

CCPE – Questionnaire for the preparation of the Opinion No. 10 of the CCPE on the relationship between prosecutors and police and/or other investigation bodies

1. According to the general legal approach the prosecutor has to instruct and supervise the police in the course of the investigation. Thus, police officers can be subject to special instructions of the prosecutor. Nevertheless, police decide on many (tactical) issues, e.g. to hear witnesses. Moreover, the police have the power to execute certain coercive measures of a minor character when due to the urgency prior judicial authorisation cannot be obtained, e.g. body searches of a suspect and seizures. Since the police have intensified their demands for an expansion of their powers in criminal proceedings in recent years, in fact police have - compared with the public prosecution office - far more expertise in criminalistics, dispose of the technical equipment, and have achieved a higher degree of specialisation. Reflecting their superior manpower, training and experience, the police in practice conduct the majority of criminal investigations in the areas up to a medium level of crimes mainly on their own, whereas the public prosecutor is "tied to" his desk. In these cases the file is turned over to the prosecutor's office only after the police see no further possibility or no further reason to investigate. In more severe or complex cases, e.g. in cases of capital or other serious offences as well as organized or white-collar crimes, there is a closer supervision and the prosecutor will usually guide the police as it is provided for in the law. Apart from that, the prosecutor will exercise his supervisory power if coercive measures which require for judicial authorisation have to be considered; then the prosecutor can determine how the investigation shall be continued and whether the case should be submitted to the investigative court in order to apply for permission for certain measures. Moreover, it is only the prosecutor who can decide to prosecute or terminate the investigation.

2. In general, particularly in more serious cases there should be a close contact between the prosecutor and the police officer handling the case.

3. Prosecutors are not regularly involved in training measures of the police, but can form part of the training programme on a voluntary basis.

4. The general rule is laid down in Section 161 subsection 1 of the Criminal Procedure Code:

"(1) For the purpose indicated in Section 160 subsections (1) to (3), the public prosecution office shall be entitled to request information from all authorities and to make investigations of any kind, either itself or through the authorities and officials in the police force provided there are no other statutory provisions specifically regulating their powers. The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office and shall be entitled, in such cases, to request information from all authorities."

Section 160 subsections 1 to 3 read as follows:

“(1) As soon as the public prosecution office obtains knowledge of a suspected criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.

(2) The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that evidence, the loss of which is to be feared, is taken.

(3) The investigations of the public prosecution office shall extend also to the circumstances which are important for the determination of the legal consequences of the act. For this purpose it may avail itself of the service of the court assistance agency.”

Section 163 reads as follows:

“(1) The authorities and officials in the police force shall investigate criminal offences and shall take all measures that may not be deferred, in order to prevent concealment of facts. To this end they shall be entitled to request, and in exigent circumstances to demand, information from all authorities, as well as to conduct investigations of any kind insofar as there are no other statutory provisions specifically regulating their powers.

(2) The authorities and officials in the police force shall transmit their records to the public prosecution office without delay. Where it appears necessary that a judicial investigation be performed promptly, transmission directly to the Local Court shall be possible.

(3) Section 52 subsection (3), Section 55 subsection (2), Section 57 subsection (1) and Sections 58, 58a, 58b and 68 to 69 shall apply *mutatis mutandis* to the examination of a witness by officials in the police force. The decision on permission pursuant to Section 68 subsection (3), first sentence, and on the assignment of counsel to a witness shall be taken by the public prosecution office; in all other cases the necessary decisions shall be taken by the person in charge of the examination. Section 161a subsection (3), second to fourth sentences, shall apply *mutatis mutandis* to decisions by officials in the police force pursuant to Section 68b subsection (1), third sentence. Section 52 subsection (3) and Section 55 subsection (2) shall apply *mutatis mutandis* to the instruction of an expert by officials in the police force. In the cases referred to in Section 81c subsection (3), first and second sentences, Section 52 subsection (3) shall also apply *mutatis mutandis* to examinations by officials in the police force.”

5. The legal concept excludes priorities in investigating certain areas of crimes (thus at least indirectly postponing investigations of other cases). According to the rule of mandatory prosecution (Legalitätsprinzip) all law enforcement authorities are obliged to initiate investigations whenever there is sufficient suspicion of a crime.

This principle is laid down in Section 152 subsection 2 of the Criminal Procedure Code:

“Section 152

[Indicting Authority; Principle of Mandatory Prosecution]

(1) The public prosecution office shall have the authority to prefer public charges.

(2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.”

An exception of this obligation exists if either the court or the prosecutor denies a public interest in prosecuting the case, see Section 153 and Section 153a of the Criminal Procedure Code, which read as follows:

“Section 153

[Non-Prosecution of Petty Offences]

(1) If a misdemeanour is the subject of the proceedings, the public prosecution office may dispense with prosecution with the approval of the court competent to open the main proceedings if the perpetrator’s guilt is considered to be of a minor nature and there is no public interest in the prosecution. The approval of the court shall not be required in the case of a misdemeanour which is not subject to an increased minimum penalty and where the consequences ensuing from the offence are minimal.

(2) If charges have already been preferred, the court, with the consent of the public prosecution office and the indicted accused, may terminate the proceedings at any stage thereof under the conditions in subsection (1). The consent of the indicted accused shall not be required if the main hearing cannot be conducted for the reasons stated in Section 205, or is conducted in his absence in the cases referred to in Section 231 subsection (2) and Sections 232 and 233. The decision shall be given in a ruling. The ruling shall not be contestable.”

“Section 153a

[Provisional Dispensing with Court Action; Provisional Termination of Proceedings]

(1) In a case involving a misdemeanour, the public prosecution office may, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. In particular, the following conditions and instructions may be applied:

1. to perform a specified service in order to make reparations for damage caused by the offence;
2. to pay a sum of money to a non-profit-making institution or to the Treasury;
3. to perform some other service of a non-profit-making nature;
4. to comply with duties to pay a specified amount in maintenance;
5. to make a serious attempt to reach a mediated agreement with the aggrieved person (perpetrator-victim mediation) thereby trying to make reparation for his offence, in full or to a predominant extent, or to strive therefor;
6. to participate in a social skills training course; or
7. to participate in a course pursuant to section 2b subsection (2), second sentence, or a driver’s competence course pursuant to section 4a of the Road Traffic Act.

The public prosecution office shall set a time limit within which the accused is to comply with the conditions and instructions, and which, in the cases referred to in numbers 1 to 3, 5 and 7 of the second sentence, shall be a maximum of six months and, in the cases referred to in numbers 4 and 6 of the second sentence, a maximum of one year. The public prosecution office may subsequently revoke the conditions and instructions and may extend the time limit once for a period of three months; with the consent of the accused it may subsequently impose or change conditions and instructions. If the accused complies with the conditions and instructions, the offence can no longer be prosecuted as a misdemeanour. If the accused fails to comply with the conditions and instructions, no compensation shall be given for any contribution made towards compliance. Section 153 subsection (1), second sentence, shall apply *mutatis mutandis* in the cases referred to in numbers 1 to 6 of the second sentence. Section 246a subsection (2) shall apply *mutatis mutandis*.

(2) If public charges have already been preferred, the court may, with the approval of the public prosecution office and of the indicted accused, provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined, and concurrently impose the conditions and instructions referred to in subsection (1), first and second sentences, on the indicted accused. Subsection (1), third to sixth and eighth sentences, shall apply *mutatis mutandis*. The decision pursuant to the first sentence shall be given in a ruling. The ruling shall not be contestable. The fourth sentence shall also apply to a finding that conditions and instructions imposed pursuant to the first sentence have been met.

(3) The running of the period of limitation shall be suspended for the duration of the time limit set for compliance with the conditions and instructions.

(4) In the case referred to in subsection (1), second sentence, number 6, also in conjunction with subsection (2), Section 155b shall apply *mutatis mutandis*, subject to the proviso that personal data from the criminal proceedings that do not concern the accused may only be transmitted to the agency in charge of conducting the social skills training course insofar as the affected persons have consented to such transmission. The first sentence shall apply *mutatis mutandis* if an instruction to participate in a social skills training course is given pursuant to other criminal law provisions.”

6. The principle of mandatory prosecution is obligatory for all public prosecution offices. See answer to question 5.

7. The prosecutor is responsible for the lawfulness including the conduct of investigations and the execution of coercive measures.

8. The public prosecutor is only responsible for complaints which fall within the technical supervision of the public prosecution office and not within the disciplinary supervision of the police. Within this competence the public prosecutor receives a complaint as soon as it is filed.

9. According to the legal framework the public prosecutor has a dominating position throughout the investigation while the factual situations can be different (see answer to question 1).

10. Due to the legal concept it is the prosecutor who is in charge with initiating, leading and terminating the investigation. See also the answer to question 1.

11. Generally the police decide which internal service is competent to deal with the case, but in more severe and complex cases the public prosecutor who is leading the investigations will determine which service of the police or investigation service shall be entrusted with the investigation work.

12. The prosecutor has the power and duty to monitor the work of the police in order to secure the lawfulness and effectiveness of the investigation.

13. Since the prosecutor is responsible for the lawfulness of the investigation, he has the right to direct the police by oral or written orders. If the police, however, act unlawfully without relying on such an instruction, it is not the public prosecutor who can be held responsible.

14. Basically, the Code of Criminal Procedure regulates how to conduct the criminal investigations both for public prosecution offices and the police. Complementary, there are internal guidelines in place.

15. The Code of Criminal Procedure contains provisions for all phases of criminal proceedings, ranging from the first interrogation of the defendant and witnesses, the conditions for pre-trial custody, the requirements for search, seizure and all other coercive measures to rules for the termination of the investigation, the indictment and the proceedings before the court.

16. The suspect or other persons affected by coercive measures can file a complaint and seek for judicial review (external control). As means of an internal control, disciplinary procedures can be initiated. Free media play an important role in disclosing deficits in the application of the law in particular cases.

17. The prosecutor is obliged to open an investigation, if there is sufficient suspicion for a criminal act committed by the police or other investigation bodies, also including the prosecutions offices (see answer to question 5). The power to inflict sanctions on the accused lies with the court.

18. Major challenges:

- One major difficulty for the prosecution offices remains to maintain the effective control of the police work in the course of the investigation (see answer to question 1.)
- Another challenge is to secure a fast and steady flow of information between police and the prosecution authority, which is a precondition for the lawfulness and the success of the investigation.
- Prosecutors are often confronted with heavy workload, which may endanger the continuation and the completion of the investigation in due course.