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

**Opinion N°2 (2008)
of the Consultative Council of European Prosecutors**

on

“Alternatives to prosecution”

adopted by the CCPE at its 3rd Plenary Meeting
(Strasbourg, 15 – 17 October 2008)

INTRODUCTION

1. The Consultative Council of European Prosecutors (CCPE) was set up by the Committee of Ministers on 13 July 2005 to prepare opinions on issues related to the prosecution service and promote the effective implementation of Recommendation Rec(2000)19 of 6 October 2000 on the role of public prosecution in the criminal justice system.
2. Article 3 of this Recommendation states that "*in certain criminal justice systems, public prosecutors (...) decide on alternatives to prosecution*". Article 24-c of this Recommendation also provides that public prosecutors should in particular "*seek to ensure that the criminal justice system operates as expeditiously as possible*".
3. This Opinion was prepared in accordance with the Terms of Reference given to the CCPE by the Committee of Ministers¹, taking into account the Framework overall action plan for the work of the CCPE² and the conclusions of the Conference of Prosecutors General of Europe held in Celle (Germany) on 23 - 25 June 2004 on the theme: "Discretionary powers of public prosecution: opportunity or legality principle - advantages and disadvantages".
4. At this Conference, the Prosecutors General of Europe noted with satisfaction a tendency for the goals pursued in Europe to be harmonised around the principles of public interest, the equality of all persons before the law and individualisation of criminal justice, in accordance with the Recommendation Rec(2000)19. The Conference of Prosecutors General of Europe called for the application of the following principles:
 - a. there should be the possibility of choice between the criminal justice response and other types of response to criminal acts, whatever system of mandatory or discretionary prosecution operates, while bearing in mind that it is necessary in the public interest to punish serious offences;
 - b. the need for an alternative to prosecution to be serious, credible and capable of preventing re-offending, while taking into account the interest of the victims;
 - c. the need for an alternative to criminal procedure to be applied in accordance with the stipulations of the law, balancing the rights of the victims with objectively fair and impartial treatment of the offender.
5. In drafting this Opinion, the CCPE also considered the following Recommendations of the Committee of Ministers Rec(87)18 concerning the simplification of criminal justice, Rec(85)11 on the position of the victim and Rec(99)19 concerning mediation in penal matters as well as the work of the Council of Europe in the field of restorative justice³. It also took into account the Framework Decision of the Council of the European Union of 15 March 2001 on the standing of victims in criminal proceedings.⁴
6. To address this issue, the CCPE decided to carry out a study on alternatives to prosecution in order to identify and promote the best practices followed in the Council of Europe member states. For this purpose, it conducted a survey among the national members of the CCPE, asking them to deliver their answers in order to sustain the discussion to be held on this theme at the 2nd plenary meeting of the CCPE (Strasbourg, 28 – 30 November 2007). This Opinion takes into account the replies by 23 member states.

DEFINITIONS

7. For the purposes of this Opinion, "alternative measures to prosecution" are understood to mean measures which go together with final, temporary or conditional discontinuation of prosecution where an offence has been committed, that would otherwise render the perpetrator liable to a criminal sanction

¹ Terms of reference adopted at the 1019th meeting of the Ministers' Deputies (27 February 2008).

² Approved by the Committees of Ministers at the 981st meeting of the Ministers Deputies on 26 November 2006.

³ See in particular the Resolution N°1 adopted during the 27th Conference of the European Ministers of Justice (Yerevan 12 – 13 October 2006).

⁴ 2001/220 JHA.

such as a suspended or unsuspended prison sentence or fine, together with ancillary penalties such as deprivation of certain rights.

8. Consequently, it is agreed that the procedure of “pleading guilty” before a court does not come within the scope of this Opinion, as it does not obviate criminal proceedings and leads to a conviction.
9. Likewise, the “discharge” that exists in some member States is not regarded as an alternative to prosecution, since it follows a conviction.

GENERAL CONSIDERATIONS

10. Recourse to alternative measures to prosecution is not in contradiction with Europe’s mainstream system of mandatory prosecution, usually to be understood in these terms: for each offence against the law there is a response, without the type of response being limited to sentencing alone; such measures are known in all systems.
11. Some member states have the discretionary prosecution system. Other member states have the mandatory prosecution system, but their codes of criminal procedure provide for such exceptions as:
 - cases where prosecution is plainly inexpedient having regard to the stated objectives, one of which is to prevent the recurrence of the offence;
 - cases where financial or other redress is made;
 - cases involving a juvenile offender.
12. In some countries, the obligation to prosecute can only be avoided for juveniles, in the context of “reformatory measures” and in very special cases concerning petty offences committed by first-time offenders, or where an offence of medium gravity is sincerely regretted.
13. The prosecuting authority in most countries is in an especially good position to propose and see to the application of alternatives validly constituting a judicial response to the offences committed. Sometimes, this is a matter of the prosecutor’s sole choice but the judge may need to assent to this arrangement to discontinue the proceedings.
14. In other countries however, the prosecutor’s role is far less significant than that of the judge, who has sole decision as to discontinuation, the prosecutor being bound to strict observance of the principle of mandatory prosecution.
15. Alternative measures have to be consistent with the goals by which the action of criminal justice must be guided, namely to prevent re-offending, assist redress of the damage incurred by society, have regard to the interest of victims, uphold the rights of the defence, form a valid response to illegal acts, and to avoid the repetition of the offence.
16. Legislation in some countries stipulates that alternative measures should be used when a criminal sanction appears unnecessary to avert repetition of the offence.
17. The concept of an act not significantly threatening society is reflected in the legislation of many countries. However, the use of alternative measures to prosecution is sometimes strictly framed as regards the most serious types of crime such as trafficking in human beings or terrorism and the serious crimes where public interest is deeply involved.
18. Alternative measures to prosecution, whose range of possibilities can be progressively enriched, illustrate an evolutionary phase in the development of society and the modernisation of justice (which is most welcome) vis-à-vis the traditional system consisting solely of suspended or non-suspended prison sentences or fines, particularly in respect of juvenile offenders or juveniles who have not previously been convicted.
19. These measures are conducive to acceptance of the judicial response by the offender and possibly the victim, if the latter is suitably associated with them. Sometimes the code provides that the victim can object to a prosecution being dropped. This is done through a review of the decision taken by the prosecution authority, either to the hierarchical superior of the prosecutor or to the higher instance court. In some member states, there is no alternative measure without the victim’s agreement.

20. Alternative measures also have the advantage of not making offenders social outcasts, and instead encouraging their rehabilitation: in some countries the criminal procedure recommends the adoption of such measures when the offence seems to have been the outcome more of thoughtlessness than of disregard for laws and legal prohibitions.
21. Alternative measures often make redress more visibly meaningful to society than mere payment of money (too superficially conscience-salving) or imprisonment.
22. As alternatives to imprisonment, they lower the prison population in a Europe where many prisons are overcrowded and the prison budget often takes up a crippling proportion of the justice budget.
23. Alternative measures can reduce the workload of courts, but often present the prosecution departments with a very large amount of work in arranging them.
24. However, they are not to be regarded as measures of a better use of means; in fact they require considerable material resources – premises especially – and human resources, careful preparation, public education and information about the nature of alternative measures to prosecution, well-trained individuals of calibre to implement and follow them up (for example mediators), alongside the prosecutors; these people must receive suitable remuneration and be professionals rather than philanthropic volunteers, just as associations discharging public service functions qualify for subsidies.
25. In some member states the legislation enumerates and restricts the cases where alternative measures can be applied. In other cases, this is done through non binding legal instruments. In accordance with Recommendation Rec(2000)19⁵ and with a view to promoting a fair, consistent and efficient activity of public prosecutors in this field, members states should seek to:
 - define general guidelines for the implementation of this criminal policy;
 - define general principles and criteria to be used by way of references against which decisions of individual cases should be taken, in order to guard against arbitrary decision making.
26. The public must be informed of the above-mentioned system, guidelines, principles and criteria. It is advisable that specific arrangements be drawn up aimed at giving an account of the concrete implementation of the above mentioned guidelines.
27. Before adopting alternative measures to prosecution, the economic, administrative and structural conditions should be evaluated to check the ability to implement these measures in a practical and concrete manner.

EXAMPLES OF ALTERNATIVES TO PROSECUTION FROM THE PRACTICE OF THE COUNCIL OF EUROPE COUNTRIES

28. Various good practices for implementing alternative measures to prosecution can be noticed in the member states of the Council of Europe. The CCPE wishes to draw the attention to some of them.
29. The “rappel à la loi” (judges' warning) is very frequently employed in some member states where it is called a “caution” when issued with some formality by a specially qualified facilitator, and particularly for minors: the prosecutor or any competent judicial authority holds a serious talk with the offender or his/her representative, during which the latter must be reminded of the legal provisions and the risks of punishment incurred for renewed lawbreaking. The objective is to foster realisation by offenders of the consequences of their act for society, the victim and themselves. This warning is used in the case of minor disturbances to society or to individuals committed by persons with no previous conviction. Another similar formula is applied in systems of restorative justice, which involves discussion concerning the gravity of the acts, etc.
30. Offenders can be referred to a medical, social or professional facility: the prosecutor or any competent judicial authority enjoins the perpetrator of the wrongful acts to contact a designated type of body, for instance an association where he/she will undergo training or instruction on a theme related to the offence; for example, in the case of traffic offences, a course which includes, in addition to driving regulations, encounters with persons severely disabled as a result of accidents, and will help offenders realise the consequences of bad driving. Another example: where the upbringing of juveniles is seriously

⁵ See para 36 of the Explanatory Memorandum.

deficient, a course in "parenting" may be offered to parents "unable to cope". For an alcoholic offender: food hygiene services may organise sessions; for young offenders guilty of disorderly or racist or antisocial conduct, instruction in citizenship may be proposed so that the minors realises the seriousness of their acts and alter their conduct.

31. The regularisation of a situation which constitutes an offence tends to dispel rapidly and effectively the disturbance arising from the breach of the law: for example, drivers unable to produce a driving licence at a road check will be invited to do so the next day. In the field of environmental protection and town planning, restoration to the original condition is often a particularly suitable and deterrent remedy though the work that it entails.
32. The suffering caused by the acts can sometimes be redressed, whether by return of fraudulently transferred property, or by monetary compensation, or by apologies to the victim. Redress is sometimes arranged as part of a process of mediation between the culprit and the victim which ascertains the parties' agreement on the conditions thereof and, where contact between them is likely in future, guards against a fresh offence - community work for instance.
33. Criminal reparation for juvenile offenders can be an educational action to which a minor is bound, for instance unpaid work in the home of an elderly person, a letter of apology to a victim, etc.
34. Family separation may be imposed on a perpetrator of domestic violence.
35. The person can be placed under observation with no subsequent criminal action against him/her if he/she is no longer suspected of having committed or intending to commit further offences.
36. Settlement can be proposed to the offender, who accepts a sanction which will be validated by justice: handing over the driving licence, unpaid work, being forbidden to appear in certain places, payment of a sum of money. This arrangement, validated by a judge, is very like a plea of guilty but regarded as an "alternative to prosecution" in that it does not constitute a conviction as such and is not placed on the record of convictions. In some countries the fiscal fine can be found as a kind of alternative measures.
37. Instruction can be given to drug addicts to have treatment (in some countries criminal proceedings are no longer brought for the simple use of narcotics; treatment is in fact preferred).
38. In some countries, consideration is also given to the motives for the act and to the author's demeanour: certain motives such as racism, discrimination or gender may preclude any recourse to an alternative.
39. "Active repentance" may be applied under the following conditions: commission of the offence being not serious and for the first time; surrender of the offender with his/her full admission of the guilt: assistance in detection of the offence; the offender becomes a collaborator to the justice system: reparation of the damage incurred as a result of the offence and the offence has no more social danger due to such repentance.
40. Mediation and conciliation in criminal matters can usefully be implemented, where appropriate, together with alternative measures to prosecution.
41. If the persons concerned comply with the alternative measures, they are not prosecuted. In some countries, reference to the measure does not appear in the record of convictions. Otherwise, when the measure is not followed, prosecution and conviction may be considered by the prosecutor.

PLACE OF THE VICTIM

42. It is essential that the rights of victims be safeguarded and, in states recognising discretionary prosecution, that victims, whether individuals or officially entitled groups, be able to seek a review if the complaint has been dropped as a result of an alternative measure to prosecution. In some countries, it even rests with the victim, in certain restrictively defined cases of offences not damaging to the community, to decide whether or not a prosecution should be brought.
43. The alternative measure should moreover represent a sound response proportionate to the offence committed and to the disruption or suffering which it has caused.

44. It appears particularly desirable and effective in preventing the development of vigilante tendencies, lack of understanding towards victims and persistence of dangerous disputes, to associate victims in choosing the procedure and determining the substance of the measure (case of mediation, redress or composition).

CONCLUSIONS

45. In the light of the survey conducted among the Council of Europe member States, and in accordance with the recommendations of the Conference of Prosecutors General that preceded it, the CCPE is of the opinion that:
- a. a modern criminal justice suited to the needs of our societies should use alternatives to prosecution when the nature and the circumstances of the offences allows this and the relevant state authorities should ensure the provision of public education and information about the nature and advantages in the public interest of alternative measures to prosecution;
 - b. the imposition of financial penalties and prison sentences, in itself, does not constitute a sufficiently effective and sensitive response to the lawbreaking of the early 21st century, whether to guard against re-offending, redress damage, extinguish disputes, or meet the expectations of society and victims;
 - c. member states should take into account instruments and new possibilities forming suitable and various responses to crime;
 - d. with a view to promoting a fair, consistent and efficient activity of public prosecutors, clear rules, general guidelines and criteria should be defined for the implementation of the criminal policy related to alternatives to prosecution; the relevant state authorities are therefore advised to adopt such provisions which will be made public in order to effectively implement such alternative measures;
 - e. alternative measures must be applied fairly and consistently in accordance with national guidelines, where they exist, in accordance with the principle of equality before the law and with a view to guarding against arbitrary decision-making in individual cases.
 - f. in order to guarantee transparency and accountability, prosecutors should be able to report on the reasons of using alternative measures at local, regional or national level, through the media or public reports, while not interfering unjustifiably in the independence or autonomy of the prosecutor;
 - g. appropriate material and human resources should be allocated to public prosecution services and other relevant state authorities so that an efficient, relevant and rapid reply can be given through alternative measures;
 - h. the introduction of alternative measures should not be guided by motives of economy but with a view to achieving high-quality justice, speedy and effective outcomes;
 - i. prosecutors should initiate and where they have the necessary powers apply effectively such alternative measures; there should be no undue intervention in the activities of prosecutors when they use their discretionary powers in relation to such measures;
 - j. member states and the relevant public authorities should develop relevant training structures and programmes and support associations and professional organisations capable of providing quality assistance in implementing alternatives to prosecution;
 - k. alternative measures must safeguard victims' interests and moreover allow them to be more fully taken into account through the quality of redress, the speed of the response, and, as appropriate the dialogue thereby opened between offender and victim;

- l. alternative measures to prosecution should never deprive victims of their rights to request that their rights are safeguarded;⁶
 - m. alternative measures should never lead to circumvention of the rules of fair trial by imposing a measure on a person who is innocent or could not be convicted owing to procedural obstacles such as time-limits on prosecution, or when there is doubt as to the responsibility of the offender identified or the extent of the damage caused by the offence;
 - n. the acceptance of one alternative measure should preclude, once executed, any prosecution in respect of the same facts (*ne bis in idem*);
 - o. if suspects are offered an alternative measure, they should be informed whether a refusal or unsatisfactory compliance on their part renders them liable to criminal prosecution;
 - p. member states and the relevant public authorities provided especially by the information gathered by the CCPE could take account of good practices followed in other systems, in order to enhance the quality of their responses to crime;
 - q. member states may consider the issue of concluding bilateral or multilateral agreements in order to apply in the territory of another state certain alternative measures such as treatment orders, driver instruction, or parenting courses, etc.
46. The CCPE recommends that the Committee of Ministers of the Council of Europe considers the issue of alternative measures to prosecution with regard to their effective application in member states as well as to the possible elaboration of proper binding and non-binding instruments on alternative measures to prosecution and their transfrontier enforcement.
47. The CCPE wishes to invite to one of its meetings one or more prosecutors from different judicial systems, identified as having worked on the effective implementation of alternatives to prosecution, in order to receive his/her/their experience and prepare an audiovisual document for circulation to the competent authorities.
48. The CCPE is available to cooperate with the CDPC, the CCJE and the CEPEJ in order to bring the viewpoint of the prosecutors whom it represents to the proceedings of these bodies on the issue of alternative measures to prosecution.

⁶ See the Recommendation N° R(85)11 of the Committee of Ministers on the position of victim in the framework of criminal law and procedure.