

THE COUNCIL OF EUROPE'S CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS:

CONCEPT, FUNCTIONING AND TASKS



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COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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I. THE TWO MOST IMPORTANT EUROPEAN INSTITUTIONS

It is widely known that, at present, the two most important European institutions are the Council of Europe and the European Union. Although they are two entirely separated bodies, both share the same fundamental values in the search of a democratic society. They were founded after the Second World War and were aimed at ending the frequent wars that took place between neighbours in Europe. European integration was seen to be an antidote to the extreme nationalism which had devastated the continent up to then.

According to the Council of Europe, a democracy, at least in theory, is government on behalf of all the people, according to their “will”.¹ The Council of Europe made clear that the connection between human rights and democracy is deep, and goes both ways: each is in some way dependent on the other, and incomplete without the other.² This is why democracy and human rights are essential requirements to become part of the Council of Europe³ and the European Union.

The Council of Europe is an international organization situated in Strasbourg (France) which comprises 47 European countries and created to promote democracy and to protect human rights and the rule of law in Europe. In fact, the Council of Europe is the Continent’s leading human rights organization. Accordingly, all Member States have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy, and the rule of law. The best known body of the Council of Europe is the European Court of Human Rights, which enforces the European Convention on Human Rights (ECHR). The Council of Europe also seeks to promote European unity by fostering cooperation on legal, cultural, and social issues. It was founded in 1949 and has a population of approximately 820 million.

The European Union began as a purely economic institution in 1957 but evolved into an organization spanning many different policy areas, from climate, environment and health to external relations and security, justice, migration, etc. Its name changed in line with its new goals from Common Market to the European Economic Community, European Community and, finally, European Union in 1993 with the Maastricht Treaty, which is the present denomination. The original members were Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany.

1. Vide Compass. Manual for Human Rights. Education with young people. Council of Europe. In: Democracy – Council of Europe. www.coe.int › web › compass.

2. Vide note 1 *supra*.

3. This is why Belarus is not yet a member of the Council of Europe. However, over the years it did sign and ratify 12 Council of Europe treaties and protocols, as well as joined four Partial Agreements: The Venice Commission, GRECO (the Group of States against Corruption), the Enlarged Partial Agreement on Sports and the European Pharmacopeia.

Right now, the European Union is a political and economic union integrated by 27 Member States and with an estimated total population of about 447 million and a single currency (the Euro). The 27 Member States are also part of the Council of Europe. The European Union was awarded the Nobel Prize for Peace in 2012 in recognition of the organization's efforts to promote peace and democracy in Europe.

II. THE CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS

As its name suggests, the Consultative Council of European Prosecutors, also known by the acronym CCPE,⁴ is a consultative body of the Committee of Ministers of the Council of Europe and was set up by a decision of the Vice-Ministers of Justice of 13 July 2005, with the intention of institutionalizing an annual conference of European Public Prosecutors, which had been held until then. The main objective of the Annual Conference was to follow up on Recommendation Rec(2000)19 on the role of the Public Prosecutor in the Criminal Justice System.⁵ The annual conference had been held every year from the adoption of Recommendation Rec(2000)19 until 2006. As the Council of Europe itself underlined, in institutionalizing⁶ this forum, the Committee of Ministers and the European Committee on Criminal Problems, both members of the Council, recognised its importance and the need of involving the Office of the Prosecutors of the Member States in their work, aimed essentially at developing common policies and legal instruments relating to the functioning and professional activity of both Committees.

Besides its role as consultative body to the Committee of Ministers of the Council of Europe, the CCPE was also set up to take care of the development of the Public Prosecutor's Offices in the European Continent in the face of the process of social change that is taking place in Europe. It has to be admitted, as the Venice Commission pointed out, that *"Political interference in prosecution is probably as old as society itself. In early societies, indeed, the prosecution power would usually have been entirely in the control of princes who could use it to punish their enemies and reward their friends. History provides many examples of the use of prosecution for improper or political purposes. One need to look no further than Tudor England or France both before and during the Revolution and the Soviet system in Eastern Europe."*⁷ This is why the Venice Commission admitted the need to introduce the necessary ways and means to avoid interferences and abuses in the Public Prosecutor's Offices in Europe.⁸

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4. The acronym CCPE corresponds to the French name of the aforementioned entity, which is Conseil Consultatif de Procureurs Européens.
 5. Recommendation Rec (2000)19 on the role of the Department of Public Prosecutions in the criminal justice system was adopted by the Council of Ministers on 6 October 2000.
 6. WWW.COE.INT. Consultative Council of European Prosecutors.
 7. REPORT ON EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE OF THE JUDICIAL SYSTEM: PART II – THE PROSECUTION SERVICE. Study No. 494 / 2008. CDL-AD (2010)040. Strasbourg, 3 January 2011. Para. 20.
 8. "Therefore, the Commission focuses on methods to limit the risk of improper interference, which range from conferring independence on a prosecutor, subject to such powers of review, inspecting or auditing decisions

The CCPE also seeks to give a unitary perspective, as far as possible, to both this development process and the institution itself, taking into account the different legal systems that coexist in Europe.⁹

The first meeting of the CCPE took place on 6 July 2006 in Moscow and consisted of representatives of Public Prosecutors from the 47 Member States of the Council of Europe.

In parallel to the CCPE, the Consultative Council of European Judges (CCJE)¹⁰ has been operating in the Council of Europe, under the same Council of Europe's scheme like the CCPE. The CCJE was established pursuant to Resolution No. 1 on Measures to Strengthen the Independence and impartiality of judges in Europe, adopted by the XXII Conference of European Ministers of Justice held in Chisinau, Moldova, on 17 and 18 June 1999. The resolution agreed on the adoption of a comprehensive programme of action to strengthen the role of Judges (which should be drafted in consultation with Judges), as well as the establishment, within the Council of Europe, of an advisory group composed of Judges which resulted in the CCJE.

The relations between the two advisory councils – CCPE and CCJE – have been particularly constructive and joint work has also been carried out between the two institutions, ranging from statements to problems affecting Judges and Prosecutors in Europe to the preparation of an Opinion, also simultaneously,¹¹ for issues of common interest.¹²

Finally, Holy See, USA, Canada, Japan, and Mexico hold observer status with the Council of Europe, and, accordingly, may participate in activities of the CCPE. Besides, some other States and organizations are observers to the CCPE and may send a representative to attend the CCPE meetings: Kazakhstan, Morocco, the International Association of Prosecutors (IAP), and the association “Magistrats européens pour la démocratie et les libertés” (MEDEL).

as may be appropriate, to the prohibition of instructions in individual cases, to procedures requiring any such instructions to be given in writing and made public. In this connection the existence of appropriate mechanisms to ensure the consistency and transparency of decision making are of particular importance.”REPORT ON EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE OF THE JUDICIAL SYSTEM: PART II – THE PROSECUTION SERVICE. Op. cit. Para. 21.

9. Perhaps one of the problems of the CCPE is the lack of awareness of its existence, both at the public and private levels. Therefore, the CCPE is striving to make this institution known, as well as the work carried out by it, which extends to a large number of subjects in which the Prosecutor's Offices are competent or which, in one way or another, affect their functioning.
10. The acronym CCPE corresponds to the French name of the aforementioned entity, which is Conseil Consultatif de Juges Européens.
11. For example, the Joint Declaration on the Problem of Justice in Turkey, on account of recent political developments, drawn up on 27 July 2016.
12. Such is the case of Opinion 4(2009), also known as the Bordeaux Declaration, under the title “Judges and Prosecutors in a Democratic Society”.

III. COMPOSITION AND FUNCTIONS OF THE CCPE

All member states may be represented on the CCPE. Members should be chosen among serving Prosecutors of proved in-depth knowledge of the functioning of the prosecution system and great personal integrity, in conjunction with the national authorities responsible for prosecutors – where such authorities exist – and with the national administration responsible for managing the prosecution service. The European Union is also invited to participate in the activities of the CCJE.

The constituent bodies of the CCPE are the General Assembly, in which all Member States are represented, the Working Group elected annually from among the candidates of the member States, the Bureau elected biannually and composed of the Chairman, the Vice-Chairman and two members of the Working Group who become members of the Bureau.

Among its functions, it should be noted that, following the line opened by the Annual Conference of European Public Prosecutors, the main task of the CCPE is the implementation of Recommendation Rec(2000)19, with the aim of developing common political and judicial instruments in relation to the functioning and professional activities of prosecutors.¹³

Regarding the concept of “*recommendations*” it must be said that the Committee of Ministers is the main decision-making body of the Council of Europe. Accordingly, the Committee of Ministers elaborates recommendations for the Member States of the Council of Europe on matters that concern human rights, democracy, and the rule of law. It is important to point out that the Recommendations of the Council of Europe, as regulated in Article 15b of the Statute of the Council of Europe, are adopted unanimously of the votes cast,¹⁴ provided that the majority of the representatives capable to attend the meetings of the Committee of Ministers are present. It should be also noted that, although Recommendations lack mandatory capacity for Member States, the Committee of Ministers may request information from them on the actions taken

13. For an excellent and detailed analysis of Recommendation Rec (2000)19 see MURA, Antonio: Introduction to Recommendation Rec (2000)19 “On the Role of Public Prosecution in the Criminal Justice System”. Rome, 4th July 2011. antonio.mura@giustizia.it.

14. According to Article 15b of the Statute of the Council of Europe:

“The conclusions of the Committee of Ministers may, where appropriate, take the form of recommendations to governments. The Committee may invite the latter to inform them of the measures they have taken with regard to those recommendations.”

Vide, Statute of the Council of Europe (number 001), made at London on 5 May 1949 (“BOE No. 51/1978 of 1 March 1978”) Instrument of Accession of Spain to the Statute of the Council of Europe (number 001), done at London on 5 May 1949.

to implement the Recommendations.¹⁵ As Antonio Mura, former President of the CCPE, rightly pointed out, it would be a form of Soft Law, “...since it is not a source of law in the true sense but superior, in any case, to the mere policy of instructions: For example, the Recommendations are often the basis for the assessments made by the European Court of Human Rights regarding the existence of legal limits and principles commonly recognized by the Member States of the Council of Europe.”¹⁶ Mura also clarified that “...the Recommendations do not incorporate sanctions in the event that governments do not comply with them or do not respond to requests for information from the Committee of Ministers, but they could serve to lose their status as Members of the Council of Europe by non-compliant States”¹⁷.

III (a) Opinions

As a way to facilitate the implementation of Recommendation Rec(2000)19, and in line with its consultative work of the CCPE, which is consubstantial to the implementation of the Recommendation, the CCPE devotes most of its efforts to preparing Opinions for the Committee of Ministers.

However, other bodies of the Council of Europe may also ask the CCPE to draw up Opinions on specific issues. In this line, a recent example has been the request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia concerning the composition of the Prosecutorial Council and its functioning, submitted on 20 April 2018. Even more recently, on 20 February 2020, the CCPE Bureau adopted an Opinion following a request by the Superior Council of Prosecutors of the Republic of Moldova concerning the independence of prosecutors in the context of legislative changes as regards the prosecution service.

It should be noted that sometimes, as a result of the work of translations, “Opinions” are referred to as “Reports”. Nonetheless, it is preferable to use the term Opinions to avoid confusion, as it has been done with the French and English versions, in their original wording.

III (b) Some Common Concepts expressed in the Opinions

The Explanatory Memorandum of the Recommendation (2000)19 defines Public Prosecutors as “...public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.”¹⁸

The Explanatory Memorandum also indicates that there is a certain number of common aspects to all Public Prosecutors in all the European Criminal Systems, which are as follows:

- ▶ *The ability to decide whether to initiate or continue prosecutions,*
- ▶ *The ability to bring prosecutions before the courts, and*
- ▶ *The ability to appeal or conduct appeals of all or some court decisions.*¹⁹

15. In this connection, the Preamble of the Recommendation emphasises, before referring to the section related to the Functions of the Public Prosecutor’s Office, that “...the text of the Recommendation, since it is not legally binding, any other formulation could have been interpreted as imposing an obligation on States, so it is only intended to indicate that it is the responsibility of the State to lead to the establishment of the principle in question.”

16. MURA, A.: Op. cit. Page 4.

17. MURA, A.: Op. cit. Page 5.

18. Paragraph 1, page 14 of the Explanatory Memorandum.

19. Paragraph 2, page 15 of the Explanatory Memorandum.

Nonetheless, there are other aspects which are not general, as those mentioned above, but more particular, according to the peculiarities of different Public Prosecutors systems in Europe:

- ▶ *implement national crime policy while adapting it, where appropriate, to regional and local realities;*
- ▶ *conduct, direct or supervise investigations;*
- ▶ *see to it that victims are effectively assisted;*
- ▶ *decide on alternatives to prosecution;*
- ▶ *supervise the execution of court decisions;*
- ▶ *etc.*²⁰

However, the Explanatory Memorandum also recognises that there are great differences in the institutional position of the public prosecutor from one country to another, because its roots lie in two major systems founded on a dual model – French and Anglo-Saxon. With the Recommendation the Council of Europe was not looking for a third option, but rather it took a dynamic approach and set out to identify the major guiding principles – common to both types of system – that ought to govern Public Prosecution as it moves into the future. At the same time, it sought to recommend practical objectives to be attained in pursuit of the institutional balance upon which democracy and the rule of law in Europe largely depend.²¹ As a result, the objective of the CCPE is that, whatever the model, the European Declaration of Human Rights, based on the ECHR²² and the lines of jurisprudence opened and developed by the European Court of Human Rights in this regard, should always prevail.²³ Nonetheless, a common system of public prosecutions in Europe cannot be disregarded in the long term future.

The Explanatory Memorandum also reflects the close professional contacts that normally exist between Judges and Prosecutors since their professional objectives go in parallel rather frequently. *“It is the task of public prosecutors, as of judges, to apply the law or to see that it is applied. Judges do this reactively, in response to the cases brought before them, whereas the public prosecutor pro-actively ‘ensures’ the application of the law. Judges sit on the bench and deliver decisions; public prosecutors are in the business of vigilance and action to bring cases to court.”*²⁴

20. Paragraph 3, page 15 of the Explanatory Memorandum.

21. Page 13, General Considerations of the Explanatory Memorandum.

22. The European Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was adopted by the Council of Europe on 4 November 1950 and entered into force in 1953.

23. This aspect is particularly underlined, inter alia, in point 6 of the *Report on the Independence and Impartiality of Public Prosecutors in the Member States of the Council of Europe 2017* prepared by the Bureau. Strasbourg, 20 October 2017. CCPE (2017)3.

24. Paragraph 1, page 14 of the Explanatory Memorandum.

III (c) Communications and press releases

Finally, the CCPE also intervenes and prepares communications in cases where, for example due to political reasons, the functioning of the Public Prosecutor's Office could be affected or challenged, as well as press releases in the events²⁵ or problems of special importance, such as terrorism.²⁶

Not to forget, of course, the work of the CCPE in collecting and processing information on the functioning of the European Public Prosecutors' Offices which is essential for the developing of the different options and possibilities referred to above.²⁷

25. Communication concerning alleged threats affecting impartiality and efficiency in the functioning of the Public Prosecutor's Office in Turkey. Document of 9 September 2015. CCPE-SA (2015)1.

26. Document of 20 November 2015.

27. The CCPE Bureau has published its Report on the independence and impartiality of the prosecution services in the Council of Europe member States (2019 edition). The Report covers the period from December 2017 to November 2019 and provides a summary of information submitted by CCPE members and observers, as well as by prosecutorial services and associations, concerning alleged infringements in member States of standards governing the independence and impartiality of the prosecution services. The Report has been prepared following a proposal in 2016 by the then Secretary General of the Council of Europe and within the framework of the implementation of the Council of Europe Plan of Action on strengthening judicial independence and impartiality.

IV. OPINIONS PREPARED BY THE CCPE WITH SPECIAL REFERENCE TO THOSE MORE REPRESENTATIVE REGARDING THE SUBJECT MATTER THEY REGULATE

So far, 15 Opinions have been drawn up by the CCPE. The last topic for the CCPE 2020 Opinion (issue 15) is related to the role of Prosecutors in emergency situations, in particular when facing a pandemic.²⁸

The list of Opinions, so far drawn up, is as follows:

- ▶ Opinion No. 1 (2007) on “Ways to improve international co-operation in the criminal justice field”;
- ▶ Opinion No. 2 (2008) on “Alternatives to Prosecution”;
- ▶ Opinion No. 3 (2008) on the “Role of Prosecution Services outside the criminal law field”;
- ▶ Opinion No. 4 (2009) on the “Relations between Judges and Prosecutors in a democratic society”;
- ▶ Opinion No. 5 (2010) on the “Role of Public Prosecution and juvenile justice”;
- ▶ Opinion No. 6 (2011) on the “Relationship between Prosecutors and the prison administration”;
- ▶ Opinion No. 7 (2012) on the “Management of the means of Prosecution services”;
- ▶ Opinion No. 8 (2013) on “Relations between Prosecutors and the media”;
- ▶ Opinion No. 9 (2014) on “European norms and principles concerning Prosecutors”;
- ▶ Opinion No. 10 (2015) on the “Role of Prosecutors in criminal investigations”;
- ▶ Opinion No. 11 (2016) on the “Quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime”;

28. The draft has been approved by the Plenary and released in November 2020.

- ▶ Opinion No. 12 (2017) on the “Role of Prosecutors in relation to the rights of victims and witnesses in criminal proceedings”;
- ▶ Opinion No. 13 (2018) on “Independence, accountability and ethics of Prosecutors”;
- ▶ Opinion No. 14 (2019) on the “Role of Prosecutors in fighting corruption and related economic and financial crime”;
- ▶ Opinion No. 15 (2015) on the “Role of Prosecutors in emergency situations, in particular when facing a pandemic”.

Since it is practically impossible to carry out a detailed examination of each and every one of them, in view of their number and the dense content almost without exception of most of them, a brief analysis will be carried out of those which could be considered more representative, especially in relation to the subjects they deal with.

It should be underlined that not all Opinions will be equally applicable in each Member State of the Council of Europe. In fact, some of them are going to be difficult to fit into some legal systems. For example, Opinion 3 (2008) on the role of the Prosecutor’s Office outside criminal law is difficult to fit in countries where the work of the Prosecutor is confined exclusively to the criminal field. The same could be said with regard to Opinion No. 5 (2010) on Public Prosecution and Juvenile Justice or Opinion No. 8 (2013) on relations between the Public Prosecutor’s Office and the press, since the involvement of the Public Prosecutor in this particular area may differ significantly from one country to another.

IV (a) Ethics and the Public Prosecution Services

This has probably been one of the areas on which the Council of Europe has placed the greatest emphasis on the development of its various activities,²⁹ but especially when it has dealt with the issue of the Public Prosecutors’ Offices. Other international organizations, such as United Nations, adopted a similar approach regarding the Public Prosecutors’ Services.³⁰

It should be noted that the Explanatory Memorandum of Recommendation Rec(2000)19 already mentioned that *“As public prosecutors become increasingly independent or autonomous, and thus of necessity assume a greater burden of responsibility, existing statutory and procedural regulations may become insufficiently detailed as a guide to the ethics and conduct of the profession.”*³¹

Prior to the establishment of the CCPE, and on the occasion of the 6th Session of the Conference of European Attorneys General held in Budapest,³² the European Guide on Ethics and Conduct of the Public Prosecutor’s Office was approved.³³ As it could not be otherwise, there is an express reference to paragraph 36 (a) of Recommendation Rec(2000)19 IN THE European Guide on Ethics,³⁴ which states, inter alia, that, *“In order to promote justice, consistency and efficiency in the activities of prosecutors, States must ensure that:*

29. Vide, for example, the European Code of Ethics of Journalistic Profession. Resolution adopted unanimously in Strasbourg, 1 July 1993. Also, Recommendation Rec (2001)10 of the Committee of Ministers to the Member States on the European Code of Police Ethics. Adopted by the Committee of Ministers on 19 September 2001, at the 765th meeting of the Ministers’ Delegates.

30. The term “ethics” is constantly mentioned on the text of the Guidelines on the Role of Prosecutors. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

31. Paragraph 35 of the Explanatory Memorandum.

32. 29–31 May 2005.

33. CPGE (2005) 05.

34. Paragraph f.

- ▶ *While giving preference to hierarchical methods of organization, they must not lead to obstructive and ineffective bureaucratic structures;*
- ▶ *General guidelines for the implementation of criminal policy are defined;*
- ▶ *Define general principles and criteria that can be used as a reference and against which one cannot act in individual cases and as a guarantee against arbitrary decisions.”*

Not to forget the Prosecutor’s duty to observe the irreproachable conduct, which is also reflected in Recommendation Rec(2000)19, in the context of criminal or non-criminal proceedings in which the Prosecutor could be competent, as well as in his/her private conduct, since it is the best way to gain trust of the public and the institutions.³⁵ As the Report on the Independence and impartiality of the services of the Public Prosecutor’s Office among the Member States of the Council of Europe also indicated, “...*the prosecutor must observe exemplary behaviour, precisely with the aim of gaining public confidence.*”³⁶ In addition, and according to the same report, “*The sharing of common legal principles and ethical values on the part of all prosecutors ... is essential for the proper administration of justice.*”³⁷

It is therefore a complex issue, in no way exhausted, and remains a matter of concern. That is precisely why the CCPE decided to elaborate Opinion No 13 (2018) on Independence, Accountability and Ethics of Prosecutors.

IV (b) Relations of the Public Prosecutor’s Office and other public or private institutions or entities

As it might be expected, the relations of the Prosecutors’ Offices with the sometimes-difficult legal world are not only varied, but also very complex. They extend to many fields and with a plurality of public and private entities. Recommendation Rec (2000)19 devotes several paragraphs to this type of relationships, in particular those relating to the legislative and executive branches³⁸ as well as with the

35. Subparagraph IV (c).

36. Report on the independence and impartiality of the services of the Public Prosecutor’s Office among the Member States of the Council of Europe in 2017. Prepared by the Bureau of the EPC on a proposal from the Secretary-General of the Council of Europe. Strasbourg, 20 October 2017. CCPE (2017)3. Paragraph 33.

37. Report on the independence and impartiality of the services of the Public Prosecutor’s Office among the Member States of the Council of Europe in 2017. Op. cit. Paragraph 34.

38. Relationship between public prosecutors and the executive and legislative powers:

“11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal, or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.

12. Public prosecutors should not interfere with the competence of the legislative and the executive powers.

13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:

a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law;

b. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;

c. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;

d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:

– to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;

– duly to explain its written instructions, especially when they deviate from the public prosecutor’s advices and to transmit them through the hierarchical channels;

judiciary³⁹ and the police.⁴⁰

In some cases, Opinions specifically devoted to these aspects, i.e. relations, have been drafted. It goes without saying that what has been included in the relevant Opinions reflects and develops the basic points previously contained in the Recommendation.

That would be the case, for example, of Opinion No 4 (2009) on relations between Judges and Prosecutors. This Opinion incorporates interesting developments in this regard. It is based, of course, on the essential differences between Judges and Prosecutors and their relationships, according to the different legal systems.⁴¹ Moreover, and even without the intention of being

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- to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;
- e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;
- f. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.
14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.
15. In order to promote the fairness and effectiveness of crime policy, public prosecutors should co-operate with government agencies and institutions in so far as this is in accordance with the law.
16. Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law.”
39. Relationship between public prosecutors and court judges:
“17. States should take appropriate measures to ensure that the legal status, the competencies, and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.
18. However, if the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.
19. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular, they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.
20. Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.”
40. Relationship between public prosecutors and the police:
“21. In general, public prosecutors should scrutinise the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.
22. In countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may:
- a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;
- b. where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;
- c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;
- d. sanction or promote sanctioning, if appropriate, of eventual violations”
41. According to paragraph 6 of the Explanatory Memorandum, “Several judicial systems coexist within the countries of the European Council:
- I. Common law systems in which there is a clear separation between judges and prosecutors and where investigative power is not combined with other functions;
- II. The continental law systems in which there are variations where judges and prosecutors belong to the ‘judicial body’ or on the contrary, where such membership is reserved only to judges.
- Moreover, in these different systems, the autonomy of the Public Prosecutor’s Office may be complete or limited in

exhaustive, the different but complementary role of Judges and Prosecutors in the Administration of Justice is recognised while admitting the independence of each other.⁴² Similarly, the regulations governing Prosecutors must guarantee the necessary conditions to adequately carry out their work, equating it to that of Judges.⁴³ Finally, as it could not be otherwise, the importance of international cooperation in the matter is highlighted in the Opinion for both Judges and Prosecutors.⁴⁴

In addition to the above, and with regard to relationships, the CCPE has prepared Opinion No. 6 (2011) on relations between Prosecutors and the prison administration, as well as Opinion No. 8 (2013) on relations between the Public Prosecutor's Office and the media.

With regard to relations with the Prison Administration, and apart from the insistence on respect for human rights, which is a common denominator in all Opinions, as has already been said, the need for the Prosecutor to be an active part in all matters relating to the improvement of the conditions of persons deprived of their liberty, as well as their reintegration into society, is also emphasised.⁴⁵ Regarding this last point, in some States, the Prosecutor plays an important role in the post-sentencing stage. In those cases, Prosecutors shall ensure that the interests of society are safeguarded where there is a real prospect of reintegration into society.⁴⁶

Opinion No. 8 (2013) on relations between the Public Prosecutor's Office and the press, focuses, in particular, on the need to provide the press with appropriate information on the matter in which the Public Prosecutor's Office is involved, while at the same time not jeopardizing the proceeding itself.⁴⁷ Opinion 8 also aims at creating an appropriate communication framework between Prosecutors and the media that is consistent with national laws and the international obligations of Member States,⁴⁸ while making it clear that although it is a document addressed to Prosecutors and not journalists, the latter are kindly urged to read.⁴⁹ The Opinion recommends

relation to the executive branch."

42. According to paragraph 3 of the Opinion, *"The proper performance of the distinct but complementary roles of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice. Judges and public prosecutors must both enjoy independence in respect of their functions and be and appear independent from each other."*
43. Paragraph 6 states that *"The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially."*
44. According to paragraph 12, *"Both public prosecutors and judges are key players in international cooperation in judicial matters. The enhancement of mutual trust between competent authorities of different states is necessary. In this context, it is imperative that information gathered by prosecutors through international co-operation and used in judicial proceedings is transparent in its content and origin, as well as made available to the judges and all parties, with a view to an effective protection of human rights and fundamental freedoms."*
45. Paragraph 36 of the Opinion No 6(2011).
46. *"Depending on the national legal systems, prosecutors may also play an important role in the process of conditional release of offenders, as well as in decision-making about pardons."* In: The Status and Role of Prosecutors. A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide. UNODC. Op. cit. Page 49.
47. *"Prosecution services must be able to satisfy the public's right to know about aspects of a criminal proceeding while at the same time not jeopardizing the proceeding itself through the dissemination of information subject to a publication ban or by comments that could be considered inflammatory or damaging to an accused [footnote 146: See article 14, paragraph 1, of the International Covenant on Civil and Political Rights.] who is under trial, [footnote 147] or to the trial process itself. Confidentiality requirements protect not only the internal work of the prosecutor's office but also the large amount of information to which prosecutors have access, including information pertaining to suspects, victims and witnesses."* In: The Status and Role of Prosecutors. A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide. UNODC. United Nations Office on Drugs and Crimes. IAP. New York. 2014. Pages 71–72.
48. Paragraph 12 of the Opinion.
49. Paragraph 13 of the Opinion.

the appointment of spokespersons for Prosecutors and journalists,⁵⁰ underlining, in addition, the need to provide training⁵¹ to Prosecutors in order to be able to adequately carry out this role in communications, especially considering that according to the Opinion “prosecution services should establish a policy of communications”.⁵²

IV (c) Opinion No. 3 (2008) on the role of the Public Prosecutor’s Office outside Criminal Law

This is one of the cases in which a CCPE Opinion has resulted in the drafting of a Recommendation, namely Recommendation CM/Rec (2012) 11, with the same title as the Opinion, as it is expressly recognised in the Opinion itself.⁵³

In this case, what prompted the Committee of Ministers to propose this legal instrument was, above all, the absence of common international legal standards on this subject, i.e. on the involvement of the Prosecutor outside the criminal field.

Returning again to Opinion No. 3 (2008), it is clear that most of the Public Prosecutors’ Offices of the Member States⁵⁴, Moldova included,⁵⁵ have competences outside Criminal Law, with very few of them lacking these powers.⁵⁶

Logically, the Opinion has been elaborated to be able to deal with a variety of systems in Europe. In fact, respect for the institutions is of the highest interest the Council of Europe, provided that they conform to the basic principles of the ECHR. However, the Opinion makes it clear that in cases where Prosecutors have competence to carry out activities outside the field of Criminal Law, it will be essential that they be exercised with complete respect for the principle of separation of powers,⁵⁷ that the principle of impartiality⁵⁸ be respected, that such functions are carried out in the name of society and the public interest,⁵⁹ that such non-criminal intervention by Prosecutors is provided for and regulated, as far as possible, by law,⁶⁰ and so on.

IV (d) Opinion No. 7 (2012) on the management of the means of the Prosecution Service

This opinion is of far-reaching interest in Europe, and of course also in Moldova, since the development of the work of the Public Prosecutors’ Offices is inconceivable without a contribution

50. Section v of the Recommendations incorporated in the Opinion.

51. Section vii of the Recommendations incorporated in the Opinion.

52. Section i of the Recommendations incorporated in the Opinion.

53. The CM/Rec(2012)11, after insisting on the need to take account of ECHR case law, in particular the right to a fair trial, expressly refers to Opinion No. 3 (2008): “*Bearing in mind Opinion No. 3 (2008) of the Consultative Council of European Prosecutors (CCPE) on ‘The role of prosecution services outside the criminal law field’ and the conclusions of the Conferences of Prosecutors General of Europe in Budapest (29–31 May 2005) and in St Petersburg (2–3 July 2008).*”

54. Paragraph 16 of the Opinion.

55. According to footnote 62 of the Opinion, these countries are: Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, France, FYR Macedonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Moldova, Monaco, Montenegro, the Netherlands, Poland, Portugal, Romania, the Russian Federation, San Marino, Slovak Republic, Slovenia, Spain, Turkey, Ukraine.

56. According to footnote 62 of the Opinion, these countries are: Estonia, Finland, Georgia, Iceland, Malta, Norway, Sweden, Switzerland and the integrated legal systems in the United Kingdom of England and Northern Ireland.

57. Paragraph 34 (a) of the Opinion.

58. Paragraph 34 (b) of the Opinion.

59. Paragraph 34 (c) of the Opinion.

60. Paragraph 34 (d) of the Opinion.

of necessary material and human resources, an aspect which is clearly indicated in article 91 et sq. of the Law on the Public Prosecutor's Service of the Republic of Moldova.⁶¹ To such an extent it is so that Report on the Independence and Impartiality of the services of the Public Prosecutor's Office among the Member States of the Council of Europe in the year 2017 insists that "...the prosecutors must have the appropriate and appropriate means to carry out their mission, which is fundamental in a rule of law."⁶²

After making it clear in the Opinion that providing a budget to the Public Prosecutor's Offices is normally based on a political decision, it is added that neither the executive nor the legislature should be in a position to influence the professional work of the Public Prosecutor's Office. It is pointed out, furthermore, that this budget must be drawn up with strict respect for the principle of the independence of prosecutors and that it must allow the assurance of the necessary preconditions for the fulfilment of their legal mission.⁶³ The Public Prosecutors' Offices should also be able to participate in the preparation of this budget.⁶⁴ In turn, it is also necessary that the costs for calculating the budget have been determined in advance and by appropriate means.⁶⁵

Moreover, such an adequate budget must be maintained, or even increased, in times of serious economic crises, for a very simple reason, as it is clearly reflected in the Opinion, since it is precisely when this type of crisis occurs, when crime increases the most in a country, as well as social disorder and criminality, and only a successful and well-endowed budget will be able to deal with it.⁶⁶

Of course, controlling and auditing are core elements for assuring the diligent management of public funds of the Public Prosecutor's Office. Besides, controlling may be a useful instrument for establishing best practices within the Prosecution service but may not be used as a means to govern the Prosecution service as such.⁶⁷

IV (e) Opinion No. 2 (2008) on alternatives to prosecution

One of the initial concerns of the CCPE has been the treatment of alternative measures to criminal prosecution. In fact, it was the second of the Opinions prepared by the aforementioned institution. The CCPE is aware that "A modern criminal justice system which is fully capable of meeting the needs of society must make use of alternative measures to criminal prosecution where the nature and circumstances of the crimes committed so permit..."⁶⁸ In such case, the public authorities must provide the necessary public education and information on the nature and advantages of such alternatives for the public interest.⁶⁹

Moreover, the Opinion devotes a substantial part of its content to exposing examples of alternatives to criminal prosecution, which are taken from different Member States.⁷⁰ For instances, Judges' warnings, mediation, negotiation, referral to appropriate medical, social or

61. The budget of the Public Prosecutor's Service. Organizational and technical-material assurance of the Public Prosecutor's Service. Chapter XIII of the Law on the Public Prosecutor's Service No. 3/2016, Official Gazette of the Republic of Moldova no. 69-77 from 25.03.2016.

62. Report on the independence and impartiality of the services of the Public Prosecutor's Office among the Member States of the Council of Europe in 2017. Op. cit. Paragraph 39.

63. Paragraph 13 of the Opinion.

64. Paragraph 14 of the Opinion.

65. Paragraph 15 of the Opinion.

66. Paragraph 20 of the Opinion.

67. Paragraph 49 of the Opinion.

68. Paragraph 45(a) of the Opinion.

69. Paragraph 45(a) of the Opinion.

70. Paragraphs 28 to 41 of the Opinion.

professional facility, etc., are mentioned.⁷¹ It is understood that failure to comply with them may lead to criminal prosecution by the Public Prosecutor's Office.⁷² Similarly, the acceptance of one alternative measure should preclude, once executed, any prosecution in respect of the same facts.⁷³ This is due to the constitutional principle known as "*non bis in idem*", also called the "*double jeopardy*" principle in the Common Law legal systems, which prohibits anyone from being prosecuted twice for substantially the same crime.

IV (f) Opinion No. 14 (2019). The role of Prosecutors in fighting corruption and related economic and financial crime

The main objective of this Opinion is to specify the particular personal and institutional approaches to be followed by prosecutors involved in the fight against a set of crimes, complex by nature and often involving secretive forms, such as corruption and related economic and financial crime.⁷⁴ This is an essential topic nowadays, considering the highly detrimental effect this kind of behaviour has on public trust, social stability and the economic well-being of a given country, and on the principles of justice and equality of all persons before the law.⁷⁵

In those cases, Prosecutors face a series of particular challenges when fighting corruption. For example, there may be a lack of political will in some countries, especially insofar as high-level corruption by influential persons is concerned. In fact, the more serious and high-level corruption is, the higher the possibility of a close link with organised crime.⁷⁶ Under those circumstances, a Prosecution service can only properly fight corruption, and enhance people's trust in public and private institutions, when the respective Member State provides a robust constitutional and other legislative framework allowing the prosecution to act as an independent/autonomous institution, as well as resources, budget and staffing. Besides, the efficient use by the Prosecution service of procedural tools to freeze, seize and confiscate property resulting from an offence, should be encouraged, as this recovery of property from white-collar criminals will have not only a repressive but also a preventive and deterrent effect.⁷⁷

According to the different Prosecution systems integrated into the CCPE, the organizational options to fight corruption are varied. A number of member States have put in place central anti-corruption authorities. In other countries, decentralised but specialised prosecution offices – or at least specialised units within those offices – tackle corruption. Finally, in small prosecution services, individual prosecutors specialise in fighting corruption in general, which should be seen as a minimum standard to guarantee the afore-mentioned particular professionalism expected from prosecutors dealing with these crimes.⁷⁸

71. Paragraphs 28 et seq. of the Opinion.

72. Paragraph 41 of the Opinion.

73. Paragraph 45 (n) of the Opinion.

74. Paragraph 6 of the Opinion.

75. Paragraph 8 of the Opinion.

76. Paragraphs 16 and 18 of the Opinion.

77. Point III on Institutional Requirements and Safeguards. Page 5 of the Opinion.

78. Paragraph 30 of the Opinion.

It is important to make a reference to the whistleblowers within this context.⁷⁹ According to the Opinion, their use may be important in the fight against corruption.⁸⁰ This is why, “Member States should ensure that provisions on the protection of particularly vulnerable witnesses in criminal proceedings also apply, where appropriate, to whistleblowers, particularly at the investigation phase. This may include, inter alia, specific confidential ways of handling information sources subject always to protecting the right of an accused to a fair trial.”⁸¹

The Opinion also encourages Prosecution services to establish as much international cooperation as possible, due to the international nature of this type of criminality,⁸² as well as to provide specific training to Prosecutors and fully respect and protect the defendants’ rights.⁸³

IV (g) Opinion No. 15 (2020). The role of Prosecutors in emergency situations, in particular when facing a pandemic

The CCPE has initiated an Opinion on a different topic but in 2020, after the appearance of the Covid-19, first identified in December 2019 in Wuhan, China, the World Health Organization declared the outbreak a Public Health Emergency of International Concern in January 2020 and a pandemic in March 2020. This emergency situation drove the CCPE to change the initial topic and to prepare documents and debate on Prosecutors and the pandemic. The result has been the Opinion No. 15 (2020) on the role of Prosecutors in emergency situations, in particular when facing pandemic.

The topic is a real challenge for Public Prosecutors since the pandemic, according to the responses provided by Member States, may affect not only civil and political rights protected by the ECHR, but also economic, social, and cultural rights. Not to forget possible discrimination against certain groups, such as health workers, and racial and ethnic minorities, resulting in hate speech, racism, xenophobia, attacks and forced returns of refugees and asylum-seekers, mistreatment of foreigners and migrants, and sexual and gender-based violence, domestic violence, including violence against women and children.⁸⁴ This is why, the previous CCPE Opinions are frequently referred in the text as a base of the Opinion No. 15.⁸⁵

Perhaps the most outstanding part of Opinion No. 15 is the one referred to international and constitutional provisions in case of emergency, applied to the work of Prosecutors, since the Opinion searches for a “uniform approach to emergency situations in European countries based

79. “Whistleblower, is an individual who, without authorization, reveals private or classified information about an organization, usually related to wrongdoing or misconduct. Whistleblowers generally state that such actions are motivated by a commitment to the public interest. Although the term was first used to refer to public servants who made known governmental mismanagement, waste, or corruption, it now covers the activity of any employee or officer of a public or private organization who alerts a wider group to setbacks to their interests as a result of waste, corruption, fraud, or profit seeking.” In: www.britannica.com.

80. “Potential whistleblowers wishing to divulge information should know who to address and how and which protection measures will apply to them. Therefore, it is very helpful to provide, within or in direct collaboration with the prosecution service, specific contact points, and to make the contact data available to the public. It should also be noted that potential whistleblowers might be accomplices to the crime they divulge. In some cases, they may be granted immunity or other forms of particular clemency because they expose themselves to great risks by their disclosures. Whistleblowers should be aware, as quickly as possible, of all protective measures put in place for them.” Paragraph 38 of the Opinion.

81. Paragraph 37 of the Opinion.

82. Point E of the Opinion. Page 8 et seq.

83. This last point is totally obvious since the fight against corruption implies special investigation techniques due to the nature of this type of criminal offences. Paragraph 61 of the Opinion.

84. Paragraph 7 of the Opinion.

85. Paragraph 13 of the Opinion.

on the principles enunciated in the text”⁸⁶ despite the variety of systems existing in Europe. The Opinion insists in the need for Prosecutors “... to be aware of situations and scenarios where fundamental rights and freedoms are particularly affected by restrictive measures. In order to avoid abuse on the use of such restrictions, as well as to avoid restricting in any way, including *de facto*, non-derogable rights, simple and effective complaints procedures, including non-formal where it might be applicable, may be established, particularly since Courts may not be entirely accessible, due to the reduction of their activity for health reasons.”⁸⁷

Departing from this perspective, Opinion No. 15 analyses the work of Prosecutors inside the Criminal Law field, making sure that:

- ▶ the integrity of the Court system and the integrity of the Prosecution service are protected,⁸⁸
- ▶ the introduction of new instruments such as videoconferencing,⁸⁹ webcasting of court sessions,⁹⁰ electronic means of communication, etc., is always done respecting the general principles of the ECHR;
- ▶ new measures, such as the creations of crisis response teams, cooperation and coordination mechanisms, guidelines to facilitate the Prosecutor’s work, alternatives to prosecution, non-custodial measures, etc. are introduced following the same perspective as described above.

When coming to the Prosecutors’ work outside the Criminal Law field, the Opinion makes clear that the same approach followed in the Criminal Law field should be applied “*mutatis mutandis*” there. In this case, and to ensure the integrity and fairness of the Prosecutors’ work “... the prosecution services may consult representatives of civil society (non-governmental organizations, foundations, charitable organizations, professional associations, etc.) where appropriate, and preferably prior to the introduction of new restrictive measures.”

As a result of the special nature of pandemics, existing functions of prosecution services and prosecutors may be extended. In that regard, Opinion N. 15 includes a number of examples, reported by Member States, including inspections in residential care homes, controlling supplies of foodstuffs, medicines, hygiene products, etc.⁹¹ In any case, the Prosecution services and Prosecutors should strive to ensure respect for human rights and freedoms in the course of application of emergency measures, not only in general, but also and in particular cases.

86. Paragraph 24 of the Opinion.

87. Paragraph 25 of the Opinion.

88. Paragraph 26 of the Opinion.

89. Paragraph 32 of the Opinion.

90. Paragraph 33 of the Opinion.

91. Paragraph 57 of the Opinion.

V. SOME FINAL NOTES

It is clear that the Public Prosecution Systems is currently under review in some Member States, as it has been mentioned throughout this work. Possibly, the Public Prosecutor's Office is undergoing more changes on the Continent than some other legal operators we are familiarised with.

Contrary to the Prosecutor, the Judge's role remains within an understandably stable scheme given that the task of judging does not offer excessive alternatives, as does the evaluation of evidence in the session court, for instance, even if it sometimes involves the use of sophisticated technological novelties. There may be exceptions, but in normal circumstances the expert shall, in due course, inform on its essential aspects and the Judge will be in a position to assess the evidence without excessive complications. That is precisely why the contributions made by the CCPE to the Public Prosecutor's Offices in Europe are of such particular importance. These Opinions are contributions that chart a way forward and it is therefore important to take them into consideration.

The Guide describes the activity, functions and tasks of the Council of Europe's Consultative Council of European Prosecutors (CCPE) and includes a compilation of the opinions prepared by the CCPE with special reference to those more representative regarding the subject matter they regulate.

The Guide is a practical tool for legal professionals to improve their practices related to the implementation of the recommendations issued by the Committee of Ministers for the Member States of the Council of Europe on matters that concern human rights, democracy and the rule of law.

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