken into account. In that sense and without prejudice to the respect for the principle of equality of arms, the prosecutor can not be considered equal to other parties (Declaration, paragraph 2). Prosecutors should also take proper account of the views and concerns of victims and take or promote actions to ensure that victims are informed of both their rights and the course of the proceedings. They should not initiate or continue prosecution when an impartial investigation on the basis of the available evidence shows the charge to be unfounded.

d. Existing international instruments

13. Several texts of the Council of Europe as well as the case-law of the Court address directly or implicitly topics related to the relationship between judges and prosecutors.

14. First and foremost, the Court assigns tasks to judges only in their capacity as the guardians of rights and freedoms – see in particular Articles 5 (right to liberty and security) and 6 (right to a fair trial) - but it does so also to public prosecutors (as a result of Article 5 paragraphs 1a and 3, and 6).

15. The Court, one of whose tasks is to interpret the ECHR, has given several rulings on matters affecting the relationship between judges and public prosecutors.

16. In particular it has dealt with the problem of a person serving in turn as prosecutor and judge in the same case (judgment of 1 October 1982 in *Piersack v. Belgium*, §§ 30-32), the need to guarantee that no political pressure is ever put on the courts or the prosecuting authorities (judgment of 12 February 2008, *in Guja v. Moldova*, §§ 85-91), the need to protect judges and public prosecutors in the context of freedom of expression (judgment of 8 January 2008, in *Saygili and Others v. Turkey*, §§ 34-40), procedural obligations of courts and public prosecutors' departments to investigate, prosecute and punish human rights violations (judgment of 15 May 2007, in *Ramsahai and Others v. the Netherlands*, §§ 321-357) and lastly the prosecuting authorities' contribution to the standardization of case-law (judgment of 10 June 2008, in *Martins de Castro and Alves Correia de Castro v. Portugal*, §§ 51-66).

17. In the area of criminal procedure, the Court has examined the status and powers of the public prosecution service and the requirements of Article 5 paragraph 3 of the ECHR (with regard to other officers "authorized by law to exercise judicial power") in the context of various factual situations (see, inter alia, the judgments of 4 December 1979, in *Schiesser v. Switzerland*, §§ 27-38, in *De Jong, Baljet and Van den Brink v. the Netherlands*, §§ 49-50, in *Assenov and Others v. Bulgaria*, §§ 146-150, in *Niedbala v.* Poland, §§ 45-47, in Pantea v. Romania, §§ 232-243, and 10 July 2008, in *Medvedyev and Others v. France*, §§ 61, 67-69). The Court has also examined the status, jurisdiction and supervisory powers of the prosecuting authorities in cases of telephone monitoring (judgment of 26 April 2007, in *Dumitru Popescu v. Romania*, §§ 68-86) and the presence of the prosecuting authorities at the deliberations of Supreme Courts (judgments of 30 October 1991, in *Borgers v. Belgium*, §§ 24-29, and 8 July 2003, in *Fontaine and Berlin v. France*, §§ 57-67).

18. Lastly, outside the criminal sphere, the Court has a well established body of case-law on the "doctrine of appearances", according to which the presence of prosecutors at the deliberations of courts is contrary to Article 6 paragraph 1 of the ECHR (judgments of 20 February 1996, in *Lobo Machado v. Portugal*, §§ 28-32, and 12 April 2006, in *Martinie c. France [GC]*, §§ 50-55).

19. Other texts have been drawn up by the Council of Europe:

- Recommendation Rec(94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges recognizes the links between judges and public prosecutors, at least in countries where the latter have judicial authority within the meaning attached to this expression by the Court;

- Recommendation Rec(2000)19 of the Committee of Ministers on the Role of Public Prosecution in the Criminal Justice System explicitly highlights the relations between judges and prosecutors, while underlining the general principles that are crucial for ensuring that these relationships contribute unequivocally to the proper performance of judges' and public prosecutors' tasks. It particularly emphasizes the obligation of States to "take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges".

- Recommendation Rec (87)18 of the Committee of Ministers concerning the Simplification of Criminal Justice provides different examples of tasks previously vested solely in judges and currently entrusted to the public prosecution service (whose primary mission still consists in undertaking and directing prosecutions). These new tasks create additional requirements concerning the organisation of the public prosecution service and the selection of the people called upon to assume those functions.

II. STATUS OF JUDGES AND PUBLIC PROSECUTORS

a. Guarantees for the internal and external independence of judges and public prosecutors; the rule of law as a condition for their independence

20. Judges and public prosecutors should be independent from each other and also enjoy effective independence in the exercise of their respective functions. They discharge different duties in the justice system and in society at large. Therefore different perspectives of institutional and functional independence exist (Declaration, paragraph 3).

21. The judiciary is based on the principle of independence from any external power and from any instructions coming from any source, as well as on the absence of internal hierarchy. Its role and, where applicable, that of juries, is to properly adjudicate cases brought before them by the prosecution services and the parties. This involves the absence of all undue influence by the public prosecutor or the defence. Judges, prosecutors and defence lawyers should each respect the roles of the others. (Declaration, paragraph 5).

22. The fundamental principle of independence of judges is enshrined in Article 6 of the ECHR and stressed in previous opinions of the CCJE.

23. The function of judging implies the responsibility for making binding decisions for the persons concerned and for deciding litigation on the basis of the law. Both are the prerogative of the judge, a judicial authority independent from the other State powers[2]. This is, in general, not the mission of public prosecutors, who are responsible for bringing or continuing criminal proceedings.

24. The CCJE and the CCPE refer to the consistent case-law of the Court in regard to article 5, paragraph 3 and article 6 of the ECHR. In particular, they refer to the decision in the case Schiesser vs. Switzerland, whereby the Court recognized the requirement of independence from the executive and the parties on the part of any «officer authorized by law to exercise judicial powers", which does not, however, exclude subordination to higher independent judicial authority (Declaration, paragraph 7).

25. Some member States assign to public prosecutors the power to make binding decisions in some areas instead of pursuing criminal prosecutions or in order to protect certain interests. The CCJE and the CCPE consider that any attribution of judicial functions to prosecutors should be limited to cases involving minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should

[2] See in particular Opinion No.1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges and Recommendation Rec(94)12 on the independence, efficiency and role of judges.

not prejudice the defendant's rights to a decision on such case by an independent and impartial authority exercising judicial functions. Under no circumstances, should any such attribution allow public prosecutors to take final decisions restricting individual freedoms and involving deprivation of liberty with no right to appeal to a judge or a court (Declaration, paragraph 7).

26. The public prosecution service is an independent authority whose existence should be based on the law at the highest possible level. In democratic states neither the parliament nor any governmental body should seek to unduly influence a particular decision taken by public prosecutors in relation to individual cases in order to determine how a prosecution in any particular case should be conducted, or constrain public prosecutors to change their decisions (Declaration, paragraphs 8 and 9).

27. The independence of public prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and it is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised (Declaration, paragraphs 3 and 8). Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned.

28. The function of the prosecutor, which may be characterized by the principles of mandatory or discretionary prosecution, differs according to the system existing in each country, according to the position which the public prosecutor occupies in the institutional landscape and in the criminal procedure.

29. Whatever their status, public prosecutors must enjoy complete functional independence in the discharge of their legal roles, whether these are penal or not. Whether they are under a hierarchical authority or not, in order to ensure his members accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must provide clear and transparent guidelines as regards the exercise of their prosecution powers, (Declaration, paragraph 9).

30. In this respect, the CCJE and CCPE wish to recall in particular Recommendation (2000)19 which recognises that, in order to promote equity, consistency, and efficiency in the activity of the public prosecution service, States should seek to define general principles and criteria to serve as a reference against which decisions are taken by prosecutors in individual cases.

31. Directions to prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria (Declaration, paragraph 9)[3].

32. Any decision to prosecute or not to prosecute must be legally sound. Any review according to the law of a decision by the prosecutor to prosecute or not to prosecute should be carried out impartially and objectively, whether or not it is being carried out within the prosecution service itself or by an independent judicial authority. The interest of the victim as well as any other person's legal interests, should always be duly taken into account. (Declaration, paragraph 9).

33. The complementary nature of judges' and prosecutors' functions means that both are conscious that impartial justice requires equality of arms between the public prosecution service and the defence, and that public prosecutors must act at all times honestly, objectively and impartially. Judges and public prosecutors have, at all times, to respect the integrity of the suspects, accused persons and victims, as well as the rights of the defence (Declaration, paragraphs 2 and 6).

34. The independence of the judge and of the prosecutor is inseparable from the rule of law. Judges as well as prosecutors act in the common interest, in the name of the society and its citizens who want their rights and freedoms guaranteed in all their aspects. They intervene in areas where the most sensitive human rights (individual freedom, privacy, protection of possessions, etc.) deserve the greatest protection. Prosecutors must ensure that evidence is gathered and proceedings are initiated and continued in accordance with the law. In doing so, they must uphold the principles laid down by the ECHR and other international legal instruments, notably respect for the presumption of innocence, the rights of the defence and a fair trial. Judges must see to it that those principles are respected in proceedings before them.

35. While a public prosecutor is permitted to refer to the judge actions and petitions defined by law and to put before the judge the matters of fact and law supporting the same, the prosecutor may not interfere in any way in the judge's decision making process and is bound to abide by the judge's decisions. The prosecutor cannot

[3] See also the CCPE Opinion N°3 (2008) on the role of public prosecutor outside the criminal law field.

oppose the enforcement of such decisions, other than by exercising such right of recourse as may be provided for by law (Declaration, paragraphs 4 and 5).

36. The activity and the demeanour of the public prosecutor and the judge should leave no doubt as to their objectivity and impartiality. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other. In the eyes of litigants and the society as a whole, there must not be even a hint of connivance between judges and prosecutors or confusion between the two functions.

37. Respect for the above principles implies that the status of prosecutors be guaranteed by law at the highest possible level in a manner analogous to that of judges. The proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, discipline, transfer (which shall be effected only according to the law or by their consent), remuneration, termination of functions and freedom to create professional associations (Declaration, paragraph 8).

38. Both judges and prosecutors should, according to the national system in force, be directly associated with the administration and the management of their respective services. For this purpose, sufficient financial means as well as infrastructure and adequate human and material resources should be put at the disposal of judges and prosecutors and should be used and managed under their authority (Declaration, paragraph 4).

b. Ethics and deontology of judges and public prosecutors

39. Judges and prosecutors should be individuals of high integrity and with appropriate professional and organisational skills. Due to the nature of their functions, which they have accepted knowingly, judges and prosecutors are constantly exposed to public criticism and must, in consequence, set themselves a duty of restraint without prejudice, in the framework of the law, to their right to communicate on their cases. As principal actors in the administration of justice, they should at all times maintain the honour and dignity of their profession and behave in all situations in a way worthy of their office[4] (Declaration, paragraph 11).

40. Judges and prosecutors should refrain from any action and behaviour that could undermine confidence in their independence and impartiality. They should consider cases submitted to them with due care and within a reasonable time, objectively and impartially.

41. Public prosecutors should refrain from making public comments and statements, using the media, which may create an impression of putting direct or indirect pressure on the court to reach a certain decision or which may impair the fairness of the procedure.

42. Judges and prosecutors should strive to acquaint themselves with ethical standards governing the functions of each other. This will enhance understanding and respect for each other's missions, thereby increasing the prospects of a harmonious collaboration.

c. Training of judges and public prosecutors

43. The highest level of professional skill is a pre-requisite for the trust which the public has in both judges and public prosecutors and on which they principally base their legitimacy and role. Adequate professional training plays a crucial role since it allows the improvement of their performance, and thereby enhances the quality of justice as a whole (Declaration, paragraph 10).

44. Training for judges and prosecutors involves not only the acquisition of the professional capabilities necessary for access to the profession but equally permanent training throughout their career. It addresses the most diverse aspects of their professional life, including the administrative management of courts and prosecution departments, and must also respond to the necessities of specialisation. In the interests of the proper administration of justice, the permanent training required to maintain a high level of professional

[4] For judges see for example the Opinion No. 3 (2002) of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality (2002) and The Bangalore Principles of Judicial Conduct (adopted by the UN ECOSOC in 2006) and the Universal Charter of the Judge, adopted by the Central Council of the International Association of Judges on 17 November 1999 in Taipei (Taiwan). For prosecutors besides the UN guidelines on the role of the prosecutors (1990), see the European Guidelines on Ethics and Conduct for Public Prosecutors (The Budapest Guidelines) adopted by the Prosecutors General of Europe on 31 May 2005 at their Conference in Budapest.

qualification and to make it more complete is not only a right but also a duty for judges and public prosecutors (Declaration, paragraph 10).

45. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality. This common training should make possible the creation of a basis for a common legal culture (Declaration, paragraph 10).

46. Different European legal systems provide training for judges and prosecutors according to various models. Some countries have established an academy, a national school or other specialised institution; some others assign the competence to specific bodies. International training courses for judges and prosecutors should be arranged. It is essential, in all cases, to assure the autonomous character of the institution in charge of organising such training, because this autonomy is a safeguard of cultural pluralism and independence.[5]

47. In this context, much importance attaches to the direct contribution of judges and prosecutors towards training courses, since it enables them to provide opinions drawn from their respective professional experience. Courses should not only cover the law and protection of individual freedoms, but should also include modules on management practices and the study of judges' and the prosecutors' respective missions. At the same time, additional lawyers' and academic contributions are essential to avoid taking a narrow-minded approach. Finally, the quality and efficiency of training should be assessed on a regular basis and in an objective manner.

III. ROLES AND FUNCTIONS OF JUDGES AND PUBLIC PROSECUTORS IN THE CRIMINAL PROCEDURE

a. Roles between judges and public prosecutors in the pre-criminal procedure

48. At the pre-trial stage the judge independently or sometimes together with the prosecutor, supervises the legality of the investigative actions, especially when they affect fundamental rights (decisions on arrest, custody, seizure, implementation of special investigative techniques, etc).

49. As a general rule, public prosecutors should scrutinise the lawfulness of investigations and monitor the observance of human rights by the investigators when deciding whether a prosecution should commence or continue.

50. Recommendation Rec(2000)19 provides that when the police is placed under the authority of public prosecutors or when police investigations are either conducted or supervised by the prosecutor, the State should take effective measures to guarantee that the public prosecutor may give instructions and may carry out evaluations and controls, and can sanction the violations. Where the police is independent from public prosecutors, the recommendation merely provides that the State should take effective measures to ensure that there is an appropriate and functional cooperation between public prosecutors and the investigative authorities.

51. Even in systems where the investigation is supervised by the prosecutor whose status invests him with a judicial authority, it is essential that any measures taken in this context which involve significant infringements of freedoms, in particular temporary detention, are monitored by a judge or a court.

b. Relations between judges and public prosecutors in the course of prosecution and court hearing

52. In some States, public prosecutors can regulate the flow of cases by exercising a discretionary power to decide which cases will be brought before the court and which cases can be dealt with without court proceedings (conciliation between the accused and the victim, pre-trial settlement of the case with the consent of the parties, plea bargaining-related simplified and shortened procedures, mediation, etc), all of which contributes towards reducing the burden on the judicial system and determining prosecution priorities.

53. Such public prosecution powers, which reflect the modernisation, socialisation, humanisation and rationalisation of the administration of criminal justice, are useful in reducing the case overload of courts. On the other hand, as soon as prosecutors have the right not to present particular cases in court, it is necessary to avoid arbitrary actions, discrimination or possible unlawful pressures from the political power and to protect the rights of victims. It is also necessary to enable any person affected, in particular the victims, to seek a

[5] See Opinion No. 4 (2003) of the CCJE on appropriate initial and in-service training for judges at national and European levels and Opinion No. 10 (2007) of the CCJE on the Council for the Judiciary at the service of society, paragraphs 65-72.

review of the prosecutor's decision not to prosecute. An option may be to allow the victim to bring the case directly to the court.

54. Therefore, in countries which operate a system of discretionary prosecution, the prosecutor should give careful consideration on whether to prosecute or not, taking into account any general guidelines or criteria which have been adopted with a view to achieving consistency in prosecution decisions.

55. The impartiality of the prosecutors during the procedure should be understood in this sense: they should proceed fairly and objectively to ensure that the court is provided with all relevant facts and legal arguments and, in particular, ensure that evidence favourable to the accused is disclosed; take proper account of the position of the accused person and the victim; verify that all evidences have been obtained through means that are admissible by the judge according to the rules of a fair trial and refuse to use evidence obtained through human rights violations, such as torture (Declaration, paragraph 6).

56. Prosecutors shall not initiate or continue prosecution and shall make every effort to stop proceedings when an impartial investigation or a review of the evidence shows the charge to be unfounded.

57. In essence, during proceedings judges and prosecutors carry out their respective functions for the purpose of a fair criminal trial. The judge supervises the legality of evidence taken by the public prosecutors or investigators and may acquit an accused when there is insufficient or unlawfully obtained evidence. The public prosecutors may also have a right to appeal a court decision.

c. The rights of the defence at all levels of procedure

58. Judges must apply the rules of criminal procedure while fully respecting the rights of the defence (giving the defendants the possibility of exercising their rights, notifying the defendants of their charge, etc.), the rights of the victims in the procedure, the principle of equality of arms and the right to a public hearing, so that a fair trial is guaranteed in all cases[6] (Declaration, paragraphs 1, 2, 6 and 9).

59. An indictment plays a crucial role in a criminal proceedings: it is from the moment of its service that defendants are formally put on written notice of the factual and legal basis of the charges against them (the European Court of Human Rights judgment of 19 December 1989 in *Kamasinski v. Austria*, § 79). In a criminal process, the "fair hearing" required by Article 6 paragraph 1 of the ECHR entails that defendants must have the right to challenge the evidence against them, as well as the legal basis of the charge.

60. In countries where public prosecutors supervise the investigation, it is also for the prosecutor to ensure that the rights of the defence are respected. In countries where the criminal investigation is directed by the police or other law-enforcement authorities, judges are involved as guarantors of individual freedoms (*habeas corpus*), particularly as regards pre-trial detention, and it is for them to ensure that the rights of the defendant are respected.

61. In many countries, however, the judge and the prosecutor only become responsible for monitoring the exercise of the rights of the defence once the investigation has been completed and examination of the charges begins. At this point it is for the prosecutor, who receives the investigators' reports, and the judge, who examines the charges and the evidence gathered, to ensure that everyone charged with a criminal offence has, in particular, been informed promptly, in a language he/she understands and in detail, of the nature and cause of the accusation against him/her.

62. Depending on their role in a particular country, prosecutors and judges must then ensure that the person has had adequate time and facilities for the preparation of his/her defence, that he/she is properly defended, if necessary by an officially appointed lawyer paid by the state, and has access, if necessary, to an interpreter, and is able to request the taking of actions necessary to establish the truth.

63. Once the case has been brought before the trial court, the powers of the judge and the prosecutor vary according to the role they play during the trial. In any event, if any of the components of respect for the rights of the defence is lacking, either the judge or the prosecutor, or both, depending on the particular national system, should be able to draw attention to the situation and objectively remedy it.

[6] See Opinion No. 8 (2006) of the CCJE on the role of judges in the protection of the rule of law and human rights in the context of terrorism.

IV. RELATIONS OF JUDGES AND PUBLIC PROSECUTORS OUTSIDE THE CRIMINAL LAW FIELD AND IN SUPREME COURTS

64. Depending on the State in which they operate, prosecutors may or may not have tasks and functions outside the criminal law field.[7] Where prosecutors have such tasks and functions these can include, inter alia, civil, administrative, commercial, social, electoral and labour law as well as the protection of the environment, social rights of vulnerable groups such as minors, disabled persons and persons with very low income. The role of prosecutors in this respect should not allow them to exercise undue influence on the final decision making process of the judges (Declaration, paragraph 13).

65. The role that public prosecutors have in certain countries before the Supreme Court is also worth mentioning. This role is comparable with that of the advocate general before the Court of Justice of the European Communities. Before these jurisdictions, the attorney general (or equivalent) is not a party and does not represent the State. He is an independent authority who sets down conclusions, in each case or only in cases of particular interest, in order to clarify for the court all aspects of the questions of law that are before it, with a view to ensuring the correct application of the law.

66. According to the rule of law in a democratic society all these competences of public prosecutors as well as the procedures of exercising these competences have to be precisely established by law. When prosecutors act outside the criminal law field, they should respect the exclusive competence of the judge or court and take into account the principles developed in particular in the case-law of the Court as follows:

i. The participation of the prosecution in court proceedings should not affect the independence of the courts;

ii. The principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field, on the one hand, and with the role of courts to protect human rights, on the other hand;

iii. Without prejudice of their prerogatives to represent the public interest, 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 principle);*

iv. The action of prosecutors' services on behalf of society to defend the public interest and the rights of individuals shall 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.

The other principles mentioned in the Declaration apply to all the functions of the public prosecutors outside the criminal law field, mutatis mutandis (Declaration, paragraph 13).

V. JUDGES, PUBLIC PROSECUTORS AND THE MEDIA (Declaration, paragraph 11)

67. Media play an essential role in a democratic society in general and more specifically in relation to the judicial system. The perception in society of the quality of justice is heavily influenced by media accounts of how the justice system works. Publicity also contributes to the achievement of a fair trial, as it protects litigants and defendants against a non-transparent administration of justice.

68. The expanding public and media attention to criminal and civil proceedings has led to an increasing need for objective information to be provided to the media both from the courts and public prosecutors.

69. It is of fundamental importance in a democratic society that the courts inspire confidence in the public[8]. The public character of proceedings is one of the essential means whereby confidence in the courts can be maintained.

70. Within the Council of Europe two main documents deal with this issue: a) Recommendation Rec (2003)13 on the Provision of Information through the Media in Relation to Criminal Proceedings, and b) Opinion No. 7 of the CCJE on Justice and Society (2005).

[7] See e.g. the CCPE Opinion N°3 on "the role of public prosecution outside the criminal law field".
[8] On this issue, see European Court of Human Rights, *Olujic v. Croatia*, (Application no. 22330/05)

71. Bearing in mind the right of the public to receive information of general interest, journalists should be provided with necessary information in order to be able to report and comment on the functioning of the justice system, subject to the obligations of discretion of the judges and prosecutors on pending cases and to the limitations established by national laws and in accordance with the case-law of the Court.

72. Media, as well as judges and public prosecutors, shall respect fundamental principles such as the presumption of innocence [9]and the right to a fair trial, the right to private life of the persons concerned, the need to avoid an infringement of the principle and of the appearance of impartiality of judges and public prosecutors involved in a case.

73. Media coverage of cases under investigation or on trial can become invasive interference and produce improper influence and pressure on judges, jurors and public prosecutors in charge of particular cases. Good professional skills, high ethical standards and strong self-restraint against premature comments on pending cases are needed for judges and public prosecutors to meet this challenge.

74. Media liaison personnel, for example public information officers or a pool of judges and prosecutors trained to have contact with the media, could help the media to give accurate information on the courts' work and decisions, and also assist judges and prosecutors.

75. Judges and prosecutors should mutually respect each other's specific role in the justice system. Both judges and prosecutors should draw up guidelines or a code of good practice for each profession on its relations with the media[10]. Some national codes of ethics require judges to refrain from public comments on pending cases, in order not to make statements that might cause the public to question the judges' impartiality[11], and to avoid violation of the presumption of innocence. In any case, judges should express themselves above all through their decisions; discretion and the choice of words are important where judges give statements to the media on cases pending or decided in accordance with the law[12]. Public prosecutors should be cautious when commenting on the procedure followed by the judge or upon the judgment issued, stating his/her disagreement concerning a decision by means of an appeal, if appropriate.

VI. JUDGES, PROSECUTORS AND INTERNATIONAL CO-OPERATION
(Declaration, paragraph 12)

76. In order to ensure the effective protection of human rights and fundamental freedoms, it is important to note the need for an efficient international cooperation notably between the Council of Europe member states on the basis of values enshrined in relevant international instruments, in particular the ECHR. International co-operation must be built on mutual trust. Information gathered through international cooperation and used in judicial procedures must be transparent in its content and origin as well as available to judges, public prosecutors and to the parties. It will be necessary to prevent international judicial cooperation from taking place without any judicial monitoring and without taking adequately into account, in particular, the rights of defence and the protection of personal data.

[9] See among others: principle I of the appendix to Recommendation Rec (2003)13 and the corresponding Explanatory Memorandum.
[10] Proposed for judges and for journalists by Opinion No. 7 of the CCJE on justice and society, paragraph 39 (2005).
[11] See e.g. Opinion No. 3 of the CCJE on ethics and liability of judges, paragraph 40 (2003).
[12] See e.g. European Court of Human Rights, *Daktaras v. Lithuania* (Application no. 42095/98) and *Olujić v. Croatia*, (Application no. 22330/05).

Opinion No. 5 (2010)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

Public prosecution and juvenile justice

YEREVAN DECLARATION

Introduction

1. The Consultative Council of European Prosecutors (CCPE) was established by the Committee of Ministers of the Council of Europe in 2005 with the task of rendering Opinions regarding the functioning of prosecution services and promoting the effective implementation of Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system.

2. For 2010, the Committee of Ministers instructed the CCPE[1], in the light of Resolution No. 2 on child-friendly justice[2], to adopt an Opinion on "the principles of public policy in juvenile justice" and to examine, *inter alia*, the place juveniles have prior to, during and after the judicial proceedings, the way in which the interests of juveniles can be taken into account during such proceedings and the improvements concerning the methods used by authorities to provide information to juveniles on their rights and access to justice, including the access to the European Court of Human Rights (ECHR).

3. Public Prosecutors are public authorities who, on behalf of society and in the public interest, ensure the application of the law where a breach of the law carries a criminal sanction. In doing so, prosecutors take into account both the rights of individuals and the necessary effectiveness of the criminal justice system, in accordance with Recommendation Rec(2000).

4. The role of prosecutors varies considerably from one State to another and the aim of this Opinion is to establish guidelines that should guide the action of all prosecutors involved in juvenile justice. This Opinion is to ensure that in all proceedings regarding juveniles, in which public prosecutors are involved, certain fundamental principles are applied with due regard to the level of maturity, vulnerability and mental capacity of the juvenile, whether as a juvenile who infringes the law, a victim or a witness. Compliance with these principles applies at all stages of the procedure, which means before the trial, during the hearing, during the enforcement of the decision and during the execution of decisions concerning juveniles.

5. In cases involving juveniles, prosecutors should pay special attention to striking the appropriate balance between, on the one hand the interest of society and the goals of justice, and on the other hand the interests, special needs and vulnerability of juveniles.

6. In States where prosecutors have competences outside the criminal law field (for example in family, custodian and administrative laws), they should always promote fundamental rights and freedoms, and in particular principles concerning special protection of juveniles as stated in this Opinion.

7. The following principles apply where these are within the competences of the prosecutors and in accordance with their national law.

8. Principles referred to in this Opinion concerning minors may also be applied to young adults.

9. Moreover, the CCPE expresses the wish that member States should take proper measures combating the other socio-economic roots that may lead to juvenile offences (for example, homelessness, unemployment, lack of education).

[1] See terms of reference of the CCPE for 2009-2010 (1044th meeting of the Ministers' Deputies, 10 December 2008).
[2] Resolution adopted by the 28th Conference of the European Ministers of Justice (Lanzarote, Spain, October 2007).

Reference documents

10. The CCPE has written this Opinion based on replies from 37 member States to a specific questionnaire on this subject[3].

11. This Opinion is based on universal[4] and regional[5] legal instruments, including the case-law of the ECHR in this matter[6].

12. The CCPE also took into account the work and conclusions of the 7th Conference of Prosecutors General of Europe (Moscow, 2006)[7] on "the role of public prosecution in the protection of individuals", as well as the CCPE Opinions No. 2 on alternatives to prosecution, No. 3 on the role of prosecution services outside the criminal law field and No. 4 on the relations between judges and prosecutors in a democratic society[8].

Definitions

13. For the purpose of this Opinion, the CCPE refers to the definitions contained in paragraph 21 of Recommendation Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures and point I of Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice :

(i) "Juvenile/minor" means a person below the age of 18 years;
(ii) "Juvenile offender" means a person below the age of 18, who is alleged to have or who has committed an offence;
(iii) "Offence" means any act or omission that infringes the law and implies a sanction and is dealt with by a criminal court or any other judicial or administrative authority.

Peculiarities of the juvenile justice

14. Juvenile justice should receive special attention from all judicial, law enforcement and social actors because of the fragility of those who are submitted to it. In all justice systems, the prosecutor should take into account the juvenile's state of minority, the possible mitigating effect on his/her level of responsibility due to that minority and pay particular attention to his/her rights.

[3] See document CCPE-GT(2010)1REV6.
[4] See in particular the United Nations legal instruments, including: the United Nations Convention on the Rights of the Child (20 November 1989); United Nations Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules", 29 November 1985); United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines", 14 December 1990); United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("The Havana Rules", 14 December 1990). See also United Nations General Comment No. 10 of the Committee on the Rights of the Child on Children's rights in Juvenile Justice (CRC/C/GC/10, 2007) and the Rules of Procedure and Evidence of the International Criminal Court (9 September 2002), and in particular rules 67 ("Live testimony by means of audio or video-link technology"), 68 (" Prior recorded testimony"), 87 ("Protective measures") and 88 (" special measures ").
[5] See in particular the normative *acquis* of the Council of Europe, such as: European Convention on Human Rights, including Articles 6, 8 and 13; Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) (entered into force on 1 July 2010 regarding the 5 member states); Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice; Recommendation Rec(2006)2 on the European Prison Rules; Recommendation Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures; Recommendation Rec(2009)10 on the integrated national strategies for the protection of children from violence; Programme "Building a Europe for and with children". See also "CommDH/IssuePaper (2009)1", document of the Commissioner for Human Rights on the theme "Children and Juvenile Justice: proposals for improvements ".
[6] See case-law of the ECHR, in particular: X and Y. v. Netherlands (26 March 1985, no. 8978/80); Bouamar v. Belgium (29 February 1988, no. 9106/80); V. v. United Kingdom (16 December 1999, no. 24888/94) and T. v. United Kingdom (16 December 1999, no. 24724/94); Couillard Maugery v. France (1 July 2004, no. 64796/01); Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (12 October 2006, no. 13178/03); Okkali v. Turkey (17 October 2006, no. 52067/99); Maumousseau and Washington v. France (6 December 2007, no. 39388/05); Yunus Aktaş and others v. Turkey (20 October 2009, no. 24744/03); M.B. v. France (17 December 2009, no. 22115/06) (Request for referral to the Grand Chamber in progress); Salduz v. Turkey (27 November 2008, no. 36391/02,).
[7] See 7th session of the Conference of Prosecutors General of Europe (Moscow, 5 to 6 July 2006) organized by the Council of Europe in cooperation with the Office of the Attorney General of the Russian Federation.
[8] See also the summary analysis of the questionnaire related to the treatment of juvenile offenders (Document PC-CP(2009)04final) and the draft Guidelines of the Committee of Ministers of the Council of Europe, prepared by a group of specialists of the European Committee on Legal Co-operation (Document CJ-S-CH(2011)9).

15. The following measures should, where appropriate, be considered:

- video or audio taping of testimonies given by juveniles, interviewing of juveniles carried out with the assistance of child psychologists, pedagogues, social workers or other experts;
- interviewing of juveniles carried out, where appropriate, in the presence of the holder of parental responsibility or another person close to the juvenile or social services;
- interrogation rooms especially adapted for children. The number of interviews of young juvenile victims should be as limited as possible;
- interviews must be carried out in ways in which repeated victimization is avoided.

16. Prosecutors should strive to promote measures aimed at preventing offending by juveniles who, because of their fragility, are likely to commit offences. Parents should be consulted and involved in the implementation of these measures.

17. Sanctions should take into account the education, training, personal environment and personality of the concerned juveniles and not just punish criminal offences or other wrongful behaviours. Measures which restrict the freedom of juveniles should be specified by law and limited to the strict requirements needed to protect society.

18. According to his/her competences, the prosecutor should seek to ensure that any contact by a juvenile, whether as an offender, a victim or a witness, with the justice system should be subject to special attention, in order to allow him/her to receive the necessary information, by means understandable for his/her age, concerning the conduct of the proceedings, the role of judicial actors and the measures taken for him/her.

19. Prosecutors should have the necessary and appropriate means to exercise their competences with juveniles or these means should be attributed to other competent services in charge of juveniles. In particular, a system of recruitment, appropriate training as well as necessary staff, means and specialised services should be provided to them. Moreover, member States should consider setting up specialised units or officers for juvenile delinquency.

20. In criminal investigations or prosecution and other proceedings involving juveniles, prosecutors should pay special attention to the timeframe and should seek to make sure that such cases are treated as a priority and carried out without any unjustified delay. A lengthy procedure may aggravate the negative impact of the committed offence and may hinder the proper re-habilitation of both a juvenile offender and a juvenile victim.

21. Prosecutors should be aware that according to international standards, children deprived of their liberty must, as a main rule, be separated from adults and shall have the right to maintain contact with their family[9].

22. The interest of society requires that the media be provided with the necessary information concerning the functioning of the justice system[10]. However, exposure to the media may be particularly harmful to juveniles involved in criminal investigations and other procedures. Prosecutors should therefore be especially aware of their responsibility not to reveal any information that might violate the rights of the juveniles involved or, information that might lead to increase their prejudice.

23. The exchange of experiences among prosecutors and international co-operation on the topic of juvenile justice is highly recommended[11].

Juveniles before the trial

24. In order to have a better knowledge of the situation of the juvenile involved in a procedure, prosecutors should, within their competences, play a key role in the co-ordination and co-operation of the main actors in the criminal investigation stage, e.g. police, probation and social services.

[9] See United Nations Convention on the Rights of the Child, Article 37.
[10] See The Bordeaux Declaration in Opinion no. 12 (2009) of the CCJE and Opinion no. 4 (2009) of the CCPE on the relations between judges and prosecutors in a democratic society.
[11] See Opinion No.1 of the CCPE on ways to improve international co-operation in the criminal justice field.

25. Prosecutors should, where appropriate, seek the advice of social services, specialised child protection services prior to making the decision on whether or not to prosecute the juveniles involved. Prosecutors should also seek their advice prior to taking a decision on which sanction or measure to propose to the Court. They should also be aware of and use, if appropriate, special technical hearing facilities for minors and experts (see paragraph 15 above).

26. Having in mind the possible damaging impact of criminal and other proceedings on the future development of juveniles, prosecutors should, to the widest possible extent and according to the law, seek alternatives to prosecution of juvenile offenders, where such alternatives constitute a proper judicial response to the offence, taking into consideration the interest of the victims and of the general public and being consistent with the goals of juvenile justice[12].

27. According to international standards, pre-trial detention of juveniles should only be used as a measure of last resort and for the shortest possible time. When dealing with juveniles, prosecutors should be especially cautious in considering whether the grounds of pre-trial detention can be achieved through less intrusive measures and ensure that pre-trial detention of juveniles takes place under conditions that can help minimise the possible negative consequences of the detention.

28. Guidelines or recommendations on appropriate measures for different types of juvenile offences could be useful to ensure equality before the law.

Juveniles in the trial

29. The aim to ensure the well-being and the interests of juveniles during trial should be shared by all prosecutors. Prosecutors should seek to minimize any excessive harm to offenders, victims and witnesses by the criminal procedure, where appropriate, when a protective approach can help.

30. The prosecutor should seek to ensure that the juvenile is made aware of the charges against him/her, and able to fully exercise his/her proper defence, in order for the juvenile to present explanations and benefit from a legal assistance in all proceedings where he/she is involved, and to be able to speak freely before the competent court.

Execution of decisions concerning juveniles

31. As regards juvenile justice, prosecutors should, where this is within their competences, seek to ensure that educational and socialisation measures, such as reparation, education, supervision by social services, treatment, placement in special juvenile facilities, mediation, as well as judicial supervision, probation and conditional release, are used to the widest possible extent, while at the same time taking into account the interest of the victim, the public interest, the interest of the juvenile as well as the goals of criminal justice.

32. Where this is within their competences, prosecutors should supervise the legality of the implementation of all sanctions and measures, as well as education in specialised facilities for juveniles and carry out regular inspections in all penitentiary specialised institutions for juveniles. These inspections should also concern facilities for the pre-trial detention of juvenile suspects.

33. Prosecutors should, where this is within their competences, ensure that juveniles, who have committed offences and who are subject to a judicial measure or sanction, are monitored and assisted in order to avoid the risk of reoffending.

34. Member States are invited to regularly verify the implementation in their national system of the Recommendation Rec(2000)19, in particular as regards juvenile justice as described in this Opinion.

[12] See Opinion No. 2 of the CCPE on alternatives to prosecution.

Opinion No. 6 (2011)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The relationship between prosecutors and the prison administration

I. Introduction

1. The Consultative Council of European Prosecutors (CCPE) was established by the Committee of Ministers of the Council of Europe in 2005 with the task of rendering Opinions regarding the functioning of prosecution services and promoting the effective implementation of Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system.

2. The Committee of Ministers instructed the CCPE[1] in 2011 to examine the issues of the relationship between public prosecutors and the prison administration in the light of Recommendation Rec(2006)2 of the Committee of Ministers to the member states on European Prison Rules.

3. The CCPE drafted this Opinion following the 25 replies received from member states to the questionnaire[2]. It clearly shows that the relationships between public prosecutors and the prison administration vary mostly in their objectives, content and structure, from no interaction to a rather detailed and structured one, sometimes controlled by the public prosecution service. Legal history, national culture and developments within the various institutions of justice explain the present variety.

Scope of the Opinion

4. All the provisions of this Opinion concern the states where public prosecutors have a specific role as regards prison matters. In States where prosecutors do not have such powers, another authority should always be able to protect the rights of persons deprived of their liberty.

5. This Opinion concerns the relations between prosecutors and institutions in charge of "persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following a conviction" as defined by Recommendation Rec(2006)2.

Aim of the Opinion

6. The confinement of persons who are detained will always entail the risk, in a closed entity, of their most basic human rights being infringed.

7. The CCPE aims to define guidelines concerning public prosecutors in exercising their duties vis-à-vis persons deprived of their liberty, and in particular:

- to determine the fields of activity which involve supervising detention conditions, ensuring that the law and human rights are respected as well as encouraging prisoners' improvement and their reintegration into society in the best possible conditions;

- to increase awareness of all the relevant authorities, including the members of prosecution services about the detainees' conditions, in order for them to effectively fulfil the role entrusted upon them by national legislation on the subject matter;

- to highlight the fundamental principles and some concrete measures defined in the Recommendation Rec(2006)2 in order to improve awareness and facilitate compliance with these principles by all authorities concerned.

[1] 1099th meeting of the Deputies Ministers (23 November 2010).
[2] See the Appendix to this Opinion as well as replies of member States to the questionnaire on the same topic on the CCPE's website: *www.coe.int/ccpe*.

General principles

8. It is necessary in any State governed by the Rule of Law that a well coordinated system of checks and balances, execution and control mechanisms is established with regard to deprivation of liberty enforced by the State. This implies that both in the context of custody and in the context of enforcement of sentences, appropriate monitoring and control mechanisms should be in place.

9. In this respect, all member states must set up an impartial, objective and professional authority for monitoring and controlling periodically and in a structured way the enforcement of the deprivation of liberty. In some member states, this can be realised by charging public prosecutors with all powers needed to exercise these tasks in the most effective way. In other states, these tasks may be fulfilled by other judicial instances or independent bodies outside the prison administration.

10. Therefore, special attention is to be paid to the goals and tasks of penal institutions and to the functions and powers of prosecution services, where they have such a role, regarding the legality of the enforcement of punishments and observance of rights and fundamental freedoms of persons who are serving their sentence and who are held in pre-trial detention.

11. Public prosecutors, when they are enforcing or ordering the enforcement of a sentence or a taking into custody decided by any competent authority, are directly concerned with the deprivation of liberty of the individual. In the framework of these activities, public prosecutors must always be governed by the principles of legality, impartiality and independence of undue influence. In fulfilling their functions they must avoid any discrimination on any ground such as sex, race, colour, language, religion, sexual orientation, political or other opinion, national or social origin, association with a national minority, property, birth or other status (principle of non-discrimination).

Reference instruments

12. As regards detention conditions, the CCPE underlines the importance of referring to the Convention on Protection of Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court on Human rights (the Court). Namely, the CCPE stresses the importance of respecting Article 3 of the ECHR stating the prohibition of torture[3] and inhuman and degrading treatment[4], Article 8 (right to respect for private and family life)[5] and Article 13 (right to an effective remedy)[6].

13. The CCPE took in particular into consideration the Recommendations Rec(2000)19 on the role of public prosecution in the criminal justice system and Rec(2006)2 on the European Prison Rules, which enumerates the rules to be applied when a member State puts an individual in detention (basic principles, conditions of imprisonment, health, good order, management and staff, inspection and monitoring, untried prisoners, sentenced prisoners), and other Council of Europe instruments[7].

14. The CCPE also took into account the relevant documents of the United Nations[8], as well as some other international legal instruments[9].

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[3] See in particular Selmouni v. France (n°25803/94), Aksoy v. Turkey (18 December 1996) and Aydın v. Turkey (25 September 1997).

[4] See in particular Jalloh v. Germany (n°54810/00), Olszewski v. Poland (13 November 2003), Labita v. Italy (n°26772/95), Kantyrev v. Russia (21 June 2007), Orchowski v. Poland (n°17885/04) and Nazarenko v. Ukraine (29 April 2003).

[5] See in particular Vlasov v. Russia (12 June 2008), Ostrovar v. Moldova (13 September 2005) Enea v. Italy (17 September 2009).

[6] See in particular Kaya v. Turkey (19 February 1998) and Melnik v. Ukraine (28 March 2006).

[7] See also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Recommendations No. R(89)12 on education in prison, No. R(93)6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison, No. R(97)12 on staff concerned with the implementation of sanctions and measures, No. R(98)7 concerning the ethical and organisational aspects of health care in prison, No. R(99)22 concerning prison overcrowding and prison population inflation, Rec(2003)22 on conditional release (parole) and Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners.

[8] See in particular the International Covenant on Civil and Political Rights (1966), the Standard Minimum Rules for the Treatment of Prisoners (1955), the Guidelines on the Role of Prosecutors (1990), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

[9] See in particular the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors in 2005.

II. The role of public prosecutors

A. Remand in custody

15. Remand in custody in criminal cases shall always comply with reasonable grounds provided for by the law and in accordance with the requirements of the ECHR and the relevant case law of the Court.

16. In States where prosecutors have a role in prison matters, they should be able to:

- supervise that the investigative bodies observe the rights of the detainee, envisaged by the ECHR and by the domestic law (for instance, the right to know about the reasons of detention, the right to notify the relatives about his/her detention, the right to defence, including the right to have a lawyer etc.), take steps to terminate the violations of such rights and also to hold persons, who are guilty of such violations, liable;

- take appropriate steps for an immediate release of a detainee, when the conditions for deprivation of liberty are not met (e.g. when detention is without warrant or where less intrusive measures are considered sufficient);

- control the legality of how pre-trial custody decided by a judge is executed.

B. Enforcement of sentences

17. Enforcing a prison sentence leads to depriving the individual of a fundamental right: that of liberty.

18. This consequence gives justification for taking measures, including by public prosecutors where they have such a role, so that:

- the sentence is enforced for a period of time that is not yet statute-barred, following a final conviction by an impartial and independent judicial authority;

- the nature and/or the length of the sentence be precisely set in accordance with the decision taken;

- the grounds for the sentence and its terms are brought to the attention of the sentenced person.

19. Before enforcing the sentence, it is essential that an authority independent of the prison administration concerned should ensure the legality of such enforcement.

20. The authorities competent to enforce a sentence must:

- especially verify that both the legal conditions are fulfilled in order to enforce a sentence and the sentence is enforced in a way that respects human dignity. Unless special circumstances arise on the basis of emergency (risks of absconding or security reasons), they should ensure to give a swift response to all questions by the prisoner, his/her lawyers or the prison administration regarding the enforcement of the sentence and provide any document to justify his/her position;

- process and transfer to the competent authority, without delay, any claim that may affect the enforcement of the sentence (for example, application for pardon, request for release).

21. Depending on the national legal systems, public prosecutors may play an important role in the process of conditional release of offenders as well as of their reintegration into society.

C. Detention regime

22. Although the European Prison Rules do not specify the role and position neither of public prosecutors, nor of any other control organ in the context of detention, public prosecutors, where they have such a role, should strictly supervise the execution of the national laws implementing these Rules. It is in particular essential that they, within their competencies, ensure the full and effective protection of the rights of the persons detained in order to allow a consistent application of human rights and freedoms within prisons.

23. Detention must respect the dignity of the persons deprived of their liberty and limit the negative effect of detention, while protecting society.

24. If public prosecutors have responsibilities to supervise compliance with legal regulations in detention facilities, they should be entitled to:

- regularly inspect the detention facilities at any time,
- have access to and retain documents, files, written orders and decisions of the prison administration,
- meet freely the persons deprived of their liberty without the presence of other persons,
- request relevant explanations from employees of the respective detention facility,
- verify the legality of procedures and resolutions issued by the educational bodies with respect to institutional care or protective education, or orders and resolutions of the Prison Service with respect to the pre-trial custody or the sentence,
- order that compliance with the applicable legal regulations be ensured with respect to the respective detention,
- take the necessary steps for a person to be immediately released, provided the person's detention is without warrant.

25. In case of any breach of legal regulations within the process of detention, public prosecutors, where they have such a role, should respond by requesting strict compliance with the applicable legal provisions, irrespective of the fact that additional costs may be incurred. Where appropriate, public prosecutors initiate disciplinary or criminal proceedings against those responsible among prison staff.

D. Reactions to offences committed in prisons (criminal and disciplinary matters)

26. The CCPE recalls that public prosecutors are “public authorities who, on behalf of society or in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system”[10]. States should take appropriate measures to ensure that public prosecutors can perform their duties with regard to all places of deprivation of liberty.

27. Individuals who are deprived of their liberty are living in a specific relationship of subordination and vulnerability. Owing to this situation, it is of particular importance that places of deprivation of liberty be protected from violations of criminal law and basic rules regarding human rights and freedoms.

28. As an instrument of crime prevention within prisons, all criminal offences committed in these places should be considered with specific attention.

29. It is in the public interest that public prosecutors, where they have such powers, initiate proper investigation when an offence has been committed, especially in cases of corruption or unjustified pressure on the person detained, or in cases of violations of human rights perpetrated by the staff of the detention facility.

30. In all cases of breach of law in prisons, member States should take appropriate measures to ensure that investigating authorities get all necessary information to conduct, direct or supervise the investigation, in order a decision can be made whether to initiate or continue prosecution before the court.

[10] See paragraph 1 of Recommendation Rec(2000)19 of the Committee of Ministers to the member states on the role of public prosecution in the criminal justice system.

E. Prison administration

31. In the States where public prosecutors have a role to play in prison matters, they should:

- take into account the instruments of the Council of Europe including recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and in particular with respect to the conditions of detention[11]. Whenever public prosecutors notice the non-compliance with these recommendations, they may address this issue to the competent authorities. Where appropriate, the Prosecutor General, for instance on the occasion of his/her annual report to the Parliament or a similar event, may propose appropriate measures to ensure compliance with such recommendations;

- ensure the Rule of Law from two different aspects. On the one hand they have to ensure the rights of the detainees, so that in their special position they should not face more detriment than prescribed by the law; on the other hand they have to provide for the protection of the society through ensuring that the sentence is enforced in full compliance with the law;

- ensure an effective protection since they have access to the places of detention, can visit them on a regular basis, and act immediately while enjoying appropriate means and a specific experience.

III. Conclusions

32. Whatever the system in place within each member States of the Council of Europe, the observance of human rights inside the detention places should be an essential concern for the public prosecutors who have to ensure compliance with the law and the fundamental principles stated in the ECHR.

33. The CCPE noted that, in a number of member states, public prosecutors play an important role in the enforcement of sentences and in the supervision over the legality of detentions and of the living conditions of the detainees within prisons. However, in other States prosecutors have no powers as regards prison matters, this role is entrusted to other authorities, who should always be able to protect the rights of persons deprived of their liberty.

34. The CCPE deems it necessary that penitentiary institutions have at their disposal sufficient resources, material and human, in order to ensure adequate detention conditions as well as favourable conditions for resocialisation of offenders.

35. The following conclusions are made in respect of member States where prosecutors have a role concerning prison matters:

a) Public prosecutors engaged in this sphere of activities should have at their disposal the necessary financial and human resources to adequately fulfil their responsibilities;
b) Depending on the workload, prosecution services are recommended to have specialised units within their organisational structure to deal with prison administration;
c) Where necessary, guidelines summarising best practices and recommendations aimed at harmonising, within each system, the general or specific approaches to the activities of prosecutors in relation of prison administration should be issued;
d) Member States or prosecution services should develop special training of prosecutors engaged in the activities in relation to prison administration;
e) In executing their responsibilities, public prosecutors should establish and develop, where appropriate, cooperation or contacts with an ombudsman or ombudsman-like institutions, authorities concerned with rehabilitation and reintegration as well as with representatives of civil society, including non-governmental organisations concerned.

[11] According to the Recommendation Rec(2006)2 (paragraph 4), “Prison conditions that infringe prisoners’ human rights are not justified by lack of resources.” In compliance with the policy and the practices derived from the recommendation, the act to seriously deviate from the law is unacceptable. If such violations of the law are noticed, according to paragraphs 92 and 93 of this Recommendation, action should be taken to put a stop to it (through the prosecutor’s inspections).

36. The CCPE considers that all competent authorities, including public prosecutors, should take all necessary steps to improve the situation of detainees and facilitate their reintegration in the society.

37. Member States should ensure that the appropriate authorities competent to enforce sentences must ensure that all legal requirements are met in regard to their execution while fully respecting human dignity and ensuring that the rights and conditions of detained persons are monitored.

38. Member States shall ensure that an appropriate investigation takes place in respect of allegations made of the commission of offenses relating to the violation of legal provisions during the detention.

APPENDIX

Description of the different legal systems and various competences of public prosecution in prison matters (analysis of replies to the questionnaire)

1. In almost half of the 25 members States that replied to the relevant questionnaire, the supervision over the penal institutions is part of the functions of the prosecution services. At the same time, in many states the prosecutors have only limited powers in protecting the rights of the persons who are being kept in the places of deprivation of liberty.

2. The sphere of competence of public prosecutors in the relevant sphere differs significantly from one state to another: starting from overwhelming supervision over penal institutions to no controlling powers in respect of deprivation of liberty or detention. Taking this into account, the members-states may be divided into three main groups: 1) those in which the prosecution services supervise over penal institutions; 2) the ones where the public prosecutors have limited powers to control the places of deprivation of liberty and detention; 3) the ones where the prosecution services do not have any rights in the above mentioned sphere.

3. In the states where the public prosecutors have full powers in respect of supervision over the execution of laws by the administrations of the penal institutions and places of detention and custody, pre-trial detention, in places of deprivation of liberty and other bodies which enforce punishment and coercive measures, they also observe the rights and duties of the detainees, those taken into custody, the convicted and the persons subjected to coercive measures.

4. To detect and terminate violations of the law in respect of the persons who are serving their sentence in the form of deprivation of liberty or who have been taken into custody in the timely manner, public prosecutors in some States have rather wide powers: to conduct independent checks of penal institutions; to request the administration to create conditions which ensure the observance of the rights of the detainees, the persons taken into custody, the convicts, and the persons who are subjected to coercive measures; to check the compliance of the orders, regulations, decisions of the penal institutions' administration with the domestic law.

5. The legislation of some member States requires that the public prosecutors should conduct regular checks of penal institutions. The frequency of such checks varies in different countries from daily visits to one visit in three months. Some states do not regulate the number of checks and these countries limit themselves only by the recommendation to public prosecutors to eventually conduct an inspection. Such a check may result in a report, a brief official report (statement) or filing petition (submission) on the detected violations which are to be sent to the director of the institution under scrutiny and if necessary, to the relevant competent body.

6. In many countries, the main solution to ensure legality is to grant a right to a prosecutor to visit the places of deprivation of liberty and custody at any time. In the course of these visits, public prosecutors have an opportunity to familiarize with the documents, to check the conditions of detention of the persons and to communicate with the convicts freely and confidentially.

7. In most States the frequency of the checks of the conditions of imprisonment is defined by law and this frequency varies from weekly control to scheduled visits four times a year in different States. In other States, the public prosecutors have a duty to conduct individual meetings with the convicts on a regular basis. At the same time, the complaint of the convicts or the detainees about the conditions of imprisonment in most states is viewed as a reason to initiate an ad hoc check of the penal institution concerned. And in some third group of States the reason for meeting is a claim or a statement of the convicts. The subject-matter of the applications from the convicts to public prosecutors may be claims on violation of their rights as detainees, but the requests can also be of another nature, for instance, the transfer of the convicts to another prison in order to ensure their safety.

8. In the States which entrust public prosecutors with limited powers in the sphere of control over penal institutions, the opportunity of cooperation of the convicted person with the public prosecutor is not excluded. In such States, the initiator of such an application is often the convict or the person in custody; they submit their claims on cruel treatment or any other violation of human rights to the public prosecutor. As a rule, the absence of the legislative regulation of such meetings does not exclude the right for the public prosecutor to communicate with the convict in confidentiality, if necessary.

9. Upon detection of the facts of violations of human rights, mostly in all responding States, where the prosecution service is supervising over the places of deprivation of liberty and custody, public prosecutors may demand explanations from officials, suspend execution of illegal orders and decisions of the administration, cancel sanctions, which were applied to the detainees in violation of the law. In many States, where the prosecution services are given wide powers, public prosecutors have a right to immediately release any person who was kept without legal reasons in the institutions which enforce punishment or who was subjected to arrest or pre-trial detention in violation of the law.

10. Violation of human rights during the serving of a sentence or a pre-trial detention justifies the public prosecutor's intervention to put a stop to it. The efficiency and the nature of the intervention of public prosecutors following the acts of prison administration may very from one member State to the other. In many States, violation of human rights in the places of deprivation of liberty or custody gives public prosecutors power to initiate an independent investigation, according to the results of which the decision is taken, to arraign the guilty officials to disciplinary, administrative or criminal liability. It is noteworthy that the opportunity to react to the cases of violations of human rights in penal institutions is granted to the prosecutors also in States where there is no prosecutor's overwhelming supervision over the places of deprivation of liberty or custody.

11. In most member States, the prosecutors do not have any powers to independently arraign the guilty officials to disciplinary liability. When the signs of a disciplinary violation are detected in the course of the investigation, public prosecutors may apply to the state body which is authorized to impose the relevant sanction on the employees of the places of deprivation of liberty and custody. Only in some States public prosecutors have the right to arraign those guilty to the disciplinary liability.

12. Public prosecutors have considerably wider powers when the signs of the criminally punishable action in the penal institution are detected. In such a situation, in most States, public prosecutors have a right to initiate a criminal case and conduct an independent investigation. Should there be any cases of sudden death, crimes committed against the convicts or by the convicts against some other convicts or against the personnel of the prison, public prosecutors must interfere. The legislation in most States grants public prosecutors a right to conduct an independent investigation or transfer of the criminal case to the investigative bodies with a right to supervise this investigation.

13. When the facts of violation of human rights of the convicted or persons in custody by the administration of the institution are defined, then in some countries it is regarded as grounds for public prosecutors to file a lawsuit seeking compensation of damage in the civil process.

14. In the States which grant the prosecution service the right to supervise over the penal institutions, the public prosecutors play a significant role in controlling the compliance of the conditions of imprisonment with the international law standards and the recommendations of the Council of Europe.

15. In some states, public prosecutors have additional powers, for instance, he/she takes a decision about the calculation of the term of imprisonment in the sentence; he/she participates in discussions about the transfer of the convicted; he/she sets restrictions on the conditions of living of the convicted in order to ensure security; he/she decides whether the convict should have an opportunity to leave the penal institutions in cases of emergency; he/she invites doctors of the relevant specializations if it is necessary to examine the person who is deprived of liberty or taken into custody. In a number of states, which grant public prosecutors limited powers in the sphere of control over penal institutions, public prosecutors have a right to examine the issues in order to define the conditions of treatment of persons who have been taken into custody, including the level of the isolation, limit the contacts and use of means of communication.

16. In several States, the powers of public prosecutors in the sphere of control over penal institutions cover only the places where the detainees and those in custody are kept. In such a case public prosecutors have power to check the documents which confirm the legality of pre-trial detention, to visit the above mentioned institutions at any time, to freely communicate with persons who are kept in custody. Moreover, in some States public prosecutors have a right to adopt decisions about arrest and taking into custody and also to participate in decision-making about the expediency of application of special measures to the persons who are under risk due to their role in the criminal communities in the course of the pre-trial detention.

17. In most States, while controlling the legality of imprisonment of the persons, public prosecutors are independent in their activities from other state bodies. However, in almost all of the member States the prosecution service is a unified centralized system and public prosecutors who are fulfilling their powers are subordinated to the prosecutor general.

18. Some prosecution services participate in decision-making about pardon. Very often when this procedure is conducted, the prosecutors express their opinion on the expediency of pardon for the convicted. In a number of States, the powers of prosecutors also include the supervision over the legality of execution of the decisions on amnesty and pardon.

19. The great significance is attributed to the activities of the prosecution service in the sphere of decision-taking about conditional release of the convicted from the places of imprisonment. In such cases the function of the prosecutor, as a rule, is not limited only to the request (motion) on conditional release and preparation of the statement for the court on the possibility of conditional release of the person concerned. In some states public prosecutors may participate in the sessions of a special commission and court hearings on conditional release and also may control the legality of such a release.

20. The prosecution services of many member States have a right to appeal against the decisions which are adopted on the issues of enforcement of the sentence (conviction). In the course of examination of such cases the public prosecutors have a right to participate in court hearings with a possibility to submit materials, to file motions etc.

21. In some states Prosecution Services are in contact with public bodies, which supervise and control the observance of human rights in the places of deprivation of liberty. The laws in a number of countries regulate the issues of cooperation of the representatives of the prosecution services with the ombudsman (on human rights). In most States this cooperation has two dimensions: first, the information presented in the reports of the ombudsman, which may serve as grounds for conducting prosecutors' checks, and secondly, the results of the work of public prosecutors in their effort to eliminate the infringements of human rights in the places of deprivation of liberty are submitted to the ombudsman.

Opinion No. 7 (2012)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The management of the means of prosecution services

I. INTRODUCTION

1. The Consultative Council of European Prosecutors (CCPE) was established by the Committee of Ministers of the Council of Europe in 2005 with the task of rendering opinions regarding the functioning of prosecution services and promoting the effective implementation of Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system.

2. The Committee of Ministers instructed the CCPE in 2012 to adopt an Opinion for its attention on the management of the means of prosecution services[1].

3. The CCPE has drafted the present Opinion on the basis of replies received from 30 member States to a questionnaire[2]. According to these replies the level of financial autonomy seems to have an impact on the tools at the disposal of prosecution services for managing their resources. The competence for establishing a budget is in most cases shared between the prosecution service and the ministry of justice; often the ministry of finance is also directly involved. Approximately half of the states indicate that the budgets of their prosecution services are governed by the system of management by results including such objectives as efficiency and productivity.

4. In addition, a significant number of countries indicated that the budgets allocated to prosecution services are regarded as insufficient; this situation is bolstered by the current crisis. The current economic situation represents a challenge to the efficiency of justice; however, it can also be an opportunity for introducing changes in the way the means of prosecution services are managed. In any case prosecution services should bear in mind the need to use the available resources in the most efficient manner.

A. Reference texts

5. The CCPE underlines the importance of referring to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court of Human Rights (the Court)[3].

6. The CCPE took into consideration the Recommendation Rec(2000)19, and in particular the part concerning the guarantees to the prosecution service for exercising its role. It also took into account the relevant conclusions and recommendations contained in the previous Opinions of the CCPE, especially in Opinions No. 3 (2008) on the "Role of prosecution services outside the criminal law field" and No. 4 (2009) on the relations between judges and prosecutors in a democratic society.

7. The CCPE also took into consideration the European Guidelines on ethics and conduct for public prosecutors – the Budapest Guidelines[4], Opinion No. 2 (2001) of the Consultative Council of European Judges (CCJE) on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the ECHR, as well as the Report of the European Commission for the Efficiency of Justice (CEPEJ) entitled "European Judicial Systems: Edition 2010"[5] and the Report of the Venice Commission on European Standards as regards the Independence of the Judicial System – Part II: the Prosecution Service[6].

[1] 1127th meeting of the Ministers' Deputies (23 November 2011).
[2] See the replies of member States to the questionnaire on the CCPE website (www.coe.int/ccpe) under "Preliminary work – preparation of the 7th CCPE opinion".
[3] See in particular *Broniowski v. Poland* (22 June 2004), §183.
[4] Adopted at the 6th Conference of Prosecutors General of Europe in Budapest in May 2005.
[5] See CEPEJ website at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp.
[6] Adopted at the 85th plenary session of the Venice Commission (17-18 December 2010).

8. Lastly, the CCPE also took note of the instruments adopted by certain other international organisations such as the United Nations and the International Association of Prosecutors, as well as the Final Document of the 5th Plenary Meeting of the Network of Public Prosecutors or equivalent institutions at the Supreme Judicial Courts of the member States of the European Union, adopted in Budapest on 26 May 2012[7].

B. Scope and purpose of this Opinion

9. The present Opinion applies to prosecution services as regards the execution of all functions entrusted to them in accordance with the law. Where they have functions outside the criminal justice system[8], the principles and provisions of this Opinion also apply to these functions *mutatis mutandis*. The prosecution services assume a key role in the national justice system and ensure the respect of human rights, including in some jurisdictions in places of detention. In particular, as the authority charged with monitoring the application of the law and prosecuting any criminal behaviour, the prosecution service must respond to the common need to combat domestic and international crime.

10. At present the prosecution service is confronted with an increasing density of crime that gives rise to a growing feeling of insecurity. Due to the serious danger it represents for the society, the expansion of organised crime, including acts of terrorism, drug trafficking and cybercrime requires an increased efficiency of the prosecutors' activities and enhanced protection of human rights and public interests.

11. Even if the powers of prosecution services to manage autonomously their own budgets and resources vary from one member State to another, autonomy of management represents one of the guarantees of their independence and efficiency. Therefore, relying on professionals in management and developing common principles as regards the management of means, particularly financial, is indispensable.

12. This Opinion aims at setting out recommendations permitting to identify the needs and allocate and use the resources of prosecution services in a more efficient manner.

II. NEEDS OF PROSECUTION SERVICES

A. Preparation of the budget

13. The budget of any prosecution service should be integrated into the state budget as a separate line. It is important to ensure that the procedures for establishing budgets for prosecution services and allocating additional financial resources to them are provided for in the law on the budget or other financial regulations. Despite the fact that allocation of funds to the prosecution service is deemed to be a political decision, the legislative and executive authorities concerned should not be in a position to unduly influence the prosecution service when making a decision on its budget. The decision on the allocation of means to the prosecution service should be made in strict accordance with the principle of its independence, and should ensure the necessary preconditions for accomplishing its mission.

14. The prosecution service should participate, along with the executive branch, in the preparation of its budget. In countries where the legal system allows it, the right of the prosecution office to contact the parliament directly in order to express its opinion concerning its needs may be one of the forms of active involvement in the preparation of its own budget. In any event the procedure for adopting the budget of the prosecution service by parliament should provide for taking into consideration the opinion of the prosecution service itself.

15. To allow for sufficient allocation of means by parliament (or by another competent state authority), the estimated costs need to be calculated in advance. This calls for reliable schemes of budget planning, be it regarding operational or investment budgets. Criminal and other relevant statistics of previous years, as well as sustainable trends and activities of the prosecution service, in particular planned and on-going projects, may serve as a basis for preparing an overall minimum budget for the year or time period to come. Management by results offers a number of helpful tools for establishing budgets for future periods.

16. In any case it is important that the responsibility for all administrative decisions related to the allocation of resources which directly affect the prosecution service activities should be placed with the prosecution service concerned.

[7] http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP_7_Ref_doc_Network_pros_gen_en.asp
[8] See Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system.

17. The management of budgetary resources should be conducted by the prosecution service itself in an efficient and responsible manner, according to the principles of good governance. Therefore an appropriate training of prosecutors on this subject should be organised, among other measures. Prosecution services should also have at their disposal, where appropriate, specialised personnel with backgrounds in finance, auditing and management to carry out such functions and ensure an appropriate use of resources. Prosecution services should be aware of the possibility to rely on such specialised personnel, and should have at their disposal the resources required to do so. They should have the final word on, and responsibility for, the essential choices.

18. The budget of the prosecution service must in all circumstances allow for its quick reaction to unforeseen events and developments.

B. Needs of the prosecution service

19. The new criminal challenges as well as the growing complexity of certain types of crime are due to the speedy development of new technologies, the increasing international integration and globalisation, the expanding international trade and data flow. This reality has enabled new ways to commit crimes, which implies the need to cooperate, including internationally, in their detection and the prosecution of criminals. Special training to enable to face the threats posed by the above-mentioned phenomena is also required.

20. At a time of economic crises, when poverty and inequality of the people can provoke an increase of social disorder and crime and make all kinds of fraud and injustice committed by those who violate the law all the more unbearable for the population, the means allocated to prosecution services should be maintained at the same level, or possibly increased, so as to allow them to be the watchdog of the public interest, human rights and fundamental freedoms.

21. There is an increasing demand for human resources in prosecution services, as well as for the necessary material and budgetary means to carry out prosecutorial tasks. Taking into account the fact that in a number of countries prosecutors also perform tasks outside the criminal law field, including those of alleviating social and environmental problems[9], this demand certainly becomes much more evident.

22. While carrying out their functions in the criminal law field or outside of it, prosecutors should be subject to proper measures related to their safety. For this purpose member States should ensure that prosecutors and, if necessary, members of their families are physically protected when their personal safety can be threatened as a result of the proper discharge of the professional duties of prosecutors[10].

23. The participation of prosecutors in international cooperation in criminal matters is increasingly expensive. To ensure that this function is carried out expeditiously and efficiently, modern technologies are needed (such as videoconferencing and encryption); additional funds and human resources are required, for example, for drafting international conventions, seconding liaison officers (prosecutors in particular) to national embassies in foreign states, funding joint investigation teams and participation in the relevant coordination bodies[11].

24. Due to the importance of the protection of human rights in places of deprivation of liberty, sufficient resources should be devoted to carrying out their supervision, where prosecution services are entrusted with such functions.

1. In the criminal law field (investigation and prosecution)

25. Adequate allocation of resources for ensuring prosecutorial activities is a necessary precondition for implementing the principle of independence of prosecutors and/or prosecution services, in particular in the criminal law area.

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[9] See Resolution (77)28 of the Committee of Ministers of the Council of Europe on the contribution of criminal law to the protection of the environment.

[10] See in particular the Declaration of Minimum Standards Concerning the Security and protection of Public Prosecutors and their Families, adopted by the International Association of Prosecutors in March 2008.

[11] For example, Eurojust, the European Judicial Network, the Network of Public Prosecutors or equivalent institutions at the Supreme Judicial Courts of the Member States of the European Union, the Consultative Forum of Prosecutors General and Directors of Public Prosecution, the Consultative Council of European Prosecutors and the Coordination Council of Prosecutors General of the Commonwealth of Independent States or other prosecutors' networks which keep appearing day after day.

26. Financial independence of prosecution services is aimed at guaranteeing fairness of criminal prosecution, effective protection of human rights and fundamental freedoms in criminal proceedings in general and, finally, a proper administration of criminal justice.

27. The management of financial resources of on-going investigations varies significantly in the different member States. The same diversity applies to the role of prosecution services in the course of an investigation: in some member States the prosecution service itself has certain or full investigative powers; in other member States it has no investigative power, but may or may not have the right to order the investigative authorities to carry out investigative and other procedural acts even though it has no investigative power of its own.

28. The costs of such investigative and other procedural acts are usually advanced by the investigating authority actually executing them. In many members States prosecutors therefore often face the problem that investigating authorities – with reference to their low budgetary means – are unable or reluctant to execute the prosecutorial order to carry out investigative and other procedural acts. This problem is especially pertinent in cases where the investigation generates additional costs, such as costs of some types of expertise (e.g. homogenetics expertise, expertise of economic matters, DNA analysis or the cost of special investigative techniques).

29. Member States should allocate sufficient means for all investigations ordered by the prosecutors to be carried out. This kind of approach would significantly contribute to ensuring that investigations are completed and there are no loopholes in criminal proceedings that may hinder the administration of justice.

30. Thus, member States where investigation is one of the functions entrusted to the prosecution service should:

- ensure an immediate and unhindered access of prosecutors to main resources allocated for conducting any actions necessary for effective and impartial investigation;

- enable them to use modern technologies in an appropriate manner for investigation and for ensuring the rule of law during investigations (computer search tools, forensic equipment, electronic data bases, videoconferencing and encryption equipment, interception of telecommunications, audio and video surveillance etc.).

The same principles should be applied to the resources required by prosecutors for an adequate action in trials.

31. In addition, special attention should be paid to the full payment and – where this is provided for in the law – a subsequent recovery of the costs borne during criminal proceedings by the different authorities. The necessary mechanisms should be set up to ensure such recovery. This aspect is of particular importance for the member States and their judicial bodies at a time of economic crises.

32. Member States may explore developing confiscation policies aimed at depriving criminals of the proceeds of crime, which may assist in the prosecution of offences, while always respecting the role and independence of prosecutors.

33. Prosecution services should not be unduly restricted in managing the budget resources allocated for investigation purposes. The utilisation of such resources should be rational, effective and transparent.

2. Outside the criminal law field

34. The prosecutorial activities outside the criminal law field which, to a different extent, are performed in most member States of the Council of Europe, sometimes require among other procedural steps special forensic examinations and involvement of specialists from different areas of expertise (e.g. psychologists in cases related to family law, accountants and financial experts on bankruptcy, chemists and biologists in matters related to environment protections etc.).

35. Depending on the variety and scope of the work the need may arise to create within a prosecution service specialised units or prosecutor positions to perform activities outside the criminal law field in general or in particular fields. The specific nature of such activity may require special training of the personnel.

III. POSSIBLE SOLUTIONS

A. Human resources

36. The current situation calls for adapting the need for human resources in accordance with the needs of the public action, whether this implies sufficient remuneration or appropriate training[12], both initial and continuous.

37. Generally speaking, there are three different professional levels in a modern public prosecution service:

- prosecutorial functions are carried out by prosecutors themselves. In case of need (and if compatible with the legal system), legal specialists may be hired for specific legal functions;

- experts in specific fields, for instance psychologists or psychiatrists may be essential to deal with cases of juvenile delinquency and mentally ill offenders, or to assist victims. Sociologists and experts in statistics may be of great use when there is a need to rely on statistical data, computer specialists – to research anything which has to do with cybercrime, or biologists or chemists to investigate environmental offences, etc.;

- administrative staff is an essential part of a public prosecutor's office. This staff must be qualified to cope with the workload of cases processed which inevitably increases in parallel with the specialisation or complexity of matters dealt with by the prosecutor.

38. A system for calculating the workload of prosecutors must be designed in order to identify their evolving needs. This system should also be able to measure those factors that influence or affect the execution of their tasks, so that those tasks are carried out properly.

B. Financial resources

39. The general principles of using public resources should be observed: the principle of opportunity, the principle of effectiveness and the principle of legality. When more than one body is involved in the use of resources (e.g. the prosecution service, the police and the tax authorities), these principles must be observed in parallel with a careful coordination to avoid duplication of efforts and ensuring that resources are used to achieve the final goal of the effective administration of justice.

40. Provided that their independence is ensured, in order to make savings prosecution services are encouraged to conclude agreements with other state authorities with a view to sharing facilities and administrative services or participating in joint actions. Coordination is an essential instrument for avoiding the waste of resources and duplication of activities – also within a prosecution service, when, for instance, more than one public prosecutor (locally competent) is investigating connected facts.

41. As an effect of the principle of legality on the use of public resources, the financial management performed by prosecution services independently should be subject to supervision by the state authorities entrusted with control and audit competencies, similarly to the courts.

C. Equipment and material resources

42. Prosecution services are urged to put in place and use compatible information technology systems for planning, monitoring and comparing the expenditure of prosecution services. This may be a practical and efficient method for balancing the use of resources against the workload of their territorial services, generating benchmarks for using resources at the level of different offices, enabling quick reallocation of resources when needed and finally ensuring accountability of the expenditure.

43. Member States are encouraged to enable prosecution services to use IT equipment in their daily work, by introducing e-justice tools, electronic case management and data exchange systems with the bodies in charge of the application of the law that prosecutors are in contact with when carrying out their tasks. This would enable ensuring a more efficient case management, reducing the length of proceedings and guaranteeing the application of data protection and confidentiality measures.

[12] See "Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service" adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).

44. Member States are also required to support the need of the prosecution services to maintain their own websites and to have adequate premises where the public can be received, in order to maintain an appropriate level of transparency and public awareness, as well as to support and facilitate access to justice.

D. The means of prosecution services and governmental austerity plans

45. Economic crises, if not properly resolved, may affect the functioning of prosecution services. The magnitude of this effect seems to vary from one member State to another: from the introduction of a general policy towards making savings and redistributing resources to core activities at the expense of capital investment, on the one hand, to radical cuts in the salaries of prosecutors, on the other. Obtaining additional human and financial resources, better technical equipment, better access to training for the staff as well as to technical expertise required in support of evidence used in courts is seen as a priority in a number of member States.

46. The prosecution services themselves must have a role to play in refuting or at least minimising the negative effect of economic crises on their everyday work. To do so, a balance should be found between the resources available and the results to be attained. By better cooperation and coordination between the European and domestic actors of fight against crime the situation can improve considerably. At the European level the different new possibilities for international cooperation in criminal matters (e.g. through Eurojust or by conducting joint investigations) should be used much more extensively. At the domestic level agreements with other local, regional and national authorities permitting the sharing of administrative services, office facilities and support staff, or improved cooperation with other monitoring authorities (such as environmental inspectorates) may help in overcoming the problems related to economic crises.

47. Where prosecution services have adequate means for the management of human and financial resources at their disposal, the quality of their work will not be affected in a negative way. The introduction of new structures within prosecution services (e.g. establishment of specialised units for the fight against economic crime or cybercrime) or in the system of financing the prosecution (e.g. providing budgetary autonomy in countries where prosecution services do not have it) can contribute on a large scale to maintaining professional quality.

48. In times of economic crisis it is especially important for prosecution services to streamline their organisations and improve management in order to ensure the optimal use of both financial and human resources. The distribution of public prosecution offices throughout the country, with a rational attribution of competence, can also be helpful.

E. Improving the management of prosecution services

a. Auditing and controlling

49. Monitoring and auditing are core elements for assuring the diligent management of public funds. They have to be adapted to the specific tasks of the prosecution service. Due to its special mission the use of funds spent, for instance, on investigating crimes cannot be assessed by ordinary cost performance calculation; investigations should not only be evaluated in terms of cost effectiveness. Monitoring may be a useful instrument for establishing best practices within the prosecution service to compare the handling of cases in different units and in different matters, but should not be used as a means to govern the prosecution service as such.

50. Only in exceptional circumstances should prosecution services revert to prioritising certain types of cases or crimes as a means of counteracting the limitation on resources. However, such prioritisation should not be to the detriment of prosecutorial activities on the whole, and especially to the effective prosecution of other types of crime, nor should it limit the general principle of equality before the law.

b. Management by results

51. Whatever is the system of management adopted by the different member States, prosecutors should always ensure that the resources put at their disposal are used in an efficient and economic manner, and that a proper control and follow-up mechanisms are in place.

52. Member States may also consider – as far as it is compatible with their respective legal systems – introducing or reinforcing a model whereby the activities of the prosecution service are managed according to the principle of management by results. This concept is an interactive, agreement-based steering model, where resources are allocated based on agreed and expected activity. The principal idea of management by results

is to help the parties strike an appropriate balance between the resources available and the results to be achieved (for example, for reducing delays of procedure or improving the access to justice of users), while fully respecting the role and the independence of the prosecution services and the principle of legality.

53. This model (concept) is a steering instrument established on the basis of performance negotiations, between a relevant government body (i.e. the ministry of finance, ministry of justice) or parliament and the prosecution service. The latter should itself participate in these negotiations, as it is best placed to set the objectives for its outputs in order to guide prosecutors in their actual work. The prosecution service should have sufficient liberty to set its objectives so as to achieve the best possible results.

54. The basis for evaluating performance and allocating resources are outcomes and outputs. The outcomes of the prosecution service consist of how well its social objectives (e.g. enforcement of criminal liability) have been attained. Outputs concern objectives which the prosecution service can itself influence through its own activities and how they are managed, i.e. operating efficiency, quality control and management of human resources.

55. Outputs and outcomes of the prosecution service should be closely linked to the prosecution service's core activities and available resources, so that the attainment of objectives depends solely on what the agency concerned does and how it is managed. Attention should be paid to the fact that the definition of outputs will impact on the activities carried out by prosecutors.

56. Management by results requires the agency concerned to report on the attainment of its objectives. In particular, local prosecution offices report to the office of the Prosecutor General, which in turn reports to the government body allocating the resources or to parliament. Evaluation and measurement of results in a clear and reliable way is vital, but may represent a challenge. Good performance indicators show what has been achieved, not what action has been taken.

57. How well the objectives are attained will influence the objectives set and the resources allocated for the next operating period. An evaluation of whether the objectives of the prosecution service have been attained or not should always be followed by decisions on concrete measures to be taken by the prosecution service itself.

IV. RECOMMENDATIONS

(i) **Prosecutors must have at their disposal sufficient means in order to fulfil their various tasks in the situation of new national and international dangers and challenges, including those brought by the development of technologies and globalisation processes.**

(ii) **Prosecution services must be enabled to estimate their needs, negotiate their budgets and decide how to use the allocated funds.**

(iii) **In order to be able to prepare their budgets, the prosecution services should rely on accurate and solid indicators derived from criminal and other relevant statistics.**

(iv) **The difficult economic and financial environment represents professional challenges which emphasise the need for a more rational management. The independence, impartiality, financial autonomy and efficiency of prosecution services are values that must be guaranteed under all economic circumstances.**

(v) **Prosecution services should use modern management methods in an efficient and transparent manner. The use of performance indicators and a system of management by results can be helpful in this respect. They must also have sufficient freedom to choose which actions to pursue to achieve the desired results. Prosecution services should not be confronted with excessive budgetary rigidity.**

(vi) **Both internal and external control and auditing of the use of prosecutorial budgets should be ensured. The external control and auditing should be in line with those applied to the courts.**

(vii) **Management training for prosecutors entrusted with management functions must be ensured. Procedures for cooperation between prosecution services and external finance and management professionals should be clearly regulated.**

(viii) **Prosecution services must be consulted on the savings to be made as well as on the initiatives to attract new resources or to increase the existing ones.**

(ix) **In order to explain the use of means required for their actions, prosecution services should maintain a proper level of transparency and public awareness of their work, including through their own websites and publication of their annual reports. In any case their image of impartiality shall be maintained.**

(x) **Exchange of experience and good practices in the field of management of means by prosecution services, at domestic and international levels, is recommended.**

Opinion No. 8 (2013)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

Relations between prosecutors and the media

I. INTRODUCTION

1. The Consultative Council of European Prosecutors (CCPE) was established by the Committee of Ministers of the Council of Europe in 2005 with the task of rendering Opinions regarding the functioning of public prosecution services and promoting the effective implementation of Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system.

2. The Committee of Ministers instructed the CCPE to adopt an Opinion in 2013 for its attention on relations between prosecutors and the media.

3. The CCPE has drafted the present Opinion on the basis of replies received from 36 member States to a questionnaire[1].

4. According to these replies, it appears that the various aspects of relations between prosecutors and the media are determined either by the Constitution and/or national laws, or by internal regulatory instruments (e.g., orders and instructions by the Prosecutors General, rules of conduct, ethical codes, etc.).

5. The diversity of the legal systems of member States explains the diversity in communication of prosecutors with the media, assigning them different tasks and roles, while always under the obligation of respecting human rights and fundamental freedoms.

A. Reference texts

6. The CCPE underlines the importance of referring to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court of Human Rights (the Court).

7. The CCPE examined, in particular, the proper balance between the fundamental rights to freedom of expression and to information as guaranteed by Article 10 of the ECHR and the right and duty of the media to inform the public regarding legal proceedings, and the rights to presumption of innocence, to a fair trial and to respect for private and family life as guaranteed by Articles 6 and 8 of the ECHR.

8. The CCPE took into consideration the following Council of Europe Committee of Ministers' Recommendations concerning prosecutors:

- the Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system, and in particular paragraph 6 on the effective right of prosecutors to freedom of expression, paragraph 7 on their training, paragraph 20 on the obligation of objectivity and fairness of the prosecutors, as well as all their duties and responsibilities regarding individuals (paragraphs 24 to 36).
- the Recommendation Rec(2012)11 on the role of public prosecutors outside the criminal justice system, and in particular paragraphs 4 to 9.

[1] See the replies of member States to the questionnaire on the CCPE website (www.coe.int/ccpe) under "Preliminary works – relations between prosecutors and the media".

9. The CCPE also took into consideration other instruments adopted by the Council of Europe, particularly:

- the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108);
- the Recommendation Rec(2002)2 on access to public documents and the Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings;
- the Recommendation Rec(2011)7 on a new notion of media.

10. In addition, the CCPE relied on the principles contained in its joint Opinion with the Consultative Council of European Judges (CCJE) on relations between judges and prosecutors in a democratic society – "Bordeaux Declaration" (2009), as well as in the CCJE Opinions No. 7 (2005) entitled "Justice and society", and No. 14 (2011) entitled "Justice and information technologies (IT)".

11. The CCPE also took into account the relevant documents of the United Nations such as the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)[2] and the Guidelines on the Role of Prosecutors (1990). The CCPE also considered the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors in 1999.

B. Scope

12. This Opinion aims at putting in place recommendations to facilitate the media having access to appropriate information and to promote proper communication between prosecutors and the media in a manner consistent with their respective national laws and the international obligations of member States.

13. This Opinion, in line with the mandate of the CCPE, is addressed to prosecutors, and it is not to be understood as recommendations for journalists. The CCPE is committed to assisting in developing a continuing understanding by the media and public in general on the role of the prosecutor and the justice system. The CCPE invites journalists, as well as all other professionals concerned, to get acquainted with this Opinion and to contribute to its dissemination.

14. Subject to the limitations mentioned in paragraphs 21, 23, 25 and 26 below, the fundamental right to freedom of expression and information is a requirement which is applicable to the various tasks and functions of prosecutors in general. This Opinion concerns all kinds of prosecutorial activities, and any provision in this Opinion that relates to the activities in the criminal justice sphere relates, *mutatis mutandis*, to prosecutors acting outside this sphere.

15. Whenever the prosecutor uses a new policy or methods of communications to disseminate information, the principles expressed in this Opinion will be applicable, since it is expected that information disseminated by prosecutors is of public interest.

16. As regards the term "media", the conclusions, principles and recommendations formulated primarily with regard to the print media, apply also to the audiovisual and electronic media, as well as to the internet when used as media.

II. BASIC PRINCIPLES

17. Relations between prosecutors, the media and any parties to the cases can be understood as relating to three basic groups of principles:

- principles aiming to guarantee a proper balance between the need to ensure an independent, impartial and transparent justice and the need to guarantee other fundamental rights, such as the freedom of expression[3] and press, which can themselves be subject to limitations which shall have a legal base, shall conform to one or several legitimate aims such as the protection of rights of others, the smooth

[2] The Beijing Rules were adopted by the UN General Assembly in its Resolution 40/33 of 29 November 1985.

[3] Concerning Article 10 of the ECHR, the Court has repeatedly stated that the "freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment" (See Lingens v. Austria, no. 9815/82, 8 July 1986; Sener v. Turkey, no. 26680/95, 18 July 2000; Thoma v. Luxembourg, no. 38432/97, 29 June 2001; Maronek v. Slovakia, no. 32686/96, 19 July 2001; Dichand and Others v. Austria, no. 29271/95, 26 February 2002).

running of investigations or the protection of private life, and shall be necessary in a democratic society and proportional to legitimate aim(s) for responding to pressing social needs;

- principles protecting individuals' rights – especially those of defendants and victims (including the right to dignity, private life[4] and security of person, as well as the presumption of innocence[5]);

- principles relating to procedural rights, especially when prosecutors act as an equal party in litigation (for example, the requirement of the equality of arms and fair trial).

In case of conflict between these principles, a proper balance should be maintained between each one of them.

Freedom of expression and of the press

18. Everyone, including participants in legal proceedings, is entitled to the right of freedom of expression.

19. Prosecutors also have the right to freedom of expression[6], while having to respect the professional secrecy, the duty of confidentiality, the duty of discretion[7] and objectivity. When prosecutors appear in the media in any capacity, they should pay attention to the risks that may arise for impartiality and integrity of the prosecution service.

20. Freedom of the press should be guaranteed during legal proceedings[8]. According to the case-law of the Court under Article 10 of the ECHR, the press has a duty to impart information or ideas on matters of public interest[9] which includes the right of the public to receive them, enabling the press to play its role as a "public watchdog" (according to the terminology of the Court). In doing so, the press will be protected all the more if it contributes to the discussion of issues that have a legitimate public interest[10].

21. During their communications with the media, prosecutors should seek to ensure that the freedom of expression and the freedom of the press do not violate the lawful rights and interests of individuals (including vulnerable persons such as juveniles, victims, defendants' family members), the requirement of data protection and the obligation of confidentiality.

[4] The Court has repeatedly underlined the State's positive obligations under Article 8 of the ECHR to protect the privacy of persons targeted in ongoing criminal proceedings (A. v. Norway, no. 28070/06, 9 April 2009) (see also in this judgment principle 8 in the Appendix to Recommendation Rec(2003)13 of the Committee of Ministers to member States on the provision of information through the media in relation to criminal proceedings).

[5] According to the Court, the presumption of innocence "will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty", Daktaras v. Lithuania, no. 42095/98, § 41, 10 October 2000.

[6] The Court reiterates that the protection of Article 10 extends to the workplace in general and to public servants in particular (Guja v. Moldova (Grand Chamber), no 14277/04, § 52, 12 February 2008). In the case of Harabin v. Slovakia (no 58688/11, § 149, 20 November 2012), the Court establishes that belonging to the judiciary (in that case, the applicant was the President of the Supreme Court), does not deprive the applicant of the protection of Article 10.

[7] The Court is "mindful that employees have a duty of loyalty, reserve and discretion to their employer. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion (Guja v. Moldova (Grand Chamber), no. 14277/04, § 70, 12 February 2008). Disclosure by civil servants of information obtained in the course of work, even on matters of public interest, should therefore be examined in the light of their duty of loyalty and discretion (Kudeshkina v. Russia, no. 29492/05, § 85, 26 February 2009; see also Guja v. Moldova (Grand Chamber), no. 14277/04, §§ 72-78, 12 February 2008). More specifically, in the case of Ozpinar v. Turkey, 20999/04, 19 October 2010, the Court reiterates that it is legitimate for a State to impose on public servants, on account of their status, a duty of reserve in respect of Article 10 or a duty of discretion in the expression of their religious beliefs in public (Kurtulmuş v. Turkey (dec.), no 65500/01, 24 January 2006). These principles apply, *mutatis mutandis*, to Article 8 of the ECHR. In this regard, the Court observes that the ethical obligations of judges might encroach upon their private life when their conduct – even though private in nature - tarnished the image or the reputation of the judiciary.

[8] See The Sunday Times v. United Kingdom (No. 1) (no. 6538/74, § 65, 26 April 1979), in which the Court has established that "the general principles stemming from Article 10 case-law "are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public".

[9] See, inter alia, Observer et Guardian v. UK, no. 13585/88, 26 November 1991.

[10] See Bladet Tromsø and Stensaas v. Norway (Grand Chamber), no. 21980/93, 20 May 1999.

Freedom to receive and impart information

22. The right of the public to receive information should also be secured[11]. However, the way this is done may depend on and may be influenced by the specific circumstances of the particular legal proceedings and may be subject to restrictions as appropriate to ensure that basic principles are respected.

23. Prosecutors should seek to ensure that information provided to the media does not undermine the integrity of investigations and prosecution or the purpose of the investigations. Neither should it breach the rights of third parties, nor influence those involved in the investigation or prosecution. It should not influence the outcome of legal proceedings.

Presumption of innocence and rights of the defense

24. Prosecutors should especially be sensitive to the rights of the defense, freedom of expression, the presumption of innocence and the right to be informed.

25. In their communications, prosecutors should make sure not to compromise the rights of the defense by distributing information in a premature manner and by not allowing the defense to respond to it[12]. They should also be careful not to transmit information which does not respect the rights of victims to be informed in an appropriate manner. Providing information should not undermine individuals' right to a fair trial.

26. In their communications, prosecutors should ensure that they do not compromise the security of those involved, including witnesses, victims, prosecutors and judges dealing with sensitive cases.

27. A balance has to be established, through respecting the presumption of innocence, between the public interest in information and the protection of persons' honour and integrity. The prosecutor, where this is within his or her jurisdiction, should take care that a detainee is not through his/her actions publicly exposed to media curiosity and that the persons involved in a case are protected appropriately from pressure from the media[13], more specifically that victims are protected in such a way as to avoid any risk of being harassed by the media.

Private life and dignity

28. At any stage of legal proceedings, the participants, whatever their role, have the right to dignity, respect for private and family life and to personal security.

29. As far as possible, during the investigation phase, the identity of suspects should not be disclosed. Attention to victims' rights should be given prior to the disclosure.

III. COMMUNICATIONS WITH THE MEDIA

30. Transparency in the exercise of prosecutors' functions is a key component of the rule of law and one of the important guarantees of a fair trial. Justice must be done and must be seen to be done. In order to ensure that, the media should be enabled to report on criminal and other legal proceedings.

31. Application of the principle of transparency in the work of prosecutors is a way of ensuring public confidence and trust, as is the dissemination of information on their functions and powers. Thus, the image of the prosecution service forms an important element of public trust in the proper functioning of the justice system. The media's widest possible right of access to information on the activities of prosecutors also serves to strengthen democracy and to develop an open interaction with the public.

[11] See, inter alia, Arrigo and Vella v. Malta (dec.), no. 6569/04, 10 May 2005; Yordanova and Toshev v. Bulgaria, no. 5126/05, § 53, 2 October 2012.

[12] With regard to the leak to the press of confidential information, see, inter alia, Stoll v. Switzerland (Grand Chamber), no. 69698/01, §§ 61 and 143, 10 December 2007; Craxi v. Italy (No. 2), no. 25337/94, 17 July 2003.

[13] See, among others, Nikolaishvili v. Georgia, no 37048/04, 13 January 2009; Sciacca v. Italy, no. 5077/99, 11 January 2005; Karakas and Yesilımak v. Turkey, 43925/98, 28 June 2005.

32. Prosecution services may also play a kind of training role and should in this capacity contribute to explaining how the justice system functions. They could make available, as appropriate, information to the media and the public in general in order to foster a better understanding and knowledge of the judicial system.

33. In addition, the openness of the work of prosecutors should contribute to improving the standard of the activities carried out by prosecution authorities. Law enforcement authorities and prosecution services may, by informing the media on the on-going proceedings and in particular on the investigations, obtain information from the general public, increasing thereby the efficiency of justice.

34. Prosecutors can also provide information, in accordance with law, to the general public through the media in order to prevent further crimes and other offences from taking place.

35. The prosecution service of each member State must consider, based on specific criteria related to its situation, legislation or traditions, the most appropriate way to communicate, whether as to who may communicate or what may be communicated.

36. In some member States, prosecutors, while providing general information to the media on policy matters or on the general role and functioning of the prosecution service, do not comment publicly on any individual case, other than as part of appropriate legal argument during court proceedings. In other member States, each individual prosecutor might communicate actively with the media about the cases he/she is dealing with, or might only provide limited factual information about a case already in the public domain. In any case, relations with the media should be built on the basis of mutual respect, trust, equal treatment and responsibility and be respectful of judicial decisions. Furthermore, in the exercise of their functions, prosecutors should act in a spirit of impartiality and equality towards all members of the media.

37. Information provided by prosecutors to the media should be clear, reliable and unambiguous.

38. Prosecutors can provide information to the media at all stages of prosecutorial activities with due respect for legal provisions concerning the protection of personal data, privacy, dignity, the presumption of innocence, ethical rules of relations with other participants in the proceedings, as well as the legal provisions precluding or restricting disclosure of certain information.

39. In any case, legal provisions on secrecy protected by law, including the confidentiality of the investigation, should be respected.

40. In some member States, any communication needs to be channeled through a spokesperson, who will not necessarily be a prosecutor, or through a specialised press office. In other member States, information needs to be authorised or communicated by the head of the prosecution office or of the prosecution service. Communications emanating from the prosecution service as a whole can avoid the risk of having the activities being presented in a personalised manner and can minimise the risks of personal criticisms.

41. Prosecutors may have a proactive approach to demands of the media; if needed, they may take the initiative to inform the public via the media, either regarding general questions related to justice, or exceptionally, where false information has become part of public opinion, regarding the rectification of such false information[14].

42. In order to carry out its functions fairly, impartially, objectively and effectively, the prosecution service may consider it appropriate to issue a press release, briefing or other communication to the media, such as holding press conferences, giving interviews or/and participating in seminars and round tables. New information technologies can be widely used to inform the public, as appropriate and in a timely manner, about prosecutorial activities and other activities to maintain law and order in the State[15]. In this regard, it seems advisable for the prosecution services and offices to properly maintain their own internet sites.

[14] See, for example, Société Bouygues Telecom v. France (dec.) no. 2324/08, 13 May 2012.

[15] The Court accepted that press releases, even when published on the Internet site of the Public Prosecutor's Office, could serve the purpose of informing the public of the submission of the bill of indictment to the court (Shuvalov v. Estonia, no. 39820/08 and 14942/09, § 79, 29 May 2012).

43. The prosecution service may, if appropriate, cooperate especially with the police or other relevant authorities in the preparation of any press release, briefing or other such communication. This can contribute to demonstrating the coordination of different services' efforts, and to avoiding and preventing the dissemination of false information and negative consequences for society following particularly serious crimes. Such cooperation should reflect the general principles set out in paragraphs 22 and 23 of the Recommendation Rec(2000)19.

44. Prosecutors should resist expressing an opinion or disclosing information that runs contrary to the fundamental principles of good communication. They should always communicate independently and objectively, avoiding expressing personal opinions or value judgments regarding persons or events.

45. When an individual prosecutor is subject to an unfair attack through the media, he/she is entrusted with the right of having the contested information rectified or other legal remedies according to the national law. Nevertheless, in such cases, as well as when false information is spread about persons or events involved in the proceedings which he/she deals with, any reaction should preferably come from the head or a spokesperson of the prosecution office and, in major cases, by the Prosecutor General or the highest authority in charge of the service or the highest state authority. Such an institutional reaction minimises the need for the prosecutor concerned to make use of his/her right of response guaranteed to every person, and the risk of excessive "personalisation" of the conflict.

46. It is recognised that in some member States, there may be legal or practical issues to be considered in relation to informing persons affected by prosecutors' decisions of those decisions in criminal matters. However, it is recommended that prosecutors should seek to ensure, where possible and/or practical, that persons affected by their decisions be made aware of those decisions before any communication of that decision to the media.

IV. RECOMMENDATIONS

i. **Member States or prosecution services should establish a policy of communications aiming to ensure that the media have access to the appropriate information necessary to inform the public of the work of prosecution services. Guidelines on their relations with the media could also be included in the ethical codes of prosecutors. It is a matter for the prosecution service in each member State to consider to what extent and how best to communicate with the media, based on its situation, legislation and traditions.**

ii. **Communications between prosecutors and the media should respect the following principles: freedom of expression and of the press, duty of confidentiality, right to information, principle of transparency, right to private life and dignity as well as the confidentiality of investigations, presumption of innocence, equality of arms, the rights of the defense and to a fair trial.**

iii. **Relations of prosecutors with all media should be built on the basis of mutual respect, trust, responsibility, equal treatment and respect for judicial decisions.**

iv. **In their relations with the media, prosecution services should consider adopting both a reactive approach, responding to the media requests, and a proactive approach, taking an initiative to inform the media of a judicial event.**

v. **Consideration may be given to entrusting media relations of public prosecutors to spokespersons or prosecutors who are specialised in public relations.**

vi. **It is recommended that prosecutors should seek to ensure, where possible and/or practical, that persons affected by their decisions in criminal matters be made aware of those decisions before any communication of that decision to the media.**

vii. **Where prosecutors have direct relations with the media, in order to ensure proper information, training in the field of communication should be provided as appropriate. This training may be in common with/or be facilitated by experts and journalists.**

viii. **Communications emanating from the prosecution service as a whole can avoid the risk of having the activities being presented in a personalised manner and can minimise the risks of personal criticisms.**

ix. **In addition to legal means at the disposal of prosecutors, any reaction to incorrect information or unfair press campaigns against prosecutors should preferably come from the head or a spokesperson of the prosecution office and, in major cases, by the Prosecutor General or the highest authority in charge of the service or the highest state authority.**

x. **It is recommended that new information technologies be used, including websites of prosecution services and offices, to inform the public in a timely manner about prosecutorial activities.**

xi. **Prosecutors may, if appropriate, cooperate with the police and other relevant authorities, to consider information to be communicated to the media and to disseminate it.**

Opinion No. 9 (2014)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

European norms and principles concerning prosecutors

This Opinion contains:
- a Charter, called “the Rome Charter”,
- a detailed Explanatory Note of the principles which appear in this Charter.

ROME CHARTER

The Consultative Council of European Prosecutors (CCPE), having been requested by the Committee of Ministers of the Council of Europe to provide a reference document on European norms and principles concerning public prosecutors, agreed on the following:

I. In all legal systems, public prosecutors (hereafter prosecutors) contribute to ensuring that the rule of law is guaranteed, especially by the fair, impartial and efficient administration of justice in all cases and at all stages of the proceedings within their competence.

II. Prosecutors act on behalf of society and in the public interest to respect and protect human rights and freedoms as laid down, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the case-law of the European Court of Human Rights.

III. The role and tasks of prosecutors, both within and outside the field of criminal justice, should be defined by law at the highest possible level and carried out in the strictest respect for the democratic principles and values of the Council of Europe.

IV. The independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged.

V. Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability.

VI. Prosecutors should adhere to the highest ethical and professional standards, always behaving impartially and with objectivity. They should thus strive to be, and be seen as, independent and impartial, should abstain from political activities incompatible with the principle of impartiality, and should not act in cases where their personal interests or their relations with the persons interested in the case could hamper their full impartiality.

VII. Transparency in the work of prosecutors is essential in a modern democracy. Codes of professional ethics and of conduct, based on international standards, should be adopted and made public.

VIII. In performing their tasks, prosecutors should respect the presumption of innocence, the right to a fair trial, the equality of arms, the separation of powers, the independence of courts and the binding force of final court decisions. They should focus on serving society and should pay particular attention to the situation of vulnerable persons, notably children and victims.

IX. Prosecutors enjoy the right to freedom of expression and of association. In the communications between prosecutors and the media, the following principles should be respected: the presumption of innocence, the right to private life and dignity, the right to information and freedom of the press, the right to fair trial, the right to defence, the integrity, efficiency and confidentiality of investigations, as well as the principle of transparency.

X. Prosecutors should not benefit from a general immunity, but from functional immunity for actions carried out in good faith in pursuance of their duties.

XI. Prosecutors and, where necessary, their families have the right to be protected by the State when their personal safety is threatened as a result of the discharge of their functions.

XII. The recruitment and career of prosecutors, including promotion, mobility, disciplinary action and dismissal, should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review.

XIII. The highest level of professional skills and integrity is a pre-requisite for an effective prosecution service and for public trust in that service. Prosecutors should therefore undergo appropriate education and training with a view to their specialisation.

XIV. The organisation of most prosecution services is based on a hierarchical structure. Relationships between the different layers of the hierarchy should be governed by clear, unambiguous and well-balanced regulations. The assignment and the re-assignment of cases should meet requirements of impartiality.

XV. Prosecutors should decide to prosecute only upon well-founded evidence, reasonably believed to be reliable and admissible. Prosecutors should refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods, in particular when they constitute a grave violation of human rights. They should seek to ensure that appropriate sanctions are taken against those responsible for using such methods or for other violations of the law.

XVI. Prosecutions should be firmly but fairly conducted. Prosecutors contribute to reaching just verdicts by the courts and should contribute to the effective, expeditious and efficient operation of the justice system.

XVII. In order to achieve consistency and fairness when taking discretionary decisions within the prosecution process and in court, clear published guidelines should be issued, particularly regarding decisions whether or not to prosecute. Where appropriate, and in accordance with law, prosecutors should give consideration to alternatives to prosecution.

XVIII. Prosecutors should have the necessary and appropriate means, including the use of modern technologies, to exercise effectively their mission, which is fundamental to the rule of law.

XIX. Prosecution services should be enabled to estimate their needs, negotiate their budgets and decide how to use the allocated funds in a transparent manner, in order to achieve their objectives in a speedy and qualified way. Where the prosecution service is entrusted with the management of resources, it should use modern management methods efficiently and transparently, being also provided with adequate training.

XX. Mutual and fair cooperation is essential for the effectiveness of the prosecution service at national and at international level, between different prosecution offices, as well as between prosecutors belonging to the same office. Prosecutors should treat international requests for assistance within their jurisdiction with the same diligence as in the case of their work at national level and should have at their disposal the necessary tools, including training, to promote and sustain genuine and effective international judicial cooperation.

Approved by the CCPE in Rome on 17 December 2014

EXPLANATORY NOTE

Introduction

1. Recommendation Rec(2000)19 of the Council of Europe's Committee of Ministers on the role of public prosecution in the criminal justice system remains, after 14 years, a milestone. At the same time, since 2000, further aspects of the public prosecution's activities have been highlighted at European level and the need for an update and a synthesis of relevant principles has become obvious.

2. In this context, the Consultative Council of European Prosecutors (CCPE), established by the Committee of Ministers in 2005, wished to identify the most notable trends as regards the status, tasks and operations of the public prosecution. In this framework, the Committee of Ministers, in January 2014[1], instructed the CCPE to adopt a reference document on European norms and principles concerning prosecutors. To undertake this task, the CCPE took into account the documents listed in the Annex to this Note.

3. The legal systems of member States are characterised by great diversity, particularly as regards the tasks and roles of prosecutors. Nevertheless, they always remain under an obligation to respect human rights and fundamental freedoms as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.

4. This document is intended for state institutions and for judicial, executive and legislative powers, as well as practitioners and researchers.

1. Definition of a prosecutor

5. Public prosecutors (hereafter prosecutors) are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system[2]. The prosecutors' mission can also include powers outside the criminal justice system, where the national legal system so provides[3].

2. Role of prosecutors

6. In all cases and at all stages of the legal proceedings, prosecutors contribute to ensuring that the rule of law and public order are guaranteed by the fair, impartial and effective administration of justice[4].

7. It is essential to ensure the independence and effective autonomy of prosecutors and to establish proper safeguards. They have a duty to act fairly, impartially and objectively. In criminal matters, prosecutors must also take into account the serious consequences of a trial for the individual, even one which results in an acquittal. They should also seek to contribute that the justice system operates as expeditiously and efficiently as possible and assist the courts in reaching just verdicts[5].

8. A system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone[6].

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[1] 1189th meeting of the Ministers' Deputies, 22 January 2014.

[2] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, Article 1.

[3] See Recommendation Rec(2012)11 of the Committee of Ministers of the Council of Europe *on the role of public prosecutors outside the criminal justice system*, 19 September 2012, Article 2.

[4] Kayasu v. Turkey, no. 64119/00 and 76292/01, 13/02/2009, § 91.

[5] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, Article 24, and Conference of Prosecutors General of Europe, 6th session, *European Guidelines on Ethics and Conduct of Public Prosecutors – "The Budapest Guidelines",* CCPE (2005)05, 31 May 2005 item III. See also Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, explanatory note, Article 11. See also Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, Article 16.

[6] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, Article 19.

2.1 Functions in criminal proceedings

9. Prosecutors play an essential role for the rule of law and the proper functioning of criminal justice systems.

10. Prosecutors decide whether or not to initiate or continue a prosecution, conduct the prosecution before an independent and impartial court established by law and decide whether or not to appeal decisions by that court.

11. In certain criminal justice systems, prosecutors also have other functions such as to elaborate and implement national crime policy (while adapting it, where appropriate, to regional and local circumstances), to conduct, direct or supervise investigations, to ensure that victims are effectively assisted, to decide on alternatives to prosecution, or to supervise the execution of court decisions[7].

2.1.1 Principles governing prosecutions

12. The legal systems of some member states provide for the principle of "legality" as the basis for prosecutions. The legal systems of other member states provide for the principle of "discretion" or "opportunity principle".

13. In order to achieve consistency and fairness when taking discretionary decisions within the prosecution process and in court, clear published guidelines should be issued, particularly regarding decisions whether or not to prosecute[8]. Even when the system does not foresee that prosecutors can take discretionary decisions, general guidelines should lead the decisions taken by them.

14. Prosecutors should seek to ensure that all necessary and reasonable enquiries and investigations are made before taking a decision in relation to a prosecution and proceed only when a case is founded upon evidence assessed to be reliable and admissible. Prosecutions should be firmly but fairly conducted and not beyond what is indicated by the evidence[9].

15. Where participation in the investigation of crime or supervision of the police or other investigation bodies is within their competence, prosecutors should do so objectively, impartially and professionally and seek to ensure that the investigating services respect legal principles and fundamental human rights[10].

16. Prosecutors should take account of the interests of witnesses, and where this is within their competence, take or promote measures to protect their life, safety and privacy, or ensure that such measures have been taken.

17. Prosecutors should take account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure[11].

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[7] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, Article 3. See also *Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress on the *Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, Article 11.

[8] See *Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress on the *Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, Article 17.

[9] Conference of Prosecutors General of Europe, 6th session, *European Guidelines on Ethics and Conduct for Public prosecutors – "The Budapest Guidelines"*, CPGE(2005)05, 31 May 2005, item III. International Association of Prosecutors, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, 23 April 1999, item 4.2. Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, Article 27.

[10] International Association of Prosecutors, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, 23 April 1999, item 4.2.

[11] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, Articles 32 and 33. See also: International Association of Prosecutors, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, 23 April 1999, item 4.3; Conference of Prosecutors General of Europe, 6th session, *European Guidelines on Ethics and Conduct for Public Prosecutors – "The Budapest Guidelines"*, CPGE(2005)05, 31 May 2005, item III; *Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress *on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, § 13; Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, explanatory note, Article 12.

18. Prosecutors should give careful consideration on whether or not to prosecute, respect the rights of victims, witnesses and suspects and afford a right to seek a review to persons affected by their decisions[12].

19. Prosecutors should respect the principle of equality of arms between prosecution and defence, the presumption of innocence, the right to a fair trial, the independence of the court, the principle of separation of powers and the binding force of final court decisions.

20. The prosecutor should put all the credible evidence available before a court and disclose all relevant evidence to the accused. There can be situations where prosecutions should be discontinued[13].

21. Prosecutors should refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods, in particular when they constitute a grave violation of human rights. They should seek to ensure that appropriate sanctions are taken against those responsible for using such methods or other violations of the law[14]. In some systems, the violation of human rights is sufficient to deny the evidence, without having to be grave.

2.2 Functions outside criminal proceedings

22. In many States, prosecutors have competences outside the criminal law field (inter alia, civil, family, labour, administrative, electoral law, protection of the environment, social rights and rights of vulnerable persons such as minors, disabled persons and persons with very low income[15]).

23. Where such competencies exist, prosecutors' mission should be to represent the general or public interest, protect human rights and fundamental freedoms, and uphold the rule of law[16]. They should also firmly respect the democratic principles and values of the Council of Europe.

24. These competencies should be exercised in such a way as to:

- respect the effective separation of state powers;
- respect the independence of the courts and their role in protecting human rights, equality of parties, equality of arms and non-discrimination;
- be regulated by law as precisely as possible, be strictly limited, clearly defined and follow clear published guidelines in order to avoid any ambiguity[17];
- ensure that there is no undue external intervention in the activities of prosecution services;

[12] Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, explanatory note, Articles 53 and 54. See also: International Association of Prosecutors, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, 23 April 1999, item 2.1. Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, Article 34.

[13] Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, explanatory note, Article 55. See also Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, Article 15.

[14] International Association of Prosecutors, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, 23 April 1999, item 4.3.

[15] Consultative Council of European prosecutors, Opinion No. 3(2008), on *the role of prosecution services outside the criminal law field*", 21 October 2008, §§ 16 and 19. See also: Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, explanatory note, § 64. See also Korolev v. Russia (no. 2), no. 5447/03, 4/10/2010, §§ 33-34; Batsanina v. Russia, no. 3932/02, 14/09/2009, § 27; Menchinskaya v. Russia, no. 42454/02, 15/04/2009, § 35.

[16] Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2012)11 on *the role of public prosecutors outside the criminal justice system*, 19 September 2012, § 2.

[17] Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2012)11 on *the role of public prosecutors outside the criminal justice system*, 19 September 2012, §§ 3 and 11, and Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2012)11 on *the role of public prosecutors outside the criminal justice system*, 19 September 2012, § 9.

- respect the right of any natural or legal person to initiate or act as a defendant to defend his or her interests before an independent and impartial tribunal, even in cases where the public prosecutor is or intends to be a party[18];

- not violate the principle of binding force of final court decisions (*res iudicata*) with some exceptions established in accordance with international obligations including the case-law of the Court;

- ensure that the ability of persons or institutions involved in the case to seek a review of actions by prosecutors is clearly prescribed;

- ensure that the right of persons or institutions, involved or interested in civil law cases to claim against measures or default of prosecutors is assured.

25. Any prosecutor's actions which affect human rights and freedoms should remain under the control of competent courts[19].

26. Where prosecutors have power to question the decision of a court or state administration, they must do so by exercising a power of appeal or a power to seek a review of a decision. In private litigation between parties, where a public interest must be defended or asserted before the court, the ultimate say rests with the court[20].

27. The prosecutor who intervenes in court outside the field of criminal justice, should, in particular, in accordance with domestic laws:

- have equal rights and obligations to the other parties to the proceedings;

- not withhold evidence relevant to the issues in dispute;

- neither participate in the deliberations of the court, nor give the impression of doing so;

- when entitled to the right of appeal to a court decision, the prosecutors should have equal rights as other parties and never substitute their rights of appeal;

- exercise its powers independently, transparently and in full accordance with the rule of law;

- intervene against legal entities in cases where there are reasonable and objective grounds to believe that the private entity in question is in violation of its legal obligations, including those derived from the application of international human rights treaties.

Relevant decisions taken by prosecutors outside the field of criminal justice should always be followed by reasons open for persons or institutions involved or interested in the case.

2.3 Alternatives to prosecution and penalties

28. Prosecutors should give consideration, where appropriate and in accordance with law, to alternatives to prosecution[21]. When applying these alternatives, they should afford full respect for the rights and legitimate interests of suspects and victims and offer the possibility of mediation and reconciliation between offender and victim[22]. Special consideration should be given to the nature and gravity of the offence, protection of society and the character and background of the offender.

[18] Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2012)11 on *the role of public prosecutors outside the criminal justice system*, 19 September 2012, § 10.
[19] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, § 73.
[20] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, § 77.
[21] See Opinion No. 2(2008) of the CCPE. See also Natsvlishvili and Togonidze v. Georgia, no. 9043/05, 29/04/2014, §§ 90-91.
[22] See *Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress on the *Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, Article 18.

29. With a view to promoting a fair, consistent and efficient activity of prosecutors, the relevant state authorities are encouraged to publish clear rules, general guidelines and criteria for the effective and fair implementation of the criminal policy related to alternatives to prosecution.

30. Alternative measures should never be used to circumvent the rules of fair trial by imposing measures on a person who is innocent or who could not be convicted owing to procedural obstacles such as time-limits on prosecution, or where there is doubt as to the responsibility of the offender identified or the extent of the damage caused by the offence.

31. Having in mind the possible damaging impact of criminal and other proceedings on the future development of juveniles, prosecutors should, to the widest possible extent and according to the law, seek alternatives to prosecution of juvenile offenders, where such alternatives constitute a proper judicial response to the offence, taking into consideration the interest of the victims and of the general public and being consistent with the goals of juvenile justice[23].

32. Prosecutors should use their best efforts to prosecute juveniles only to the extent strictly necessary[24].

3. Status of prosecutors and safeguards provided to them for carrying out their functions

3.1 The independence of prosecutors

33. Independence of prosecutors – which is essential for the rule of law - must be guaranteed by law, at the highest possible level, in a manner similar to that of judges. In countries where the public prosecution is independent of the government, the state must take effective measures to guarantee that the nature and the scope of this independence are established by law[25]. In countries where the public prosecution is part of or subordinate to the government, or enjoys a different status that the one described above, the state must ensure that the nature and the scope of the latter's powers with respect to the public prosecution is also established by law, and that the government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law[26].

34. The European Court of Human Rights (hereafter "the Court") considered it necessary to emphasise that "in a democratic society both the courts and the investigation authorities must remain free from political pressure"[27]. It follows that prosecutors should be autonomous in their decision making and, while cooperating with other institutions, should perform their respective duties free from external pressures or interferences from the executive power or the parliament, having regard to the principles of separation of powers and accountability[28]. The Court also referred to the issue of independence of prosecutors in the context of "general safeguards such as guarantees ensuring functional independence of prosecutors from their hierarchy and judicial control of the acts of the prosecution service"[29].

35. The independence of prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned.

36. States must ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability[30].

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[23] Consultative Council of European Prosecutors, Opinion No. 5 on *public prosecution and juvenile justice*, Yerevan Declaration, CCPE (2010)1, 20 October 2010, § 26.
[24] See *Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress on the *Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, § 19.
[25] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system,* 6 October 2000, § 14.
[26] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, § 13, items a & b. For further safeguards, see also items from c to f.
[27] Guja v. Moldova (Grand Chamber), no. 14277/04, § 86.
[28] Kolevi v. Bulgaria, no. 1108/02, 05/02/2010, §§ 148-149; Vasilescu v. Romania, no. 53/1997/837/1043, 22/05/1998, §§ 40-41; Pantea v. Romania, no. 33343/96, 03/09/2003, § 238; Moulin v. France, no. 37104/06, 23/02/2011, § 57.
[29] Kolevi v. Bulgaria, no. 1108/02, 05/02/2010, § 142.
[30] See *Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress *on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, § 4.

37. Prosecutors should, in any case, be in a position to prosecute, without obstruction, public officials for offences committed by them, particularly corruption, unlawful use of power and grave violations of human rights[31].

38. Prosecutors must be independent not only from the executive and legislative authorities but also from other actors and institutions, including those in the areas of economy, finance and media.

39. Prosecutors are also independent with regard to their cooperation with law enforcement authorities, courts and other bodies.

3.2 The hierarchy

40. A hierarchical structure is a common aspect of most public prosecution services, given the nature of the tasks they perform. Relationships between the different layers of the hierarchy must be governed by clear, unambiguous and well-balanced regulations, and an adequate system of checks and balances must be provided for.

41. In a State governed by the rule of law, when the structure of the prosecution service is hierarchical, effectiveness of prosecution is, regarding public prosecutors, strongly linked with transparent lines of authority, accountability and responsibility.

42. It is essential to develop appropriate guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities, in particular in trial procedures, are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system[32]. In a hierarchical system, the superior prosecutor must be able to exercise appropriate control over the decisions of the office, subject to proper safeguards for the rights of individual prosecutors.

3.2.1 The assignment and the re-assignment of cases

43. With respect to the organisation and the internal operation of the public prosecution, in particular the assignment and re-assignment of cases, this should meet requirements of impartiality with respect to the structure, responsibilities and decision-making competences of the prosecution services.

44. Assignment and re-assignment of cases should be determined by transparent regulation that is aligned with the hierarchical or non-hierarchical structure of the prosecution service.

3.2.2 Instructions

45. General decisions on implementation of crime policies should be transparent in order to ensure fair, consistent and efficient activities of public prosecutors.

46. Instructions of a general nature must be in writing and, where possible, be published or otherwise transparent. Such instructions must respect strictly equity and equality[33].

47. Instructions by the executive or by superior level of the hierarchy concerning specific cases are unacceptable in some legal systems. While there is a general tendency for more independence of the prosecution system, which is encouraged by the CCPE, there are no common standards in this respect. Where the legislation still allows for such instructions, they should be made in writing, limited and regulated by law.

48. A public official who believes he/she is being required to act in a way which is unlawful, improper or unethical, should respond in accordance with the law[34].

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[31] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, § 16.
[32] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, §§ 31 and 32.
[33] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, Explanatory Memorandum (§ 13).
[34] Committee of Ministers of the Council of Europe, Recommendation n° R(2000)10 on *codes of conduct for public officials*, 11 May 2000, § 12, item 1.

49. A prosecutor enjoys the right to request that instructions addressed to him/her be put in writing. Where he/she believes that an instruction is either illegal or runs counter to his/her conscience, an adequate internal procedure should be available which may lead to his/her eventual replacement[35].

50. It should be understood that these guarantees are established in the interest of both individual prosecutors and the public[36].

3.3 Appointment and career

3.3.1 General principles

51. Member States should take measures to ensure that:

a) the recruitment, the promotion and the transfer of prosecutors are carried out according to fair and impartial procedures and excluding discrimination on any ground such as gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status;

b) the careers of prosecutors, their professional evaluation, their promotions and their mobility are governed by transparent and objective criteria, such as competence and experience; recruitment bodies should be selected on the basis of competence and skills and should discharge their functions impartially and based on objective criteria;

c) the mobility of prosecutors is governed also by the needs of the service[37].

52. The appointment and termination of service of prosecutors should be regulated by the law at the highest possible level and by clear and understood processes and procedures.

53. The proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, salaries, discipline and transfer (which must be affected only according to the law or by their consent)[38]. For these reasons, it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal[39].

54. Striving for impartiality, which in one form or another must govern the recruitment and career prospects of public prosecutors, may result in arrangements for a competitive system of entry to the profession and the establishment of High Councils either for the whole judiciary, or just for prosecutors[40].

55. The manner in which the Prosecutor General is appointed and dismissed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office[41].

56. If governments have some control over the appointment of the Prosecutor General, it is important that the method of selection is such as to gain the confidence and respect of the public as well as of the members of the judicial and prosecutorial system and legal profession. The Prosecutor General should be appointed either for an adequately long period or permanently to ensure stability of his/her mandate and make him/her independent of political changes[42].

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[35] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, § 10.
[36] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, Explanatory Memorandum (§ 10).
[37] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, § 5, items a, b and c.
[38] See: Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, Explanatory Note, § 37.
[39] See: Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, § 18.
[40] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, § 5, items a, b and c.
[41] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, § 34-35.
[42] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, § 37. Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, A/HRC/20/19, 7 June 2012, § 65.

3.3.2 Training

57. The highest level of professional skills and integrity is a pre-requisite for an effective prosecution service and for public trust in that service. Prosecutors should therefore undergo appropriate education and training with a view to their specialisation[43].

58. Different European legal systems provide training for judges and prosecutors according to various models, the training being entrusted to specific bodies. In all cases, it is important to assure the autonomous character of the institution in charge of organising such training, because this autonomy is a safeguard of cultural pluralism and independence[44].

59. Such training should be organised on an impartial basis and regularly and objectively evaluated for its effectiveness. If it is appropriate, joint training for judges, prosecutors and lawyers on themes of common interest can contribute to improving the quality of justice[45].

60. The training should also include administrative staff and officials, as well as law enforcement agents.

61. Training, including management training[46], is a right as well as a duty for prosecutors, both before taking their duties and on a permanent basis.

62. Prosecutors should benefit from appropriate specialised training in order to adequately fulfil their responsibilities within and outside the criminal justice system[47], including in relation to the management of budgetary resources[48] and in the field of communication[49].

63. States should therefore take effective measures to ensure that prosecutors have appropriate education and training, both before and after their appointment. In particular, prosecutors should be made aware of:

a) the principles and ethical duties of their office;
b) the constitutional and other legal protection of persons involved in legal proceedings;
c) human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 5 and 6 in particular) and by the case-law of the European Court of Human Rights;
d) principles and practices of organisation of work, management and human resources;
e) mechanisms and materials which contribute to efficiency and consistency in their activities[50].

64. New criminal challenges as well as the growing complexity of certain types of criminality are due to the speedy development of new technologies, the globalisation and expanding international trade and data flow. Special training to enable prosecutors face the threats posed by the above mentioned phenomena is also required[51].

3.3.3 Evaluation of professional skills

65. Evaluation of the performance of prosecutors should be carried out at regular intervals, be reasonable, on the basis of adequate, objective and established criteria and in an appropriate and fair procedure.

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[43] Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, Explanatory Note, § 43.
[44] Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, Explanatory Note, § 46.
[45] Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, § 10.
[46] Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, § 10.
[47] Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2012)11 *on the role of public prosecutors outside the criminal justice system*, 19 September 2012, § 8.
[48] Consultative Council of European Prosecutors, Opinion n° 4(2009) on *judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, § 10, and the Consultative Council of European Prosecutors, Opinion No. 7(2012) on *the management of the means of prosecution services*, 11 December 2012, § 17.
[49] Consultative Council of European Prosecutors, Opinion No. 8(2013) on *relations between prosecutors and the media*, 9 October 2013, Recommendation VII.
[50] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, § 7.
[51] Consultative Council of European Prosecutors, Opinion No. 7(2012) on *the management of the means of prosecution services*, 11 December 2012, § 19.

66. Prosecutors should have access to results concerning their evaluation and have the right to submit observations and to legal redress, where appropriate.

67. The promotion of prosecutors must be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures[52].

3.3.4 Transfer and mobility

68. A means of improperly influencing a prosecutor might be his/her transfer to another prosecutor's office without consent.

69. In introducing transfer or secondment against the will of a prosecutor, either internal or external, the potential risks should be balanced by safeguards provided by law (for example, a transfer which is disguising a disciplinary procedure).

70. The ability to transfer a prosecutor without his/her consent should be governed by law and limited to exceptional circumstances such as the strong need of the service (equalising workloads, etc.) or disciplinary actions in cases of particular gravity, but should also take into account the views, aspirations and specialisations of the prosecutor and his/her family situation[53].

71. It should be possible to appeal to an independent body.

3.3.5 Dismissal

72. Given their important role and function, the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities[54]. All guarantees attached to the disciplinary procedures should apply.

73. The independence of prosecutors is their protection from arbitrary or politically motivated dismissal. This is particularly relevant with reference to the Prosecutors General and the law should clearly define the conditions of their pre-term dismissal[55].

3.4 Conditions of service

3.4.1 General principles

74. Prosecutors should have the necessary and appropriate means to exercise their missions which is fundamental for the rule of law[56].

75. States should take measures to ensure that prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement[57].

76. The conditions of service should reflect the importance and dignity of the office, and respect attached to it[58]. The appropriate remuneration of prosecutors also implies recognition of their important function and role

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[52] See *Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress *on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, § 7.
[53] Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers,* Gabriela Knaul, A/HRC/20/19, 7 June 2012, §§ 68 and 69.
[54] Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers,* Gabriela Knaul, A/HRC/20/19, 7 June 2012, § 70.
[55] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, § 40.
[56] Consultative Council of European Prosecutors, Opinion No. 7(2012) on *the management of the means of prosecution services*; see also Opinion No. 5(2010) on *the public prosecutor and the juvenile justice*, Declaration of Yerevan, 20 October 2010, § 19.
[57] Committee of Ministers of the Council of Europe, Recommendation Rec (2000)19 on *the role of public prosecution in criminal justice system*, 6 October 2000, § 5d.
[58] Committee of Ministers of the Council of Europe, Recommendation Rec (2000)19 on *the role of public prosecution in criminal justice system*, 6 October 2000, § 5 item d.

and can also reduce the risk of corruption[59]. Bonuses, where they exist, should be based on criteria which are completely objective and transparent.

3.4.2 Incompatibilities and conflicts of interest

77. Prosecutors should at all times adhere to the highest ethical and professional standards. In particular, they should not act in cases where their personal interests or their relations with the persons interested in the case could hamper their full impartiality[60]. Prosecutors should not engage in any activity or transaction or acquire any position or function, whether paid or unpaid, that is incompatible with or detracts from the proper performance of his/her duties[61].

78. States should guarantee that a person cannot at the same time perform duties as a prosecutor and as a court judge. However, States may take measures in order to make it possible for the same person to perform successively the functions of prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards[62].

79. Any attribution of judicial functions to prosecutors should be restricted to cases involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants' right to a decision on such cases by an independent and impartial authority exercising judicial functions[63].

80. Prosecutors should, at all times, conduct themselves in a professional manner and strive to be and be seen as independent and impartial[64].

81. Prosecutors should abstain from political activities incompatible with the principle of impartiality.

82. Prosecutors should exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial and prosecutorial independence or impartiality. While they are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they must not comment on pending cases and must avoid expressing views which may undermine the standing and integrity of the court[65].

83. In accordance with the law, for an appropriate period of time, the prosecutor should not act for any person or body in respect of any matter on which he/she acted for, or advised, the public service and which would result in a particular benefit to that person or body[66].

84. A prosecutor, like a judge, may not act in a matter where he/she has a personal interest, and may be subject to certain restrictions aiming to safeguard his/her impartiality and integrity[67].

3.5. Guarantees in proceedings

85. Standards and principles of human rights establish that prosecutors are responsible in the performance of their duties and may be subject to disciplinary procedures[68].

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[59] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD (2010)040, 3 January 2011, §69. Also see: Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, A/HRC/20/19, 7 June 2012, § 71.

[60] Conference of Prosecutors General of Europe, 6th session, *European Guidelines on Ethics and Conduct for Public Prosecutors – "The Budapest Guidelines",* CPGE(2005)05, 31 May 2005, item II.

[61] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)10 on *codes of conduct for public officials*, 11 May 2000, § 15, items 1, 2, 3.

[62] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, §§ 17 and 18.

[63] Consultative Council of European Prosecutors, Opinion No. 4(2009) on *the relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, § 7.

[64] Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, A/HRC/20/19, 7 June 2012, § 81.

[65] Adapted from the Code of Judicial Ethics of the International Criminal Court.

[66] Committee of Ministers of the Council of Europe, Recommendation n° R (2000)10 *on codes of conduct for public officials*, 11 May 2000, Article 26 item 3.

[67] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD (2010)040, 3 January 2011, §§ 17 and 62.

[68] Human Rights Council, *Interim report of the Special Rapporteur on the independence of judges and lawyers*, A/65/274, 10 August 2010, § 60.

86. In a democratic system under the rule of law, an acquittal of an individual should not result in disciplinary proceedings against the prosecutor responsible for the case.

87. States should take measures to ensure that disciplinary proceedings against prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review[69].

88. Prosecutors should not benefit from a general immunity that would protect them from prosecution for crimes they have committed, and for which they have to answer before the courts, as this may lead to lack of public trust or even to corruption[70]. States may establish special procedures to bring prosecutors to justice as a guarantee for their independence and impartiality.

89. According to general standards, prosecutors may need protection from civil suits for actions done in good faith in pursuance of their duties.

3.6 Protection of prosecutors, their families, etc.

90. States should take measures to ensure that prosecutors, and where necessary, their families are protected by the State when their personal safety is threatened as a result of the discharge of their functions[71].

91. When prosecutors or their families are subject to violence or threats of violence, or to any form of intimidation, coercion or inappropriate undue surveillance, a thorough investigation of such incidents should be carried out and steps to prevent their future recurrence should be taken; when needed, prosecutors and their families should be provided with the necessary counselling or psychological support[72].

4. Duties and rights of prosecutors

4.1 Duties concerning the conduct of prosecutors

4.1.1 The fundamental duty of impartiality, objectivity and fairness

92. Prosecutors should carry out their functions impartially and act with objectivity. They should also treat people as equal before the law and should neither favour anyone nor discriminate against anyone.

93. Prosecutors are aware of the dangers of corruption and do not ask for, accept or receive benefits or any advantage in the exercise of their functions. Through their impartiality, prosecutors must ensure the confidence of the public in the prosecution services. Prosecutors avoid secondary occupations and other tasks in which their impartiality might be endangered. They identify situations that pose a conflict of interest and, if necessary, recuse themselves from handling the task.

4.1.2 The accountability of prosecutors

94. Prosecutors operate on the basis of public liability. Their decisions are based on the law and other regulations, and they remain within the scope of their discretion. In particular, prosecutors should respect and ensure the protection of human rights.

95. Prosecutors act in a transparent manner, unless legislation restricts their actions or the publicity of the documents they have drafted. They should particularly be careful to express their decisions in an understandable manner to the parties concerned and when communicating with the public and media.

96. The professional knowledge and skills of prosecutors, particularly as regards management, communication and cooperation, including at international level, must be at a high level and must be

[69] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in criminal justice system*, 6 October 2000, § 5 item e. See also *Guidelines on the Role of Prosecutors* adopted by the Eighth United Nations Congress *on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, § 22.
[70] Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service*, CDL-AD(2010)040, 3 January 2011, § 61.
[71] Committee of Ministers of the Council of Europe, Recommendation Rec (2000)19 on *the role of public prosecution in criminal justice system*, 6 October 2000, § 5, items g.
[72] Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, A/HRC/20/19, 7 June 2012, §§ 76 à 78 and 118.

maintained through training. Prosecutors must manage cases, for which they are responsible, with speed and optimum quality and they should use resources available to them in a responsible manner.

4.1.3 The duty to maintain the dignity of the profession

97. Prosecutors must earn the trust of the public by demonstrating in all circumstances an exemplary behaviour. They must treat people fairly, equally, respectfully and politely, and they must at all times adhere to the highest professional standards and maintain the honour and dignity of their profession, always conducting themselves with integrity and care[73].

4.1.4 Code of ethics and conduct

98. The sharing of common legal principles and ethical values by all prosecutors involved in the legal process is essential for the proper administration of justice[74] and for the respect of the highest professional standards. Prosecutors must be able to identify ethical problems in their work and to refer to clear principles to solve them.

99. Codes of professional ethics and of conduct should be adopted and made public, based on international standards developed by the United Nations, as well as those set out in the European Guidelines on Ethics and Conduct for Public Prosecutors (The Budapest Guidelines) adopted by the Conference of Prosecutors General of Europe on 31 May 2005.

4.2 Fundamental freedoms of prosecutors

100. Prosecutors enjoy the freedom of opinion and speech and freedom of association in the same manner as other members of the society. When making use of these rights, they must take into account the duty of discretion and be careful not to jeopardise the public image of independence, impartiality and fairness which a prosecutor must always uphold.

101. All necessary steps should be taken to ensure that prosecutors' privacy is respected[75]. However, they should behave with discretion and caution to avoid putting into question the dignity of their profession or their ability to exercise their functions.

5. Relations with other actors and institutions

5.1 Relations with victims, witnesses, suspects, defendants, accused persons and the public

102. Prosecutors should uphold the right to a fair trial and take into account the legitimate interests of witnesses, victims, suspects, defendants or accused persons by ensuring that they are informed of their rights and the progress of the procedure[76].

5.2 Relations with courts (judges and court staff) and lawyers

103. Where the prosecution service is a part of the judicial institution, it is necessary to establish a clear distinction between prosecutors and court judges. Member States should clarify the legal status, the competencies and the procedural role of prosecutors by law in a way that there can be no doubt about the reciprocal independence and impartiality of prosecutors and court judges[77].

104. A fair, impartial and effective justice can only be guaranteed by complementary actions of judges and prosecutors[78].

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[73] Conference of Prosecutors General of Europe, 6th session, *European Guidelines on Ethics and Conduct for Public Prosecutors – "The Budapest Guidelines"*, CPGE(2005)05, 31 May 2005, item II.
[74] Consultative Council of European Prosecutors, Opinion No. 4(2009) on *relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, § 10.
[75] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)10 on *codes of conduct for public officials*, 11 May 2000, § 17.
[76] Conference of Prosecutors General of Europe, 6th session, *European Guidelines on Ethics and Conduct for Public prosecutors – "The Budapest Guidelines"*, CPGE(2005)05, 31 May 2005, item II.
[77] See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe *on the role of public prosecution in the criminal justice system*, 6 October 2000, § 17, and see also the CCPE Opinion No. 4(2009), 8 December 2009, Explanatory Note, § 66.
[78] Consultative Council of European Prosecutors, Opinion No. 4(2009) on the *relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, § 3.

105. For the effectiveness of judicial action, the prosecutors must also always maintain courteous relations with all court staff and lawyers.

5.3 Relations with investigators

106. The prosecutors and investigators cooperate in an appropriate and effective manner in the course of investigations.

107. It is up to the prosecutors, where this is within their competence, to ensure that investigators act legally, respect the rights of the defence and inform all suspects, in the shortest possible time and in a language that is accessible, in detail, about the facts that could be used against them[79].

5.4 Relations with the prison administration

108. The prosecutor, within the limits of his/her competence, is responsible for verifying the lawfulness of how the detention is carried out. He/she must ensure the full and effective protection of the rights of detainees and inmates, improve their situation and facilitate their reintegration into society[80].

5.5 Relations with the media

109. Prosecutors are encouraged to regularly inform the public, through the media, about their activities and the results thereof[81]. The actions of prosecutors should strive to promote and preserve transparency and public trust in the prosecution service.

110. Communications from prosecutors must demonstrate impartiality, without improperly influencing judges in any way and exposing them to personal criticisms.

111. When an individual prosecutor is subject to an unfair attack through the media, he/she is entrusted with the right of having the contested information rectified or other legal remedies according to the national law. Nevertheless, in such cases, as well as when false information is spread about persons or events involved in the proceedings which he/she deals with, any reaction should preferably come from the head or a spokesperson of the prosecution office and, in major cases, by the Prosecutor General or the highest authority in charge of the service or the highest state authority. Such an institutional reaction minimises the need for the prosecutor concerned to make use of his/her right of response guaranteed to every person, and the risk of excessive "personalisation" of the conflict.

5.6 Relations with public services and other institutions

112. Prosecutors should not interfere with the competence of the legislature or the executive. However, they should cooperate with state institutions and various services.

113. Prosecutors should be empowered, without suffering any hindrance, to order investigations and prosecute civil servants and elected officials when they are suspected of having committed crimes[82].

6. Organisation of the prosecutor's office

6.1 Structure

114. A fundamental responsibility of the prosecution service is to ensure the effectiveness of its action. There should be an organisation and a structure to meet all of its statutory tasks with speed and skill while maintaining a high level of quality.

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[79] Consultative Council of European Prosecutors, Opinion No. 4(2009) on the *relations between judges and prosecutors in a democratic society*, 8 December 2009, Bordeaux Declaration, Explanatory Note, §§ 60 and 61.
[80] Consultative Council of European Prosecutors, Opinion No. 6(2011) on *the relationship between prosecutors and the prison administration*, 24 November 2011, §§ 16 and 36.
[81] Consultative Council of European Prosecutors, Opinion No. 8(2013) on *relations between prosecutors and the media,* 9 October 2013, §§ 20 and 22. See also the case-law of the European Court of Human Rights: Arrigo and Vella v. Malta (dec.), no. 6569/04, 10 May 2005; Yordanova and Toshev v. Bulgaria, no. 5126/05, § 53, 2 October 2012; Observer et Guardian v. UK, no. 13585/88, 26 November 1991.
[82] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in criminal justice system*, 6 October 2000, § 16.

6.2 Staff

115. The prosecutor's office should be managed effectively, avoiding any bureaucratic drift. To do this, prosecutors should have sufficient and qualified administrative personnel, adequately trained. Experts in specific fields should also be provided for, e.g. for the reception of victims of crimes, data processing, statistics.

6.3 Management of resources

116. The provision of adequate organisational, financial, material and human resources contributes to ensuring independence. Particularly in times of economic difficulty, sufficient resources should be assigned to provide a quality service[83].

117. Where the management of resources is entrusted to the prosecution service, it has the duty to do it with the utmost rigor and transparent manner[84]. For this purpose, as well as to maximise the results with the given means, there should be relevant measures in place; prosecutors should also receive adequate training and be supported by qualified specialists.

118. In any case, either where the prosecution services have or do not have management autonomy, they should be enabled to estimate their needs, negotiate their budgets and decide how to use the allocated funds in a transparent manner, in order to achieve the objectives of speedy and quality justice[85].

6.4 Specialisation

119. The need of specialisation of prosecutors, as well as within the public prosecutors organisational structure, should be seen as a priority[86], to better respond to new forms of criminality, as well as in cases where the prosecutor has competences outside the criminal law field. It would also improve and facilitate international co-operation. Specialisation is essential to improve effectiveness, but also to answer the challenges for the prosecutors' mission coming from the complexity of contemporary society.

6.5 Internal cooperation

120. Mutual and fair cooperation is essential for the effectiveness of the prosecution service, between different prosecution offices as well as between prosecutors belonging to the same office.

7. International cooperation

121. Prosecutors should treat international requests for support within their jurisdiction with the same diligence as in the case of their work at national level. In their jurisdiction, they should contribute, where appropriate, to the implementation of foreign decisions**.**

122. Prosecutors should benefit from training in the application of international instruments and basic principles governing the major legal systems. They may participate as much as possible in exchanges and international fora useful for the exercise of their functions, including in particular the collection of best practices[87].

123. When it results in more efficiency, prosecutors should use cooperation arrangements such as Eurojust, the European Judicial Network and other various relevant networks including liaison prosecutors[88].

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[83] See Opinion No. 4(2009) of the CCPE, Bordeaux Declaration, para 4. See also Consultative Council of European Prosecutors, Opinion No. 7(2012) on *the management of the means of prosecution services*, 11 December 2012, recommendation (i).

[84] Consultative Council of European Prosecutors, Opinion No. 7(2012) on *the management of the means of prosecution services*, 11 December 2012, § 51.

[85] Consultative Council of European Prosecutors, Opinion n°7(2012) *on the management of the means of prosecution services,* 11 December 2012, recommendation (ii).

[86] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, § 8.

[87] Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, §§ 38 and 39.

[88] Consultative Council of European Prosecutors, Opinion No. 1(2007) on *ways of improving international co-operation in the criminal justice field*, 30 November 2007, §§ 38 and 39.

Opinion No. 10 (2015)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The role of prosecutors in criminal investigations

I. Introduction

1. The Consultative Council of European Prosecutors (CCPE) was established by the Committee of Ministers of the Council of Europe in 2005 with the task of rendering Opinions on issues concerning the implementation of Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system.

2. The Committee of Ministers instructed the CCPE to prepare and adopt an Opinion in 2015 for its attention concerning the role of prosecutors in criminal investigations. The CCPE has prepared this Opinion on the basis of replies to the questionnaire received from 29 member States[1].

3. According to these replies, it appears that the various aspects of relations between prosecutors and investigation bodies are determined by the Constitution and/or national laws and internal regulatory instruments (e.g. orders and instructions by the Prosecutor General, rules of conduct, ethical codes, etc.).

4. The role of prosecutors in criminal investigations varies from one system to another. In some countries, prosecutors can conduct investigation. In other countries, either the police can conduct investigations under the authority and/or supervision of prosecutors, or the police or other investigative bodies can act independently.

5. The system of prosecution may be different in each member State. It may be based on the principle of mandatory prosecution or discretionary prosecution. In addition, the various prosecution systems have traditionally reflected either the inquisitorial or adversarial models.

6. There has been an evolution in recent years in Europe, particularly under the influence of the European Court of Human Rights (hereafter the Court), in bringing these models closer together in an effort to ensure both effective investigation and respect for the rights of the persons concerned, with the main goal of compliance of all these systems with shared fundamental values.

A. Reference texts

7. The CCPE underlines the importance of referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the ECHR), in particular its Articles 2, 3, 5, 6 and 8 and the relevant case-law of the Court. It also refers to the importance of the findings and recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

8. The CCPE took into consideration the above-mentioned Recommendation Rec(2000)19, which notes that in some criminal justice systems, public prosecutors conduct, direct or supervise the investigation[2]. The CCPE also took into consideration Recommendation Rec(2001)10 of the Committee of Ministers to member States on the European Code of Police Ethics[3], Recommendation Rec(2005)10 of the Committee of Ministers to member States on "special investigation techniques" in relation to serious crimes including acts of terrorism, as well as the Conclusions adopted by the 6th Conference of Prosecutors General of Europe in Budapest, Hungary, on 31 May 2005, concerning

[1] See the replies of member States to the questionnaire on the CCPE website (www.coe.int/ccpe) under "Preliminary works - Action of prosecutors within the framework of criminal investigation (2015)".
[2] For these States, the Recommendation establishes that prosecutors should scrutinise the lawfulness of police investigations, give instructions to the police, monitor their implementation and sanction eventual violations. States, in which the police is independent of the prosecution, are expected to take all measures to guarantee that there is appropriate and functional co-operation between prosecution and the police.
[3] It provides guidance on the principles to be respected in the context of criminal investigations by the police and it stipulates that it is up to public prosecution or the investigating judge to ensure compliance.

the relationship between prosecutors and the police. The CCPE relied on the principles contained in its Opinion No. 9(2014) on European norms and principles concerning prosecutors - "Rome Charter", and its other relevant Opinions, in particular the CCPE Opinion No. 3(2008) on the role of prosecution services outside the criminal law field, and Opinion No. 8(2013) on relations between prosecutors and the media.

9. The CCPE also took into account the relevant documents of the United Nations such as the International Covenant on Civil and Political Rights of 1966, the Code of Conduct for Law Enforcement Officials adopted by the United Nations General Assembly on 17 December 1979 (Resolution 34/169), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the Guidelines on the Role of Prosecutors of 1990 and the recommendations of the committees charged with monitoring the implementation of relevant United Nations instruments[4].

10. The CCPE also considered the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors (IAP) in 1999, other relevant documents adopted by the IAP, as well as the Sopot Declaration of the Prosecutors General of the Visegrad Group[5] of 25 May 2015 concerning the relations between the prosecution services and the police.

B. Purpose and scope of the Opinion

11. This Opinion aims at putting in place recommendations as regards the role of prosecutors in criminal investigations, taking into account the rights of all parties involved in these investigations (victims, defendants, defence counsel, witnesses, etc.), and at identifying and promoting good working practices between prosecutors and investigators.

12. Recommendation Rec(2000)19 briefly highlights the relations between prosecutors and investigation bodies, in noting the distinctions among different existing systems in the member States of the Council of Europe.

13. This issue is essential in the context of the proper administration of criminal justice. One of the basic principles of the rule of law is respect for human rights and fundamental freedoms by prosecutors and investigators at all stages of the investigation.

14. This implies that:

- prosecutors, when it is within their authority, should ensure that persons affected by an investigation are treated humanely and are able to assert their legitimate rights;

- prosecutors should use all their authority, as far as it is possible within the framework of their competence and powers, in ensuring that the investigative bodies respect the law and follow specific standards of conduct, in order to be accountable before an appropriate authority for any abuse of power or behaviour;

- prosecutors should ensure that the results of the investigation presented to the trial judge reflect the reality of the findings in order not to mislead the court.

15. This Opinion is limited to investigations in the criminal field and in the context of public prosecution.

[4] Human Rights Committee, Committee Against Torture, Committee on the Rights of the Child.
[5] The Visegrad Group is composed of the Czech Republic, Hungary, Poland and Slovakia.

II. The role of prosecutors in criminal investigations

A. Oversight of investigations by prosecutors

16. In general, prosecutors should scrutinise the lawfulness of investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, prosecutors should also monitor how the investigations are carried out and if human rights are respected.

17. Where they have the power to do so, prosecutors may give binding instructions, advices, directions or guidelines as appropriate to investigative bodies regarding either the entire course of investigations or specific investigative acts with a view to ensuring compliance with both substantive and procedural rules of criminal law, as well as with rights guaranteed by the ECHR.

18. With a view to ensuring effective prosecutions, these instructions or guidelines may deal with, *inter alia*, the evidence that must be obtained, the proper strategy in the development of investigations, the means or tools to be used for the collection of evidence, the facts that must be clarified and proven and measures to be taken during investigations.

19. Where prosecutors have a supervisory role over investigations, they should ensure that the investigative bodies keep the prosecutors informed of the progress of the investigation of criminal cases, of the implementation of criminal policy priorities that have been assigned to them and of the application of prosecutors' instructions.

20. In member States where it is within their competence, prosecutors should:

    - strive to ensure that investigations have the sole aim of establishing the truth and clarifying the cases, are conducted in a lawful manner with respect for human rights and fundamental principles proclaimed, in particular, in Articles 2, 3, 5, 6 and 8 of the ECHR and are carried out in due time with objectivity, impartiality and professionalism. When in charge of directing, controlling or supervising the work of the investigators, they should ensure, as far as it is possible within the framework of their competence and powers, that the investigators respect the same principles as well as fundamental rights;

    - strive to ensure that the presumption of innocence and the rights of the defence are respected during investigations. Wherever possible, it is necessary, during this phase of investigation, not to disclose publicly the identity of suspects, and to ensure their personal safety and their rights to dignity and protection of their private life;

    - in the course of investigations, strive to guarantee the confidentiality of information in order not to jeopardise the progress and effectiveness of investigations;

    - during the investigations, in which they are involved, ensure that the personal security and the rights of the parties, witnesses and other participants in the case are guaranteed;

    - ensure that victims, and in particular vulnerable persons, are informed about the initiating and the outcome of the investigations by appropriate means, respectful of their rights;

21. In fulfilling these tasks, prosecutors should perform their duties fairly, consistently and expeditiously, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

22. Where it is within their competence, prosecutors should also take into account the questions relating to the effective management of resources, including human and financial resources. They should also avoid disproportionate expenses, while always respecting the rule of law and procedural rights.

B. Situations in which the prosecutors conduct investigations

23. In member States where prosecutorial investigation is allowed, prosecutors must conduct investigations lawfully, professionally, fairly, expeditiously, to the best of their ability and without prejudice or discrimination against anyone. They should also develop lines of investigation which may be favourable to the defence and gather and disclose evidence in this respect.

24. Within the framework of their investigative functions, prosecutors should at least have the same rights and obligations as other investigative bodies as well as have at their disposal the means necessary for the accomplishment of their functions.

C. Situations in which the police or other investigation bodies conduct investigations under the authority of prosecutors

25. In member States where the police is placed under the authority of the prosecution or where police investigations are supervised by the prosecution services, prosecutors should be vested with effective measures to guarantee that they can fully carry out their tasks in criminal investigations, always in compliance with national and international law. They should ensure that investigations are conducted in the most appropriate and effective way and with a continuous respect for the rule of law and procedural rights.

26. Such tasks may include;

- ensuring effective implementation of criminal policy priorities;
- giving instructions to police as to when to initiate and how to carry out criminal investigations;
- allocating individual cases to the relevant investigation agency;
- promoting a fruitful and effective co-operation between police and prosecution, and coordinating investigation when it concerns several bodies;
- giving guidance and instructions on matters of the law;
- supervising the legality and quality of investigations;
- carrying out evaluations and control, in so far as this is necessary, of compliance with the law;
- and, where appropriate and in accordance with national law, sanction or promote sanctioning of violations.

27. In member States where prosecutors supervise investigations, they should be vested with sufficiently broad procedural powers, in order to ensure that criminal investigations are carried out efficiently and in full conformity with the law. In particular, in such member States where prosecutors have the power, within the framework of the national law, to supervise investigations:

- prosecutors should ensure that the investigators respect legal provisions, including those concerning the legality of initiating, suspending and terminating a criminal case, and also take due account of the rights of participants in criminal proceedings, including victims and defence parties. To be able to do so, prosecutors should be duly informed about all important decisions concerning investigations to be made in future and already made, particularly when they involve the possibility of serious limitation of the rights and freedoms of the participants in criminal proceedings (for instance, about the consequences of a reported crime and the main events of the investigations);

- prosecutors should have the power to either approve the adoption of such important decisions by the investigator or to overrule them;

- in order for the rights and lawful interests of participants in criminal proceedings to be duly respected, prosecutors should also inform, where appropriate, these participants about their right to appeal before a superior prosecutor or a court;

- prosecutors should observe confidentiality of the investigation. They should not allow disclosure of confidential information received from investigators or third parties, unless disclosure of such information may be necessary in the interests of justice or in accordance with the law;

- prosecutors should have the possibility to get access freely and at any time to all materials relating to criminal investigation available to investigators in order to enable efficient timely

supervision of the investigation, if necessary, to avoid the loss of important evidence, to ensure security and access (if the national law so permits) to the case-file for the victims, or to prevent the possibility of escaping from justice of those who should be prosecuted;

- prosecutors should exercise supervision over investigations on a regular basis, namely with a view to preventing illegal or ungrounded detention or imprisonment of persons;

- prosecutors should strive to protect, according to international and national law, all persons deprived of liberty, from improper treatment on the part of officials and other persons, and they should consider carefully the claims filed in connection therewith;

- prosecutors should have legally established competences enabling them not only to assess the lawfulness of investigators' actions and the fulfilment of their instructions, but also to prevent as far as possible violations of the law by these investigators;

- whenever investigators use unlawful investigative methods resulting in serious violations of human rights, prosecutors should have the right to initiate criminal prosecution against such investigators, or to apply before the competent authorities for them to initiate criminal prosecution or disciplinary proceedings towards these investigators.

- prosecutors should have the right to freely visit a suspect/defendant held in custody.

D. Situations in which the police is independent as regards conducting investigations

28. In member States where the police or other investigation authorities investigate independently, the legal systems should have in place appropriate supervisory procedures to ensure the lawfulness of investigations and to ensure that the police and other investigative authorities act professionally, fairly and expeditiously.

29. In any case, prosecutors should be able to take effective measures to promote suitable and functional co-operation with investigative bodies.

III. The role of prosecutors concerning respect for the rights of the defence during investigations and investigation techniques

A. Respect for the principle of the presumption of innocence and the rights of the defence

30. According to the case-law of the Court[6], every criminal process, including the procedural aspects, must be of an adversarial nature and ensure equality of arms between the prosecution and the defence. This is a fundamental aspect of the right to a fair trial. Moreover, Article 6(1) of the ECHR requires that the prosecution authorities disclose, during the trial phase, to the defence all relevant evidence in their possession, for or against the accused person. The *right to a fair trial* includes the principle of equality of arms and also presumes the principle of adversarial procedure. It includes the right to full disclosure, in a timely manner, of all relevant material in the prosecutor's possession. This presumes the availability of all elements of proof and an obligation by the prosecutor or other investigative authority to look for evidence of both guilt and innocence.

31. Prosecutors, regardless of their role in the investigations, should ensure that their actions are in accordance with the law and in particular, respect the following principles:

- equality before the law;
- impartiality and independence of prosecutors;
- the right of access to a lawyer;
- the right of the defence to full disclosure of all relevant material;
- the presumption of innocence;
- equality of arms;
- the independence of courts;
- the right of an accused to a fair trial;

[6] See Messier v. France (ECHR, 30 June 2011).

32. Respect for *the presumption of innocence* is binding not only for the courts but also for all other state bodies. Prosecutors and investigation bodies should refrain from any statement or attitude that would contribute to violating this principle.

33. The *principle of equality of arms* requires, as a part of fair criminal procedure, that the person who is the subject of an investigation should be able to present his/her case before a court without being placed at a substantial disadvantage vis-à-vis the opposing party. A fair balance should therefore be maintained between the parties allowing them to discuss any element of the investigation.

34. Respect for the *adversarial principle* in criminal matters requires distinguishing between the investigation phase and the phase of trial. Concerning the first phase of investigation, the adversarial principle is not absolute. Rather, it is an anticipation of it: it consists of a search for evidence to establish whether there are sufficient grounds to proceed with an indictment and, during this phase, the procedure can be confidential[7].

35. However, Article 6(3)(a) of the ECHR sets out the right of every accused to be informed promptly, in a language they understand and in detail, of the nature and cause of the accusation against them. The accused must be precisely informed of the accusation against him/her, at least from the moment when he/she is arrested. In addition, it is also from that moment onwards that the reasonable time period within the meaning of Article 6(1) starts running. A person who is arrested, detained or deprived of his/her liberty should be informed promptly in writing of his/her rights. Such a notification should be written clearly in a language the person can understand. This notification should, *inter alia*, include information specifying his/her right:

    - to be fully informed of the accusation against him/her;
    - to be fully informed of the basis for his/her detention;
    - to have access to, and consult effectively a lawyer;
    - to translation and/or interpretation.

36. The obligation to seek out and preserve evidence of guilt or innocence should be interpreted realistically on the facts of each case and the relevance of the evidence should be evaluated.

37. Evidence relevant to guilt or innocence should, so far as necessary and practicable, be kept, in conformity with national law, at least until the conclusion of the procedure. The fact that evidence is not to be used by the prosecution does not justify its destruction or unavailability or the destruction of notes or records about it. Where the evidence gives rise to a reasonable possibility of rebutting the prosecution case, it should be retained.

38. Where the prosecutor is aware of material relevant to the issue of innocence of an accused and/or which might materially assist the defence, the prosecutor should disclose that material. If the prosecutor refuses or is not able to do this, this may result in an acquittal or discontinuation of the prosecution.

39. At all times, prosecutors should conduct themselves professionally, in accordance with the law, the rules and ethics of their profession and the Code of Ethics for Prosecutors (the "Budapest Guidelines"[8]). They should strive to attain the highest standards of integrity and ensure that their conduct is above reproach.

[7] See Salduz v. Turkey (ECHR, 27 November 2008). Salduz was convicted for terrorism based on statements of facts without legal assistance during the first interrogation by the police. According to the Court, the right of all suspects to have access to legal assistance is one of the fundamental elements of a fair trial.

[8] European Guidelines on ethics and conduct for public prosecutors adopted by the Conference of Prosecutors General of Europe in 2005 in Budapest, Hungary.

B. Special techniques of investigations

40. Prosecutors should adjust their activity to the fast evolution of criminality. Within this framework, they should make use of the new techniques available as far as they are in conformity with the law, and pay due attention to the need for specialisation and multidisciplinarity.

41. Prosecutors should take into account that the use of some of such techniques can also result in restrictions or constraints on the rights of persons: e.g. the use of informants, under-cover-agents, the recording of meetings, the surveillance and interception of telephone calls, emails, internet communication, the use of intrusive computer programmes, G.P.S. or scanners, etc.

42. In member States where prosecutors are involved in investigations which use special techniques that are particularly intrusive to private life, they should not resort to such investigative measures except in serious cases, where a serious offense has been committed or prepared, and only if other measures are not usable or appropriate, and "to the extent that this is necessary in a democratic society and is considered appropriate for efficient criminal investigation and prosecution" (Rec(2005)10, paragraph 2). Prosecutors should respect, in this context, the principles of proportionality and impartiality, the fundamental rights of individuals as well as the presumption of innocence.

43. In order to achieve an appropriate balance in using these techniques, member States should:

    - take appropriate legislative measures to permit and define the limits concerning the use of evidence obtained through the use of these new techniques;

    - take appropriate measures to meet the requirements imposed by the ECHR and principles emanating from the case-law of the Court (judicial control, respect for legality, etc.);

    - provide proper training for prosecutors and for the staff of the prosecution services, in order to enable prosecutors to make efficient use of new techniques and to facilitate criminal investigations.

IV. Measures for strengthening the role of prosecutors in the investigation

A. International co-operation

44. Prosecutors should promote international co-operation and mutual trust in the field of criminal proceedings, taking into account the necessity to respect the sovereignty of States and to strictly comply with relevant provisions of international and national law.

45. States should promote direct contacts between prosecutors from different states or international organisations within the framework of international conventions and agreements in force with a view, in particular, to sharing experiences through specialised networks, seminars and workshops.

46. Prosecutors should consider international requests for extradition and legal assistance in criminal matters, including freezing, seizure and confiscation, within the scope of their jurisdiction, paying the same attention to them as they would do to their own or to similar cases at national level.

47. Co-operation of prosecutors should be improved by using, whenever possible, new information technologies, particularly for the transfer and execution of requests for legal assistance, as well as by regularly upgrading the quality of their requests and their translation into other languages.

48. A more extensive specialisation of prosecutorial activities in the field of international co-operation should be promoted, namely by appointing specialised prosecutors to fulfil this task or by establishing relevant structures concerned with issues of international co-operation, which would render assistance to prosecutors.

49. It is necessary to ensure special training for prosecutors as well as for other participants in the procedure in international legal co-operation issues, to ensure they have the necessary skills to draft extradition and mutual legal assistance requests, as well as to consider and respond to similar requests from other countries. Such training should encompass the learning of foreign languages as well as an updating of international and comparative law, thus promoting and facilitating effective networking among participants from different countries.

50. Where prosecutorial bodies are assigned as central national authorities for international co-operation in criminal matters, they should be authorised, within the framework of their national legislation, to execute foreign requests directly and/or forward them for execution to other competent authorities with the right to supervise their execution.

51. In this respect, due consideration should be given to the establishment of contact points in each country, allowing for direct communication between competent authorities of these countries, with regular meetings among them in order to discuss issues of common interest. These contact points should have strong skills in international cooperation matters and should understand and speak foreign languages. The provision of "liaison magistrates" can be useful for the same purposes and should be encouraged.

B. Interaction with mass media

52. Prosecutors should be aware of the need to seek efficient interaction with mass media in line with the principles of publicity and transparency in their work, increasing public confidence, spreading information about their functions and powers, and thereby contributing to fostering a better knowledge of their work[9].

53. Information provided by prosecutors to mass media should be clear, reliable and precise and should not undermine the integrity and effectiveness of the investigation or the personal security of prosecutors. It should not refer to particular prosecutors, but impersonally to the action of the prosecution office. Prosecutors should treat the media without any discrimination.

54. This information should also be in compliance with freedom of expression, protection of personal data, confidentiality of investigations, dignity, the principle of presumption of innocence, ethical norms with respect to other participants in the proceedings, as well as legal norms regulating and restricting disclosure of specific information.

55. Prosecutors may also provide the general public with information, through mass media, with a view to promoting the prevention and/or prosecution of crimes, as well as to promote a better understanding of the functioning of criminal proceedings, either at national or international level.

56. To be able to better inform the general public in proper time about their activity, prosecutors should make use of information technologies, including the setting-up, due management and regular updating of web-sites.

57. Specific training for interaction with mass media should be provided in situations where prosecutors have direct and regular contact with mass media professionals with a view to providing information of quality and rigour. Such training could be carried out, whenever necessary, with the assistance of experts and journalists.

C. Training

58. A high level of professional qualification of prosecutors, in particular within the framework of investigations, is a necessary condition for the efficient work of the prosecution service and for improving confidence of the public in it. That is why prosecutors should be educated accordingly and take initial and on-going training courses regarding their specialisation.

[9] See the CCPE Opinion No. 3(2008) on the role of prosecution services outside the criminal law field, and Opinion No. 8(2013) on relations between prosecutors and the media.

LIST OF RECOMMENDATIONS

a. Member States should clearly define the rights and obligations of prosecutors and investigation bodies in the framework of criminal investigations.

b. In general, prosecutors should scrutinise the lawfulness of investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, prosecutors should also monitor how the investigations are carried out and if human rights are respected.

c. In carrying out this task, prosecutors should have the legal, financial and technical means to verify the lawfulness of investigations and to react to any violation of the law.

d. Investigations should always be carried out impartially and include an obligation on investigators to seek out and preserve evidence relevant to both guilt and innocence.

e. Prosecutors should present all available credible evidence to the court and disclose all relevant evidence to the accused.

f. Prosecutors should always respect the rights of the accused, victims, witnesses or persons otherwise involved in the proceedings.

g. Prosecutors and investigative bodies should cooperate and exchange all information necessary for the exercise of their functions.

h. Prosecutors and investigative bodies should fulfil their tasks in the most effective and expeditious manner, especially when the case concerns detainees, and should respect the principle of proportionality in using the means of investigations.

i. Prosecutors and investigative bodies should have proper training, as appropriate, both as regards the law and the most modern techniques of the investigation.

j. Prosecutors and investigative bodies should develop the most efficient international relations and cooperation.

k. Prosecutors should seek to develop public confidence by providing information about their functions and powers, and thereby contributing to fostering a better knowledge of their work while at the same time respecting fundamental rights and principles such as the presumption of innocence and the right to a fair trial.

Opinion No. 11 (2016)

**of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe**

The quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime

I. INTRODUCTION

1. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Prosecutors (CCPE) prepared an Opinion on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime. In member states, where prosecution services perform other functions outside criminal justice, the principles and recommendations of this Opinion apply also to these functions.

2. In a growing number of member states of the Council of Europe, the public service in general, and institutions in the field of criminal justice including prosecution services in particular, receive, to an increasing extent, attention from the public, politicians and the media. Therefore, prosecution services need to demonstrate that they fulfil their duties with an utmost and up-to-date professionalism.

3. The objective of this Opinion is to determine how prosecution services can fulfil their mission with the highest quality and efficiency. It also looks into how they should organise their work in a modern manner using all the latest technical methods and means, and how the efficiency and quality of their work can be measured and evaluated. The second part of the Opinion will address how prosecution services can meet the growing demands for quality and efficiency also when facing specific challenges in the fight against terrorism and serious and organised crime.

4. The CCPE considers that prosecution services are complex public organisations. Therefore, in order to respond adequately to increasing needs, social challenges and pressure for rendering better public services, the overall legal, organisational and technical framework as well as the necessary financial and human resources are of paramount importance.

5. Member states of the Council of Europe have different legal systems including prosecution services. The CCPE respects each of them in their diversity. Therefore, not all the elements discussed in this Opinion may concern all member states. However, they mostly do address the concerns of prosecutors to work as efficiently as possible and with a high quality and strict respect for the law and human rights.

6. This Opinion has been prepared on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) as well as other Council of Europe instruments including: European Convention on Mutual Assistance in Criminal Matters of 1959, European Convention on the Suppression of Terrorism of 1977, European Convention on Cybercrime of 2001, Convention on the Prevention of Terrorism of 2005 and its Additional Protocol of 2015, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005, Convention on Action against Trafficking in Human Beings of 2005, Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system and Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice**.**

7. This Opinion is also based on the Committee of Ministers Guidelines on human rights and the fight against terrorism of 2002, Recommendation Rec(2005)10 of the Committee of Ministers on “special investigation techniques” in relation to serious crimes including acts of terrorism, and previous CCPE Opinions, in particular No. 1(2007) on ways to improve international co-operation in the criminal justice field, No. 7(2012) on the management of the means of prosecution services, No. 9(2014) on European norms and principles concerning prosecutors, including the “Rome Charter”, No. 10(2015) on the role of prosecutors in criminal investigations.

8. The following United Nations instruments have also been taken into account: Convention for the Suppression of Terrorist Bombings of 1997, Convention for the Suppression of the Financing of Terrorism of 1999, Convention against Transnational Organized Crime of 2000, Convention against Corruption of 2003.

9. The CCPE has also considered the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors (IAP) in 1999.

10. To prepare this Opinion, the CCPE analysed in particular the replies by 30 of its members to the questionnaire drafted for this purpose by the Secretariat (the compilation of replies is available on the CCPE website: www.coe.int/ccpe).

II. QUALITY AND EFFICIENCY FACTORS OF THE WORK OF PROSECUTORS

A. External environment

11. The quality and efficiency of the work of prosecutors depend not only on their talent and skills, but are also significantly affected by external factors which are mostly out of control of prosecutors: legislative and court decisions, resources made available and expectations from the society. Consequently, these factors merit a careful consideration particularly from the point of view of their impact on the quality and efficiency of prosecutorial work.

1. Legal framework, national traditions

12. Respect for the rule of law is an obligation for all Council of Europe member states. Also, a number of quality requirements have been laid down in the ECHR. Thus, Article 6 sets important requirements for any national legal framework to ensure the quality of criminal justice, such as independence of the judiciary, reasonable time, accessibility and publicity[1]. Since every prosecution service carries out its functions within a legal framework, legislation is a paramount precondition for the quality and effectiveness of its work. Laws and, mostly in common law systems, judgments influence the type and volume of cases brought by prosecutors before the courts, as well as the ways in which they are processed. This framework should be clear and simple to operate, ensuring that national systems are not flooded with cases, for instance by establishing alternative ways of dispute resolution. On the other hand, poor drafting or too frequent changes in the legislation or jurisprudence may prove to be serious barriers for well-reasoned and convincing prosecutorial decisions.

13. A clear and simple legal framework facilitates access to justice and contributes to making it efficient, for instance by helping to reduce the heavy caseload, particularly within the criminal justice system, using public resources more efficiently and productively, as well as allowing for allocation of more time and financial resources for offences that severely disturb public order, in particular for offences of terrorism and serious and organised crime. Likewise, national legislation and justice systems should take into consideration technological development, promote easy access of prosecution services to databases and other relevant information and provide the basis for improving the quality of their work.

14. Political systems and legal traditions also have direct impact on the work of prosecutors. This includes the status of the prosecution services and, in particular, their independence from the executive power. Furthermore, the current security situation in Europe where countries face increasing threats of terrorism and serious and organised crime, should lead to national criminal policies aiming to improve the quality and efficiency of prosecutors' work.

[1] See Final Report 2008 of the European Network of Councils for the Judiciary (ENCJ) Group on Quality Management.

15. Although international cooperation has been steadily improving in the past decades, sometimes there are delays in answering requests from other states that may seem to be unjustified. This hinders efficient extradition and other requests for assistance and therefore undermines the efficiency of prosecutors' work and the court proceedings in the requesting states. States should thus continue to strive for immediate transnational cooperation in criminal cases, on a basis of mutual trust.

2. Resources

16. The availability of financial and other resources in member states has a direct impact on the quality and efficiency of prosecutors' work. In this context, the CCPE underlines in particular the need to ensure adequate human and technical resources, proper and consistent training, as well as the scope of the social security packages provided to prosecutors that should be commensurate with the importance of their mission. The situation in member states shows furthermore that efficiency can be increased by a certain level of autonomy (in particular regarding the budget) of prosecution services in most areas concerning management.

17. Prosecutors should thus have adequate human, financial and material resources in order to be able to consider and examine all relevant matters. The assistance of qualified staff, adequate modern technical equipment and other resources can relieve prosecutors from undue strain and therefore improve the quality and efficiency of their work.

3. Impacts from the public

18. Prosecutors need receiving quickly reliable and comprehensive information from all relevant players in a society. Therefore, relations with other actors within and outside the justice system (e.g. police and other state authorities, lawyers, NGOs) play a vital role in the capacity of prosecutors to quickly take well-founded decisions based on an effective exchange of relevant information at national and international level. For this purpose, prosecutors need coherent and sufficient legal norms and procedures allowing to gather information needed for taking qualified decisions in ways proportionate to the interests at stake.

19. Member states should take measures in line with the rights set out in the ECHR which can help to strengthen the public trust in prosecution services by responding to growing demands from the media and thus working more transparently. For prosecution services, the use of modern information structures and techniques is indispensable for delivering quick and accurate information to the public.

20. The leaking, in criminal cases, of sensitive information to the media may not only reduce the efficiency of the investigation and infringe the victims' rights, but also create risks for the presumption of innocence and the right "not to be labelled". To prevent this, the access of unauthorised persons to sensitive information should be inhibited. False or biased news on investigations might betray the public trust and generate doubts as to the independence, impartiality and integrity of the prosecution system or the courts. Therefore, proper communication between the prosecution services and the media should be established, to help avoiding the publication of false or biased news or minimising the negative effects thereof.

21. Everyone should have a right to complain or appeal against a measure taken by a prosecutor. To increase the quality and accountability of prosecutors' decisions, an effective and impartial complaint mechanism should be established and the grounds and the results of the complaints should be analysed, not only from the point of view of the right to a fair trial, but also to promote the quality of prosecutors' work through eliminating their shortcomings and preventing failures.

4. Undue external influence

22. Prosecutors should exercise their functions free from external undue influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

B. Internal environment

1. Strategic vision

23. The quality and efficiency of the work of prosecutors are also significantly affected by internal factors. The management of the prosecution services should provide strategic leadership. A strategic plan including professional objectives and management of human and material resources should guide the prosecutors' work. It can provide for internal measures to improve quality and efficiency through adequate management of human resources and cases, as well as targeted activities to that effect.

2. Management of human resources: selection, recruitment, promotion and training of prosecutors

24. To promote quality, it is indispensable that the selection, recruitment, promotion and relocation of prosecutors be based on clear and predictable criteria laid down in law or internal guidelines in written form.

25. The quality of prosecutorial decisions or other actions depends, among other factors, on permanent training of the prosecutors involved. The CCPE is of the opinion that the heads of prosecution offices and/or other competent institutions (e.g. judicial training institutions) should be responsible for an active training policy, including self-education, within their institutions that provides for increasing quality and efficiency in the work of prosecutors.

26. Prosecutors should have, at every phase of their career, a continuous training programme in order to maintain and improve their professional skills[2]. Such training should also include information technology, ethics and communication skills[3], as well as management issues in general and case management in particular, and be available for every level of the prosecution service. Specific themes should be addressed in depth (providing also common training with other institutions, when useful) to improve professional skills needed to face constantly evolving challenges (such as terrorism, as specified below)[4].

27. In several previous Opinions, the CCPE emphasised the importance of promoting specialisation of prosecutors, especially through participation in regular training sessions[5], professional events and conferences. Gaining more advanced knowledge through such participation and acquiring other qualifications may lead to promotions, advancement or better remuneration for prosecutors.

28. Principles and guidelines on issues such as time management, adequate methodology or increased co-operation with other actors of the justice administration system should aim at facilitating everyday work and thus enhancing the quality and efficiency of prosecutorial work.

29. Integrity, standards of good behaviour, both professional and personal, and, in member states where they exist, legal provisions on ethics or codes of ethics for prosecutors should be part of their regular training.

[2] See CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, Rome Charter, Article XIII, Explanatory Note, paragraphs 57, 61 and 63.
[3] Ibid., Explanatory Note, paragraph 62.
[4] Ibid., Rome Charter, Article XX, Explanatory Note, paragraph 64.
[5] Ibid., Rome Charter, Article XIII, Explanatory Note, paragraphs 57 and 62.

3. Management of prosecution services

a. Organisation of the work of prosecution services: responsibilities, administrative divisions, distribution of competence, etc.

30. The efficiency and quality of prosecutors' work call, in general, for clear and adequate organisational structure, responsibilities and competencies to administer human and material resources in line with the actual criminal or social situation in the area of their jurisdiction[6]. On the other hand, when facing new criminal, sociological, economic and international challenges, the structure and working mechanisms of the prosecution services should be flexible enough to respond in an adequate, sufficient, quick and legal way.

31. In particular, establishment, where appropriate, of specialised units in the framework of prosecution services (e.g. prosecutors dealing with cases of terrorism, narcotics, economic crimes, environment protection, and working in the area of international co-operation) should be considered.

32. Furthermore, prosecution services should organise proper analytical and methodological work with a view to enhancing the quality and efficiency of prosecutors' work.

33. In member states, dissemination of best practices for dealing with certain types of crimes as well as proper distribution of cases and effective use of information technology, including for the management of single cases, may increase efficiency and ensure better quality. Heads of prosecution services/offices and/or other competent institutions, in particular, should be responsible for promoting the use of such management tools and for sharing the knowledge of best practices within their offices.

b. Ethical rules

34. In most member states, to enhance quality and efficiency, prosecution services evaluate the integrity of prosecutors and other employees over a mid-term or long-term period. This is done in different ways. Some systems have laid down legal or general standards, others have adopted a code of ethics. Others, still, take oaths from newly appointed prosecutors. They commit to personal and professional qualities, impartiality and fairness, integrity and ethical impeccability. The CCPE has previously recommended that "codes of professional ethics and of conduct, based on international standards, should be adopted and made public"[7], having emphasised that "prosecutors should adhere to the highest ethical and professional standards, always behaving impartially and with objectivity"[8].

35. The main aim of a code of ethics would be to promote those standards recognised as necessary for proper and independent work of prosecutors. If prosecution services are to adopt codes of ethics, these should, as mentioned above, be in line with adopted common international standards such as laid down in Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system (hereafter Rec(2000)19)[9], the European Guidelines on ethics and conduct for public prosecutors of the CPGE, 31 May 2005 (Budapest Guidelines), CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors (Rome Charter) quoted above, and other relevant international instruments.

[6] See CCPE Opinion No. 7(2012) on the management of the means of prosecution services, paragraph 47.
[7] See CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, Rome Charter, Article VII.
[8] Ibid., Article VI.
[9] See Rec(2000)19, Explanatory Memorandum, commentaries on individual recommendations, paragraph 35.

c. Measuring the performance of the prosecution services (quantitative and qualitative)

36. In a large number of member states, there are statistics available to measure the quantitative workload, the performance of the prosecutor's office and the criminal situation in the area of its jurisdiction. In many member states, the evaluation of prosecutors is used to enhance the quality and efficiency of the prosecution service.

37. Prosecution services should determine indicators and follow-up mechanisms in a transparent way, primarily to motivate prosecutors to strive for higher levels of professional work. Internal follow-up within prosecution services should be regular, proportionate and be based on the rule of law.

38. The CCPE considers that quantitative indicators as such (number of cases, duration of proceedings, etc.) should not be the only relevant criteria to evaluate efficiency, either in the functioning of the office or in the work of an individual prosecutor. Similarly, it has been stated by the Consultative Council of European Judges (CCJE) "that "quality" of justice should not be understood as a synonym for mere "productivity" of the judicial system"[10].

39. This is why qualitative indicators, such as proper and thorough investigation (when this is under the prosecutor's competence), appropriate use of evidence, accurate construction of the accusation, professional conduct in court, etc., should also be taken into consideration as a way to complement indicators of a quantitative character. The desirability for speedy prosecutions should also take into account the safeguards provided by Article 6 of the ECHR[11].

40. Therefore, as the real and final objective, legal systems should be able to provide for a system of evaluation capable of assessing both quantitative and qualitative indicators of prosecutors' work which respects the essential principles of justice, in line with the ECHR and other international instruments.

41. The special nature of terrorism and serious and organised crime makes it even more necessary to follow and respect the above-mentioned approach. In those cases, it will also be necessary to take into account the safeguards provided in CCPE Opinion No. 10(2015) on the role of prosecutors in criminal investigations, in particular when special investigation techniques are being used[12], due to the risk of significant human rights restrictions that they entail.

d. Evaluating the work of individual prosecutors (quantitative and qualitative)

42. Evaluation of prosecutors and their work may be a useful strategic tool in order to improve skills necessary for confronting the evolving demands for quality, efficiency and professionalism. Individual evaluations may also provide important input for developing the most relevant training for prosecutors at all levels.

43. Responses to the questionnaire by members of the CCPE show that there are two types of evaluation used: formal and informal. The formal evaluation is made within a fixed timeframe (e.g. every 3 or 5 years). It is governed by a special procedure and focuses on specific skills to be evaluated. Sometimes, it is combined with a rating system which allows for comparison with other colleagues and for a quicker promotion. Its results are open for judicial review when they are not accepted by the evaluated prosecutor. The informal evaluation is more or less a discussion to collect and give information about how to improve the quality and efficiency of the prosecutor's work (e.g. drafting an understandable accusation, ability for team working, avoiding violation of standards, etc.) or in a more strategic manner, whether for instance prosecutors have skills to fulfil their duties. The aim of both types of evaluation of the prosecutors' work should be to examine the development of skills and working capacity, as well as to envisage promotion and – in some countries – incentives and awards, or generally to prevent disorder and misconduct, avoiding potential disciplinary measures.

[10] See CCJE Opinion No. 6(2004) on a fair trial within a reasonable time and the role of judges in proceedings, taking into account alternative means of dispute settlement, paragraph 42.
[11] See CCJE Opinion No. 11(2008) on the quality of judicial decisions, paragraph 26.
[12] See paragraphs 40-43.

44. The CCPE recommends that the evaluation of prosecutors' work be transparent and foreseeable, having been based on clear and previously published criteria, both as regards substantive and procedural rules.

45. Transparent and foreseeable evaluation means for the evaluated prosecutor to be able to discuss the results of the evaluation, or, where appropriate, compare the results of a self-evaluation with the evaluation conducted by the superior or by the person responsible, if different, and to submit them for review. The results of the evaluation should not be published in a way that may infringe the personal integrity and honour of the evaluated prosecutor.

46. Evaluation should be conducted on the basis of equal criteria at the same level within the prosecution service. Like in the case of measuring the overall performance of the prosecution service, the CCPE considers that defining quality of prosecutors' work should contain both quantitative and qualitative elements, such as the number of opened and closed prosecution cases, types of decisions and results, duration of prosecutorial proceedings, case management skills, ability to argue clearly orally and in writing, openness to modern technologies, knowledge of different languages, organisational skills, ability to cooperate with other persons within and outside the prosecutor's office.

4. Management of cases

47. A high quality decision or other relevant action by a prosecutor is one which reflects both the available material and the law, and which is made fairly, speedily, proportionally, clearly and objectively. In this respect, it is obvious that prosecutorial actions should, in line with the ECHR and other relevant international instruments, respect the rights of victims, their families and witnesses and be balanced with the rights of the defendants, as well as with the public interest in prosecuting crimes. Therefore, prosecutors should seek to carry out their work in accordance with these principles. It is the opinion of the CCPE that prosecution services should support prosecutors' work by setting out good practices of case management in various fields of prosecutorial competences and duties. Prosecutors' decisions should further reflect the following elements:

a. Objectivity and impartiality

48. Prosecutors should remain independent in the performance of their functions and exercise them always upholding the rule of law, integrity of criminal justice system and the right to a fair trial. Prosecutors should adhere to the highest ethical and professional standards, should carry out their duties fairly, and always behave impartially and objectively.

49. Prosecutors should provide for equality of individuals before the law without any kind of discrimination, including on the grounds of gender, race, colour, national and social origin, political and religious belief, property, social status and sexual orientation.

b. Comprehensiveness

50. All decisions and actions by prosecutors should be carefully considered by them. They should seek out evidence relating both to guilt and innocence and should ensure that all appropriate lines of enquiry be carried out, including those leading to evidence in favour of the accused or suspected persons. Thus, they should consider if the evidence delivered by the investigation is clear and comprehensive. This does not, however, require an investigator to engage in a disproportionate commitment of resources and should be reasonably and realistically interpreted on the facts of each case. It does not take away from the responsibility of defence lawyers to seek out evidence they consider relevant.

51. Prosecutors should decide to prosecute only upon well-founded evidence, reasonably believed to be reliable and admissible, and refuse to use evidence involving a grave violation of human rights.

c. Reasoning

52. Clear reasoning and analysis are basic requirements of prosecutors' work. They should fully consider all relevant evidence and examine factual and other issues revealed by the investigation and by the parties. All decisions or actions by prosecutors should reflect such relevant evidence, be in accordance with the law and general guidelines which may exist on the subject. Decisions and actions by prosecutors should be justified in consistent, clear, unambiguous and non-contradictory manner.

d. Clarity

53. All instructions or directives, as well as any official acts given by prosecutors should be clearly understandable by those to whom they are addressed. Where in writing, such instructions and directives should be drafted in a very clear language. In addition, prosecutors should pay particular attention to the format of written instructions and directives so that they can be readily identified.

e. Exchange of information and co-operation

54. Co-operation is essential for the effectiveness of the prosecution service both at national and international levels, between different prosecution offices, as well as between prosecutors belonging to the same office, as well as between prosecutors and law enforcement agencies/investigators. Increasing specialisation of prosecutors is likely to improve the effectiveness of such cooperation.

55. Where prosecutors have an investigative function, they should seek to ensure an effective exchange of information in a due manner among themselves, as well as between themselves and law enforcement agencies/investigators. This should help in avoiding duplication of work, as well as in complementing efforts of different prosecutors and law enforcement agencies in cases which are connected to each other.

56. Where prosecutors do not have such an investigative function, they should, as appropriate, co-operate during investigations with the relevant investigating agency, particularly in furnishing relevant advice and/or guidance.

57. Such co-operation should continue until the end of investigation, with a view to ensuring that all relevant evidence is made available to the prosecutor and disclosed, as appropriate, to the defence.

III. MAJOR CURRENT CHALLENGES FOR QUALITY AND EFFICIENCY IN FIGHTING TERRORISM AND SERIOUS AND ORGANISED CRIME

A. Introduction

58. Most member states of the Council of Europe have observed that serious and serious and organised crimes have become more complex and international. Terrorism has severely hit many countries and is currently a major priority in the work of prosecution services. Illegal migration poses new challenges in this context such as in the areas of terrorism, organised crime and human trafficking.

59. Prosecutors are in the first line to pursue the prosecution of these grave crimes in courts and therefore they exercise an essential role in safeguarding public safety and protecting the rule of law.

B. Fighting terrorism and serious and organised crime at national level

1. Strategy of the fight against terrorism and serious and organised crime

60. In line with UN Security Council Resolution 1566 (2004) concerning threats to international peace and security caused by terrorism, the CCPE considers it as a key duty of prosecutors "to bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts" or serious and organised crime. To fulfil this duty in a qualified and efficient way, prosecutors need to act within a sufficient legal framework, to cooperate with all relevant stakeholders in this field at national and international levels, and to have sufficient human and material resources. New threats of terrorism (financing by serious and organised crime, propaganda, recruitment and training of fighters through the

internet) require new responses, new forms of investigation and prosecution techniques and measures, so that prosecutors are able to act with the efficiency and quality increasingly required by the society.

61. The CCPE considers that in the investigation and prosecution of cases of terrorism and serious and organised crime, the independence and impartiality of prosecutors in performing their duties should be particularly safeguarded.

2. *Legislative framework to set up for these types of crime, and organisational and financial resources to be made available to prosecutors*

62. An inadequate legislative and institutional framework for combating terrorism, serious and organised crime and cybercrime and their financing, including money laundering, allows terrorists, perpetrators in the field of serious and organised crime and their supporters to act without territorial limits and to use their funds to carry out and expand their criminal activities. To be effective, prosecutors depend on the legislation that clearly criminalises any activities which constitute a direct or indirect support to terrorist activities and serious and organised crime, including propaganda for, and recruitment of terrorists, etc. This would allow prosecutors to widen their field of action in the fight against terrorism and serious and organised crime by application of legal instruments set up for severe forms of criminality.

63. The fight against terrorism and, in particular, recruitment of potential terrorists, admission into the organisation, making terrorist propaganda and sharing information with terrorist purposes, training and preparation for terrorist activities and transporting with terrorist purposes would require the need to have at an early stage insider information about terrorist and serious and organised crime. However, disproportionate restriction of fundamental rights and freedoms should be avoided. For the same reason, clear limits and criteria for a proportionate application of the laws should be established, especially when preventive measures are to be brought before the prosecution, and so being subject to regular law of criminal procedure.

3. Investigation techniques and using special tools and means including modern information technologies

64. In most member states, special investigative techniques such as electronic surveillance and undercover operations have been shown to be effective tools to combat terrorism and serious and organised crime. These tools are being made available to prosecution offices, at least in jurisdictions where prosecutors have investigative powers. As they infringe the right of privacy not only of suspects but of other persons not necessarily involved in the relevant criminal situation under investigation, the use of these measures needs thorough and permanent consideration by prosecutors at any stage of the proceedings, so that the outcome of the investigation is accepted by courts and society at large.

65. The retention and preservation, to an appropriate and proportional extent, of traffic and location data by private enterprises and communication companies should be ensured, while respecting the national and international jurisdiction as well as the ECHR and the Council of Europe's Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data of 1981.

66. The answers to the questionnaire show that all member states have taken organisational steps to enhance the quality and efficiency of prosecutorial decisions in terrorist and serious and organised crimes cases. Some have specialised units within the prosecution offices, others have transferred this duty to one office for the whole country. The CCPE considers it desirable to concentrate the investigation and prosecution of these criminal cases in special units. This can ensure the necessary professionalism not only in the use of special investigative techniques but in developing the communication to, and with, other stakeholders in this field. This can also ensure special training of the prosecutors involved and allowing them to receive the most modern technical, legal and organisational means available. Specialised police units or experts, which are directly subordinated to and are at the disposal of the prosecution entities, where appropriate, may enhance the quality and efficiency of the investigations combating terrorism and serious and organised crime. Such organisational framework will further help prosecutors to perform their duties with full independence and impartiality, with the necessary respect for the human rights of suspects, and the necessary protection of victims, witnesses and other persons involved in the criminal process.

4. Case management

67. A proper case management methodology can ensure that special investigation techniques that are intrusive are only to be used, subject to the necessary judicial oversight, where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more individuals or by an as-yet-unidentified individual or group of individuals.

68. The CCPE underlines that, according to the case-law of the European Court of Human Rights (hereafter the ECtHR), special investigations techniques are only to be used while respecting the principle of proportionality and they should meet minimum requirements of confidentiality, integrity and availability[13].

69. In cases, where the law on terrorism and serious and organised crime provides for the limitation of the rights of individuals in criminal proceedings, prosecutors who decide to apply such a limitation should always consider whether it is justified vis-à-vis the obligation of proportionality, and ensure that evidence is not obtained by means of torture or other cruel, inhuman or degrading treatment, taking as a basis the interpretation of these concepts in the case-law of the ECtHR. Notwithstanding the gravity of the offences of terrorism and serious and organised crime, a qualified and effective case management ensures that prosecutorial decisions are taken with respect for the time limits and are carried out in an objective, impartial and professional manner, respecting the presumption of innocence and the right to defence, as well as the rights of victims of crime. It is part of their competences, that prosecutors should monitor the respect of these fundamental principles and freedoms throughout the proceedings of law enforcement agencies.

70. If victims and witnesses are allowed to preserve their anonymity, the right balance should be preserved with the rights of accused persons.

71. Appropriate protection should be applied towards victims, witnesses and other persons involved in the proceedings including prosecutors themselves and their families.

5. Training

72. Rec(2000)19 indicates that special attention should be paid to continuous training of prosecutors, given the emergence of new forms of crime and the necessity of continuing international cooperation in criminal matters. To carry out the most efficient prosecution, prosecutors have constantly to be updated and specialised in investigating and prosecuting terrorism and serious and organised crime in all their forms. As regards special needs in these fields of criminality, training of prosecutors should in particular focus on the collection and use of evidence at regional, national and international levels, forms and techniques of co-operation of stakeholders, exchange of experience and best practices, understanding of possible violations of human rights, the role of social media in recruitment of potential terrorists, and proper communication with the media.

73. The CCPE is of the opinion that training in this field should also cover relevant national and international legal instruments and the case-law of the ECtHR.

6. Information management (exchange, cooperation)

74. Sharing of evidence or information with relevant units is among the most important elements of fighting terrorism and serious and organised crime. Such information should especially be shared with intelligence and security units, judicial units and, where appropriate, institutions that have been targeted numerous times by terrorist activities. Moreover, if deemed necessary and beneficial, evidence and information regarding terrorists may be directly disclosed to the public as well.

75. One of the possible weaknesses in investigations occurs when the police and other law enforcement and intelligence authorities do not share relevant received information with prosecutors at the right time. To avoid this problem, it could be advisable to promote joint investigations between relevant prosecutorial and police authorities. In member states, where prosecutors have investigative powers,

[13] For a list of the ECtHR cases related to terrorism, see at https://www.unodc.org/tldb/en/case-law-of-the-european-court-of-human-rights-related-to-terrorism.html. See also a book entitled “Counter-terrorism and human rights in the case law of the European Court of Human Rights” by Ana Salinas de Frias (2012), see at https://book.coe.int/eur/en/european-court-of-human-rights/4966-counter-terrorism-and-human-rights-in-the-case-law-of-the-european-court-of-human-rights.html.

they should coordinate and manage these actions.

76. For the purposes of greater efficiency, besides cooperation and joint resolution of specific problems in the operations, it has been proved to be effective to hold consultative meetings with members of multidisciplinary groups with the participation of prosecutors.

77. The CCPE stresses the necessity to enhance the efficiency of investigating and prosecuting the financing systems of terrorism and serious and organised crime through an intensive, systematic and consistent approach. First of all, there is a need to exchange information through a national data based information system. Furthermore, it is necessary to establish close cooperation between law enforcement agencies and banks, as well as other private legal entities and individuals (insurance companies, brokerages, notaries, lawyers, bailiffs, etc.). Another increasingly important investigative approach is the cooperation with internet service providers to follow virtual or digital money.

C. Fighting terrorism and serious and organised crime at international level

78. International cooperation between prosecutors has become a vital tool due to the increasing number of transborder crimes, in particular severe and serious and organised crime, including terrorism. The international scale of the relations between criminal groups and individuals, facilitated by globalisation and modern means of communications, means that a solely national focus on investigating and prosecuting those crimes, as well as preventing them, is not sufficient.

79. As affirmed by the CCPE, prosecutors should always show willingness to cooperate and "should treat international requests for assistance within their jurisdiction with the same diligence as in the case of their work at national level and should have at their disposal the necessary tools, including training, to promote and sustain genuine and effective international judicial cooperation"[14].

80. Fulfilling these requirements has become particularly urgent today, taking into account the level of attacks and challenges raised by terrorism and international serious and organised crime. Effective international cooperation is unavoidable not only to prevent, but also to investigate, prosecute, prove and legally punish perpetrators of those crimes and to confiscate and recover criminal proceeds. These objectives presume a shared maximum effort to detect and destroy the financing of criminal groups and individuals, their logistical and operational bases, the supply of false documents, weapons and explosives. A great challenge by modern criminals comes from their use of modern means of communication (including social media and networks in the internet), whose monitoring and legal interception require a global action.

81. Direct contacts between national prosecution services are an efficient and adequate way to raise efficiency and quality in cross-border criminal cases, not only by responding to requests for legal assistance, but also by promoting exchanges of information originating from parallel investigations and sometimes by setting up joint investigation teams. The CCPE encourages member states to improve legal basis for direct co-operation and to promote quick and flexible cooperation through the appointment of national focal points on certain types of crime like terrorism or serious and organised crime and/or by appointing liaison magistrates in other countries.

82. Harmonising national legislation with international legal standards, regarding both legal classification of criminal acts and the legality of the proceedings, would significantly ease cross-border cooperation. The same applies to the possible systematisation and harmonisation of national laws. A strong effort should thus be made to overcome obstacles arising from national cultures, which consider autonomy in criminal law as a valuable part of the identity of each national criminal system.

83. In order to improve and facilitate international cooperation, three main aspects should be considered: the legal basis for a smooth and effective cooperation; an adequate implementation of international legal instruments in every participating state; creation of practical and operational instruments.

84. Obstacles to international cooperation should be removed. Not knowing the colleagues on the other side of the border, not speaking the same language, not understanding other cultures in fighting crime cause natural hesitation to work together. For that purpose, international cooperation bodies and networks have been set up, both institutional and informal. Formal network organisations at law enforcement level,

[14] See CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, Rome Charter, Article XX.

such as Europol and Interpol, and at judicial level, such as Eurojust and the European Judicial Network, are swift and efficient ways to develop legal cooperation across borders, bridging gaps between legal systems, cultures and languages. States should provide those organisations with capacities needed for smooth and successful international assistance. Less formal organisations can also be useful in fighting crime across borders, like the International Association of Prosecutors, which contributes to systematising international standards related to the exercise of prosecutorial functions, and to connecting prosecutors all over the world through thousands of contact points (e.g. network of prosecutors dealing with terrorist cases established in 2015, and the network of prosecutors dealing with cybercrime created in 2010).

RECOMMENDATIONS

1. In order to respond to public demands for transparency and accountability, prosecution services should act strategically with a view to ensuring the highest possible level of quality and efficiency in the work of prosecutors.

2. Since every prosecution service carries out its functions within a legal framework, proper legislation is a paramount precondition for the quality and effectiveness of its work.

3. In order to improve and facilitate international cooperation, including in extradition, legal assistance and recovery of criminal proceeds, three main aspects should be considered: legal basis for smooth and effective cooperation; adequate implementation of international legal instruments in every participating state and creation of practical and operational tools.

4. The impartiality of prosecutors is an important requirement for improving the quality of human rights protection. Therefore, member states should ensure that prosecutors can perform their functions with maximum independence, free from undue influences, inducements, pressures, threats or interference, direct or indirect, coming from any quarter or for any reason.

5. The quality of prosecutors' work depends also on guarantees provided for the personal safety of prosecutors and their families. In particular, when prosecutors are involved in cases of terrorism and serious and organised crime, prosecution services should take proactive measures for the protection of their lives, health, freedom, physical integrity and property.

6. False or biased news on investigations might betray the trust of the public in the quality of justice and generate doubts as to the independence, impartiality and integrity of the prosecution system and the courts. Therefore, one should achieve an active information policy towards the media and the public.

7. In order to act with the efficiency and quality expected by the public, prosecutors should have adequate human, financial and material resources in order to give appropriate attention to all relevant matters in considering their cases, including specialised units in the framework of prosecution services. Providing them with the assistance of qualified staff, initial and continuous training, adequate modern technical equipment including centralised database systems, and other resources can relieve prosecutors from undue strain and therefore increase the quality of their decisions and the efficiency of prosecution services. All these measures should be encompassed within a mid-term or long-term strategic view.

8. The CCPE considers that standards for defining quality of the work of prosecution services and of prosecutors should contain both quantitative and qualitative elements, such as number of opened and closed prosecution cases, types of decisions and results, duration of prosecutorial proceedings, case management skills, ability to argue clearly in speaking and in writing, openness to modern technologies, knowledge of other languages, organisational skills, ability to cooperate with other persons within and outside the prosecutor's office.

9. Clear reasoning and analysis are basic requirements for the quality of prosecutors' work. Therefore, they should fully consider all relevant evidence and examine all relevant factual and other issues revealed by the investigation and by the parties. All decisions or actions by prosecutors should reflect such relevant evidence, be in accordance with the law and general guidelines which may exist on the subject. Decisions and actions by prosecutors should be justified in consistent, clear, unambiguous and non-contradictory manner.

10. Where appropriate and in line with national legislation, prosecution services should publish guidelines for prosecutors setting out in general terms the principles which should guide the initiation and conduct of prosecutions. Such guidelines should set out the factors to be taken into account at different stages of a prosecution, so that a fair, reasoned and consistent policy underpins the prosecution intervention. Prosecution services should determine indicators and follow-up mechanisms in a transparent way, primarily to motivate prosecutors for higher levels of professional work. Internal follow-up within prosecution services should be regular and based on the rule of law.

11. To increase the quality of prosecutors' work, an effective and impartial complaint system and periodical questionnaires carried out with relevant stakeholders have been shown to be beneficial in terms of identification of possible deficiencies in the system. A control mechanism monitoring the prosecutors' decisions, especially as regards offences without a complainant or victim, may make it possible to redress possible mistakes made during the investigation and prosecution phases.

12. Qualified and effective case management ensures that prosecutorial decisions are taken with respect for any time limits and are carried out in an objective, impartial and professional manner, respecting the presumption of innocence and the right to defence, as well as the rights of victims of crime. It is part of their competences that prosecutors should also monitor respect for these fundamental rights and freedoms throughout the proceedings of law enforcement agencies.

13. In cases of terrorism and serious and organised crime, member states should take appropriate and proportional measures to allow prosecutors the use of special investigation techniques.

Opinion No. 12 (2017)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The role of prosecutors in relation to the rights of victims and witnesses in criminal proceedings

1. Introduction: purpose and area of application of the Opinion

1. The Consultative Council of European Prosecutors (CCPE) was established by the Committee of Ministers of the Council of Europe in 2005 with the task of formulating *inter alia* Opinions on questions relating to the application of Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system.

2. The Committee of Ministers instructed the CCPE to prepare and adopt, in 2017, an opinion for its attention on the role of prosecutors in relation to the rights of victims and witnesses in criminal proceedings. The CCPE drafted this Opinion on the basis of responses of 31 member States to the questionnaire[1].

3. The purpose of this Opinion is to determine how prosecutors can fulfil their mission with the highest quality and efficiency as regards their role in protecting the rights of victims and witnesses affected by crime. The Opinion highlights, particularly, the role of prosecutors in protecting these persons when they are deemed to be vulnerable, during the different stages of criminal proceedings as well as during the execution of court verdicts, since victims and witnesses can also be vulnerable during the execution phase and even thereafter.

4. The CCPE notes that in member States, where prosecutors perform functions outside the criminal justice field, the principles and recommendations of this Opinion also apply, *mutatis mutandis*, to these functions.

5. Member States of the Council of Europe have diverse legal and organisational frameworks for prosecution services, as well as common features. For instance, not all prosecution services have a function of criminal investigation. Therefore, not all the elements discussed in this Opinion will apply to all member States. However, prosecutors in all member States should pay particular attention to protecting the rights of victims and witnesses in criminal proceedings and they should act with strict respect for the law and human rights.

6. This Opinion acknowledges the importance of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as the "ECHR"), as well as of the relevant case law of the European Court of Human Rights (hereafter referred to as the "ECtHR"). It has also taken into account several Council of Europe conventions[2] and other instruments of criminal law including Resolution (77) 27 on the compensation of victims of crime, Recommendation R (85)11 on the victim's position in the framework of criminal law and procedure, Recommendation R(87)21 on assistance to victims and the prevention of victimization, Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice, Guidelines on the Protection of Victims of Terrorist Acts (2005), Recommendation Rec(2006)8 on assistance to crime victims and Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice system. This Opinion is also based on most previous CCPE Opinions[3].

[1] See the document CCPE(2017)1 or http://www.coe.int/t/dghl/cooperation/ccpe/opinions/Travaux/Compilation_CCPE_avis%2012.pdf

[2] See the list of such CoE Conventions in footnotes 20 and 21.

[3] See in particular Opinion No. 1 (2007) on "Ways to improve international co-operation in the criminal justice field", Opinion No. 5(2010) on public prosecution and juvenile justice, Opinion No. 8(2013) on relations between prosecutors and the media, Opinion No. 9(2014) on European norms and principles concerning prosecutors, including the "Rome Charter", Opinion No. 10(2015) on the role of prosecutors in criminal investigations, Opinion No. 11(2016) on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime.

7. The CCPE has also taken into consideration relevant United Nations documents[4] as well as the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors (IAP) in 1999.

2. Definitions

8. For the purposes of this Opinion, victims are persons who have directly or indirectly suffered any physical, emotional, social, economic or any other harm as a result of a criminal offence. This definition does not exclude legal persons who may avail themselves of the applicable provisions of this Opinion. A "witness" means a person who, notwithstanding his/her status towards the procedural law, is in possession of information relevant to the disclosure, apprehension, determination and evaluation of facts subject to investigation and court proceedings.

9. Although a victim of a crime may not necessarily be a party in criminal proceedings, he/she plays an essential role in the criminal justice process. Victims may also act as witnesses and should thus be treated as such, if the national law does not provide for a specific procedural regime for victims.

10. For the purpose of this Opinion, vulnerable persons, whether victims or witnesses, are those who, due to their age (children, the elderly), situation, maturity or disability (physical or mental), are at a higher risk of harm (physical or emotional) than others. Victims of torture and other forms of inhuman and degrading treatment are particularly vulnerable, and special regard should be had by prosecutors in this respect.

11. When this Opinion makes reference to law enforcement agencies, these may be deemed to include, in member States, the police, investigation agencies, security forces, prosecutors or prosecution services, within the framework of their respective competence.

3. The rights of victims and witnesses and protective measures

12. Anyone, who is a victim and/or a witness of a crime, may suffer damages of a physical, emotional, social, economic or other nature, from which some may never fully recover. These damages can also, directly or indirectly, affect persons closely related to them.

13. In order to respect their human dignity and to guarantee their security, criminal justice systems should include a set of rights and protective measures for victims and witnesses which should be respected by all actors in the criminal process.

14. Such provisions can also contribute to ensure better cooperation by victims and witnesses who feel duly protected. It is, moreover, essential to ensure that victims and witnesses, particularly when they are vulnerable, receive appropriate care, counselling and support.

15. Victims should be informed of all their representative and participatory rights and duties and have a rapid and effective response to their needs, for example by having access to measures aiming to protect them and to adequate compensation for damages suffered. It is also important that the criminal justice system provides adequate responses to prevent secondary victimisation (see paragraphs 32-38 below).

16. There are particular protection regimes that may be needed by especially vulnerable persons. This notwithstanding, in general, victims and witnesses should be treated fairly and according to the principle of equal treatment for all.

[4] See in particular the Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power, approved by the UN General Assembly in 1985, the Guidelines on the Role of Prosecutors (1990), the United Nations Convention on Transnational Organized Crime (2000) and the 2003 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, the Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide (2014).

17. Victims' and witnesses' rights may vary according to the stage of the criminal proceedings in which they participate. Concerning the reporting of a crime, a victim has the right[5] to bring the crime to the attention of the relevant authorities and to be informed – from the initial contact with the police or any prosecuting authority and in a language he/she can understand:

- of the procedures whereby a complaint may be lodged;
- of his/her rights during the procedure and the trial;
- of the availability of legal aid, advice and assistance;
- of the possibility, where appropriate, to claim damages (emotional and/or economic);
- of the possibility, where appropriate, of reimbursement for trial and other related costs and expenses.

18. The victim is also entitled to request and receive, in accordance with the law, information:

- about the progress of the proceedings, the evidence taking and the prosecutor's decision to prosecute (and for what offenses) or not to prosecute, or to propose alternative dispute resolution and the reasons supporting these decisions;
- about the venue and date of the trial, his/her right to be present and to be heard in court proceedings, as well as, where provided by law, to be legally represented, to have access to files and records and to lodge appeals;
- about any protection measures that might be ordered on his/her behalf, namely aiming at preserving his/her anonymity, personal data and safety in accordance with the nature of the crime and the circumstances of the case;
- about available social, medical and other help (for instance, victims' support services, health facilities, anti-violence centres and shelter houses), which he/she may benefit from;
- about changes regarding the prison sentence imposed upon the convicted person, and the date of his/her possible release;
- about regional and international individual/collective complaints mechanisms and how to access them.

19. In this context, there may be:

- participation of experts in the hearing, such as of psychologists or medical and other experts, to assist prosecutors, law enforcement agencies or courts (for instance in cases of sexual offences, domestic violence, human trafficking or child pornography),
- the intervention of specialised units and competent well-trained officers to participate in the interrogation or examination;
- the use of officers of the same gender as the victim if appropriate, especially for certain kinds of crimes (e.g. in cases of sexual crimes or crimes against sexual freedom, domestic violence) to participate in the interrogation or examination;
- specific state programmes for the protection of witnesses;
- the need to avoid contacts with the offender, and to avoid victims repeatedly giving evidence, if not strictly necessary, in order to prevent secondary victimisation;
- the use of special conditions for giving evidence (e.g. special premises fitted for children, safe waiting rooms, special rooms within the courts or even outside courts' premises, interrogations taking place during out of office hours, use of two-way mirrors, of video and audio recording, closed-circuit television or live television links for victim's testimony, if necessary with face and voice distortion by technical means).

20. Victims and, where appropriate, witnesses should also be informed, at least in particularly serious circumstances, of the defendant's and/or offender's arrest, release or evasion.

[5] In some legal systems, this reporting may be seen as a duty.

4. Role of prosecutors in protecting the rights of victims and witnesses

Role and duties of the prosecutor towards victims and witnesses

21. The role of prosecutors with regard to protecting the rights of victims and witnesses are in many member States provided for by law, but may also stem from legal traditions, prosecution policies or ethical rules[6]. It is the duty of prosecutors to be guided by the standards of professional conduct as defined therein.

22. Prosecutors should always treat victims and witnesses in a respectful, non-discriminatory and impartial manner with due regard to the personal circumstances of these individuals.

23. Prosecutors should exercise sound judgment in the performance of their duties, including when dealing with victims and witnesses, particularly when vulnerable.

24. Prosecutors should take proper account of the lawful interests of witnesses and of the views and concerns of victims when their personal interests are affected, and promote or take actions to ensure that victims and witnesses are informed of both their rights and duties, and of developments in the criminal proceedings.

25. At all stages of the proceedings, prosecutors should aim to protect the dignity, private and family life and personal security of victims and witnesses, as well as to secure their procedural rights, including the right to information, and, where appropriate, the victims' right to receive legal aid and compensation.

26. The role of protecting the rights of victims and witnesses may, depending on the national legal system, be carried out in cooperation with, or resorting to, the law enforcement agencies and the courts.

27. Prosecutors should require victims and witnesses to attend judicial proceedings whenever their testimony is essential to the prosecution and the defence or is required by law. Moreover, given the importance of victim/witness testimony, member states should establish both legislative and institutional mechanisms for victim/witness interrogation so that they can testify freely and in safety.

28. According to the ECtHR, in criminal proceedings, the rights of defence may be balanced for the purpose of protecting the witness/victim, in particular the respect for their private life. Thus, certain measures may be taken for the particular purpose of protecting the witness/victim[7].

29. Special protective measures are the mechanisms that guarantee the physical and psychological integrity of victims/witnesses, as well as, where appropriate, of members of their families, and the inviolability of their property.

30. In this respect, special protective measures should, where appropriate, be provided for victims/witnesses before, during and after they testify, in order to respond to the possible concern they may have for their lives, health and property or for those of their family members.

31. Prosecutors, police and other law enforcement officers should be able to apply special protective measures according to the circumstances of the criminal case and the extent to which the life, health and property of victims/witnesses or their family members are at stake.

Avoiding secondary victimisation

32. Secondary victimisation is a harm which is not caused directly by an offender, but originates as a consequence of actions of prosecutors, law enforcement agencies or judicial authorities having an impact on the victim. Prosecutors should seek to avoid secondary victimisation being caused by their actions.

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[6] See also Recommendation Rec (2000)19, paragraphs 32 and 33:
32. Public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy, or see to it that such measures have been taken.
33. Public prosecutors should take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.

[7] See the judgment of the ECtHR in the case of *S. N. v. Sweden*, 2 July 2002.

33. Certain types of victims, especially of domestic violence, sexual abuse, trafficking in human beings, terrorism and illegal migration may meet conditions for a special status – the status of an especially vulnerable victim – due to violence or the threat of violence they may be subject to, as well as to the risk of secondary victimisation.

34. An unprofessional approach by prosecutors, police, other law enforcement or judicial authorities, may also lead to secondary victimisation. Lack of understanding of the particular situation of victims may give rise to feelings of isolation, uncertainty and loss of faith in the criminal justice system on the part of the victims.

35. Unprofessional, lengthy or late investigation and prosecution can lead to an irreparable loss of evidence, or contravene the requirement for the case to be completed within a reasonable period of time or relevant statutory limitation period.

36. For certain types of criminal activities (e.g. domestic violence, sexual abuse, trafficking in human beings, terrorism, illegal immigration), prosecutors should be able to specialise, gain knowledge of judicial psychology and benefit from relevant professional training, to enable them to deal with these types of cases expeditiously and competently.

37. Where a second interrogation of vulnerable victims is not possible, convenient or essential, use should be made of audio and video recordings, although with due respect for the adversarial principle.

38. In order to avoid secondary victimisation, interrogation of young children and other vulnerable persons should be carried out without the offender being present, in special interrogation rooms and using audio and video recordings, or through video-conference equipment. While respecting the adversarial principle, these records should be usable within criminal proceedings as evidence[8], to avoid unnecessary repetition.

Special concern about particular groups of victims (for example of terrorism, trafficking in human beings, domestic violence, sexual abuse)

39. While all victims of criminal offences deserve the attention of the police and law enforcement and judicial authorities, some must benefit from a special regime because of the specific nature of the trauma they have suffered or the seriousness of the crime they have been subject to.

40. Prosecutors, where it is within their competence, should aim at early detection of these cases and pay attention, in particular, to:

- securing early testimony so that this may later be used as evidence in court proceedings;
- early initiation of criminal investigation and prosecution and adequate supervision of their outcome;
- prevention of unnecessary repeated victim testimony;
- appointment, where appropriate, of a guardian to a child participating in the proceedings;
- requesting expert advice and formulating the questions for the experts with precision.

Domestic violence and sexual abuse

41. Domestic violence is frequently characterised by a significant period of time of repetitive attacks, aggravating aggressiveness of the offender, emotional interdependence between the offender and the victim and by secrecy (taking place most of the time in private). Very often, a victim does not wish to cooperate with law enforcement authorities, due to material and psychological dependence on the offender, shyness and an assumption that the offender´s behaviour will improve. Victims may sometimes wish to play down the seriousness of the offender's actions, refuse to testify, change their testimony or assume some guilt themselves. If a victim is willing to testify, he/she normally provides maximum information immediately after an incident (very often it is the last and the most serious attack; sometimes, however, it may be after the first attack, when a child is involved).

[8] See Art. 23 and 24 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime - right to protection of victims with specific protection needs during criminal proceedings. See also Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010).

42. Prosecutors, where it is within their competence[9], should aim at early detection of these cases and pay attention, in particular, to:

- differentiation of events falling under the concept of domestic violence;
- the need for the proper legal qualification of an act leading to domestic violence; in this respect, they should not focus only on the most recent attack which led a victim to file a criminal complaint but also look for previous criminal incidents (there is a risk of the qualification of previous attacks as another or less serious crime);

43. Intra-family violence, a criminal phenomenon which is often practically invisible, requires investigators and prosecutors to listen carefully to victims in order to detect, as soon as possible, violations and to put an end to violent behaviour. Interrogations should be carried out with all necessary legal guarantees. It is also important to cooperate with agencies and public and private institutions that may provide assistance to victims of domestic violence.

44. To avoid harmful consequences for a victim in his/her daily life, it should be ensured, *inter alia*, where appropriate, that the violent spouse rather than the victim leaves the home of the family or is subject to a restraint order and prohibited from approaching it, and that the victim can benefit from the use of modern technologies, such as to have a telephone to warn the competent authorities in case of imminent danger.

45. It is essential for prosecutors, police and other law enforcement authorities to pay particular attention to receiving, and listening to victims of sexual abuse, especially if the victim is a child or a person with mental disabilities.

Trafficking in human beings

46. Trafficking in human beings is a criminal phenomenon with different forms, such as: trafficking in migrants, sexual exploitation or forced labour[10]. Victims are often vulnerable persons concerned about the aftermath of the offense and avoiding retaliation by the offenders. It is therefore important that prosecutors, police or other law enforcement and judicial authorities help them to receive the necessary support to ensure their protection and to get them out of their criminal environment.

47. The authority concerned should pay attention in particular to:

- the effective investigation of a case;
- the early identification of a victim or potential victim of trafficking in human beings;
- the proper legal qualification of an act as a crime of trafficking in human beings and not as another, especially less serious, crime;
- the concrete and effective protection of the rights of a victim or potential victim of trafficking in human beings;
- considering new forms of trafficking in human beings, e. g. early and/or forced marriages and marriages of convenience, forcing victims, mainly children, to beg and commit crimes;
- the possible links of trafficking in human beings with any criminal activity related to illegal migration;
- the application, where possible, of the non-punishment principle towards victims of trafficking in human beings[11].

[9] See in particular the Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence.

[10] Some terms - slavery, servitude, and forced labour can be found in the ECtHR case law related to Art. 4 of the Convention. The definition of these terms should be precise but flexible and capable of being adapted to differing circumstances. Procedural aspects of Art. 4 include positive obligations by Contracting States to effectively prosecute and punish any crime the aim of which is to keep a person in slavery, servitude, or forced labour – i.e. a procedural obligation to investigate effectively offences committed within the state's jurisdiction. Effective investigation has to be impartial, independent, thorough and sufficient, prompt and subjected to public scrutiny, and it is not *a priori* a question of result but of the means used.

[11] The non-punishment principle is not contrary to human rights. See the ECtHR in the case of *Rantsev v. Cyprus and Russia* and in the case of *Siliadin v. France* – a part of Art. 4 of the Convention. See also Council of Europe Convention on Action against Trafficking in Human Beings (Art. 26).

48. Within the framework of illegal migration, where the lives and health of migrants are very often endangered, prosecutors, police and other law enforcement authorities should pay attention in particular to:

- possible links between illegal migration and trafficking in human beings and the possible growth in the number of cases of trafficking in human beings in connection with immigrants;
- the identification of smugglers and criminal smuggling networks;
- the identification of crimes related to illegal migration, e.g. falsification of documents (ID cards, visa, residence permit, registration of asylum seekers) and links of smugglers to other criminal activities (trafficking in human beings, drug abuse, criminal activity affecting property);
- monitoring social media (advertisement of services, driver recruitment, information on migratory route development, the situation in destination countries, advertisements such as "looking for a passenger");
- focusing on unaccompanied child migrants or other isolated persons – they are more likely to be potential victims of trafficking in human beings because of their vulnerable position;
- the contexts of illegal migration and terrorism and their possible interconnection.

Terrorism

49. Acts of terrorism often leave victims seriously traumatised and isolated after the events. It is thus important that prosecutors, according to their legal competence and as soon as the facts are known, pay attention to the fate of victims during investigations and throughout the whole duration of the proceedings[12].

50. It is particularly essential for families and relatives of the victims, to be informed as soon as possible of their fate. The announcement of the victims' condition, whether injured, deceased or missing, should be made in a humane manner. They should also receive adequate and free emergency assistance while ensuring strict respect for their privacy.

51. Every precaution should be taken when returning bodies and objects belonging to victims of acts of terrorism.

52. Prosecutors should also seek to transmit to victims, where appropriate, reliable information on the facts and progress of investigations, paying particular attention to informing victims before information is shared with or reported by the media.

53. Victims of acts of terrorism are often seriously affected in their physical and psychological integrity but also in their financial situation. Prosecutors should ensure, as far as possible, a rapid processing of cases allowing for prompt and adequate compensation for any harm suffered.

***Use of special measures or procedures to protect and to rehabilitate victims*/witnesses**

Support and assistance

54. Sufficient material, human and financial resources are needed in order to provide appropriate protection and assistance to victims and witnesses. Human resources should involve not only trained prosecutors, but also psychologists, pedagogues and other competent experts.

55. As public institutions and NGOs often play an important role in the fulfilment of programmes and projects on victim and witness assistance, effective cooperation should be organised with them.

[12] See also the Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers on 2 March 2005.

Testimony of victims and witnesses especially when they are vulnerable: ability to provide sworn testimony, assessment of risk, and other protective measures

56. To avoid secondary victimisation, prosecutors should assess whether, by interviewing victims and witnesses, especially when vulnerable, they are likely to provide relevant information for the case.

57. Vulnerable victims and witnesses should be fully informed in advance of the consequences and the scope of their interrogation.

58. Prosecutors should respect the right of children to have appropriate representatives in the proceedings.

59. Where a sworn testimony is necessary, the victim or witness should be warned about the consequences of such testimony.

60. In those legal systems, where a victim/witness can be asked to take an oath, when there is an objection to being sworn either because he/she has no religious belief or it is contrary to his/her religious belief, he/she should be allowed to make his/her solemn affirmation (statement) and this should be recognised as having the same force and effect as if he/she had taken the oath.

61. Participation of particularly vulnerable victims and witnesses in criminal proceedings should be subjected to risk management analysis mechanisms, revealing possible threats to these persons, in order to provide for proper and proportional protective measures and to monitor the effectiveness of their application.

The effect of a refusal or an inability of children, persons with mental disabilities or other vulnerable persons to provide evidence

62. Subject to law, any person can be interrogated regardless of his/her age if he/she is aware of circumstances relevant for the criminal case. If prior to the child interrogation an issue arises as to whether the child is able to correctly understand and frame the circumstances of the criminal case, or whether conducting procedural activities may have adverse psychological impact on the child, the procedural activity should be conducted based on the assessment by an expert.

63. It is up to the court's discretion to decide, with the help of experts, whether a person with mental disabilities is able to give evidence, based on the ability of the person to understand and properly express the circumstances of the case, and that doing so will not impair his/her health.

Assistance of experts to victims and witnesses

64. Victims and witnesses who have difficulties in understanding the questions and producing evidence may testify with the help of appropriate experts both at pre-trial and trial stages so as to ensure coherent communication.

65. An expert may explain questions to the person testifying, as well as his/her answers, to ensure adequate communication with the prosecutor and the court. The participation of an expert should not reduce the duty of the prosecutor to make sure that the questions put to the victim and the witness are relevant and correspond to his/her level of intellectual maturity. Domestic legislation and/or other instruments should envisage rules for the appropriate behaviour of experts in this respect.

Special measures regarding admissibility of evidence

66. Domestic legislation should envisage special mechanisms to ensure admissibility of evidence obtained using special means. Video-recording of interrogations, questioning in another location via video conference/live TV link, or showing previously video-recorded testimony may be used in this context. These mechanisms should provide appropriate guarantees aimed at ensuring a fair trial, respect the guarantees of the adversarial principle set forth for the accused under Article 6.3 (d) of the ECHR, ensure the reliability of the evidence, and protect the rights of the persons against whom the testimony is made.

Avoiding examination of victims and witnesses several times and cross-examination about their personal lives

67. Where within the scope of their supervisory functions, prosecutors should take measures to reduce the number of interrogations of children, persons with mental disabilities and vulnerable persons in general. These persons should be questioned, if possible, once and only when strictly necessary. The interrogation should be as comprehensive as possible, in order to avoid repetition. When a psychologist or other relevant expert finds that direct interrogation may harm a child or person with mental disabilities, consideration should be given to the interrogation being conducted via adequate technical means.

68. Direct communication between the vulnerable victim/witness and the alleged offender should be as limited as possible, especially in cases of sexual exploitation, sexual abuse and sexual violence, and only when strictly necessary to ensure a fair trial. This may include permitting a victim**/**witness to give evidence from behind a screen or other similar device so as to prevent the victim**/**witness seeing the accused.

Possibility to exclude the public from trials

69. Trials should normally take place in public. In very limited circumstances, however, domestic legislation should envisage the possibility of closed hearings (*in camera)* (for instance where the presence of the public may violate the right of the victim or witness to private life or may cause mental or other harm to a child). In any event, it should be a matter for the court to decide, always ensuring that the requirements of fair trial and transparency are duly observed.

The role of prosecutors and other actors in the enforcement of these rights and in case of their violation

70. Prosecutors, where appropriate, should co-operate, with police and other law enforcement and judicial authorities, victim support institutions, mediation and reconciliation advisory units and NGOs. The prosecutor, as appropriate, should co-operate with institutions (social service centres, community centres, hospitals, educational institutions, witness protection and victim rights protection units) or direct victims to such institutions to have them benefit from support and assistance (legal, psychological, financial in matters of housing, education and employment) in order to facilitate post-violence recovery.

71. The victim should be informed of available options, such as mediation, reconciliation and restorative justice in the matter of access to justice[13]. Taking into account his/her age, maturity and mental capacity, the victim should be informed, in this respect, about the risks and benefits of the choices available.

72. The prosecutor, as appropriate, should take necessary measures for the provision of sufficient and timely information to victims about available support services and legal measures, in a language they can understand[14].

73. The prosecutor should, where appropriate, use all legal remedies against ungrounded decisions of the police and other law enforcement authorities taken to the detriment of victims and witnesses.

5. Training

74. Professional training, which is a right and a duty for prosecutors in general, is crucial in a field with possible social, medical and psychological implications, like the relations with victims and witnesses of crimes and vulnerable persons involved in criminal proceedings. Training programmes should include exchange of information and experiences on good practices and operational models at national, regional and international level.

75. Protection of rights of victims and witnesses should be recognised as essential for the due process of law and for the fairness of trials. Therefore, this topic should be included in prosecutors' training programmes, both in initial and in-service training, in order for it to become a significant component of their professional knowledge and culture.

76. Certain types of crimes present particular challenges as far as victims/witnesses are concerned. For instance, in cases of organised crime, terrorism or cybercrime, witnesses can feel exposed to impending

[13] This approach is also a requirement of the UN Basic Principles on the use of restorative justice programmes in criminal matters (2002) and Council of Europe Recommendation No. R (99)19 on mediation in criminal matters.
[14] See Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011).

threats; in sexual or domestic violence or stalking, vulnerable victims/witnesses are exposed to specific constraints; in crimes committed via the internet, a victim can feel helpless to oppose aggressions, identity thefts, etc.

77. Each of these challenges can be better faced by prosecutors who are well aware of possible psychological effects on the persons involved and of appropriate techniques to relate to vulnerable persons. Specialised training is therefore recommended, with the involvement not only of investigators and members of other legal professions, but also of experts of relevant different disciplines and NGOs.

78. Training programmes should refer to the adequate approach to various types of victims/witnesses, to their respect and protection and to the effectiveness of their rights within the framework of criminal proceedings. Appropriate techniques of examination and interrogation should be considered, to obtain truthful and comprehensive testimony, while avoiding any negative impact on the person involved.

79. Skilled and trained prosecutors may contribute to train prosecutorial staff, police and other law enforcement agencies, so that the area of law enforcement as a whole may be permeated by the same professional knowledge and culture and have the same appropriate operational tools.

6. International cooperation

80. Due to the widespread internationalisation of various aspects of social life, international cooperation against crime, including judicial and police cooperation as well as technical assistance, is of growing importance to the protection of the rights of victims/witnesses in criminal proceedings, in particular in cases of terrorism and transnational crime, e.g. trafficking in human beings and in human organs, sexual exploitation and sexual abuse of children and cybercrime.

81. The role of prosecutors in relation to international cooperation in combating crime and, thus, in the protection of witnesses and the rights of victims is of great importance, especially concerning formal and informal exchange of expertise and information both on request or spontaneously (e.g. sharing fingerprints and DNA data), extradition[15], mutual legal assistance[16], transfer of proceedings in criminal matters[17], and seizure, confiscation and recovery from abroad of the proceeds from crime[18]. Efforts to update and increase the existing legal basis for such co-operation should continue with the active participation of all prosecution services in Europe.

82. International cooperation for the confiscation of assets abroad and their recovery is of the utmost importance to victims[19]. The CCPE encourages therefore member States to develop and enhance common legal grounds for recovery of confiscated assets in the course of international cooperation.

[15] *See*, first of all, the European Convention on Extradition (1957, ETS № 24) and 4 additional protocols thereto (1975, ETS № 086; 1978, ETS № 098; 2010, CETS № 209; 212, CETS № 212).
[16] *See*, first of all, the European Convention on Mutual Assistance in Criminal Matters (1959, ETS No. 30) and 2 additional protocols thereto (1978, ETS № 099; 2001, ETS № 182).
[17] *See* the European Convention on the Transfer of Proceedings in Criminal Matters (1972, ETS № 073).
[18] *See*, e.g., the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990, ETS № 141) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005, CETS № 198).
[19] As a novelty to the recent system, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005) imposes an obligation on the Parties to give priority consideration to returning the confiscated property to the requesting Party, to the extent permitted by domestic law and if so requested, to ensure that victims are compensated or that the confiscated property is returned to their legitimate owners (Art. 25, para 2).

83. Prosecutors should be familiar with and use relevant international instruments in the context of the protection of victims and witnesses, particularly the European Convention on the Compensation of Victims of Violent Crimes (1983, CETS No. 116)[20] and recent Council of Europe's criminal law conventions with provisions relating to the protection of the rights of victims and witnesses and members of their families[21].

84. Prosecutors should also use in international co-operation, to their full extent, new technologies in order to ensure the legitimate rights of victims and witnesses (e.g. possibility to give testimony from abroad without travelling, in particular by video conference and to take electronic evidence from abroad).

85. Prosecutors should effectively use and support existing international co-operation bodies such as Eurojust and judicial networks (like the European Judicial Network). Wide use should be also made of such modern tools of co-operation as controlled delivery, covert investigations, and joint investigation teams.

86. Taking into account the White Paper on Transnational Organised Crime (2014), in particular its provisions related to the strengthening of international judicial co-operation and witness protection, the CCPE sees an interest in the implementation of the measures provided for in the Council of Europe Action Plan on Combating Transnational Organised Crime (2016-2020)[22], which includes, inter alia, the co-ordination of international witness protection programmes with the allocation of appropriate budgets, developing guidelines on protected witnesses' rights and duties, and updating relevant Council of Europe's instruments and publications[23].

87. International co-operation in cases of witness protection should be developed further, while taking into account national and international good practices in this domain[24].

[20] This Convention entered into force on 1 February 1988 and has so far received 26 ratifications/accessions and eight signatures not followed by ratification, and is the first international treaty specially devoted to the protection of the right of victims to compensation concluded within the framework of the Council of Europe.

[21] See, e.g. the Council of Europe Convention on the Prevention of Terrorism (2005, CETS № 196), Art. 13; the Council of Europe Convention on Action against Trafficking in Human Beings (2005, CETS № 197), Chapter III; the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007, CETS № 201), Chapter IV; the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011, CETS № 210), Chapter IV; the Council of Europe Convention on counterfeiting of medical products and similar crimes involving threats to public health (2011, CETS № 211), Chapter IV; the Council of Europe Convention on the Manipulation of Sports Competitions (2014, CETS № 215), Art. 21; the Council of Europe Convention against Trafficking in Human Organs (2015, № 216), Chapter IV.

[22] Doc. CDPC (2015) 17 Fin, 2 March 2016.

[23] In particular, Recommendation Rec(2005)9 on the protection of witnesses and collaborators, "Protecting witnesses of serious crime -Training manual for law enforcement and judiciary" (2006), "Terrorism: Protection of witnesses and collaborators of justice" (2006).

[24] See, e.g. UNDCP Model Witness Protection Bill (2000) and the Agreement on Protection of Participants of Criminal Proceedings, signed in the framework of the Commonwealth of Independent States on 28 November 2006 and entered into force on 13 April 2009.

RECOMMENDATIONS

1. **Prosecutors must perform their duties with utmost quality and efficiency, in protecting the rights of victims and witnesses, during the various stages of criminal proceedings, including during the execution of court verdicts.**

2. **Criminal justice systems should include a comprehensive set of rights and protective measures for victims and witnesses which should be respected by all actors in the criminal process. Particularly when they are vulnerable, victims and witnesses should receive appropriate care, counselling and support.**

3. **Victims and witnesses should receive fair and dignified treatment by prosecution services and should be informed of all their rights, including representation and participation, and their needs should promptly be responded to (by ensuring protective measures, compensation for damages, etc.).**

4. **At all stages of the proceedings, prosecutors should aim to protect the dignity, private and family life and personal security of victims and witnesses and to secure their procedural rights, including the right to information on the progress of the procedure and, where appropriate, the right of victims to receive legal aid and compensation.**

5. **Prosecutors, police and other law enforcement officers engaged in criminal proceedings should be able to apply special protective measures according to the circumstances of the criminal case and the extent to which the life, health and property of victims/witnesses or their family members are at stake.**

6. **Prosecutors should have the necessary skills to prosecute particularly sensitive cases such as terrorism, human trafficking, domestic violence and sexual assault and should cooperate with all relevant actors, either public or private, to handle such cases more effectively and in order to avoid secondary victimisation. Specially trained prosecution units may be established in that regard, where necessary.**

7. **Sufficient material, human and financial resources should be made available to prosecutors for providing appropriate protection and assistance to victims and witnesses. Victims should also be informed about regional and international individual/collective complaints mechanisms and how to access them.**

8. **Victims should be informed of available options for access to justice such as mediation, reconciliation or restorative justice.**

9. **Protection of rights of victims and witnesses, particularly when vulnerable, as well as an adequate approach to various types of victims/witnesses, should be part of the initial and in-service training programmes of prosecutors, in order to become a significant component of their professional knowledge and culture.**

10. **In the interests of victims and justice, prosecutors should use and support existing international cooperation bodies and promote the development of existing and new instruments of international cooperation. Particular attention should be paid, in this regard, to the confiscation of proceeds of crime and the recovery of confiscated assets.**

Opinion No. 13 (2018)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

Independence, accountability and ethics of prosecutors

I. INTRODUCTION, PURPOSE AND SCOPE OF THE OPINION

1. The Consultative Council of European Prosecutors (CCPE) was set up by the Committee of Ministers of the Council of Europe in 2005 with the task of formulating particularly opinions on matters concerning the implementation of Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system.

2. Following the decision of the Committee of Minister adopted in this framework,[1] the CCPE decided to prepare and adopt in 2018 an Opinion for its attention on the independence, accountability and ethics of prosecutors.

3. For this purpose, bearing in mind that many international instruments are already devoted to the independence of prosecutors, the CCPE relies in particular on its Opinion No. 4 (2009) entitled “Judges and prosecutors in a democratic society" (Bordeaux Declaration), adopted jointly with the Consultative Council of European Judges (CCJE), and recalls that the independence of public prosecution is an indispensable corollary to the independence of the judiciary. The CCPE refers also to its Opinion No. 9 (2014) entitled “European norms and principles concerning prosecutors” (Rome Charter), where it is mentioned that the general tendency to enhance the independence and effective autonomy of prosecution services should be encouraged, prosecutors should be autonomous in their decision-making and perform their duties free from external pressure or interference.

4. The CCPE, in this Opinion, addresses possible interferences into prosecutors' independence and pressures, in particular political pressures, exerted on them, as it has been observed in some member States. By gaining insight into the issues linked to independence, accountability and ethics, the CCPE seeks to raise awareness among prosecutors and relevant authorities as regards relevant developments and reforms in these areas.

5. The CCPE also takes into consideration the Council of Europe's Plan of Action on strengthening judicial independence and impartiality in member States,[2] as well as the Report of the Secretary General of the Council of Europe – 2016 on the “State of democracy, human rights and the rule of law - a security imperative for Europe”.[3]

6. The CCPE recalls here, as it did in the course of its previous work, that the functions of prosecutors and the way in which they exercise them, should be consistent with respect for the right of individuals to a fair trial laid down in Article 6 of the European Convention on Human Rights (hereafter referred to as the ECHR). Prosecutors also exercise their functions within the framework of the rule of law principle, which requires respect for a certain number of fundamental values, such as impartiality, transparency, honesty, prudence, fairness, and contributing to the quality of justice. In order to increase public confidence in the justice system, prosecutors must always be concerned with making sure that these values are respected and that they guide prosecutors' activities.

7. In recent years, the European Court of Human Rights (hereafter referred to as the ECtHR) has developed important case law in support of the prosecutors' independence, regardless of whether they are considered to be a judicial authority or not. The prosecutor who directs and controls the first phase of criminal proceedings is to be considered "the advanced watchdog of human rights" and this essential role is to be played throughout the process.[4]

[1] 1300th meeting of Deputies Ministers, 21-23 November 2017.
[2] Prepared at the initiative of the Secretary General of the Council of Europe and adopted at the 1253rd meeting of Deputies Ministers, 13 April 2016.
[3] Presented at the 126th Session of the Committee of Ministers, 18 May 2016 (Sofia).
[4] See the selection of the case law of the ECtHR concerning the prosecutors' action in the annex to the present Opinion.

8. In their systems of administrative and hierarchical organisation, member States, if they intend to confer or maintain the status of judicial authority for prosecutors within the meaning of the ECHR, should ensure that they have all the guarantees, in particular required for independence, attached to this status, as specified by the ECtHR case law.[5]

9. The tasks assigned to prosecutors vary from State to State in line with the systems in force. Thus, the legal systems of some member States provide for the principle of "legality" as the basis for prosecutions, some other member States provide for the principle of "discretion" or "opportunity"; others have a mixture of these principles. Some member States entrust prosecutors with a genuine supervision role over police and investigators and others do not; in some systems, prosecutors intervene in the hearing and in other systems their role in the criminal trial remains limited. In many member States, prosecutors enjoy competence in carrying out the public action and prosecution and in controlling the legality of investigations which will be submitted to judges as a basis for their decisions. They also sometimes have competence over the enforcement of sentences and the supervision of prisons.

10. The principles of independence, objectivity and impartiality set out in this Opinion and previous Opinions of the CCPE, concerning criminal cases, apply *mutatis mutandis* to non-criminal competences of prosecutors.

11. Finally, the CCPE wishes to recall - without repeating their content - some relevant international instruments in this field, such as those of the Council of Europe (in particular Opinions of the CCPE and the CCJE and the "European Guidelines on ethics and conduct of public prosecutors - the Budapest Guidelines")[6] and of other international organisations.[7]

12. In light of these instruments, and within a European context where the ways in which prosecutors carry out their tasks are permanently evolving, this Opinion does not aim to enact a fixed European code but rather a sort of "hard core" of principles that should be provided for the relevant authorities and guide prosecutors' daily action and their behaviour, both inside and outside their work, and to which they can refer.

13. The independence, accountability and ethics of prosecutors should be concepts included in a statute for prosecutors provided in national law, or even in the constitutions of member States.

14. Taking into account the proximity and complementary nature of the missions of judges and prosecutors, as well as of requirements in terms of their status and conditions of service,[8] prosecutors should have guarantees similar to those for judges.

II. CONCEPTS

Independence of prosecutors

15. "Independence" means that prosecutors are free from unlawful interference in the exercise of their duties to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind.

16. Independence applies both to the prosecution service as a whole, its particular body and to individual prosecutors in the sense explained below.

[5] See the selection of the case law of the ECtHR concerning the prosecutors' action in the annex to the present Opinion.
[6] Adopted at the Conference of Prosecutors General of Europe on 31 May 2005. See also documents of the Venice Commission (in particular, the Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service adopted in December 2010, CDL-AD(2010)040).
[7] See, for instance, instruments and documents of the European Network of Councils for the Judiciary (ENCJ) (in particular, the Report 2014-2016 entitled "Independence and Accountability of the Prosecution"), of the United Nations (in particular, Guidelines on the Role of Prosecutors (1990), the Convention against Corruption of 2003), those of the International Association of Prosecutors (in particular, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors of 1999), as well as the Status and Role of Prosecutors which is a Guide jointly adopted by United Nations Office on Drugs and Crime and the International Association of Prosecutors in 2014.
[8] See Opinion No. 9 (2014) of the CCPE, Explanatory Note to the Rome Charter, paragraph 53.

17. Prosecutors should exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial and prosecutorial independence or impartiality. While they are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they should not comment on pending cases and should avoid expressing views which may undermine the standing and integrity of the court. Prosecutors should abstain from political activities incompatible with the principle of impartiality.[9]

18. Prosecutors should be free to form and join professional associations to represent their interests, to protect their status and to promote their professional training.

Accountability of prosecutors

19. Being "accountable" means in particular:

- not to act arbitrarily;
- to base decisions on the law;
- to justify decisions whether based on the principle of legality or opportunity (discretion);
- to provide, as appropriate, reports to relevant stakeholders.

Ethics of prosecutors

20. “Ethics" means all guidelines setting out standards of conduct and practices, both in and outside their work, expected of all prosecutors working for or on behalf of a public prosecution service.

21. Respect for ethical rules is a fundamental duty that should guide the activities of prosecutors. It is important to be able to refer to compilations containing ethical principles of prosecutors which should govern their conduct.

22. The conduct of prosecutors, like that of judges, cannot be left to their sole discretion, be it within and outside their work. This is particularly important when assessing the activities of prosecutors and in disciplinary proceedings against them.

III. INDEPENDENCE OF PROSECUTORS

23. The mission of prosecutor is demanding and difficult: it requires professionalism, character, courage, balance and determination. The possession of these qualities must be a determining criterion in the recruitment of prosecutors and throughout their career. The process of legal education, selecting candidates and in-training should seek to ensure respect for such criteria. However, these personal requirements are not sufficient to ensure the independence of prosecutors. The status and independence of prosecutors should be clearly established and guaranteed by law.

24. In this regard, it is particularly desirable that, while ensuring respect for gender balance, the process of appointment, transfer, promotion and discipline of prosecutors be clearly set out in written form and be as close as possible to that of judges, particularly in member States which uphold the principle of the unity of the judiciary and which have links between the functions of judges and prosecutors throughout their careers. In such cases, provisions should preferably be established by law and applied under the control of an independent professional authority (for instance, composed of a majority of judges and prosecutors elected by their peers) such as a Council for the judiciary or for prosecutors, competent for the appointment, promotion and discipline of prosecutors. This is particularly relevant if prosecutors are to be recognised as judicial authorities within the meaning of Article 5 of the ECHR or to be given an indisputable role and authority in matters of individual rights and freedoms, in particular in new areas, such as the protection of personal data.

25. As a means to ensure the independence of prosecutors, clear mechanisms with regard to instituting prosecution or disciplinary proceedings against prosecutors should also be established. For instance, there is a special procedure established by law in some member States which enables the initiation of proceedings for administrative and/or criminal offences allegedly committed by prosecutors.

[9] See Opinion No. 9 (2014) of the CCPE, Explanatory Note to the Rome Charter, paragraphs 81-82.

26. These provisions should also aim at preventing and resolving possible or real conflicts of interests and enabling prosecutors to ensure that the law is properly applied, without being exposed to pressure or measures contrary to their mission.

27. More generally, independence of prosecutors implies that they have sufficient means and also the authority, competence and powers necessary for the proper performance of their tasks. They should in particular be consulted on the determination of the resources necessary for their mission.

28. Appropriate training of prosecutors on the administration of their service and management of their resources should be provided, otherwise their independence could be significantly hampered.

29. Means of subsistence, comparable to those of judges, including proper remuneration, ensuring their material independence and their protection, as well as that of the members of their families, should be guaranteed to prosecutors. Such protection should include legal and physical protection of their life, health and property, as well as honour and reputation, against any violence, attack or pressure, and provide for corresponding state insurance.

30. The legal status of prosecutors on which their activities are based is too often unknown to the public and therefore misunderstood. Relevant information should therefore be made publicly available to avoid any misinterpretation of their role. The prosecution service should be involved in this process.

External independence and internal independence

31. Prosecutors must be independent in their status and behaviour:

- they must enjoy external independence, i.e. vis-à-vis undue or unlawful interference by other public or non-public authorities, e.g. political parties;

- they must enjoy internal independence and must be able to freely carry out their functions and decide, even if the modalities of action vary from one legal system to another, according to the relationship to the hierarchy.

32. In some legal traditions, public opinion associates public action by prosecutors with the exercise of political power, notably through Government. The case law of the ECtHR requires mutual independence between these two authorities, since its failure would ruin the legitimacy of the prosecutor's intervention in the preparatory phase and the conduct of the criminal trial, and in his/her fields of competence outside the criminal field.[10] Indeed, the prosecutor should be the guarantor of respect for the law and the defender of society; he or she must not be an instrument in the interests of any social, political and religious group, any fraction in the government or the protector of its supporters. This requirement is particularly crucial whenever the prosecutor's intervention aims at combatting organised crime or corruption, or has an impact on individual rights and freedoms, in particular deprivation of liberty.

33. There is a general tendency for more independence of prosecutors and prosecution services, which is encouraged by the CCPE, although there are still no common accepted standards in this respect.

34. Respect for *external independence* does not prevent the prosecution service from receiving general instructions on priorities of prosecutorial activities as they result from the law, the development of international co-operation or requirements relating to the organisation of the service.

35. Such instructions should always be given in accordance with the law, in a fully transparent and written manner and the discussions to which they may give rise should never prejudice the personal situation of the prosecutor, including his/her career.

36. Instructions by the executive concerning specific cases are generally undesirable. In this context, instructions not to prosecute must be prohibited and instructions to prosecute must be strictly regulated in accordance with Recommendation Rec(2000)19.[11]

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[10] See the selection of the case law of the ECtHR concerning the prosecutors' action in the annex to the present Opinion.

[11] See paragraph 13(d) of Recommendation Rec(2000)19: "Where the public prosecution is part of or subordinate to the government, member States should take effective measures to guarantee that where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:

- to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;

37. Courts should respect the prosecutors' independence. The intervention and the attitude of the prosecutor should leave no doubt as to his/her objectivity and impartiality. Judges and prosecutors should both enjoy independence in respect of the execution of their functions and also be and appear to be independent from each other.

38. Prosecutors should respect the independence of the courts and the judiciary as a whole. They may challenge judges' decisions only through the remedies provided by law. Prosecutors should take all measures within their competence to protect the independence of courts.

39. *Internal independence* does not mean that every prosecutor is free to do anything; he or she may be subject to a hierarchy whose task is to ensure, in a clear way and without prejudice to independence, the proper functioning of the prosecution service as a whole and coherence, consistency and uniformity of action in the administration of justice and protection of human rights.

40. A hierarchical structure is a common aspect of most prosecution services. Internal independence does not prevent a hierarchical organisation of the service and the issuing of general recommendations or guidelines/directives on the application of the law to ensure consistency of law and jurisprudence or priorities for prosecutorial action. This is especially necessary in member States in which the “opportunity/discretionary principle” applies. All internal instructions within the prosecution service should be provided in writing, be transparent and aim at seeking the truth and to ensure the proper administration of justice.

41. Lines of authority, accountability and responsibility should be transparent in order to promote public confidence.

42. If a prosecutor receives individual instructions from his/her hierarchy which appear illegal or not in accordance with the professional code of ethics, he/she should not be compelled to comply with them and should be given the opportunity to present his/her reasons to his/her hierarchy.

43. Clear mechanisms should be established, which will allow lower level prosecutors to appeal against assignments or instructions of a superior prosecutor if they find that these assignments or instructions are illegal or unjustified.

44. The possibility of an appeal against decisions of prosecutors, be it an appeal to a superior prosecutor or to a court, when filed by victims, is in no way contrary to their independence but helps to increase their accountability, provided that it gives rise to proper consideration and the parties are kept informed of it.

45. The independence of prosecutors also requires material independence which implies, in the same way as for judges, financial and other means necessary for the exercise of their missions:

- prosecutors are often required to be on duty at night and on public holidays; they should be sufficient in numbers to meet these constraints and should receive adequate remuneration to avoid being discouraged from performing their duties in such situations;

- they should be provided with modern equipment and proper services (sophisticated performing computers and software, videoconferencing systems, access to translation services where necessary, etc.) adapted to their daily tasks and enabling them to communicate efficiently with law enforcement officers and courts, lawyers, parties and international partners, in a context of greater international co-operation, and geographical rationalisation of courts (judicial map) and modernisation of court systems;

- duly to explain its written instructions, especially when they deviate from the public prosecutor’s advices and to transmit them through the hierarchical channels;
- to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments.”

- they should have appropriate staff support as well as access to relevant legal information (legislation, case law, etc.), to professional experts (in the fields of banking, economics, cyber security, biology, etc.) and to forensic examinations (DNA analysis, drug detection systems, etc.).

IV. ACCOUNTABILITY OF PROSECUTORS

46. In order to promote public confidence, prosecutors must be independent but also feel accountable. This accountability should be exercised with respect for individual rights and freedoms, including the presumption of innocence and protection of privacy. Clear published, and regularly updated, guidelines and codes of professional ethics and conduct would assist in promoting transparency, consistency, accountability and fairness.

47. The accountability of prosecutors is not meant to interfere with their independence. Although independent, prosecutors are accountable, in cases and the manner provided for in national laws:

- they should report, as appropriate, to the hierarchy, to parties and in particular to victims, to judicial authorities and other public officials and bodies, to civil society and to the media. They should explain their actions or provide information to the public in a proactive manner, particularly in cases that require public attention and concern; information may take the form of an annual report (general or on a particular aspect of crime within their jurisdiction), consist in explaining the causes of a failure or error in procedure or assessment or simply refer to the actual stage of an investigation or a procedure;

- they are subject, where appropriate, to disciplinary proceedings which must be based on a law, in the event of serious breaches of duty (negligence, breach of the duty of secrecy, anti-corruption rules, etc.), for clear and determined reasons; the proceedings should be transparent, apply established criteria and be held before a body which is independent from the executive; concerned prosecutors should be heard and allowed to defend themselves with the help of their advisers, be protected from any political influence, and have the possibility to exercise the right of appeal before a court; any sanction must also be necessary, adequate and proportionate to the disciplinary offence.

48. Unless they are found to have committed a disciplinary offence or to have clearly failed to do their work properly, prosecutors, similar to judges, may not be held personally responsible for their choices of public action once they have been the result of a personal intellectual and legal analysis.

49. Member States should redress the damage stemming from prosecutors' professional action or omission and prosecutors should not be held personally liable for such damage, except in cases of deliberate offences and/or gross negligence.

50. Prosecutors should not benefit from a general immunity, but from functional immunity for their actions carried out in good faith in pursuance of their duties[12]. The prosecutor should, however be criminally liable for any offences committed, including in the course of administration of justice, in accordance with national law.

V. ETHICS OF PROSECUTORS

51. The respect for the rule of law requires the highest ethical and professional standards in behaviour of prosecutors, as for judges, both on duty and off, which allows confidence in justice by society. Prosecutors act on behalf of the people and in the public interest. They should therefore always maintain personal integrity and act in accordance with the law, fairly, impartially and objectively, respecting and upholding fundamental rights and freedoms, including the presumption of innocence, the right to a fair trial, and the principles of equality of arms, separation of powers, and binding force of court decisions. They have a duty to be free from political or other influence.

[12] See Opinion No. 9 (2014), Rome Charter, paragraph X.

52. The ethical rules of prosecutors should preferably be specified by law and take the form of codes of ethics, prepared and made public by national statutory and/or disciplinary bodies such as Councils for the Judiciary or for prosecutors. When elaborating such national codes of ethics, the appropriate international documents should be taken into account. Hereafter, as a matter of reference, some of the most relevant ethical rules concerning prosecutors' activities can be found.

53. Prosecutors have an obligation of neutrality and should act independently of their personal preferences, social background, relationships, political, philosophical or religious beliefs; they should respect diversity and refrain from bias or prejudice or discrimination. Prosecutors cannot accept any form of harassment, racism or discrimination, or any other forms of inappropriate behaviour in their workplace.

54. They should be, and appear to be, impartial in their decisions, be transparent, avoid conflicts of interest and not favour any party because of any connection with it. Where there is a risk that the prosecutor may not have sufficient distance from that person, he or she should refrain from handling the case. Prosecutors should also avoid any possibility of undue pressure (e.g. by media). Prosecutors should abstain from political activities incompatible with the principle of impartiality and should not act in cases in which their (or their family's) personal interests could hamper their full impartiality and objectivity.

55. They must demonstrate absolute integrity in their behaviour and not accept any kind of benefits or remuneration linked to the content of their choices, nor maintain career ambitions that may improperly guide their decisions (for example to please a particular political or administrative authority).

56. They should be guided only by the will to ensure compliance with the law and should always ensure that they provide a clear, reasoned and transparent legal basis for their decisions.

57. Where they supervise investigations and/or police actions, prosecutors should seek to ensure that investigations are conducted independently and in accordance with the law, and play an active role in the protection of the rights of the defence and ensuring equality of arms. In such cases, they should ensure that any restrictions of individual freedoms and privacy are necessary, adequate and proportionate to the legitimate aim pursued, in particular in terrorism or other public security cases.

58. Prosecutors should seek to ensure that all necessary and reasonable enquiries and investigations are made before taking a decision in relation to a prosecution and proceed only when a case is founded upon evidence assessed to be reliable and admissible. Prosecutions should be firmly but fairly conducted and not beyond what is indicated by the evidence.

59. Prosecutors should not use evidence obtained through a grave violation of human rights, should seek to ensure that such evidence is not accepted by courts and that appropriate sanctions are taken against those responsible.

60. Prosecutors should be driven by attention to others in their legitimate expectation of justice. This attention should be particularly directed towards the most vulnerable: victims, witnesses, the elderly, children and juveniles, persons with disabilities, persons without resources or having difficulty in understanding the situations they face, foreigners cut off from their familiar environment and/or not understanding the language and the procedure.

61. When performing their duties, whether in their service, during the investigation or at the hearing, prosecutors should observe discretion and reserve; in particular, they should refrain from expressing political, philosophical or religious convictions, personal hostility or showing contempt or violent attitude towards any person on account of the antipathy which his/her conduct might inspire, even if seriously reprehensible.

62. When their mission authorises them to make statements or communications in cases with which they are familiar, prosecutors should ensure that they do not jeopardise the life or physical integrity of those involved in the proceedings (namely victims and witnesses) or the work of investigators by revealing on-going investigations, that they do not violate the principle of the presumption of innocence and do not unduly damage the honour and reputation of others on mere assumptions.

63. Ethics education should be offered in initial and in-service training.

64. Since the ethical issues faced by prosecutors are increasingly varied, complex and evolve over time, member States should provide available mechanisms and resources (specific independent bodies, experts within the Councils of Justice or prosecutorial councils, etc.) to assist prosecutors as regards the questions they raise (for example, whether or not to recuse themselves from a case because of a possible conflict of interests and knowledge or prejudices they may have, or the possibility for them to have supplementary activities such as arbitration, etc.).

65. Member States should ensure that prosecutors are protected from any disadvantages resulting from compliance with the ethical rules attached to their office and, in particular, from intimidation, isolation or career setbacks that may result therefrom.

VI. INTERNATIONAL CO-OPERATION

66. While the systems of social, political, legal and administrative organisation differ from one member State to another, the common adherence to democratic values facilitates the development of similar legal solutions and of opportunities for co-operation between prosecutors from different member States.

67. With the support of their administrations, prosecution services and, where appropriate, prosecutors themselves, should therefore benefit from it and promote opportunities to exchange information on good practices regarding independence, accountability and ethics. To this end, information exchange networks, bilateral and multilateral international seminars, training courses, twinning arrangements and all means of mutual benefit through this co-operation should be developed.

68. This international co-operation should also include issues relating to the protection of independence, accountability and ethics in the future.

RECOMMENDATIONS

i. Appropriate provisions should be adopted in member States, in parallel to the independence of judges, to strengthen the independence, accountability and ethics of prosecutors, whether in the criminal law field or as regards their other fields of competence. Political influence should not be acceptable.

ii. Member States, while ensuring respect for gender balance, should ensure that prosecutors are selected on the basis of their skills and moral and ethical values, and receive adequate initial and in-service training to carry out their functions with independence, impartiality, accountability and full respect for ethical standards. They should facilitate the provision of relevant information and advice to prosecutors on these matters.

iii. The status, independence, recruitment and career of prosecutors should, similarly to judges, be clearly established by law and governed by transparent and objective criteria. Member States should guarantee a status for prosecutors that ensures their external and internal independence, preferably by provisions at the highest legal level and guaranteeing their application by an independent body such as a Prosecutorial Council, in particular for appointments, careers and discipline.

iv. Instructions by the executive concerning specific cases are generally undesirable. In this context, instructions not to prosecute must be prohibited and instructions to prosecute must be strictly regulated in accordance with Recommendation Rec(2000)19.

v. Internal independence does not prevent a hierarchical organisation of the prosecution service and the issuing of general recommendations on the application of the law to ensure coherence and consistency of law and jurisprudence or priorities for prosecutorial action.

vi. If instructions are given to prosecutors, they should be given in writing, in a fully transparent manner and always with the objective of applying the law while respecting rights and freedoms, without restrictions disproportionate to the legitimate objective pursued.

vii. Appropriate information on the prosecution service and prosecutorial activities should be made widely available to the general public. Prosecutors should play a key role in

disseminating such information. While ensuring respect for their independence, the principle of the presumption of innocence, the needs of the investigation and the protection of personal data, prosecutors should report on their activities and results to their hierarchy and to other public authorities, with whom they work, as well as to the public through appropriate channels and in accordance with the law.

viii. When their mission authorises them to make public statements on cases within their competences, prosecutors should ensure that they do not jeopardise the life or physical integrity of those involved in the proceedings or the work of investigators by revealing on-going investigations and that they do not violate the principle of the presumption of innocence.

ix. Member States should protect prosecutors and, as appropriate, members of their families, when carrying out their functions.

x. The promotion of prosecutors should be based on merit.

xi. The status, remuneration and treatment of prosecutors as well as the provision of financial, human and other resources for prosecution services should correspond, in a way comparable to those of judges, to the eminent nature of the mission and the particular duties of prosecutors.

xii. In their systems of administrative and hierarchical organisation, member States, if they intend to confer or maintain the status of judicial authority for prosecutors within the meaning of the ECHR, should ensure that they have all the guarantees, in particular those required for independence, attached to this status.

xiii. Prosecutors should seek to continuously develop their legal, ethical and social knowledge in order to properly fulfil their mission.

xiv. Codes of ethics should be adopted and made public. Prosecutors should respect rules of ethical conduct in accordance with the highest standards, regularly updated in relation to the development of society and emerging issues. They should observe discretion and reserve corresponding to their functions, so that their independence, objectivity and impartiality cannot be put into doubt.

xv. Where they supervise investigations and/or police actions, prosecutors should ensure that restrictions of individual rights and freedoms and privacy are necessary, adequate and proportionate to the legitimate aim pursued. They should pay particular attention to the most vulnerable persons, in particular the victims of crime, and to the rights of the defence.

xvi. Prosecutors should take all measures within their competence to respect and protect the independence of courts.

xvii. In the context of international co-operation, in order to enrich their practices and further reflect on their mission, prosecutors should communicate with their foreign partners. Information exchange networks, training institutions, liaison prosecutors, international seminars, training courses, the twinning arrangements can be particularly useful for these purposes. It is also worth noting in this context the importance of international associations of judges and prosecutors, whose task is to defend the independence, ethics and individual and social accountability of judges and prosecutors in a State governed by the rule of law and which, as a result, can play a key role in disseminating the values mentioned in this Opinion.

Annex

Selection of the case law of the ECtHR concerning the prosecutors' status and activities

The ECtHR stated that the absence of the prosecutor at the hearing could lead to a violation of the principle of a fair trial.[13]

The ECtHR considered the question of independence of prosecutors with regard to compliance with Article 6 §1 (fair trial) of the ECHR when the prosecution service was one of the parties to the trial challenged by the applicant.

In the case *Zinsat v. Bulgaria* of 15 June 2006 (57785/00), the ECtHR challenged the fact that the prosecutor had substituted himself for a court, deciding to act on his own, without effective remedy.

The ECtHR has also endeavoured to verify the compliance with the requirements of Article 5§3 of the ECHR when the supervision of detention was entrusted to a prosecutor. It considered that when this control was entrusted to a prosecutor, the latter must in any case be independent, impartial, able to control the validity of the measure and be competent to order the release.

This is the meaning of the judgment *Schiesser v. Switzerland* of 4 December 1979 (7710/76), in which the need for the independence of the prosecutor vis-à-vis the executive and the parties was affirmed.

If the member States wish the prosecution service to be recognised as a judicial authority within the meaning of the ECHR - a quality to which the prosecutors of the countries concerned are very attached - the member States must take into account that in a few judgments, the ECtHR decided that the prosecution service did not meet the criteria for being recognised as a judicial authority within the meaning of Article 5 of the ECHR.[14]

The ECtHR is very demanding with regard to the independence of prosecutors, but this should not lead to interpreting this requirement one of mistrust, or even as a depreciation of the role of prosecutors in the judicial process, quite the contrary. As Mr André Potocki, judge of the ECtHR in respect of France noted at a conference held in Paris on 17 May 2018 before the Network of Prosecutors General of the Supreme Courts of the European Union, the prosecutor who directs and controls the first phase of criminal proceedings is also and at the same time, "the advanced watchdog of human rights".

[13] See ECtHR Karel v. Russia of 20 September 2016 (926/08).

[14] See ECtHR Medvedyev v. France [GC], 29 March 2010, no. 3394/03; Moulin v. France, 23 November 2010, no. 37104/06; Jasinski v. Poland, 20 December 2005, no.30865/96; Vasilescu v. Romania (from the point of view of the concept of court within the meaning of Article 6§1), 22 May 1998, no. 27053/95 ; Pantea v. Romania, 3 June 2003, no. 33343/96; Assenov and others v. Bulgaria, 28 October 1998, no. 24760/94, §149.

Opinion No. 14 (2019)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The role of prosecutors in fighting corruption and related economic and financial crime

I. Introduction: purpose, scope, definitions

A. Purpose

1. The Consultative Council of European Prosecutors (CCPE) was set up by the Committee of Ministers of the Council of Europe in 2005 with the task of formulating particularly opinions on matters concerning the implementation of Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system[1].

2. In accordance with the mandate given to it by the Committee of Ministers, the CCPE has prepared this Opinion on the role of prosecutors in fighting corruption and related economic and financial[2] crime.

3. As already highlighted in previous Opinions of the CCPE, the tasks assigned to prosecutors vary from State to State in line with the respective constitutional and legislative backgrounds and legal traditions. Thus, the criminal justice systems of some member States provide for the principle of "legality" as the basis for prosecutions, while other member States provide for the principle of "discretion" or "opportunity"; others have a mixture of these principles. Some member States entrust prosecutors with a general supervision role over police and investigators, and others do not[3]. In countries, where prosecutors have the general oversight of investigations, they may themselves conduct the investigations, or the latter is conducted by the police under the authority of the prosecution service.

4. Regardless of the different prosecution systems, common requirements and challenges can be identified in relation to the effective fight against crime, and when it comes to respecting the defendant's human rights, the interests of the State regarding crime policy and the rights of victims and other participants in the criminal procedure. The present Opinion seeks to identify common guidelines and standards for how prosecutors should act in the specific field of corruption and related economic and financial crime. In member States, where prosecutors perform functions outside the criminal law field, the conclusions and recommendations of this Opinion also apply, *mutatis mutandis*, to such prosecutorial activities. Some of the findings will likely be more relevant for a given prosecutorial system than for another. However, the present Opinion does not intend to express a preference for one or the other system, but rather intends to promote improvements in all of them. The Opinion may therefore be used for inspiration for all actors involved in criminal proceedings, particularly from the point of view of bringing them together for better efficiency.

B. Scope

5. The fight against corruption and related economic and financial crime is of interest to, and requires the involvement of, many public and private actors, such as prosecutors, judges, police investigators, experts, supervisory entities, governmental agencies, mass media, NGOs and other concerned elements of civil society. The CCPE expresses the wish that the principles set out in this Opinion will, in addition to prosecutors, inspire also the actions of other interested and relevant actors in order to enhance the overall results.

[1] In drafting its Opinions, the CCPE also takes into account other relevant Recommendations and instruments adopted after its creation, particularly Recommendation Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system.
[2] In some member States, the concept of economic crime covers financial crime as well.
[3] See, for example, Opinion No. 13 (2018) of the CCPE on independence, accountability and ethics of prosecutors, para 9.

6. The objective of the Opinion is to specify the particular personal and institutional approaches to be followed by prosecutors and prosecution services involved in the fight against a set of crimes, complex by nature and often involving secretive forms, such as corruption and related economic and financial crime (as defined below). The present Opinion particularly focuses on high-level criminal offences in this field, i.e. when the prosecution service and individual prosecutors face particular challenges as regards substantive law and procedure. In this regard, it is recommended that prosecution services be consulted whenever new rules or provisions are being designed by executive or legislative authorities in this domain.

7. The CCPE emphasises from the outset that an efficient and effective, and at the same time transparent and human rights-abiding, prosecutorial fight against corruption and related economic and financial crime, depends to an important extent on the political will to truly tackle and control such criminal behaviour. Therefore, member States should not only show strong commitment but also foster supportive environment for their prosecution services, as well as for the individual prosecutors dealing with this type of crime, in addition to increasing and deepening their participation in the international cooperation in this field.

8. The effective fight against corruption and related economic and financial crime, and the highly detrimental effect this kind of behaviour has on public trust, social stability and the economic well-being of a given country, and on the principles of justice and equality of all persons before the law, is not only a question of prosecuting the perpetrators. It is of utmost importance to use all proper legal, legislative and other tools for the prevention of such crimes. It is necessary that both society in general, and the prosecutors dealing with corruption and related criminal offences in particular, are perfectly aware of the extremely damaging character of such offences. Tolerance towards corruption should be continuously combatted.

9. In preparing this Opinion, the CCPE has relied in particular on its Opinion No. 1 (2007) on ways of improving international co-operation in the criminal justice field, Opinion No. 3 (2008) on the role of prosecution services outside the criminal law field, Opinion No. 7 (2012) on the management of the means of prosecution services, Opinion No. 8 (2013) on relations between prosecutors and the media, Opinion No. 10 (2015) on the role of prosecutors in criminal investigations, Opinion No. 11 (2016) on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime, Opinion No. 12 (2017) on the role of prosecutors in relation to the rights of victims and witnesses in criminal proceedings, and Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors.

10. The CCPE has also relied on the most important instruments and findings of the Council of Europe in the field of fighting and preventing corruption, most notably the Criminal Law Convention on Corruption (1999)[4], the Civil Law Convention on Corruption (1999)[5], Recommendation Rec(2000)10 of the Committee of Ministers to member States on codes of conduct for public officials (2000), the findings of the Group of States against Corruption (GRECO) in its five Evaluation Rounds[6] to date, and documents of MONEYVAL, as well as the relevant case law of the European Court of Human Rights (ECtHR) on corruption and related matters[7].

11. Anti-corruption instruments of other international organisations and mechanisms have also been taken into consideration, particularly the United Nations Convention against Corruption of 2003[8] and Guidelines on the Role of Prosecutors of 1990, the Convention of the Organisation for Economic Co-operation and Development on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997[9], the EU Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 1997[10], the Model Law on Fighting Corruption, adopted by the Inter-Parliamentary Assembly of the participating countries of the Commonwealth of Independent States in 1999, the EU Council's Framework Decision 2003/568/JHA

[4] European Treaties Series – No. 173.
[5] European Treaties Series – No. 174.
[6] Notably the findings in the IVth Evaluation Round, to a large extent completed, on "Corruption prevention in respect of members of Parliament, judges and prosecutors" were of a particular interest for the CCPE in drafting the present Opinion.
[7] E.g. in more recent times, ECtHR *Gutsanovi v. Bulgaria* – 34529/10, judgment from 15.10.2013 [Section IV]; *Apostu v. Romania* – 22765/12, judgment from 03.02.2015 [Section III]; *Tsalkitzis v. Greece* (no. 2) – 72624/10, judgment from 19.10.2017 [Section I].
[8] UN General Assembly resolution 58/4 of 31 October 2003.
[9] Together with the 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials.
[10] Official Journal C 195, 25.06.1997, p. 0002 – 0011.

of 22 July 2003 on Combating Corruption in the Private Sector[11], as well as 13 publications of the Financial Action Task Force (FATF) on corruption issues[12]. The CCPE also took into account the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors in 1999.

12. The CCPE has based itself on a draft Opinion prepared by Dr Rainer HORNUNG-JOST, Deputy Chief Prosecutor at the Lörrach Prosecution Office (Germany), former Director of the German Judicial Academy, and thanks him for his valuable expert contribution to its work.

C. Definitions

13. The CCPE underlines that there is no universally accepted definition of corruption. That said, it considers that the best reference for defining the term "corruption" within the scope of this Opinion can be drawn from the Council of Europe Criminal Law Convention on Corruption (ETS173) as it has been applied by GRECO[13]. It means that "corruption" is a concept that contains or addresses a variety of criminal offences, such as active and passive bribery in the public and private sectors and trading in influence. Phenomena such as corruption as a result of the acceptance of gifts, public procurement, or illicit enrichment are likewise detrimental to the public trust in the good functioning of a state under the rule of law.

14. In a significant number of cases, corruption offences are neatly entwined with other – often secretive – phenomena of economic and financial crime, such as fraud, tax fraud, money laundering, embezzlement, etc. Consequently, specialised prosecution services and/or prosecutors quite often do not deal only with corruption offences, but also with other related economic and financial crimes, for example, computer fraud, theft of intellectual property, violations of competition law, violations of stock market regulations, fraudulent bankruptcy and/or insolvency offences. The corruption may also be related to such crimes as trafficking in human beings, smuggling of migrants, illegal labour, environmental, land and urban planning law offences, etc.

15. As a result, for the purposes of the present Opinion, when the term "corruption" is used, it also includes related economic and financial crime.

II. Particular challenges faced by prosecution services and individual prosecutors when fighting corruption

16. Prosecutors face a series of particular challenges when fighting corruption. For example, there may be a lack of political will in some countries, especially insofar as high-level corruption by influential persons is concerned[14]. It may also happen that some politicians seek to exert illegal influence on investigations, particularly when the latter concern themselves personally or their families, other members of the government or the parliament, their political parties or a business friend, and the like.

17. Corruption involves quite often less visible but complex mechanisms, posing a real challenge for prosecutors to assess them. At the same time, defendants tend to have significant resources at their disposal, enabling them to mount a sophisticated defence strategy which may be difficult to overcome. Finally, prosecution services and prosecutors must be able to oppose possible delaying tactics while guaranteeing the principle of equality of arms. They should also have sufficient and adequate resources to properly prosecute, and courts should have available a range of appropriate and proportionate penalties for the purpose of sentencing.

[11] Official Journal L 192, 31.07.2003, p. 54 – 56.
[12] As a rule issued in cooperation with the G20 Anti-Corruption Working Group.
[13] In its IIIrd Evaluation Round.
[14] Often involving particularly large financial amounts.

18. The more serious and high-level corruption is, the higher the possibility of a close link with organised crime[15].

19. The particular challenges which prosecutors face when fighting corruption, relating to its secretive and complex nature, are also valid for the fight against related economic and financial crime. Moreover, further challenges contribute to the complexity of the prosecutors' task. Combatting serious economic crime most often entails a need for an in-depth economic analysis and a need to deal with voluminous files, often focusing on a series of criminal acts. In addition, today's white-collar criminals often use their expertise in communications technologies to conceal their identity, the offences they commit and relevant evidence. Prosecution services should dispose of comprehensive and updated information including statistical data on the extent and characteristics of corruption in their respective countries.

20. Serious economic crime means by nature that one or several entities, including public and private entities, or individuals may have suffered significant financial losses. So, when dealing with this kind of crime, prosecutors have to be aware of the victims' rights and expectations and have to ensure the security of witnesses. They must also be able to handle, in line with applicable laws and rules and with celerity, the complex proceedings concerning the freezing, seizure, confiscation and recovery of criminal assets, be it for the benefit of the State, of the victims, or both.

III. Institutional requirements and safeguards

A. Legislative framework, resources, budget, staffing

21. In light of the afore-mentioned numerous challenges, a prosecution service can only properly and adequately fight corruption, and enhance people's trust in public institutions and the private commercial sector, when the respective member State provides a robust constitutional and other legislative framework allowing the prosecution to act as an independent/autonomous institution and in an effective, transparent and accountable way, free of any undue political or other external influence.

22. Since fighting corruption and economic crime can be a politically and otherwise sensitive issue, it is of utmost importance that the domestic systems of recruiting, promoting/advancing and transferring of prosecutors, as well as disciplinary procedures, offer the necessary guarantees and safeguards for independent, autonomous and transparent decision-making and are governed by transparent and objective criteria[16].

23. It is each member State's obligation to provide the necessary institutional, legal and operational framework and human, financial and technical resources in order to ensure that even in the most complex corruption and economic crime cases, final decisions are taken with a view to avoid undue delay and, where appropriate, before the expiry of any statutory limitation period. The allocation of insufficient financial and human resources, which may be one of the main reasons why the prosecution may react late or may be seen to react leniently in cases of corruption, should be avoided. The same conclusions apply to other authorities involved in the process, such as the police, other law enforcement and control agencies, and the courts. In this context, the number of prosecutors assigned to the fight against corruption should be based on an assessment of the importance of this crime for the State concerned, as well as of the prosecution service's needs.

24. Investigating and prosecuting complex corruption cases also requires, in particular, the provision of modern equipment and other means, such as sophisticated hardware and software to the prosecution service[17], as well as highly professional economic, banking and computer expertise.

[15] See Opinion No. 11 (2016) of the CCPE on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime.
[16] For more detailed information, see Opinion No. 13 (2018) of the CCPE on independence, accountability and ethics of prosecutors, Recommendations ii, iii and x.
[17] See Opinion No. 13 (2018) of the CCPE on independence, accountability and ethics of prosecutors, para 45.

25. The efficient use by the prosecution service of procedural tools to freeze, seize and confiscate property resulting from an offence, should be encouraged, as this recovery of property from white-collar criminals will have not only a repressive but also a preventive and deterrent effect. In addition, statutory or other regulatory instruments obliging a public official having been finally convicted for corruption to resign or to be dismissed from office and to be prevented from presenting him/herself for public office, at least for a specific period of time, also have an important repressive and preventive effect.

26. The often legally and factually complex and cumbersome process of asset recovery requires a sufficient number of highly motivated and professional collaborators. Each member State should provide the necessary budget to ensure that a sufficient number of competent prosecutors and efficient and properly trained support staff (clerks, etc.) and experts are regularly assigned to the prosecution service. The CCPE notes that several member States refinance the costs of prosecuting corruption and related economic and financial crime cases through the recovery of property and assets from white-collar crime.

27. In some member States, the law allows legal persons to be prosecuted under criminal law. Other member States introduced administrative or civil liability of legal persons for criminal acts of their high officials for the benefit of legal persons. This can also be effective in combating the corruption of individuals acting through legal persons, and in depriving a legal person, systematically involved in corrupt activities, of its incriminated gains. Administrative and/or civil mechanisms are also needed for the confiscation of assets in cases where evidence suggests that they were obtained through white-collar crimes, particularly in cases of income hidden from tax authorities.

28. Prosecutors, when they conduct or supervise the investigation, must have, subject to, where appropriate, judicial authorisation, effective access to all relevant sources of information, often stored in public or private databases. It is furthermore decisive to ensure the prosecution service's access to registers of property and interests or asset declarations regularly provided by public officials and other persons in accordance with national law, in order to deter potential perpetrators from committing an act of corruption and to prosecute them when such an act is committed. This is an essential tool for uncovering an existing system of corruption or associated criminal structures. Access to bank records or tax information is also of the utmost importance for the effective prosecution of corruption cases.

B. Organisational mechanisms and specialisation of prosecutors

29. The CCPE encourages member States to take all necessary measures to ensure the impartiality, professionalism and specialisation of prosecutors and other stakeholders, as appropriate, when fighting corruption.

30. A significant number of member States have put in place central anti-corruption authorities. Depending on the domestic setting, these authorities also have, sometimes exclusively, prosecutorial competencies in the investigation of this type of crime. In other countries, decentralised but specialised prosecution offices – or at least specialised units within those offices – tackle corruption. Finally, in small prosecution services, individual prosecutors specialise in fighting corruption in general, which should be seen as a minimum standard to guarantee the afore-mentioned particular professionalism expected from prosecutors dealing with these crimes.

31. In order to be able to work on complex cases of corruption, good case management by prosecutors is indispensable. Depending on the particular system, prosecutions and, where applicable, investigations by the prosecution service, may be centralised. This does not preclude the formation of teams of prosecutors in particularly complex and sensitive high-level cases, both in the investigation and in the trial phase. Given that such cases are complex and time-consuming, the most expedient and effective flow of information within the prosecution service should be ensured.

32. The best possible cooperation and flow of information are not only an internal prerequisite for the prosecution service, they are also a very important factor concerning the relations between the prosecution services and other stakeholders involved in fighting corruption. The CCPE underlines the importance of cooperation and coordination between the prosecution service, on the one hand, and law enforcement agencies, customs, financial intelligence units, and tax fraud investigation services, supervisory institutions, etc. on the other, whose professionalism and specialisation are also indispensable.

33. In particular, as regards complex and sensitive high-level cases of corruption, the prosecutors involved should have access to the necessary external expertise. This concerns, e.g., the analysis of balance sheets or computer databases and equipment held by other authorities. In given cases, it can be quite beneficial to make such non-legal experts (chartered accountants, etc.) members of an interdisciplinary team working on a specific aspect of a particular case under the supervision of the prosecutor.

C. Allocation of cases and workload

34. As a general rule, allocation of corruption cases and regulation of workload should follow an objective system of distribution in accordance with the complexity and potential difficulty of the cases, as well as the knowledge, abilities and skills of the prosecutors. Furthermore, prosecutors in charge of these cases should receive the necessary support and be allocated sufficient time corresponding to their complexity.

D. Proper and adapted investigation and prosecution tools and whistleblowers

35. High-level corruption is by nature a very serious crime and may cover a range of criminal offences. This makes it indispensable to give to prosecutors (and/or, depending on the system, to the police) a full range of lawful investigative tools, including special investigation techniques. This also includes the use of adequate technologies.

36. The CCPE wishes to reiterate, however, that for the acceptance of the results of an investigation, it is of utmost importance in a democratic society that the principles of necessity and proportionality be scrupulously respected when applying means of coercion and special investigation techniques, while providing the prosecution with all tools for finding relevant evidence for criminal investigation or administrative inquiry related to legal persons. Any disproportionate restriction of fundamental human rights and freedoms should be avoided by establishing clear limits and criteria for the application of a given investigation tool[18]. The most intrusive measures should depend on an independent judicial authorisation. Once such a measure is ordered by a court, it is the prosecution service's task, where it conducts the investigation, to thoroughly and permanently consider, at any stage of the proceedings, whether the continuation of the measure is still necessary.

37. Member States should have stringent rules in place on how to protect people from within a given authority/organisation having insider knowledge on particular perpetrators and their criminal schemes. These potential whistleblowers often play a primordial role in the disclosure of corruption. Their identity should be protected in the event of disclosure of information. Member States should ensure that provisions on the protection of particularly vulnerable witnesses in criminal proceedings also apply, where appropriate, to whistleblowers, particularly at the investigation phase. This may include, *inter alia*, specific confidential ways of handling information sources subject always to protecting the right of an accused to a fair trial.

38. Potential whistleblowers wishing to divulge information should know who to address and how and which protection measures will apply to them. Therefore, it is very helpful to provide, within or in direct collaboration with the prosecution service, specific contact points, and to make the contact data available to the public. It should also be noted that potential whistleblowers might be accomplices to the crime they divulge. In some cases, they may be granted immunity or other forms of particular clemency because they expose themselves to great risks by their disclosures. Whistleblowers should be aware, as quickly as possible, of all protective measures put in place for them.

[18] See Opinion No. 11 (2016) of the CCPE on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime, para 65.

E. International cooperation

39. In a significant number of cases, the economic and financial crime committed is of a cross-border nature, requiring the cooperation of the prosecution services and law enforcement agencies of several countries or international, including supranational, bodies, and of the banking system worldwide. It is also possible that the financial damage is not limited to the national level but may affect simultaneously the financial interests of several States, international, including supranational, organisations (e.g. the European Union (EU)) and foreign individuals or entities.

40. The perpetrators have, e.g., an interest in hiding their gains and relevant evidence in another country or in several countries simultaneously. Therefore, they should not be able to take advantage of a lack of cooperation instruments among States or their different criminal systems and procedural rules. Consequently, it is of utmost importance that efficient extradition and mutual legal assistance mechanisms allow for direct contact and cooperation between prosecution services of different member States, all by using modern and sufficiently secured communication techniques[19].

41. In order to ensure a widely harmonised approach to the fight against corruption, the CCPE invites member States to ratify, where applicable, the most important international instruments within the scope of the present Opinion.

42. The CCPE invites member States to adopt, on a bilateral or multilateral level and where appropriate, similar mechanisms and measures in order to facilitate practical cooperation between the prosecution services and law enforcement agencies of member States when fighting cross-border corruption. The CCPE notes the continued efforts by the United Nations Office on Drugs and Crime (UNODC), the EU[20] and other regional (sub-regional) initiatives in this direction. Furthermore, the CCPE acknowledges the facilitating practical support for this cooperation provided by institutions such as EUROJUST, as well as informal organisations such as the International Association of Prosecutors.

43. In addition, in cross-border cases, in order to permanently recover the offender's gains in the interest of the State or identified victims[21], mutual recognition or execution, through mutual legal assistance, of temporary seizure and final confiscation orders issued by a member State in respect of property in another member State could facilitate the freezing, confiscation and recovery or return of criminal assets[22].

44. In order to fight corruption in an efficient way, member States should assist each other in providing information necessary to prevent, detect and investigate corruption offences including those of submitting false and/or insufficient information in the declarations by public officials and other persons concerned as regards their property, profits, expenses and interests even in the absence of criminal investigation.

[19] See Opinion No. 1 (2007) of the CCPE on ways of improving international co-operation in the criminal justice field.
[20] It should also be noted that the EU has developed particular instruments and mechanisms in order to ensure the most effective fight against cross-border crime, and more particularly in order to ensure the best possible protection of the EU's financial interests. Domestic prosecution services benefit from practical support by the anti-fraud office OLAF, by Eurojust, as well as by the European Judicial Network in Criminal Matters. In a rather near future, the European Prosecutor and her relevant counterparts in member States will enter the field. Multilateral treaties such as the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union have introduced new innovative investigation and prosecution tools, such as the formation of Joint Investigation Teams (JITs) in appropriate cases of organised cross-border crime. See also EU Directive 2014/41/EU, of 3/4/2014, regarding the European Investigation Order in criminal matters.
[21] See Opinion No. 12 (2017) of the CCPE.
[22] See, e.g., the EU Council's Framework Decision 2003/577/JHA of 22 July 2003 on the Execution in the European Union of Orders freezing Property or Evidence, and the EU Regulation 2018/1805 of 14/11/2018 on the mutual recognition of freezing orders and confiscation orders, following Council Framework Decisions 2003/577/JHA and 2006/783/JHA.

F. Transparency and contacts of prosecutors with the media

45. Transparency in the exercise of prosecutors' functions is a key component of the rule of law, one of the important guarantees of a fair trial, and necessary for ensuring public confidence and trust. Indeed, a positive image of the prosecution service forms an important element of public trust in the proper functioning of the justice system. In order to develop an open interaction of the prosecution service with the public[23], the prosecution service should take a pro-active approach. The media's and the public's widest possible lawful access to information on the activities of prosecutors also serves to strengthen democracy and transparency.

46. This is especially true when it comes to a truly sustainable and successful fight against corruption. Tackling corruption in all its facets and from the roots is only possible when accompanied by openness and transparency and free from any undue or unlawful political or other influence.

47. As a matter of principle, prosecution services should provide appropriate information to the media and to the public at all stages of their activities as regards fighting corruption including through their websites. At the same time, this should be done with due respect for legal provisions concerning the protection of personal data, privacy, dignity, the presumption of innocence, ethical rules of relations with other participants in the proceedings, as well as legal provisions precluding or restricting disclosure of certain information, particularly where required to ensure the security and consistency of the investigation[24].

IV. Personal requirements and safeguards

A. Personal integrity, impartiality, independence and protection

48. Prosecutors dealing with corruption are in a very sensitive professional position and therefore it is all the more important that they respect European and international standards on prosecutors' professional conduct[25]. It is important to bear in mind that the enounced principles also concern the prosecutors' behaviour out of office and outside their professional role.

49. Prosecutors must in particular demonstrate absolute integrity and neutrality, acting independently of any kind of bias, preferences or factors, and guided only by the law. Prosecutors should also avoid any risk of undue pressure, be it external or internal[26] and benefit from guarantees of independent, autonomous and transparent decision-making. They should be, and also appear to be, impartial in their decisions, be transparent, avoid conflicts of interest and not favour any party in criminal and other proceedings. Where there is a risk that the prosecutor may not have sufficient distance from any such party, he/she should refrain from handling the case.

50. In cases where corruption among prosecutors occurs, any impression or appearance of a preferential treatment vis-à-vis the defendant should be avoided by the prosecutor(s) in charge, respecting the principle of equality of all before the law.

51. The prosecutor should be removed, in accordance with lawful proper procedure, from cases relating to corruption, whenever there is a sign of potential bias, preference or conflict of interest. This right, however, should not be abused and decisions to remove a prosecutor should be justified and recorded. In case of manifestly improper case management by the prosecutor, disciplinary or, as the case may be, criminal proceedings may be opened against him/her. In case of necessity, there should be mechanisms of defining and settling any conflict of interests, established within the prosecution service and its bodies.

[23] See Opinion No. 8 (2013) of the CCPE on relations between prosecutors and the media, paras 30-31.
[24] See Opinion No. 8 (2013) of the CCPE on relations between prosecutors and the media, para 38.
[25] As laid down in Opinion No. 13 (2018) of the CCPE on independence, accountability and ethics of prosecutors. A central instrument in this respect are also the so called "Budapest guidelines", i.e. the European Guidelines on Ethics and Conduct for Public Prosecutors, as adopted in the name of the Council of Europe by the Conference of Prosecutors General in Budapest on 31 May 2005, CPGE (2005) 05.
[26] See Opinion No. 13 (2018) of the CCPE on independence, accountability and ethics of prosecutors, paras 53-56.

52. In a case of undue interference, appropriate protection should be applied towards prosecutors and investigators involved in the proceedings and their families[27].

B. Specific training

53. The professional requirements for prosecutors fighting corruption are particularly high. Therefore, it is all the more important for such prosecutors to undergo regular in-service training, as tailor-made as possible, responding to their specific needs.

54. Such training should also cover legislative and case law developments, both the domestic developments, and the jurisprudence of international courts such as of the European Court of Human Rights and, where appropriate, of the Court of Auditors and of the European Court of Justice. Prosecutors should also be aware of the role and functioning of relevant international bodies in this field, and their respective instruments and recommendations.

55. The prevention, investigation and prosecution of corruption are often of a multidisciplinary nature. Therefore, the continued training of anti-corruption and economic crime prosecutors may include also abilities such as reading and understanding balance sheets, understanding IT, working with complex software, etc. Trainers and experts from outside the prosecution service may be involved for this purpose. It may be of practical use to organise the exchange of counter-corruption experience between the prosecution services of different States.

56. Prosecutors within the scope of the present Opinion have to be particularly stress-resistant. They should be able to deal with very voluminous files and particularly skilled defendants and defence counsel. In order to avoid professional burn-out, it is important that the training also comprises so-called “soft” skills, such as stress management, case management, critical thinking, memory training and other relevant supports. The chiefs of prosecutorial teams should also benefit from such support, as well as appropriate leadership training.

57. Finally, the training should be complemented by more informal and subtle elements in the workplace. This can involve meetings and round tables with other institutions, officials and experts fighting corruption. The CCPE underlines the added value of networking in this respect.

C. Respect for defendants’ rights

58. Prosecutors should promote and respect the principle of equality of arms between prosecution and defence, the presumption of innocence, the right to a fair trial, the independence of the court, the principle of separation of powers and the binding force of final court decisions, and other applicable rights enshrined in relevant international instruments.

59. Throughout the investigation and prosecution phases, the prosecutor should fully respect and protect the defendants’ rights, notably by scrupulously respecting and applying the principles of necessity and proportionality. This is all the more valid when special investigation techniques are at stake; these should be reserved for criminal cases of particular importance and gravity[28].

60. Despite the complex nature of the criminal offences within the scope of the present Opinion, prosecutors should decide on indictment or dismissal of a case within a reasonable time. Accordingly, if the defendant is in pre-trial detention, both the investigation and the trial should be as expeditious as possible.

61. A defendant in corruption and related crime cases is as entitled to the respect of his/her right to privacy and the principle of the presumption of innocence, as any other defendant. The prosecutor handling the case should respect the principle of equal treatment under the law. At the same time, he/she should avoid exposing the defendant to unnecessary publicity or assumptions of guilt by the general public.

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[27] See the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors of 1999 and the Declaration on Minimum Standards concerning the Security and Protection of Public Prosecutors and their Families of 2008 developed by the International Association of Prosecutors (IAP).

[28] The CCPE refers to its findings in previous Opinions, and especially in Opinion No. 10 (2015) on the role of prosecutors in criminal investigations. In addition, as already mentioned in para 36 of the present Opinion, the disproportionate restriction of fundamental rights and freedoms should be avoided by establishing clear limits and criteria for the application of a given investigation tool.

V. Recommendations

Whereas:

there is no universally accepted definition of corruption, the CCPE considers that the best reference for defining the term “corruption” can be drawn from the Council of Europe Criminal Law Convention on Corruption (ETS173) as it has been applied by GRECO. It means that “corruption” is a concept that contains or addresses a variety of criminal offences, such as active and passive bribery in the public and private sectors and trading in influence;

in a significant number of cases, corruption offences are neatly entwined with other – often secretive – phenomena of economic and financial crime, such as fraud, tax fraud, money laundering, embezzlement, etc. Consequently, the effective fight against corruption should involve dealing with other related economic and financial crimes as well;

it is of utmost importance to use all proper legal, legislative and other tools for, first of all, prevention of corruption and related economic and financial crime;

in fact, the effective fight against corruption and related economic and financial crime, and the highly detrimental effect this kind of behaviour has on public trust, social stability and the economic well-being of a given country, and on the principles of justice and equality of all persons before the law, is not only a question of prosecuting the perpetrators, but mainly of preventing the occurrence of such offenses;

it is necessary that both society in general, and the prosecutors dealing with corruption and related criminal offences in particular, are fully aware of the extremely damaging character of such offences. Tolerance towards corruption should be continuously combatted;

the CCPE agreed on the following main recommendations:

1. Taking into account that prosecutors face a series of particular challenges when fighting corruption, consistent and systematic efforts should be undertaken by member States to establish an enabling environment for their work.

2. A political will should be clearly and consistently demonstrated and affirmed at the highest level for fighting corruption.

3. Member States should establish a robust constitutional and legislative framework allowing the prosecution to act as an independent/autonomous institution and in an effective, transparent and accountable way, free of any undue political or other external influence.

4. Domestic systems of recruiting, promoting/advancing and transferring prosecutors, as well as any disciplinary procedures, should offer the necessary guarantees and safeguards for independent, autonomous and transparent decision-making and be governed by transparent and objective criteria.

5. The necessary institutional, legal and operational framework and human, financial and technical resources should be provided for the prosecution services in order to ensure that even in the most complex corruption cases, final decisions are taken without undue delay and before the expiry of any relevant statutory limitation period.

6. Member States should provide the necessary budget to ensure that a sufficient number of competent prosecutors are recruited and efficient and properly trained support staff (clerks, etc.) and experts are assigned to the prosecution service, as well as that the necessary modern equipment and other means are made available.

7. Prosecutors and prosecution services should, in line with applicable laws and rules and with celerity, handle complex proceedings concerning the freezing, seizure, confiscation, recovery and return of criminal assets.

8. All necessary measures to ensure the impartiality, professionalism and specialisation of prosecutors (and other stakeholders, as appropriate) fighting corruption should be undertaken. It is all the more important for such prosecutors to undergo regular in-service training.

9. Prosecutors, when they conduct or supervise the investigation, must have, subject to, where appropriate, judicial authorisation, effective access to all relevant sources of information, often stored in public or private databases, such as registers of property and interests or asset declarations, bank records and tax information.

10. Throughout the investigation and prosecution phase, prosecutors should thoroughly respect and protect the defendants' rights, notably by scrupulously respecting and applying the principles of necessity and proportionality, particularly when applying coercion and special investigation techniques.

11. In order to be able to work on complex cases of corruption, good case management by prosecutors is indispensable and it may take different forms, for example, the establishment of specialised teams of prosecutors and providing for the most expedient and effective flow of information within the prosecution service.

12. The CCPE underlines the importance of cooperation and coordination between prosecution services, on the one hand, and law enforcement agencies, customs, financial intelligence units, and tax fraud investigation services, supervisory institutions, etc. on the other.

13. Member States should have stringent rules in place on how to protect persons with insider knowledge about particular perpetrators and their criminal schemes. The potential whistleblowers often play a primordial role in the disclosure of corruption. Their identity and personal integrity should be protected in the event of disclosure of information.

14. In case of undue interference, appropriate protection should be provided to prosecutors and investigators involved in the proceedings and their families.

15. Since corruption is often of a cross-border nature, it is of utmost importance that efficient extradition and mutual legal assistance mechanisms allow for direct contact and cooperation between prosecution services of different member States, including information sharing with non-public actors, civil society and NGOs.

16. In order to ensure a widely harmonised approach to the fight against corruption, member States should ratify, where applicable, the most important international instruments for fighting corruption.

Opinion No. 15 (2020)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The role of prosecutors in emergency situations, in particular when facing a pandemic

I. Introduction: purpose and scope of the Opinion

1. In accordance with the terms of reference entrusted to it by the Committee of Ministers, the Consultative Council of European Prosecutors (CCPE) has prepared the present Opinion on the role of prosecutors in emergency situations, in particular when facing a pandemic.

2. An effective and autonomous prosecution service committed to upholding the rule of law and human rights in the administration of justice is one of the pillars of a democratic state. The responsibility of prosecutors to promote and to strengthen the rule of law has many inherent aspects entailing significant challenges to prosecutors. These challenges are particularly demanding in the context of emergency situations.

3. The Venice Commission defines the state of emergency as a temporary situation in which exceptional powers are granted to the executive and exceptional rules apply in response to, and with a view to overcoming, an extraordinary situation posing a fundamental threat to a country. Examples include natural disasters, civil unrest, epidemics, massive terrorist attacks, economic crisis, war and military threats[1].

4. Keeping this in mind and while considering that the challenges to the work of prosecutors and their responsibilities are particularly demanding in the context of all the above-mentioned examples of emergency situations, the CCPE wishes to focus in the present Opinion, for reasons explained below, on the role of prosecutors in the context of the COVID-19 pandemic declared in 2020. Nevertheless, in light of relevant international and constitutional provisions, the Opinion also encompasses the role of prosecutors in cases of emergencies in a general way[2] and its content may be extended to similar situations in future.

5. The COVID-19 pandemic has caused a global health crisis – a public health emergency - unlike any experienced for more than a century. The unprecedented situation in the world due to the fight against the pandemic has presented equally unprecedented challenges for prosecution services. The pandemic has strongly affected societies, governments, communities, families and individuals' lives, livelihoods and standards of living. Furthermore, the impact of the restriction measures has been felt most severely by the most vulnerable groups. The need for keeping social distancing and applying lockdown measures have resulted, in many instances, in the disruption of courts' and prosecution services' work, delays in proceedings and have impacted on procedural time limits (such as those related to pre-trial detention), and the suspension or reduction of legal aid, as well as public and community services. The measures have significantly affected international cooperation. The pandemic often also had, as a consequence, the need to replace prosecutors or prosecutorial staff infected or who may have died as a result of infection.

6. The main lesson which prosecutors have learned during the pandemic, and which will be applicable in other future emergency situations as well, is that their ability to effectively perform their functions and observe their duties including by applying, as appropriate, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "ECHR") in member States has been put to the test – quite profoundly - during the pandemic, and will also continue to be during its aftermath (or period of recovery).

[1] See Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Strasbourg, 26 May 2020 (CDL-PI(2020)005rev), para 5.
[2] See Chapter II of the present Opinion.

7. The restrictions introduced as a result of emergency situations, as the pandemic, may affect not only civil and political rights protected by the ECHR, but also economic, social and cultural rights entailing possible discrimination against certain groups, such as health workers, and racial and ethnic minorities, resulting in hate speech, racism, xenophobia, attacks and forced returns of refugees and asylum-seekers, mistreatment of foreigners and migrants, and sexual and gender-based violence, domestic violence, including violence against women and children[3].

8. Prosecutors may be confronted with dilemmas as regards putting into practice the most fundamental principles and requirements guiding their mission – such as legality, proportionality, equality and non-discrimination, and evaluating the adequacy, necessity and duration of certain measures – notions that are not only necessary in regular times but key in case of suspension or restriction of human rights, for instance on public health grounds.

9. In this way, prosecutors have faced the challenge of making sure that, in the course of their work, the measures taken under public health emergency are used so as to protect people and not as a pretext for human rights infringements, and that new legal measures are applied with strict respect for human rights obligations.

10. The objective of this Opinion is therefore to determine how prosecution services can, without hampering their functional autonomy, fulfil their mission with the highest quality and efficiency, respecting the rule of law and human rights, in the context of emergency situations, particularly the COVID-19 pandemic and their aftermath.

11. As the CCPE underlined in its past Opinions, member States of the Council of Europe have different legal systems including prosecution services. The CCPE respects each of them in their diversity. Therefore, not all the elements discussed in the present Opinion may concern all member States. However, this Opinion mostly does address the concerns of prosecutors to work as efficiently as possible, even under the most challenging circumstances, avoiding any unlawful or undue interference in their work and maintaining the highest quality in all their activities and strict respect for the law and human rights.

12. This Opinion has been prepared on the basis of the ECHR[4] and the relevant case law of the European Court of Human Rights (hereafter referred to as ECtHR), as well as other Council of Europe instruments including Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system and Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice.

13. This Opinion is also based on the previous CCPE Opinions, in particular No. 2 (2008) on alternatives to prosecution, No. 3 (2008) on the role of prosecution services outside the criminal law field, No. 5 (2010) on the role of public prosecution and juvenile justice, No. 6 (2011) on the relationship between prosecutors and the prison administration, No. 7 (2012) on the management of the means of prosecution services, No. 8 (2013) on relations between prosecutors and the media, No. 9 (2014) on European norms and principles concerning prosecutors, including the "Rome Charter", No. 10 (2015) on the role of prosecutors in criminal investigations, No. 11 (2016) on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime, No. 13 (2018) on independence, accountability and ethics of prosecutors, as well as on the Statement of the President of the CCJE of 24 June 2020 on the role of judges during and in the aftermath of the COVID-19 pandemic: lessons and challenges, the Venice Commission's Opinion on Protection of Human Rights in Emergency Situations (2006), the Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency (2020) and on Resolution 1659 (2009) of the Parliamentary Assembly of the Council of Europe on Protection of Human Rights in Emergency Situations.

[3] The CCPE relies in this regard on the responses of member States to the questionnaire for the preparation of the present Opinion, see the responses, as well as their compilation (document CCPE(2020)1 of 7 October 2020), see at https://www.coe.int/en/web/ccpe/the-role-of-prosecutors-in-emergency-situations-in-particular-when-facing-a-pandemic .

[4] In this regard, refer to the factsheet "Derogation in time of emergency" (https://www.echr.coe.int/documents/fs_derogation_eng.pdf), elaborated by the Press Unit of the European Court of Human Rights in September 2020, which contains a list of ECtHR cases of particular relevance. The Factsheet also indicates, on page 2, under the title "Facts and figures", the number of Council of Europe member States that have so far resorted to Article 15 of the ECHR as a result of the pandemic, derogating from their obligations under the ECHR.

14. The Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August – 7 September 1990), as well as the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors (IAP) in 1999, have also been taken into account[5].

II. International and constitutional provisions in case of emergencies and their influence on the work of prosecutors

15. International provisions of treaties duly ratified by Member States apply in cases of emergency situations in their territories. For instance, Article 15 of the ECHR states that in times of emergency threatening the life of the nation, member States may take measures derogating from their obligations under the ECHR to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. The same applies to the United Nations International Covenant on Civil and Political Rights (ICCPR) (Article 4)[6].

16. Under these international instruments and provisions laid down in the Constitutions or relevant laws of member States, while there is no uniformly defined model for declaring a state of emergency and it is the factual situation which will determine its actual extent and rationale, a necessary precondition for declaring a state of emergency should be that the powers provided by regular legislation are not sufficient to overcome the emergency. The ultimate goal of any state of emergency should therefore be for the State to overcome the emergency and return as soon as possible to the normal situation[7].

17. The CCPE takes note that, in member States, different frameworks exist for declaring emergencies, either on the basis of the constitution or constitutional laws, or on the basis of regular legislation addressing possible emergency situations, or even by enacting emergency measures without officially proclaiming a state of emergency[8]. In any case, a formal proclamation should be expected to be made before derogating from rights set out in the ECHR.

18. The CCPE further notes that according to the ECHR, any emergency measures should not be inconsistent with other obligations of member States under international law, and, in this regard, the ICCPR which all member States of the Council of Europe are parties to, refers to a public emergency the existence of which should be officially proclaimed[9]. In this regard, the meaning of such official proclamation may have different implications in member States.

19. Furthermore, emergency measures should respect human rights obligations and ensure that the public health emergency is not used as a pretext for human rights infringements. A balance has to be struck between national security or public safety (or both), on the one hand, and the enjoyment of fundamental rights and freedoms, on the other[10].

[5] See also INTERPOL. COVID-19 Pandemic. Guidelines for Law Enforcement, 26 March 2020; Preventing crime and protecting police: INTERPOL's COVID-19 global threat assessment, 6 April 2020; Corruption Risks and Useful Legal References in the context of COVID-19: doc. Greco(2020)4, 15 April 2020).

[6] See document CCPR/C/128/2, "Statement on derogations from the Covenant in connection with the Covid-19 pandemic" adopted by the Human Rights Committee on 24 April 2020 (https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf).

[7] See Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Strasbourg, 26 May 2020 (CDL-PI(2020)005rev), para 5.

[8] See Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Strasbourg, 26 May 2020 (CDL-PI(2020)005rev), para 22.

[9] See Article 4(1)) of the ICCPR.

[10] See Venice Commission's Opinion on Protection of Human Rights in Emergency Situations adopted by the Venice Commission at its 66th plenary session (Venice, 17-18 March 2006).

20. The legislation regulating the adoption of measures during emergency situations must respect first of all non-derogable rights, i.e. those which cannot be affected in any circumstances[1112].

21. Legislation affecting other rights and freedoms should be based, first of all, on the overarching principle of the rule of law, and on the principles of necessity, adequacy, equality and non-discrimination, proportionality, temporariness, effective (parliamentary and judicial) scrutiny, predictability of emergency legislation and loyal co-operation among state institutions[13].

22. This is needed in order to balance the fundamental rights and freedoms with the necessary restrictive measures and thereby address any conflicting rights and conflicting situations, while facing the consequences of the emergency and preparing for future emergencies, including through developing the possibilities for the productive work of prosecutors and prosecutorial staff, and inventing new ways of responding to pressing challenges.

23. The adoption of emergency measures must clearly stipulate to which part of the territory of the member State they apply, for how long, and – crucially - when and how the emergency situation ceases (for instance, through the inclusion of sunset clauses)[14].

24. While noting the variety of systems and frameworks in member States, the CCPE is of the opinion that it would be particularly useful to have a uniform approach to emergency situations in European countries based on the principles enunciated above.

25. This is the legal framework, integrated by international instruments and domestic legislation, in which prosecution services will have to operate during emergency situations. Prosecutors should therefore be aware of situations and scenarios where fundamental rights and freedoms are particularly affected by restrictive measures. In order to avoid abuse on the use of such restrictions, as well as to avoid restricting in any way, including de facto, non-derogable rights, simple and effective complaints procedures, including non-formal where it might be applicable, may be established, particularly since courts may not be entirely accessible, due to the reduction of their activity for health reasons.

[11] See factsheet "Derogation in time of emergency" (https://www.echr.coe.int/documents/fs_derogation_eng.pdf), elaborated by the Press Unit of the European Court of Human Rights in September 2020. Article 15 § 2 of the ECHR prohibits any derogation in respect of the right to life, except in the context of lawful acts of war, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and the rule of "no punishment without law"; similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime) to the Convention, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the Convention and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the Convention. In relation to a pandemic, the freedom "from medical or scientific experimentation without consent" is of relevance.

[12] See document CCPR/C/128/2, "Statement on derogations from the Covenant in connection with the Covid-19 pandemic" adopted by the Human Rights Committee on 24 April 2020: "States parties may not resort to emergency powers or implement derogating measures in a manner that is discriminatory, or that violates other obligations that they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed. Nor can States parties deviate from the non-derogable provisions of the Covenant – article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, the slave trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (principle of legality in the field of criminal law), article 16 (recognition of everyone as a person before the law) and article 18 (freedom of thought, conscience and religion) – or from other rights that are essential for upholding the non-derogable rights found in the aforementioned provisions and for ensuring respect for the rule of law and the principle of legality even in times of public emergency, including the right of access to court, due process guarantees and the right of victims to obtain an effective remedy".

[13] See Venice Commission's Reflections on Respect for Democracy, Human Rights and the Rule of Law during States of Emergency, Strasbourg, 26 May 2020 (CDL-PI(2020)005rev), paras 6-16.

[14] A sunset clause is a provision of a law that it will automatically be terminated after a fixed period unless it is extended by law.

III. Implementation of the usual functions of prosecution services and prosecutors in emergency situations

A. Implementation of the functions of prosecution services and prosecutors in the field of criminal law

26. In the same way that the integrity of the court system, including its competences, independence and impartiality, should be safeguarded, especially as concerns access to a court and to an effective remedy for the protection of human rights in emergency situations, the integrity of the prosecution service and its organisation should also be protected, applying the same rationale, as the only way to guarantee the functioning of the justice system during an emergency situation[15].

27. The CCPE has already emphasised that it is in the interest of society that the rule of law be guaranteed by the fair, impartial and effective administration of justice. Prosecutors and judges should ensure, at all stages of the proceedings, that individual rights and freedoms are guaranteed. This involves respect for the fundamental rights of defendants and victims[16].

28. As regards the particular modes of functioning and interventions of prosecution services during an emergency situation[17], they, as well as courts, should be kept operating[18] to address urgent matters, while ensuring their adequate protection, as in the case of the pandemic from the disease, even at a time when some non-urgent cases may be postponed.

29. It is evident that the functioning of prosecution services, like that of courts, should adapt to the circumstances imposed by an emergency situation. The development of new technologies and progressive improvement of videoconferencing systems in the judiciary across the Council of Europe's member States have created new possibilities for ensuring the hearing of witnesses, experts and defendants without the need to compel them to travel to different venues within the member State[19] where the investigation or the trial are being conducted[20].

30. Obviously, as shown by some examples in Europe[21], this approach could be of greater interest in cases of emergency, avoiding or reducing limitations on the functioning of the prosecution services and courts. While ensuring safety from infection and facilitating a hearing that allows the parties to fully participate, the objective should be to make the remote proceedings and hearing as close as possible to the usual practices in the prosecution service and the court.

31. The ECtHR in its case law has also established that physical absence does not necessarily constitute a violation of the right to a fair trial. The Court has pointed to several international law instruments that

[15] As it has been stated in Resolution 1659 (2009) of the Parliamentary Assembly of the Council of Europe on Protection of Human Rights in Emergency Situations.

[16] See Joint Opinion No. 4 (2009) of the CCPE and No.12 (2009) of the Consultative Council of European Judges (CCJE) on the relations between judges and prosecutors in a democratic society, including the Bordeaux Declaration, Section 1 of the Declaration.

[17] In the case of Portugal, the Prosecutor General's Office is in permanent session during the whole duration of the emergency situation in order to defend the principle of legality and the rights of citizens, as is also the Ombudsman (Articles 18, 2 of Law 44/86).

[18] As is the case, for example, in Portugal (see Article 22 of Law 44/86 in Portugal).

[19] As an example, the system of e-mail notifications of courts has been introduced in Ireland to ensure the acceptance of agreements in the procedure.

[20] Except, of course, certain cases where physical presence might be necessary, as in the case of habeas corpus.

[21] See Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings (adopted on 30 January 2019, CM(2018)169-add1final); see also CEELI/ODIHR joint webinars series on access to justice during and after the pandemic, including videoconferencing in support of remote access to courts at https://ceeliinstitute.org/webinars/. Also, for example, in Italy, the security of trials against mafia suspects provided a reason to introduce videoconferencing in criminal proceedings in 1992. This regulation was expanded significantly in 1998. Germany applies a regulation for hearing witnesses, whose well-being could be jeopardised if physically present, using videoconferencing, etc.

provide for participation in the trial using videoconferencing as a way of respecting Article 6 of the ECHR[22], and it has adopted several judgments as regards the use of videoconferencing[23].

32. The CCPE wishes to emphasise that when establishing videoconferencing in courts, due attention should be paid to the interests of all the participants, particularly the preservation of the rights of the defence.

33. Regarding the webcasting of court sessions, in normal conditions, webcasting is being used to reach a wider audience and encourage a broader interest in the aspects of public life touched upon by courts. Accordingly, when it comes to an emergency situation, webcasting is even more justified not only for the civic engagement but in order to expressly demonstrate that justice is being performed openly and in public.

34. Any suspension or extension of procedural time limits due to an emergency situation should be clearly stated in the law, be proportionate to the duration of the emergency and without prejudice to the reasonable time requirements as regards trials (except in urgent cases or cases raising important human rights issues, particularly as regards non-derogable rights[24]). In addition, possible reductions of the time limits to the extent that fair trial rights may be infringed should also be avoided.

35. The creation of crisis response teams within the prosecution service at central, regional and local level may be envisaged, as well as other organisational responses aiming at adaptation among prosecutors vis-à-vis particular situations in a member State. The prosecution services should convey the message about the need for adaptation to all prosecutors and raise awareness about new circumstances and new measures.

36. In accordance with the prosecution system in each member State, guidelines should be issued by the prosecution office at central level, highlighting co-operation mechanisms both within and outside the prosecution service in particular emergency circumstances. If guidelines at central level are not possible due to the organisational set-up of the prosecution services, they should at least strive to be coherent across different prosecutorial offices. Uniformity of application of the law and regulations should be expected from prosecutors and prosecution services throughout the States concerned.

37. Specific cooperation and coordination mechanisms and procedures may be established during emergency situations with other institutions such as law enforcement agencies, investigation and control bodies, courts, health institutions, mass media, professional associations of prosecutors and other civil society organisations. Cooperative and coordinative arrangements may include personnel and other relevant agencies which in a normal situation are not necessarily in contact with the prosecution services.

38. The conduct of investigations, or the supervision of those carried out by police and other investigation authorities, must be implemented with a particular vigilance for monitoring the protection of human rights and freedoms in the context of an emergency situation. An extended power for the prosecution services is not envisaged here, but rather using the existing powers most effectively in such situations.

39. In this context, victims and witnesses and other vulnerable groups should be effectively assisted and/or protected and defendants should have their rights respected throughout the criminal procedure. The prosecution services and prosecutors should particularly monitor whether emergency measures interfere with fundamental human rights and freedoms to a greater extent than is strictly necessary.

[22] See ECtHR *Marcello Viola v. Italy* - 5 October 2006 (http://hudoc.echr.coe.int/eng?i=001-77246).
[23] See ECtHR *Marcello Viola v. Italy* - 5 October 2006 (http://hudoc.echr.coe.int/eng?i=001-77246); *Sakhnovskiy v. Russia*, Grand Chamber - 2 November 2010 (http://hudoc.echr.coe.int/eng?i=001-101568); *Repashkin v. Russia* (No. 2), 16 December 2010 (http://hudoc.echr.coe.int/eng?i=001-102282); *Vladimir Vasilyev v. Russia* - 10 January 2012 (http://hudoc.echr.coe.int/eng?i=001-108478); *Yevdokimov and Others v. Russia* - 16 February 2016 (http://hudoc.echr.coe.int/eng?i=001-160620); *Gorbunov and Gorbachev v. Russia* – 1 March 2016 (http://hudoc.echr.coe.int/eng?i=001-160993); *Sakhnovskiy v Russia*, 27 November 2018 (http://hudoc.echr.coe.int/eng?i=001-187831).
[24] For instance, Decree-Law 10-A/2020, of 13 March, Law 1-A/2020, of 19 March, Law 4-A/2020 of 6 April 2020 in Portugal.

40. In these exceptional circumstances, prosecutors and prosecution services should particularly strive to explore the possibility of using alternatives to the prosecution in general and to pre-trial detention in particular. Mediation could also be another possibility to face the effects that may appear as a result of a state of emergency[25].

41. An emergency situation may have a considerable impact on criminality. It may help reduce some types of criminality, for instance due to quarantine or confinement measures. It may also increase it, by creating new trends for criminality or conditions for the perpetration of particular offenses (such as domestic violence, economic and financial crime related to the funds used to deal with the emergency situation), by creating new types of offenses or by facilitating their perpetration (such as violation of confinement or curfew measures). This poses challenges and require prosecution services and prosecutors to pay special attention and take corresponding measures, if need be, for initiating prosecution in urgent cases, or cases relating to the emergency situation, for instance, disobedience vis-a-vis law enforcement agencies' or health personnel's lawful orders regarding illegal or wrong disposal of sanitary waste, intervention in cases of domestic violence and other potential infractions specific to such context. They should furthermore pay attention to the need to ensure an adequate understanding of the evolving knowledge related to the emergency situation, for instance, in case of eventual malpractice by health professionals during a pandemic, to take into account, for evaluating their civil, administrative or criminal liability, the scientific knowledge available at the time the medical act was performed[26].

42. Prosecution services and prosecutors should explore possibilities for approaching and entering into a meaningful dialogue with courts at the time of their reduced capacity and activity, in order to discuss how to proceed with priority cases. Flexibility is also needed from the prosecution services in order to address the backlog of cases leading to their significant reduction in the aftermath of emergency situations, as the pandemic, when courts resume their normal activity, and efforts should be deployed at an early stage to recover as soon as possible from such backlog.

43. The process of appealing court decisions can further be rationalised and streamlined through the application of electronic means of communication and management of proceedings.

44. Where applicable for prosecution services, carrying out, or participating in, the supervision of the execution of court decisions should take into account, whenever possible, in the event of a pandemic, the possibility of using non-custodial measures or reduction of prison sentences in order to avoid overcrowding in penitentiary institutions and to prevent the dissemination or spread of the disease inside them.

45. Ensuring that the law is respected within the framework of national crime policy and adapting its application, where appropriate, to regional and local priorities – for instance, in cases where disobedience of lawful orders from law enforcement and health personnel regarding confinement may add to the spread of the disease – should be high on the agenda of the prosecution services.

46. In emergency situations, as the pandemic, lockdowns and shelter measures may be accompanied by heightened risks for vulnerable groups, including children, victims of gender-based violence and human trafficking and others, facilitating their witnessing of or suffering violence and abuse. Enforcement of restrictions on movement and physical distancing measures can serve as a cover for discrimination and violence against vulnerable groups. In this context, prosecution services and prosecutors should take measures to prevent and remedy such cases as efficiently as possible. For example, in order to ensure permanent access to legal remedies for victims, including of domestic violence and other vulnerable persons, their complaints should continue to be received and acted upon during, as well as, in the

[25] See Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (15 September 1999) and the Guidelines for Prosecutors for Victim – Offender Mediation, adopted by the International Association of Prosecutors on 27 November 2018. See also Recommendation CM/Rec(2002)10 on mediation in civil matters, and European Handbook for Mediation Lawmaking of 14 June 2019 (CEPEJ (2019)9) of the European Commission for the Efficiency of Justice (CEPEJ).

[26] See UN CTED. The impact of the COVID-19 pandemic on terrorism, counter-terrorism, and countering violent extremism, June 2020 (https://www.un.org/sc/ctc/wp-content/uploads/2020/06/CTED-Paper%E2%80%93-The-impact-of-the-COVID-19-pandemic-on-counter-terrorism-and-countering-violent-extremism.pdf); INTERPOL. Global Lanscape on COVID-19 Cyberthreat); FATF. COVID-19-related Money Laundering and Terrorist Financing Risks and Policy Responses. Paris, May 2020 (http://www.fatf-gafi.org/publications/methodsandtrends/documents/covid-19-ml-tf.html); INTERPOL. COVID-19: The Global Threat of Fake Medicines, May 2020; MONEYVAL report: Money laundering and terrorism financing trends in MONEYVAL jurisdictions during the COVID-19 crisis, 2 September 2020.

aftermath of emergency situations, as the pandemic, where appropriate by creating innovative ways for victims to present their complaints.

47. In member States, where prosecutors perform functions outside the criminal law field, the conclusions and recommendations of the present Section A also apply, *mutatis mutandis*, to prosecutorial activities mentioned below in Section B.

B. Implementation of functions of prosecution services and prosecutors outside the criminal law field

48. The CCPE notes substantial differences in member States due to the fact that in some of them, prosecutors have extensive powers outside the criminal law field, and in others they do not have such powers. Therefore, it should be kept in mind that the following paragraphs may be only relevant for the former group of States.

49. In this context, and depending on the national legal framework, the prosecution services, as in the field of criminal law, may also monitor the necessity, proportionality and adequacy of emergency measures adopted outside the criminal law field (for instance, in the field of civil and administrative law). This is an important activity of the prosecution services in the non-criminal area, which should also be focused mainly on the protection of human rights and freedoms, including the health of the general population.

50. Where applicable, and depending on the national legal framework, it is thus essential to ensure that all restrictive measures are taken in accordance with international human rights standards and obligations, that any interference with these rights is proportionate and limited, both in time and in scope, to situations when it is genuinely necessary in a democratic society. Enforcement of these measures should not be discriminatory[27]. To ensure these objectives, the prosecution services may consult representatives of civil society (non-governmental organisations, foundations, charitable organisations, professional associations, etc.) where appropriate, and preferably prior to the introduction of new restrictive measures.

51. Prosecution services, particularly in emergency situations, should adopt adequate measures to prevent any undue influence in their prosecutorial activity. They should also refrain from any type of discrimination, especially discrimination against human rights defenders and journalists, ensuring that they do not face disproportionate treatment or punishment as a result of their work.

52. Modern technology is currently used to monitor the contacts of persons infected with COVID-19, symptoms or compliance with the imposed quarantine measures. To achieve these objectives, mobile phone applications and traffic and location data from telecommunication services providers are used. The prosecution services and prosecutors, where competent and appropriate, should monitor this process in line with ECHR principles, and relevant domestic legislation in order to see that any interference with the right to privacy be limited to what is required to achieve the intended purpose and its applicability be restricted in time

53. Personal data must be processed in accordance with applicable laws and with control by competent data protection authorities. Any use of such data should be, as a general rule, subject to the consent of the person concerned or at least the person should be later informed of such use. Personal data collected must be secured so that they cannot be misused by hackers or other persons who should not have access to it. Individuals shall be informed of the reasons behind measures taken and their duration and should be able to defend themselves against their possible misuse. The use of personal data collected in this way should primarily serve to prevent the spread of COVID-19, not for assessing administrative or criminal liability of people involved. Competent units or experts of the prosecution services may, where appropriate, control this process in line with ECHR principles, as well as other relevant international and domestic provisions.

[27] OHCHR, COVID-19: States should not abuse emergency measures to suppress human rights – UN experts, online: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722.

54. Compliance with quarantine measures imposed should take priority over the enforcement of other more stringent restrictive measures. Sanctions for possible infractions should be proportionate to the acts committed. In order to avoid over-criminalisation of such acts, and to avoid undermining public trust in the rule of law, cases should be, wherever possible, resolved by agreement, especially if perpetrators cooperate with the authorities. The enforcement of restrictive measures should not be discriminatory against minorities, marginalised groups or human rights defenders and journalists. The prosecution services, where applicable and if they are competent, should monitor this process in line with ECHR principles and other relevant international and domestic provisions.

55. The impact of emergency situations is usually felt long after the restrictive measures are lifted. Even after lifting these measures, people may remain restrained, as is the case, in the event of a pandemic, having to stay in quarantine or some other form of social isolation. This applies even more to vulnerable groups that have been disproportionately affected by the pandemic, notably members of minority groups, people at risk of poverty, the elderly, persons with disabilities, persons in nursing homes or other persons suffering most from the pandemic, migrants, refugees, women and children at risk of domestic abuse and sexual violence, victims of hate speech, human trafficking. These vulnerable groups must be protected, not isolated, and their protection has to be fully ensured, where applicable, by prosecution services and prosecutors which must treat them in accordance with the principle of equality before the law and non-discrimination, to ensure respect of their human dignity and rights.

IV. Existing, new or extended functions of prosecution services and prosecutors in response to emergency situations

56. At the time of a pandemic, existing functions of prosecution services and prosecutors may be extended, where applicable and appropriate. New functions may also be entrusted to them in this context. Diverse legal systems in member States regulate differently the possibility of such new or extended functions. Accordingly, interventions by the prosecution service in certain member States may go beyond previously established limits. There have been different examples of how the extended role of the prosecution services and prosecutors may apply in order to protect people better in these circumstances.

57. The following paragraphs refer to examples provided by member States in their responses to the questionnaire for the preparation of the present Opinion. Such examples include:

- investigations on profiteering on foodstuffs, hygiene products and essential medicines and supplies, as well as criminal liability related to the transmission of the infection or to its medical treatment[28];

- prosecutor's offices organise inspections in residential care homes for the elderly with identified COVID-19 cases to check the measures taken to prevent its further spread[29];

- disrespect of the curfews as a health measure is considered as a crime in several countries, and the prosecution service has an extended authorisation to prosecute such cases. The implementation in general of emergency measures is subject to supervision by prosecution offices[30];

[28] Italy.
[29] Bulgaria and Spain. At the beginning of June 2020, the Spanish Public Prosecutor´s Office investigated almost 200 residential care homes for elderly people, regarding COVID-19 problems.
[30] North Macedonia.

- given the powers of the prosecution service, preventive measures and the prompt and effective handling of reported facts are important tools in the fight against domestic violence, and this is given close attention in the context of the pandemic[31];

- the prosecution service has taken appropriate measures in order to avoid overcrowding in places of custody, as well as in court halls, in the offices of prosecutors and judges, without encroaching upon the rights of defendants and vulnerable groups. It applies necessary measures for the protection of individuals in general and vulnerable groups in particular, predominantly for possible violent discrimination. It gives instructions for the prosecution of some cases in order of priority, such as when a danger of exceeding the statute of limitations exists or when there are defendants temporarily in custody. There is no possibility that important cases would ‘’close’’ in any way because of the accumulation of a large number of files. Problems that arise due to coronavirus must be overcome with a great deal of effort by all participants related to justice (prosecutors, judges, secretaries, lawyers)[32].

58. In many member States, the prosecution services and prosecutors have to interact in general more closely with the media and explain their work in the context of the pandemic. In some cases, they have to inform the public of more severe sanctions in times of emergency and of the penalties imposed[33]. In this regard, it is important to ensure that possible restrictions on media freedom and freedom of expression are not vaguely formulated, since actions to combat alleged "misinformation" could be unduly applied to any sort of criticism. At the same time, and despite the pandemic, prosecutors should seek to ensure that information provided to the media does not undermine the integrity of investigations and prosecution or the purpose of the investigations. Neither should it breach the rights of third parties, nor influence those involved in the investigation or prosecution. It should not influence the outcome of legal proceedings[34].

59. The prosecution services and prosecutors should strive to ensure respect for human rights and freedoms in the course of application of emergency measures, such as confinement/lockdown, closure of public areas and other relevant restrictive measures.

60. Thus, the enforcement of emergency measures should be carried out fairly and humanely and any penalties imposed should be proportional to the offence committed and laid down by law.

61. The prosecution services may be asked to monitor the process of setting up of areas for quarantine or confinement. Where applicable, the prosecution services should ensure that persons held in quarantine or confinement are treated as free persons, except for the limitations necessarily placed upon them in accordance with the law and on the basis of scientific evidence for quarantine purposes. These persons should not be viewed or treated as if they were detainees.

62. Persons held in quarantine or confinement should further be able to continue benefitting from the fundamental safeguards against ill-treatment, including information on the reasons for their quarantine or confinement, have the right of access to independent medical service, the right to legal assistance and the right to ensure that third parties are notified of their being in quarantine or confinement, in a manner consonant with their status and situation. They should be able to communicate with families and friends through appropriate means and should not suffer from any form of marginalisation or discrimination, including once they have returned to the community.

[31] Slovakia.
[32] Greece.
[33] Belgium.
[34] See Opinion No. 8 (2013) of the CCPE on “Relations between prosecutors and the media”, para 23.

V. Overcoming challenges faced by prosecution services and prosecutors in emergency situations

63. In emergency situations, and in particular during a pandemic, prosecution services and prosecutors must apply the law without falling below the expected standards, with strict respect for human rights and fundamental freedoms. In such situations, prosecutors assume the greatest responsibility and duty, since these are times where they are most needed

64. A pandemic brings about unemployment and loss of income caused by the decrease in economic activity and it may have enduring negative psychological effects. Cases of domestic violence, racism and intolerance, and in particular violence against medical and health staff may increase. Consequently, as a result of a possible increase in crimes against vulnerable persons, as well as crimes against property, prosecution services may experience some momentary difficulties.

65. Other possible challenges derive from a possible decrease in the budget allocated to the prosecution services, due to the dire economic consequences of the pandemic and the need to adequately protect prosecutors, prosecutorial staff, as well as their families and the parties to the proceedings from the risks caused by a pandemic.

66. Moreover, there is the risk of a spread of the disease in prisons and detention facilities. This raises the need to protect the prison personnel, prisoners and detainees, as well as their families, from the pandemic. Where applicable, all essential measures must be taken by prosecution services to protect the rights of detainees and prisoners.

67. In order to minimise the effect of a pandemic, prosecutors should urgently and effectively deal with crimes committed against vulnerable persons. While dealing with all other crimes, prosecutors should continue their activities in due course. If necessary, investigations that are not urgent may be postponed provided that the limits and conditions thereof are established by law beforehand.

68. As regards investigations of violations caused by the application of public health measures, the balance between the protection of human rights and of the health of general public and particular persons should be continuously taken into consideration.

69. Since the challenges that prosecutors face in emergency situations are serious and complex, cooperation among prosecution services, justice administration bodies and parties to the proceedings is particularly needed to overcome these challenges.

70. During emergency situations, when compared to normal times, there may be an increased risk of unlawful interferences that might damage the independence of prosecutors. In this regard, in order to preserve the internal and external independence or autonomy of prosecutors and prosecution services, governments and other powers of State, media, parties to the proceedings and civil society should assume the corresponding responsibility of not unduly interfering with prosecutorial activity.

71. As regards the evaluation of prosecutors' work, any deterioration in their working conditions and increase in their workloads as a result of an emergency situation should be duly taken into consideration.

72. In order to protect prosecutors, prosecutorial staff, parties to the proceedings, detainees and prisoners from a pandemic, all physical measures must be taken within the premises of prosecution services to ensure their safety, for instance through the organization of shifts for prosecutors and prosecutorial staff, as well as in prisons and detention facilities, and all necessary cleaning and sanitary supplies must be provided.

73. In addition, instead of face to face contact, effective teleworking, teleconferencing and videoconference systems should be provided through developing the technological infrastructure.

74. In emergency situations, the allocation of an appropriate budget is key in ensuring prosecution services are equipped with all means necessary and up to expected standards, so as not to significantly affect its activity.

75. Prosecutors should not compromise by reducing or limiting the standards of professional ethics even in emergency situations and they should be aware that challenges should be dealt with while preserving these standards.

76. In order for prosecutors and prosecutorial staff not only to adapt to new working modes and conditions but also to adequately protect themselves from an emergency situation, as a pandemic, training activities should be developed in an effective manner and all kinds of expert support should be provided in this regard.

77. Prosecution services should maintain contacts with national health authorities and periodically evaluate measures and precautions that should be taken.

78. If necessary, medical staff should be made available to prosecution services, courts, law enforcement agencies, as well as in prisons and detention facilities. The measures that minimise the risks in these places should be regularly evaluated in line with the recommendations of experts.

79. If risks increase significantly due to an emergency situation, in order to manage them and possibly postpone some activities, legal and administrative regulations can be adopted while strictly respecting human rights and establishing the limits beforehand.

VI. International co-operation and difficulties during the pandemic

80. An emergency situation such as a pandemic poses particularly serious problems for international co-operation. At the time when confinement and lockdown measures affect even the simplest operations of prosecution services inside their countries, the closed borders and quarantine measures affect even more strongly any kind of international, including transborder co-operation.

81. Certain elements of such co-operation may break down completely or be substantially delayed during emergency situations, as a pandemic, for example, in cases of mutual legal assistance, implementation of European arrest warrants, extradition, joint investigation teams and other measures related to the physical transfer of persons.

82. The impact of the COVID-19 pandemic has particularly magnified the need for all stakeholders to step up efforts to fight crime.

83. Since the special measures connected with the COVID-19 pandemic are different in member States, prosecution offices in different States should intensify consultations among themselves to develop more effective and innovative forms of co-operation and to maximise operational efficiency. In order to strengthen international cooperation and coordination, prosecution services of member States should announce their emergency contacts in advance for such situations.

84. Good practices should be identified and used to inform the development of new protocols and procedures related to the effective functioning of the prosecution offices during the COVID-19 pandemic. These should include a wider use of technology, such as online procedures to communicate cases, videoconferencing, legal recognition of electronic evidence or evidence presented by electronic means, establishment of electronic case files and evidence management systems, as well as the use of emergency regulations. Good practices can also involve facilitating the remote participation of victims and witnesses in pre-trial proceedings. Oversight and accountability of prosecutors in the context of emergency regulations should continue to be ensured throughout the duration of the emergency.

85. Because of the difficulties with paper-based documents' transmission, affected by the pandemic, prosecution offices should consider the possibility of accepting and processing mutual legal assistance and extradition requests if communicated by electronic mail. States that have a mandatory requirement to provide legal assistance only when receiving paper-based requests, should temporarily reconsider such requirements and try to process the requests based on electronic copies until the receipt of the corresponding paper-based requests.

86. Because of the current restrictions on free movement of persons between States, prosecution offices should consider the possibility of accepting and processing the requests for transit permission of the extradited persons by e-mail, which will help to reduce the amount of working time and resources needed during the pandemic and to respond more promptly to the requests.

87. As the persons who are subject to extradition are in custody and there are numerous issues (technical, organisational, financial) related to their transfer, requested and transiting States should consider providing possible assistance in applying more simplified procedures of established quarantine rules for officials from requesting States who are traveling to their territory with a mission to organise the transfer of those persons.

VII. Recommendations

Introduction

1. Under international instruments ratified by member States of the Council of Europe, a formal declaration of a state of emergency must be made, before emergency measures can be applied.

2. While there is no uniformly defined model for declaring a state of emergency and it is the factual situation which will determine its actual extent and rationale, a necessary precondition for declaring a state of emergency should be that the powers provided by regular legislation are not sufficient to overcome the emergency. The ultimate goal of any state of emergency should therefore be for the State to overcome the emergency and return as soon as possible to the normal situation.

3. The legal framework in which prosecution services will have to operate during emergency situations, as a pandemic, is defined by international instruments ratified by member States, as the ECHR and the ICCPR, which define a set of conditions to be observed in such situations (for instance, regarding non-derogable rights or other rights essential for upholding non-derogable rights), as well as by constitutional or other domestic legislation.

4. The responsibility of prosecutors to promote and to strengthen the rule of law has many inherent aspects entailing significant challenges to prosecutors. These challenges are particularly demanding in the context of emergency situations.

5. The COVID-19 pandemic has caused a global health crisis – a public health emergency - unlike any experienced for more than a century. The unprecedented situation in the world due to the fight against the pandemic has presented equally unprecedented challenges for prosecution services.

Recommendations

1. If a state of emergency is to be declared, and in the case of derogation from rights set out in the ECHR, in line with its Article 15, or set out in the ICCPR, in line with its Article 4, a formal proclamation should be made before such derogation enters into force.

2. The restrictions introduced as a result of the pandemic may affect not only civil and political rights protected by the ECHR, but also economic, social and cultural rights with the possible risk of entailing discrimination against particular groups. Restrictions to be imposed should therefore respect human rights obligations and ensure that the public health emergency is not used as a pretext for human rights infringements but aims foremost at protecting people.

3. The legislation regulating the adoption of measures during emergency situations must respect first of all non-derogable rights. Legislation affecting other rights must be based on the overarching principle of the rule of law, and on the principles of necessity, adequacy, equality and non-discrimination, proportionality, temporariness, effective (parliamentary and judicial) scrutiny, predictability of emergency legislation and loyal co-operation among state institutions.

4. In the same way that the integrity of the court system, including its competences, independence and impartiality, should be safeguarded, especially as concerns full access to a court and to an effective remedy for the protection of human rights in emergency situations, the integrity of the prosecution service and its organisation should also be protected, applying the same rationale.

5. While ensuring safety from infection for prosecutors and prosecutorial staff and their families or providing necessary medical treatment to those infected, the functioning of prosecution services, like that of courts, should adapt to the circumstances imposed by an emergency situation, while still being able to deal with urgent cases or decisions. Prosecution services should adopt at an early stage all necessary measures to recover backlog of cases delayed due to the emergency situation.

6. The development of new technologies and progressive improvement of videoconferencing systems in the judiciary across the Council of Europe's member States have created new possibilities for ensuring the hearing of witnesses, experts and defendants. The objective to achieve with their use should be to facilitate a hearing that should allow the parties to fully participate and make the remote proceedings and hearing as close as possible to the usual practices in the prosecution service and the court, while respecting the same rights and safeguards.

7. The creation of crisis response teams within the prosecution service at central, regional and local level may be envisaged, as well as other organisational responses aiming at addressing particular pressing situations in a member State.

8. In accordance with the prosecution system in each member State, guidelines should be issued by the prosecution office, for instance at central level, highlighting co-operation mechanisms both within and outside the prosecution service in particular emergency circumstances. Uniformity of application of the law and regulations should be expected from prosecutors and prosecution services (or offices) throughout the States concerned.

9. During emergency situations, specific cooperation and coordination mechanisms and procedures may be established by prosecution services with other institutions such as law enforcement agencies, investigation and control bodies, courts, health institutions, mass media, professional associations of prosecutors and other civil society organisations.

10. Where appropriate, prosecution services and prosecutors should particularly monitor whether the use of emergency measures interfere with fundamental human rights to a greater extent than is strictly necessary. They must apply the law without falling below the expected standards, with strict respect for human rights and fundamental freedoms.

11. Depending on the national legal framework, prosecution services, in addition to their intervention in the field of criminal law, may also be called upon to monitor the necessity, proportionality and adequacy of emergency measures adopted outside the criminal law field.

12. All restrictive measures should be taken in accordance with international human rights standards and obligations and ensuring that any interference with these rights is proportionate and limited, both in time and in scope, and that they apply to situations when it is genuinely necessary in a democratic society. Enforcement of these measures should not be discriminatory.

13. An emergency situation such as a pandemic poses particularly serious problems for international co-operation. Closed borders and quarantine measures affect even more strongly any kind of international, including transborder co-operation.

14. Certain elements of such co-operation may break down completely or be substantially delayed during an emergency situation, as a pandemic. Prosecution offices should intensify consultations to develop more effective and innovative forms of co-operation in order to maximise operational efficiency.

15. Prosecution offices should consider the possibility of applying more simplified procedures during emergency situations, for instance accepting and processing mutual legal assistance and extradition requests if communicated by electronic mail. States should consider providing possible assistance in applying more simplified procedures of established quarantine rules for officials from requesting States.

16. Considering that member States will certainly conduct evaluations of the impact of the pandemic on their judicial systems and on the regular functioning of their courts and prosecution services, and considering also that those evaluations may contain valuable information, the CCPE may request member States to share the results of those evaluations in order to assess whether the present Opinion needs to be updated in the future.

Opinion No. 16 (2021)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

Implications of the decisions of international courts and treaty bodies as regards the practical independence of prosecutors

I. Introduction: purpose and scope of the Opinion

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Prosecutors (CCPE) has prepared the present Opinion on the implications of the decisions of international courts and treaty bodies as regards the practical independence and effective autonomy of prosecutors and related aspects.

2. This topic was selected by the CCPE with a view to highlighting the impact of decisions of international courts and treaty bodies on the independence of prosecutors. Although many of such decisions focus rather on the independence of the judiciary, this independence is closely linked to the independence of prosecutors since the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary[1]. Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability[2]. Consequently, appropriate provisions should be adopted in member States, in parallel to the independence of judges, to strengthen likewise the independence, accountability and ethics of prosecutors[3].

3. Systems of criminal justice vary throughout Europe. The different systems are rooted in different legal cultures and there is consequently no uniform model for all states. There are, for example, important differences between systems which, in the framework of criminal procedure, are adversarial in nature and those which are inquisitorial[4]. Nevertheless, over the centuries, European criminal justice systems have borrowed extensively from each other so that today there are probably no pure systems. This borrowing across systems has led to a degree of convergence[5].

4. The most important convergence factor, and one that really brings all these systems together, is the requirement of the independence of the prosecution services as a pre-requisite for the rule of law and the independence of the judiciary, as mentioned in para 2 of the present Opinion. Because of the serious consequences for the individual of a criminal investigation and trial, since it may lead to conviction and punishment, the prosecutor must act cautiously and fairly in deciding whether to prosecute, and for what charges. In this regard, a prosecutor, like a judge, may not act in a matter where he or she has a personal interest, and may therefore be subject to certain professional restrictions aiming to safeguard his or her own impartiality and integrity[6].

5. The independence of prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and it is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised. Thus, akin to the independence secured to judges, the independence of prosecutors is not a prerogative or privilege conferred in their interest, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned[7].

[1] See the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section IV.
[2] See the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section V.
[3] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section i.
[4] See the Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 7.
[5] See the Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 9.
[6] See the Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), paras 16-17.
[7] See the CCPE Opinion No. 4 (2009) on relations between judges and prosecutors in a democratic society, para 27.

6. In countries, where the public prosecution is part of, or subordinate to, the government, the state must ensure that the nature and the scope of its powers with respect to the public prosecution is clearly established by law, and that the government exercises its powers in a transparent way and in accordance with international treaties and standards, national legislation and general principles of law[8].

7. The independence and autonomy of prosecutors and prosecution services should therefore be encouraged[9] and guaranteed by law, at the highest possible level, in a manner similar to that of judges. In countries, where the public prosecution is independent of the government, the state must consequently take effective measures to guarantee that the nature and the scope of this independence are established by law[10] and not just by administrative regulations. A fully independent prosecution system remains a guarantee of unconditional impartiality of prosecutors.

8. The case-law of international courts and decisions of treaty bodies may also play an important role. The present Opinion aims at examining the impact for the independence of the prosecution services and of individual prosecutors of such case-law and decisions.

9. This Opinion has been prepared on the basis of the European Convention on Human Rights (hereafter ECHR) and the relevant case-law of the European Court of Human Rights (hereafter ECtHR), as well as of the case-law of the Court of Justice of the European Union (hereafter CJEU) and relevant United Nations treaty body decisions.

10. This Opinion is also based on the previous CCPE Opinions, in particular the Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including the Rome Charter, and the Opinion No. 13 (2018) on independence, accountability and ethics of prosecutors, as well as on the Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system (hereafter Recommendation Rec(2000)19) and Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice system (hereafter Recommendation Rec(2012)11).

11. The CCPE has also gained an insight into the UN Guidelines on the Role of Prosecutors adopted in 1990[11], as well as into the Standards of professional responsibility and statement of the essential duties and rights of prosecutors, adopted in 1999 by the International Association of Prosecutors (IAP)[12].

12. In the course of the preparation of the present Opinion, the CCPE has based itself on the significant contributions provided by Mr João Manuel da Silva Miguel (Portugal), Mr José Manuel Santos Pais (Portugal), Ms Jana Zezulova (Czech Republic) and Ms Ioana Bara-Bușilă (Romania), and thanks them for their valuable expert contribution to this work.

II. Decisions of international courts as regards the practical independence of the judiciary in general and prosecutors and prosecution services in particular

A. Principles developed by the CCPE as regards independence of prosecutors and prosecution services

13. According to the CCPE, the concept of independence means that prosecutors are free from unlawful interference in the exercise of their duties so as to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind. Independence applies not only to the prosecution service as a whole, but also to its particular bodies and to individual prosecutors[13].

[8] See the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 33.
[9] See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section IV.
[10] See Rec(2000)19, para 14. See also CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, para 33.
[11] By the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[12] These Standards serve as an international benchmark for the conduct of individual prosecutors and of prosecution services. They establish that the use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference. If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be transparent, consistent with lawful authority, and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.
[13] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, paras 15-16.

14. In practical terms, the above definition results in several important principles in order to make such independence a reality:

- first of all, measures for such independence should be established through a corresponding legal framework, like those for the independence of judges[14];

- consequently, the status, independence, recruitment and career of prosecutors should, similarly to judges, be clearly established by law and governed by transparent and objective criteria[15];

- a status for prosecutors should ensure both their external and internal independence, preferably by provisions at the highest legal level and guaranteeing their application by an independent body such as a Prosecutorial Council, in particular for appointments, careers and discipline[16]. It is necessary in particular to secure proper tenure and appropriate arrangements for the promotion, discipline and dismissal of prosecutors[17];

- in the course of their career, including for recruitment and promotion, prosecutors should be selected on the basis of their skills, knowledge and ethical values, and receive adequate training to carry out their functions independently and impartially, and with full respect for ethical standards[18];

- instructions by the executive power concerning specific cases are generally undesirable. In this context, instructions not to prosecute must be prohibited and instructions to prosecute must be strictly regulated in accordance with the Recommendation Rec(2000)19[19];

- general instructions on priorities of prosecutorial activities as they result from the law, the development of international co-operation or requirements relating to the organisation of the service should always be given in accordance with the law, in a fully transparent and written manner[20]. If instructions are given to prosecutors by their superiors in the prosecution service, these should be presented in writing, given transparently and always with the objective of applying the law, seeking the truth and ensuring the proper administration of justice, while respecting human rights and fundamental freedoms[21];

- status, remuneration and treatment of prosecutors as well as the provision of financial, human and other resources allocated to prosecution services should correspond, in a way comparable to those of judges, to the eminent nature of the mission and the particular duties of prosecutors[22];

- member States should protect prosecutors and, as appropriate, members of their families and livelihood, when carrying out their functions[23];

- in their systems of administrative and hierarchical organisation, member States, if they wish to confer or maintain the status of judicial authority for prosecutors within the meaning of the

[14] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section i.
[15] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section iii.
[16] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section iii.
[17] See Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 18; see also CCPE Opinion No. 9(2014) on European norms and principles concerning prosecutors, para 53.
[18] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section ii.
[19] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section iv.
[20] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, paras 34-35.
[21] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, para 40, Recommendations, Section vi.
[22] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section xi.
[23] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section ix.

European Convention on Human Rights, should ensure that they have all the guarantees, in particular those required for independence, attached to this status[24];

- general public and interested individuals should upon request receive appropriate information on the prosecution service and prosecutorial activities. In parallel, prosecutors should play a key role in disseminating such information through appropriate channels and in accordance with the law, ensuring at the same time respect for prosecutorial independence, presumption of innocence, needs of the investigation, protection of personal data and other relevant aspects[25].

15. As regards in particular the term of office of prosecutors, it is important to recall the position endorsed by the Venice Commission that prosecutors should benefit from a career until retirement. Appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her[26].

B. Case-law of the European Court of Human Rights (ECtHR)

16. Article 6 of the European Convention states that everyone has the right to an independent and impartial tribunal established by law. There is a vast jurisprudence on what an independent tribunal should be. The relevance of the concept derives from the fact that it is an element of the judicial system vital to the strengthening and functioning of the rule of law. An independent and impartial tribunal guarantees the respect for human rights and fundamental freedoms and is vital to ensure the public trust in the justice system in a democratic society.

17. Independence and autonomy of prosecutors have been examined so far by the ECtHR only to a limited extent, unlike the case-law on judges which is much more comprehensive. These concepts in relation to prosecutors were touched upon only in some judgments. However, since the independence and autonomy of the prosecution services constitute, in the opinion of the CCPE, an indispensable corollary to the independence of the judiciary[27] (also see paras 2 and 4 of the present Opinion), the guidance provided by the judgments referring to the judiciary may also be applicable to some extent, *mutatis mutandis,* to the prosecution services.

18. The concept of an independent tribunal requires independence not only from the executive and the parties to the proceedings but also from the legislator[28]. Moreover, in order to determine whether a tribunal can be considered to be independent as required by Article 6 of the ECHR, appearance of independence may also be of importance[29].

19. The ECtHR cast further light on the importance of appearance of independence and pointed out that what is at stake here is the confidence which courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused[30].

20. Compliance with the requirement of an independent tribunal is assessed on the basis of statutory criteria, such as the manner of appointment of its members and the duration of their term of office, or the existence of sufficient safeguards against the risk of outside pressures[31].

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[24] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section xii.
[25] See the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations, Section vii.
[26] See Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 50.
[27] See the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section IV.
[28] *Ninn-Hansen v. Denmark* (dec.), no. 28972/95, 18 May 1999, para 93.
[29] *Sramek v. Austria*, no. 8790/79, 22 October 1984, §42. See, *mutatis mutandis*, *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, Series A no. 80, pp. 39-40, para 78; and *Piersack v. Belgium*, no. 8692/79, 1 October 1982, Series A no. 53, pp. 14-15, para. 30.
[30] *Şahiner v. Turkey*, no. 29279/95, 25 September 2001, § 44. For civil limb, see *Sacilor Lormines v. France*, no. 65411/01, 9 November 2006, § 63; *Grace Gatt v. Malta*, no. 46466/16, 8 October 2019, § 85.
[31] *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015, § 221; *Findlay v. the United Kingdom*, no. 22107/93, 25 February 1997, § 73; *Bryan v. the United Kingdom*, no. 19178/91, 22 November 1995, Series A no. 335-A, p. 15, para 37. Regarding civil limb, see *Langborger v. Sweden*, no. 11179/84, 22 June 1989, § 32; *Kleyn and Others v. the Netherlands* [GC], (nos. 39343/98, 39651/98, 43147/98 et 46664/99), 6 May 2003, § 190.

21. In particular, the irremovability of judges by the executive during their term of office is in general considered as a corollary of their independence and thus included in the guarantees of Article 6 of the ECHR[32].

22. Even though the ECtHR established that Article 6 of the ECHR requires the courts to be independent not only of the executive and the parties, but also of the legislature, the mere appointment of judges by Parliament cannot be construed as casting doubt on their independence or impartiality[33].

23. The appointment of judges by the executive may be permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role[34].

24. The requirement of impartiality has two aspects: first, the tribunal must be subjectively free of personal prejudice or bias, and secondly, it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt as to its impartiality[35].

25. As regards the duration of the term of office of judges, no particular tenure has been specified as a necessary minimum. Even though the irremovability of judges by the executive during their term of office is in general considered as a corollary of their independence[36], the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that the irremovability is recognised in fact and other necessary guarantees are present[37].

26. Judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court[38].

27. In particular, doubts as to the independence and impartiality of the trial court may be said to have been objectively justified on account of the repeated and frequent replacements of members of the trial bench in a criminal case, carried out for unascertainable reasons and not circumscribed by procedural safeguards[39].

28. In this regard, where members of a tribunal include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, accused persons may entertain a legitimate doubt as to those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society[40].

29. The principles applicable when determining whether a tribunal can be considered independent and impartial within the meaning of the ECHR apply not only to professional judges, but to lay judges and jurors as well[41].

30. In a democratic society, both the courts and the investigative authorities must remain free from political pressure. It is thus in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State[42].

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[32] *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, Series A no. 80, pp. 39-40, para 80.
[33] *Filippini v. San Marino* (dec.), no. 10526/02, 26 August 2003, § 8; *Ninn-Hansen v. Denmark* (dec.), no. 28972/95), 18 May 1999, §§ 89, 93.
[34] *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, 30 November 2010, § 49; *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, § 79; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], no. 2312/08 and 34179/08, 18 July 2013, § 49.
[35] *Findlay v. the United Kingdom*, 25 February 1997, Reports of Judgments and Decisions 1997-I, p. 281, § 73.
[36] *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, Series A no. 80, pp. 39-40, para 80.
[37] *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28 June 1984, § 80.
[38] *Parlov-Tkalčić v. Croatia*, no. 24810/06, 22 December 2009, § 86; *Daktaras v. Lithuania*, no. 42095/98, 10 October 2000, § 36; *Moiseyev v. Russia*, no. 62936/00, 9 October 2008, § 184, *Sacilor Lormines v. France*, no. 65411/01, 9 November 2006, § 59.
[39] *Moiseyev v. Russia*, no. 62936/00, 9 October 2008, § 184.
[40] *Şahiner v. Turkey*, no. 29279/95, 25 September 2001, § 45.
[41] *Holm v. Sweden*, no. 14191/88, 25 November 1993, § 30.
[42] *Guja v. Moldova* no. 14277/04, 12 February 2008, § 86 and 90.

31. Moreover, for an investigation to be effective, persons responsible for carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence[43].

32. There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts[44].

33. The general procedural safeguards applicable in member States include provisions guaranteeing the institutional or functional independence of public prosecutors, whether they are members of the judiciary or civil servants[45]. Furthermore, in some member States, prosecutors are protected from undue pressure through additional safeguards such as the obligation to prosecute all offences except petty offences[46] (based on the need to respect the principle of legality). In some other member States, which recognise the principle of discretionary prosecutions, importance is attached to the transparency of official guidelines[47].

34. The prosecution systems in some member States are structured hierarchically with higher-ranking prosecutors having the power to give orders and instructions to the lower-ranking prosecutors. Despite this structure, a number of safeguards are in place in the legal systems of member States to ensure the effectiveness and independence of the organs in charge of criminal investigations in respect of high-ranking prosecutors. These safeguards include:

- transfer of the case to another entity within or outside the prosecution system;
- special investigation procedures in cases involving suspicion against high-ranking prosecutors;
- suspension of the prosecutor under suspicion from his/her duties (in the case of the highest-ranking prosecutor this decision would be made by the political bodies in charge of his/her appointment); and
- general safeguards such as guarantees ensuring functional independence of prosecutors from their hierarchy and judicial control of the acts of the prosecution service[48].

35. In 2020, the ECtHR expressly referred to the independence of prosecutors, stating that the removal from office of a chief prosecutor and the reasons justifying it in that particular case can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the independence of prosecutors, which – according to the Council of Europe and relevant international instruments – is a key element for the maintenance of judicial independence. Against this background, it appeared that the premature removal of the applicant from her position as chief prosecutor defeated the very purpose of maintaining the independence of the judiciary[49].

36. The ECtHR set out that the executive branch of the government cannot remove chief prosecutors without independent judicial review[50] and also noted that the premature termination of the applicant's mandate was a particularly severe sanction, which undoubtedly had a "chilling effect" in that it must have discouraged not only her but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary[51]. In this way, the ECtHR reaffirmed, inter alia, the freedom of expression for prosecutors with respect to legislative reforms which may have an impact on the judiciary and its independence.

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[43] *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009, §193; *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, 15 May 2007, §§ 321-332; *Khaindrava and Dzamashvili v. Georgia*, no. 18183/05, 8 June 2010, §§ 59-61; *Tahsin Acar v. Turkey* [GC], no. 26307/95, 8 April 2004, §§ 222-225; *Güleç v. Turkey*, no. 21593/93, 27 July 1998, § 82; *Scavuzzo-Hager and Others v. Switzerland*, no. 41773/98, 7 February 2006, §§ 78 and 80-86; and *Ergi v. Turkey*, no. 23818/94, 28 July 1998, §§ 83-84.

[44] *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002 IV, § 140.

[45] *Kolevi v. Bulgaria*, no. 1108/02, 5 February 2010, §§ 148-149; *Vasilescu v. Romania*, no. 27053/95, 22 May 1998, §§ 40-41; *Pantea v. Romania*, no. 33343/96, 3 June 2003, § 238; *Moulin v. France*, no. 37104/06, 23 November 2011, §§ 57.

[46] *Kolevi v. Bulgaria*, no. 1108/02, 5 February 2010, §§ 149.

[47] *Kolevi v. Bulgaria*, no. 1108/02, 5 February 2010, §§ 149.

[48] *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009, § 142.

[49] *Kövesi v. Romania* no. 3594/19, 5 May 2020, § 208.

[50] *Kövesi v. Romania*, no. 3594/19, 5 May 2020, §§ 154, 201, 205 and 208-209. See also *Baka v. Hungary*, no. 20261/12, 23 June 2016, §§ 156-157 and 164-167.

[51] *Kövesi v. Romania*, no. 3594/19, 5 May 2020, §§ 209.

C. Case-law of the Court of Justice of the European Union (CJEU)

37. The CJEU stated that Article 19 of the Treaty of the European Union contains an obligation to ensure judicial independence, and it underlined that the guarantee of independence, which is inherent to the task of adjudication, is required not only at the EU level, but also at the level of member States as regards national courts. The concept of judicial independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions[52].

38. The CJEU also stressed that the guarantees of independence and impartiality require rules, particularly as regards the composition of the judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body concerned, the case-law requires, inter alia, that dismissals of its members should be determined by express legislative provisions[53].

39. The CJEU stated, as regards prosecutors, and interpreting the concept of an 'issuing judicial authority' of a European judicial warrant[54], that Article 64 of the French Constitution guarantees the independence of the judicial authorities, which comprises judges and public prosecutors, and that the Public Prosecutor's Office carries out its duties objectively, free from any instruction in a specific case from the executive, since the Minister for Justice may issue only general instructions concerning criminal justice policy to public prosecutors in order to ensure that that policy is consistently applied throughout the territory. According to that government, under no circumstances can those general instructions have the effect of preventing a public prosecutor from exercising his/her discretion as to the proportionality of issuing a European arrest warrant. Moreover, the Public Prosecutor's Office conducts prosecutions and ensures that the law is applied in accordance with the principle of impartiality[55].

40. Thus, the CJEU underlines several criteria to assess if a particular prosecutor is to be considered as an issuing judicial authority of a European arrest warrant:

- participating in the administration of justice;
- acting objectively;
- being independent;
- being subject to judicial scrutiny[56].

41. Regarding the third criterion, it requires statutory rules and institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive[57].

42. Consequently, prosecutors of member States who are responsible for conducting prosecutions and who act under the direction and supervision of their hierarchical superiors are covered by the term 'issuing judicial authority', within the meaning of that provision, provided that their status affords them a guarantee of independence, in particular in relation to the executive, in connection with the issuing of a European arrest warrant[58]. In addition to the autonomy and independence of prosecutors, their decisions on issuing European arrest warrants must be subject to judicial review[59].

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[52] Case C-64/16, (Associação Sindical dos Juízes Portugueses), 28 February 2018, §§ 42 and 44.
[53] Case C-64/16, (Associação Sindical dos Juízes Portugueses), 28 February 2018, and case C- 216/18 (Minister for Justice and Equality), 25 July 2018, §§ 63 and 66.
[54] Within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.
[55] See case 566/19 (joined cases C-566/19 and C-626/19), 12 December 2019, §54. See the same date judgements in cases 625/19 and 627/19. See also case C-489/19, 9 October 2019; and cases C-508/18 (joined cases C-508/18 and C-82/19) and C-509/18, 27 May 2019.
[56] See cases C-648/20, C-206/20, C-414/20.
[57] Case 566/19, §52. See also cases, C 508/18 and C 82/19 PPU, §§51 and 74.
[58] Case 566/19, §58.
[59] Case 566/19, §74.

D. Case-law of the Inter-American Court of Human Rights

43. Independence of judges is guaranteed in Article 8 of the American Convention on Human Rights. The jurisprudence of the Inter-American Court of Human Rights follows also the criteria of the ECtHR regarding independence of judges as the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures[60].

44. Closely in line with the jurisprudence of the ECtHR, the Inter-American Court stated that one of the principal purposes of the separation of public powers is to guarantee the independence of judges[61].

45. The Inter-American Court held that the requirements related to access to a court, together with criteria of independence and impartiality, also extended to the non-judicial bodies responsible for the investigation prior to the judicial proceedings, showing that investigations into violations of human rights must not only be carried out in a reasonable time but they must also be independent and impartial[62].

46. The Court also held that it is particularly important that the competent authorities adopt all reasonable measures to guarantee the necessary probative material in order to carry out the investigation and that they be independent, both de jure and de facto, from the officials involved in the facts of the case. The foregoing requires not only hierarchical or institutional independence, but also real independence[63].

47. Independence de jure and de facto covers a double dimension: the first is institutional or systemic, while the second is functional, referring to justice operators' individual independence in performing their functions[64].

48. The Inter-American Court also held that reinforced guarantees of independence applying to judges, due to the necessary independence of the judicial power which is essential for the exercise of the judicial functions, should also be applied to prosecutors based on the nature of the duties performed by them[65].

49. Referring to the specific duties of prosecutors, the Court underlined the duty of the State to conduct an independent and objective investigation as regards violations of human rights and crimes in general, emphasising that the authorities in charge of the investigation be independent, de jure and de facto, which requires not only hierarchical or institutional independence, but also actual independence[66].

50. The Court added that the independence of prosecutors guarantees that they will not be the object of political pressures or improper hindrance in their actions, nor will they suffer retaliation for the decisions objectively made by them. This demands a guarantee of stability and a fixed term in their positions. Therefore, the specific guarantees for prosecutors, in an equivalent application of the mechanisms of protection acknowledged for judges, result in the following: (i) that separation from office must obey exclusively to the causes permitted, either through a proceeding that complies with the right to a fair trial or because the mandate for which they have been appointed has expired; (ii) that prosecutors may only be removed for grave disciplinary offenses or incapacity, and (iii) all proceedings against prosecutors must be according to fair procedures that guarantee objectivity and impartiality under the Constitution or the law, given that free dismissal of prosecutors promotes an objective doubt regarding the actual possibility for them to perform their duties without fear of retaliation[67].

E. Impact of decisions of international courts on practical independence of prosecutors

51. The above-mentioned judgments of international courts provide useful elements as regards the independence of the judiciary in general and the independence of prosecutors in particular. As explained

[60] Case *Tribunal Constitucional v. Perú*, judgment of 31 January 2001, §75.
[61] Case of the *Constitutional Court v. Peru*, 31 January 2001. § 73.
[62] Case of *Cantoral Huamaní and García Santa Cruz v. Peru*, 10 July 2007, §§ 132-133,
[63] Case of *Zambrano Vélez et al. v. Ecuador*, 4 July 2007, §122.,
[64] Report on "Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas", approved by the Inter-American Commission on Human Rights on 5 December 2013, § 25.
[65] Case of *Martínez Esquivia v. Colombia*, 6 October 2020, §§84, 86.
[66] Case of *Martínez Esquivia v. Colombia*, §§ 86-88. In the same sense the IACHR, Report No. 109/18, Case 12.840. Merits. *Yenina Esther Martinez Esquivia v. Colombia*, 5 October 2018, approved by the Commission at its session No. 126 held on 5 October 2018, 169 Period of Sessions, available at: https://www.oas.org/en/iachr/decisions/court/2019/12870FondoEn.pdf
[67] Case of *Martínez Esquivia v. Colombia*, §§95-96.

above, the safeguards provided for the judiciary may also be applicable to some extent for prosecution services and prosecutors.

52. Thus, the various elements of independence stressed in these judgments may be used for reinforcing the institutional independence of prosecution services, as well as the functional independence of individual prosecutors, as regards in particular the legislative framework for organisational autonomy of the prosecution services, process of appointment, evaluation and dismissal of prosecutors, their term of office, non-interference into the prosecutors' work and other important aspects.

53. The main added value of the case-law of the ECtHR is its binding force. The ECtHR judgments, in which breaches of the ECHR are found, impose on the respondent State a legal obligation not just to pay those concerned the sums awarded as a just satisfaction, but also to identify, subject to supervision by the Committee of Ministers of the Council of Europe, general measures to be adopted in its domestic legal order to put an end to the violations found by the Court and to redress as far as possible their effects[68].

54. Thus, the requirement to undertake general measures to put an end to violations is obligatory and is supervised by the Committee of Ministers. Such general measures may include new or amended legislation, new institutions, mechanisms, procedures, new criteria for appointment, relocation, promotion, evaluation, dismissal of prosecutors, new safeguards in the course of disciplinary proceedings against prosecutors, developing ethical standards and other measures.

55. That's why the CCPE considered it essential to prepare the present Opinion which expressly shows the elements of independence of prosecutors developed in the ECtHR case-law which can be translated into practice within the framework of obligatory general measures.

56. At the same time, there are important advisory instruments developed by the Council of Europe and providing an in-depth guidance as regards the independence of prosecutors in all above-mentioned aspects. These instruments include in particular the previous Opinions of the CCPE and the Reports of the Venice Commission relevant for the prosecution. The recommendations contained in these instruments are actively advocated by the Committee of Ministers for implementation in member States and they are often translated into practice at national level. They serve as a basis for judicial and prosecutorial reforms in member States, and the Council of Europe co-operation activities, both bilateral and multilateral, take into close account these advisory instruments, along with the case-law of the ECtHR.

57. The CCPE notes that some judgments of the ECtHR, for example, the judgment where the Court referred expressly to the independence of prosecutors[69], included references to the CCPE Opinions[70]. The CCPE also welcomes the fact that its advisory instruments have been used, among other sources, by the ECtHR when preparing judgments in particular cases.

F. Decisions of national courts reinforcing the practical independence of prosecutors

58. As the CCPE underlined, member States of the Council of Europe have different legal systems including diverse prosecution services. However, irrespective of the national prosecution system[71], national decisions of the Supreme Courts, Courts of Cassation, Supreme Administrative Courts and Constitutional Courts in member States have dealt with the issue of independence of prosecutors and the prosecutor's offices in various contexts.

59. Over the years, such decisions were adopted as a response to various situations faced by member States in respect of the status of prosecutors and different aspects of the prosecutorial professions, and they were largely guided by the case-law of the ECtHR, as well as by the recommendations of the Committee of Ministers of the Council of Europe and opinions of the CCPE, CCJE, Venice Commission, GRECO and other key bodies of the Council of Europe.

[68] See Article 46 of the ECHR on binding force and execution of judgments of the European Court of Human Rights.
[69] *Kovesi v. Romania*, no. 3594/19, § 208.
[70] In its judgment in the case of *Kovesi v. Romania*, no. 3594/19, CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including Rome Charter, was cited, para 91 of the judgment.
[71] With regard to the different status of the prosecution service within the system of state powers in each member Stat e, the Public Prosecutor's Office is most often classified as an executive or judicial power. However, it can be assumed that the Public Prosecutor's Office can be described rather as a *sui generis* body, standing outside of the classical triad of the three state powers.

60. In their responses to the questionnaire for the preparation of the present Opinion, member States indicated in particular in what context these highest judicial bodies at national level took decisions reinforcing the prosecutorial independence and impartiality. The most relevant topics and aspects analysed were as follows, showing the wide range of the topics discussed:

- Constitutional status and independence of the Public Prosecutor's Office, position of the Public Prosecutor's Office, independence of the Public Prosecutor's Office and prosecutors, autonomy, admissibility and limits of hierarchy within the prosecution service[72];
- Appointment and dismissal of prosecutors and Prosecutor General, the transfer of chief prosecutors[73];
- Instructions, interference into the activity of public prosecution and the relation to the executive and legislative power [74];
- Salaries of prosecutors, salary restrictions due to the COVID - 19 pandemic, recalculation of pensions[75];
- Control of the constitutionality of some provisions of the Law on the Public Prosecution Office (i.e. new procedure of election, appointment, dismissal of Prosecutor General and composition of Superior Council of Prosecutors, pension regulation) and other legal regulations[76];
- Reporting on the activities of the Public Prosecutor's Office by the Prosecutor General to the President and Parliament or Government, and to the Supreme Judicial Council; nature of the reports; providing information on pending cases[77] and dismissal of the Prosecutor General for non-approval of the annual report by the Parliament[78];
- Establishment of Parliament's Committee for investigation and establishing the political responsibility of public officials, including prosecutors and judges, involved in prosecution and trial in several cases of a politician for corruption offenses[79];
- The position of the prosecutors in criminal proceedings (exercising oversight over the lawfulness of pre-trial investigation, relationships between the investigative body and the prosecutor; mandatory criminal action)[80];
- The position of prosecutor outside the field of criminal law[81].

61. Decisions of national courts reinforcing the practical independence of prosecutors are one of the examples of the positive progressive impact of the case-law of international courts, and in particular of the ECtHR, on the practical independence of prosecutors in member States. As demonstrated above, such decisions concern a wide spectrum of the aspects of the prosecutorial status and profession, and they are particularly needed where reforms of the judiciary and prosecution do not provide sufficiently positive results.

62. The national judicial authorities are closely assisted by the Council of Europe and rely, in addition to the case-law of the ECtHR, on the advisory standards developed by the Council of Europe bodies, and in particular on the CCPE findings which provide a voice and perspective of serving prosecutors throughout Europe and aim to ensure that prosecutors can work in an independent, impartial and effective way when fulfilling their important responsibilities within their national legal systems.

63. Such combination of useful effects both from the case-law of the ECtHR and advisory findings of the Council of Europe bodies provides the national judicial authorities a relevant contextual framework for

[72] Armenia, Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Italy, Latvia, Lithuania, Poland, Portugal.
[73] Czech Republic, Italy, Lithuania.
[74] Cyprus, Hungary, Lithuania, Luxembourg.
[75] Czech Republic, Latvia, Slovenia, Ukraine.
[76] Republic of Moldova, Slovak Republic, Ukraine.
[77] Bulgaria.
[78] Hungary, Lithuania.
[79] Hungary, Slovenia.
[80] Armenia, Czech Republic, Estonia, Italy, North Macedonia.
[81] Bulgaria, Czech Republic, Hungary, Russian Federation.

reinforcing the practical independence of prosecutors at national level. It considerably helps them to work impartially and implement more efficiently the provisions of the ECHR, which in turn allows them to resolve more disputes at national level thus preventing the increasing flow of cases, including repetitive ones, to the ECtHR.

III. Decisions of treaty bodies as regards the practical independence of the judiciary in general and prosecutors in particular

64. The Human Rights Committee (hereafter the HRC) which is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) by its State parties, issued a number of relevant recommendations as regards the judicial and prosecutorial independence.

65. All States parties to the ICCPR are obliged to submit regular reports to the HRC on how the rights under the Covenant are being implemented. In response, the HRC issues concluding observations in respect of the State concerned. Many of the HRC concerns as regards prosecutors and their work have been expressed in concluding observations issued after the review of reports presented by State parties.

66. These concerns are related to the reform of the justice system and the full observance of due process guarantees, implying the need to strengthen the independence of both the judiciary and the prosecution service[82].

67. In this regard, due care should be given to ensure judicial independence, including the independence of prosecuting authorities, from the executive power[83], the President[84] or the legislative power[85].

68. An independent body should be responsible for judicial discipline and sufficient safeguards should be in place to prevent disciplinary actions being taken against judges and prosecutors for minor infractions or for a controversial interpretation of the law[86]. Such an independent body, for instance a High Prosecutorial Council, should comprise prosecutors elected by professional self-governing bodies[87].

69. In this regard, decisions related to the selection, disciplining, evaluation and permanent appointment of judges[88] and prosecutors[89], as well as dismissals, therefore ensuring their security of tenure[90], should be based on objective criteria explicitly provided for by law[91].

70. Concerns have also been raised regarding the need to fight corruption effectively[92] and to avoid corruption in the judiciary, both by judges and prosecutors[93].

71. As regards some countries, concerns have also been expressed concerning possible broad powers of the Prosecutor General when this may lead to weak accountability or interference with the activity of courts[94].

72. In addition to reviewing State parties reports and issuing concluding observations, the First Optional Protocol to the Covenant gives the HRC competence to examine individual complaints with regard to

[82] Concluding observations in respect of Angola, 2019.
[83] Concluding observations in respect of Azerbaijan, 2016; Central African Republic, 2020; Czech Republic, 2019; Equatorial Guinea, 2019; Lao People's Democratic Republic, 2018; Niger, 2019; Paraguay, 2019; Romania, 2017; Swaziland, 2017; Tajikistan, 2019.
[84] Concluding observations in respect of Belarus, 2018.
[85] Concluding observations in respect of the Czech Republic, 2019; Guatemala, 2018; Lao People's Democratic Republic, 2018; Paraguay, 2019; Serbia, 2017; Tajikistan, 2019; Viet Nam, 2019; Angola, 2019.
[86] Concluding observations in respect of Azerbaijan, 2016; Belarus, 2018; Bulgaria, 2018.
[87] Concluding observations in respect of the Czech Republic, 2019.
[88] Concluding observations in respect of Azerbaijan, 2016.
[89] Concluding observations in respect of Belarus, 2018; Viet Nam, 2019.
[90] Concluding observations in respect of the Central African Republic, 2020; Czech Republic, 2019; Equatorial Guinea, 2019; Guatemala, 2018; Mongolia, 2017; Niger, 2019.
[91] Concluding observations in respect of Equatorial Guinea, 2019; Guatemala, 2018; Lao People's Democratic Republic, 2018; Mongolia, 2017; Tajikistan, 2019.
[92] Concluding observations in respect of Azerbaijan, 2016; Guatemala, 2018.
[93] Concluding observations in respect of Angola, 2019; Central African Republic, 2020; Equatorial Guinea, 2019; Mongolia, 2017; Paraguay, 2019.
[94] Concluding observations in respect of Bulgaria, 2018; Tajikistan, 2019.

alleged violations of the Covenant by States parties to the Protocol, similarly to the activity deployed by the ECtHR under the ECHR.[95]

73. According to the HRC's established case-law, under article 39 (2) of the Covenant, it is empowered to establish its own rules of procedure, which the States parties have agreed to recognise. By adhering to the Optional Protocol, a State party to the Covenant recognises the competence of the HRC to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation of any of the rights set forth in the Covenant (Optional Protocol, Preamble and Article 1). Implicit in the adherence of a State to the Optional Protocol is the undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination thereof, to forward its Views to the State party and to the individual concerned (Articles 5 (1) and (4)). It is incompatible with its obligations under Article 1 of the Optional Protocol for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of communications and in the expression of its Views[96].

74. The HRC has an extensive set of decisions and Views concerning the rights set forth in the Covenant, particularly on judicial independence, which is similar in many aspects to the case-law of the ECtHR[97].

75. The HRC underlined[98] that a tribunal is, under the Covenant, a body established by law, which is independent of the executive and legislature or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. The right of everyone facing criminal charges to access to such body cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision[99].

76. The HRC added that the requirement of competence, independence and impartiality of a tribunal under the Covenant is an absolute right that is not subject to any exception.[100] The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature[101].

77. According to the HRC, States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.[102] A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.[103] It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of

[95] At the end of the 132nd session, in July 2021, the Committee concluded that there had been a violation of the Covenant in 1,278 (83.4 per cent) of the 1,532 Views that it had adopted since 1979.
[96] See General comment No. 33 (2008), paras. 8 and 10; and, inter alia, *Levinov v. Belarus* (CCPR/C/105/D/1867/2009, 1936, 1975, 1977-1981, 2010/2010), para. 8.2; and *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 6.2, *Piandiong v. Philippines* (CCPR/C/70/D/869/1999 and Corr.1), para. 5.1; *Maksudov v. Kyrgyzstan* (CCPR/C/93/D/1461, 1462, 1476 and 1477/2006), paras. 10.1–10.3; and *Yuzepchuk v. Belarus* (CCPR/C/112/D/1906/2009), para. 6.2. As indicated in paragraph 19 of the Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol, failure to implement interim measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol. The HRC is therefore of the view that, by failing to respect the request for interim measures transmitted to a State party, this State party fails in its obligations under article 1 of the Optional Protocol.
[97] According to the HRC, as expressed in General Comment 33 (2008) on the obligations of States Parties under the Optional Protocol to the Covenant (see para 11), while the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.
[98] In its interpretation of Article 14 of the Covenant concerning access to courts and related principles.
[99] HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 18.
[100] Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.
[101] HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 19.
[102] Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.
[103] Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law[104].

78. As regards the dismissal of judges, the HRC pointed out[105] that they may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.[106] The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.[107]

79. As regards the concept of impartiality, the HRC determined two aspects[108]: 1) judges must not allow their judgement to be influenced by personal bias or prejudice, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other[109]; 2) the tribunal must also appear to a reasonable observer to be impartial. A trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.[110]

80. The HRC also required, as regards liberty and security of persons, that a prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by Covenant[111].

81. Furthermore, as regards the right of the arrested or detained person to be brought promptly before a judge or other officer authorised by law to exercise judicial power, this right is intended to bring the detention in a criminal investigation or prosecution under judicial control[112].

82. The HRC also addressed the issue of the protection of prosecutors in the context of their freedom of expression, that defamation laws must be crafted with care to ensure that they comply with the Covenant and that they do not serve, in practice, to stifle freedom of expression. At the same time, the HRC acknowledged that public prosecutors are not on the same footing as public figures, and, like judicial officers, require a measure of public confidence for the effective performance of their functions[113].

83. The HRC added that the principle of judicial independence, an essential guarantee for the independent exercise of judicial functions, requires that judges and prosecutors be able to interpret and apply the law and assess facts and evidence freely, without being subjected to intimidation, obstruction or interference in the exercise of their functions. Judges should not be subject to criminal or disciplinary sanctions for the content of their decisions, except in cases involving serious crimes, corruption, misconduct or incompetence that render them unfit for office; in such cases, this should be done in accordance with procedures that respect fair trial guarantees. Judicial errors should be corrected by review of the decision by a higher court[114].

IV. Conclusions

A. Principles developed by the CCPE as regards independence of prosecutors and prosecution services

1. The CCPE has developed in its previous opinions the following key elements of independence of prosecutors and prosecution services:

[104] HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 19.
[105] HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 20.
[106] Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.
[107] Communication No. 933/2000, *Mundyo Busyo et al v. Democratic Republic of Congo*, para. 5.2.
[108] HRC General Comment 32 (2007) dealing with the right to equality before courts and tribunals and to a fair trial, para 21.
[109] Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.
[110] Idem.
[111] HRC General Comment 35 (2014) dealing with the rights to liberty and security, para 15.
[112] HRC General Comment 35 (2014) dealing with the rights to liberty and security, para 32.
[113] HRC General Comment No. 34, para 32; HRC Communication No. 2716/2016, *Eglé Kusaitê v. Lithuania*, para 8.7.
[114] HRC General Comment No. 34, para 5.5; HRC Communication No. 2844/2016, *Baltasar Garzón v. Spain*, para 5.4.

- prosecutors must be free from unlawful interference in the exercise of their duties and political pressure or unlawful influence of any kind, including when acting outside the criminal law field, to ensure full respect for and application of the law and the principle of the rule of law;

- a corresponding legal framework, like that for the judiciary, regulating the status, independence, recruitment, tenure of office and career of prosecutors on the basis of transparent and objective criteria must be established;

- prosecutors should benefit from a career until retirement because appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutors will make biased decisions depending on the priorities of the appointing authorities;

- the external and internal independence of prosecutors and prosecution services should be ensured by an independent body such as a Prosecutorial Council;

- instructions given to prosecutors and to the prosecution services, both external and internal should be based on guidelines containing specific safeguards such as legality and transparency of such instructions, which should always pursue the objective of applying the law while respecting human rights and fundamental freedoms;

- the status, remuneration and treatment of prosecutors as well as the allocation of financial, human and other resources allocated to the prosecution services should be regulated in line with the importance of their mission and work, and in a way comparable to those of judges;

- prosecutors and, where appropriate, members of their families and livelihood, must be protected when carrying out their functions.

B. Inventory of the relevant case-law of international courts and treaty bodies as regards the independence of the judiciary in general and prosecutors and prosecution services in particular

2. The right to an independent and impartial tribunal is a core value of the rule of law and is enshrined in the main international and regional legal instruments, guaranteeing the respect for human rights and fundamental freedoms and being vital for ensuring public trust in the justice system in a democratic society. This right has known a rich and well-established jurisprudence of international courts and treaty bodies.

3. In such jurisprudence, the independence of the judiciary has been thoroughly examined, and it also contains references to the independence and autonomy of the prosecution services. Since the independence and autonomy of the prosecution services constitute, in the opinion of the CCPE, an indispensable corollary to the independence of the judiciary, guidance provided by relevant international judgments and decisions relating to the judiciary may to some extent be applicable *mutatis mutandis* to the prosecution services.

4. Criminal justice systems, rooted in different legal cultures, vary throughout Europe. Despite the differences, an important convergence factor is emerging in recent years grounded in the requirement of the independence of the prosecution services as a prerequisite for the rule of law and the independence of the judiciary.

5. The case-law of the European Court of Human Rights underlines that in a democratic society, both the courts and the investigative authorities must remain free from political pressure. It is thus in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State.

6. For an investigation to be effective, persons responsible for carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those investigated but also a practical independence.

7. The general procedural safeguards applicable in member States to the prosecution include provisions guaranteeing the institutional or functional independence of prosecutors, whether they are members of the judiciary or civil servants.

8. The prosecution systems in some member States are structured hierarchically with higher-ranking prosecutors having the power to give orders and instructions to the lower-ranking prosecutors. Despite this structure, a number of safeguards are in place in the legal systems of member States to ensure the effectiveness and independence of the organs in charge of criminal investigations in respect of high-ranking prosecutors.

9. The Court of Justice of the European Union, interpreting if a particular prosecutor is to be considered as an issuing judicial authority for a European arrest warrant, stated that this was the case when he/she meets the following three criteria: participates in the administration of justice, acts objectively, is independent and is not exposed to any risk of being subject, *inter alia*, to an instruction in a specific case from the executive. However, a decision by a prosecutor issuing a European arrest warrant must be subject to judicial review.

10. The Inter-American Court of Human Rights, in line with the jurisprudence of the European Court of Human Rights, stated that one of the principal purposes of the separation of public powers is to guarantee the independence of judges. The Court also held that reinforced guarantees of independence applying to judges, due to the necessary independence of the judicial power which is essential for the exercise of the judicial functions, should also be applied to prosecutors based on the nature of the duties performed by them.

11. The Court elaborated further that authorities in charge of the investigation should be independent, *de jure* and *de facto*, which requires not only hierarchical or institutional independence, but also actual independence. Prosecutors should not be the object of political pressures or improper hindrance in their actions, nor should they suffer retaliation for the decisions made by them. This demands a guarantee of stability and a fixed term in their positions, as well as procedural guarantees as to their removal or disciplinary proceedings instituted against them.

12. The Human Rights Committee (HRC), a body of independent experts monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has also issued a number of relevant recommendations as regards the judicial and prosecutorial independence. Many of these recommendations have been expressed in concluding observations issued after the review of reports presented by State parties and relate to the reform of the justice system and the full observance of due process guarantees, implying the need to strengthen the independence of both the judiciary and the prosecution service.

13. In this regard, decisions related to the selection, disciplining, evaluation and permanent appointment of prosecutors, as well as dismissals, ensuring therefore their security of tenure, should be based on objective criteria explicitly provided for by law.

14. In addition to reviewing State parties reports and issuing concluding observations, the First Optional Protocol to the ICCPR gives the HRC the competence to examine individual complaints with regard to the alleged violations of the ICCPR. This competence is recognised by all States parties by virtue of their accession to the Protocol. According to the case-law of the HRC, the principle of judicial independence, an essential guarantee for the independent exercise of judicial functions, requires that judges and prosecutors be able to interpret and apply the law and assess facts and evidence freely, without being subjected to intimidation, obstruction or interference in the exercise of their functions.

C. Impact of the relevant case-law of international courts and treaty bodies on the practical independence of prosecutors

15. The above inventory of the relevant case-law of international courts and treaty bodies, for many years concerned with judicial independence and in recent years, as well, with prosecutorial independence, provides useful elements which can have an important effect for the impartiality and independence, in law and in practice, of prosecutors.

16. The various elements of this case-law contribute for reinforcing the institutional independence of prosecution services, as well as the functional independence of individual prosecutors, both in the criminal justice system and, in countries where the public prosecution has responsibilities in other areas, outside the criminal justice system.

17. In particular, the legislative framework for organisational autonomy of the prosecution services, process of appointment, evaluation and dismissal of prosecutors, their term of office, non-interference into the

prosecutors' work and other important aspects relating to their career, will surely benefit from such case-law.

18. The main added value of the case-law of the European Court of Human Rights (ECtHR) is its binding force and the requirement to undertake general measures in member States to put an end to violations identified by the ECtHR judgments. This process is obligatory and is supervised by the Committee of Ministers of the Council of Europe.

19. Such general measures may include new or amended legislation, new institutions, mechanisms, procedures, new criteria for appointment, relocation, promotion, evaluation, suspension and dismissal of prosecutors, new safeguards in the course of disciplinary proceedings brought against them, developing ethical standards and other measures.

20. There are also important advisory instruments developed by the Council of Europe bodies and institutions providing an in-depth guidance as regards the independence of prosecutors. These instruments serve as soft law standards and constitute a basis for judicial and prosecutorial reforms in member States in the framework of the Council of Europe co-operation activities.

21. These soft law instruments may, in turn, serve as a source of inspiration and be used as a reference, both universally and at a regional level, by international courts and treaty bodies in their increased search for a fairer and more effective judicial system in which the independence and impartiality of prosecutors and prosecution services are laid down in a proper legal framework, similar to the one applicable to judges.

Opinion No. 17 (2022)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

The role of prosecutors in the protection of the environment

I. Introduction: purpose and scope of the Opinion

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Prosecutors (CCPE) decided to produce the present Opinion on the role of prosecutors in the protection of the environment. The CCPE is conscious of the need to enhance responses to environmental crimes and related infringements, and as such to contribute to strategies for protecting the environment, public health and safety, and upholding individuals' right to a clean, healthy and sustainable environment[1]. This topic was selected by the CCPE plenary meeting with a view to highlighting the important role that can and should be played by prosecutors in protecting the environment, notably when pursuing the cause of justice, serving the public interest, creating an effective deterrence through prosecutions and enhancing respect for the law.

2. Environmental crimes and related infringements are a growing source of global concern and a pressing threat to individuals and society. They often have long-lasting and irreversible effects, including a global reach and impact on both existing and future generations, which may affect and involve different states and justice systems. It is equally important that such crimes can undermine the rule of law, good governance and fuel geopolitical conflicts. In this context, prosecutors' increased and sustained attention to environmental crimes and enforcement is essential to strengthen the rule of law that environmental governance is based on, and to set benchmarks and values in this respect.

3. Globalisation and enhanced cross-border trade, while bringing financial, economic, social and other benefits, also opened the door to evolving criminality, especially to environmental crimes and related infringements. Environmental crimes are widely recognised as among some of the most profitable forms of transnational criminal activity. Such crimes frequently converge with other serious crimes, such as human and drug trafficking, counterfeiting, cybercrime and corruption. Furthermore, proceedings relating to environmental crimes can often be complex, as these crimes can be perpetrated by a range of actors, from individuals, companies and corporations, corrupt officials, organised criminal networks or a combination of all of these actors. This, in turn, presents specific challenges for prosecutors that requires not only in-depth practical knowledge, capacities and capabilities, but also innovative collaborative approaches and strong aspiration to solve challenges and thwart environmental crime.

4. The present Opinion draws on the experience and approaches taken by prosecutors in Council of Europe member States, considering their role in the protection of the environment and their competences, with due consideration to the variety of legal systems. The Opinion also takes into account other major differences which impact on their experience, namely the differences in the type of environmental crimes they are faced with, their different organisational approaches, and that, under domestic law, environmental crimes and infringements may be considered and treated differently.

5. The Opinion identifies and describes the conduct, expected from prosecutors in the prevention, detection, investigation and prosecution of environmental crimes. Such crimes are usually complex,

[1] A/HRC/RES/48/13 - UN Human Rights Council, Resolution 48/13 adopted on 8 October 2021, "The human right to a clean, healthy and sustainable environment", and UN General Assembly's adoption on 28 July 2022 of Resolution 76/300 which also recognises the right to a clean, healthy and sustainable environment as a human right, and calls to scale up efforts to ensure such environment for all.

committed in a sophisticated and well-organised manner, secretive in nature, and require a multidisciplinary approach.

6. The Opinion aims to serve as a reference tool for prosecutors in combating environmental crime and protecting the environment.

7. The Opinion takes note of the need to review periodically existing legal instruments and mechanisms to sanction and remedy environmental crimes and related infringements whether through criminal, administrative or civil law, in respect of both natural and legal persons. The regular review of links between environmental crimes and other serious crimes, notably organised crime and corruption, as well as crimes committed in the context of armed conflicts through means of warfare and of the availability of adequate tools and channels for national inter-agency and international co-operation are also critical.

8. Member States tackle environmental crimes and related infringements through criminal, administrative and civil law. Criminal law is usually resorted to in response to more serious violations presenting a higher degree of danger and a corresponding higher level of social disapproval and condemnation. Although the legal systems and approaches to similar issues may vary in member States when a common value such as the protection of the environment is at stake, common goals, requirements and solutions can nevertheless be identified. Prosecutorial involvement remains vital for increasing the quality of the application of the law, for consistency and for bringing the perpetrators to justice.

9. The protection of the environment requires a holistic approach and the involvement of stakeholders representing both the private and public sectors, including judges, prosecutorial, police and investigating authorities, institutions entrusted with protecting the environment under domestic legislation, concerned governmental bodies and agencies, mass media, non-governmental and civil society organisations. Taking into account that the extent of prosecutorial involvement in protecting the environment may vary in member States and that other authorities may also play a significant role in this field, in addition to prosecutors, the present Opinion can also be useful, *mutatis mutandis,* to such authorities entrusted with protecting the environment under domestic laws and regulations, as well as to all interested and relevant actors.

10. The Opinion acknowledges the importance of the European Convention on Human Rights (ECHR), as well as of relevant case law of the European Court of Human Rights (ECtHR). It has been prepared on the basis of both the Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system and Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice system. The Opinion also takes into account other legal instruments of the Council of Europe, as well as of the European Union, and other international legal instruments.

11. The CCPE wishes to express its deepest gratitude to its President, Mr Antonio Vercher Noguera (Spain) for the initiation of discussions in the CCPE on the role of prosecutors in protecting the environment, for the preparation of the working document that served as a basis for the present Opinion, and for his constant efforts during the whole process leading to the adoption of this Opinion. The CCPE also wishes to thank Ms Kateřina Weissová (Czech Republic), CCPE expert, for her productive contribution to this Opinion.

II. The concept of the environment and legal instruments for its protection

A. The concept of the environment

12. It is important to identify the concept of “environment” from the outset, in order to better understand the scope of values, interests and goods that prosecutors and other relevant authorities are expected to

protect within the framework of protecting the environment, and its operational understanding in the context of this Opinion.

13. Given the social relevance and vital importance of environmental issues, various legal instruments at national, regional and international level have included definitions of the environment. Taking a wide approach, the environment encompasses the surrounding external conditions influencing the sustainable development or growth of people, animals or plants, and living and working conditions of people. The environment belongs to all living beings and is thus important for all.

14. The environment includes natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape[2]. The environment is defined not as an abstraction but as representing the living space, the quality of life, and the very health of human beings, including generations unborn[3], which is an essential aspect within the concept of sustainable development.

15. In order not to leave unprotected any object that should be covered by the concept of "environment", member States should favour a wide and comprehensive approach, as far as possible, while defining the term "environment" in line with the current national and international legal frameworks on the subject.

B. International legal instruments and soft law standards for the protection of the environment

16. The interaction between human rights and environmental protection is increasingly being recognised. Even though the right to a healthy environment as such is not provided for by the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) nevertheless has some case law touching upon the environment because it was understood that the damage inflicted on the environment may undermine the enjoyment of some of the rights guaranteed by the ECHR[4]. The Council of Europe inter-governmental bodies also carry out work in this area[5]. Furthermore, the right to a healthy environment is guaranteed under the domestic legislation of the majority of member States, including at the constitutional level in some of them.

17. Along with growing and repeated concerns regarding the protection of the environment, numerous legal instruments have been adopted at various levels. Some of the instruments adopted by the Council of Europe relate closely to the protection of certain environmental components, while others relate to the activities posing a danger to the environment and cultural property, including access to the relevant information.

18. The following important instruments have been adopted by the Council of Europe in the last decades:

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[2] In accordance with Article 2 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993).

[3] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of the International Court of Justice (ICJ) of 8 July 1996, ICJ Reports (1996) 226, para 29.

[4] For example, *Guerra and Others v. Italy*, no 116/1996/735/932, 19 February 1998 (severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely); *López Ostra v. Spain*, no. 16798/90, 9 December 1994 (absence of a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life); *Fadeyeva v. Russia*, no 55723/00, 9 June 2005 (absence of a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life); *Giacomelli v. Italy*, no 59909/00, 2 November 2006 (absence of a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life); *Tătar v. Romania*, no 67021/01, 6 July 2009 (failure to assess, to a satisfactory degree, the risks that the activity of the company operating the mine might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes, and more generally their right to enjoy a healthy and protected environment). Also see the Steering Committee for Human Rights (CDDH) Manual on Human Rights and the Environment (3rd edition, February 2022).

[5] In particular, the Steering Committee for Human Rights (CDDH) prepared the Recommendation of the Committee of Ministers to member States on human rights and the protection of the environment adopted by the Committee of Ministers on 27 September 2022, which called on the member States to actively consider recognising at the national level the right to a clean, healthy and sustainable environment.

- 1977 Council of Europe Resolution (77) 28 on the contribution of criminal law to the protection of the environment;
- 1979 Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats, or Bern Convention;
- 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment;
- 1998 Council of Europe Convention on the Protection of Environment through Criminal Law[6];
- 2000 Council of Europe Landscape Convention, or Florence Convention;
- 2017 Council of Europe Nicosia Convention on Offences relating to Cultural Property.

19. Since more than half of the Council of Europe member States are also members of the European Union (EU), the CCPE wishes to emphasise also the relevance for the protection of the environment of the EU's legislation, such as the relevant EU Directives for protecting the environment through criminal law and regulations[7].

20. Some international treaties oblige the contracting States to penalise, in criminal or administrative proceedings, certain conduct or illicit activities[8].

C. Legal framework for the protection of the environment at national level

21. The differences in the legal systems and traditions of member States are mirrored in the way they design their legislation to protect the environment and in the way they treat environmental crimes and related infringements.

22. The present Opinion does not intend to express a preference for a particular system, but rather intends to underscore the risk that a deficiency or leniency of domestic legislation on the protection of the environment, possible loopholes of such legislation, lack of concrete action or inaction may result in the use of the territory of a State as a "safe haven" by perpetrators.

23. The following reasons possibly make environmental crimes attractive to criminal groups and networks:

- relatively low possibility for detection either because of de-prioritisation of environmental crimes and related infringements by competent authorities or because of the leniency or lack of harmonisation of the domestic legislation;
- technical deficiencies in legislation, policies and procedures which inhibit law enforcement action;
- lack of or insufficient co-operation of relevant competent authorities at domestic level;
- poor capability or insufficient co-operation with neighbouring and/or other countries on environmental crimes;
- 'low risk, high reward' nature of environmental crime.

24. In order to prevent environmental crimes committed by organised criminal networks, member States should take necessary steps at national level, starting by strengthening their legal framework, addressing legal shortcomings, and ensuring its effective implementation in practice. For instance, introducing the involvement of organised crime or corruption as an aggravating circumstance may be considered as one of the possible ways to strengthen the legislation.

[6] It should be noted that the plenary meeting of the European Committee on Crime Problems (CDPC), held on 14-15 June 2022, approved the Feasibility Study on the Protection of the Environment through Criminal Law which underlines the need for and appropriateness of a new Council of Europe Convention to replace the 1998 Convention on the Protection of the Environment through Criminal Law.
[7] E.g. Directive 2008/99/EC, Directive 2005/33/EC, Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.
[8] Such as the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES Convention.

25. It is worth reiterating that the protection of the environment requires a holistic approach and the quality of the legislation constitutes one of the core elements of this approach. Domestic legislation should be designed in a manner that allows member States' authorities to respond better to the challenges encountered within the framework of the protection of the environment and to keep pace with developing international standards, which become more demanding as the environment deteriorates.

26. To that end, domestic legal frameworks relevant for environmental protection should be subject to periodical reviews by competent authorities. This may entail the need to amend or adopt new legislation, including establishing new categories of offences to best address the most harmful unlawful activities, in order to adequately address the needs for environmental protection, and take into account changing and more demanding international standards.

27. Prosecution services should be consulted or be directly involved in processes whereby new legislation or rules are being designed, or legal reforms are being undertaken by the executive or legislative authorities.

III. Guiding principles regarding the protection of the environment

28. One of the relevant principles is *the general precautionary principle* introduced by the Rio Declaration on Environment and Development[9] . It takes into account the fact that it is often difficult, if not impossible, to assess the precise impact of human action on the environment and that some actions can cause irreparable harm and sets out that where there are threats of serious or irreversible damage, the lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation[10].

29. The principle "*in dubio pro Natura"* is applicable from a preventive perspective. Accordingly, in case of doubt in establishing whether an activity can be harmful to the environment or not, it should be resolved in favour of the protection of the environment.

30. Another principle is that *of corporate liability*. As stressed earlier, there is a growing trend in the involvement of legal persons in committing violations against the environment which, in turn, requires mechanisms to hold legal persons liable.

31. The vast majority of member States have already introduced provisions on corporate liability, either under criminal, administrative or civil law. Therefore, the validity and credibility of the principle "*societas delinquere non potest"* is being abandoned. In this regard, the CCPE wishes to emphasise that whatever approach towards environmental crimes and related infringements is adopted, the liability of legal persons should always be established by law.

32. Another principle applicable is *the principle of absolute liability*, in particular for civil and administrative liability. Any person who owns hazardous or dangerous substances or objects creating a potential risk to humanity is to be liable for any damage caused, irrespective of the person's intent in causing such damage or harm.

33. It is also worth referring to *the principle of enforceable rights applicable to nature*, leading to deliberation over whether nature should have its own rights in contrast with the concept of people's rights to nature. Even though this principle has not been clearly stated in the case law, it is an evolving principle.

[9] Principle 15 of the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, 1992.

[10] The precautionary principle is one of the principles on which the EU policy on the environment is based (see the Judgment of the Court of First Instance (Third Chamber) of 11 September 2002. Pfizer Animal Health SA v. Council of the European Union), and it has been gradually incorporated into the EU legislation and national legislation (in line with the first subparagraph of Article 191(2) of the Treaty on the Functioning of the European Union (TFEU)), as well as into various international legal instruments.

34. The principle that *the polluter pays*[11], which requires the party responsible for the pollution to pay for the damage caused to the environment, and *the principle of sustainable development* should also be mentioned.

35. *The principle of prevention* which is a general principle in different areas of law is also important in the context of environmental crimes and related infringements, and it is as important as bringing perpetrators to justice. Prevention allows avoiding long lasting, costly and often irreversible effects of environmental crimes and related infringements, resulting in obvious social and economic benefits. Prevention also reduces long-term costs related to the criminal justice system and the workload of the bodies dealing with such violations, including prosecution services.

IV. Environmental crimes and penalties

A. Environmental crimes

36. While it is difficult to know the exact scale of illicit proceeds from environmental crimes, estimates available indicate that environmental crime is among the most profitable crimes in the world, generating around USD 110 to 281 billion in criminal gains each year[12], rising by 5-7 % annually. Illegal trade in wildlife products alone accounts for USD 7-23 billion[13]. This makes environmental crime the fourth largest criminal activity in the world after drug smuggling, counterfeiting, and human trafficking.

37. As noted earlier, environmental crimes and related infringements may be treated differently by member States. However, following the evolving nature and seriousness of violations against the environment, criminal law began to be resorted to more often in fighting them.

38. There is no universally agreed definition of environmental crimes. Numerous legal instruments, including the 1998 Council of Europe Convention on the protection of the environment through criminal law, set out provisions to establish certain criminal offences. The 1998 Convention was the first supranational instrument to consider the criminal law treatment of behaviour that is environmentally damaging. It provided that environmental violations with serious consequences must be treated as criminal offences subject to appropriate sanctions, and incorporates a list of offences, including those of an intentional nature and those which are only the result of negligence. According to that instrument, sanctions must take into account the serious nature of these offences. As a minimum, imprisonment and pecuniary sanctions must be available. It is also recommended to include the reinstatement of the environment either as a sanction or as a civil liability attached to the environmental violation.

39. It is worth noting that the devastating impact of crimes against the environment can be differently classified, such as ecological (loss of biodiversity and natural habitats, deterioration of the ecosystem), economic loss of legitimate incomes by states and fair-playing business actors, unfair competition and social impact (on the health of individuals and unemployment triggered by unfair competition circumstances).

40. In order for an unlawful act against the environment to constitute a crime, several elements should be present. In particular, a certain level of gravity and/or substantial damage is required. Although these terms are widely used at national level, they are interpreted differently in member States. Some jurisdictions prefer to link the damage directly with the financial impact of an unlawful act in order to determine whether the act results in substantial damage or not. In this case, the monetary benefits of the perpetrator and the amount required to remedy the damage are used as measures to calculate the total amount of the damage.

41. Other jurisdictions link the damage with the ecological impact of an unlawful act for the same purpose. In some member States, the application of both approaches at the same time for the determination of substantial damage is possible. In doing so, the duration of an unlawful act, its reversibility and impact are taken into account. It should however be noted that even when the impact of an unlawful act may

[11] Principle 16 of the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, 1992.
[12] RHIPTO, INTERPOL and GI (2018) World Atlas of Illicit Flows.
[13] UNEP-Interpol Rapid Response Assessment: the Rise of Environmental Crime (June 2016).

be reversible, if it requires substantial budget allocation, lasts long, or is reversed as a result of permanent disturbance of the ecosystem, it is still to be classified as an act causing substantial damage[14].

42. Although the CCPE does not express a preference for any of the aforementioned approaches, it wishes to highlight, in relation to the general terms such as “substantial or significant damage”, “negligible impact” and “irreversible damage inflicted to the environment”, that further and precise clarification for these terms should be provided with an aim of maintaining consistency of implementation and not leaving unjustified or unacceptable leeway for their discretionary interpretation in practice.

B. Penalties for environmental crimes

43. In view of the fact that member States set the criminal sanctions in accordance with their domestic legal traditions and needs, the CCPE does not intend to recommend minimum or maximum level sanctions or recommend the introduction of certain types of sanctions. However, it wishes to underscore that sanctions applicable to both natural and legal persons in the environmental context should be effective, proportionate and dissuasive.

44. For a sanction to be effective, the results gained through its imposition should respond to its objectives. When assessing the effectiveness of a sanction, the extent of the compensation of the damage caused by the violation, whether the sanction served as a discouragement for potential perpetrators and other possible elements can be taken into account.

45. The proportionality of a sanction means its full correspondence to the nature, gravity and circumstances of a violation. To satisfy the proportionality requirement, a wide range of different possible sanctions to be applied for violations of varying nature and severity should be available.

46. A dissuasive sanction should discourage violations and prevent their recurrence. In addition, it should be enforceable and fully address the alleged violation. In this way, there should be appropriate and possibly simple enforcement procedures.

47. In order to provide prosecutors with the necessary toolbox for sanctioning, the law should provide an adequate range of sanctions of both monetary and non-monetary nature applicable to environmental crimes, and also the possibility to order the reinstatement of the environment.

48. Respecting the differences of national legal systems, the following best practices in combating environmental crimes may be highlighted, including but not limited to:

- tracing, freezing and confiscating assets and/or proceeds and instrumentalities of environmental crimes;
- using the fines imposed on perpetrators for environmental crimes in the public interest or in favour of environmental protection and rehabilitation;
- obliging the perpetrators to take measures to remedy the environmental harm and restore the environment;
- keeping pace with sophisticated environmental offenders by piercing the corporate veil to reach the legally accountable individuals behind a corporate entity;
- imposing suspension or other limitations concerning the activities on the perpetrator.

49. In order to ensure effective deterrence, the monetary sanctions applicable to environmental crimes should be set taking into account the economic situation of the perpetrator. Such intrusive sanctions as imprisonment may be applied in the case of serious consequences as a result of unlawful actions of an individual or a group of individuals. Relevant competent institutions should be able to order restorative measures, where appropriate.

50. Guidelines designed for prosecutors and other stakeholders distinguishing an environmental crime from an administrative violation, and addressing the peculiarities of investigations into environmental

[14] See also https://www.eea.europa.eu/help/glossary/eea-glossary/irreversibility-of-environmental-damage.

violations, sentencing principles, case law examples and other related issues can be produced and disseminated by prosecution services and other relevant actors.

V. Role of prosecutors in protecting the environment through criminal law

51. As stressed by the CCPE Opinion No. 10 (2015)[15], prosecutors play an essential role in criminal investigations. Depending on the national legislation, prosecutors might be entrusted with the oversight over the investigation carried out by other law enforcement agencies, conducting an investigation by themselves, as well as participating in trials.

52. No matter in what capacity and to which degree they are involved in criminal proceedings, prosecutors should ensure, when it is within their authority, that an investigation into environmental crimes is conducted thoroughly, that all the targets in the chain of responsibility (natural and legal persons, perpetrators, co-perpetrators and accomplices) are identified and that they establish all incidences of unlawful acts and any possible links with organised and violent crime and associated offences.

53. Prosecutors should strive to ensure that not only the direct perpetrators of environmental crimes, but also the offenders acting in other capacities, such as masterminds, instigators, abettors and those who benefit from these crimes, are brought to justice.

54. As noted earlier, prosecutors should be aware of the link between environmental crime and organised and violent crime, corruption, financing of terrorism[16], or with crimes committed in the context of armed conflict through warfare methods and means. They should understand how to detect and investigate such crimes, and in particular money laundering associated with environmental crimes[17].

55. As stressed by the CCPE Opinion No. 11 (2016)[18], special investigative techniques such as electronic surveillance and undercover operations that have been shown to be effective tools to combat terrorism and organised crime are being made available to prosecution offices in other areas as well, at least in jurisdictions where prosecutors have investigative powers.

56. It is of utmost importance to put the necessary legal tools, such as freezing and seizure of assets and covert investigative techniques at the disposal of prosecutors in order to combat environmental crime. Depending on the national context, prior judicial authorisation might be required to apply special investigative techniques to this effect.

57. It is also important to determine the level of gravity[19], as well as the volume of the damage caused by a criminal act committed against the environment. In many jurisdictions, in order to decide whether an environmental violation should be classified as a crime or not, the level of gravity and the damage it caused are crucial. It should also be borne in mind that the impact of an environmental violation may emerge decades after the date it was actually committed and its effects may be continuous and long lasting.

58. In order to ensure the thoroughness of an investigation in this regard, prosecutors, no matter whether they are directly conducting it or in charge of its supervision, should seek forensic expertise and other specialists and experts. This might be the case, even if there is a specialisation of prosecutors on environmental cases, when a particular issue in an investigation goes beyond their knowledge and experience.

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[15] Opinion No. 10 (2015) of the CCPE on the role of prosecutors in criminal investigations.

[16] There is evidence that armed groups and terrorist organisations do, to varying extents, rely on certain environmental crimes to support and finance their operations. See CTED Trends Alert, Concerns over the use of proceeds from the exploitation, trade and trafficking of natural resources for the purposes of terrorism financing (June 2022).

[17] Illegal logging, mining, waste trafficking and wildlife trade were considered as the main predicate environmental offences for money laundering, see Financial Action Task Force (FATF) Report on Money Laundering from Environmental Crime (July 2021), and the FATF Report on Money Laundering and the Illegal Wildlife trade (June 2020).

[18] Opinion No. 11 (2016) of the CCPE on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime.

[19] Sometimes the environmental crime is based on the concept of gravity that it represented, even if damages were not caused.

59. Parallel financial investigations focusing on both environmental crimes and connected money laundering offences simultaneously are an effective tool to identify larger criminal networks and disrupt financial flows. Financial intelligence units' capacities to detect, analyse and report suspicious transactions in connection with suspected environmental crimes and, where appropriate, exchange information in this respect with their foreign counterparts, as well as their co-operation with prosecutors are critical to enhance investigative efforts in this area. Prosecutors should be able to receive and make use of qualitative financial intelligence and other forms of relevant information to support investigations and prosecute perpetrators[20].

60. The principle of specialisation gained more importance in the light of the growing concerns for the protection of the environment[21]. It is worth noting that every piece of legislation, regardless of how perfectly it is formulated and worded, carries the risk of becoming "dead letters" without proper application. Enforcement of legislation on the environment requires sufficient budgetary allocation, well-trained and specialised staff, and as a significant step, the establishment of specialised multidisciplinary units and bodies.

61. The complexity of the subject, its special nature and diversity, association with other disciplines, requirement of special in-depth knowledge and possible involvement of organised criminal groups and legal persons are only some of the reasons necessitating the specialisation of prosecutors dealing with environmental cases. In addition, given the evolving nature of violations against the environment, the specialisation should be accompanied by continuous training provided to prosecutors[22]. Joint training of investigating authorities with other key actors could also have a positive impact, as it would enhance authorities' skills and understanding of factors that influence whether violations should be addressed through administrative, civil, criminal law or a through a combined approach.

62. Establishment of specialised prosecutors and/or multidisciplinary units, particularly within the prosecution system, is highly dependent on the national context and factors such as the size, workload and budget of the prosecution service. Accordingly, the establishment of specialised prosecutors and/or units dealing with the environment should not be required of prosecutorial bodies. However, it should be seen as a priority for the States where it is feasible.

63. As regards the stage of the trial, the CCPE wishes to reiterate that the proper performance of the distinct but complementary roles of judges and prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice. Judges and prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other[23]. They must therefore refrain from any action and behaviour that could undermine confidence in their independence and impartiality[24].

VI. The protection of the environment in administrative and civil law

64. The quality of the legislative framework on environmental protection cannot be assessed solely on the basis of the availability of criminal law measures. Carefully formulated and duly implemented administrative and civil law is as important as criminal law in protecting the environment.

[20] See for example, ECOFEL, Egmont Centre of FIU Excellence and Leadership, Financial investigations into wildlife crime (January 2021).
[21] As the European Network of Prosecutors for the Environment (ENPE) pointed out, environmental specialisation should be available for each and all environmental offences (no distinction in the judicial system between "less" and "more" serious offences, where only the latter ones would benefit from specialist prosecutors and judges), see Sanctioning Environmental Crime (WG4). Final report: key observations and recommendations, 2016–2020 of the ENPE, para 28.
[22] Council of Europe Resolution (77) 28 on the contribution of Criminal Law to the Protection of the Environment. See also Sanctioning Environmental Crime (WG4). Final report: key observations and recommendations, 2016–2020 of the European Network of Prosecutors for the Environment (ENPE), para 70, which sets out that training must above all aim to create knowledge and understanding of environmental crime and the harm it causes or can cause. Such knowledge and understanding are essential for commitment to the prosecution and sanctioning of environmental offences.
[23] Opinion No. 4 (2009) of the CCPE on the relations between judges and prosecutors in a democratic society, Bordeaux Declaration, clause 3.
[24] Opinion No. 4 (2009) of the CCPE on the relations between judges and prosecutors in a democratic society, para 40.

65. Considering that in several jurisdictions, prosecutors fulfil functions outside the criminal justice system, this part of the Opinion deals with the role of prosecutors in protecting the environment through administrative and civil law.

66. Administrative law sets standards for providing licensing, special permissions and authorisations, as well as for the inspection and monitoring of compliance. Considering the wide and growing range of issues covered by administrative law, its proper formulation and implementation are important to deter potential perpetrators from committing environmental crimes and related infringements.

67. Although administrative sanctions may not express the same degree of social disapproval as criminal sanctions and are imposed for violations that don´t amount to criminal offences, they may usefully complement the latter according to the practice of the European Court of Human Rights, and they may provide a certain degree of flexibility enabling a tailored approach towards diverse environmental violations.

68. The environment can and should be protected by all available means, including through administrative and civil law[25]. In fact, the combination of all possible means of protection may prove to be most effective if the systems are compatible, open for co-operation and complement each other.

69. Legal systems in which criminal and administrative sanctions co-exist and are adequately applied ensure a better protection of the environment. However, as stated earlier, clear boundaries should be set between the two fields of law in order to prevent possible ambiguities and legal uncertainty. Prosecutors, where they are entitled to do so under domestic legislation, may ensure that the boundary between administrative and criminal law is respected by those who are responsible for their implementation.

70. Legal uncertainty, ambiguous wording of the domestic legal framework, overlap of powers of different stakeholders or lack of coordination between the competent authorities could in some cases result in violations of the principle of *non-bis in idem* (also referred to as the double jeopardy principle). Thus, a body responsible for administrative sanctioning and a body responsible for penal sanctioning could sanction a perpetrator for the same violation.

71. While concurrent application of criminal and administrative sanctions should not be ruled out, it is important to ensure that those should be complementary and not result in penalising the perpetrator twice for the same offence. Accordingly, prosecutors, where it is within their mandate, should ensure that parallel application of administrative and criminal law is in accordance with the existing legal framework and traditions and does not represent a denial of the legitimate interests of the affected persons, either natural or legal persons.

VII. Internal co-operation and coordination in protecting the environment

72. Successful environmental protection requires cross-disciplinary and interagency co-operation. The environment can be protected more comprehensively when all concerned actors representing both public and private sectors are involved in its protection, and an adequate level of cooperation and coordination among them is duly ensured.

73. Lack of co-operation and coordination among the bodies entrusted with the application of the legislation on the protection of the environment may negatively affect the whole mechanism for the protection and may even violate the rights of concerned persons.

[25] In accordance with the Council of Europe Resolution (77) 28 on the contribution of Criminal Law to the Protection of the Environment.

74. There are prosecution services in member States where civil, administrative and criminal functions are incorporated within their activities, whereas prosecution services in other member States do not have such extensive duties; they only handle environmental cases in the field of and by means of criminal law. In the latter model, however, there should be specific authorities entrusted with such tasks and responsibilities in civil and administrative matters.

75. In those systems where the prosecution service incorporates civil, administrative and criminal functions, it is important that close co-operation is ensured among the prosecutors handling cases in these different fields. Such internal co-operation should be institutionalised by regulations, internal rules and guidelines, thus making such a complex approach efficient and effective, including through regular exchanges of information.

76. In systems where civil and administrative duties do not fall within the remit of the prosecution service, the latter should co-operate with the relevant authorities. Co-operation should be guaranteed by laws and regulations, which should set out clearly the legal basis for this co-operation, including the exchange of information and, where appropriate, the exchange of intelligence among relevant stakeholders.

77. The following examples of good practices in this field could be highlighted:

- establishing inter-coordination groups, national environmental expert groups or regional groups, with the participation of prosecutors;
- setting up well equipped technical units at the disposal of prosecutors;
- maintaining a situational overview of environmental crimes and related infringements, issuing annual reports of the state of play of environmental crimes;
- establishing mechanisms for co-operation between law enforcement authorities, possibly including specialised environmental police, and public institutions in charge of environmental monitoring;
- long-term co-operation of prosecutors with other specialised bodies[26] and conducting investigations in co-operation with them and the police;
- providing opinions, suggestions or comments/objections to any strategic documents or action plans elaborated to prevent and combat environmental crimes, and actively contributing to the formulation of environmental protection related legislation to ensure that it takes into account prosecutors' views and expertise.

78. Non-governmental and civil society organisations also play a very important role as stakeholders in the implementation and enforcement of environmental law[27]. They can contribute to the enforcement of domestic legislation by monitoring, for example, compliance with environmental regulations and detecting violations, including crimes committed. They may also, if allowed by the national legal framework, take action in the interest of society or of certain groups in the protection of the environment (e.g. *amicus curiae*, *actio popularis*) and raise awareness on environmental issues.

79. Co-operation ensures that an environmental case is examined from various aspects, and this improves efficiency. Irrespective of the model of a prosecution service, the conclusions and recommendations of the Opinion No. 14 (2019) of the CCPE also apply *mutatis mutandis* to prosecutorial activities in the field of environmental protection[28].

[26] Such as environmental inspectorates, customs, administrative authorities, financial investigation units.
[27] Without prejudice to the independence and autonomy of the prosecution services.
[28] Opinion No. 14 (2019) of the CCPE on the role of prosecutors in fighting corruption and related economic and financial crime, Chapter I, para 4.

80. The CCPE also wishes to highlight the importance of collecting and analysing annual or semi-annual investigative data on the protection of the environment, in order to have a clear overview of the trends, achievements and further action to be taken. The relevant process should include the collection of data on the number of offences detected, investigations initiated, cases discontinued, referrals to courts, final convictions or acquittals, type of sanctions imposed on the perpetrators, etc. The data should be as detailed as possible and preferably be collected at a centralised level.

81. Depending on the national context, collection and processing of relevant data might be entrusted to prosecutors' offices. However, when this is not the case, the process should involve them. The results of data collection and processing should regularly be made public and should contribute to further actions such as the adoption of national strategies, as well as lead to revising the legislative framework where appropriate. This data should also be used for increased awareness-raising, so that not only prosecutors but also the general public understand the scale of environmental criminality and the role of the prosecution in protecting the environment.

VIII. International co-operation in protecting the environment

82. Environmental crimes are frequently international by their nature which calls for collective action. The increased involvement of criminal groups and networks in environmental crimes, as well as their likely association with terrorism and organised and other serious crimes, were also among the concerns expressed during the 2022 European Conference of Prosecutors[29], which called for enhanced international co-operation among prosecutors in this regard.

83. Even if an environmental crime is committed within the territory of one member State, its consequences may affect other member States, confirming the maxim that "pollution knows no borders". This requires close bilateral and multilateral co-operation among member States, and measures to ensure that gaps in legal frameworks for environmental crimes do not inhibit such co-operation.

84. Prosecutors should always show willingness to co-operate and should treat international co-operation requests on environmental matters within their jurisdiction with the same diligence and priority level as other criminal matters both at national and international level[30]. It is an asset that the tools for cooperation in environmental cases are the very same as those for cooperation in all types of cross-border crime[31].

85. For international co-operation to be effective, there should be a common understanding of environmental crimes and related infringements and their impact. Joint and cross-border investigative teams and techniques are particularly useful, where coordinated action is required. Their use is also beneficial as not only it would limit risks of duplication of prosecutors' work, but also facilitate securing the necessary evidence, exchanging information and carrying other extensive measures in the States concerned[32]. Prosecution services should have adequate resources at their disposal for such activities.

86. With regard to the previously mentioned profits from environmental crime and observing the principle "crime must not pay", international co-operation should also cover assistance in tracing, freezing and confiscating the proceeds of environmental crime including, where possible, asset returning or asset sharing. Whenever possible, this should also involve the provision of assistance in non-conviction-based (NCB) confiscation proceedings, as well as the enforcement of foreign forfeiture decisions irrespective

[29] The European Conference of Prosecutors was co-organised by the CCPE in close co-operation with the Italian authorities, on 5-6 May 2022 in Palermo, within the framework of the Italian Presidency of the Committee of Ministers of the Council of Europe. The Conference brought together Prosecutors General and other legal professionals from 46 member States of the Council of Europe, as well as 8 non-member States, and focused on the prosecutorial independence, autonomy and accountability, investigation and prosecution of environmental crimes and financial crimes in the virtual environment.
[30] Opinion No. 9 (2014) of the CCPE on European norms and principles concerning prosecutors, Rome Charter, Article XX.
[31] Sanctioning Environmental Crime (WG4). Final report: key observations and recommendations, 2016–2020 of the European Network of Prosecutors for the Environment (ENPE), para 25.
[32] See also the Report on the Eurojust's Casework Environmental Crime, issued on 29 January 2021.

whether they were issued in connection with the conviction of a natural or legal person or in an NCB-forfeiture.

87. In systems, where assets forfeited in mutual legal assistance (MLA) proceedings are located in the requested State, legislation should provide for the sharing of assets with or the return of assets to the jurisdiction where the environmental crime was committed or where the damage stemming from that crime occurred.

88. The CCPE would also like to emphasise the role at European level of both Europol and Eurojust in facilitating cross-border co-operation in criminal or administrative matters, as well as the role of professional networks such as the European Network of Prosecutors for the Environment (ENPE), European Judicial Network (EJN) and the EnviCrimeNet. Prosecutors in member States should be encouraged to participate, whenever possible, in the activities of these bodies.

89. In addition to existing networks and taking into account the role of designated contacts for international co-operation, other official mechanisms and procedures for swift and effective cross-border co-operation are still needed, as very often official documents, evidence and other materials have to be transferred from/to prosecutors of different member States who are involved in corresponding criminal cases.

90. Co-operation and collaboration for the protection of the environment, in all its dimensions and in particular across borders, are essential given the growing sophistication of environmental criminals and their defence strategies. In order to prevent investigative and prosecutorial efforts being hindered or undermined, it is of utmost importance that the domestic legal framework in the member States adequately implements international standards for the protection of the environment. It is equally necessary to move towards a harmonised legislative framework, especially regarding the definition of crimes, sanctions and investigative tools.

IX. Recommendations

Whereas:

- there is a pressing need to enhance responses to environmental crimes and related infringements which are a growing source of global concern;
- environmental crimes often have links with other serious crimes such as human and drug trafficking, counterfeiting, cybercrime, corruption and financing of terrorism;
- consequently, the complexity of the proceedings relating to environmental crimes requires a holistic approach and the collaboration of various stakeholders;
- such holistic approach requires availability of adequate tools and channels for effective co-operation at both national and international level;
- prosecutorial involvement in the protection of the environment remains vital for increasing the quality of the application of the law and bringing the perpetrators to justice;

the CCPE agreed on the following recommendations:

1. A wide and comprehensive approach should be favoured while defining the term “environment” in line with the current national and international legal frameworks on the subject.

2. It should be kept in mind that the damage inflicted to the environment may undermine the enjoyment of some of the rights guaranteed by the European Convention on Human Rights.

3. Prosecution services should be consulted or be directly involved when new legislation is designed or legal reforms are undertaken as regards the protection of the environment.

4. While there is no universally agreed definition of environmental crimes and this term is interpreted differently in member States, the general elements of these crimes such as the concepts of gravity and damage and other relevant elements should be precisely and clearly established at national level.

5. The sanctions for environmental crimes applicable to both natural and legal persons in the environmental context should be effective, proportionate and dissuasive, including those of monetary and non-monetary nature, as well as the possibility to order the reinstatement of the environment.

6. Prosecutors should ensure that an investigation into environmental crimes is conducted thoroughly, that perpetrators, co-perpetrators and accomplices are identified and that all possible links with other types of crime are established.

7. Prosecutors should also strive to ensure that not only the direct perpetrators of environmental crimes, but also the offenders acting in other capacities, such as masterminds, instigators, abettors and those who benefit from these crimes, are brought to justice.

8. Prosecutors should have at their disposal the necessary legal tools and investigative techniques in order to combat environmental crime. Parallel financial investigations focusing on both environmental crimes and connected money laundering offences simultaneously are one of the effective tools to identify larger criminal networks and disrupt financial flows.

9. Prosecutors dealing with environmental crimes should receive relevant training. Furthermore, enforcement of legislation on the environment requires sufficient budgetary allocation, well-trained and specialised staff, and also the establishment of specialised multidisciplinary units and bodies.

10. The environment should be protected by all available means, including through administrative and civil law, and prosecutors may have a role in this process as well.

11. Although administrative sanctions may not express the same degree of social disapproval as criminal sanctions, they usefully complement the latter.

12. Successful environmental protection requires cross-disciplinary and interagency co-operation among prosecutors themselves, as well as between prosecutors and other relevant actors, including both state institutions and non-governmental and civil society organisations.

13. Prosecutors may play a role in the prevention of environmental crimes and related infringements, since it allows avoiding their long lasting, costly and often irreversible effects, and it also reduces long-term costs related to the criminal justice system, including prosecution services.

14. Since environmental crimes are frequently international by their nature, prosecutors should always treat international co-operation requests on environmental matters with the same diligence and priority level as other criminal matters.

15. The important role of both Europol and Eurojust which facilitate cross-border co-operation in criminal or administrative matters at European level, as well as of professional networks such as the European Network of Prosecutors for the Environment (ENPE), European Judicial Network (EJN) and others should be emphasised.

16. In addition to existing networks, and taking into account the role of designated contacts for international co-operation, other official mechanisms and procedures for swift and effective cross-border co-operation are still needed, as very often official documents, evidence and other materials have to be transferred from/to prosecutors of different member States who are involved in corresponding criminal cases.

Opinion No. 18 (2023)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

Councils of Prosecutors as key bodies of prosecutorial self-governance

I. Introduction

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Prosecutors (CCPE) has prepared this Opinion on Councils of Prosecutors as key bodies of prosecutorial self-governance.

2. The topic of the Opinion was chosen by the CCPE following the development of the CCPE standards on the independence and impartiality of prosecutors and the need to understand the institutional framework required to support these fundamental principles. The CCPE found it necessary to examine the present situation in member States as regards prosecutorial self-governance and to formulate a roadmap for the future based on best European practices.

3. The Opinion duly takes into account Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system and previous CCPE Opinions, in particular, Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including the Rome Charter, Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Opinion No. 16 (2021) on the implications of the decisions of international courts and treaty bodies as regards the practical independence of prosecutors. Furthermore, the Opinion takes note, inter alia, of the responses of the CCPE members to the questionnaire on Councils of Prosecutors as key bodies of prosecutorial self-governance.

4. The Opinion also takes into account Opinions of the Consultative Council of European Judges (CCJE) No. 10 (2007) on Council for the Judiciary at the service of society and No. 24 (2021) on the evolution of Councils for the Judiciary and their role in independent and impartial judicial systems, as well as the relevant case law of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union (CJEU), relevant instruments of the European Commission for Democracy through Law (Venice Commission), the Group of States against Corruption (GRECO) and other institutions of the Council of Europe.

5. The Opinion also uses relevant instruments of the institutions outside of the Council of Europe, in particular, the Compendium on Councils for the Judiciary (2021) of the European Network of Councils for the Judiciary (ENCJ), the Standards of professional responsibility and statement of the essential duties and rights of prosecutors of International Association of Prosecutors (IAP), the Report of the Special Rapporteur of the United Nations on the independence of judges and lawyers, the study of the Organisation for Economic Co-operation and Development (OECD) on the Independence of Prosecutors in Eastern Europe, Central Asia and Asia Pacific (2020) and the Report of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) on Strengthening Functional Independence of Prosecutors in Eastern European Participating States (2020).

6. The CCPE wishes to thank the experts appointed by the Council of Europe, Mr João Manuel da Silva Miguel (Portugal) and Ms Anca Jurma (Romania), for their significant contributions in the process of drafting the text of the Opinion.

II. Scope and purpose of the Opinion

7. Councils of Prosecutors are becoming increasingly widespread in the legal systems of individual States.[1] However, justice systems vary throughout Europe. The different systems are rooted in different legal cultures and there is no uniform model for all member States. This diversity also has an impact on prosecutorial self-governance models, with or without Council of Prosecutors or other bodies dealing with such self-governance.

8. The replies[2] to the questionnaire on Councils of Prosecutors as key bodies of prosecutorial self-governance show that in the majority of member States, a collective body – irrespective of its official title – exists within the prosecution system to deal with prosecutorial career, including appointment/election, evaluation, promotion, transfer, discipline and other matters. Approximately half of these bodies deal with matters related to both judges and prosecutors while the other half deal only with prosecutors. In some member States, a Council of Prosecutors or other bodies dealing with prosecutorial self-governance do not exist.

9. The replies also show that there is great diversity among member States concerning the structure, organisation, composition, competence, functions and other aspects of Councils of Prosecutors or other bodies.

10. Moreover, prosecution services are structured and organised in a wide variety of ways in which Council of Prosecutors or other bodies are involved to various degrees.[3]

11. In some models, the prosecution service is totally independent of both the executive and judicial powers.

12. In other cases, the prosecution service is part of the judicial power. In such structures, there is often a high judicial council or a similar umbrella independent body that regulates the careers of both judges and prosecutors.[4] There may also be the possibility of switching between the respective careers of judge and prosecutor, which in some cases is limited by law.

13. In yet another model, the prosecution service is organised as an autonomous body but is linked to the executive power to a greater or lesser extent. A Council of Prosecutors or a similar independent body may in some cases regulate the career of prosecutors. The Minister of Justice or another organ of the executive power sometimes retains a certain degree of control over recruitment of prosecutors and can decide on appointments autonomously or on the advice of the Council of Prosecutors. The Minister of Justice may also remain responsible for organisational matters and budget management of the prosecution system.

14. A variation of the same model used in other jurisdictions is that all policy, operational and administrative matters reside with the operational head of the prosecution service. However, some budgetary control may remain with the responsible minister, which may have an impact on the independence of the service.

15. In some cases, the prosecution service is part of the executive power, where appointments, career and disciplinary proceedings may be dealt with by the Ministry of Justice, and a prosecutorial council or similar body may approve or advise on these matters.

[1] Venice Commission's Report on European Standards as regards the independence of the Judicial System: Part II – The Prosecution Service, 17-18.12.2010, CDL-AD(2010)040 §§ 64-68; see also the Venice Commission's Compilation of Opinions and Reports concerning prosecutors (CDL-PI(2022)023), 26 April 2022. See also the Report of the UN Special Rapporteur on the independence of judges and lawyers (Doc. A/HRC/38/38, 2 May 2018) where it is pointed out that the number of judicial councils, responsible either for judges or both for judges and prosecutors, increased greatly in recent decades, and it is estimated that, to date, over 70 percent of the countries in the world have some form of judicial council.
[2] Mentioned in the para 3 of the present Opinion.
[3] Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/HRC/20/19), 7.6.2012, §29.
[4] Also known as the passerelle system.

16. While recognising these differences in member States, the CCPE is of the view that what brings them together is the need to provide for the independence and autonomy of the prosecution services in order to secure their impartial and effective functioning and decision making.

17. The purpose of this Opinion is therefore to examine and highlight the key role of Councils of Prosecutors and other bodies dealing with the prosecutorial self-governance in safeguarding institutional independence and autonomy of the prosecution services and functional independence of individual prosecutors.

18. However, as also mentioned by the Venice Commission, it would be difficult to impose a single model for such prosecutorial councils in all member States of the Council of Europe, and their existence cannot be regarded as a uniform standard binding on all European States.[5]

19. The Opinion strives in particular to offer best practices to member States. This is with a view to improving both the existing systems and prosecutorial self-governance having due regard to different legal cultures and traditions and within the overall framework of reinforcing the independence, efficiency and quality of justice.

III. General mission of Councils of Prosecutors: to safeguard the independence of prosecutors and the rule of law

20. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) underpins the rule of law as a structural pillar of a democratic society. Access to justice is one of the core elements of the ECHR, which proclaims the right of everyone to an independent and impartial tribunal established by law.[6]

21. The European Court of Human Rights (ECtHR) consequently developed vast case law on the standards for the independence and impartiality of judges and efficient administration of justice. In this regard, Councils for the Judiciary and their structure, composition and functioning have been mentioned in the case law of the ECtHR.[7]

22. The Court of Justice of the European Union (CJEU) has also expressed itself on Councils for the Judiciary.[8] It stated, for example, that the participation of such councils in the process for the appointment of judges may, in principle, contribute to making that process more objective. However, that is only the case, *inter alia*, if such body is itself sufficiently independent from the legislative and executive powers and of the authority to which it is required to deliver such an appointment proposal.[9]

23. Councils for the Judiciary are bodies tasked with safeguarding the independence of the judiciary and of individual judges, and thereby promoting the efficient functioning of the judicial system.[10] To date, many

[5] Venice Commission's Report on European Standards as regards the independence of the Judicial System: Part II – The Prosecution Service, 17-18.12.2010, Study N° 494 / 2008 - CDL-AD(2010)040 - §§ 68.
[6] In Article 6 of the ECHR.
[7] ECtHR judgments *Oleksandr Volkov v. Ukraine*, 9 January 2013, §§ 109-117. *Ramos Nunes de Carvalho e Sá v. Portugal*, 6.11.2018, § 144; *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 12. 2020; *Xero Flor w Polsce v. Poland*, 7.5.2021 – 4907/18, §§ 243-251.
[8] It should be noted that the European Charter of Fundamental Rights states that in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection (Article 52(3)). The European Charter also provides for the right to a fair trial similar to that provided by the ECHR (Article 47 of the Charter).
[9] CJEU judgment of 19 November 2019 C-585/18, C-624/18 and C-625/18. Also see CJEU *European Commission v. Poland*, 24.6.2019 – C 619/18, §§ 71-73; *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, C 585/18, C-624/18, C-625/18, §§ 120-122 ; *European Commission v. Poland*, 24.6.2019 – C 619/18, §§ 74-75; *A.K. v. Krajowa Rada Sadownicta*, 19.11.2019, C 585/18, C-624/18, C-625/18, §§ 123, 133-134; *VQ v. Land Hessen*, 9.7.2020 – C2727/19, § 54; *Repubblika Il-Prim Ministru v. WY*, 20.4.2021 – C-896/19; C-83/19 and others 18.5.2021.
[10] Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities, paras 26-29; CCJE Opinions No. 1 (2001), para 45, and No. 10 (2007) and No. 24 (2021); Venice Commission's Report on the Independence of the Judicial System, Part I: the Independence of Judges (para 32), adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

European legal systems introduced Councils for the Judiciary.[11] As it was already mentioned, in some cases, these Councils are dealing with both judges and prosecutors.[12]

24. As regards specifically Councils of Prosecutors, while the ECtHR has not yet developed similar case law, it did emphasise the principle of prosecutorial independence in general.[13] For example, the Court considered it necessary to reiterate that in a democratic society, both the courts and the investigation authorities must remain free from political pressure.[14] Moreover, the Court observed that it was in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State.[15]

25. The CCPE emphasised that the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary, and, therefore, the general tendency for such independence should be further encouraged.[16] Prosecutors should be autonomous in their decision making and should perform their duties free from external pressure or interference, in accordance with the principles of separation of powers and accountability.[17]

26. The CCPE went on to directly recommend a status for prosecutors that ensures their external and internal independence and autonomy, preferably by provisions at the highest legal level and guaranteeing their application by an independent body such as a Council of Prosecutors, in particular for appointments/elections, careers and discipline,[18] which should be regulated by clear and well understood processes and procedures.[19]

27. The Venice Commission noted that Councils of Prosecutors are important for reducing and ultimately eliminating the risks created by interference of other powers of the state (i.e. the executive and legislative powers) or, in other words, strengthening the independence of prosecutors. In the case of Councils responsible both for judges and prosecutors, it should be ensured that they cannot influence each other's appointment/election and disciplinary proceedings.[20]

28. The Venice Commission further noted that Councils of Prosecutors, when they are independent of other state bodies, have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus shield prosecutors from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often play a role in disciplinary matters.[21]

29. The Council of Europe's Group of States against Corruption (GRECO) also developed guidance on the self-governance of prosecutors when issuing recommendations on enhancing the independence of prosecutors as a prerequisite for promoting integrity in the prosecution service. Acknowledging that there

[11] Comparative Overview on Judicial Councils in Europe by Professor Anne Sanders (2022) at https://rm.coe.int/comparative-overview-on-judicial-councils-in-europe-en/1680a923bc. See also the Report of the European Committee on Legal Co-operation (CDCJ) to the Secretary General of the Council of Europe on Review of the Implementation of the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality, adopted by the CDCJ at its 98th plenary meeting (1-3 June 2022).
[12] Comparative Overview on Judicial Councils in Europe by Professor Anne Sanders (2022) at https://rm.coe.int/comparative-overview-on-judicial-councils-in-europe-en/1680a923bc.
[13] CCPE Opinion No. 16 (2021) on implications of the decisions of international courts and treaty bodies as regards the practical independence of prosecutors, paras 16-36, for an analysis and list of relevant judgments of the ECtHR.
[14] ECtHR judgment *Guja v. Moldova* no. 14277/04, 12 February 2008, § 86.
[15] ECtHR judgment *Guja v. Moldova* no. 14277/04, 12 February 2008, § 90; see, *mutatis mutandis*, *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313.
[16] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, point IV.
[17] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, point V.
[18] CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendation iii. See also the Report of the European Committee on Legal Co-operation (CDCJ) to the Secretary General of the Council of Europe on Review of the Implementation of the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality, adopted by the CDCJ at its 98th plenary meeting (1-3 June 2022), para 147.
[19] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 52.
[20] European Commission for Democracy through Law (Venice Commission), Report on European Standards as regards the independence of the Judicial System: Part II – The Prosecution Service, 17-18.12.2010, CDL-AD(2010)040, conclusion 20).
[21] Venice Commission's Report on European Standards as regards the independence of the Judicial System: Part II – The Prosecution Service, 17-18.12.2010, Study N° 494 / 2008 - CDL-AD(2010)040 - §§ 64-68.

is a diversity of systems with regard to the role and organisation of public prosecution in the criminal justice system, GRECO recommended countries where prosecutorial (or mixed, judicial and prosecutorial) councils exist, that they play a stronger role in the selection, appointment/election and career management of prosecutors, in disciplinary matters, as well as in case management and organisational programmes of prosecutorial offices.[22]

30. The European Network of Councils for the Judiciary (ENCJ) considers that such Councils should act to strengthen and maintain the rule of law, in particular by providing support for judicial independence, accountability and the quality of the judiciary. The ENCJ also highlights that if these standards do not specifically address issues concerning prosecutors, considering the wide variety of organisation of prosecution services in Europe, this does not prevent them from also applying to prosecutors and safeguarding their independence.[23]

31. The study of the Anti-Corruption Network for Eastern Europe and Central Asia (ACN) of the Organisation for Economic Co-operation and Development (OECD), while acknowledging the absence of any binding international standard in this field, encourages countries to develop national prosecutorial councils or other types of self-governing bodies. Such bodies, being conferred with powers concerning the appointment/election of prosecutors, disciplinary proceedings, and other crucial matters, are a relevant factor enhancing the independence of the prosecution service and protecting prosecutors from external interference and pressure.[24]

32. In addition, the OECD's above-mentioned study highlights the existence in some countries of collegial bodies within the prosecution services that consider, propose or even adopt important decisions regarding prosecutors' activities.[25]

33. The United Nations also recognises that prosecution services are constructed in a wide variety of ways, and if the prosecution service is organised as an autonomous agency, a prosecutorial council or a similar independent body may regulate the career of prosecutors.[26]

34. Taking into account the vast variety of legal and prosecutorial systems in Europe, the CCPE notes that there may be other effective means to provide for prosecutorial independence and prosecutorial self-governance than by establishing Councils of Prosecutors or other bodies dealing with it. However, the existence of such Councils or other bodies has a clear institutional value, if compared with alternative means. These institutions produce durable effects and ensure the long-term sustainability of independent and autonomous prosecution systems.

35. Therefore, the institutional value of Councils of Prosecutors – whether as separate bodies or as a part of Councils for the Judiciary responsible for both judges and prosecutors – or other bodies dealing with prosecutorial self-governance should be emphasised.

36. Moreover, such Councils should not merely exist in legislation but should also be operational in practice. The existence of a legislative framework and international standards may not always be enough on its own for the development in practice of an independent and impartial prosecution system. For this reason, the prosecution service and other branches of government, politicians, media and civil society must all work together in a long-term effort to increase professionalism, transparency and ethics within the

[22] GRECO, "Corruption prevention. Members or Parliament, Judges and Prosecutors. Conclusions and trends" page 28.
[23] The ENCJ Compendium on Councils for the Judiciary (2021).
[24] See OECD's Anti-Corruption Network for Eastern Europe and Central Asia (ACN) at https://www.oecd.org/corruption/acn/The-Independence-of-Prosecutors-in-Eastern-Europe-Central-Asia-and-Asia-Pacific.pdf, page 29.
[25] See OECD's Anti-Corruption Network for Eastern Europe and Central Asia (ACN) at https://www.oecd.org/corruption/acn/The-Independence-of-Prosecutors-in-Eastern-Europe-Central-Asia-and-Asia-Pacific.pdf, pages 38-39.
[26] Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/HRC/20/19, 7.6.2012, § 29).

prosecution service and the judiciary to turn rules on paper into a culture of respect for judicial independence for the benefit of the society.[27]

37. To summarise, Councils of Prosecutors are very well placed to:

- Secure effective and impartial prosecution services and individual prosecutors through their independent decision making in accordance with rule of law principles;

- Create in this way a favourable framework for prosecution services to be able to guarantee the lawfulness of proceedings and the right to a fair trial in line with rule of law principles; and

- Ensure compliance of the work of prosecutors with international legally binding instruments, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as with soft law instruments.

38. When dealing with these and other functions as well as the role of Councils of Prosecutors, the principles of Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system, as well as of the CCPE's related Opinions, should be followed as the basic safeguards for the prosecution system, its independence, impartiality and effectiveness.

IV. Composition of Councils of Prosecutors: to enable effective functioning of an independent and transparent Council

1. Composition of Councils of Prosecutors

39. The structure and composition of Councils of Prosecutors are varied. Their roots and development are linked to the development of each legal system and its historical, cultural and social context.

40. In the same way as judicial councils and in order to guarantee the stability of Councils of Prosecutors and stress their importance, these bodies should necessarily be established by law and function based on law.

41. There is no one-size-fits-all model for Council of Prosecutors. The main principle should be the setting-up of a structure, with an appropriate composition, proportionate to the size of the prosecution service in order to optimise the fulfilment of its tasks. A margin of appreciation is left to member States in setting up such bodies, provided that this main principle is respected.

42. Where Councils of Prosecutors exist, two main models can be identified: one where prosecutorial members are the majority or the totality of the composition and the other where prosecutorial members are not the majority of the composition.

43. Both the CCPE and Venice Commission underlined that setting up a Council of Prosecutors is a very welcome step towards the depoliticisation of the prosecution service, and it is therefore very important that it is conceived as a pluralistic body. In order to ensure the neutrality of this body, the independence of such Council and its members should clearly be stipulated.[28]

44. The Venice Commission also pointed out in particular that if such Councils are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent of other state bodies,

[27] Venice Commission, Urgent Interim Opinion on the draft new constitution, 11th of December 2020, Bulgaria, CDL-AD(2020)035 para 37; see also CCJE Opinion n. 24(2021) – CCJE(2021)11. Test for Europe's Judiciaries in: European Yearbook of Constitutional Law 2019, 287-310.

[28] Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, paras 33-34.

they have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield prosecutors from political influence.[29]

45. The presence and participation of lay members is seen as a way of promoting and guaranteeing the real independence of the prosecution system by rendering the Council free from any political interference and serving to reinforce its autonomy. In addition, the membership of lay members reinforces the accountability and transparency of the profession of prosecutors and their openness to the general public.

46. In Councils with mixed composition, it would be preferable that prosecutor members constitute the majority, elected by their peers, according to rules previously adopted and a transparent procedure and by a method guaranteeing the widest representation at all levels, gender-balanced, and as appropriate with a regional and national level representation, in all the panels of the Council. All the prosecutorial members must act as representatives of the entire prosecution service.

47. The composition of Councils of Prosecutors should, as appropriate, reflect the diversity in the prosecutorial systems and in the society in general. Lay members, when elected by Parliament, should be elected by a qualified majority to allow the opposition's participation. However, in the case of non-election in the first round, it can take place in the second round by a simple majority as anti-deadlock mechanism.

48. The Consultative Council of European Judges (CCJE) pointed out that prospective members of the Council for the Judiciary should not be active politicians, members of the Parliament or executive officials.[30] The CCPE is of the opinion that a similar approach should be pursued in relation to the members of Councils of Prosecutors.

49. *Ex officio* members may exist in a number that does not jeopardise the principles highlighted above.

50. A Council of Prosecutors can benefit from full-time membership, as needed, in order to fulfil its mission more effectively, as well as to strengthen its independence and public image. Guarantees should be in place to ensure that, after the end of their mandate, prosecutorial members can be reinstated in positions that correspond to their seniority and qualifications.

2. Qualifications of members of Councils of Prosecutors

51. Members of Councils of Prosecutors, whether prosecutors or not, are to be selected on the basis of predetermined, fair and clear criteria through a transparent procedure.

52. A set of rules considering the eligibility criteria should be established in advance. The candidates' competence, experience, integrity, independence, impartiality and other relevant factors should be outlined and taken into consideration.

53. Candidates for membership of the Councils of Prosecutors should in particular exhibit high ethical standards and should not be involved in politics for a reasonable period of time before and after their mandate in the Council.

3. Selection methods of members of Councils of Prosecutors

54. The members of a Council of Prosecutors must be selected in a way that supports the independence and effective functioning of the Council, the prosecution service, and as a direct effect the judiciary, removing or circumventing any perception of political influence or conflict of interest.

[29] Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, para 65.
[30] CCJE Opinion No. 10 (2007) on Council for the Judiciary at the service of society, para 23; see also CCJE Opinion No. 24 (2021) on the evolution of Councils for the Judiciary and their role in independent and impartial judicial systems, para 8(B)(b).

55. The selection of members should be governed by predetermined rules, disseminated in advance. These rules should apply to whatever selection method is concerned: election, appointment or other.

56. Rules should be in place to ensure that the prosecutorial members are selected by their peers, representing all levels of the prosecution service and not only senior officials of prosecutorial bodies. Associations of prosecutors may be entitled to present candidates.

57. The selection process should be transparent and ensure that the candidates' qualifications, especially their impartiality and integrity, are ascertained. Vacancies should be advertised publicly, and equal opportunities guaranteed to support a diverse group of independent candidates.

58. The number of *ex officio* members should be limited, and membership of officials from the executive should be discouraged.

59. The election of prosecutorial members by parliaments or their selection by the executive should preferably be avoided. The election by parliaments of lay members may be acceptable. However, the selection process should be transparent and preferably be done by a qualified majority.[31] In the case of non-election in the first round, it can take place in the second round by a simple majority as anti-deadlock mechanism.

60. An election or nomination of lay members by institutions such as the Bar or other professional associations, non-governmental organisations (NGOs), when in line with member States' legal traditions, may be appropriate.

4. Selection of the Chairs of Councils of Prosecutors

61. The Chair of a Council of Prosecutors can play a key role in the functioning of the Council and its external and internal image. Clear rules to that end should be adopted.

62. The Chair of a Council of Prosecutors should be elected/appointed in a manner that ensures his/her impartiality and independence from the legislative and executive powers and ensures the absence of undue influence from within the hierarchy of the prosecution service.

63. The Venice Commission pointed out that the election of the Chair of a Council by its members is welcome.[32] Where the minister of justice is an *ex officio* member of the Council, having him/her chair the Council may raise doubts as to the independence of this body.[33] The CCPE is therefore of the opinion that the Chair should be one of prosecutorial members elected by all members – both prosecutorial and lay – by a qualified majority. The same rule should apply to the election of the chairmanship of other similar bodies. However, in the case of non-election in the first round, it can take place in the second round by a simple majority as anti-deadlock mechanism.

64. In countries where, owing to their legal traditions, the Chair of the Council of Prosecutors can be appointed *ex officio*, the chairmanship of the Council should not be granted to an *ex officio* member representing the executive power (i.e. the Minister of Justice) in order to avoid any undue influence.

5. Status and duration of the mandate of members of Councils of Prosecutors

65. The mandate of all members of the Council of Prosecutors should be of the same duration. They should be selected for a fixed term of office and should enjoy adequate protection for their impartiality and independence.

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[31] Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, para 66.
[32] Venice Commission's Opinion on the draft law on the Public Prosecutors' service of Moldova, CDL-AD(2008)019, para 62.
[33] Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, para 40.

66. Member's term of office should only end after the election of their successor. Reaffirming the importance of the security of tenure of all members of the Council as a condition for its independence, the removal from office of a member should be based on serious grounds clearly established by law, and in a procedure in which his/her rights to a fair trial are guaranteed.

67. In this regard, the CCPE agrees with the Venice Commission that the possibility to revoke a member of the Council of magistrates for having been the subject of one of the disciplinary sanctions provided by law for judges and prosecutors is questionable, as it allows the dismissal of the person even for the lightest disciplinary sanctions.[34] It may also be recalled in this context that the Venice Commission is of the opinion that decisions on suspension of a member should take into account the gravity of the accusations and the existence of at least a probable cause that a serious disciplinary offence has been committed.[35] The CCPE considers that a possibility for judicial appeal should be available.

68. The CCPE also agrees with what the Venice Commission stressed regarding the revocation of elected members of such Councils by a withdrawal of confidence, i.e. by vote of the general meetings of prosecutor's offices. The Venice Commission consistently objected to the introduction of such a mechanism, because it involves a subjective assessment and may prevent the elected representatives from taking their decisions independently. A vote of confidence is rather specific to political institutions and is not suitable for institutions such as judicial Councils, and even less for individual members of such Councils.[36]

69. In case of incapacity or loss of the status under which a member was elected or appointed to it, this member may cease his/her tenure. In case of a decision by the Council itself or a special body within it, the member should benefit from a fair hearing, including the possibility of appeal, in the proceedings established by law.

V. Competence and powers of Councils of Prosecutors in order to strengthen the independence and impartiality of justice

70. Both the Venice Commission and GRECO confirmed that Councils of Prosecutors may deal with the appointment/election matters concerning prosecutors, as well as disciplinary proceedings, including removals. For example, the Venice Commission stressed that in such cases, the prosecutor concerned should have a right to be heard in adversarial proceedings and in systems where a Council of Prosecutors exists, this council, or a disciplinary committee within it, could handle disciplinary cases (with an appeal to a court against disciplinary sanctions still to be available).[37] GRECO also underlined that, ideally, such a Council could be given an important role in the handling of disciplinary matters.[38]

71. The CCPE also mentioned in relation to the appointment/election of prosecutors that striving for impartiality, which, in one form or another, must govern the recruitment and career prospects of prosecutors, may result in arrangements for a competitive system of entry to the profession and the establishment of High Councils either for the whole judiciary, or just for prosecutors.[39]

72. Councils of Prosecutors should have a wide range of competences to better protect and promote prosecutorial independence and the efficient administration of justice. Competence and powers of the Council should be provided for by law.

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[34] Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 142.
[35] Venice Commission's Opinion on the Draft Law on the Judicial Council in North Macedonia, CDL-AD(2019)008, para 37; see also the Venice Commission's Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, CDL-AD(2014)028, para 30.
[36] Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 143.
[37] Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, para 52.
[38] GRECO's Fourth Evaluation Round Report on Hungary (2015), page 49.
[39] Opinion No. 9 (2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, para 54.

73. Thus, Councils of Prosecutors should have a role in regulating or developing the organisation of the prosecution system and offices. In addition to the appointment/election and disciplinary matters mentioned above, they can deal with evaluation, promotion and transfer of prosecutors.

74. Moreover, further competencies of Councils of Prosecutors in the governing of the prosecution service should be encouraged, such as:

a. Training of prosecutors;

b. Control and/or management of the budget of the prosecution system in order to effectively manage it;

c. Providing for the transparency of the prosecution system and relations with media, including the protection, where needed, of the image of prosecutors;

d. Co-operation with other relevant bodies at national, European and international level;

e. Promoting the efficiency and quality of justice;

f. Providing opinions on legislative proposals regarding the organisation and functioning of the prosecution service, as well as for the justice system as a whole.

75. In cases where different functions of a Council of Prosecutors, such as appointment/election, disciplinary matters and training of prosecutors, are attributed to various branches or boards of such Council or to different independent bodies competent for specific aspects of prosecutorial administration, their composition should reflect the type of tasks and the way in which they should be carried out.

76. Extended financial powers of a Council of Prosecutors imply its accountability not only vis-à-vis the executive and legislative powers, but also vis-à-vis the courts and the public.

VI. Functioning and decision-making process of Councils of Prosecutors

77. The Consultative Council of European Judges (CCJE) stressed that every Council for the Judiciary must work in a transparent fashion, giving reasons for its decisions and procedures and be accountable in this way. Relations between Councils and other powers of the state, i.e. the executive and legislative powers, must be based on a culture of respect for the rule of law and understanding of their respective roles in a democratic state. Councils should actively engage in open, respectful dialogue with other powers of the state, associations of judges and civil society including bar associations, NGOs and the media.[40]

78. The CCPE is of the opinion that this should also apply to Councils of Prosecutors. Their functioning and decision-making process should be governed by written and transparent rules preferably adopted by law. Such rules should provide, in particular, for the quorum, voting procedure, majority to adopt a decision. If needed, detailed regulations of a Council of Prosecutors should be adopted by the Council itself.

79. Decisions with an impact on the career of prosecutors should be reasoned, and those having binding force can be subject to a judicial review on the initiative of the prosecutor concerned.

80. In case of the reversal of a decision concerning the career of prosecutors, including transfers and disciplinary breaches, remedies should be available to them.

81. As mentioned above, Councils of Prosecutors can benefit from full-time membership, which can assist Councils in operating as a professional and effective organisation, by strengthening their independence, avoiding conflicts of interest, improving its image and assisting in fulfilling its mission.

[40] Opinion No. 24 (2021) of the CCJE on the evolution of Councils for the Judiciary and their role in independent and impartial judicial system, Chapter IV, Conclusions and recommendations, paras 7, 20, 21.

82. Irrespective of whether the members of a Council of Prosecutors serve as full-time or part-time members, they should be allocated enough working time and adequate financial and administrative resources in order to fulfil their functions.

83. Guarantees for avoiding unlawful influence or interference of outside actors into the work and decision making of Councils of Prosecutors and other bodies dealing with prosecutorial self-governance should be effectively provided.

84. To reinforce public confidence in the justice system, Councils of Prosecutors should act transparently and be accountable for their activities, through periodical reports or other appropriate means. In such reports, measures already taken or to be taken could be highlighted in order to improve the functioning of the justice system.

85. As already mentioned, in the case of umbrella Councils[41] responsible both for judges and prosecutors, it should be ensured that they cannot influence each other's appointment/election and disciplinary proceedings.

VII. Other bodies dealing with prosecutorial self-governance

86. The variety of organisational models of prosecution services in member States results in a diversity of types of other bodies dealing with prosecutorial self-governance. In addition to Councils of Prosecutors, other bodies may include:

- congresses or general assemblies of prosecutors, which have in general competence to elect members of the Council of Prosecutors or other bodies of the prosecution service, to adopt annual reports and policy documents. They are composed of all the prosecutors in the country;

- committees of senior prosecutors or collegium of the prosecution service – bodies that are usually made up either by *ex officio* members, prosecutors with management positions, determined by the law, chaired by the Prosecutor General. These bodies assist the Prosecutor General in his/her strategical mission of organising the activities of the office;

- qualification commissions, attestation commissions, ethical committees which are bodies with an advisory role on selecting, appointing or promoting prosecutors, on evaluation and discipline. In some cases, such commissions exist as bodies of the Council of Prosecutors, but in other cases, they are structures established by the Prosecutor General. These commissions are composed of prosecutors appointed or elected. In some cases, they also may include lay members.

87. Thus, there are different approaches applied with regard to the competence, powers and composition of these bodies, to the functions they fulfil, which may be not as extensive and/or complex as those of a Council of Prosecutors, in the way its members are appointed or elected, in the level of (or lack of) autonomy in relation with the Prosecutor General and in other aspects.

88. The CCPE recalls that international soft law instruments encourage as best practice the setting up of professional, non-political structures aiming at enhancing the institutional and functional independence of prosecution services. The CCPE therefore recognises the importance and value of other bodies dealing with prosecutorial self-governance, and accordingly considers that they should be composed and function in such a way so as to exclude political interference and act for reinforcing the independence and impartiality of prosecution services.

[41] Mentioned in para 12 of the present Opinion.

VIII. Recommendations

Whereas:

- there is a need to further explore and understand the institutional framework to support the standards developed by the CCPE on the independence and impartiality of prosecutors;

- Councils of Prosecutors are becoming increasingly widespread in member States, in light of the diversity of their legal systems, traditions and cultures;

- the establishment of Councils of Prosecutors has a clear institutional value in comparison to alternative settings in order to provide for prosecutorial independence and prosecutorial self-governance;

- in member States where they exist, there is great diversity in terms of structure, organisation, composition, competence, functions, and other aspects of Councils of Prosecutors or other bodies dealing with prosecutorial self-governance;

- the above-mentioned diversity calls for the development of common standards and guidelines for national authorities;

the CCPE agreed on the following recommendations:

1. The institutional value of Councils of Prosecutors, as self-governing bodies, for securing the effective and impartial functioning of the prosecution services and individual prosecutors through their independent decision-making should be taken into account. Such institutional value should be considered in member States where Councils of Prosecutors do not exist, in accordance with their domestic legislation, legal traditions and cultures. If established, the below recommendations should apply to them.

2. Although differences may exist in member States, Councils of Prosecutors should be established by law, and given appropriate competence, structure and composition, proportionate to the size of the prosecution service, and with adequate financial and administrative resources.

3. If Councils of Prosecutors are conceived with mixed composition, they should be composed in a balanced way, through the representation of lay members, including representatives of other legal professions, academics and civil society. In Councils with such mixed compositions, it would be preferable that prosecutor members constitute the majority, elected by their peers.

4. Members of Councils of Prosecutors, whether prosecutors or not, are to be elected according to previously adopted rules and predetermined, fair and clear criteria, through a transparent procedure.

5. Prospective members of Councils of Prosecutors should not be active politicians, members of the parliament or executive officials.

6. Guarantees should be in place ensuring that, after the end of their mandate, prosecutorial members serving as full-time members can be reinstated in positions that correspond to their seniority and qualifications.

7. The impartiality and independence of the Chairs, as well as of members of Councils of Prosecutors, from the executive and legislative powers, and the absence of undue influence from within the hierarchy of the prosecution service, should be ensured.

8. The mandate of all members of Councils of Prosecutors should be of the same duration and should only end after the election of the successor. They should be selected for a fixed term in office and should enjoy adequate protection for their impartiality and independence.

9. Decisions on the suspension of a member should take into account the gravity of the accusations and the existence of a sufficient degree of probability that a serious disciplinary offence has been committed. In addition, such decisions should be subject to appeal through judicial avenues.

10. Councils of Prosecutors should be provided by law with a wide range of competencies in career matters and have a role in regulating or developing the organisation of the prosecution system and offices, while promoting prosecutorial independence and efficient administration of justice.

11. The functioning and decision-making process of Councils of Prosecutors should be governed by written and transparent rules preferably adopted by law. Such rules should provide, in particular, for the quorum, voting procedure and majority to adopt a decision. If needed, detailed regulations of a Council of Prosecutors should be adopted by the Council itself.

12. Decisions of Councils of Prosecutors with an impact on the career of prosecutors should be reasoned, and those having binding force can be subject to a judicial review on the initiative of the prosecutor concerned.

13. To reinforce public confidence in the justice system, Councils of Prosecutors should act transparently and be accountable for their activities, through periodical reports or other appropriate means.

Opinion No. 19 (2024)

of the Consultative Council of European Prosecutors
to the Committee of Ministers of the Council of Europe

Managing prosecution services to ensure their independence and impartiality

I. Introduction

1. In accordance with the terms of reference given by the Committee of Ministers, the Consultative Council of European Prosecutors (CCPE) has prepared this Opinion on managing prosecution services to ensure their independence and impartiality, as well as reinforcing the efficiency of the work of prosecution services.

2. The CCPE has previously stressed that the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged,[1] in order to avoid any possible political pressure.

3. The CCPE has already developed a set of standards on prosecutorial independence and impartiality, including as regards prosecutorial self-governing bodies. The topic of this Opinion was chosen by the CCPE to build on these foundations with a view to focusing on how the independence and impartiality of prosecution services can be ensured and further reinforced through their management.

4. In doing so, the Opinion takes into account the diversity of legal systems and models existing across Europe and, in particular, the fact that in many legal systems, public prosecution services are structured as highly hierarchical institutions, led by the prosecutors general.[2] As a consequence, the independence and impartiality of prosecution services largely depend on how independent and impartial their heads are, and on their role in respect of individual prosecutors. At the same time, this is also applicable, *mutatis mutandis*, to systems without such a strong hierarchical structure.

5. The Opinion, therefore, explores the crucial role of prosecutors general in managing prosecution services as a way of ensuring their independence and impartiality, and, for that purpose, also highlights the importance of their own independence and impartiality, including through the transparency of the appointment/election procedure, the length of their term of office, together with safeguards concerning their removal and against any form of undue interference with their work.

6. The Opinion duly takes into account Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system, Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice system and previous CCPE Opinions, in particular Opinion No. 7 (2012) on the management of the means of prosecution services, Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including the Rome Charter, Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, as well as Opinion No. 18 (2023) on Councils of Prosecutors as key bodies of prosecutorial self-governance. Furthermore, the Opinion takes account of the responses of the CCPE members to a questionnaire on managing prosecution services to ensure their independence and impartiality.

7. Furthermore, the Opinion also takes into account the following: Opinion of the Consultative Council of European Judges (CCJE) No. 19 (2016) on the role of court presidents, the relevant case law of the European Court of Human Rights (ECtHR), reports of the European Commission for Democracy through Law (Venice Commission), instruments of the European Commission for the Efficiency of Justice (CEPEJ), the results of the Fourth Evaluation Round of the Group of States against Corruption (GRECO) in respect of prosecutors, the Review of the Implementation of the Council of Europe Plan of Action for 2016-2021

[1] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, point IV.
[2] The Opinion uses the umbrella term “prosecutor general” to refer to the heads of prosecution services, irrespective of the titles used for this position in different legal systems (e.g. chief prosecutor, director of public prosecutions, etc.). The CCPE also acknowledges that prosecutors general may need to delegate part of their powers under certain conditions and in specific cases, as well as there are systems without a hierarchical subordination to one single head of the prosecution service.

on Strengthening Judicial Independence and Impartiality of the European Committee on Legal Co-operation (CDCJ).

8. The Opinion also uses relevant documents of international bodies outside of the Council of Europe, in particular, those of United Nations treaty monitoring bodies, the reports of the Special Rapporteur of the United Nations on the independence of judges and lawyers, the standards of professional responsibility and statement of the essential duties and rights of prosecutors of the International Association of Prosecutors (IAP), the study of the Organisation for Economic Co-operation and Development (OECD) on anti-corruption reforms in Eastern Europe and Central Asia, progress and challenges (2016-2019), and the report of the European Network of the Councils for the Judiciary (ENCJ) on Independence and Accountability of the Prosecution (2014-2016).

9. The CCPE is grateful to its President, Ms Jana Zezulova (Czechia) for her substantial contribution and support throughout the process leading up to the adoption of this Opinion.

II. Purpose and scope of the Opinion

10. The CCPE has consistently emphasised that member states should take effective measures to ensure that prosecutors can fulfil their professional duties and responsibilities within an appropriate legal and organisational framework. For this purpose, prosecution services should be given the possibility of assessing their needs, including technological means[3], human resources, negotiating their budgets, deciding how to use the allocated funds to the best effect and transparently. Where entrusted with the management of their resources, prosecution services should use modern management methods and tools in an efficient, transparent manner, in addition to being provided with adequate training for that purpose.[4] The management of prosecution services plays an important role in achieving the proper use of resources allocated to them.

11. In this context, while acknowledging the diversity of legal systems and models existing across Europe, the CCPE considers that what they have in common is the need to provide for the independence and autonomy of the prosecution services. In order to secure their impartial and effective functioning and decision making.[5]

12. In this regard, whilst mindful of existing differences between legal systems, this Opinion recognises the central role played by prosecutors general in the management of prosecution services, not only in representing the institution but also acting as the main guarantor of its independence and autonomy. This also involves upholding the functional independence and impartiality of individual prosecutors.

13. Given that a common feature of most prosecution services is their hierarchical structure, it is all the more important that prosecutors general be fully independent and impartial themselves, in addition to being seen as such. In order to ensure the independence and autonomy of the services they manage and for which they are accountable.

14. There are a number of important ways of securing the independence of prosecutors general. The most crucial characteristics are objective eligibility criteria for candidates, their profile based on merit, the transparency of procedures governing their appointment/election, the length of their term of office and safeguards concerning their removal and against any form of undue interference with their work. All these aspects have a significant bearing on the overall independence of the prosecution services and their impartial decision making.

15. In view of the above and building on the principles already set out by the CCPE regarding the functioning of prosecution services, this Opinion examines the crucial role of prosecutors general in ensuring the independence and impartiality of their institutions, both externally and internally, through their effective, transparent management.

16. The Opinion also takes into account existing standards of other bodies and institutions of the Council of Europe and beyond, reading them in conjunction with the CCPE recommendations, with the aim of

[3] The Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law was adopted on 17 May 2024 is the first-ever international legally binding treaty in this field. It aims at ensuring that the activities of artificial intelligence systems are fully consistent with human rights, democracy and the rule of law.
[4] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, point XIX.
[5] CCPE Opinion No. 18 (2023) on Councils of Prosecutors as key bodies of prosecutorial self-governance, para 16.

providing overall guidance to member states. For this purpose, the Opinion focuses on the following main aspects:

- the appointment/election procedure, in addition to the term of office of prosecutors general, the safeguards concerning their removal and against undue interference with their work as a guarantee of their independence;

- the role of prosecutors general in safeguarding the independence and impartiality of the prosecution services, including through the management of the financial, material and human resources of their services (as regards prosecutors, as well as the staff of the prosecution services, including those with the status of a civil servant);

- the possible role of other management officials in prosecution services depending on the legal system of member states.

17. The Opinion offers pertinent guidance while considering various approaches to the management of prosecution services in member states. While it refrains from expressing any preference, it emphasises the importance of respecting the principles for the preservation of prosecutorial independence and impartiality. In particular, the Opinion acknowledges that:

    - in various jurisdictions, prosecution services may be organised in centralised systems, where a central body, typically the Prosecutor General's Office, manages the entire service, or in decentralised systems where regional prosecution services or different prosecutorial bodies have internal autonomy in their management, or in combination of both systems;

    - in certain member states, the management of the prosecution service may be assigned to a specific official (e.g. Prosecutor General, Chief Prosecutor, or Director of Public Prosecutions);

    - in other member states, the management of the prosecution service may be assigned to a body (e.g. council of prosecutors or other prosecutorial self-governing body or a particular section within the service rather than a specific official);

    - in some member states, tasks and functions related to the management of the prosecution service may be distributed among various chief prosecutors or different officials or bodies;

    - respect for the principles established in the European Convention of Human Rights and the case law of the European Court of Human Rights, aimed at the preservation of prosecutorial independence, is very important.

18. Since the concept of independence is closely linked to the issue of accountability, the latter is also addressed in the Opinion. In this regard, the Opinion builds upon the idea that the public prosecution should account periodically and publicly for its activities as a whole, and in particular, the way in which its priorities were carried out.[6]

19. The Opinion acknowledges that, due to factors such as the workload and the size of the prosecution service, prosecutors general may need to delegate some functions and tasks to their deputies or other high-ranking officials within the service. Even if management functions are carried out by these officials instead of the prosecutor general, the standards outlined in the present Opinion continue to apply *mutatis mutandis*.

III. Prosecutors general as guarantors of prosecutorial independence through the management of prosecution services

20. The independence and impartiality of prosecutors general is achieved by a combination of several important factors which this chapter highlights.

21. First of all, transparency, objective eligibility criteria and exclusion of undue interference in the appointment/election of prosecutors general, as well as safeguards concerning their removal and undue interference with their work are vital. In this context, a clear definition of their term of office is also crucial.

[6] Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system, para 11.

22. The functions and tasks of prosecutors general are addressed separately, emphasising that they should be explicitly and clearly stipulated, preferably in domestic legislation at the highest level, and, if need be, complemented through further regulations to ensure their transparency, in addition to the independent and impartial functioning of the prosecution services.

23. Thus, this part of the Opinion brings together relevant standards in this regard and further elaborates on them, providing member states with guidance in the matter.

A. Independence of prosecutors general through appointment/election, term of office and guarantees concerning pre-term removal

24. The appointment/election of the prosecutors general should not only be transparent, following established, objective criteria for the choice of candidates and free of undue interference, but also be perceived as such by the judicial and prosecutorial communities in particular, in addition to the public in general. This is important to foster not only trust within the judiciary and prosecution services but also, crucially, public trust in the justice system.

25. The status, independence, recruitment, career including evaluation, removal and disciplinary actions, of prosecutors should, similarly to judges, be clearly established by national legal system while being governed by transparent and objective criteria. This is all the more important when it comes to prosecutors general owing to their crucial role in managing the prosecution services.

26. The independence and impartiality of prosecutors general should also be guaranteed through a combination of factors. Such factors include but are not limited to the length of their term of office and safeguards concerning their removal, as well as against any form of undue interference with their work. This is important not only in terms of guaranteeing independence, but also ensuring stability, promoting accountability, enhancing public trust and facilitating professional development within the prosecutorial system.

1. Appointment/election of prosecutors general

27. The CCPE has previously stated that the manner in which prosecutors general are appointed plays a significant role in the system guaranteeing the correct functioning of the prosecutor's offices,[7] more specifically when it comes to their independence and impartiality.

28. The CCPE recognises the diversity of legal systems and models across Europe, resulting in different approaches to the appointment/election of the prosecutors general and their term of office. These approaches may involve the participation of the parliament, bodies which are responsible for prosecutorial self-governance[8] in the selection process, or the decision by the head of state and/or government. The CCPE agrees with the position of the Venice Commission, which emphasises the importance of striking an appropriate balance between the requirement of democratic legitimacy in such appointments, on the one hand, and the necessity of depoliticisation, on the other.[9]

29. If governments have some control over the appointment of prosecutors general, it is important that the method of selection is such as to gain the confidence and respect of the public as well as of members of the judicial, prosecutorial system and legal profession.[10]

30. The CCPE is mindful of the interest of governments in retaining some control over the appointment/election of prosecutors general in some legal systems owing to the crucial role of prosecution services in implementing national criminal law policies. The CCPE considers that a way of reducing the risk of

[7] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 55; Venice Commission *Report on European Standards as regards the independence of the judicial system: Part II – the prosecution service,* CDL-AD(2010)040, 3 January 2011, paras 34-35.
[8] These bodies are understood in the context of the CCPE Opinion No. 18 (2023) where it is stressed that the institutional value of Councils of Prosecutors – whether as separate bodies or as a part of Councils for the Judiciary responsible for both judges and prosecutors – or other bodies dealing with prosecutorial self-governance should be emphasised.
[9] CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, paras 19, 20 and 27.
[10] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 56; Venice Commission *Report on European Standards as regards the independence of the judicial system: Part II – the prosecution service,* CDL-AD(2010)040, 3 January 2011, para 37; UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, A/HRC/20/19, 7 June 2012, para 65.

politicisation would be to keep to a minimum the role of the executive in the appointment/election of the prosecutors general, or to accompany it by very important safeguards. This can be achieved through various means, including the involvement of prosecutorial self-governance bodies,[11] such as councils of prosecutors where they exist, or other independent bodies, including the legislative power, in the selection and/or nomination process.[12]

31. Another way of reducing the risks of politicisation, either real or perceived, is to ensure a transparent procedure for the selection of prosecutors general. In this regard, the CCPE welcomes the practice of establishing eligibility criteria for the candidates for the position of prosecutor general that are objective, transparent and merit based.

32. The CCPE acknowledges that such criteria may vary from one member state to another due to the differences in legal systems and traditions. However, it is important that eligibility criteria are predetermined, by being either explicitly provided for by law or established by an institution entrusted by law to do so, so that they are not adjusted to eliminate or support certain candidates based on political considerations or any other unlawful interests.

33. Notwithstanding the type of legal system, the CCPE considers that it should always be checked that the candidates for the position of prosecutor general have the necessary legal expertise and determination, having fully accepted the need to protect and promote prosecutorial independence, for instance, by preventing any possible conflict of interest. Furthermore, an appropriate legal and professional background should be a primary requirement, in order to ensure the candidates' capacity to lead the prosecution service efficiently. Additionally, the merits of the candidates, including experience, proven management and other skills should also be considered as important. The combination of the aforementioned criteria is relevant to assess the capacity of a candidate to safeguard the independence and impartiality of the prosecution services. If possible in accordance with the legal system of the state, the process of selection and establishment of the list of candidates may be subject to judicial review.[13]

2. Term of office of prosecutors general and guarantees concerning pre-term removals

34. The CCPE has already emphasised that prosecutors general should be appointed/elected either for an adequately long period or permanently to ensure the stability of their office and make them immune to political changes,[14] and their appointment/election and termination of service should be regulated by law at the highest possible level and according to clear procedures.[15]

35. The CCPE also wishes to reiterate its concerns regarding the pre-term removal of prosecutors general (i.e. before the expiration of the mandate).[16] The independence of prosecutors implies their protection from any arbitrary or politically motivated removal. This is relevant for all prosecutors but even more so as regards prosecutors general.

36. Where pre-term removal is possible according to the national legal system, the applicable conditions should be clearly defined,[17] and it should only be based on clear and objective grounds.[18] The pre-term removal of prosecutors general from office should thus be *ultima ratio* and it should take into consideration the severity of the reasons. The procedure of the pre-term removal should, similarly to grounds for it, be free from political interference and be transparent, well-founded and also made public.

[11] If such bodies are involved, their opinion should be given serious consideration. If allowed by the national legislation and practices, such opinions should prevail. Any decision of the executive authorities not to follow it should be reasoned.
[12] As the Venice Commission pointed out, the use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to promote a broad consensus on such appointments, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), para 87(3).
[13] Upon the appointment/election and during the term of office, the prosecutors general should not engage in political activities.
[14] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 56.
[15] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 52.
[16] That is not in strict compliance with paras 34 and 36 of the present Opinion.
[17] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 73; Venice Commission *Report on European Standards as regards the independence of the judicial system: Part II – the prosecution service,* CDL-AD(2010)040, 3 January 2011, para 40.
[18] OECD (2020), Anti-corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2016- 2019, page 149, § G.

37. The CCPE considers in particular that the grounds for pre-term removal of prosecutors general should not be broadly or vaguely formulated so as to prevent excessive discretion in the decision-making process and arbitrary interpretations. Furthermore, there must be express reference to the prohibition of any removal that occurs outside the pre-defined procedure and based on objective pre-determined criteria. Political motives or personal preferences should be proscribed in such cases.

38. The European Court of Human Rights (ECtHR) set out that the executive branch of the government cannot remove chief prosecutors without independent judicial review.[19] The CCPE welcomes a possibility for independent judicial review[20] of any decision by any decision-making body concerning the pre-term removal of the prosecutor general.

B. Ethical and professional standards, accountability and disciplinary proceedings as a way to guarantee the independence of prosecutors general

39. The CCPE has already stressed that codes of professional ethics and conduct should be adopted and made public based on international standards developed by the United Nations, as well as those set out in the European Guidelines on Ethics and Conduct for Public Prosecutors (the Budapest Guidelines) adopted by the Conference of Prosecutors General of Europe on 31 May 2005.[21]

40. Ethical, professional standards and pre-determined norms on disciplinary proceedings applicable to prosecutors general are very important for safeguarding their independence, as well as their impartiality, which in turn has a bearing on their management of the prosecution services, affecting both the overall independence and impartiality of the prosecutorial activities.

41. As already stated by the CCPE, prosecutors should, in the course of their work, at all times adhere to the highest ethical and professional standards, always behaving impartially and objectively.[22] Furthermore, standards and principles of human rights establish that prosecutors are responsible for the performance of their duties and may be subject to disciplinary proceedings.[23]

42. As with the possibility of pre-term removal from office, the guarantees and safeguards against political or other undue interference in the context of disciplinary proceedings, according to national legal system, are applicable to all prosecutors and prosecutors general.

43. The CCPE underlines that prosecutors general are expected to embody high ethical values and be subject to the legal principles of transparency and accountability during their term of office.

44. At the same time, the CCPE wishes to reiterate that the accountability of prosecutors is not meant to interfere with their independence. Although independent, prosecutors are accountable, in cases and in the manner provided for in national laws.[24] The accountability of prosecutors general is a way of ensuring that prosecution services are managed independently, impartially and effectively in order to contribute to a better functioning of the justice system.

45. Accountability mechanisms are essential for fostering public trust in the justice system, ensuring that prosecutors general adhere to professional and ethical standards, while fulfilling their duties responsibly. Accountability reduces risks of abuse of power, promoting impartiality and transparency in decision making.

46. Depending on the domestic legal system, member states may either consider establishing dedicated ethical rules for prosecutors general, taking into account their crucial managerial role, or ensuring that they are bound by the ethical conduct expected from the entire prosecutorial community. In both cases, these rules should be clear, objective and transparent. They should not leave the door open to arbitrary interpretations and political or other undue interferences.

[19] ECtHR *Kövesi v. Romania*, no. 3594/19, 5 May 2020, paras 154, 201, 205 and 208-209. See also *Baka v. Hungary*, no. 20261/12, 23 June 2016, paras 156-157 and 164-167.
[20] If possible and applicable in national legal system.
[21] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 99.
[22] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, point VI.
[23] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 85; UN Human Rights Council, *Interim report of the Special Rapporteur on the independence of judges and lawyers,* A/65/274, 10 August 2010, para 60.
[24] CCPE Opinion No. 13 (2018) on independence, accountability and ethics of prosecutors, para 46.

47. To achieve this, any possible disciplinary proceedings against prosecutors general for potential misconduct should, similarly to the possibility of pre-term removal where they exist, be based on clear, objective and transparent grounds. The criteria and procedures should be unambiguously and clearly defined by domestic law. Under no circumstances, should such proceedings be driven by political motives or be subject to any kind of political or other undue interference.

48. Irrespective of the national legal system, disciplinary proceedings against prosecutors general should be conducted by an independent, impartial body, guaranteeing that they benefit from a fair hearing and due process. Independence and impartiality in cases involving high-ranking prosecutors may be secured by different means, such as the proceedings by a separate body outside the prosecution system, special guarantees for independent decision making despite hierarchical structure, public scrutiny, judicial control or other measures. When the possibility exists, concerning disciplinary proceedings, the same system could apply to the highest-ranking members of the judiciary and prosecution services.

C. Management functions and tasks of prosecutors general

49. Functions and tasks carried out by prosecution services vary across member states owing to the diversity of legal systems and traditions. As a consequence, the functions and tasks assigned to prosecutors general also differ from one country to another. In most jurisdictions, they are entrusted with a wide range of responsibilities, including those related to career matters of prosecutors and staff of prosecution services as well as the management of various resources allocated to them.

50. The functions and tasks delegated to prosecutors general should be explicitly and clearly stipulated in applicable legislation and regulations in order to ensure transparency, independence and accountability. Where there is a council of prosecutors, the law should define the relations between the prosecutor general and such a body. The aim should be to create a fair balance of powers, in order to achieve a more effective and coordinated performance. This will ensure the respect for a wider internal independence of prosecutors, while at the same time safeguarding an effective, coherent and sustainable intervention of the prosecution service in the courts.

1. General role of prosecutors general

51. The key role of prosecutors general is to ensure the transparent, independent and efficient management of the prosecution services, which they are responsible for, and ensure, in particular, the independent and impartial decision making of the service's sub-divisions, bodies and of individual prosecutors.[25]

52. When tasked by domestic laws and regulations with managing the resources of the prosecution services, prosecutors general should also ensure efficient as well as adequate economical use of these resources. In addition, they should ensure that control and follow-up mechanisms function effectively.[26]

53. Prosecutors general are often responsible for representing the prosecution services within the overall structure of state bodies in member states, as well as before foreign prosecution services and international organisations. They should accordingly ensure the preservation of their institutional independence, impartiality and promote their cooperation with state institutions, together with various other bodies and actors,[27] while not interfering with their competence.

2. Role of prosecutors general regarding the careers of prosecutors and staff of the prosecution services

54. The independence and impartiality of individual prosecutors is achieved by a combination of several important factors which this chapter highlights with a focus on the role of prosecutors general.

55. When prosecutors general assume responsibilities for career-related matters concerning prosecutors, guarantees and standards stipulated by relevant instruments of the Council of Europe, in the way

[25] As the CCPE stressed, in all legal systems, prosecutors contribute to ensuring that the rule of law is guaranteed, especially by the fair, impartial and efficient administration of justice in all cases and at all stages of the proceedings within their competence, Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Section I.
[26] CCPE Opinion No. 7 (2012) on management of the means of prosecution services, para 51.
[27] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 112.

described in paragraph 17 of this Opinion, including the previous opinions of the CCPE, should be fully applicable.[28]

56. Member states are therefore expected to ensure that procedures for the recruitment of prosecutors are competitive, merit based and incorporate safeguards against any approach that favours or otherwise takes into account political or other undue considerations.

57. The status, independence, recruitment and career of prosecutors should, similarly to judges, be clearly established by law and governed by transparent and objective criteria.[29] In jurisdictions where prosecutors general are competent for carrying out, overseeing or having any other role in the recruitment of prosecutors (both with or without the status of civil servants, depending on national legal system), they should, within the limits of their competence, ensure that such recruitment is implemented on the basis of the candidates' skills, merit, integrity, ethical values and other objective criteria, as well as being free from any kind of discrimination. Recruitments that rely on excessive discretion or occur outside predefined procedures should be avoided.

58. If prosecutors general are also entrusted with carrying out, overseeing or having any other role in the recruitment of staff of the prosecution services (both with or without the status of civil servants, depending on national legal system),[30] such recruitments should be adjusted to the needs of the prosecution service and be both transparent and objective.

59. In various jurisdictions, prosecutors general may also assume responsibilities for other career-related aspects concerning prosecutors, as well as the staff of the prosecution services. These responsibilities may encompass professional evaluations, promotions, transfers, awarding honours in recognition of professional achievements, having a role in disciplinary proceedings against prosecutors along with the imposition of disciplinary sanctions, or other tasks and measures.

60. In particular, in jurisdictions where prosecutors general are competent for carrying out, overseeing or having any other role in the recruitment of prosecutors or staff of the prosecution services (both with or without the status of civil servants, depending on national legal system), they should ensure that:

- both the first appointment and promotion of prosecutors or staff of the prosecution services adhere to clear, precise, uniform selection procedures and criteria, notably merit, enshrined in the law;[31]

- aspects related to the careers of prosecutors or staff of the prosecution services and their profession are governed by transparent and objective criteria, such as competence together with experience,[32] while avoiding excessive discretion and personal or otherwise biased preferences;

- mobility in particular is based on the needs of the prosecution service,[33] and is governed by known and objective criteria, such as competence and experience;

- disciplinary proceedings against prosecutors or staff of the prosecution services are governed by national legal systems, in order to guarantee a fair and objective assessment and decision which should be subject to independent judicial review;[34]

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[28] This includes, but is not limited to, the guarantees provided by Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system, Recommendation Rec(2012)11 of the Committee of Ministers on the role of public prosecutors outside the criminal justice system, the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including Rome Charter, and the CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors.

[29] CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendation III; see also the CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, point XII.

[30] The term "staff of the prosecution services" is understood, for the purposes of the present Opinion, as including everybody working in the prosecution service, however not having the status of a prosecutor (e.g. contract employees, experts, administrative and financial officers, accountants, clerks, etc.).

[31] GRECO's Fourth Evaluation Round: corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report concerning Georgia adopted by GRECO at its 74th plenary meeting (Strasbourg, 28 November-2 December 2017), para 94.

[32] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, point XII.

[33] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 51; Committee of Ministers of the Council of Europe, Recommendation Rec(2000)19 on *the role of public prosecution in the criminal justice system*, 6 October 2000, para 5, items a, b and c.

[34] Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system, 6 October 2000, para 5, item e.

- disciplinary sanctions imposed on prosecutors or staff of the prosecution services are based on clear evidence and, at the same time, are effective[35], proportionate[36] and dissuasive;

- the dismissal of prosecutors or staff of the prosecution services is subject to strict requirements, which in the case of prosecutors should not undermine the independent and impartial performance of their activities.[37]

3. Role of prosecutors general in the consistent application of law and case management

61. The concept of independence applies not only to the institutional independence of the prosecution services but also to the functional independence of its structural bodies and individual prosecutors. The principle of independence requires that prosecutors be free in their decision making and protected from unlawful interference, political pressure or any kind of undue influence in the fulfilment of their statutory duties.[38]

62. At the same time, the functional independence of prosecutors is not in contradiction with a hierarchical organisation of the prosecution service and the issuing of general recommendations or guidelines/directives on the consistent application of the law. This equally applies to case law or implementation of the priorities for prosecutorial action.[39] Prosecutors general have the primary competence in this process, either themselves issuing such recommendations or guidelines/directives or supervising their adoption by other management officials of the prosecution service. Decisions on implementation of crime policies should be transparent in order to ensure fair, consistent and efficient activities of prosecutors,[40] always in accordance with law.

63. In this context, the CCPE reiterates that relationships between the different layers of the hierarchy in the prosecution services must be governed by clear and unambiguous rules so that personal or other considerations do not play an unwarranted role.[41] Prosecutors general have a key role in ensuring that their services are managed to ensure that all prosecutorial operations are implemented transparently, impartially, effectively and based on strict compliance with law.

64. Depending on the national legal system, the prosecutor general may also play a role in case distribution and be empowered to re-assign cases among prosecutors. These processes should be fair and transparent while being based on clear criteria including but not limited to the complexity, nature or volume of cases, professional experience, skills, specialisation and workload of individual prosecutors. They should meet the requirements of impartiality with respect to the structure, responsibilities and decision-making competencies of the prosecution services.[42] Decisions by superior prosecutors to remove cases from subordinate prosecutors should be reasoned and in writing.[43]

65. Taking note of the developing process of digitalisation of the work of the prosecution services,[44] the CCPE also notes that prosecutors general may use their managerial power, as well as their competence, to introduce or further reinforce the use of modern technologies in the work of prosecutors, in addition to the process of case management and distribution, where it is considered important in order to respond to the needs and effectiveness of the prosecution system. This should be in line with the relevant tools, notably those developed by the CEPEJ.[45] In this regard, prosecutors general should seek to ensure the

[35] GRECO's Fourth Evaluation Round: corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report concerning Bosnia and Herzegovina adopted by GRECO at its 70th plenary meeting (Strasbourg, 30 November- 4 December 2015), para 126.
[36] UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers,* Gabriela Knaul, A/HRC/20/19, 7 June 2012, para 86.
[37] UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers,* Gabriela Knaul, A/HRC/20/19, 7 June 2012, paras 68-69.
[38] CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendations I-III.
[39] CCPE Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, Recommendation V.
[40] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 45.
[41] Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system, para 9.
[42] CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 43.
[43] GRECO's Fourth Evaluation Round: corruption prevention in respect of members of parliament, judges and prosecutors, Compliance Report concerning Georgia adopted by GRECO at its 82nd plenary meeting (Strasbourg, 18-22 March 2019), para 64.
[44] CCPE thematic study on digitalisation in the work of prosecution services and international co-operation (2023).
[45] CEPEJ European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment (2018), CEPEJ Guidelines on electronic court filing (e-filing) and digitalisation of courts (2021), CEPEJ Guidelines on videoconferencing in judicial proceedings (2021).

participation of the prosecution system in the design and implementation of court information, in addition to case management systems.

66. In this context, a unique data and document repository at national level should be put in place, and more efficient, effective and easily developed means of research and analysis should be provided.[46]

67. The CCPE also wishes to reiterate an important aspect concerning the organisation of prosecution systems in Europe which is the possibility of introducing the specialisation of prosecutors, and the role of the prosecutors general in this respect.[47] In this regard, taking into account the growing trend towards specialisation of the prosecution services in Europe, the CCPE underlines that all above-mentioned principles applicable to the role of the prosecutors general in consistent application of law and case management, should equally apply *ipso facto* to the specialised prosecution bodies and their prosecutors.

68. The CCPE further highlights the important role that prosecutors general have in reinforcing international cooperation between prosecution services, as well as judicial bodies of member states in addition to international courts and bodies. Such cooperation may contribute to the full respect of international commitments and obligations of member states, along with the implementation of decisions issued by international bodies. In this regard, it should be emphasised that all of the above-mentioned principles as regards the role of prosecutors general in ensuring prosecutorial independence and impartiality are also fully applicable when it comes to any area of international cooperation involving prosecution services.

IV. Recommendations

Whereas:

- in many legal systems, public prosecution services are structured as highly hierarchical institutions;
- prosecutors general play a central role in the management of prosecution services while acting as the main guarantors of their independence and autonomy;
- the independence and impartiality of prosecution services largely depend, *inter alia*, on how independent and impartial their heads are, in addition to their role in respect of individual prosecutors;

the CCPE accordingly agreed on the following recommendations:

1. Prosecutors general must be fully independent and impartial. They must also be seen as such, to ensure the independence as well as the autonomy of the services they manage and for which they are accountable.

2. A way of reducing the risk of politicisation would be to keep to a minimum the role of the executive in the appointment/election of the prosecutors general, or to accompany it by very important safeguards. This can be achieved through various means, including the involvement of prosecutorial self-governance bodies, such as councils of prosecutors where they exist, or other independent bodies, including the legislative power, in the selection and/or nomination process.

3. Eligibility criteria that are objective, transparent and merit-based should be established for candidates to the position of prosecutor general.

4. Prosecutors general should be appointed/elected either for an adequately long period or permanently to ensure the stability of their office and make them immune to political changes. Their appointment/election and termination of service should be regulated by law at the highest possible level, in accordance with clear procedures.

[46] CEPEJ Guidelines on electronic court filing (e-filing) and digitalisation of courts (2021), para 71.

[47] As it is mentioned in Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system, para 8, in order to respond better to developing forms of criminality, in particular organised crime, specialisation should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. The CCPE also spoke of specialisation, for example, in its Opinion No. 9 (2014) on European norms and principles concerning prosecutors, para 119, mentioning that the need of specialisation of prosecutors should be seen as a priority, to better respond to new forms of criminality, as well as in cases where the prosecutor has competences outside the criminal law field. It would also improve and facilitate international co-operation.

5. Where pre-term removal of prosecutors general is possible according to the national legal system, the applicable conditions should be clearly defined. Such removal should always be based on clear, predetermined and objective criteria. It should be *ultima ratio,* should take into consideration the severity of the reasons and be based on a procedure which is free from any political interference, while being transparent, well-founded and clearly communicated to the public.

6. In particular, the grounds for pre-term removal should not be broadly or vaguely formulated so as to prevent excessive discretion in the decision-making process and arbitrary interpretations. Any removal that occurs outside the pre-defined procedure based on objective pre-determined criteria, as well as political motives or personal preferences should be prohibited.

7. Prosecutors general should adhere to the highest ethical and professional standards, always behaving impartially and objectively. They should also be subject to the legal principles of transparency and accountability during their term of office.

8. Any possible disciplinary proceedings against prosecutors general should be based on clear, objective and transparent grounds, criteria and procedures. The proceedings should be unambiguously and clearly defined by national legal system. Under no circumstances, should such proceedings be driven by political motives or be subject to any kind of political or other undue interference.

9. The functions and tasks delegated to prosecutors general should be explicitly and clearly stipulated in applicable legislation, as well as regulations, to ensure transparency, independence and accountability.

10. When tasked by domestic law with managing the resources of the prosecution services, prosecutors general should also ensure cost effective use of these resources.

11. When responsible for representing the prosecution services within the overall structure of the state bodies in member states, as well as before foreign prosecution services and international organisations, prosecutors general should accordingly ensure preservation of their institutional independence and impartiality and promote their cooperation with state institutions and various other bodies and actors, while not interfering with their competence.

12. In jurisdictions where prosecutors general are competent for carrying out, overseeing or having any other role in the recruitment of prosecutors (both with or without the status of civil servants, depending on national legal system), they should, within the limits of their competence, ensure that such recruitment is implemented on the basis of the candidates' skills, merit, integrity, ethical values and other objective criteria, and is free from any kind of discrimination. Recruitments that rely on excessive discretion or occur outside predefined procedures should be avoided.

13. Relationships between the different layers of the hierarchy in the prosecution services must be governed by clear and unambiguous rules so that personal or other considerations do not play an unwarranted role. Prosecutors general have a key role in ensuring that their services are managed and all prosecutorial operations are implemented transparently, impartially, effectively and based on strict compliance with law.

14. Prosecutors general may play a role in case management and distribution and be empowered to re-assign the cases among prosecutors. All these processes should be fair and transparent and be based on clear criteria including but not limited to the complexity, nature or volume of cases, professional experience, skills, specialisation and workload of individual prosecutors.

15. Prosecutors general may use their managerial power and competence to introduce or further reinforce the use of modern technologies in the work of prosecutors, in addition to the process of case management and distribution, where it is considered important in order to respond to the needs and effectiveness of the prosecution system.

16. Prosecutors general play an important role in reinforcing international cooperation between prosecution services, as well as judicial bodies of member states and with international courts and bodies. All principles as regards the role of prosecutors general in ensuring prosecutorial independence and impartiality are also fully applicable when it comes to any area of international cooperation involving prosecution services.

The Consultative Council of European Prosecutors (CCPE) is an advisory body of the Council of Europe established in 2005 on issues relating to the independence, impartiality and competence of prosecutors. The CCPE is composed exclusively of serving prosecutors. To fulfil its mission, the CCPE provides advice and guidance through its opinions adopted during the plenary meetings of the CCPE. These opinions reflect best European standards and practices and provide relevant recommendations for reinforcing the status of prosecutors and ensuring their independent and impartial work for the benefit of fair justice provided to the public.

The website of the Consultative Council of European Prosecutors can be consulted at the following address: **www.coe.int/ccpe**

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