

## Questionnaire for the preparation of the CCPE Opinion No. 15 (2020):

### The role of prosecutors in emergency situations

#### Answers on behalf of Germany:

#### General questions

1. Has there been an emergency or similar situation declared in order to fight against COVID-19? (by which provisions (constitutional, other), part of the territory covered, duration)

In order to contain the spread of the coronavirus, neither a state of emergency within the meaning of article 5 section 1 of the German Infection Protection Act nor a similar state of emergency has been declared in the Federal Republic of Germany. However, a state of emergency has intermittently been declared by some federal states. The numerous regulatory measures introduced and the restrictions imposed on public life have generally been pursuant to ordinances enacted by the federal states, which are in turn responsible for health care and have for the most part coordinated the respective steps taken among themselves and with the federal government so far. These ordinances are pursuant to the German Infection Protection Act and the intervention provisions contained therein. They include far-reaching restrictions on public life, such as the prohibition to leave home without a valid reason, the prohibition of assembly and ban on gatherings, the ban on public and private events, the prohibition of assembly in churches, mosques, synagogues and places of worship of other denominations, the shutdown of shops, commercial operations open to the public, the hospitality business, accommodation facilities, hotels, places of entertainment, sports facilities, public facilities as well as bans on visiting clinics, retirement and nursing homes. Each of those measures were applied for a limited period of time, i.e. for about 14 days, and were extended several times and adapted to the prevailing status of the pandemic. The restrictions have gradually been relaxed since mid May 2020.

2. Which rights have been affected as a result of this emergency situation? (i.e. freedom of assembly, freedom of movement, right to health, freedom of conscience and religion, etc.)

Due to the numerous regulations and restrictions on public life, constitutionally protected rights were, and still are, considerably restricted, such as the right to free development of one's personality, personal freedom, the right to informational self-determination, the right to freedom of assembly, the right to freedom of movement, the right to the undisturbed practice of religion, the right to freedom of the arts and sciences, the right to freedom of occupation.

3. In case of suspension or restriction of rights on public health grounds, which requirements have been necessary (i.e. legality, proportionality, adequacy of the measures, necessity) and which principles (equality, non-discrimination) and limits

must have been observed? (i.e. searches, restrictions relating to media, political parties, etc.)

As a consequence of the principle of the rule of law, all measures restricting fundamental rights are subject to an examination of proportionality. Any such restriction must then be imposed by legitimate means and serve a legitimate objective. In principle, any public interest is a legitimate objective, including the protection of public health and the containment of an epidemic situation of national significance within the meaning of article 5 section 1 of the German Infection Protection Act. Any infringement must be appropriate, necessary, reasonable and proportionate in the strict sense. Severe infringements on fundamental rights must be weighed against the benefit of the objective pursued in each individual case. The appropriateness of measures to be taken is ensured if the respective infringement on fundamental rights is not disproportionate to the objective pursued. When examining the aforesaid, the abstract benefit of any such measure and the abstract benefit of its objective must first be determined. In order to then determine the concrete benefit of such infringement, the concrete severity level of such infringement must be established and to what extent it will achieve its objective. In the final step of the examination, any conflicting interests must be weighed against each other. The continuation of restrictions is subject to the constant assessment of these criteria. Upon request, also by citizens, the Federal Constitutional Court will examine the proportionality of the measures taken at short notice.

4. Has there been detected any kind of discrimination, also originating from private persons, against certain groups (for instance, health workers, racial and ethnic minorities), hate speech, racism, xenophobia, attacks and forced returns of refugees and asylum-seekers, mistreatment of foreigners and migrants, and sexual and gender-based violence?

There are no valid data on pandemic-related offences. In most federal states there have been no reports on the discrimination of individual sections of the population or other epidemic-related incidents as listed in the questionnaire. However, there have been isolated xenophobic attacks, particularly on Asian people, who due to their ethnicity were blamed for the outbreak of the pandemic. There was also a report on the attack on a fellow citizen of Jewish faith, who as a Jew was expressly held responsible for the corona crisis by the attacker. The restrictions imposed to fight the corona pandemic are likely to have led to an increase in domestic violence offences, whereby there is no statistical evidence to substantiate an increase in the number of cases as yet. According to media reports, the Outpatient Clinic for the Protection against Violence at the Charité hospital in Berlin has noted a significant increase in the number of cases of serious abuse. In Berlin facial injuries, strangulation marks and stab wounds normally account for around 60 percent of injuries sustained and rose to 90 percent during the corona crisis.

#### **Questions relating to the usual functions of prosecution services but in an emergency situation**

5. How the prosecution service has worked in emergency situation? (i.e. restraints imposed on prosecution services such as teleworking and limited possibilities to get to

the working premises, to use the corresponding equipment, to interact with relevant professionals etc.)

Pursuant to articles 143 and 145 of the German Courts Constitution Act it would have been possible to assign the official duties of the authority unable to carry out its work to the offices of public prosecutors in the vicinity if a massive infection incidence had occurred at the office of a public prosecutor.

However, it has been the objective of every public prosecutor's office to keep operating as usual during the pandemic. The vast majority of offices of public prosecutors and prosecutors general divided their staff into two groups that alternated in working from home and at the office. This procedure ensured that there was no direct contact between the members of one group and those of another group. In almost all federal states public prosecutors were provided with the hardware and software equipment required to work from home, thereby enabling them to carry out the day-to-day work at their home offices to a large extent. If the technical equipment available proved to be insufficient, the respective stocks were sometimes already increased during the crisis, such as mobile devices. Communication with colleagues was maintained by phone or via video conferencing. International video conferencing meetings were also held with Eurojust and the Italian authorities. There have been no significant backlogs in proceedings in any of the federal states.

For technical or factual reasons it was, however, not possible for support teams to work from home, which is why some staff members were exempted from their regular duties, whereby their salaries or remuneration were paid in full.

Limitations in processing, if any, are due to the fact that not all public prosecutors have been provided with mobile workstations as yet and that electronic files have not been introduced yet. The offices of some public prosecutors secured the transportation of files to the head of departments working from home by enlisting the services of the police.

Public access to the offices of public prosecutors and prosecutors general has been severely limited. Visitors are required to comply with strict hygiene measures. Business trips have mostly been cancelled and further training measures have been put on hold until further notice.

6. How criminal suspects in pre-trial detention have been dealt with? Article 5(3) of the European Convention on Human Rights requires trial within a reasonable time or release pending trial. But if the criminal courts are scarcely functioning, trials do not take place. Consequently, have criminal suspects been released from pre-trial detention? (even if they could have been dangerous). Or have the grounds for detention in custody and custody time limits been interpreted differently, according to the exceptional circumstances - in other words, has a "reasonable time" within the meaning of Art. 5(3) of the ECHR become longer?

Some investigations necessitating the personal contact of police investigators or the office of the public prosecutor with other persons have been postponed for the time being, unless they were deemed urgent. There was a temporary sharp drop in the number of main hearings in criminal courts due to the restrictions. It may therefore be assumed that proceedings will generally take longer in the short term.

In principle, the main hearings in detention cases have continued to be conducted. Due to the organisational measures taken in court rooms it has been possible to conduct hearings in compliance with hygiene rules. Proceedings

involving many parties have sometimes taken place in premises other than courts.

Throughout Germany there have been very few cases where prisoners on remand were released due to the special circumstances resulting from the pandemic.

If no sentence has been passed imposing a prison term or the deprivation of liberty or a detention order, the pre-trial detention for the same offence may only be extended beyond a six-month period if the specific complexity or scope of the investigation or another good cause do not yet warrant a sentence to be passed and justify continued detention pursuant to article 121 section 1 of the German Code of Criminal Procedure [StPO]. Once the six-month period has expired the higher regional court must reach a decision as to whether pre-trial detention is to be continued if the main hearing has not yet started or if the main hearing has been adjourned (article 121 section 3 of the Code of Criminal Procedure). The Stuttgart higher regional court recently reached a decision according to which the quarantine of indispensable parties to the proceedings preventing the main hearing from being continued as scheduled constitutes good cause within the meaning of article 121 section 1 of the Code of Criminal Procedure and makes it imperative to adjourn the main hearing and may justify continued pre-trial detention. According to a recent decision reached by the Celle higher regional court, good cause may also be deemed to exist if the court is not able to reduce the risk of infection of the parties to the proceedings, the court's employees, the security guards and the public to an acceptable level in accordance with the rules governing the proceedings, namely those intended to safeguard the rights of the defence and ensure a public main hearing.

The existing provisions on the adjournment of an ongoing main hearing pursuant to article 229 of the Code of Criminal Procedure were supplemented by a provision in article 10 section 1 of the Introductory Act to the Code of Criminal Procedure, which became effective on 28 March 2020 and is applicable until 26 March 2021, pursuant to which the course of adjournment periods is affected if the main hearing cannot be held due to the protective measures in place to prevent the spread of the SARS-CoV-2 virus, irrespective of how long the main hearing may last. However, the adjournment period is limited to a maximum of two months.

Since the start of the coronavirus outbreak extraditions and detentions for the purpose of criminal prosecution and the execution of sentences have virtually come to a halt due to the lack of collective passenger transport possibilities and the virtual suspension of international air traffic. Nevertheless, a few persecuted persons were released in line with the principle of proportionality.

7. Has there been any particular intervention of the prosecution service in the emergency situation (i.e. in the case of Portugal, the Prosecutor General's Office has been in permanent session during the whole duration of the emergency situation in order to defend the principle of legality and the rights of citizens)

During the crisis no specific interventions have been made or measures taken by the offices of public prosecutors that could be compared to those taken by the office of the prosecutor general in Portugal.

8. Have there been crisis response teams created within the prosecution service and at which level (central, regional, local)?

Crisis response teams have been set up at the offices of some prosecutors general and public prosecutors which are convened if and when required to perform coordination tasks for the authority concerned and for the offices of subordinate prosecutors. Moreover, the prosecutor general has stayed in constant contact with the district's lead senior public prosecutors mainly by phone or via video conferencing. Far reaching decisions were taken at senior level, whereby staff representatives were involved in most cases.

Contact persons have been assigned to corona-related proceedings at some offices of prosecutors general. Specific jurisdiction to deal with violations of the Infection Protection Act has been provided by some offices of public prosecutors. Other corona-related offences have been subject to general jurisdiction.

9. Have there been guidelines to address the emergency situation issued for the prosecution service and at which level? What measures have been taken regarding shifts of prosecutors (for urgent matters, or during the period where courts have been mostly closed or with their activity significantly reduced) and the replacement of infected prosecutors?

The state governments of some federal states have given instructions to civil servants and employees covered by collective agreements on how to proceed if they are tested positive to COVID-19 or suspect to be infected, regardless of whether they show symptoms nor not. For the most part there have been additional recommendations for court clerks or decrees of the Ministry of Justice of each federal state which are continuously updated and brought up to date. In addition, the offices of some prosecutors general have issued recommendations addressing the specific needs of the offices of public prosecutors. The heads of the respective authorities have issued their own house rules or introduced similar regulations.

The offices of some prosecutors general have drawn up schedules, both for their own offices and those of public prosecutors, which include general regulations and procedures to be followed in the event of an outbreak. Separate work-distribution plans have been prepared in order to ensure that the office concerned can continue operating, even if several people are infected.

10. Has there been specific cooperation with other agencies set up (i.e. law enforcement, courts, etc.)?

Most prosecutors have been in close cooperation and consultation with the courts and the investigating authorities. For example, agreements were made with the police with regard to their investigations and as to whether interrogations and searches should be carried out or postponed. Court procedures have often been coordinated, for example, by resorting to summary proceedings or being more generous in closing cases pursuant to articles 153 and 153a of the German Code of Criminal Procedure or by generously reducing fines in misdemeanour cases. When the regulations restricting operations came into effect, agreements with correspondent authorities were sometimes made in order to ensure the efficiency of so-called system-relevant fields. For example, the fields to be kept operational were jointly defined, the mobile numbers of individual officials were made available on a cross-authority basis, duty rosters were exchanged and arrangements were made for the delivery of urgent items by courier service. Agreements with other authorities were reached

according to which priority was to be given to any proceedings pertaining to violations of the Infection Protection Act. In individual cases the joint use of the office buildings of other authorities was agreed upon. Files or court exhibits kept by the police were to be handed over at the reception of the offices of public prosecutors. In one district the introduction of file exchange servers between the offices of the public prosecutor, the prosecutor general and the higher regional court was expedited in order to avoid a delay in the transport of files, which is rather common.

11. Has the prosecution service conducted or supervised investigations carried out by police and other investigation authorities to ensure the adequate protection of human rights in the emergency situation?

The offices of public prosecutors are responsible for leading preliminary investigations at all times, even if specific investigations are carried out by police officers. The respect of human rights in criminal and investigative proceedings is based on the rule of law and is guaranteed by the Constitution at every stage of the proceedings. The protection of human rights is therefore not specifically monitored by the offices of public prosecutors. If violations became known, they would be investigated.

12. Has the prosecution service decided on alternatives to prosecution to avoid overcrowding in detention facilities in the emergency situation?

With regard to criminal and juvenile enforcement, short prison sentences of up to six months, or up to eight or 12 months in some federal states and up to three years in one federal state, as well as alternatives to imprisonment and juvenile detention were temporarily not enforced, unless compelling specific preventive or other reasons, in particular the impending expiry of the statute of limitations, rendered the immediate enforcement mandatory. Such measures have not been taken with regard to criminal prosecution in preliminary and criminal proceedings. Furthermore, the options for criminal proceedings stated in our answer to question 10 above, i.e. closing preliminary proceedings subject to certain conditions or in the absence of such conditions, were more frequently used if and when appropriate.

The state judicial administration of one federal state ruled that prisoners due for release between 20 March 2020 and 18 May 2020 could in principle be released as early as 19 March 2020. This rule applied to prisoners above the age of 50 and those at risk to be infected with SARS-CoV-2 as per definition of the Robert Koch Institute. Prisoners convicted of serious crimes were excluded from this scheme.

In most federal states pre-trial arrest warrants were unreservedly executed.

13. Have there been any specific modalities for action of the prosecution service in the emergency situation as regards:

- initiating prosecution (particularly in urgent cases, or cases relating to the emergency situation – for instance, disobedience to law enforcement agencies, health personnel, intervention in cases of domestic violence, etc.);

- conducting prosecution before the courts, particularly when courts have significantly reduced their activity (have courts maintained their activity, even if somewhat reduced?);
- ensuring that victims and witnesses and other vulnerable participants were effectively assisted and/or protected and defendants had their rights respected through the whole procedure
- appealing court decisions;
- supervising the execution of court decisions and applying whenever possible non-custodial measures or reduction of prison sentences (to avoid overcrowding in detention facilities and to prevent the dissemination or spread of the disease);
- implementing national crime policy (i.e. in cases where disobedience to lawful orders of law enforcement and health personnel, regarding confinement, may add spreading the disease)
- carrying out functions, where applicable, outside the criminal justice system (i.e. lockdowns may result in heightened risk of people, namely children, witnessing or suffering violence and abuse, unemployment/enforcement of movement restrictions and physical distancing measures can serve as a cover for discrimination and violence against particularly groups, namely foreigners or vulnerable groups, observation of labour laws and social protection, minimising the risks of contagion of workers and employees)

There have been no specific modalities for initiating, conducting and concluding preliminary proceedings, not even with regard to certain offences. However, agreements were reached with the police and other authorities to prioritise corona-related proceedings in order to ensure that they were promptly concluded and had a deterrent effect on the public. Specific communication channels were occasionally provided and standby services were set up for the prosecution of serious violations of the regulations to contain the pandemic, namely domestic violence. With regard to proceedings pertaining to violations of the regulations to contain the pandemic it should, however, be noted that such violations were mostly treated as offences in the past and will almost exclusively be treated as such in the future, the prosecution of which is the responsibility of administrative authorities rather than that of the offices of public prosecutors.

The offices of public prosecutors have endeavoured to reduce the number of cases requiring a main hearing by increasing the number of penalty order requests and have at times issued penalty orders for criminal offences already indicted. With regard to main hearings, the offices of public prosecutors and the courts have been mindful of witnesses who are in the risk group and have spared them from making a personal appearance, for example, by summoning other persons instead.

A significant number of criminal courts have reduced their operations, in particular public main hearings. It has, however, been ensured that urgent investigation orders were issued and that main hearings in detention cases and protracted trials were conducted or continued and verdicts reached.

There have been no limitations on the remedies available. No specific measures have been taken by the offices of public prosecutors.

With regard to the question pertaining to the enforcement of prison sentences we wish to refer to our answer to question 12.

## **Questions relating to the possible new functions of prosecution services as a result of an emergency situation**

14. Have there been any new or extended functions of prosecution services resulting from the emergency situation as regards for example:
- supervising maintenance of public order and security;
  - supervising implementation of emergency measures including confinement of population, closure of public areas and other relevant measures;
  - supervising general protective measures for the population and maintenance of provision of relevant services, including to the most vulnerable groups during and after the pandemic (women, children, elderly, people living in institutions, deprived of their liberty or in detention or confinement, displaced, homeless, migrants, refugees, slum-dwellers, etc.);
  - ensuring regulatory measures to prevent profiteering on foodstuffs, hygiene products and essential medicines and supplies;
  - reducing the risk of stigmatising and harmful conduct against vulnerable groups, including those infected by COVID-19;
  - ensuring the rights of persons held in quarantine or confinement;
  - interacting with media and highlighting the work of prosecution services in the context of emergency situation;
  - informing the population about the emergency measures and the corresponding penalties for their non-observation

The corona pandemic has not led to new or additional responsibilities to be assumed by the offices of public prosecutors. However, their relations with the press had to be adjusted to press inquiries as to what conduct is indictable and what is not. This was a controversial and ambiguous issue, especially in the early days of the corona pandemic. There was a sharp increase in public relations work due to the corona virus. Furthermore, their workload has considerably been affected by the pandemic. There has been an increase in the number of proceedings for violations of the Infection Protection Act. Moreover, far more proceedings for subsidy fraud in connection with the corona aid provided by the federal government and federal states and associated money laundering proceedings are to be expected.

## **Questions relating to the challenges for the prosecution service in an emergency situation**

15. What are, in your opinion, the main challenges faced by prosecution services in an emergency situation and in its aftermath/recovery?

The biggest challenge is striking a balance between protecting the health of all staff and ensuring the provision of services, so the public continues to have confidence in the proper functioning of law enforcement agencies. Alternative working methods, such as working from the home office, video conferencing and video negotiations, have proven to be an essential tool in mastering this task.

In the aftermath of the pandemic public prosecutors will have to cope with a higher workload due to the backlog of cases before criminal courts and the resulting higher number of sessions.

Furthermore, experience has shown that certain proceedings, except for detention cases, were in particular not pursued by investigators during the first



two months of lockdown. So as to avoid an infection, no searches were made or witnesses interviewed. As restrictions have meanwhile been eased, regular operations are to be restored. To this effect, the provision of appropriate protective equipment to investigators in particular is required, which is currently not always the case.

16. For example, have specific plans been made with regard to the returning to “normal life”? In member States where court proceedings have been suspended for months, there will be a huge back load of cases now to be dealt with. Is it the task of prosecutor to decide how these cases should be prioritised? Will special initiatives be taken, i.e. court proceedings during weekends, extra payment of prosecutors for extra work? Is there a risk that less serious cases will be closed or prosecution waived?

The offices of prosecutors general and public prosecutors have either already resumed or will gradually be resuming normal operations in the weeks to come. Any backlogs will progressively be reduced.

Reducing the considerable backlog of criminal court sessions will be of particular importance. Some courts consider holding sessions on Saturdays. It may also be the task of the offices of public prosecutors to help reduce these backlogs to a reasonable extent by closing minor offence cases before they come to trial. In addition, penalty orders in particular have become an important means of resolving cases. There are concerns that less serious cases will no longer be adequately sanctioned in view of the burden the courts are under.

17. Are challenges faced by prosecution services in an emergency situation and in its aftermath/recovery related to:

- independence and accountability of prosecutors in the context of emergency situations;
- ethics and professional conduct of prosecutors during emergency situations and thereafter;
- training of prosecutors on working modalities at the time of emergency situations (for instance, for teleworking) and protecting themselves from COVID-19;
- creation of multidisciplinary teams, if need be (with health personnel, for instance);
- support to vulnerable groups, which are to be the most impacted by the economic consequences of the pandemic (unemployment, worsening working conditions, impact on economic, social and cultural rights in general, etc.)
- international assistance and cooperation, taking into account the consequences of the pandemic and the need for a reinforced cooperation among prosecution services (sharing best practices)

In this kind of crisis situation particular challenges are primarily posed by the organisational and technical issues involved in the provision of services. For further details, please refer to our answer to question 18.

Unlike judges, public prosecutors are not independent. The existing ministerial right to give instructions has also applied during the emergency situation. When exercising the right to give instructions, no instructions are given in individual cases. There have been no attempts to exert political influence on the manner in which preliminary proceedings, for example, for violating the Infection Protection Act, are conducted.

18. What are, in your opinion, ways and methods to overcome these challenges?

A major challenge that public prosecutors coping with an unrelenting workload while working from home were faced with was that their work environment had at times not been adapted to the situation. It would be desirable to expedite the establishment of home offices. Public prosecutors looking after their children while working from home were under enormous pressure. It is rather difficult to cope with an already high workload under these circumstances. An increase in the number of emergency childcare places would therefore be desirable. It would also be desirable to provide the ideal technical environment for home office work, such as the introduction of electronic files in particular. Apart from better IT equipment, the data network capacity available should also be expanded. Furthermore, employees should be trained in the use of new electronic work instruments, such as Skype, Zoom, MS Teams and public prosecutor-specific data processing programmes. It would also be desirable to provide training in the art of coping with the situation itself, for example, remote leadership skills and remote delegation skills, as well as virtual communication structures.

In order to ensure that international mutual legal assistance and extraditions in particular can continue in such emergency situations, international or at least Europe-wide arrangements for future pandemics would be desirable. International mutual legal assistance in criminal matters will continue to be of major importance and will be affected by the emergency situation for quite a while, as SARS-CoV-2/COVID-19 has impacted the various countries differently. A greater use of electronic legal transactions will also have to be considered.