

Strasbourg, 20 November 2015

## **CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE)**

Opinion No.10 (2015)  
of the Consultative Council of European Prosecutors  
to the Committee of Ministers of the Council of Europe

**on**

**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<sup>1</sup>.
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.

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<sup>1</sup> See the replies of member States to the questionnaire on the CCPE website ([www.coe.int/ccpe](http://www.coe.int/ccpe)) under "Preliminary works - Action of prosecutors within the framework of criminal investigation (2015)".

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<sup>2</sup>. 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<sup>3</sup>, 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 6<sup>th</sup> Conference of Prosecutors General of Europe in Budapest, Hungary, on 31 May 2005, concerning 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<sup>4</sup>.
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<sup>5</sup> of 25 May 2015 concerning the relations between the prosecution services and the police.

#### **B. Purpose and scope of the Opinion**

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> Human Rights Committee, Committee Against Torture, Committee on the Rights of the Child.

<sup>5</sup> The Visegrad Group is composed of the Czech Republic, Hungary, Poland and Slovakia.

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.

## **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<sup>6</sup>, 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;

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<sup>6</sup> 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<sup>7</sup>.
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”<sup>8</sup>). They should strive to attain the highest standards of integrity and ensure that their conduct is above reproach.

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<sup>7</sup> 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.

<sup>8</sup> 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 multidisciplinary.
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<sup>9</sup>.
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.

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<sup>9</sup> 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.

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.

## **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.