The public prosecutor's office in the member states of the Council of Europe

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The Public Prosecutor's Office in the member States of the Council of Europe: Its relationship with the police and its task in relation to victims

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I. Introduction

Recommendation (2000) 19 of the Committee of Ministers to the Member States of the Council of Europe on "the role of public prosecution in the criminal justice system" is a wide-ranging recommendation. A large number of subjects are dealt with: the task of the Public Prosecutor's Office, its position in the structure of the State, the way in which public prosecutors have to fulfil their task and so on. Not all these subjects are discussed here. The Secretariat General of the Council of Europe has asked us, on the occasion of this second Pan-European Conference of Prosecutors General of Europe, only to present an analysis of the replies to three questions in the questionnaire sent at its behest to the Member States in order to obtain a picture of the implementation of the Recommendation. These three questions are:

1) the translation and dissemination of the Recommendation and its implementation in national legislation;
2) the relationship between the Public Prosecutor's Office and the police;
3) and the task of the Public Prosecutor's Office with regard to victims.

Before discussing the replies to the questions concerned in the questionnaire, it is appropriate to comment on the questionnaire as a means of assessing the application of so important a recommendation as Recommendation (2000) 19.

II. Some notes on the questionnaire

In Europe, it is not easy to carry out national comparative research on the implementation of the policy conducted by institutions such as the Council of Europe and the European Union in the field of criminal justice. The reasons for this are many and varied. First, proper research is seriously complicated by language problems. Second, in quite a few Member States solid legal research is lacking. And third, in even more Member States, there is no empirical research on criminal justice, let alone any evaluative empirical research in this area.

It should also be clear that a questionnaire is not in every respect a suitable instrument for overcoming these problems. If there is no tradition of research on criminal law in a country, it is impossible for a questionnaire to make up for this deficiency. Moreover, it is difficult to compile a questionnaire that is suitable for 40 or more Member States. It must not be forgotten either that devising a questionnaire is a difficult exercise in itself: the precise formulation of questions is always onerous, there may not be too many questions, and so on. Nor is it easy to identify people who are both willing and able to answer a questionnaire thoroughly. And finally it must be borne in mind that even a questionnaire easily becomes out-of-date because the developments concerned are so rapid. To stay with our own case, the Public Prosecutor's Office nowadays in many countries is a dynamic and complex enterprise, so it is difficult to give outsiders/foreigners an accurate picture of, for example, how legislation is evolving and organizational changes are being put into effect.

There is therefore, from the theoretical and practical points of view, a strong argument for it being necessary in evaluating research to complement even a suitable questionnaire with at least literature study, document analysis and in-depth interviews with experts. But a project of this kind can only be carried out by a relatively large multinational research team that has sufficient time and financial resources at its disposal. In the prevailing circumstances, we were obviously not in a position to do this. One of the few institutes in Europe that can carry out such projects is the Max-Planck-Institut für Ausländisches und Internationales Strafrecht in Freiburg i. B. in Germany.

The purpose of these notes on the problems of thorough comparative legal research is not to criticize indirectly the efforts a number of people in the Member States of the Council of Europe have made to fill in the present questionnaire. Nor are they an excuse for the deficiencies in the following analysis of the replies to a number of questions in the questionnaire. They have only been made to emphasize the relative importance of this analysis. Nevertheless, it is appropriate to point out that it has not been easy to prepare this analysis because the informative content of the replies diverges considerably. In this sense it is as good or as bad as the replies that were given. There was no scope for checking answers in one way or another or supplementing them. We have had to make do with the replies as presented to us. Moreover, a few Member States did not respond to the questionnaire.

III. The translation, dissemination and implementation of Recommendation(2000) 19

With regard to translation of the Recommendation, that it is presented in both English and French is, of course, an important point. For this reason, in a minority of countries it was not necessary to translate it. In a large number of countries, however, the Recommendation has been translated or a translation is in progress.

About the dissemination of the Recommendation there is also not much to be said. In the vast majority of Member States, it has been disseminated within the Public Prosecutor's Office. This has been done in various ways: through internal magazines or newsletters and/or via specialist journals. The same is true of its dissemination within the most concerned sections of the departments of justice. Here, too, it was done both through internal channels and through magazines. In university circles, one could learn of the Recommendation by the same routes. With regard to evaluation of the Recommendation, most Member States replied that there is or has been no evaluation and that to date an evaluation has not been necessary and/or useful because this initiative is too recent. However, some Member States add that the Recommendation is, indeed, discussed from time to time. And one country replied that it would be willing to evaluate the impact of the Recommendation in the near future.

It could be added to what has been stated above that it would obviously be interesting to examine how institutions with which the Public Prosecutor's Office works a great deal – such as the police and the court or specific interest groups such as victims' movements – view the implementation of, and compliance with, the Recommendation. It could also be of interest to involve the Parliament in an evaluation study because the relationship with the legislature power constitutes an important element of the Recommendation.

IV. The relationship between the Public Prosecutor's Office and the police apparatus: putting into effect of Items 21, 22 and 23 of Recommendation (2000) 19

IV.1. The lawfulness of police investigations and the observance of human rights by the police

Under Item 21 of Recommendation (2000) 19, the Public Prosecutor's Office should watch over the lawfulness of police investigations and this at the latest at the time when it takes a decision on whether or not to institute or continue the prosecution. From this point of view, the Public Prosecutor's Office is also responsible for supervision of the observance of human rights by the police.

In many countries, this responsibility of the Public Prosecutor's Office is either explicitly included in the legislation or implicitly assumed by it. In other countries, this responsibility of the Public Prosecutor's Office as such is not immediately apparent from the legislation but is given form in some other way. In Cyprus, for example, traditionally there is close co-operation between the Public Prosecutor's Office and the police whereby the Public Prosecutor's Office in particular monitors the respect for human rights. In Ireland and Scotland, the Public Prosecutor's Office will consider the lawfulness of the investigation conducted by the police services in the context of deciding whether or not to prosecute. Thus, a prosecution will as a rule only be brought if the Public Prosecutor's Office is convinced that the investigation conducted by the police can stand the test of human rights and the law.

IV.2. The Public Prosecutor's Office and supervision of and authority over the police

IV.2.1. General

Those countries in which the police are under the authority of the Public Prosecutor's Office or in which police investigations are either conducted or supervised by the public prosecutor should, in accordance with Item 22 of Recommendation (2000) 19, take a number of specific measures. These measures concern the instructions with a view to the implementation of crime police priorities (IV.2.2.), the allocation of cases to the police services (IV.2.3.), the evaluation and monitoring of police activity (IV.2.4.), and sanctioning if need be in relation to this activity (IV.2.5.).

Each of these questions is analysed more closely in the following sections. However, it must be pointed out immediately that the summary nature of certain replies to the questionnaire does not allow a determination to be made for each Member State of the extent to which the measures have actually been taken. Thus, for example, it can be stated with regard to the Netherlands, Norway and Slovakia only that the legislation considered globally appears to be in accordance with the measures provided for in Item 22 of the Recommendation.

IV.2.2. The instructions with a view to effective implementation of crime policy priorities

In accordance with Item 22a of Recommendation (2000) 19, the Member States should take measures to enable the Public Prosecutor's Office to issue instructions to the police with a view to effective implementation of crime policy priorities.

In Belgium, Hungary and the Netherlands, among other countries, the Public Prosecutor's Office can by law issue instructions to the police with a view to effective implementation of crime policy priorities. In Estonia, it is explicitly stipulated in the law that the crime policy priorities are established annually by the government and that both the Public Prosecutor's Office and the police are bound by them.

Item 22a of the Recommendation has not been implemented in all the Member States. In Scotland, for example, there are ministerial guidelines from the Lord Advocate, but these do not relate to the setting of priorities in relation to crimes to be investigated. A setting of priorities of this type is one of the prerogatives of the police, who themselves take the necessary initiatives in this regard.

In Latvia, too, it is not explicitly stipulated in the law that the Public Prosecutor's Office can issue instructions to the police with a view to the effective implementation of crime policy priorities. However, at the meetings of the Crime Prevention Council, which are chaired by the Prime Minister, priorities are set for the prevention of criminality. Partly on the basis of these priorities, specialized departments have been set up within the Public Prosecutor's Office to tackle particular forms of criminality – for example, financial and economic crimes – whereby particular priorities are de facto set indirectly for combating criminality.

IV.2.3. The allocation of cases to the police services

Item 22b of Recommendation (2000) 19 stipulates that the states should take effective measures so that the Public Prosecutor's Office can allocate individual cases to the police service that is considered the most suitable for handling them. This recommendation is obviously only relevant to those countries where several (general) police services exist. This is not the case, for example, in Belgium and the Netherlands.

In Bulgaria, Latvia and Romania, the Public Prosecutor's Office can entrust the case to the police service that it considers most suitable for handling it.

However, an option of this kind is not granted to the Public Prosecutor's Office in all countries where several police services exist. The rule that applies in Turkey, for example, is that the police authorities themselves decide which police service will deal with a particular case. In Scotland, too, a decision of this kind is considered a question of internal organization of the police over which the Public Prosecutor's Office has no authority. A similar principle applies in countries such as Estonia, Hungary and Portugal.

IV.2.4 Evaluation and monitoring of police action

Under Item 22c of Recommendation (2000) 19, the Public Prosecutor's Office should have available to it the option of carrying out evaluations and checks, in so far as these are necessary to monitor compliance with the law.

In many Member States, such evaluations and checks are not explicitly provided for in law. However, this does not preclude them to a sense from being regarded as a logical outcome of the supervision and management for which the Public Prosecutor's Office is responsible in relation to the police.

In Latvia and Turkey, the Public Prosecutor's Office also carries out regular inspections of police stations, which enables police action to be checked and evaluated.

IV.2.5. Sanctions

In the event of any infringements of law by the police, the Public Prosecutor's Office under Item 22d of Recommendation (2000) 19 should be able to take sanctions against them or to cause sanctions to be applied.

Partly in accordance with this, it is provided in Latvia, Romania and the Ukraine, for example, that the citizen may submit a complaint to the Public Prosecutor's Office against the action of the police in his or her case.

In a number of Member States, the Public Prosecutor's Office, whether or not in response to a complaint, may institute an investigation into a possible infringement of the law by the police.

Sanctions against a demonstrated unlawful action by the police can take various forms. The Public Prosecutor's Office in Latvia, for example, can issue warnings to police officers. In other Member States, such as Hungary, Poland and the Ukraine, the Public Prosecutor's Office has the power to alter, withdraw, revoke or annul a decision of the police. Another possible sanction consists in the Public Prosecutor's Office withdrawing the investigation from a particular police officer or police service and then entrusting it to another officer or service, or where appropriate continuing with it itself. An option of this kind is provided for in Bulgaria, Poland and the Ukraine.

IV.3. The Public Prosecutor's Office and appropriate and functional co-operation with the police

Countries in which the police are independent of the Public Prosecutor's Office should, in accordance with Item 23 of Recommendation (2000) 19, take effective measures to ensure appropriate and functional co-operation between them.

In Ireland, the police in formal terms are completely independent of the Public Prosecutor's Office. The Public Prosecutor's Office therefore has no authority over the police there nor is it responsible for directing or supervising the criminal investigation. However, this does not preclude significant functional co-operation taking place between the police and the Public Prosecutor's Office. The Public Prosecutor's Office, for example, gives legal advice to the police in relation to investigations into grave, serious or complex crimes. This type of advice is provided not just in specific cases but also in a more general sense. In addition, the Public Prosecutor's Office organizes training for police officers, among other things in the areas of the tackling of fraud, sexual abuse or other forms of complex criminality.

In Finland too, the police are in principle independent of the Public Prosecutor's Office. However, the law qualifies this principle to some extent. It is provided that the police inform the Public Prosecutor's Office, except in simple cases, of the crimes established by it. In addition, the police will conduct the criminal investigation at the request of the Public Prosecutor's Office. That the police direct this investigation does not preclude the possibility of the Public Prosecutor's Office issuing instructions to the police. Partly on the basis of these rules, attempts are constantly being made to optimise the co-operation between the police and the Public Prosecutor's Office but without departing from the principle of mutual independence of these two bodies.

In Austria, a draft amendment to the Code of Criminal Procedure is now being discussed in which attention is given to, among other things, the appropriate and functional co-operation between the Public Prosecutor's Office and the police set forth in Item 23 of the Recommendation.

V. The relationship between the Public Prosecutor's Office and the victim of a crime: putting into effect of Items 33 and 34 of Recommendation (2000) 19

V.1. The treatment of the victim

Under Item 33 of Recommendation (2000) 19, the Public Prosecutor's Office is obliged to take proper account of the views and concerns of victims when their personal interests are affected.

With regard to a number of Member States, it can be stated in general that the legislation appears to be in accordance with this recommendation. It is also found that in many Member States, it is part of the responsibility of the Public Prosecutor's Office to take proper account of the justified interests of the victim of a crime and also to give the victim the necessary support and advice.

The treatment of the victim by the Public Prosecutor's Office in certain Member States forms only part of a broader victim-oriented policy. This is the case in Ireland, for example, where the Department of Justice, Equality and Law Reform issued a Victim's Charter and Guide to the Criminal Justice System. Mention may also be made of Scotland, where an extensive Scottish Strategy for Victims was drawn up by the government.

V.2. The provision of information to the victim

V.2.1. General

Item 33 of Recommendation (2000) 19 additionally contains for the Public Prosecutor's Office the obligation to take or promote actions to ensure that victims are informed of both their rights and developments in the procedure. The concise nature of some replies to the question does not allow this question to be analysed for all the Member States.

V.2.2. Provision of information by the Public Prosecutor's Office

In a goodly number of Member States, it is explicitly stipulated in the law that the Public Prosecutor's Office is obliged to explain to the victim his or her rights and duties in the criminal procedure. In certain Member States, although this obligation is recognized in principle, it is at the same time made subject to one or more conditions. The Public Prosecutor's Office in Belgium, for example, will only provide information to the victim in those cases in which the victim has made what is known as an injured-party declaration. In the Netherlands, although the Public Prosecutor's Office will in principle inform the victim of the possibility of compensation, it will only give more detailed information on the progress of the procedure to those victims who have expressed the desire to receive such information.

V.2.3. Access for the victim to the case records

The provision of information to the victim need not necessarily take place or only take place through the Public Prosecutor's Office. In a number of countries, including Hungary, Latvia, Poland, Switzerland and the Ukraine, the victim has been granted the right, in some cases under particular conditions, to have access to the case record. The victim is therefore not dependent, or not wholly dependent, on the Public Prosecutor's Office but can actively gather the necessary information himself or herself.

V.2.4. The provision of information as part of a broader victim-oriented policy

In some Member States, the provision of information to the victim is embedded in a broader victim-oriented policy. It is a fundamental principle in Ireland, for example, that it is part of the primary responsibility of the police to provide the victim with the necessary explanation on the course of the criminal proceedings. However, a specific organization is also provided here, Victim Support, which gives victims the necessary advice and recommendations. It does this in co-operation with the Public Prosecutor's Office. In addition, we must note the already mentioned Victim's Charter and Guide to the Criminal Justice System, in which it is explained to the victims of crimes in general what their rights in the criminal proceedings are and what they may expect from the bodies involved in this procedure.

In Scotland, too, the provision of information by the Public Prosecutor's Office to the victim is to be regarded as part of a broader policy. It represents just one part of the Scottish Strategy for Victims already mentioned. It is envisaged in the context of this strategy that by 2002 a Victim Liaison Office (VLO) will be set up in each region. These VLOs will be organizationally distinct from the Public Prosecutor's Office, but this does not mean that their establishment precludes further optimisation of the relationship between the Public Prosecutor's Office and the victim.

V.3. The victim and the decision not to prosecute

V.3.1. General

It is stated in Item 34 of Recommendation (2000) 19 that interested parties of recognized or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute. Such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorizing parties to engage private prosecution. It can broadly be stated that the legislation in Liechtenstein, Moldova and Norway now already complies with this recommendation, while it is expected that in the near future this will also be the case for legislation in Austria, Estonia and Lithuania.

V.3.2. The hierarchical review

In some Member States, it is possible for the victim to submit an appeal to the Public Prosecutor's Office against the decision not to prosecute. Such an appeal will usually be examined in the context of the hierarchical supervision within the Public Prosecutor's Office. In Ireland, although the victim – or another interested party – may appeal to the Public Prosecutor's Office against the decision not to prosecute, this appeal is not

handled in the context of hierarchical supervision. In addition, it is in principle only possible in those cases in which the suspect has not yet been informed of the decision not to prosecute.

V.3.3. The judicial review

In certain Member States, the victim may submit the decision of the Public Prosecutor's Office not to prosecute to a judicial authority for review. In Bulgaria and Romania, a judicial review of this kind of the decision not to prosecute is complementary to the internal review of this decision within the Public Prosecutor's Office. This is also the case in Ireland, on the understanding that the victim can only turn to the court in cases in which it can be demonstrated that the Public Prosecutor's Office has acted in bad faith or that the decision of the Public Prosecutor's Office was influenced by an improper motive or an improper policy.

In other Member States, such as the Netherlands, Switzerland and Turkey, the decision of the Public Prosecutor's Office not to prosecute can only be reviewed by the court. If the court finds the complaint by the victim to be admissible and well-founded, he will order the Public Prosecutor's Office to bring proceedings.

In the Czech Republic, the possibility of a judicial review of the decision of the Public Prosecutor's Office not to institute proceedings is explicitly ruled out. For the time being, this is still the case in Slovakia, although there are now plans there to grant the victim the right to have the decisions of the Public Prosecutor's Office reviewed by a judicial authority.

V.3.4. The private prosecution

The most far-reaching check on the decision of the Public Prosecutor's Office consists in granting the victim the possibility of instituting criminal proceedings himself.

A system of private prosecution of this kind is provided for in Belgium, Cyprus, Finland, France, Spain and other countries. The possibility of private prosecution is made subject to one or more restrictions in some Member States. In Scotland, the victim will only be able to institute criminal proceedings himself or herself if he or she has obtained prior judicial permission to do so. In Hungary and Macedonia, private prosecution is only possible for particular crimes, while it must be pointed out, with regard to Hungary, that plans now exist to grant the victim the right to prosecute in all those cases in which the Public Prosecutor's Office does not institute proceedings itself.

In some Member States, the possibility of a private prosecution is radically rejected. This is the case, for example, in the Czech Republic, Liechtenstein, Moldova, the Netherlands and Slovakia. The rejection of a system of private prosecution in which the victim himself institutes criminal proceedings and therefore prosecutes does not necessarily imply that the victim would not be involved in the criminal proceedings. The victim in Liechtenstein and the Netherlands, for example, does have the option of joining the Public Prosecutor's Office and having his civil claim to compensation handled in the context of the criminal proceedings.

VI. Conclusions

Despite all the methodological problems, it can be said that the replies to the questionnaire do give some idea of the practical significance of the Recommendation for the Member States of the Council of Europe. It would, therefore, also be worthwhile to examine its effect in the practice of criminal procedure in other ways. In particular, that the Public Prosecutor's Office constitutes the centre of the web of the criminal procedure means that a study of this kind cannot be termed a superfluous luxury.