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SUMMARY OF THE SECOND REPORT
on the Role of Public Prosecutors outside the Criminal Field

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That the First Report – presented during the 5th Session of CPGE in Celle (Germany) – made an overview on the non-criminal-law activities of the different Prosecution Services of Europe and drew the conclusion that Member States of the Council of Europe can be divided into two groups.

a) The first group consists of those Member States in which prosecutors do not have any tasks outside the criminal field, or even if they have, their tasks are not considered important.
b) In other Member States – whose replies to Part I was examined – prosecutors have tasks of high importance in the extra-penal area. In these Member States the different tasks of Prosecution Services could be classified in two sub-groups as
    ba) civil law tasks and
    bb) public (administrative and constitutional) law tasks.

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

Considerations of CPGE on the Role of Public Prosecutors outside the Criminal Field were followed by CCPE. The Questionnaire was amended with Part II (four new questions) by the Bureau of CCPE during its 3rd meeting in Popowo (Poland) in order to have a detailed study of the functions of the public prosecution service outside the field of criminal justice.

The goal of the second report is to have a synthesis of the national replies to the Questionnaire including both Parts I and II. This Second Rreport can be summarised as follows:

1. The first considerations focus on non-penal tasks of prosecutors is the Member States in general

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

a) In some Member States there are no competencies outside the criminal field **(Slide 2.)**,
b) only few or very specialized competencies were communicated by some other Member States **(Slide 3.),**
c) while prosecutors of other Memeber States have extensive non-penal competencies **(Slide 4.)**.

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

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

i) Prosecution Services in almost half of Member States did not have non-penal competencies or these competencies are declared to be not important or appear very rarely in practice.
ii) Whereas prosecutors in more than half of Member States have at least some non-penal competencies.

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

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

Regarding to the special organizations for non-penal tasks it can be considered that such internal departments are distinctive for the Prosecution Services that have extended non-penal competencies.

2. Considerations on specific powers, rules or rights of prosecutors

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

a) Prosecutors and other parties in civil law cases

Prosecution services did not report any special powers or authorities when prosecutors take part in *civil court proceedings* as petitioners. They have the same powers as other parties, their role 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. Consequently, this kind of competencies fits better for civil law than administrative law field. However, their decision is not a final one, if the party concerned is not satisfied, he/she can seek for a court decision – it means that in its nature the prosecutors "decision" is an offer, and the real decision – if the party concerned refuses the offer – is a court-competence.

The most important aims prosecutors may take legal actions for are presented by **Slide 5**.

Substantial legal grounds are much more concordant than their aim. They were included in almost each answer, but in different phrasings. The most important legal grounds are presendted by **Slide 6.** These notions are well-known as principles of government in all legal systems. Usually, in certain situations provided by law, the participation of the prosecutor in litigation is compulsory.

b) Prosecutors and other parties in public law cases

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

- firstly, in all those countries where prosecutors have competencies to control activity of administrative authorities, prosecutors are empowered to start court actions against decisions of such bodies as well,
- secondly, some replies mentioned that prosecution services have the right to formulate opinion regarding the draft-legislation on structure of judiciary, rules of procedure or substantive law applied; we considered this opportunity as opinion of organization involved in legislation not as special competence of prosecutors.

Special competencies were given to some prosecution services against administrative decisions as presented by **Slide 7.** It would have been interesting to have a comprehensive list of competencies recognized as "most important" by the different Prosecution Services. Althoug the replies were not certain enough to answer this question, the „most important" ones are those presented by **Slide 8.**

3. The "adjusted" matrix of competencies

The present examinations point out that there is a definite difference between European countries according to the existence and extension of non-penal competence of prosecutors. To understand this difference we should return to the matrix of competencies. It helps to adjust the matrix of competencies by sorting Member States with extended non-penal competencies by the way of proceeding: prosecution services with competencies which let them act only (or mostly) in courts (by legal actions) are separated from those which are empowered to use also extra-court (direct, own-power) measures. The outcome of this sort is presented in *Table 2.* in the written report.

Based on the adjusted matrix of competencies it can be reconsidered that the important fields of the matrix among "border-lines" change as follows (see **Slide 9.**):

- prosecution services *without* non-penal tasks,
- prosecution services with few, not important or special *civil law* tasks,
- prosecution services with both civil law and administrative law competencies to start *court-actions*,
- prosecution services having also extra-court (direct, own-power) administrative law competencies besides civil law and administrative law competencies to start *court-actions*.

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

Lack of non-penal competence of prosecutors is significant only for common law and Scandinavian Countries. A similarly strong but not exclusive common feature can be considered in the case of French (Roman) and German law families. Their prosecution services have more or less non-penal task but they can proceed only (or mostly) through court-actions. It is not without importance to considerate that a great number of Member States – half of them – belongs to this group.

It could be surprising that the group of countries with extended and intensive non-penal tasks is not predetermined by pertinence to law families. At the same time an other common feature of these countries is their authoritarian experience, during the XXth century.

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

It is noticeably that the abovementioned conclusion does not give a full explanation of the phenomenon. It is not explained why Member States belonging to different law families sustained intensive non-penal prosecutorial competencies after the fall of authoritarian regimes.

One of the possible reasons to sustain intensive non-penal competencies of prosecutors can be a need for a new, impartial parliamentarian or judicial institution contributing to maintenance of ordré public and rule of law in connection with public administration or contributing to harmonized court jurisdiction. The need was continent-wide, the institutional model – the scandinavian ombudsmen and ombudsman-like institutions – was also common, but it appeared in different forms in the law families or in the groups of States with same historical experience. Common law countries trusted the democratic tradition of their institutions and stress the political (parliamentary) control of administration, the Roman and German law families give more or less tasks to their prosecution services ensuring legal protection and harmonization of court jurisdiction. The latter way is strengthened by the experience of authoritarian regimes of some Countires. Some extra-court competencies of prosecutors make reasonable to place them among ombudsman-like institotions.

It seems that four important roots of non-penal tasks of prosecutors and especially extended administrative powers can be identified as presented by **Slide 10.**:

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

5. Requirements of non-penal competencies

The survey of institutional models can be followed by formulation of special requirements of activity of prosecutors in civil and administrative law cases, taking into account the list of principles governing non-penal activities of prosecutors presented in the First Report in Celle (see: **Slide 11.**). Conclusions of the First Report are validated by answers to Part II, namely by judgements of ECHR and of the constitutional courts mentioned in the replies. The judgements affirm that competencies regarding court-actions are well-known in majority of European countries. However, some circumstances are to be examined profoundly.

a) Court-actions in civil or administrative cases

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

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

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

a) If the outcome of the proceeding is strictly a proper interpretation of law – even though it is compulsory for lower courts –, it could be sufficient to make the position of the prosecutor public. Even in this case there is no reason to let prosecutor participate in the final decision-making council of judges.

b) Equality of arms is to be added to requirement of publicity if the judgement for consolidation of case law has a direct effect on a pending case, since such a judgement has influence on the interests of the adverse party (parties).

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

As it was presented, prosecutors are given extra-court (direct, own-power) administrative law competencies (warning, protest etc.) in rather few Member States, but these States find them necessary. Requirements of direct administrative competencies are less clear that those of court-actions (since the latter ones are similar – consequently well known – to rules governing the activity of private parties).

As prosecution services has no decisionmaking powers, what places them among ombudsmen-like institutions, the following question cannot be by-passed: why did the ombudsman-like institutions become so popular, almost obligate among control-forums of public administration? Or: why is necessary an institution which may formulate only unenforceable recommendations, which is not empowered to make decisions declaring the "truth"? To have the answer to these questions two surveys are necessary:

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

ad i) The first survey shows that the executive branch is less and less able to exercise its governmental power through traditional administrative instruments – it cannot converse its power into individual decisions of public authorities. New forms of activity are concentrating on regulation of services assured by private enterprises and on discovering of new territories to be administrated. One of the consequences of this new approach of public administration is that public law liability of leaders of administration should be distinguished from political accountability. Public law liability (or its traditional form, the ministerial responsibility) is more and more evaporating while political accountability is still validated by elections and different forms of referendum. Due to changes of forms of its activity, the executive branch has more powers than it is prima facie recognizable from constitutional texts. Public power is formally based on institution of government, but its roots are to be sought in relations between the institutional structure and people as political body. Political order anticipates the constitutional order formulated in texts (or in law). The reaction of constitutional law to this new situation is seeking for more legal guaranties and restrictions.

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

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

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

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

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

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

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

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

By replies on the Questionnaire the mentioned essential questions could have been answered and the presented relevant requirements could have been detected regarding non-panel competencies of prosecutors.