



Strasbourg, 5 December 2008

CDL-JD(2008)004\*

Study No. 494 / 2008

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS ON**  
**EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE**  
**OF THE JUDICIAL SYSTEM:**  
**PROSECUTION SERVICE**

**by**  
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## The question of the independence of and non-interference in the prosecution

### I. General remarks

1. For years, the scope of independence the prosecution should enjoy has evoked discussion. That stems to a large extent from the fact that European standards allow for two different ways of resolving the position of the prosecution vis-à-vis other state organs.

*'Legal Europe is divided on this key issue between the systems under which the public prosecutor's office enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action. As a prevailing concept, it can be seen, that in the current situation the very notion of European harmonisation round a single concept of a Prosecutor's Office seemed premature.'* (Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the criminal justice System, Explanatory Memorandum p.11).

It should be noted, however, that at present the more widespread tendency is to search for solutions allowing for a more independent prosecutor's office rather than one subordinated or linked to the executive authority (government). Only a few of the countries belonging to the Council of Europe have a prosecutor's office forming part of the executive authority (eg Austria, Germany, Poland, the Netherlands). Currently, a draft has been prepared in Poland proposing amendments to the Law on Prosecutor's Office which would separate the role of the Ministry of Justice from that of Prosecutor General.

2. Apart from those tendencies, there also exists an essential difference as to how to concept of independence is perceived when applied to judges as opposed to the prosecutor's office. Even when quite closely linked to the courts, the Prosecutor's Office is not a court. Hence, the independence of the Prosecutor's Office by its very essence differs in scope from that of judicial independence. As individuals forming part of the Prosecutor's Office, a legal-protection organ, prosecutors enjoy the attribute of independence.

3. The principle of independence, to which prosecutors are entitled, is defined as a directive, whereby in the exercise of their legislatively mandated activities they need not obtain the previous approval of their superiors nor have those activities confirmed. However, unlike judges, the independence of prosecutors is not sovereign in that they are not subject solely to the Constitution and legislation. A characteristic feature of the Prosecutor's Office is the principle of hierarchic subordination which in a significant way also determines the nature of that organ's independence. Prosecutors are bound by the directives, guidelines and instructions issued by their superiors. In spite of those differences, Polish literature dealing with penal procedures in terms of independence has pointed out that the status of prosecutors approaches that of judges.<sup>1</sup>

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<sup>1</sup> (cc. S. Waltoś, *Prokuratura – jej miejsce wśród organów władzy, struktura i funkcje (The Prosecutor's Office — its position amongst organs of authority, structure and functions)*, „Państwo i Prawo” vol. 4/2002, p. 5; *ibid. Proces karny. Zarys systemu, (Penal proceedings. Outline of the System)*, Warsaw 2006, p. 167).

II. The Prosecutor's Office external independence.

4. An increasingly widespread tendency amongst the European states is the search for a model in which the Prosecutor's Office would be separated to a greater degree from the executive authority. Such a tendency is especially apparent amongst all the newer states of the Council of Europe that are preparing new solutions affecting the Prosecutor's Office. It should be emphasised, however, that the principle of independence alone, particularly the states that emerged following to collapse of the Soviet system, is no guarantee of a democratic prosecution model. On the contrary, it may lead to the creation of an all-powerful prosecutor's office, thereby posing a potential threat to the democratic functioning of other state organs, including courts of law.

5. It therefore bears reiterating that the concept of the prosecutor's office independence within the system of state organs, ie its separation from the executive authority, does not constitute a universally binding principle in every law-governed state. A Prosecutor's Office forming part of the executive authority does not contradict the essence of a law-governed state (eg Germany and Poland). Therein lies a major difference between the Prosecutor's Office and the courts. The independence of the judiciary and its separation from the executive authority is a cornerstone of the law-governed state, from which there can be no exceptions. The independence of the Prosecutor's Office is not as categorical in nature as that of the courts. One cannot therefore expect the acceptance of a uniform model for all states. Such pluralism of models is permitted by a Council of Europe Recommendation (Rec (2000)19). Its paragraph 13 contains basic guidelines for the government of those states where the public prosecution is part of or subordinate to the government.

Hence, linking the Office of Prosecutor to the government is admissible in a law-governed state.

6. However, in accordance with the principles of a law-governed state, there must exist organisational arrangements preventing the exertion of influence or political pressure on prosecutors. Legal guarantees for prosecutors in the conduct of cases and decision-making process need to be formulated.

7. Owing to the function performed by the Prosecutor's Office, some instruments overseeing it should be created, even when the principle of independence has been declared. Such instruments should subject the Prosecutor's Office to supervision and control making it publicly accountable for its overall performance. The submitting of reports by the Prosecutor General could be one such instrument. Whether such reports should be submitted to parliament or the executive authority should also be considered. That depends on the model in force as well as state tradition.

8. When organising the Prosecutor's Office, solutions linking that organ to the courts would seem preferable to a model of total independence in which the Prosecutor's Office would be separate from both executive and judicial authority. Entirely separating the Prosecutor's Office from government and judicial authority gives it a rather vaguely defined position within the system of state organs. In such cases, there repeatedly arises the question: does this not run to risk, especially in the so-called new democracies, of a fourth authority such as that exercised by prosecution organs in the Soviet-era system.

9. The manner in which the Prosecutor General is appointed and recalled plays a significant role in the system guaranteeing the independence of the Prosecutor's Office. The Prosecutor General should be appointed for a relatively long term not coinciding with parliament's term in office. That would ensure the greater stability of the prosecutor and make him independent of current political change.

In its opinions CDL-INF(1996)2 and CDL(1995)73, the Venice Commission stated as follows: *'It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However, it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the government.'*

10. A single, categorical principle cannot be formulated as to who — the president or parliament — should appoint the Prosecutor General in a situation when he is not subordinated to the government. The matter is variously resolved in different countries. Acceptance of the principle of cooperation amongst various organs seems a good solution, as it makes it possible to avoid unilateral political nominations. In such cases, a consensus must be reached. If it is decided to grant the President the right of appointment, then the right of submitting candidatures — for instance by a Council of Prosecutors, if such exists — should be clearly defined. If a given system does not envisage a Council of Prosecutors, the right of putting forward candidates should be granted to some other organ (a college of prosecutors) or independent institution. I personally do not favour parliament appointing the prosecutor, because that always runs the risk that a candidature will be more politicised.

To strengthen the independence aspect, it seems he should be appointed to one longer term than two shorter ones.

The law on the prosecutor's office would clearly define the conditions of the Prosecutor's pre-term dismissal. In the opinion of the Venice Commission (re Ukraine) one can find the following position: *'The grounds for such dismissal would have to be prescribed by law. (...) The Venice Commission would prefer to go even further by providing the grounds for a possible dismissal in the Constitution itself. Moreover, there should be a mandatory requirement that before any decision is taken, an expert body has to give an opinion whether there are sufficient grounds for dismissal'*.(CDL(2006)073).

11. A Council of Prosecutors is becoming increasingly widespread in the political systems of individual states. It is intended to play a part in the appointment of prosecutors. It would be difficult, however, to impose a single model of such a Council on all the states of the Council of Europe. Moreover, the existence of this Council cannot be regarded as a uniform standard binding on all European states.

12. It is therefore essential to concentrate to a greater degree on developing a catalogue of guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities in trial procedures are free of external pressure from outside the prosecutor's office as well as internal pressures within the prosecution system. (Clear directives on how to conclude a case issued by the superiors of the prosecutor handling it.) A thus conceived principle of independence is an instrument of fundamental character.

### III. Guarantees of non-interference

Since the Prosecutor's Office is organised along the lines of hierarchic subordination, it is necessary to define the guarantees of independence (of non-interference) of each prosecutor within the internal prosecution system.

13. The principle of hierarchic subordination means a prosecutor may receive certain instructions from his superiors. But the orders issued by a prosecution superior to a subordinate prosecutor may not pertain to case-related activities. They may not interfere in the content of individual case activities such as how a case is to be resolved. Such was the position of the Venice Commission:

*'All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.'*

14. One of the principles influencing the situation of a prosecutor's independence is the legally sanctioned ban on delegating a prosecutor (beyond a certain duration, eg six months) to another prosecutor's office without his consent. Such transfers (of longer duration) have in the past been used as an instrument for applying political pressure on the prosecutor.

15. Immunity. A prosecutor may not be put on trial or temporarily arrested without the consent of a disciplinary court. Detailed regulations should be contained in the law on the prosecutor's office.

16. The principle of a prosecutor's apolitical profile. A prosecutor may not be a member of any political party nor engage in any public activities that would conflict with the principle of his independence. Neither should a prosecutor become involved in any election campaign.

17. Incompatibility. A prosecutor may not hold other state offices or perform other state functions apart from holding the position of professor in an academic institution.