Investigation and Prosecution: Framework of Investigations

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I. Introduction

The main aim of this chapter is to give an overview of the possibilities for administrative and judicial criminal investigations. In the classic French tradition the judicial investigation is carried out by or under the authority of the Public Prosecutor or the examining/investigating judge. In some systems/jurisdictions, the judicial investigation is carried out by the police or some special inspectorate or law enforcement authority (customs, for instance). Who are they? What type of powers do they have? Are they judicial investigative authorities using powers provided in the Code of Criminal Procedure or in special legislation (of a civil or military nature)? What are the relationships between the Public Prosecutor, the investigating judge and the other law enforcement authorities? The Questionnaire has been used as a guideline for the structure. Legislation, case law and jurisprudence/doctrine (constitutional law, criminal law, criminal procedure, administrative procedure) have been taken into account and thanks to the project meetings in Trier and further questioning, information about the law in action (actor and practice) could be obtained.

The objective of this study is to a large extent linked to economic and financial crimes. Many of these crimes concern tax and customs matters. This is the reason why the questionnaire and the responses thereto could not be limited to the Criminal Code and the Code of Criminal Procedure, but also had to take into account the special legislation (such as customs and tax legislation or agricultural legislation, or special legislation concerning organised crime, corruption, money laundering, etc.). Finally, the regulatory framework of the investigation is not limited to criminal procedure, but also includes administrative law and police legislation (and even military legislation).

The result of this is that the questions about investigation deal with a complex area of regulatory power and enforcement activity. However, for far too long, even in Western European legal tradition, the (judicial) investigation was only to a small extent regulated by criminal procedure. Most of the (judicial) investigation was carried out under police law, administrative law or in what may be termed a legal no man's land. Recently, with the regulation of police cooperation and with the regulation of the pro-active or special investigative techniques there is an increasing consciousness concerning the necessity to provide for global regulation of the judicial investigation, in order to seek a good balance between investigative powers and procedural safeguards under the rule of law.

Investigation, prosecution, rights of the defence and evidence are to a certain extent overlapping issues. For that reason issues dealing substantially with prosecution, rights of the defence and evidence are dealt with in the relevant chapters of this book. These issues, however, have been indirectly taken into account in this chapter.

Issues concerning OLAF are dealt with in the chapter concerning cooperation.

II. The legal status and nature of the investigative authorities

1. Comparative part

Bulgaria

In the Bulgarian legal system the classic main actors are present: administration, the police and the Public Prosecutor. However, we can still see a remnant of the Russian legal system – the investigator.

The administration generally deals with administrative enquiries with the aim of compliance and the verification of, for instance, tax and customs duties. Under certain statutes the administrative authorities have the jurisdiction to impose administrative sanctions. When during an administrative enquiry suspicions arise that an offence has been committed, in principle the case must be transferred to the Office of the Public Prosecutor. However, both the Code of Criminal Procedure and the Customs and Tax Statutes provide for judicial powers for the customs and tax authorities under specific circumstances. This means that the administrative authorities can, under specific conditions (restricted competence), have the status of judicial police.

The police authorities are authorities having administrative and judicial powers. *De iure* they are in charge of the preliminary investigation of minor offences, but under the supervision of the Public Prosecutor. When police organs carry out preliminary investigations, they are in a subordinate posi-

tion to the prosecutors. *De facto* the police forces have a great deal of autonomy and the relations between the police authorities and the prosecutors are far from good. The national rapporteur speaks of a "war between the institutions". We should underline the fact that the police authorities do have military status and they are subject to military discipline. This might create problems of supervision as well as problems concerning the civil and military forum.

The Public Prosecutor is *de iure* and *de facto* a prosecuting authority and only exceptionally an investigating authority. While by law he is entitled to undertake certain functions in the guise of an investigator, the main investigatory responsibility lies with the investigator, who acts under the formal control of the prosecutor. The *de iure* responsibility for the powers of the judicial police is *de facto* void and he has no real power over the activities of the main actor in the investigatory field, i.e. the investigator.

There is no investigating judge in the Bulgarian system. The investigator was until 1991 (before the Constitutional Reform) a part of the police force. In 1991 the investigators were transferred to the judiciary and are now considered to be magistrates. Under the Code of Criminal Procedure, the investigator is the main authority for conducting preliminary investigations. He is entitled to initiate criminal proceedings and he can order the arrest of suspected persons for 24 hours. He can interrogate witnesses, perform searches, etc. At the end of the proceedings, the investigator prepares an accusatory statement (an indictment) and submits it to the prosecutor, who finally decides whether or not to bring the case to trial.

Czech Republic

In the legal system of the Czech Republic we see a very similar situation. The classic main actors are present: administration, the police and the Public Prosecutor. However, here we can also see the very same remnant of the Russian legal system - the investigator.

The administration generally deals with administrative enquiries with the aim of compliance and the verification of, for instance, tax and customs duties. When during an administrative enquiry suspicions arise that an offence has been committed, in principle the case must be transferred to the investigators at the Bureau of Investigation. The administrative authorities do not have real judicial powers. However, customs officers can act as the investigating authority for less serious offences (with a maximum penalty of three years imprisonment). Customs officers do have judicial police powers for specific customs offences (restricted competence).

Up until the indictment stage, procedures are called "quasi-administrative" criminal proceedings. If the sanctions are not more severe than imprisonment for up to three years, then the police authorities, customs officers, etc. are competent investigating authorities. If the sanctions are more severe than three years imprisonment, only the investigators are the competent investigating authority, as they are the investigating authority after the person in question has been charged.

The authorities responsible for criminal proceedings are, in addition to the court, the Public Prosecutor, the investigators of the Ministry of the Interior and the police authorities.

The term police authorities refers *to all organs of the Police Force of the Czech Republic, including the Military Police, the Prison Service of the Czech Republic and the Security Information Service (BIS). The customs authorities also perform the role of police bodies in proceedings that relate to specific customs offences.*

The Public Prosecutor is *de iure* and *de facto* a prosecuting authority and not an investigating authority. The *de iure* responsibility for the powers of the judicial police is *de facto* void and he has no real power concerning the activities of the main actor in the investigative field, i.e. the investigator. The only exception is his power to approve coercive measures. However, the Public Prosecutor, although acting independently, is a part of the Ministry of Justice. In fact this semi-independent body exercises the judicial functions of a judge of liberties. There is no investigating judge in the Czech Republic.

The investigators are the main investigative authority in the Czech Republic. Although *de iure* the prosecutor does have investigative powers, *de facto* this power is void. The investigators are organised in the Bureau of Investigation. The Bureau of Investigation is a part of the police structure and as such has a quasi-military structure. The investigators of the Bureau have wide investigative pow-

ers and are independent of the Public Prosecutor. Only for coercive measures such as detaining in custody or searching homes or freezing assets, do they need the approval of the Public Prosecutor. *De iure* the prosecutor can give binding instructions to the investigators, which is also the case in practice. The Bureau of Investigation is a part of the Ministry of the Interior. The Chief of the Bureau is subordinated to the Ministry of the Interior.

An amendment to the Czech Code of Criminal Procedure was accepted by Parliament late in 2001 concerning the position of investigators. They will be transferred from the Bureau of Investigation (which will be abolished) and be integrated within the Criminal Police structure. The powers of the investigators to make decisions in preliminary proceedings (halting, suspending proceedings or transferring the case) will be transferred to the prosecutors only. Only prosecutors will be authorised to investigate all crimes committed by members of the Police and the Secret Security Service.

Estonia

In Estonia many specialist administrative authorities enjoy administrative investigatory powers and, although limited to specific offences, judicial investigatory powers (restricted competence). The Tax and Customs Authorities are examples of double investigatory jurisdiction. Under the administrative investigatory powers they can also seize property and documents; also under these judicial investigatory powers they may search and seize.

The main judicial authorities in Estonia are: the Police Board, the Central Criminal Police and the police prefectures; the Security Police Board; the Prisons Administration; Border Guard Authorities; Customs Officers; Headquarters of the Defence Forces; and the prosecutors. The Police Board and the prosecutors have general judicial powers (general competence), the others only for specific offences (restricted competence). The Prosecutor's Office is a part of the executive under the Ministry of Justice.

There is no investigating judge in the Estonian penal system.

The judicial authorities belonging to the police forces have a great deal of autonomy. Only for very coercive measures do they need the approval of the prosecutor (search warrant) or a judge (arrest warrant). *De iure* the prosecutor supervises the investigation and can give binding instructions. If the investigator does not agree with the decisions of the prosecutor he can appeal to a higher prosecutor and ask for an overruling decision. *De facto* prosecutors supervise the legality of investigations; however, this does not mean that they can interfere with the investigation.

The investigators have the right to submit, in a criminal matter under investigation, binding written applications for carrying out individual investigatory activities and for providing assistance in investigatory activities to other pre-trial investigating authorities.

Hungary

In Hungary many specialist administrative authorities have administrative investigatory powers. Some of them also have judicial investigatory powers, although these are limited to specific offences (restricted competence). The Customs and Tax Authorities are examples of double investigatory jurisdiction. It must however be stressed that the investigatory powers of the tax and customs authorities are not judicial powers in the strict sense. The Hungarian Customs and Finance Guard only have quasi-judicial powers in the case of financial administrative offences, e.g. smuggling or tax fraud on a small scale.

The authorities having general judicial competence are the police forces and the prosecutors. However, the prosecutors mainly supervise the investigation and to a certain extent have the function of supervising the legality of investigations (by issuing warrants or by giving instructions or dealing with complaints).

The main judicial investigatory body is the Police, having a great deal of autonomy in this field. However, the new Code of Criminal Procedure (that will probably come into force in 2003), provides for an increased role for the prosecutor in the investigation, thereby increasing the possibility of overseeing the investigation.

The Prosecutor's Office remains unchanged. It is independent from the executive and the judiciary as well, and is only connected to Parliament through the person of the Prosecutor General (the old Proc-

uratura System). There are proposals to integrate the Prosecutor's Office into the Ministry of Justice, but they are not likely to be adopted very soon.

There is no investigating judge in the Hungarian criminal justice system.

Lithuania

In Lithuania a substantial number of administrative investigating authorities also have judicial powers, although limited to specific offences (restricted competence). They are: The State Control (State Audit Institution); the Tax Police Department of the Ministry of the Interior; The Customs Department of the Ministry of Finance and the State Tax Inspectorate also of the Ministry of Finance. The State Control Authority has competence in the field of public Treasury Auditing. The Tax Police Department is a specialist agency with competence in the field of money laundering and other breaches of financial law. The Customs and Tax Authorities have the classic competence in this respect.

The general judicial investigatory power lies in the hands of the Investigation Department of the Ministry of the Interior and of the Police (general competence). Other judicial authorities only have restricted competence. The State Security Department is only competent for offences against state security; the Special Investigations Service is only competent in corruption and corruption-related offences. Both authorities are only accountable to the President and to Parliament.

The investigators within the prosecutions system possess limited competence. They can only carry out pre-trial investigation in the field of Organised Crime and Corruption. They belong to the Organised Crime and Corruption Investigation Division within the Prosecution Office. The Public Prosecutor has the right to give binding instructions to the investigators, but there is no administrative relationship between the investigating and prosecution authorities. The investigators can initiate and execute the investigators independently. They can even appeal against the binding instructions of a prosecutor before a higher prosecution authority. Only for some warrants do the investigators need the approval of a prosecutor (search warrant) or of a court (a warrant for wire-tapping). The Prosecution Office belongs to the judiciary.

There is no investigating judge in the criminal justice system of Lithuania, but in the draft Code of Criminal Procedure, an investigating judge, having the functions of a judge of liberties, is envisaged.

It should be stressed that there is a tendency to limit the competence of the special investigatory bodies, given the wide powers at their disposal and their complex structure.

Poland

In Poland there is of course also the distinction between authorities dealing with administrative investigations and those authorities dealing with judicial investigations. However, the Polish criminal justice system in the area of economic and financial crime is quite different from the other Candidate Countries. First of all, we have to underline the fact that there is a fundamental distinction between common offences and tax and customs offences. For the latter the Fiscal Criminal Code and the Customs Code apply. These Codes provide for specific customs and fiscal offences and for specific procedural rules concerning the investigation and prosecution of customs and fiscal offences. However, the Fiscal Criminal Code and Customs Code are only a special feature of the common criminal law whose provisions apply when they do not contradict the Fiscal Criminal Code and the Customs Code. All this means that the Fiscal and Customs Authorities have wide judicial powers under these Codes; moreover, for these offences they also have prosecutorial power.

In relation to fiscal and customs offences, the inquiries may be carried out by fiscal investigating authorities, being the Revenue Office (Ministry of Finance), the Customs Office (Ministry of Finance), the Fiscal Control Inspector and the Officer of Customs Inspection (Ministry of Finance), and by non-fiscal investigating authorities, being the Border Guards, the Police, the Military Police and the State Protection Office. The Border Guards, the Military Police and the State Protection Office also have prosecutorial competence for specific offences. The Fiscal Control Inspector has competence in the area of auditing the budget of the State Treasury. The Office of Customs Inspection has specific competence in the area of the illegal import and export of goods and capital.

All the fiscal and customs authorities have broad judicial investigatory powers. However, the prosecutor is entitled to take over any case. In about 5 % of all cases being investigated by the financial inquiry authorities, the prosecutors have prolonged the preliminary proceedings, which means that these proceedings have lasted for more than 3 months. In 2% of all cases the proceedings have been taken over by the prosecutors (proceedings exceeding 6 months).

The Attorney General is the head of the prosecution service. The Minister of Justice exercises the function of the Attorney General *ex lege*. The independence of the Public Prosecutor is guaranteed by several provisions. In practice, judicial investigations are mostly carried out by the Police, even if the Public Prosecutor is the main and leading authority in the Code of Criminal Procedure. For some coercive measures the Police need to obtain a warrant from the prosecutor, for others from the judge. There is no investigating judge in the criminal justice system of Poland. The Police is an armed, hierarchically organised service, forming part of the Ministry of the Interior. In 1999, the Minister of the Interior created, within the Police Headquarters, a special unit to deal with organised crime, including economic offences, the so-called Central Bureau of Investigation. The CBI has national competence. Special Police forces, also with a military status, are the State Protection Office and the Border Guards.

It should be stressed that Poland amended its legislation in 2000 in order to allow representatives of international organisations, like the EU, to take part in joint investigations. The Commission thereby has the possibility under the Act on Fiscal Control and under the Act on Customs Inspection to take part in checks of EU funds in Poland. Moreover, a Polish section of OLAF has been created within the office of the General Customs Inspector.

Romania

Under the Romanian legal system the administrative bodies have no judicial investigatory powers. They have no powers under the Code of Criminal Procedure, nor can they undertake search and seizure operations.

The following authorities have judicial investigatory powers: criminal investigating authorities, like the police and specific investigating authorities with the police authority and the Public Prosecutor. The Public Prosecutor is the leading judicial investigating authority in the case of a limited list of serious offences, like treason, homicide, corruption, torture, etc. The Public Prosecutor's Office is a part of the Judiciary. Prosecutors are magistrates. For other offences the criminal investigation is carried out by the criminal investigating bodies belonging to the police forces. The police force belongs to the Ministry of the Interior and has a military status: the General Inspectorate of the Police, the General Police Direction of the municipality of Bucharest, the county police inspectorates; the police inspectorates for railway, air and sea transport and education institutions for the training of police officers. The other investigating bodies are specified in the Code of Criminal Procedure: the officers especially appointed by commanders of military units, the officers especially appointed by the garrison commanders, the officers especially appointed by the commanders of military centres, the frontier guard officers, the officers especially appointed by the Ministry of the Interior for frontier crimes, and the port police. *De iure* the Public Prosecutor may give instructions to the criminal investigating authorities. *De facto* the police have a great deal of autonomy, although there is a tendency to increase the cooperation between the police and the prosecutors.

There is no investigating judge in the criminal justice system of Romania. At present no investigatory powers need a warrant from a judge. Only for classic coercive measures, must the approval of a prosecutor be sought.

Slovakia

The system in Slovakia is for historical reasons very similar to that in the Czech Republic. Minor offences (misdemeanours) are dealt with by administrative authorities and can be punished with administrative fines, a ban on professional activities, etc. The system of misdemeanours and the system of criminal offences are completely distinct from each other. An act (*actus reus*) cannot at the same time be a misdemeanour and a criminal offence. For criminal offences punishable with up to three years imprisonment, the leading judicial investigating authorities are the police investigators belonging to the Ministry of the Interior. This police force seems to be poorly qualified. The monopoly of

the Ministry of the Interior concerning the judicial investigation is challenged by other departments, like Finance, Defence, Transportation, etc. The Tax and Customs authorities can only investigate administrative offences, not criminal offences.

The Public Prosecutor has a monopoly on prosecutions and has supervisory power over the investigation. The independence of the public Prosecution's office has decreased however. The Public Prosecutor is *de iure* and *de facto* a prosecuting authority and not an investigating authority. His *de iure* responsibility for the powers of the judicial police is *de facto* void and he has no real power concerning the activities of the main actor in the investigative field, i.e. the investigator. The only exception is his power to approve coercive measures.

The investigators are the main investigative authority in Slovakia. Although *de iure* the prosecutor does have investigative powers, *de facto* this power is void. The investigators have mostly a military status. They have wide investigative powers and are autonomous of the Public Prosecutor. However, the prosecutor can overturn the decisions of the investigator for reasons of illegality. *De iure* the prosecutor can give binding instructions to the investigators, but *de facto* this is very rare. Only for coercive measures such as detaining in custody or searching private homes or freezing assets, do inspectors need the approval of the Public Prosecutor and of the court.

There is no investigating judge in Slovakia. However, a new law on criminal proceedings provides for a special judge for preliminary hearings.

Slovenia

In Slovenia the preliminary investigatory proceedings are mostly conducted by the police forces belonging to the Ministry of the Interior. The Public Prosecutor does not have investigative powers, but he can request the police to investigate, although this cannot be qualified as binding orders. *De iure* the prosecutor can direct preliminary criminal proceedings. However, *de facto*, the police usually conduct the investigation of their own initiative without any involvement from the side of the prosecutor.

Slovenia has a system of investigating judges. They are the leading authority (*dominus litis*) in pre-trial proceedings, and they formally interrogate the suspect. They also have wide judicial investigatory powers. In practice the investigating judges are to a large extent dependant upon the preliminary information obtained by the police forces. The preliminary investigation by the police (Article 148 Code of Criminal Procedure) is subject to criticism, as the police officers interrogate suspects without informing them of their rights. The existence of pre-trial proceedings is also under attack, as is the existence of the investigating judge as such. Some want to give the Public Prosecutor a stronger role in the pre-trial proceedings and to make the prosecutor responsible for the coordination of the criminal investigation. Others want to increase the investigatory police powers.

Special investigatory bodies, like the tax inspectors and the customs officials, belonging to the Ministry of Finance, also have wide judicial investigative powers, including search and seizure.

Public Prosecutors are appointed by the Government of the Republic upon a proposal by the Minister of Justice. The European Public Prosecutor belongs to the executive branch, but does have complete independence and judicial autonomy.

2. Assessment of the acquis communautaire

There is no general acquis communautaire, neither in the first nor in the third pillar policy areas, concerning the investigating authorities and their legal status and nature. However, in the field of agricultural law, one can find specific Community regulations concerning the status and nature of specialised administrative authorities, such as in the field of vini-viti culture, olive culture, tobacco culture, etc. However, these regulations are not directly concerned with the financial interests of the Union and are for that reason not a part of the research field of this study.

3. Assessment of the Corpus Juris 2000

There are no specific provisions in the Corpus Juris 2000 concerning the legal status and nature of the investigating authorities. They only have the duty to communicate EU fraud cases to the European Public Prosecutor. Their legal status and nature depend upon domestic law. In other words, the Corpus Juris has not harmonised the areas of administrative and judicial investigation as such.

III. Judicial investigatory powers and judicial warrants

1. Comparative part

Bulgaria

Under the Code of Criminal Procedure, the investigator is the main authority for conducting preliminary investigations. He is entitled to initiate criminal proceedings and he can order the arrest of suspected persons for 24 hours. He is competent in the field of classic judicial investigations, for instance: to interrogate witnesses, victims and suspects; he can order expert assessments, he can require the production of documents or of objects, perform searches, etc. The Public Prosecutor is not in principle an investigative authority, he may only exceptionally perform certain investigative actions.

As far as search and seizure are concerned, they are in principle only allowed after a court warrant, granted by a judge at the court of first instance. However, an *a posteriori* warrant is possible, subject to the condition that the investigator communicates the action within 24 hours. In specific circumstances, the investigators can act without a warrant, for instance if there are indications that persons are withholding evidence relevant to the case.

Pre-trial detention is allowed when the crime is punishable with a term of imprisonment and if there is a risk that the accused will flee justice or will commit further crimes.

The investigator may detain a person for 24 hours if:

- the person is caught red-handed; or
- there is a witness indicating that he has committed the crime; or
- very convincing evidence has been found on his person or in his home; or
- he has no permanent residence and there is a real risk that he may flee justice.

The investigator must immediately inform the prosecutor of the detention. After the expiry of 24 hours the prosecutor can decide to prolong the detention for up to 3 days (72 hours). If the prosecutor decides to initiate a preliminary procedure against the person in question and wants to detain him in custody, he has to ask the court for an arrest warrant. The pre-trial detention cannot exceed two months, with the exception of the most serious crimes, for which the pre-trial detention can be extended for up to two years. The warrant procedure before the court is an expeditious procedure. The court deals with the case within 3 days after the request, in the presence of the prosecutor and the lawyer. An appeal against the decision, taken immediately after the pleadings of both parties, is possible before the higher court. The higher court tries the case with a panel of three judges.

As regards the proactive or special investigatory techniques, only two such techniques are provided for in Bulgaria. The Code of Criminal Procedure was amended in 1997 in order to introduce the tapping of communications. For this, permission is needed from the chairman of the district court. If refused, the investigator can appeal against the decision to the court of appeal. A special court register contains the tapping approvals. The length of time of the tapping cannot in principle exceed two months, although it can be prolonged for up to a maximum of 6 months, with the additional consent of the Court. If permission for tapping is granted, the Minister of the Interior allows the special police forces to tap the communications. Tapping of communications must be stopped if the aim of the tapping has been achieved, if there are no results from the tapping and if the approved term has expired. Tapping is so widely used that a Parliamentary Inquiry was commenced on the topic, because of the very high number of approvals for tapping (more than 10,000 in 1999 only) and because of its use to listen in on politicians and magistrates without convincing grounds. The Parliamentary Inquiry produced only a weak political recommendation.

The second special investigative technique has since 1999 been provided for in the Customs Act: controlled delivery. Customs authorities may use this technique with the strict co-operation of the police forces and under the supervision of the prosecutor. There is no need for a judicial warrant or permission and/or approval. It seems that its use is very limited or non-existent, but having said that the legal possibility is still very new.

Czech Republic

The investigators, organised within the Bureau of Investigation, are the main investigative authority in the Czech Republic. In principle they are fully autonomous and can decide when and how to investigate. Being competent in the field of classic judicial investigations, they can interrogate witnesses, victims and suspects; they can order expert assessments, they can require the production of documents or of objects, and they can carry out searches, etc. However, for some investigative powers they do need the approval of a prosecutor or a judge. The approval of a judge is required for home searches, wire-tapping, mail investigation, and police undercover operations. The approval of a prosecutor is needed for searching premises, seizure against the will of the person, the physical investigation of the offender.

Police arrest is possible for a period of 48 hours. Within the period of 48 hours police forces have to hand over the arrested person to the prosecutor. The prosecutor can release the offender or ask a judge to detain the offender in custody. There must be reasonable grounds for such a custody order, such as the risk of fleeing justice, the risk of obstructing the investigation, and the risk of repeating the same offences. If the case is very complex or if there has been a case of obstruction by the accused, the detention can be extended by up to three years and for a list of specific serious crimes up to a maximum of 4 years.

Proactive and special investigatory techniques will be explicitly specified in the Code of Criminal Procedure from 01.01.2002 onwards. They are currently partially in the Police Code and partially in the Code of Criminal Procedure.

Estonia

The judicial authorities belonging to the police have a wide degree of autonomy in the use of their investigative powers. Being competent in the case of the classic judicial investigation, they can interrogate witnesses, victims and suspects; they can order expert assessments, they can require the production of documents or of objects, and they can carry out searches, etc. They can also require financial institutions to disclose information.

However, for some investigative powers they require the approval of a prosecutor or a judge. The approval of a prosecutor is needed for: home searches and physical (bodily) investigations. However, in urgent cases, the investigator may carry out the home search, subject to the condition that he communicates this to the prosecutor within 24 hours. Moreover, the investigator might appeal against a decision of the prosecutor and ask a higher prosecutor to overrule the first decision.

Concerning pre-trial detention, a judge's warrant is needed for detention of longer than 48 hours. A person may not be held in custody for longer than six months. In a case of particular complexity or the seriousness of the case the chief Public Prosecutor or senior county or city prosecutor may exceptionally request the extension of the custodial term for up to one year.

The approval of a judge is also needed for surveillance activities, as provided for in the Surveillance Act. Police Authorities can covertly collect information on persons, goods, premises, etc. Such activities can cover identity and surveillance. For exceptional surveillance techniques, such as the covert entry of private homes, premises, databanks; placing technical devices, covert examination of postal items, wire-tapping and the commission of criminal offences in order to detect other criminal offences, formal approval is needed from an administrative court. However, in a case of urgency, the police can even use such special surveillance techniques without *a priori* approval, subject to the condition that the Public Prosecutor is duly informed and that the administrative court is asked for its approval, at the latest on the next working day.

Hungary

The Police, the offices of the Public Prosecutors and the specialist judicial investigating bodies (Customs and Finance Guards, Border Guards, Tax and Financial Control Administrations), being competent in the case of classic judicial investigations, can interrogate witnesses, victims and suspects; they can order expert assessments, can require the production of documents or objects, can perform searches, seizure etc. A seizure can only take place for evidentiary purposes or for the purpose of confiscation. They also have wide powers in obtaining information from other public authorities.

Interesting is the fact that the Act on the Police extensively deals with the covert collection of information. The Act distinguishes between methods that can be used without judicial permission and methods that need the approval of a court. The police can make use of informants and undercover agents, surveillance of persons and premises, they can tap communications, and can set a police trap without any approval. Further, the police may offer financial compensation for cooperation and can even reach an agreement with crown witnesses providing substantial information, offering to reduce the charges or even to drop the criminal investigation (settlement of the case). Subject to formal approval by the Public Prosecutor, information relating to serious offences (punishable by a minimum of two years imprisonment) in the field of taxes, securities, telecommunications, health care institutions, etc., may be collected secretly. Subject to formal approval by the courts are the following: secret searches of private homes, wire tapping, access to postal communications, the use of special technical devices for investigation (e.g. planting listening devices). The covert collection of information can be used for the purposes of crime prevention and investigation, arresting perpetrators or collecting criminal evidence. These methods can be used in a broader context (no direct link with the mentioned purposes) if it concerns cross-border crime, drug trafficking, terrorist crime, etc.

The Tax Authorities, the Customs Authorities and the Border Guards have the same powers as the police concerning the secret collection of information. They can also search and seize.

For the use of some investigative powers a warrant from a court is needed: pre-trial detention, a prohibition on leaving one's private residence, temporary compulsory medical treatment and the freezing of assets. For other investigative powers the approval of the Public Prosecutor might be needed: the seizure of postal communications.

Pre-trail detention can only be ordered in the case of a well-founded suspicion that the person to be arrested has committed a crime punishable by imprisonment. If the arrest is ordered by an investigating authority, the Public Prosecutor must be informed within 24 hours. The maximum term for the police arrest is 72 hours. Pre-trial detention is possible if:

- there is a danger that the offender will flee from justice;
- he might hinder or endanger the investigation;
- he might commit new offences.

Pre-trial detention is ordered by the court of first instance for a period of one month, a period that can be extended by a further two months. After three months the detention may be extended only by the decision of a single judge at the county court. The total period may not exceed one year from the date of the original order of detention. Beyond this time period, detention may only be extended by the Supreme Court. For detention after the indictment, specific rules apply: the detention ordered or approved by the court of first instance shall continue until the final decision of the court; a detention order after this point in time shall continue until the *res iudicata* (non-appealable judicial decision), but shall not exceed the maximum term of imprisonment which may be imposed by the court of first instance.

Lithuania

The police and other administrative investigating bodies are competent in the case of classic judicial investigations, such as for instance: interrogating witnesses, victims and suspects; ordering expert assessments, requiring the production of documents or of objects, carrying out searches, etc.

For some coercive measures, however, authorization from a prosecutor is required. This is the case for searching premises and homes. However, in urgent cases, a search may be carried out subject to the condition that the prosecutor will be notified of the search within 24 hours. Body searches also

need the authorization of a prosecutor. However, during an arrest and when there are substantial grounds to believe that the person present in the premises or home where a seizure or search is being carried out is concealing items or documents on his person which may be relevant to the case, then a body search may be carried out. For information concerning property and information which is at the disposal of financial institutions an authorization by a prosecutor is generally needed.

For tapping telephone conversations a warrant from the chairman of the regional court or from a judge of the criminal chamber of this court is needed. The authorization can be given for 6 months and is only possible for preventing or investigating serious crimes or when there is a threat of violence, extortion or any other unlawful acts against victims, witnesses or other parties in the proceedings or against their relatives. For the use of technical devices for surveillance the provisions are limited to the use of photography, video and audio recording for preventing and investigating crime. However, a specific Law on Operation Activities provides for other proactive investigative techniques such as:

- monitoring mail and electronic communications – with a warrant from a judge;
- covert monitoring of a person's correspondence, telegraphic and other communications and recording them - with a warrant from a judge;
- the use of special equipment and technical devices for surveillance – with a warrant from a judge;
- acting as *agents provocateurs* in order to stimulate a criminal act – with the authorization of the Prosecutor General.

Poland

The police and administrative investigating bodies are competent in the case of classic judicial investigations, such as, for instance, interrogating witnesses, victims and suspects; ordering expert assessments, requiring the production of documents or of objects, performing searches, etc. For very coercive measures, like telephone tapping, a warrant from a judge must first be granted.

Police detention without a warrant is possible for a maximum of 48 hours. The court can order preliminary detention for a period not exceeding three months. This period may be extended, in view of the special circumstances of the case, upon the request of the prosecutor at the court. In some cases, this may mean for a maximum period of two years, but only after the approval of the Supreme Court upon a request from the court where the case is pending.

Besides the classical techniques of criminal investigation in the Code of Criminal Procedure, the Act on the Police provides for the possibility of operations in a limited list of intentional offences that can be prosecuted *ex officio*. They include economic and fiscal offences. In order to prevent or to reveal these offences, the Minister of the Interior, after having obtained the written approval of the Prosecutor General, may order, for a determined period of time, correspondence to be checked, and to use technical measures permitting the covert retrieval of information and the securing of evidence. Also "controlled purchase" is allowed. This concept, which is not so far removed from "police provocation" covers:

- secretly purchasing or seizing the assets of crime, as well as
- accepting or providing a material benefit, but without using incitement.

It is also allowed to use the institution of the so-called "controlled mailed parcel" or controlled delivery. The Minister of Justice may order the secret surveillance of the dislocation and storage of as well as trade in the objects of crime, if this does not constitute a danger to human life or health. Finally, the police may use civilian informants against payment.

Also the Tax and Customs Legislation provide for specific provisions concerning the (secret) collecting of information and the use of technical devices. Under the Customs legislation it is also possible to use controlled delivery.

The proactive techniques provided for in the Act on the Police may in principle only be used during the phase before the criminal proceedings are instituted. From that very moment on, the Code of Criminal Procedure applies. However, some techniques such as "controlled purchase" may also be

used after the commencement of criminal proceedings. During the criminal investigation the prosecutor may ask the police to submit the suspect to (secret) surveillance.

Romania

Only the police, and no other administrative investigating bodies, are competent in the case of classic judicial investigations such as, for instance interrogating witnesses, victims and suspects; ordering expert assessments, requiring the production of documents or objects, performing searches, etc. In principle the police can act on their own initiative, without the need for authorization, approval or a warrant, either from the prosecutor, or from a judge. The Code of Criminal Procedure only prescribes mandatory authorization by the prosecutor – not by a judge – in the case of audio and video recordings, home searches and body searches and investigating certain institutions. The Act on State Security also provides for wire-tapping, with the authorization of the prosecutor, following the provisions of the Code of Criminal Procedure. This does not mean, however, that the secret police have the same powers as the judicial police!

Police arrest is only possible for 24 hours. The prosecutor can decide on pre-trial detention for a period up to a maximum of 30 days; a decision than can be appealed to the courts. However, a further extension is possible upon a decision by the courts up to the maximum penalty provided by law for the indicted offence.

In the Code of Criminal Procedure there are no provisions on proactive or special investigation techniques. Only audio or video recordings are possible.

Slovakia

Only investigators from the Bureau of Investigation, and no other administrative investigatory bodies, are competent in the case of classic judicial investigations. They can interrogate witnesses, victims and suspects; they can order expert assessments, they can require the production of documents or objects, perform searches, etc.

For certain coercive measures, however, the investigators need authorisation from a prosecutor: the arrest of a person, searching premises, body searches, wire-tapping, and mail surveillance. A judge's warrant is needed for pre-trial detention, an arrest warrant, and a house search.

The prosecutors very often provide binding instructions for the investigators and overturn some of their decisions.

According to a amendment to the Constitution due to enter into force on 1 July 2001, anyone who is arrested must be promptly informed of the grounds for the arrest, interrogated and at the latest within 48 hours (72 hours for extremely serious offences) released or brought before a court. Before the amendment this maximum period was 24 hours. This applies both to police detention, detention by the investigator or by the prosecutor. The proposal to detain a person in custody shall be placed before the court by the prosecutor. The maximum pre-trial detention is two years, but this might be extended in the case of serious offences to three years or to five years for very serious offences.

In Slovakia proactive investigative techniques such as controlled delivery, controlled purchase and the bugging of telecommunications (this last measure after a court order) do exist. According to the Police Act, police authorities may use technical devices, with the consent of a judge, when investigating serious offences. Such devices may be used for tapping, making video or audio recordings and for opening and examining transported consignments.

Slovenia

In Slovenia the competence in the case of judicial investigations is divided between the police and the investigating judge. Before the commencement of the preliminary phase of the criminal proceedings, the police can act as an autonomous judicial investigating body. After the commencement of the preliminary phase, they may only act upon the request of the investigating judge, since he is the *dominus litis* of that phase. Combining the Police Act and the Code of Criminal Procedure, the police authorities are competent in the case of many classic judicial investigatory techniques: they can order expert assessments, they can require the production of documents or objects, they can perform searches and seize objects, and they can arrest suspected persons. However, they can never interro-

gate the suspect, nor examine witnesses or experts. They may even conduct home searches and body searches without a warrant if:

- the person concerned so approves;
- there is a call for help;
- a person has been "caught in the act" of committing a crime;
- if reasons of safety to persons and property so require.

In such a case they have to submit a report to the investigating judge or to the Public Prosecutor.

The tax and customs authorities also have judicial investigatory powers. They can require the production of documents and evidence and can search premises, excluding a home search.

The Police may detain a person for 24 hours in the case of public disorder. They may detain a person for 48 hours if grounds for suspicion exist that he has committed a criminal offence. Furthermore, pre-trial detention is ordered by the investigating judge upon the request of the prosecutor. This may be ordered if there is a well-grounded suspicion and if there is a danger that he will flee justice; or a danger that he will destroy evidence or endanger the investigation or that, in the case of serious crimes, there is a danger that he will repeat the crime.

Concerning proactive or special investigation techniques we have to distinguish between the so-called "special methods and measures", provided for in the Code of Criminal Procedure, and the so-called "police special methods and measures", provided for in the police legislation. If there is reason to believe that a person has committed a crime which must be prosecuted officially, or if such a person is in the process of committing a crime which must be prosecuted officially, or if such a person is the process of committing the crime, or organising or planning to commit it, and the police cannot find any other way to reveal, prevent or prove this, they may apply the following measures under the "police special methods and measures":

- surveillance and tailing with the use of technical equipment for the purposes of documentation;
- undercover work;
- undercover operations;
- altered documentation and identification insignia.

In this respect permission is needed from the director general of the police; only for altering documentation and identification insignia is permission required from a prosecutor. Police special methods and measures may last for three months, although a further three-month extension may be allowed.

The special methods and measures are formal acts, whose results are admissible as evidence in court. The special methods and measures have recently been changed (1998) in order to bring them into line with those constitutional safeguards defined in the case-law of the Constitutional Court. Special methods and measures can be conducted when well-grounded reasons for suspicion exist that a certain person has committed, is committing, is preparing to commit, or is organizing the commission of certain criminal offences and upon the existence of a well-grounded suspicion that communication devices and/or computers are being used. Special methods and measures can only be used for very serious crimes and for a limited list of other crimes (bribery, money laundering, etc.)

Special methods and measures are:

- telecommunications surveillance by means of bugging and recording;
- postal surveillance and control of other deliveries;
- computer surveillance (including financial transactions between financial institutions);
- tapping and recording of conversations with the consent of at least one of the involved persons;
- tapping and observation of premises.

Special methods and measures must be approved by the investigating judge in a written warrant upon a reasoned request by the Public Prosecutor. In urgent circumstances an oral approval by the investi-

gating judge is valid subject to the condition that it is followed by a written warrant within 12 hours after the oral approval. Special methods and measures can be granted for 1 month; it is possible to apply for an extension up to a maximum of 3 months (tapping and observation of premises) or of 6 months (tapping and recording of conversations with the consent of at least one of the persons involved).

2. Assessment of the acquis communautaire

There is no general acquis communautaire, either in the first or in the third pillar policy area, either concerning the investigative authorities and their judicial investigative powers, or concerning the rule of law and the mandatory obligations of judicial warrants.

3. Assessment of the Corpus Juris 2000

The Corpus Juris as such does not deal with the broad field of judicial investigatory powers, which are at the disposal of the police authorities, administrative investigative authorities, examining judges and prosecutors. The intervention of the Corpus Juris is limited to a definition of the investigative powers of the European Public Prosecutor (Article 20 Corpus Juris) and the rule of law function of the judge of freedoms (Article 25bis Corpus Juris). This of course has certain consequences for the investigative powers of the European Delegated Public Prosecutors at Member State level.

In those Candidate Countries having a Public Prosecutor system in which their function is limited to prosecution and supervision of the investigation, but in which the Public Prosecutor does not have his own investigative powers, there is of course a case of complete incompatibility on the part of the national system with the Corpus Juris architecture. The same can be said of the countries in which no judge (examining judge or a single judge in the court) is called upon to authorize coercive measures which have the effect of restricting or depriving a person of the rights and fundamental freedoms laid down in the ECHR.

Finally, the Corpus Juris provides for a maximum period of nine months for pre-trial detention, under the strict judicial control of the judge of freedoms (Article 25 (3) Corpus Juris). This judicial control is not really a problem for pre-trial detention or pre-trial custody. However, in some Candidate Countries the period of pre-trial custody can be longer for more serious crimes, even up to two years.

IV. Accusatorial or inquisitorial nature of the investigation (also in the case of suspects)

1. Comparative part

Bulgaria

The Bulgarian Code of Criminal Procedure does not contain a specific definition of a 'suspect', although case-law has clarified the meaning of the concept on the basis of Article 202 Code of Criminal Procedure (see the criteria for pre-trial detention under point 3.1.1).

Defence counsel may participate in the proceedings from the moment of detention or from the moment charges are brought. Defence counsel has the right to have direct contact with the accused, to have access to the files of the case, to present new evidence and to be present during all investigative procedures.

Czech Republic

A person becomes a suspect from the moment that a law enforcement agency has indications that he might have been the offender. He becomes an accused when there is a reasonable suspicion that he has committed the offence.

The pre-trial procedure to a large extent has an accusatorial character, given the many rights available to the defence lawyer during the pre-trial investigation.

Estonia

A suspect is a person with regard to whom the investigators have sufficient grounds to suspect that he has committed a criminal offence and with regard to whom the investigators have made a specific order to that effect. He becomes an accused person from the moment that specific charges have been brought against him.

The procedure is a mixture of accusatorial and inquisitorial aspects. Criminal defence counsel has the right to examine the petitions and statements of the person being defended, the minutes of the interrogation of such person, and also to examine the minutes of the detention of the person being defended, and the ruling on the choice of a preventive measure, and to make excerpts therefrom; criminal defence counsel has the right to participate in the court hearing for taking the person being defended into preventive custody, and in the court hearing for the extension of the term for holding the person being defended in custody; criminal defence counsel has the right to submit petitions for removal and may file appeals against court rulings during the preliminary investigation, to participate in the ordering of expert assessments and in all procedural acts performed with the participation of the person being defended with the right to submit questions and to make statements through the preliminary investigator, to examine the minutes of investigative activities conducted with the participation of the defence counsel, and to submit comments to that effect. Criminal defence counsel has the right to examine the documents of state and local government agencies which are necessary for the provision of legal assistance and to make excerpts and copies therefrom, to receive information, notices and certificates necessary for the defence, and in matters requiring special expertise, to receive oral and written consultations from experts. In the performance of his or her duties, criminal defence counsel has the right to use equipment; however, the preliminary investigator may refuse to permit such use with good reason, which shall be documented in the minutes of the procedural act. But the full disclosure of government files, which will be used at trial, is only possible after the conclusion of the pre-trial investigation.

Hungary

The person against whom criminal proceedings are being conducted is called the suspect during the investigation. Criminal proceedings may be commenced against a person based on a well-founded suspicion that he has committed a crime. The essence of the suspicion must be communicated to the suspected person. From the moment that the prosecutor charges the person, he becomes an accused.

The system of criminal investigation is based on the inquisitorial rule. The principle is however tempered by the right of the suspect and his/her defence counsel to be present at most of the investigative actions, to have access to the files, to submit proposals, etc.

Lithuania

A person detained on suspicion of having committed a crime or a person subjected to a remand measure before the charge is entered, or a person questioned about a criminal act he has committed shall be considered to be a suspect. A person with respect to whom a decision to prosecute has been made shall be considered to be the accused.

The investigation is based on inquisitorial procedural rules, but the defendant and/or defence counsel has the right to submit evidence, to request further investigation and to appeal against decisions in the pre-trial phase to the prosecutor or to a judge.

Poland

The Polish Code of Criminal Procedure makes a distinction between a "suspect" and a "suspected person". A suspected person is a person actually suspected of having committed an offence, but no charges have as yet been laid against him. The suspected person is not a party to the proceedings. He does not have the rights of a suspect (the right to defence), but some measures, like surveillance, questioning, arrest, body search... may be applied to him. A person only becomes a "suspect" if the order has been made to present charges against that person, based on sufficient grounds for suspicion. The order is communicated to the person and he is then called in for interrogation. From that moment on, the person falls within the ambit of the rules on pre-trial proceedings in the Code of Criminal Procedure and he can be subjected to specific measures such as, for instance, the disclosure

of financial information in bank accounts. On the other hand, a suspect has the right of access to a defence counsel. An accused is a person against whom an indictment has been filed at court.

The system of criminal investigation is mainly based on the inquisitorial rule. However, the parties may file evidential requests. The investigator shall permit the parties and defence counsel to participate in all investigative activities, which cannot be repeated during the court hearing. The defence needs authorization from the investigator to access the file. A denial in this respect may be appealed against.

Romania

The Code of Criminal Procedure makes a distinction between a 'perpetrator' and an 'accused'. Only from the moment that the perpetrator becomes an accused, does he have procedural rights and duties. The procedural system is rather based on an accusatorial system. The defendant has the right to request further investigations and to appeal against decisions to the prosecutor or to the judge.

Slovakia

The Code of Criminal Procedure does not contain a definition of a 'suspect', nor does it confer specific rights on suspects during the pre-trial phase. After the indictment the defendant becomes an accused, having specific procedural rights. The pre-trial proceedings are carried out on the basis of the inquisitorial system, but the investigator is obliged to collect evidence against the suspect, including evidence, which may be used in his favour.

Slovenia

The Code of Criminal Procedure makes a distinction between a suspect, a defendant and an accused. A suspect is a person against whom preliminary proceedings are being conducted. During the judicial investigation by the examining judge the suspect is considered to be the defendant. Once the indictment has been laid he then becomes an accused.

Police investigation is organized in an inquisitorial way. The judicial investigation by the examining judge is also based on the inquisitorial tradition, but there are some accusatorial elements present: the defendant, being presumed innocent, can attend all the investigative procedures. The procedure on pre-trial detention is adversary. There are strict rules for carrying out investigative acts, otherwise the evidence gathered is subject to being excluded. The investigating judge must also exclude statements given by the suspect during the police preliminary proceedings.

2. Assessment of the acquis communautaire

There is no general acquis communautaire, either in the first or in the third pillar policy area, either concerning the inquisitorial or accusatorial character of the investigation, or concerning the definition of a suspect and an accused.

3. Assessment of the Corpus Juris 2000

The Corpus Juris does define the rights of the accused (Article 29) and does define the point in the procedure from when a person has to be considered to be an accused. In the law of the Candidate Countries an accused person does have substantive rights, but it is not always clear from which moment. The same can be said about the status of the suspect.

V. Mandatory investigation or investigative discretion? (including a monopoly or room for private enforcement?)

1. Comparative part

Bulgaria

The law enforcement authorities practically have a monopoly as regards investigation and prosecution. Only in a few cases are private prosecutions possible. The role of private persons is limited to

complaints and their procedural rights as victims. Only in the case of some specific minor offences (such as minor injuries, criminal libel) can they directly instigate private prosecutions before the court.

Both investigation and prosecution are mandatory. Due to the application of the principle of the legality of the investigation and prosecution there is no discretionary policy. The Minister of Justice cannot give any general or specific instructions. The chief prosecutor can give general or even specific instructions to the law enforcement agencies dealing with the investigation or prosecution, but those instructions cannot replace the personal convictions of those authorities concerning the case.

Czech Republic

The law enforcement authorities have a monopoly as regards investigation and prosecution. The role of private persons is limited to complaining and their procedural rights as victims. In some cases, however, the approval of the victim is necessary for prosecution.

Both investigation and prosecution are mandatory. Due to the application of the principle of the legality of the investigation and prosecution there is no discretionary policy. The Minister of Justice is not entitled to give mandatory instructions in either specific or general matters. The supreme Public Prosecutor is only entitled to give (for all prosecutors) general directions with the aim of securing consistency in public prosecutions. *De facto* these instructions also deal with, *extra legem*, specific cases. The higher-ranking prosecutor may give instructions to the lower ranking in a specific case. The higher-ranking prosecutor can even take over the case from the lower ranking if the latter is inactive or active *contra legem*.

Estonia

Victims have specific rights during the preliminary phase and during the court trial, but they cannot act as an investigator or prosecutor. Of course the victim can complain and ask for an investigation.

De iure Estonia makes use of the legality principle. De *facto* the police select the cases. The Draft Estonian Code of Criminal Procedure has taken the first steps towards the introduction of the opportunity principle. In this respect, in criminal cases in which:

- the maximum penalty does not exceed five years imprisonment; and
- the guilt of the suspect is modest; and
- the suspect has compensated the damage caused; and
- the suspect has reimbursed the costs of the criminal proceedings; and
- there is no major public interest at stake; and
- the suspect agrees to settle the case,

the prosecutor may apply to the court for the settlement of the criminal case. The court can agree to this, thereby imposing on the suspect the payment of an amount of money to be used in the public interest or to serve a number of hours of community service.

There are no guidelines/directives/instructions from the Ministry of Justice and/or of the Prosecutor's Office, either concerning general policy, or concerning specific criminal cases.

Hungary

As a main rule, the Public Prosecutor has a monopoly to prosecute. The possibility for the victim to act as a private prosecutor is the only exception to this rule. For misdemeanours such as the violation of privacy, the violation of the secrecy of correspondence, defamation, etc. the injured person may prosecute as a private prosecutor. The private prosecutor is entitled to the rights relating to the prosecution, unless the Code of Criminal Procedure provides otherwise. The Court in this respect is entitled to order an investigation and to entrust the police with this task.

The New Code of Criminal Procedure has introduced the possibility for the victim to act as a substitute private prosecutor if:

- the Public Prosecutor has dropped the case; or

- the Public Prosecutor or the investigating authority have rejected the complaint; or
- the public prosecutor or the investigating authority have put an end to the investigation.

Normally, the victim cannot act as a prosecutor during the preliminary investigation. The victim can become a substitute private prosecutor during the investigation phase (after the prosecutor or the investigating authority has rejected the complaint or terminated the investigation) or during the prosecution phase (after the public prosecutor has dropped the case). The status of the private prosecutor during the investigation phase is practically the same as the status of the victim; he/she cannot exercise the power of the investigating authorities. On the other hand, the private prosecutor can – with certain exceptions – exercise the powers of the public prosecutor in the prosecution phase.

Investigating authorities are bound by the principle of legality. The only case where the investigating authorities have certain discretion as to whether or not to commence an investigation is when there is a prevailing interest of national security or criminal law enforcement, which must then be approved by the prosecutor. An investigation may also be denied when the investigation in question is undercover.

Neither the Ministry of Justice nor the Public Prosecutor's Office can issue directives concerning criminal policy. The Public Prosecutor's Office has competence to give instructions with regard to investigating specific cases only.

Lithuania

The prosecutors have a monopoly over prosecution and law enforcement agencies have a monopoly over investigation. Only in the case of four crimes (so-called private indictment cases: slander, sexual coercion, torture and minor harm to health), does the Code of Criminal Procedure grant the victim the power to prosecute. In these cases the public prosecutor can join the prosecution or prosecute himself if the victim remains inactive.

Both for investigation and prosecution the principle of legality applies. The prosecutor General may give binding instructions on investigation and prosecution policy. At this point in time there are about thirty instructions of a general nature, including one on economic and financial crime. The Minister of Justice can only issue non-binding recommendations. This competence is also made use of in practice.

Poland

In Poland the public prosecutor does not have a monopoly concerning prosecution. For some offences (privately prosecuted offences), the victim may lodge an indictment as a private prosecutor. When an offence is prosecuted by a private prosecutor, the public prosecutor may instigate proceedings or may intervene in the private prosecution. In this case, the proceedings shall be conducted *ex officio*, and the private prosecutor shall be granted the rights and status of a subsidiary prosecutor.

The principle of legality applies. There is the legal possibility for the general public prosecutor to give binding instructions and orders to subordinated prosecutors. This *de iure* possibility has not been used since 1989. Under Communism, binding instructions were very often used. Since that period, the general public prosecutor has, however, already made use of it on a few occasions, for instance to demand a more active investigation in the field of corruption of officials.

Romania

In Romania the prosecution is strictly public. There are no possibilities for private prosecution.

The principle of legality applies. The Minister of Justice may give binding written orders. This is done through the General Prosecutor. However, he may not give negative determinations (not to investigate, not to prosecute) in specific cases. Also the General Prosecutor may give instructions, guidance, etc. based on the principle of hierarchical subordination.

Slovakia

There is a monopoly of public investigation and public prosecution. The police monopoly in the investigation is integrated by the administrative law enforcement agencies of the Ministries of Finance, Defence, etc. There is no private investigation or private prosecution in Slovakia.

The principle of legality applies in Slovakia. Neither the Ministry of the Interior, or the Ministry of Justice can issue binding instructions or intervene in concrete cases. The General Prosecutor may issue instructions, both generally and in particular matters. The instructions can take the form of positive or negative orders.

Slovenia

In Slovenia law enforcement, both investigation and prosecution, is a monopoly of public law enforcement authorities.

The Code of Criminal Procedure contains no specific provision on the legality or opportunity of the proceedings. However, there is a strict legality principle for the police investigation. Also the state prosecutor was traditionally bound by the principle of legality, but this was softened in 1994 with the introduction of certain forms of diversion in cases of criminal offences punishable by a fine or a prison term of up to a maximum of three years. There is an even stronger principle of opportunity for criminal offences punishable by a fine or imprisonment of up to a maximum of one year. In these cases the state prosecutor is not obliged to commence criminal prosecution. Slovenia today has a mixed system (legality-opportunity). For minor offences there is a wide power of discretion for the public prosecutor, taking into account the nature of the offence, the circumstances of the offence, the personality of the defendant, etc. The decision not to prosecute must always be taken by the prosecutor. There is no police waiver.

When it concerns provisions under the Act on Liability of Legal Persons for Criminal Offences, the main principle is the opportunity principle.

There are not and may not be guidelines or instructions from the Ministry of Justice. However, internal instructions within the Public Prosecutor's Office do exist. Some of them are published, others are not.

2. Assessment of the acquis communautaire

There is no general acquis communautaire, neither in the first nor in the third pillar policy area, concerning the possibilities for private prosecution or concerning the legality or opportunity principles. The French Strawberry case (C-265/95), in which France was condemned by the European Court of Justice for violating the EC Treaty (community loyalty principle and free circulation of goods principle) because of systematic non-criminal prosecution does not mean that the opportunity principle would be incompatible with the EC Treaty.

3. Assessment of the Corpus Juris 2000

The Corpus Juris does not deal with private prosecution. Concerning the legality or opportunity principle, the Corpus Juris prescribes the legality principle, but with quite a number of possibilities to settle cases conditionally or to impose a compounding procedure. Important is the legal control over the discretionary power of the public prosecutor.

Most of the Candidate Countries do employ quite a strict use of the legality principle. The Corpus Juris offers more possibilities of discretion and selection of cases, including the possibility to prescribe criminal policy by means of instructions or guidelines.

VI. Transition from investigation to prosecution

1. Comparative part

Bulgaria

The investigators decide when the investigation has sufficiently clarified the circumstances relating to the offence and to the offender. Normally they have two months to conclude the investigation, but

this term can be extended by the public prosecutor. The conclusion of the investigator is transferred to the prosecutor. On the basis of his inner persuasion and the collected evidence, the investigator drafts a "concept indictment". The prosecutor decides:

- whether the committed act is an offence;
- if there are grounds for settling the case (prescription, amnesty, ...);
- whether the evidence required for revealing the objective truth has been collected;
- whether the collected evidence sustains the prosecution;
- whether there have been breaches of procedure.

The prosecutor can decide to prosecute, not to prosecute or to ask for a further investigation.

Czech Republic

If the investigators are in charge of the case, then the investigators themselves can decide on which procedure to follow. They can decide to halt the procedure (lack of evidence) or to transfer the case to the public prosecutor. The report of the investigator is the basis for the indictment, drafted by the prosecutor. If a prosecutor is in charge of the case, he can also decide to prosecute or to halt the procedure (lack of evidence). In this case the appeal before the higher ranking public prosecutor.

Estonia

A pre-trial investigation shall be completed by the preparation of a summary of charges, and a referral of the case by the prosecutor to the court. The prosecutor also has the right to return the criminal case with written instructions to the investigative bodies if further investigation is necessary.

A preliminary investigator prepares a summary of charges (indictment). A summary of charges consists of a descriptive part and a conclusion. After the preparation of the summary of charges, a preliminary investigator shall immediately send the file and the summary of charges to a prosecutor. Upon a review of a file received from a preliminary investigator, a prosecutor shall verify their substance and legal form. After reviewing a criminal file, a prosecutor shall: 1) approve the summary of charges; 2) return the criminal matter together with his or her written instructions for further investigation to a preliminary investigator, or 3) terminate the criminal proceedings by making a corresponding order pursuant to the procedure prescribed in Article 68 of the Estonian Code of Criminal Procedure. If a prosecutor does not consent to the summary of charges, he or she shall prepare a new summary of charges, remove the summary of charges prepared by a preliminary investigator from the file and return the summary to the preliminary investigator indicating the deficiencies thereof. If a summary of charges is prepared in violation of Article 174 of the Estonian Code of Criminal Procedure, a prosecutor has the right to return the file to the preliminary investigator for the preparation of a new summary of charges pursuant to the requirements of the Estonian Code of Criminal Procedure. If necessary, a prosecutor has the right to question victims and witnesses and perform other specific procedural acts in a criminal matter, which has been sent to him or her for approval of the summary of charges. A prosecutor has the right to exclude, by his or her order, specific clauses of charges from a summary of charges and apply an Act, which prescribes a less serious criminal offence if the contents of the charges remain essentially the same. If it is necessary to amend the charges such as to make the charges more severe or the contents thereof significantly different from the original charges, a prosecutor returns the criminal matter to the preliminary investigator for further investigation and to bring new charges.

Hungary

The investigating authority concludes the investigation. It then sends the file to the prosecutor within eight days of the conclusion of the investigation. The prosecutor examines the file within fifteen days (or thirty days in complex cases) and based on his findings he can file charges, order a supplementary investigation, suspend the investigation or terminate it.

Lithuania

The pre-trial investigation will be concluded by drawing up a bill of indictment. The investigator must inform the accused of his right of access to the file. The accused also has the right to request a

supplementary pre-trial investigation. The investigator must decide on this formally and can only dismiss the request on reasoned grounds. Having complied with these requirements, the investigator draws up the indictment and transfers the file and the indictment to the prosecutor. The prosecutor must decide within 5 days whether to: approve the indictment, redraft the indictment, refer the file back to the investigator with a request to supplement the investigation or to redraft the indictment, to discontinue or to suspend the proceedings.

Poland

If there are grounds to conclude the investigation or the inquiry, the investigating authority notifies the defendant of the date of the final examination of the file. The defendant has *a priori* access to the file and can submit supplementary data. If there is no need for further investigation, only the investigating authority issues an order to conclude the pre-trial proceedings. If the pre-trial investigation was not in the hands of the prosecutor the file is transferred to the prosecutor in order to prepare the indictment (only in summary proceedings, the investigating authority can also issue the indictment). Within 14 days of the conclusion of the inquiry, the public prosecutor files an indictment to the court or issues an order of dismissal, suspension of the inquiry or demands a further investigation into the case.

Romania

When the investigator considers the investigation to have been finalized, he then makes sufficiently grounded proposals to the prosecutor. The prosecutor, after having studied the file, can seize the court, dismiss the case, or return it to the investigators for further investigations. He is in charge of drafting the indictment.

Slovakia

At the end of the pre-trial investigation, the prosecutor, an investigator or a police authority may either conclude the case, suspend it, hand it over (for instance in disciplinary proceedings) or commence criminal prosecution. A police authority may prosecute offences for up to three years. The formal decision to prosecute, called a "ruling", is communicated to the prosecutor within 48 hours. The 'ruling' is communicated to the accused within three days and not later than the beginning of the first interrogation. If the investigator considers the investigation to have been completed, he will hand over the file, together with a draft indictment, to the prosecutor. If the prosecutor agrees, he then finalizes the indictment.

Slovenia

The investigation is concluded at the moment when the investigating authority, mostly the police, sends the file to the prosecutor. He has to decide whether to dismiss the complaint, request the police to collect additional information, request other governmental bodies for information or to request the opening of a judicial investigating by the examining judge. In the last-mentioned case, the examining judge will send the file to the prosecutor after he has completed his investigation. The prosecutor is the authority for elaborating the indictment and for seizing the court.

2. Assessment of the acquis communautaire

Neither Community law nor Union Law contains specific provisions on transferring a criminal investigation into a criminal prosecution.

3. Assessment of the Corpus Juris 2000

The Corpus Juris does contain specific provisions concerning the indictment and the seizure of the court (including concerning the choice of forum). However, the main question at stake here is the relationship between the investigative authorities and the prosecutor. In the Corpus Juris it is clear that the prosecutor is the main investigative authority, dealing with and leading the judicial investigation. He is of course also responsible for the indictment and the seizure of the court.

It is obvious that this model is very new for many Candidate Countries, in which the prosecutor is not an investigating authority and in some countries is not even responsible for the indictment or for the prosecution of minor offences.

VII. Conclusions and Recommendations

1. The legal status and nature of the investigating authorities

a) The relationship between Public Prosecutors and the investigating authorities

In most of the Candidate Countries the role of the public prosecutor is limited to the prosecution of criminal cases and to some extent to supervision of the judicial investigation. This means that the Public Prosecutors are not an investigating authority at all. The only exceptions are Lithuania and Romania, where the Public Prosecutors do have some judicial investigative powers, but for a very limited set of offences. The overall absence of the public prosecutor in the judicial investigation phase is not due to the dominant position of an investigating judge in the pre-trial investigation. Only in one Candidate Country (Slovenia) does the investigating judge exist.

This means that the leading investigating authority in criminal cases, the police, have *de iure* and *de facto* a far-reaching autonomy and considerable discretion, not only in commencing and conducting investigations, but in some countries even in an indirect or direct way on the indictment and whether or not to prosecute. The Public Prosecutors occupy a very reactive position and are very dependant on the input of the investigating authorities.

The investigating police authorities are a complex field. In some Candidate Countries we see classic police forces, mostly still subject to a military regime, functioning under the authority of the Ministry of the Interior. In Romania we can see many specific military or militarised police forces having judicial powers.

In other Candidate Countries we are confronted with a remnant of the former communist system: specialist bodies for criminal investigation within the police forces, called investigators (see Bulgaria, Czech Republic, Slovakia). In some countries these bodies and their personnel have been moved to the judiciary. The investigators are specialist police forces dealing with judicial investigation, mostly under the authority of the Ministry of the Interior.

There is nothing inherently against the existence of specialist police forces dealing with judicial investigations, subject to the condition that they work under the authority and/or under the supervision of a judicial body, such as the public prosecutor or an investigating judge. However, in most Candidate Countries these investigators do have far-reaching autonomy and the *de iure* supervision of the public prosecutor is *de facto* void and very rarely applied.

In the light of this conclusion it is important to look at the Council of Europe Recommendation Rec(2000)19 on "The Role of public prosecution in the Criminal Justice System", especially the part on "Relationship between Public Prosecutors and the police":

1. 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.
2. 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.

3. States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional co-operation between the public prosecution and the police.

To put these recommendations into practice, the public prosecutor, as a part of the judiciary, and having the functions of an independent magistrate should:

- have a leading function in the investigation phase;
- and/or have *de iure* and *de facto* powers to supervise the police investigation, including the possibility to give binding instructions.

b) The relationship between the judicial authorities and the administrative (law enforcement) agencies

Differences between the Candidate Countries are present, just as they are in the Member States of the EU. However, when it comes to enforcement of economic and financial offences this is an important issue. We see countries in which the administrative agencies have neither judicial investigative powers, nor strong administrative investigative powers (for instance Romania). When they discover an offence, they have to transfer the case to the judicial authorities (the police, public prosecutor). One can question whether this approach is a very efficient one when it concerns fiscal and customs matters or subsidies in the economic field. Other countries (such as Poland and Lithuania) do have administrative agencies with far-reaching judicial investigative powers. In Poland they even have prosecutorial powers for the specific offences under their competence. This seems to be an efficient approach for the enforcement of fiscal and customs offences. One can, however, question whether a) prosecutorial powers for the administrative bodies is not a bridge too far from the point of view of the rule of law; and b) how the investigative policy by the agencies and the prosecutorial policy by the prosecutors is elaborated. In most Candidate Countries we see some form of double investigative jurisdiction for the administrative law enforcement agencies. They have both administrative and judicial as well as semi-judicial investigative powers, including the power to search and seize. In some Candidate Countries there is competition between the responsible ministries and the Ministry of the Interior (competition between the police/investigators and the specialized law enforcement agencies).

The Council of Europe Recommendation does not contain specific elements concerning this topic. We would recommend specialization in the enforcement field, giving real enforcement powers to the administrative agencies, but under the control of the public prosecutor. Moreover, the law enforcement agencies and the public prosecutor should elaborate public guidelines dealing with enforcement priorities and the selection of cases (between administrative sanctioning and criminal sanctioning).

The administrative sanctioning power of the administrative agencies

From the point of view of the rule of law and in line with the ECHR, the power to imprison should be the monopoly of the criminal courts.

The investigating magistrate

It is quite surprising that in all Candidate Countries, even in Romania, the investigating judge has not survived as the leading judicial authority during the pre-trial investigation phase, at least when it concerns serious offences. Only in Slovenia does the investigating judge still exist, but his existence is currently under challenge.

Although the investigating judge, as conceptualised under the French tradition, has a complex and hybrid set of functions, including both investigative functions and the functions of a judge of freedoms, it can be said that his investigative powers in the Candidate Countries are to a large extent in the hands of the police and that his functions as a judge of freedoms have only to a certain extent been taken over by the judiciary.

In our opinion it would not be a good idea to re-establish the investigating judge, as provided for under the French tradition, but it is highly recommended that a substantial role should be provided for the judge of freedoms, in line with the ECHR and with the Corpus Juris 2000.

2. Judicial investigatory powers and judicial warrants

a) Investigatory powers, the rule of law and judicial warrants

De iure we can summarize that there is no real lack of investigative powers, either administrative or judicial. In some countries, the division of these powers is to some extent problematic (see point 1.). The main concerns are the following:

1. Are these powers really used and does the public prosecutor have the possibility to activate the use of investigative powers?
2. To which extent is there a need for approval/permission or for a judicial warrant, in order to protect the civil rights of citizens?

Concerning the first point, within the framework of this study it is impossible to give an empirical answer to the efficient use of the investigative powers. Therefore one needs to have data from an empirical criminological study. However, in many national reports one can find references to frustrations concerning the correct use of police powers and the activities of the investigators. Concerning the binding instructions, it must at least be possible for the prosecutor to supervise the police investigation and to give binding instructions to the police authorities. In some Candidate Countries this is the case, in others it only exists *de iure* or not at all.

Concerning the second point, there is a surprising difference between the Candidate Countries. In Romania, the investigative authorities do have a large degree of autonomy and only need the permission of the prosecutor in the case of far-reaching investigative powers. A judicial warrant issued by a judge or court is never needed. In most countries some coercive measures need the approval of the public prosecutor, others need a court warrant. In general the most severe measures are the subject of a court warrant, but there are some differences between the Candidate Countries.

From the point of view of the ECHR and of the Corpus Juris 2000, we recommend:

- those coercive measures having an impact on the civil rights of persons do need at least to be approved by the public prosecutor;
- those coercive measures limiting the private life of persons must be the subject of a warrant granted by a judge of freedoms.

b) Proactive and/or special investigative techniques

In most of the Candidate Countries fundamental reforms have led to the introduction of proactive and/or special investigative techniques. Only in some countries are they fairly limited (such as for instance Bulgaria, Czech Republic, Romania). In the others, however, there is a rather imposing set of these techniques.

We should stress that the Candidate Countries, which do have them mostly, make a distinction between special methods of investigation at the police level, provided for under the Police Act or under special Police legislation, and the proactive and/or special investigative techniques provided for under the Code of Criminal Procedure.

Regulating the whole phase of pre-trial investigation from judicial police work up to the indictment in the Code of Criminal Procedure seems to us to be a very good approach. The extent of the powers is defined and the lines of responsibilities and accountabilities are clearly defined. The same should be done for the proactive and/or special investigative techniques. They can only be regulated outside de Code of Criminal Procedure as far as they are part of the intelligence system and do not have the aim of preventing or investigating criminal offences.

The proactive and/or special investigative techniques provided for under the general or specific police laws in the Candidate Countries do give extended powers to the police forces and do not provide

for sufficient judicial control thereof. In some cases far-reaching powers can be used without any permission from the prosecutor or without any judicial warrant. We would recommend integrating these powers in the Code of Criminal Procedure and bringing them into line with the judicial authorisations foreseen in that context.

3. Accusatorial or inquisitorial nature of the investigation?

It seems that no Code of Criminal Procedure of the Candidate Countries has a clear substantial definition of a suspect, which is linked to that of the commencement of the pre-trial preliminary investigation.

From the information obtained, it is difficult to draw a clear picture of the adversial nature of the pre-trial proceedings. In quite a few countries the defendant and his/her lawyer seem to have substantial procedural rights. On the other hand, in some countries distinctions are made between different categories of offenders (not always linked to the position of the accused or the indicted), which makes it difficult to make a clear assessment. Further investigation is needed.

4. Mandatory investigation or investigative discretion?

In most Candidate Countries there is a system of Public Prosecutors with a monopoly. Only in some Candidate Countries (for example, Poland) is there some room, in a limited set of offences, for private prosecution in criminal matters.

In all the Candidate Countries the leading principle is that of legality. *De iure* there is very little to no room for discretion in the investigation or in the prosecution. Only in Slovenia is there some room for the opportunity principle and for the less serious offences we can speak of a mixed regime.

The same can be said for the guidelines and instructions. In most of the Candidate Countries there is no tradition of general guidelines, neither emanating from the Ministry of Justice nor coming from the General Prosecutor's Office.

It should be said that the spelling out of enforcement priorities is not per se contradictory to the legality principle. Every system has hidden numbers and in every system there are ways of selecting cases. The important point is that there must be an efficient enforcement system, both at the level of investigation and of prosecution. Criminal policy is not in the first place the result of enforcement activities, but must be a guiding policy for such enforcement activities, of course with the accountability of Parliament.

5. The transition from investigation to prosecution

As said, in most of the Candidate Countries, the prosecutor is a reactive authority, not active in the investigation and responsible for the prosecution. In most of the Candidate Countries the investigators send the file to the prosecutor who has wide discretion whether to prosecute, to terminate the investigation (no offence, no evidence), or to return the file for further investigation. The prosecutors have sufficient competence and power when it concerns the drafting of the indictment and the prosecution.

Annex: Submissions to the Candidate Countries

1. The public prosecutor as a part of the judiciary, and having the functions of an independent magistrate should have a leading function during the investigation phase, and/or have *de iure* and *de facto* powers to supervise the police investigation, including the possibility to give binding instructions.
2. It is envisaged that it is possible to grant real enforcement powers to the administrative agencies, however under the control of the public prosecutor. Moreover, the law enforcement agencies and the public prosecutor should elaborate public guidelines dealing with enforcement priorities and the selection of cases (between administrative sanctioning and criminal sanctioning).

It is not recommended that the investigating judge, as provided for under the French tradition, be re-established, but it is highly recommended that a substantial role be provided for the judge of freedoms, in line with the ECHR and with the Corpus Juris 2000, in order to ensure judicial warrants are provided for coercive measures relating to goods and persons. From the point of view of the ECHR and of the Corpus Juris 2000, we would recommend that (a) coercive measures, having an impact on the civil rights of persons, should need at least the approval of the public prosecutor and (b) coercive measures limiting the private life of persons, or imposing restrictions on goods or persons, be the subject of a warrant issued by a judge of freedoms.