



Strasbourg, 23 November 2018

CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE)

Opinion No. 13(2018) of the CCPE:

«Independence, accountability and ethics of prosecutors»

I. INTRODUCTION, PURPOSE AND SCOPE OF THE OPINION

1. The Consultative Council of European Prosecutors (CCPE) was set up by the Committee of Ministers of the Council of Europe in 2005 with the task of formulating particularly opinions on matters concerning the implementation of Recommendation [Rec\(2000\)19](#) of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system.

2. Following the decision of the Committee of Minister adopted in this framework,^[1] the CCPE decided to prepare and adopt in 2018 an Opinion for its attention on the independence, accountability and ethics of prosecutors.

3. For this purpose, bearing in mind that many international instruments are already devoted to the independence of prosecutors, the CCPE relies in particular on its Opinion No. 4 (2009) entitled "Judges and prosecutors in a democratic society" (Bordeaux Declaration), adopted jointly with the Consultative Council of European Judges (CCJE), and recalls that the independence of public prosecution is an indispensable corollary to the independence of the judiciary. The CCPE refers also to its Opinion No. 9 (2014) entitled "European norms and principles concerning prosecutors" (Rome Charter), where it is mentioned that the general tendency to enhance the independence and effective autonomy of prosecution services should be encouraged, prosecutors should be autonomous in their decision-making and perform their duties free from external pressure or interference.

4. The CCPE, in this Opinion, addresses possible interferences into prosecutors' independence and pressures, in particular political pressures, exerted on them, as it has been observed in some member States. By gaining insight into the issues linked to independence, accountability and ethics, the CCPE seeks to raise awareness among prosecutors and relevant authorities as regards relevant developments and reforms in these areas.

5. The CCPE also takes into consideration the Council of Europe's Plan of Action on strengthening judicial independence and impartiality in member States,^[2] as well as the Report of the Secretary General of the Council of Europe – 2016 on the "State of democracy, human rights and the rule of law - a security imperative for Europe".^[3]

6. The CCPE recalls here, as it did in the course of its previous work, that the functions of prosecutors and the way in which they exercise them, should be consistent with respect for the right of individuals to a fair trial laid down in Article 6 of the European Convention on Human Rights (hereafter referred to as the ECHR). Prosecutors also exercise their functions within the framework of the rule of law principle, which requires respect for a certain number of fundamental values, such as impartiality, transparency, honesty, prudence, fairness, and contributing to the quality of justice. In order to increase public confidence in the justice system, prosecutors must always be concerned with making sure that these values are respected and that they guide prosecutors' activities.

7. In recent years, the European Court of Human Rights (hereafter referred to as the ECtHR) has developed important case law in support of the prosecutors' independence, regardless of whether they are considered to be a judicial authority or not. The prosecutor who directs and controls the first phase of

criminal proceedings is to be considered "the advanced watchdog of human rights" and this essential role is to be played throughout the process.[4]

8. In their systems of administrative and hierarchical organisation, member States, if they intend to confer or maintain the status of judicial authority for prosecutors within the meaning of the ECHR, should ensure that they have all the guarantees, in particular required for independence, attached to this status, as specified by the ECtHR case law.[5]

9. The tasks assigned to prosecutors vary from State to State in line with the systems in force. Thus, the legal systems of some member States provide for the principle of "legality" as the basis for prosecutions, some other member States provide for the principle of "discretion" or "opportunity"; others have a mixture of these principles. Some member States entrust prosecutors with a genuine supervision role over police and investigators and others do not; in some systems, prosecutors intervene in the hearing and in other systems their role in the criminal trial remains limited. In many member States, prosecutors enjoy competence in carrying out the public action and prosecution and in controlling the legality of investigations which will be submitted to judges as a basis for their decisions. They also sometimes have competence over the enforcement of sentences and the supervision of prisons.

10. The principles of independence, objectivity and impartiality set out in this Opinion and previous Opinions of the CCPE, concerning criminal cases, apply *mutatis mutandis* to non-criminal competences of prosecutors.

11. Finally, the CCPE wishes to recall - without repeating their content - some relevant international instruments in this field, such as those of the Council of Europe (in particular Opinions of the CCPE and the CCJE and the "European Guidelines on ethics and conduct of public prosecutors - the Budapest Guidelines")[6] and of other international organisations.[7]

12. In light of these instruments, and within a European context where the ways in which prosecutors carry out their tasks are permanently evolving, this Opinion does not aim to enact a fixed European code but rather a sort of "hard core" of principles that should be provided for the relevant authorities and guide prosecutors' daily action and their behaviour, both inside and outside their work, and to which they can refer.

13. The independence, accountability and ethics of prosecutors should be concepts included in a statute for prosecutors provided in national law, or even in the constitutions of member States.

14. Taking into account the proximity and complementary nature of the missions of judges and prosecutors, as well as of requirements in terms of their status and conditions of service,[8] prosecutors should have guarantees similar to those for judges.

II. CONCEPTS

Independence of prosecutors

15. "Independence" means that prosecutors are free from unlawful interference in the exercise of their duties to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind.

16. Independence applies both to the prosecution service as a whole, its particular body and to individual prosecutors in the sense explained below.

17. Prosecutors should exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial and prosecutorial independence or impartiality. While they are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they should not comment on pending cases and should avoid expressing views which may undermine the standing and integrity of the court. Prosecutors should abstain from political activities incompatible with the principle of impartiality.[9]

18. Prosecutors should be free to form and join professional associations to represent their interests, to protect their status and to promote their professional training.

Accountability of prosecutors

19. Being "accountable" means in particular:

- not to act arbitrarily;
- to base decisions on the law;
- to justify decisions whether based on the principle of legality or opportunity (discretion);
- to provide, as appropriate, reports to relevant stakeholders.

Ethics of prosecutors

20. "Ethics" means all guidelines setting out standards of conduct and practices, both in and outside their work, expected of all prosecutors working for or on behalf of a public prosecution service.

21. Respect for ethical rules is a fundamental duty that should guide the activities of prosecutors. It is important to be able to refer to compilations containing ethical principles of prosecutors which should govern their conduct.

22. The conduct of prosecutors, like that of judges, cannot be left to their sole discretion, be it within and outside their work. This is particularly important when assessing the activities of prosecutors and in disciplinary proceedings against them.

III. INDEPENDENCE OF PROSECUTORS

23. The mission of prosecutor is demanding and difficult: it requires professionalism, character, courage, balance and determination. The possession of these qualities must be a determining criterion in the recruitment of prosecutors and throughout their career. The process of legal education, selecting candidates and in-training should seek to ensure respect for such criteria. However, these personal requirements are not sufficient to ensure the independence of prosecutors. The status and independence of prosecutors should be clearly established and guaranteed by law.

24. In this regard, it is particularly desirable that, while ensuring respect for gender balance, the process of appointment, transfer, promotion and discipline of prosecutors be clearly set out in written form and be as close as possible to that of judges, particularly in member States which uphold the principle of the unity of the judiciary and which have links between the functions of judges and prosecutors throughout their careers. In such cases, provisions should preferably be established by law and applied under the control of an independent professional authority (for instance, composed of a majority of judges and prosecutors elected by their peers) such as a Council for the judiciary or for prosecutors, competent for the appointment, promotion and discipline of prosecutors. This is particularly relevant if prosecutors are to be recognised as judicial authorities within the meaning of Article 5 of the ECHR or to be given an indisputable role and authority in matters of individual rights and freedoms, in particular in new areas, such as the protection of personal data.

25. As a means to ensure the independence of prosecutors, clear mechanisms with regard to instituting prosecution or disciplinary proceedings against prosecutors should also be established. For instance, there is a special procedure established by law in some member States which enables the initiation of proceedings for administrative and/or criminal offences allegedly committed by prosecutors.

26. These provisions should also aim at preventing and resolving possible or real conflicts of interests and enabling prosecutors to ensure that the law is properly applied, without being exposed to pressure or measures contrary to their mission.

27. More generally, independence of prosecutors implies that they have sufficient means and also the authority, competence and powers necessary for the proper performance of their tasks. They should in particular be consulted on the determination of the resources necessary for their mission.

28. Appropriate training of prosecutors on the administration of their service and management of their resources should be provided, otherwise their independence could be significantly hampered.

29. Means of subsistence, comparable to those of judges, including proper remuneration, ensuring their material independence and their protection, as well as that of the members of their families, should be guaranteed to prosecutors. Such protection should include legal and physical protection of their life, health and property, as well as honour and reputation, against any violence, attack or pressure, and provide for corresponding state insurance.

30. The legal status of prosecutors on which their activities are based is too often unknown to the public and therefore misunderstood. Relevant information should therefore be made publicly available to avoid any misinterpretation of their role. The prosecution service should be involved in this process.

External independence and internal independence

31. Prosecutors must be independent in their status and behaviour:

- they must enjoy external independence, i.e. vis-à-vis undue or unlawful interference by other public or non-public authorities, e.g. political parties;
- they must enjoy internal independence and must be able to freely carry out their functions and decide, even if the modalities of action vary from one legal system to another, according to the relationship to the hierarchy.

32. In some legal traditions, public opinion associates public action by prosecutors with the exercise of political power, notably through Government. The case law of the ECtHR requires mutual independence between these two authorities, since its failure would ruin the legitimacy of the prosecutor's intervention in the preparatory phase and the conduct of the criminal trial, and in his/her fields of competence outside the criminal field.^[10] Indeed, the prosecutor should be the guarantor of respect for the law and the defender of society; he or she must not be an instrument in the interests of any social, political and religious group, any fraction in the government or the protector of its supporters. This requirement is particularly crucial whenever the prosecutor's intervention aims at combatting organised crime or corruption, or has an impact on individual rights and freedoms, in particular deprivation of liberty.

33. There is a general tendency for more independence of prosecutors and prosecution services, which is encouraged by the CCPE, although there are still no common accepted standards in this respect.

34. Respect for *external independence* does not prevent the prosecution service from receiving general instructions on priorities of prosecutorial activities as they result from the law, the development of international co-operation or requirements relating to the organisation of the service.

35. Such instructions should always be given in accordance with the law, in a fully transparent and written manner and the discussions to which they may give rise should never prejudice the personal situation of the prosecutor, including his/her career.

36. Instructions by the executive concerning specific cases are generally undesirable. In this context, instructions not to prosecute must be prohibited and instructions to prosecute must be strictly regulated in accordance with Recommendation [Rec\(2000\)19.\[11\]](#)

37. Courts should respect the prosecutors' independence. The intervention and the attitude of the prosecutor should leave no doubt as to his/her objectivity and impartiality. Judges and prosecutors should

both enjoy independence in respect of the execution of their functions and also be and appear to be independent from each other.

38. Prosecutors should respect the independence of the courts and the judiciary as a whole. They may challenge judges' decisions only through the remedies provided by law. Prosecutors should take all measures within their competence to protect the independence of courts.

39. *Internal independence* does not mean that every prosecutor is free to do anything; he or she may be subject to a hierarchy whose task is to ensure, in a clear way and without prejudice to independence, the proper functioning of the prosecution service as a whole and coherence, consistency and uniformity of action in the administration of justice and protection of human rights.

40. A hierarchical structure is a common aspect of most prosecution services. Internal independence does not prevent a hierarchical organisation of the service and the issuing of general recommendations or guidelines/directives on the application of the law to ensure consistency of law and jurisprudence or priorities for prosecutorial action. This is especially necessary in member States in which the "opportunity/discretionary principle" applies. All internal instructions within the prosecution service should be provided in writing, be transparent and aim at seeking the truth and to ensure the proper administration of justice.

41. Lines of authority, accountability and responsibility should be transparent in order to promote public confidence.

42. If a prosecutor receives individual instructions from his/her hierarchy which appear illegal or not in accordance with the professional code of ethics, he/she should not be compelled to comply with them and should be given the opportunity to present his/her reasons to his/her hierarchy.

43. Clear mechanisms should be established, which will allow lower level prosecutors to appeal against assignments or instructions of a superior prosecutor if they find that these assignments or instructions are illegal or unjustified.

44. The possibility of an appeal against decisions of prosecutors, be it an appeal to a superior prosecutor or to a court, when filed by victims, is in no way contrary to their independence but helps to increase their accountability, provided that it gives rise to proper consideration and the parties are kept informed of it.

45. The independence of prosecutors also requires material independence which implies, in the same way as for judges, financial and other means necessary for the exercise of their missions:

- prosecutors are often required to be on duty at night and on public holidays; they should be sufficient in numbers to meet these constraints and should receive adequate remuneration to avoid being discouraged from performing their duties in such situations;
- they should be provided with modern equipment and proper services (sophisticated performing computers and software, videoconferencing systems, access to translation services where necessary, etc.) adapted to their daily tasks and enabling them to communicate efficiently with law enforcement officers and courts, lawyers, parties and international partners, in a context of greater international co-operation, and geographical rationalisation of courts (judicial map) and modernisation of court systems;
- they should have appropriate staff support as well as access to relevant legal information (legislation, case law, etc.), to professional experts (in the fields of banking, economics, cyber security, biology, etc.) and to forensic examinations (DNA analysis, drug detection systems, etc.).

IV. ACCOUNTABILITY OF PROSECUTORS

46. In order to promote public confidence, prosecutors must be independent but also feel accountable. This accountability should be exercised with respect for individual rights and freedoms, including the presumption of innocence and protection of privacy. Clear published, and regularly updated, guidelines and codes of professional ethics and conduct would assist in promoting transparency, consistency, accountability and fairness.

47. The accountability of prosecutors is not meant to interfere with their independence. Although independent, prosecutors are accountable, in cases and the manner provided for in national laws:

- they should report, as appropriate, to the hierarchy, to parties and in particular to victims, to judicial authorities and other public officials and bodies, to civil society and to the media. They should explain their actions or provide information to the public in a proactive manner, particularly in cases that require public attention and concern; information may take the form of an annual report (general or on a particular aspect of crime within their jurisdiction), consist in explaining the causes of a failure or error in procedure or assessment or simply refer to the actual stage of an investigation or a procedure;
- they are subject, where appropriate, to disciplinary proceedings which must be based on a law, in the event of serious breaches of duty (negligence, breach of the duty of secrecy, anti-corruption rules, etc.), for clear and determined reasons; the proceedings should be transparent, apply established criteria and be held before a body which is independent from the executive; concerned prosecutors should be heard and allowed to defend themselves with the help of their advisers, be protected from any political influence, and have the possibility to exercise the right of appeal before a court; any sanction must also be necessary, adequate and proportionate to the disciplinary offence.

48. Unless they are found to have committed a disciplinary offence or to have clearly failed to do their work properly, prosecutors, similar to judges, may not be held personally responsible for their choices of public action once they have been the result of a personal intellectual and legal analysis.

49. Member States should redress the damage stemming from prosecutors' professional action or omission and prosecutors should not be held personally liable for such damage, except in cases of deliberate offences and/or gross negligence.

50. Prosecutors should not benefit from a general immunity, but from functional immunity for their actions carried out in good faith in pursuance of their duties^[12]. The prosecutor should, however be criminally liable for any offences committed, including in the course of administration of justice, in accordance with national law.

V. ETHICS OF PROSECUTORS

51. The respect for the rule of law requires the highest ethical and professional standards in behaviour of prosecutors, as for judges, both on duty and off, which allows confidence in justice by society. Prosecutors act on behalf of the people and in the public interest. They should therefore always maintain personal integrity and act in accordance with the law, fairly, impartially and objectively, respecting and upholding fundamental rights and freedoms, including the presumption of innocence, the right to a fair trial, and the principles of equality of arms, separation of powers, and binding force of court decisions. They have a duty to be free from political or other influence.

52. The ethical rules of prosecutors should preferably be specified by law and take the form of codes of ethics, prepared and made public by national statutory and/or disciplinary bodies such as Councils for the Judiciary or for prosecutors. When elaborating such national codes of ethics, the appropriate international documents should be taken into account. Hereafter, as a matter of reference, some of the most relevant ethical rules concerning prosecutors' activities can be found.

53. Prosecutors have an obligation of neutrality and should act independently of their personal preferences, social background, relationships, political, philosophical or religious beliefs; they should respect

diversity and refrain from bias or prejudice or discrimination. Prosecutors cannot accept any form of harassment, racism or discrimination, or any other forms of inappropriate behaviour in their workplace.

54. They should be, and appear to be, impartial in their decisions, be transparent, avoid conflicts of interest and not favour any party because of any connection with it. Where there is a risk that the prosecutor may not have sufficient distance from that person, he or she should refrain from handling the case. Prosecutors should also avoid any possibility of undue pressure (e.g. by media). Prosecutors should abstain from political activities incompatible with the principle of impartiality and should not act in cases in which their (or their family's) personal interests could hamper their full impartiality and objectivity.

55. They must demonstrate absolute integrity in their behaviour and not accept any kind of benefits or remuneration linked to the content of their choices, nor maintain career ambitions that may improperly guide their decisions (for example to please a particular political or administrative authority).

56. They should be guided only by the will to ensure compliance with the law and should always ensure that they provide a clear, reasoned and transparent legal basis for their decisions.

57. Where they supervise investigations and/or police actions, prosecutors should seek to ensure that investigations are conducted independently and in accordance with the law, and play an active role in the protection of the rights of the defence and ensuring equality of arms. In such cases, they should ensure that any restrictions of individual freedoms and privacy are necessary, adequate and proportionate to the legitimate aim pursued, in particular in terrorism or other public security cases.

58. Prosecutors should seek to ensure that all necessary and reasonable enquiries and investigations are made before taking a decision in relation to a prosecution and proceed only when a case is founded upon evidence assessed to be reliable and admissible. Prosecutions should be firmly but fairly conducted and not beyond what is indicated by the evidence.

59. Prosecutors should not use evidence obtained through a grave violation of human rights, should seek to ensure that such evidence is not accepted by courts and that appropriate sanctions are taken against those responsible.

60. Prosecutors should be driven by attention to others in their legitimate expectation of justice. This attention should be particularly directed towards the most vulnerable: victims, witnesses, the elderly, children and juveniles, persons with disabilities, persons without resources or having difficulty in understanding the situations they face, foreigners cut off from their familiar environment and/or not understanding the language and the procedure.

61. When performing their duties, whether in their service, during the investigation or at the hearing, prosecutors should observe discretion and reserve; in particular, they should refrain from expressing political, philosophical or religious convictions, personal hostility or showing contempt or violent attitude towards any person on account of the antipathy which his/her conduct might inspire, even if seriously reprehensible.

62. When their mission authorises them to make statements or communications in cases with which they are familiar, prosecutors should ensure that they do not jeopardise the life or physical integrity of those involved in the proceedings (namely victims and witnesses) or the work of investigators by revealing on-going investigations, that they do not violate the principle of the presumption of innocence and do not unduly damage the honour and reputation of others on mere assumptions.

63. Ethics education should be offered in initial and in-service training.

64. Since the ethical issues faced by prosecutors are increasingly varied, complex and evolve over time, member States should provide available mechanisms and resources (specific independent bodies, experts within the Councils of Justice or prosecutorial councils, etc.) to assist prosecutors as regards the questions they raise (for example, whether or not to recuse themselves from a case because of a possible conflict of

interests and knowledge or prejudices they may have, or the possibility for them to have supplementary activities such as arbitration, etc.).

65. Member States should ensure that prosecutors are protected from any disadvantages resulting from compliance with the ethical rules attached to their office and, in particular, from intimidation, isolation or career setbacks that may result therefrom.

VI. INTERNATIONAL CO-OPERATION

66. While the systems of social, political, legal and administrative organisation differ from one member State to another, the common adherence to democratic values facilitates the development of similar legal solutions and of opportunities for co-operation between prosecutors from different member States.

67. With the support of their administrations, prosecution services and, where appropriate, prosecutors themselves, should therefore benefit from it and promote opportunities to exchange information on good practices regarding independence, accountability and ethics. To this end, information exchange networks, bilateral and multilateral international seminars, training courses, twinning arrangements and all means of mutual benefit through this co-operation should be developed.

68. This international co-operation should also include issues relating to the protection of independence, accountability and ethics in the future.

RECOMMENDATIONS

- i. Appropriate provisions should be adopted in member States, in parallel to the independence of judges, to strengthen the independence, accountability and ethics of prosecutors, whether in the criminal law field or as regards their other fields of competence. Political influence should not be acceptable.**
- ii. Member States, while ensuring respect for gender balance, should ensure that prosecutors are selected on the basis of their skills and moral and ethical values, and receive adequate initial and in-service training to carry out their functions with independence, impartiality, accountability and full respect for ethical standards. They should facilitate the provision of relevant information and advice to prosecutors on these matters.**
- iii. The status, independence, recruitment and career of prosecutors should, similarly to judges, be clearly established by law and governed by transparent and objective criteria. Member States should guarantee a status for prosecutors that ensures their external and internal independence, preferably by provisions at the highest legal level and guaranteeing their application by an independent body such as a Prosecutorial Council, in particular for appointments, careers and discipline.**
- iv. Instructions by the executive concerning specific cases are generally undesirable. In this context, instructions not to prosecute must be prohibited and instructions to prosecute must be strictly regulated in accordance with Recommendation [Rec\(2000\)19](#).**
- v. Internal independence does not prevent a hierarchical organisation of the prosecution service and the issuing of general recommendations on the application of the law to ensure coherence and consistency of law and jurisprudence or priorities for prosecutorial action.**
- vi. If instructions are given to prosecutors, they should be given in writing, in a fully transparent manner and always with the objective of applying the law while respecting rights and freedoms, without restrictions disproportionate to the legitimate objective pursued.**

- vii. **Appropriate information on the prosecution service and prosecutorial activities should be made widely available to the general public. Prosecutors should play a key role in disseminating such information. While ensuring respect for their independence, the principle of the presumption of innocence, the needs of the investigation and the protection of personal data, prosecutors should report on their activities and results to their hierarchy and to other public authorities, with whom they work, as well as to the public through appropriate channels and in accordance with the law.**
- viii. **When their mission authorises them to make public statements on cases within their competences, prosecutors should ensure that they do not jeopardise the life or physical integrity of those involved in the proceedings or the work of investigators by revealing on-going investigations and that they do not violate the principle of the presumption of innocence.**
- ix. **Member States should protect prosecutors and, as appropriate, members of their families, when carrying out their functions.**
- x. **The promotion of prosecutors should be based on merit.**
- xi. **The status, remuneration and treatment of prosecutors as well as the provision of financial, human and other resources for prosecution services should correspond, in a way comparable to those of judges, to the eminent nature of the mission and the particular duties of prosecutors.**
- xii. **In their systems of administrative and hierarchical organisation, member States, if they intend to confer or maintain the status of judicial authority for prosecutors within the meaning of the ECHR, should ensure that they have all the guarantees, in particular those required for independence, attached to this status.**
- xiii. **Prosecutors should seek to continuously develop their legal, ethical and social knowledge in order to properly fulfil their mission.**
- xiv. **Codes of ethics should be adopted and made public. Prosecutors should respect rules of ethical conduct in accordance with the highest standards, regularly updated in relation to the development of society and emerging issues. They should observe discretion and reserve corresponding to their functions, so that their independence, objectivity and impartiality cannot be put into doubt.**
- xv. **Where they supervise investigations and/or police actions, prosecutors should ensure that restrictions of individual rights and freedoms and privacy are necessary, adequate and proportionate to the legitimate aim pursued. They should pay particular attention to the most vulnerable persons, in particular the victims of crime, and to the rights of the defence.**
- xvi. **Prosecutors should take all measures within their competence to respect and protect the independence of courts.**

- xvii. **In the context of international co-operation, in order to enrich their practices and further reflect on their mission, prosecutors should communicate with their foreign partners. Information exchange networks, training institutions, liaison prosecutors, international seminars, training courses, the twinning arrangements can be particularly useful for these purposes. It is also worth noting in this context the importance of international associations of judges and prosecutors, whose task is to defend the independence, ethics and individual and social accountability of judges and prosecutors in a State governed by the rule of law and which, as a result, can play a key role in disseminating the values mentioned in this Opinion.**

Annex

Selection of the case law of the ECtHR concerning the prosecutors' status and activities

The ECtHR stated that the absence of the prosecutor at the hearing could lead to a violation of the principle of a fair trial.^[13]

The ECtHR considered the question of independence of prosecutors with regard to compliance with Article 6 §1 (fair trial) of the ECHR when the prosecution service was one of the parties to the trial challenged by the applicant.

In the case *Zinsat v. Bulgaria* of 15 June 2006 (57785/00), the ECtHR challenged the fact that the prosecutor had substituted himself for a court, deciding to act on his own, without effective remedy.

The ECtHR has also endeavoured to verify the compliance with the requirements of Article 5§3 of the ECHR when the supervision of detention was entrusted to a prosecutor. It considered that when this control was entrusted to a prosecutor, the latter must in any case be independent, impartial, able to control the validity of the measure and be competent to order the release.

This is the meaning of the judgment *Schiesser v. Switzerland* of 4 December 1979 (7710/76), in which the need for the independence of the prosecutor vis-à-vis the executive and the parties was affirmed.

If the member States wish the prosecution service to be recognised as a judicial authority within the meaning of the ECHR - a quality to which the prosecutors of the countries concerned are very attached - the member States must take into account that in a few judgments, the ECtHR decided that the prosecution service did not meet the criteria for being recognised as a judicial authority within the meaning of Article 5 of the ECHR.^[14]

The ECtHR is very demanding with regard to the independence of prosecutors, but this should not lead to interpreting this requirement one of mistrust, or even as a depreciation of the role of prosecutors in the judicial process, quite the contrary. As Mr André Potocki, judge of the ECtHR in respect of France noted at a conference held in Paris on 17 May 2018 before the Network of Prosecutors General of the Supreme Courts of the European Union, the prosecutor who directs and controls the first phase of criminal proceedings is also and at the same time, "the advanced watchdog of human rights".

[1] 1300th meeting of Deputies Ministers, 21-23 November 2017.

[2] Prepared at the initiative of the Secretary General of the Council of Europe and adopted at the 1253rd meeting of Deputies Ministers, 13 April 2016.

[3] Presented at the 126th Session of the Committee of Ministers, 18 May 2016 (Sofia).

[4] See the selection of the case law of the ECtHR concerning the prosecutors' action in the annex to the present Opinion.

[5] See the selection of the case law of the ECtHR concerning the prosecutors' action in the annex to the present Opinion.

[6] Adopted at the Conference of Prosecutors General of Europe on 31 May 2005. See also documents of the Venice Commission (in particular, the Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service adopted in December 2010, CDL-AD(2010)040).

[7] See, for instance, instruments and documents of the European Network of Councils for the Judiciary (ENCJ) (in particular, the Report 2014-2016 entitled "Independence and Accountability of the Prosecution"), of the United Nations (in particular, Guidelines on the Role of Prosecutors (1990), the Convention against Corruption of 2003), those of the International Association of Prosecutors (in particular, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors of 1999), as well as the Status and Role of Prosecutors which is a Guide jointly adopted by United Nations Office on Drugs and Crime and the International Association of Prosecutors in 2014.

[8] See Opinion No. 9 (2014) of the CCPE, Explanatory Note to the Rome Charter, paragraph 53.

[9] See Opinion No. 9 (2014) of the CCPE, Explanatory Note to the Rome Charter, paragraphs 81-82.

[10] See the selection of the case law of the ECtHR concerning the prosecutors' action in the annex to the present Opinion.

[11] See paragraph 13(d) of Recommendation [Rec\(2000\)19](#): “Where the public prosecution is part of or subordinate to the government, member States should take effective measures to guarantee that 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;
- 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.”

[12] See Opinion No. 9 (2014), Rome Charter, paragraph X.

[13] See ECtHR *Karel v. Russia* of 20 September 2016 (926/08).

[14] See ECtHR *Medvedyev v. France* [GC], 29 March 2010, no. 3394/03; *Moulin v. France*, 23 November 2010, no. 37104/06; *Jasinski v. Poland*, 20 December 2005, no.30865/96; *Vasilescu v. Romania* (from the point of view of the concept of court within the meaning of Article 6§1), 22 May 1998, no. 27053/95 ; *Pantea v. Romania*, 3 June 2003, no. 33343/96; *Assenov and others v. Bulgaria*, 28 October 1998, no. 24760/94, §149.