

WORKING GROUP "CRIMINAL JUSTICE IN THE EU"
Section B - Impartiality

B. Freedom of Investigation

BULGARIA

Pursuant to Article 51, para 1 of the Bulgarian Criminal Procedure Code (CPC) investigators and police investigators shall be the investigative bodies.

Pursuant to Article 193 of the CPC the prosecutor and the investigative bodies shall be the pre-trial bodies.

Pursuant to Article 194a of the Criminal Procedure Code the investigation pertaining to materials received by State agency "National security" is conducted by a prosecutor. In that case the prosecutor may assign the investigation or the performance of separate investigating activities also to an investigator.

Pursuant to Article 194 of the CPC investigation shall be carried out by investigators in cases of: publicly actionable criminal offences such as crimes against the republic (treason, betrayal and espionage, diversion and sabotage, propaganda of fascist or other antidemocratic ideology or forcible change of the social and state system established by the Constitution of the Republic of Bulgaria, terrorism), crimes against the information representing a state secret and against the foreign classified information, crimes against peace and humanity; criminal offences committed by individuals enjoying immunity, members of the Council of Ministers, judges, prosecutors and investigators or civil servants with the Ministry of Interior or State Agency "National Security"; criminal offences committed abroad.

Investigations pertaining to crimes other than the abovementioned are carried out by police investigators. Unlike the investigators who are organs of the judiciary, the police investigators are state servants and organs of the executive.

Pursuant to Article 51, para 2 of the CPC the investigating bodies operate under the guidance and supervision of a prosecutor. Pursuant to Article 46 of the CPC the prosecutor shall bring up charges of and uphold the indictment for publicly actionable criminal offences. In discharge of this assignment the prosecutor: directs the investigation and exercises constant supervision for its lawful and timely conduct in his/her capacity of a supervising prosecutor; may perform investigation or separate investigative or other procedural action; participates in judicial proceedings as accuser on behalf of the state; takes measures for the elimination of infringements on the laws pursuant to the procedures set forth in the CPC and exercises supervision for legality in the enforcement of coercive measures. Pursuant to Article 196 of the CPC when exercising guidance and supervision, the prosecutor may: 1. constantly control the progress of investigation, studying and inspecting all case materials; 2. give instructions in relation to the investigation; 3. take part or perform investigative actions; 4. remove the investigating body, where he has committed a violation of the law or is not capable of ensuring the correct conduct of the investigation; 5. withdraw a case from an investigating body and transfer it to another; 6. assign to the respective bodies of the Ministry of Interior the implementation of individual actions related to the discovery of the crime; 7. revoke on his own motion or on the basis of a complaint by the interested individuals decrees of investigative bodies. The supervising prosecutor shall directly monitor the lawfulness of the investigation and its completion within the set period. Pursuant to Article 197 of the CPC written instructions of the prosecutor to the investigating body shall be binding and shall not be subject to objections. Pursuant to Article 144, para 3 of the Judicial System Act

The respective regional or district prosecutor shall give annually an opinion in writing regarding the work of the police investigator, a copy of which shall be forwarded to the chief police investigator. Pursuant to Article 145, para 4 Prosecutors may, within their competence and in compliance with the law, give mandatory dispositions in writing to police bodies.

The Bulgarian prosecution service is governed by the principle of compulsory prosecution (or the legality principle). Pursuant to Article 207, para 1 of the CPC pre-trial proceedings shall be instituted where there is a statutory occasion and sufficient information about the perpetration of a crime. An exception to this rule represents Article 61 pursuant to which regarding a juvenile who commits a crime due to aberration or frivolity, which does not represent a great social danger, the prosecutor may decide not to institute or discontinue the instituted pre-trial proceedings, and the court may decide on no committal to trial or no conviction if corrective measures can be successfully applied according to the Juvenile Delinquency Law.

CZECH REPUBLIC

The status and competences of the public prosecution are regulated by the Public Prosecution Act (Act No. 283/1993 Coll., as amended, hereinafter called PPA). The public prosecutor's competence lies in criminal proceedings in the first place, in civil, commercial and administrative procedures only when provided by a special law. The public prosecution representing the interests of the state supervises the pre-trial proceedings, and once the indictment has been submitted, represents the public before the court where she/he has the status of a party. (Public Prosecution Act, Sec. Para 1, 4)

The status and competences of the police are regulated by the Police Act (Act No. 283/1991 Coll., as amended). The police perform tasks related to internal order and security, the police are, inter alia, the primary law enforcement body responsible for detecting crimes, establishing the offenders and conducting of criminal investigation. (Police Act, Sec. Para 1, 2)

As regards the relations between the police and the public prosecution their cooperation forms an integral part of the pre-trial proceedings governed by the Criminal Procedure Code (Act No. 141/1961 Coll., as amended, hereinafter called CPC). The most frequent and important cooperation between the public prosecutor and the police takes place during investigation, the subject matter of this questionnaire. See b.1.2 for more details.

Regarding the question of compulsory or discretionary prosecution the principle of mandatory prosecution applies in the Czech Republic. If the results of investigation justify sufficiently the bringing the charged person before the court, the public prosecutor does it and represents public action in trial before the court. (CPC, Sec. 2 Para 8, Sec. 176 Para 1) The indictment may only be brought for an act for which a criminal prosecution has been instituted. (CPC, Sec. 176 Para 2) The public prosecutor is obliged to prosecute all criminal acts he/she learns about unless any law or declared international agreement, by which the Czech Republic is bound, specify otherwise. (CPC, Sec. 2 Para 3) The principle of mandatory prosecution is a subject to some exceptions, however. With regard to the possible existence of certain sensitive relations between the suspect and the victim initiation of criminal prosecution or its continuation is conditioned by the consent of the victim in case of specified crimes. (CPC, Sec. 163)

Regarding discretion the public prosecutor may terminate a case in three ways. First, he/she may terminate the criminal prosecution if the punishment in which the criminal prosecution may result is of absolutely no significance as compared with the punishment that has already been imposed (or that shall be imposed expectedly) on the charged person for another crime; if a sufficient decision on the crime of the charged person has already been made by other body in disciplinary proceedings, or by a foreign court; or if, with regard to the importance of the protected interest that has been affected by the crime, the mode or consequence of the crime or the circumstances under which the crime has been committed and with regard to the behaviour of the charged person after committing the crime, it is obvious that the purpose of the criminal proceedings has been achieved. (CPC, Sec. 172 Para 2) Second, the public prosecutor may conditionally terminate criminal prosecution for offences punishable by imprisonment of five years or less, taking into account the circumstances of the offence and the accused. The accused must admit responsibility for the offence and compensate for any damage caused by the offence. He/she is then placed on probation with conditions for 6-24 months. (CPC, Sec. 307-308) Third, the public prosecutor may decide to approve a settlement. The accused must admit responsibility for the crime, compensate for any damage and deposit money for a specified recipient for socially beneficial purposes. All victims of the crime must consent to the settlement procedure. (CPC, Sec. 309-314)

DENMARK

The tasks and organization of the Prosecution Service are set out in the Administration of Justice Act. The service is structured as a hierarchy of three levels headed by the Director of Public Prosecutions (the General Prosecutor). The second level comprises six units called Regional Public Prosecutors, while at the local level there are 12 Commissioners heading both the local prosecution service and the police.

In addition to the basic structure the service includes two specialised units with nationwide powers: The Special Prosecutor for Serious Economic Crime and The Special International Crimes Office handling war crimes and crimes against humanity, etc.

The Prosecution Service as well as the Police and the Prison Service are subordinate to the Minister of Justice.

The key task of the Prosecution Service is to ensure enforcement of the law in cooperation with the police and in pursuance of the rules of the Administration of Justice Act in situations where a breach of the law carries a criminal sanction.

The Director of Public Prosecutions and his staff conduct criminal cases before the Supreme Court and the Special Court of Indictment and Revision. The Regional Public Prosecutors and their staff conduct criminal cases before the High Courts. The Regional Public Prosecutors also conduct cases before the City Courts if the case involves the use of a jury. The legal staff of the Commissioners conduct other criminal cases before the City Courts.

The Commissioners are responsible for the police investigation of all criminal cases and decide to prosecute or not in the vast majority of criminal cases. Due to their dual function as head of both police and prosecution, they are subject to close supervision by the Regional Public Prosecutors.

The Danish system does not include investigating magistrates but leaves the control of police investigations to the courts and the Prosecution Service. The legal staff of the Commissioner decides whether to prosecute or not.

ENGLAND & WALES

The responsibility for charging offenders lies with the public prosecutors such as the Crown Prosecution Service (with or without the leave of a senior law officer) and the responsibility is purely discretionary.

FRANCE

En vertu de l'article 40 du code de procédure pénale, le procureur de la république reçoit les plaintes et les dénonciations et apprécie la suite à leur donner.

Même si l'auteur est identifié, le procureur de la République n'a pas l'obligation d'engager des poursuites. Il peut, en vertu de l'article 40-1 du code précité décider de classer sans suite la procédure lorsque des circonstances particulières liées à la commission des faits le justifient. Il peut également décider de mettre en œuvre une mesure alternative aux poursuites pénales (rappel à la loi assorti ou non d'obligations, médiation, composition pénale).

HUNGARY

no answer

ITALY

To clarify the current relationships between police and public prosecutors, it is necessary to briefly dwell beforehand on the structure of the State prosecutor's offices. The reformation brought about recently by decree no. 106 dated 20 February 2006, as subsequently amended, specified the role played by the State prosecutor within the framework of the public prosecutor's office; in particular, the hierarchical character of the whole structure was enhanced, as this organisational approach was considered to be the most suitable one in order to streamline and put fully into practice the principle whereby prosecution is compulsory - as per Article 112 of Italy's Constitution. Prosecution is committed exclusively to the State prosecutor, who may take steps either in person or by allocating the given proceeding to one or more prosecutors attached to his/her office. When allocating a proceeding, the State prosecutor may also set out the standards to be complied with by the individual magistrate in discharging the tasks committed to him/her. - Every State prosecutor's office is equipped with a judicial police office, in order to carry out the respective institutional tasks. Either the State prosecutor in person or the individual public prosecutors that have been entrusted with the given proceeding in the manner described above avail themselves directly of the judicial police staff attached to their office

(pursuant to section 58 of the Criminal procedure code). - The individual judicial police offices report to the magistrates that are in charge of the offices they are attached to (section 59 of the Criminal procedure code). - The head of the public prosecutor's office a given judicial police office is attached to is also the head of the latter police office and coordinates their activities by having regard to the requests made by the individual magistrates (section 9 of the provisions implementing the Criminal procedure code).

LITHUANIA

Rules of the criminal procedure in the Republic of Lithuania are established by the Code of Criminal Procedure (hereinafter referred to as CCP), which maintains the principle of the criminal prosecution. Besides Article 2 of this Code presents the duty of the public prosecutor and the institution of the pre-trial investigation to apply all the measures indicated by laws every time when indications of the criminal act appear in order to conduct the investigation and reveal the criminal activities within a reasonable time.

Police is one of the main institutions of the pre-trial investigation mentioned in the Article 165 of the CCP. Article 164 of the Code also establishes the status of the pre-trial investigation officer and the public prosecutor in the process – the pre-trial investigation is carried out by the officers of the pre-trial institutions. The pre-trial investigation is launched and led by the prosecutor. The prosecutor may decide to conduct the whole investigation or part of it, whereas in some cases identified by the Law of the Criminal Procedure the judge of the pre-trial investigation may perform actions of the pre-trial investigation. Article 172 of the CCP specifies that officers of the institutions of pre-trial investigation perform all the pre-trial investigation actions established in this Code except those actions that may be executed only by the prosecutor (Article 170 of the CCP) or the judge of the pre-trial investigation (Article 173 of the CCP).

MALTA

no answer

NETHERLANDS

Answers a5-b3 have been prepared by the Dutch public prosecutor

Powers of the police force: public order and investigation of criminal offences

Powers of the Prosecution Service: supervision over the police in investigating criminal offences, prosecuting offenders, execution of sanctions.

In the Netherlands there is a system of discretionary prosecution. The prosecution service may decide not to prosecute in case a prosecution would probably not lead to a conviction, due to lack of evidence or for technical considerations. The prosecution may also decide not to prosecute under the expediency principle. This principle is laid down in sect. 167 of the Code of Criminal Procedure which authorises the the prosecution service to waive (further) prosecution “for reasons of public interest”.

POLAND

no answer

PORTUGAL

In our system, there is no discretionary prosecution. The notice of every crime originates an investigation or a trial in a lighter form of procedure.

The public prosecutors have the competence and the responsibility for guiding the investigation procedure, directing the police in order to achieve the results. Nevertheless, different police forces have strategic autonomy and command.

There are some categories of penal offences that can only be investigated by the force "Policia Judiciária", in spite of the corresponding procedures being directed by public prosecutors.

During any investigation, any measure that can offend or restrict citizens' rights or freedom demands the intervention of a judge.

ROMANIA

The Criminal Procedure Code includes in its special part, under Title I, Chapter II, the functional, substantive and personal competence of a public prosecutor and of the investigative bodies of the judicial police.

Public prosecutors work within prosecution offices attached to courts, and the judicial police work within the Ministry of the Interior and of Administrative Reform, and these two entities are not in any relationship of subordination to each other.

According to the current legislation (Art. 218 of the Criminal Procedure Code), public prosecutors direct, supervise and coordinate the activity of criminal prosecution; in exercising this task, prosecutors directly run and control the activity of criminal prosecution performed by the judicial police and by other special bodies of criminal investigation; also, prosecutors may take any step of criminal prosecution in the cases in which they are supervising the criminal prosecution (Art. 209 paragraphs 1 and 2 of the Criminal Procedure Code).

According to Art. 209 para. 3 of the Criminal Procedure Code, prosecutors must perform criminal prosecution in relation to certain offences expressly provided in the law, but also in the cases that are ascribed to the competence of the National Anti-corruption Directorate and of the Directorate for the Investigation of Offences of Organised Crime and Terrorism.

Under Art. 201 para. 2, the bodies of criminal investigation are the investigative bodies of the judicial police and the special investigative bodies.

The bodies of criminal investigation perform the criminal investigation work directly, under the leadership and supervision of the prosecutor, and they are obliged to carry out his orders (Art. 219 para. 2 of the Criminal Procedure Code). They are obliged also to immediately inform the prosecutor of any offences that they have found out about.

According to Art. 5 of Law No. 364/2004 on the Organisation and Operation of the Judicial Police, the members of the Judicial Police are subordinated to their hierarchical officers in their accomplishment of other professional activities than those that are directed and controlled, under the law, by the prosecutors.

According to Art. 6 of Law No. 364/2004, the appointment, promotion and removal of the members of the Judicial Police take place under the norms of competence approved by order of the minister of the interior and of administrative reform, with the endorsement of the General Prosecutor of the Prosecution Office of the High Court of Cassation and Justice.

According to Art. 207 of the Criminal Procedure Code, the police bodies of criminal investigation have a general competence, carrying out criminal investigation for any offence that is not assigned by the law into the competence of other bodies of criminal investigation.

In relation to the tasks and competences of the members of the Judicial Police, according to the provisions of Art. 9 of Law No. 364/2004, they work directly under the authority and control of the head prosecutors of prosecution offices attached to first instance courts and district courts, according to their assignment and territorial competence, and respectively under the authority of the general prosecutors in charge of prosecution offices attached to courts of appeal, and the General Prosecutor in charge of the Prosecution Office of the High Court of Cassation and Justice exercises authority, directly or through designated prosecutors, over the bodies of judicial police throughout Romania.

Also, the General Prosecutor of the Prosecution Office of the High Court of Cassation and Justice may suggest to the minister the removal from office of a Judicial Police member for any failure or inappropriateness in the fulfilment of obligations in his activity as a body of criminal investigation of the Judicial Police.

The Romanian lawmaker has established the principle of officialness as a general rule for the prosecution, trial and punishment of criminal offences.

The compulsory nature of criminal action issues from the principles of officialness and of legality, which are set forth in Art. 2 of the Criminal Procedure Code. Thus, every time that the judicial bodies are notified about the perpetration of an offence, they are obliged to initiate criminal prosecution in order for those who are guilty to be punished, unless the law provides otherwise.

SCOTLAND

The Crown Office and Procurator Fiscal Service ("COPFS") is responsible for the prosecution of crime in Scotland, the investigation of sudden or suspicious deaths and complaints against the police. The Procurator Fiscal ("PF") in Scotland is responsible for the investigation of all crimes and can instruct and direct the police in connection with investigations. The police carry out an initial investigation and submit a report to the local PF. The PF considers this report and decides whether criminal proceedings should take place. In taking this decision, the PF considers whether there is sufficient evidence to proceed. If there is, the PF will then decide whether to prosecute, whether an alternative to prosecution (such as a warning) would be more appropriate or whether to take no action in the case. The PF considers a number of factors in coming to this decision, including the

seriousness of the offence, the length of time since the offence took place and the age of the offender.

b1. How is freedom of investigation ensured in terms of both substantive and procedural domestic law? Please provide information on the following:

BULGARIA

Pursuant to Article 54, para 3 of the Ministry of Interior Act in exercising such powers a police investigator shall make decisions in conformity with his/her convictions based on the objective, comprehensive and complete examination of all circumstances under the relevant case, governed by law. Pursuant to Article 54, para 3 higher-ranking officials shall not be entitled to give instructions concerning the performance of acts under an investigation and drafting conclusion, as well as in any other way to interfere in the investigation.

CZECH REPUBLIC

See question b1.1

DENMARK

See question B. and B1.4. Furthermore the court exercises authority in the investigation procedure as some investigations are only allowed if the court accepts the specific investigation requested by the prosecution service or the police. For instance this structure applies when the prosecution service or the police request to tap the phone or an email-address of the defendant.

ENGLAND & WALES (b1 to b4)

It is most convenient to answer these questions generically. Essentially, the process of investigation is purely under the control of the police or other investigative body, but as a matter of course the Crown Prosecution Service (or other public prosecutor) may be consulted on particular issues. With terrorist offences, this is likely to occur and the Crown Prosecution Service may well be asked to give advice on particular issues. Save as regards this consultative element, the police do not “report” to any other person or body during their investigations. It follows that public prosecutors do not “control and direct investigations” save to the extent that the advice that they give may well be accepted.

Crown Prosecutors do not act under the control of the executive, save to the extent that the Attorney General (the chief legal adviser to the government) has overall responsibility for the work of the Crown Prosecution Service. However, despite being a member of the government, the Attorney acts as an independent law officer giving advice to the government.

The judiciary would only on an exceptional basis order the prosecution to undertake additional research as regards the evidence in a case. There is no specific legislative provision in this regard; instead it reflects the judges’ common law powers of ensuring

there is a fair trial. It is unlikely that this would include judicial intervention if it was considered there had been an element of superficiality as regards the investigation but such a step remains a possibility.

FRANCE

see question b1.1

HUNGARY

See question b1.1

ITALY

B1. Under Italy's legal system, the judicial police are subordinated to judicial authorities. That is to say, the public prosecutor is empowered to avail himself/herself of judicial police staff. Every magistrate (prosecutor) in charge of a given investigation, based on the allocation mechanisms described under B., may avail himself/herself directly of judicial police staff. There are no "filters" or interferences between a magistrate and the judicial police. By the same token, if the judicial police are informed of a given crime, they must report without delay directly to the public prosecutor, in writing, on the main facts at issue.

LITHUANIA

The impartiality of the pre-trial investigation is guaranteed by the principle of the competition among the accused and the defense side on which the criminal process is based and which is established in Article 7 of the CCP. The criminal process is also based on the priority of protecting human rights within the criminal process established in Articles 44, 45, 46 of the CCP and which is implemented by particular procedural guarantees identified in Articles 17, 47 and 48 (defense), Articles 53-56 (representation), Articles 57, 58, 60 (removal and grounds for the removal), Articles 62, 63, 64, 65 (appeal against the activities and decisions of the pre-trial investigation officer, public prosecutor and the judge of the pre-trial investigation), parts 2–5 of Article 178 (implementation of the right of the parties of proceedings to ask for the performance of the pre-trial investigation actions), Article 181 (implementation of the right of the parties of proceedings to review the data of the pre-trial investigation) and other. Moreover only court may acknowledge the data of the pre-trial investigation as the evidence but on its own initiative the court neither may perform the actions of the investigation, nor collect the important data for the settlement of the case. It should be noted that any interference in the activities of the judge, pre-trial investigation officer, prosecutor, also lawyer or bailiff may be punished according to the criminal liability due to the Article 231 of the Criminal Code of the Republic of Lithuania.

MALTA

See question b1.1

NETHERLANDS

See question b1.1

POLAND

Preparatory proceedings are conducted by a prosecutor and where provided by applicable laws – by the police (Article 298 § 1 of the Penal Code).

The prosecutor as the dominus eminens of the preparatory proceedings will initiate and conduct the investigation or inquiry or delegate the initiation or management of such investigation to another authorized body and will also supervise preparatory proceedings conducted by another competent body.

The police will conduct preparatory proceedings exclusively in the form of an inquiry (Article 312). The prosecutor may delegate the entire investigation or some parts thereof to the police or delegate only selected activities within that investigation.

The prosecutor in charge of an investigation or inquiry may delegate to the police:

- a) the entire inquiry or investigation or selected parts thereof (delegated inquiry or investigation),*
- b) certain activities within the scope of a given inquiry or investigation.*

In such cases the Police conduct the investigation or inquiry to a limited extent, as delegated by the prosecutor.

The prosecutor may not delegate the following activities to the police in the course of an ongoing inquiry or investigation:

- a) drafting a decision to present, modify or supplement charges, announcing it to the suspect and interrogating him/her (Article 313 § 1 and Article 314),*
- b) providing the suspect and his/her attorney with files of the investigation/inquiry, issuing a decision to close the investigation/inquiry and announcing it (Article 321),*
- c) requiring separate administrative decisions, i.e. to appoint a court expert.*

Those exclusions demonstrate that even delegating the entire investigation or inquiry to a certain body does not mean that that body will be fully independent in managing such investigation/inquiry, because it will not be able to carry out certain designated activities; in actuality, a prosecutor can never delegate the entire body of an investigation/inquiry to the police or other agencies.

Actually, a prosecutor will initiate an investigation/inquiry and conclude it. The role of other bodies is limited to establishing certain facts and evidence and to handle organizational and investigatory duties.

PORTUGAL

See question b1.1

ROMANIA

The Constitution of Romania, through Art. 132 indent 1, has set forth that “public prosecutors work according to the principles of legality, impartiality and hierarchical control, under the authority of the minister of justice”.

Law No. 304/2004 on Judicial Organisation has taken over and developed the provisions of the fundamental law, establishing that “public prosecutors are independent, under the law, in what regards the solutions that they ordain”.

According to Art. 3 para. 1 of Law 3030/2004 on the Statute of Judges and Public Prosecutors, “public prosecutors appointed by the President of Romania (at the proposal of the Superior Council of the Magistracy) enjoy stability and are independent.”

As regards the investigative bodies of the judicial police, the impartiality of investigations has been regulated by Law No. 364/2004. Thus, in Art. 8 indents 2 and 3 , it has been provided that hierarchical superiors may give directions to members of the judicial police, in the activity of detecting offences, collecting data to identify the perpetrators and initiating criminal prosecution, but they may not give them directions or orders relating to criminal investigations, as such orders may be given to them only by a public prosecutor.

SCOTLAND

The role of the police in the investigation of crime is set out in section 17 of the Police (Scotland) Act 1967 (general functions and jurisdiction of constables). Section 17(1)(b) provides that it shall be the duty of a constables “where an offence has been committed...to take all lawful measures and make such reports to the appropriate prosecutor, as may be necessary for the purpose of bringing the offender with all due speed to justice”. Section 17(3) provides that “in relation to the investigation of offences the chief constable shall comply with such lawful instructions as he may receive from the appropriate prosecutor”.

The Lord Advocate is the head of criminal prosecutions and investigations of deaths in Scotland and any decision taken in that capacity is made independently from any other person, as provided by section 48(5) of the Scotland Act 1998.

b1.1: Who are the judicial police to report to in the course of investigations? (please describe their administrative and functional subordination)

BULGARIA

In the course of the investigation the police investigators report to the supervising prosecutor. The posts in the police investigations are as follows: chief police investigator, senior police investigator, police investigator, junior police investigator. Pursuant to Article 219, para 1 of the Ministry of Interior Act the chief police investigator shall realize also coordination and methodological guidance of the pre-trial investigators' activity, by keeping track of the legally correct execution of the investigation, of the execution of the public prosecutor's obligatory instructions and the observance of the term of investigation

CZECH REPUBLIC

Investigation is in general carried out by the Service of the Criminal police and Investigation of the Police of the Czech Republic in departments with territorially limited jurisdiction. The Minister of Interior may also charge other police departments to carry out the investigation and determine their competence. (CPC, Sec. 161 Para 2)

The public prosecutor himself leads investigation of crimes committed by members of the Police of the Czech Republic, members of the Security Information Service and the Office for Foreign Relations and Information. (CPC, Sec. 161 Para 3) This measure has been taken due to the risk of ineffective or biased investigation by the police officers with regard to the existing professional relationships.

Investigation may also be carried out by the captain of a ship during a long-distance voyage in respect of any crime committed on such ship due to practical purposes. (CPC, Sec. 161 Para 5)

DENMARK

*See question **B** and **B1**.*

ENGLAND & WALES

See question b1

FRANCE

Dans le ressort de chaque tribunal, le procureur de la République et ses substituts ont seuls qualité pour diriger l'activité des officiers et agents de police judiciaire.

L'activité de la police s'exerce sous le contrôle des magistrats, qui dirigent l'enquête : sous le contrôle du procureur de la République pour les enquêtes flagrantes et préliminaires et sous le contrôle du juge d'instruction, lorsqu'il s'agit d'un dossier d'information.

HUNGARY

The Government directs the operation of the Police through the Minister of the Justice and Law Enforcement.

The National Chief Police Commander shall direct the ORFK, direct and control the operation and professional activities of police departments with an independent liability within the limits set out in the laws and by other legal means of public administration.

In his/her directing competence, the National Chief Police Commander shall be entitled to issue a national chief police commander's order binding upon all the units of the Police.

The police officer shall discharge his/her tasks set out in his/her job description in accordance with the laws and regulations, obey the orders of his/her superiors subject to the provisions of the Act on Police and protect public security and internal order even risking his/her life if necessary.

The detailed regulations of the internal organisation and operation of the Police and the order of issuing the regulation shall be designed so as to enable to determine the individual responsibility of the persons issuing and implementing the regulations.

In discharging his/her tasks, the police officer shall carry out the orders of his/her service superiors. The order shall be rejected if its execution would constitute a criminal act.

The police officer shall not refuse to carry out an unlawful order of his/her superior - except for the case referred to in previous paragraph - but shall promptly draw the superior's attention to the unlawfulness of the order if it is clear to him/her. If the superior maintains the order, he/she shall issue it in writing at the subordinate's request. Refusal or failure to issue a written order may be reported to the direct superior of the officer giving the order, however the exercise of this right shall not have a postponing effect on the execution of the order.

If the police officer's superior infringes the law, the police officer may report it to the direct superior of that superior or if the infringement is committed by the head of a police department, to the superior police unit of that department or to the organisation supervising the Police. The head of the organisation to which such report is made shall have the infringement investigated and inform the reporter about the findings and the measures taken within 8 days of receiving the report.

The person reporting an infringement shall not be sanctioned but in the case of an unfounded report, he/she shall be accountable (Act XXXIV of 1994 on the Police).

About the relations between the police and the public prosecutors: The investigating authority conducts the investigation upon the order of the prosecutor or independently. The investigating authority shall conduct the investigation or perform certain investigative actions independently, if the criminal offence was detected by, or the complaint filed with, the investigating authority itself, or the offence came to the notice of the investigating authority in another way (Act XIX of 1998 on Criminal Procedure).

The investigating organ shall be liable to proceed in conformity with the instructions given, in individual cases, by the public prosecutor in respect of the inquiry, including those

related to detention and release of the suspected persons, to the conditions of custody, and to the affectation or withdrawal of other security measures to be taken towards the alleged offenders.

The leader of the investigating organ shall have the right to file, through his superior organ, a remonstrance with the subordinate public prosecutor, against any instruction given by the public prosecutor. The remonstrance shall have no delaying effect (Act V of 1972 on the Prosecution Service of the Republic of Hungary).

ITALY

B1.1. The relationship between judicial authorities and judicial police is based on functional dependence if account is taken both of the investigational activities performed by judicial police and of the power vested in public prosecutors to direct investigations. It is no hierarchical dependence relationship, which only applies to the relationship between the judicial police and the respective corps (i.e. State Police, Carabinieri, Financial Police). However, judicial police offices are organisationally subordinated to the State prosecutor as clarified under B.

LITHUANIA

Police officers and officers of other institutions of the pre-trial investigation must inform the prosecutor about the started investigation, who makes the decision about the party pursuing the investigation: the prosecutor, the same or the other institution of the pre-trial investigation, or the investigation group formed by the officers of the separate institutions (Article 171 of the CCP). The head of the pre-trial investigation institution or the person authorised by him has very limited powers in the process of the pre-trial investigation. They can make a resolution on the start of the pre-trial investigation, devote to the subordinate officers to conduct urgent actions of the investigation, while prosecutor did not make a decision on the further organisation of the investigation, they must also check the decision of the pre-trial investigation officer on the refusal to start the investigation although the final decision belongs to the prosecutor. In all the other cases the pre-trial investigation officers make the decisions independently from any administrative or executive institutions as Article 172 of the CCP indicates that officers must listen only to the instructions of the prosecutor who leads and controls the investigation.

MALTA

In Malta, similarly to other offences the Police, besides investigating such offences are also entrusted with the prosecution of offences before the lower courts. The Attorney General prosecutes before the Criminal Court. Investigations are entirely conducted by the Police who as stated above have designated a specialised unit (International Relations Unit) for such purpose. Thus the police would be subject to the supervision of their superiors. When a magisterial inquiry has been initiated (for the purpose of establishing whether an offence has been committed and if in the affirmative, so that evidence may be

collected and preserved), the police would be acting under the supervision of the Inquiring Magistrate and thus subject to any instructions which the said Magistrate may order.

NETHERLANDS

The public prosecution service has supervision over the criminal investigations by the police

Regional police forces are under administrative management of the mayor of the largest/most central town of the region and ultimately under the supervision of the Ministry of the Interior. The national police force is directly under the supervision of the Ministry of the Interior.

POLAND

The police report to the prosecutor, who will supervise and approve actions taken by the police during preparatory proceedings.

PORTUGAL

Police forces report to the public prosecutor to whom the file was sent. Police forces, in general, have their own independent command and strategic autonomy to practice the acts that are necessary or ordered by the public prosecutor. That is an exclusively functional subordination.

ROMANIA

According to Art.1 of Law No. 364/2004 on the Organisation and Operation of the Judicial Police, "the Judicial Police is organised and operates within specialised structures of the Ministry of the Interior and of Administrative Reform".

According to Art. 2 para. 2 of the same law, the officers and specialised agents in para. 1 have the capacity of investigative bodies of the Judicial Police. Workers who specialise as investigative bodies are designated by the MIAR with the favourable endorsement of the Prosecution Office of the High Court of Cassation and Justice.

Art. 5 of Law No. 364/2004 provides that "in professional activities other than those directed and controlled, under the law, by public prosecutors, the members of the Judicial Police are subordinated to their hierarchical officers appointed according to the norms of competence approved by order of the minister."

To conclude, the members of the judicial police are subordinated, from the administrative viewpoint, to their hierarchical superiors, and functionally, to the public prosecutor who supervises the criminal prosecution work.

SCOTLAND

The police report to the PF. The PF is in charge of investigations and can instruct the police in the course of investigations. However, in practical terms, the chief police officer conducts the investigation on a day-to-day level.

b1.2: May public prosecutors control and direct investigations?

BULGARIA

See the outline above with reference to the powers of the prosecutor.

CZECH REPUBLIC

Yes.

The Police proceed autonomously in order to find the necessary evidence leading to clarification of all basic facts as fast as possible. (CPC, Sec. 164 Para 1) The Police search and submit evidence to the public prosecutor regardless of whether it is in favour of the accused or not. (CPC, Sec. 161 Para 3) Save for the cases for which the consent of the public prosecutor is necessary the police body makes all decisions on the investigative techniques and execution of investigative acts independently and is fully liable for the lawful and timely execution thereof. (CPC, Sec. 164 Para 1, 5) However, the use of some means of investigation by the police body is subject to prior approval of the public prosecutor. These are means that infringe basic human rights and freedoms but still do not necessitate approval of a judge (e. g. seizure of objects (CPC, Sec. 79), seizure of a bank account or another financial institution's account (CPC, Sec. 79a, 79b), securing the book securities (CPC, Sec. 79c), search warrant for other premises or land (CPC, Sec. 83a), body search warrant (CPC, Sec. 83b).

The public prosecutor may impose on the police body to perform the acts that are necessary for clarification of the matter or ascertaining of the offender. To verify the facts indicating that a crime has been committed, the public prosecutor is further authorised to require files from the police body, documents, materials and reports on progress in verification of notification; take any thing away from the police body and take measures to have the matter transferred to a different police body; and adjourn temporarily the initiation of criminal prosecution. (CPC, Sec. 157 Para 2)

The public prosecutor conducts also the supervision over investigation. (CPC, Sec. 174 Para 1) The public prosecutor pursuing the supervision is authorised to issue binding instructions to investigate crimes; to require from the police body the files, documents, materials and reports on committed crimes for the purpose of checking the police body for timely initiation of criminal prosecution and due practice therein; to participate in carrying out the acts of the police body; to carry out in person an individual act or the entire investigation, and to issue decision in any matter; to return a case to the police body with his/her instructions on addition; to cancel unlawful or unjustified decisions and measures of the police body, which may replace with his/her own ones; to order the acts in the matter be carried out by other person engaged in active service in the police body. (CPC, Sec. 174 Para 2)

The public prosecutor takes all final decisions during the pre-trial proceedings such as transfer of a case to another body (CPC, Sec. 171), termination of criminal prosecution (CPC, Sec. 172), suspension of criminal prosecution (CPC, Sec. 173), conditional

termination of criminal prosecution in pre-trial proceedings (CPC, Sec. 307-308) and approval of a settlement. (CPC, Sec. 309-314)

During the entire pre-trial proceedings, the person against whom the criminal proceedings is conducted and the injured person have the right to ask the public prosecutor at any time to eliminate delays in the proceedings or defects in practice of the police body. (CPC, Sec. 157a)

After termination of investigation the police body submits the file to the public prosecutor with the motion to bring indictment with the list of proposed proofs and with the justification of the reason for which it has not admitted the motions to produce more proofs, or it makes a motion for any decision. (CPC, Sec. 166 Para 3)

Investigation of crimes committed by members of the Police of the Czech Republic, members of the Security Information Service and the Office for Foreign Relations and Information is carried out by the public prosecutor. (CPC, Sec. 161 Para 3) See b.1.1 for more details.

DENMARK

See question B and B1.

ENGLAND & WALES

See question b1

FRANCE

Voir supra

HUNGARY

Yes, public prosecutors may control and direct investigations , as follows:

The prosecutor shall order or perform an investigation to establish the conditions for accusation.

When the investigating authority conducts an investigation or certain investigative actions independently, the prosecutor shall supervise compliance with the Act of Criminal Procedure throughout the procedure and ensure that the persons participating in the procedure can assert their rights. With this in view, the prosecutor

a) may order an investigation, assign the investigating authority to conduct the investigation, and may instruct the investigating authority to perform – within its own geographical jurisdiction – further investigative actions or further investigation, or to conclude the investigation within the deadline designated by the prosecutor,

- b) may be present at the investigative actions, and may examine or send for the documents produced during the investigation,*
- c) may amend or repeal the decision of the investigating authority, and shall consider the complaints received against the decision of the investigating authority,*
- d) may reject the complaint, terminate the investigation and order the investigating authority to terminate the investigation,*
- e) may refer the proceedings in his own competence.*

In the event that the prosecutor conducts the investigation, it may instruct any investigating authority to perform – within its own geographical jurisdiction – an investigative action, and in the course of an investigation by the prosecutor’s office, the Prosecutor General may employ the members of other investigating authorities upon the consent of the national head of the given authority.

The prosecutor shall oversee lawful enforcement of coercive measures ordered in the course of the criminal proceedings and entailing the restriction or deprivation of personal freedom (Act XIX of 1998 on Criminal Procedure).

The Prosecution Service shall perform criminal investigations in the affairs provided by the law, exercise supervision over the lawfulness of the investigations, act as a public attorney in the procedures before the courts as well as exercise supervision over the lawfulness of the execution of punishments.

In order to perform its duties, the Prosecution Service shall conduct investigation in affairs defined by the law (investigation in criminal cases coming within the competence of the Prosecution Service) and exercise supervision of lawfulness of the investigations in criminal cases (supervision over the legality of the investigations).

While exercising supervision over the legality of inquiries, the public prosecutor shall:

- a) have the right to supervise the measures taken by the investigating organs relative to denunciations and made in the course of inquiry;*
- b) be entitled to re-examine the legality of the ordered detention;*
- c) consider the complaints submitted against decisions made during investigation and for having taken, or omitted, certain measures;*
- d) have the right to order investigation or supplementary inquiry;*
- e) take care - under the conditions provided by law - of denying to investigate, or of lodging indictment;*
- f) be entitled to carry on certain actions of inquiry or to have them carried out by the investigating organs, as well as to draw any criminal case to himself from the investigating organ;*
- g) have the right to initiate for improving the struggle against delinquency, co-ordinated measures to be taken by the investigating and other organs (Act V of 1972 on the Prosecution Service of the Republic of Hungary).*

ITALY

B1.2. The public prosecutor directs investigations and can avail himself/herself directly of judicial police (section 327 of the Criminal procedure code). The judicial police carry out

the activities entrusted to them following the steps taken by the public prosecutor (section 348 of the Criminal procedure code) and enforce the orders/instructions issued by the public prosecutor; additionally, they may carry out further investigations on their own initiative, even after having preferred information on a crime, providing they notify the public prosecutor thereof immediately.

LITHUANIA

The prosecutor has a responsibility to conduct and lead the pre-trial investigation as indicated in Article 118 of the Constitution of the Republic of Lithuania, also part 1 Article 164 of the CCP, parts 2 and 3 Article 170, parts 2 and 3 Article 171, part 2 Article 176 and other.

MALTA

Saving the reply given to the preceding question, the Police are the investigators of terrorism-related offences. Moreover they also prosecute such offences which carry punishments of less than 10 years imprisonment before the lower courts. If however the offence carries a punishment of more than 10 years imprisonment this falls under the competence of the Criminal Court. Similarly falling under the criminal Court's competence are offences carrying a punishment of over 6 months imprisonment where the defence and the Attorney General consent to proceedings being tried before the Criminal Court.

NETHERLANDS

Yes, they may

POLAND

A public prosecutor is in charge of preparatory proceedings, and will possibly also supervise activities delegated to other bodies in the course of the preparatory proceedings.

PORTUGAL

Yes, that is possible, except for some categories of crimes, which are supposed to be investigated exclusively by the force called "Policia Judiciária". But even in these crimes, the police operates under a functional subordination with regard to the public prosecutors. The latter can, at any time, control what has been done or order some actions. At the end of the procedure, public prosecutors evaluate what has been done and can order what they think is necessary.

ROMANIA

According to Art. 218 of the Criminal Procedure Code, public prosecutors direct and control the criminal investigation work of the judicial police and of other special investigative bodies and make sure that all criminal prosecution steps are taken in compliance with the legal provisions. This is reiterated in Art. 63 b) of Law No. 304/2004 on Judicial Organisation.

SCOTLAND

Yes. The PF controls and directs investigations, although in practical terms the police will conduct day-to-day operations. Please see comments above. For example, the PF may, on considering the report by the police, direct that a further statement is taken from a witness or may decide to instruct an expert report. In more serious cases the PF will visit the crime scene and inspect the locus. In the case of a suspicious death, the PF will also attend the post-mortem examination of the body.

b1.3: Are public prosecutors under the authority of the executive power, and can constraints be imposed in concrete on criminal prosecution by the executive power?

BULGARIA

The public prosecutors are independent organs of the judiciary and are not subject to the authority of the executive power. The latter cannot impose constraints on the criminal prosecution.

CZECH REPUBLIC

No. The public prosecution is not subordinated to the Ministry of Justice and carries out its competence impartially. (PPA, Sec. 2 Para 2) However, the public prosecution is included in the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll., as amended) in the chapter on the executive power and the Ministry of Justice partly performs an administration of the prosecution service which leads to indirect dependency of the public prosecution on the Ministry of Justice – personnel, organizational and material (concerning e.g. appointment of prosecutors; budget of prosecution which forms a part of the Ministry of Justice's budget; education of prosecutors). The Ministry of Justice also delivers Order of Administrative Procedure for prosecutors.

DENMARK

See question B, B1. and B1.4.

ENGLAND & WALES

See question b1

FRANCE

En vertu du principe de la séparation des pouvoirs, l'autorité judiciaire est indépendante.

L'article 30 du code de procédure pénale permet au ministre de la justice :

- d'adresser aux magistrats du ministère public les instructions générales d'action publique.*
- de dénoncer au procureur général les infractions à la loi pénale dont il a connaissance.*
- d'enjoindre le procureur général d'engager ou de faire engager, par instructions écrites versées au dossier, des poursuites ou de saisir la juridiction compétente des réquisitions qu'il juge opportunes.*

L'article 33 du code de procédure pénale dispose que le ministère public est tenu de prendre des réquisitions conformes aux instructions qui lui sont données, dans certaines conditions:

- il doit s'agir d'instructions écrites versées au dossier d'engager ou de faire engager les poursuites ou de saisir une juridictions de réquisitions que le procureur général juge opportunes. (article 36 du code de procédure pénale).*

HUNGARY

No, public prosecutors are not under the authority of the executive power, and constraints can not be imposed in concrete on criminal prosecution by the executive power.

The Prosecution Service shall be directed and guided by the Prosecutor General (The Constitution).

The public prosecutors shall perform their duties in subordination to the Prosecutor General; it is only the Prosecutor General or the superior public prosecutor who shall have the right to give them instructions (Act V of 1972 on the Prosecution Service of the Republic of Hungary).

ITALY

B1.3. Under Italy's Constitution (Part I - Title IV, concerning the judicial system), the judicature is an autonomous body, independent of any other power (Article 104). Additionally, the Constitution provides that public prosecutors are entitled to the safeguards set out in their respect by the legislation on the judicial system (article 107(4) of the Constitution). Under section 4 of Royal decree no. 12/1941 (which includes all the general regulations applying to the judicial system), the judicature is comprised of public prosecutors as well as of all the judges. The above information is meant to clarify that in Italy's judicial system public prosecutors are entitled to the same safeguards as apply to judges with regard to their autonomy and independence. This means that it is ruled out from the start that public prosecutors may ever be under the authority of the executive power - nor are constraints of whatever kind envisaged in connection with investigations and/or decisions related to prosecution.

LITHUANIA

Public prosecutors are completely independent from the executive authorities and nobody can interfere into the procedural activities of the prosecutor as Article 118 of the Constitution and part 2 Article 3, also part 2 Article 11 of the Law of the Republic of Lithuania on the Prosecutor's Office establish that discharging his functions, the prosecutor shall be independent and obey only the laws. Moreover, the prosecutor's office is an independent institution of the state and state, municipal institutions and agencies, their officials and employees, political parties and politicians, public organisations and media, other natural and legal persons shall be prohibited from assigning any tasks to the prosecutor's office or imposing on it obligations that are not prescribed by law or in any other way interfere with the activities of the prosecutor. Attempts at influencing the

prosecutor seeking the rendering of an unlawful decision shall be treated as interference with prosecutor's activities and shall make the person liable under the law (Parts 3 and 4 Article 11 of the Law on the Prosecutor's Office).

MALTA

Whilst the prerogative of investigating and prosecution of offences is entrusted to the Commissioner of Police, the Attorney General who forms part of the executive, enjoys a similar protection when it comes to the exercise of his prosecutorial functions. Indeed article 91(3) of the Constitution provides:

“(3) In the exercise of his powers to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him by any law in terms which authorise him to exercise that power in his individual judgment the Attorney General shall not be subject to the direction or control of any other person or authority.”

NETHERLANDS

The prosecution service acts under the responsibility of the Minister of Justice, but it is not an agency of that (or any other) Ministry. The Minister of Justice is politically accountable for the Prosecution Service. The Minister of Justice may give instructions concerning investigation and prosecution in individual cases as well. Examples of such instructions are extremely rare.

If the minister decides to issue an instruction to prosecute, the court hearing the case will be fully informed of that decision. It is of course the court that makes the the ultimate decision in criminal prosecutions. If the Minister decides that a person will not be prosecuted, he has to inform Parliament of his decision.

POLAND

A public prosecutor as a representative of the judiciary conducts his/her proceedings independently of other government bodies. Furthermore, members of the legislative branch and of the executive branch are not statutorily authorized to undertake any activities aimed to impose any constraints on or otherwise direct any activities in the course of the preparatory proceedings.

PORTUGAL

The public prosecutors have legal autonomy and are not dependent of the executive power. Constraints cannot be imposed by the executive power that cannot also make suggestions

ROMANIA

According to Art. 62 of Law No. 304/2004 on Judicial Organisation, “Public prosecutors work according to the principles of legality, impartiality and hierarchical control, under the authority of the minister of justice, and according to the law”. However, this aspect is not likely to create an influence from the executive power upon the activity of prosecutors, because, to continue the above provisions, the Law provides in para. 3 that “Public prosecutors shall exercise their functions according to the law, while respecting and protecting human dignity and protecting the rights of persons”, and in para. 4 “Prosecution offices shall be independent in their relations with the law courts and with the other public authorities”.

Moreover, under Art. 131 of the Romanian Constitution, public prosecutors are not under the authority of the executive power, as they form part of the judicial power and, therefore, no constraints or conditions may be imposed by the executive power upon the course of criminal proceedings, and the career of members of the Judiciary (be they judges or public prosecutors) is dealt with by the Superior Council of the Magistracy, which is the guardian of the independence of justice.

This idea is supported also by the provisions of Art. 132 para. 1 of the Constitution, Art. 62 para. 2 and Art. 69 of Law No. 304/2004 on Judicial Organisation, according to which the minister of justice may exercise control over public prosecutors through expressly designated public prosecutors, however only with regard to management efficiency, to the manner in which the prosecutors fulfil their service duties and to their working relations with users of the judicial system and with other persons.

SCOTLAND

As set out above, the head of criminal prosecutions and investigations of deaths in Scotland is the Lord Advocate and she is independent from the Government in that role. However, the Lord Advocate is a member of the Scottish Executive, by virtue of section 44(1)(c) of that Act and the First Minister recommends persons for appointment to that office. Therefore, a new Lord Advocate is usually appointed when the political administration changes. The Lord Advocate formerly sat in the Scottish Cabinet but this practice was discontinued by the current administration in May 2007. However, the Lord Advocate remains a member of the Scottish Executive and retains the right to address the Cabinet and to receive Cabinet papers. Neither the government nor the judiciary can influence or impose constraints on the Lord Advocate in her role in the investigation or prosecution of criminal offences.

b1.4: Is it provided for that a judicial authority may take steps autonomously in order to ensure that facts amounting to criminal offences are investigated in greater depth, in case there is inaction, superficiality and/or unwillingness in probing deeper into an investigation?

BULGARIA

In case of inaction or superficiality leading to substantial violations of procedural rules in the course of pre-trial proceedings susceptible of being removed, which have resulted in the restriction of procedural rights of the accused party and his counsel, of the victim or of his/her heirs, the judge-rapporteur pursuant to Article 249, paragraph 2 of the CPC shall return the case file to the prosecutor for further investigation, stating the violations made in his/her order.

CZECH REPUBLIC

No.

DENMARK

Danish criminal procedure is based on the accusatorial principle and not the inquisitorial principle. In other words the court is not responsible for the investigation of a criminal case. Therefore the overriding principle is that the prosecution service and the police are responsible for the investigation. The prosecution service has to inform the court about all facts in the case. The prosecution service is also required to inform the court about facts that are in favour of the defendant.

However, the court is obliged to act in accordance with the Danish principle of 'True Content'. The principle obliges the court in all criminal cases, as the court has to aim at 'the truth' in criminal cases regardless of the investigation of the prosecution service and the police.

ENGLAND & WALES

See question b1

FRANCE

En vertu de l'article 85 du code de procédure pénale, toute personne qui se prétend lésée par un crime ou un délit peut se constituer partie civile devant le juge d'instruction, sous certaines conditions :

- *S'il s'agit d'un crime, de délit de presse ou de certains délits en matière électorale, le plaignant peut saisir directement le juge d'instruction de sa plainte avec constitution de partie civile.*

- *Pour les autres infractions, cette plainte n'est recevable que si la personne justifie que le procureur de la République lui a fait connaître qu'il n'engagera pas les poursuites ou qu'un délai de 3 mois s'est écoulé depuis le plaignant a déposé plainte devant ce magistrat ou depuis qu'elle a adressé, au procureur, copie de sa plainte déposée dans un service de police.*

Le juge d'instruction ne peut en aucun cas se saisir lui-même.

Une fois saisi par les réquisitions du procureur prises à la suite de la plainte avec constitution de partie civile, il diligente toute les investigations nécessaires.

En cas de crime, le procureur de la République doit saisir le juge d'instruction.

HUNGARY

Is it provided for that a judicial authority may take steps autonomously in order to ensure that facts amounting to criminal offences are investigated in greater depth, in case there is inaction, superficiality and/or unwillingness in probing deeper into an investigation?

General rule, that evidence shall cover the facts which are relevant to the application of criminal statutes and legal regulations on criminal proceedings. The objective of gathering evidence shall be the thorough and complete elucidation of the true facts. However, the burden and responsibility of proof is on the prosecutor.

ITALY

B1.4. General Prosecutors attached to Appellate Courts are empowered to take an investigation upon themselves. In order to fully implement the principle whereby prosecution is compulsory (as per article 112 of Italy's Constitution), the Criminal procedure code provides that the General Prosecutor attached to the competent Appellate Court may take a given proceeding upon himself/herself under specific circumstances pointing to a critical status of the investigations, if the public prosecutor fails to prosecute and/or apply for dismissal of the case within the deadline set out in the law. Thereafter the General Prosecutor has thirty days at his/her disposal to carry out such investigations as are deemed indispensable and draw the relevant conclusions. Under section 70(6-bis) of Royal Decree no. 12/1941, the State prosecutor concerned may challenge the General Prosecutor's decision before the General Prosecutor attached to the Court of Cassation (Supreme Court). - Additionally, it should be pointed out that where the judge for pre-trial investigations decides not to comply with the request for dismissal of the case lodged by the competent public prosecutor, the judge himself/herself may, in rejecting the request for dismissal of the case, draw the public prosecutor's attention to such additional investigations as he/she may deem necessary and set out a deadline for performing those additional investigations (under section 409(4) of the Criminal procedure code). In this manner, the judge for pre-trial investigations is empowered autonomously to ensure more in-depth investigations whenever this is required.

LITHUANIA

The judge of the pre-trial investigation on his own initiative performs no actions (Part 4 Article 173 of the CCP). The prosecutor conducting and leading the investigation shall be responsible for the success, particularity, objectivity, promptitude and completeness of the investigation (Article 118 of the Constitution of Lithuania, Article 2, part 1 Article 164, Article 170 of the CCP). This means that prosecutor must give compulsory instructions to the institution of the pre-trial investigation if he shall notice the delay, superficiality or inactivity indications while conducting the investigation, to abolish the unlawful or invalid decisions of the pre-trial investigation officer and handle the complaints. Appeals against the activities and decisions of the prosecutor may be provided to the prosecutors of a higher level and decisions of the prosecutors of a higher level may be appealed to the judge of the pre-trial investigation. Moreover, the suspect and his advocate, the injured party as well as civil claimant, civil defendant and their representatives have a right on their own initiative to ask the prosecutor to carry out particular actions in the investigation and prosecutor's refusal to take these actions may be appealed to the judge of the pre-trial investigation (Parts 2, 3, 4, 5 Article 178 of the CCP). When the pre-trial investigation is completed, the parties of the proceedings shall have a right to review the data of the case and provide applications for the supplements of the investigation. In this case the particularity of actions taken by the pre-trial investigation officer and the prosecutor are also controlled by the parties of the proceedings and evaluated by the judge of the pre-trial investigation. It should be also noted that parties of the proceedings have a right to appeal against the decision of the prosecutor to terminate the investigation to the court, in the cases specified by laws the decision of the prosecutor to terminate the investigation must also be approved by the judge of the pre-trial investigation. The prosecutor also has a right to reopen the pre-trial investigation due to the appeals of the parties of the proceedings and on his own initiative (Articles 214, 217 of the CCP).

MALTA

It is for the police to initiate an investigation. On the other hand a magistrate conducting the inquiry into the in genere, which is initiated following a report by the police or any other person, enjoys a wide-range of powers leading it to collect and preserve all the evidence necessary to establish whether an offence has been committed and to establish which offence/s have been committed and whether a perpetrator/s can be identified. The powers of the Inquiring magistrate emanate from the provisions of Title I-II of Part II of the Criminal Code (Attached enclosure. For ease of reference vide http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf). The procedural rules governing the inquiry do not allow for complacency and indeed, even in the absence of specific rules inter alia on the time-frame within which the inquiry is to be concluded (art.550A), magistrates discharge their duties thoroughly and efficiently.

NETHERLANDS

Yes, there is. The Prosecution Service can order the police to continue/ start or deepen an investigation..

POLAND

A court conducting criminal proceedings is authorized to examine the preparatory proceedings managed by the prosecutor.

During the initial examination of the indictment, the court will verify the indictment for compliance with formal requirements and if any faults are found which indicate that the indictment was wrongly formulated, the court will return the indictment to the prosecutor to revise and correct such faults within 7 days (Article 337 § 1 of the Code of Criminal Procedure).

If the court believes that the files of the case demonstrate significant faults of the preparatory proceedings, particularly if obtaining proof is necessary, the court may return the case to the prosecutor in order to complete the investigation/inquiry. The court is authorized to direct the process of completing the investigation/inquiry (Article 345 § 1 and § 2 of the Code of Criminal Procedure).

The court is also authorized to commit the public prosecutor to complete the evidence after the trial and the hearing of evidence have already started, if obtaining proof by the court were to delay the delivery of the verdict beyond a reasonable time span (Article 397 § 1 of the Code of Criminal Procedure).

PORTUGAL

That cannot happen. Although, in the event that a judicial authority becomes aware that criminal offences that have not been investigated properly, has the power to make that statement in a decision on the case, so that other public prosecutors, if necessary in the top of the chain of command can take the appropriate measures.

ROMANIA

According to Art. 218 para. 3 of the Criminal Procedure Code, public prosecutors may attend the taking of any criminal investigation steps, and they may request and check any file kept by a body of criminal prosecution. Also, as we have stated before, when a public prosecutor finds that a step taken by the body of criminal prosecution does not comply with the legal provisions, he or she cancels it by means of an order.

Also, solutions rendered by public prosecutors may be cancelled in reasoned manner by their hierarchical superiors, only on grounds of non-legality.

Art. 275 of the Criminal Procedure Code provides also that any person may file a complaint with the hierarchically superior public prosecutor, when they believe that a step taken by the public prosecutor has harmed their legitimate interests. Also, they may file a complaint with a court, against the solution rendered by the hierarchical superior, where

they believe that the criminal prosecution was superficial, and the solution was not sound and not legal.

Also, according to Art. 42 para. 1 of the Regulation for the Organisation and Operation of the Superior Council of the Magistracy, the judicial inspection for public prosecutors performs checks, analyses and control in specific fields of the work of prosecution offices, including making sure that the prosecutors deal with ongoing cases within a reasonable period of time.

SCOTLAND

In Scotland, as in the other jurisdictions in the United Kingdom, the legal system operates on an adversarial rather than an inquisitorial basis. Therefore, judges are charged to decide a case based solely on the evidence and arguments put before them by the prosecution and defence and do not have power to undertake their own separate investigations. An exception to this is in relation to contempt of court proceedings. In such cases the judge may ask the prosecutor for assistance in investigating the circumstances in which the contempt had arisen.

b2. Do you consider judicial authorities dealing with criminal proceedings to discharge their jurisdictional functions in full where several facts may happen not to be brought to their attention as a matter of discretion?

BULGARIA

Pursuant to Article 13 of the CPC within the limits of their competence, the court, the prosecutor and investigative bodies shall be obligated to apply all available measures in order to secure discovery of the objective truth.

CZECH REPUBLIC

Yes, impartiality of the judge is saved despite the fact that the criminal prosecution before courts is only possible based on indictment or motion for punishment lodged by the public prosecutor. The public prosecutor represents public action and is obliged to prosecute all criminal acts he/she learns about unless any law or declared international agreement, by which the Czech Republic is bound, specify otherwise. (CPC, Sec. 2 Para 3, 8) See b.1.1-b.1.4 for more details.

DENMARK

We are sorry but we have not been able to answer B2., as we do not understand the question.

ENGLAND & WALES

Trials of terrorist offences are, in reality, always dealt with by a judge sitting with a jury. The judge controls admissibility and ensures that only relevant and admissible material is brought to the attention of the primary fact finding tribunal: the jury. Given that only irrelevant and inadmissible evidence is excluded, the jury are able to “fulfil their jurisdictional functions in full”.

FRANCE

no answer

HUNGARY

See the answers 1.4.

ITALY

B2. The jurisdictional function committed to judicial authorities dealing with criminal proceedings cannot be considered to be discharged in full if certain items of evidence may fail to be brought to their attention on a discretionary basis. Account should be taken of the considerations made under B1. with regard to the functional dependence existing between public prosecutor and judicial police, on the one hand, as well as to the General Prosecutor's power to take an investigation upon himself/herself and the pre-trial judge's power to take steps in case the public prosecutor's investigation is deemed not to be complete (see B1.4.). It should be pointed out that there are procedural and administrative safeguards aimed at ensuring that investigations are both impartial and thorough.

LITHUANIA

The Code of Criminal Procedure maintains the principle of the criminal prosecution. Article 2 of this Code presents the duty of the public prosecutor and the institution of the pre-trial investigation to apply all the measures indicated by laws every time when indications of the criminal act appear in order to conduct the investigation and reveal the criminal activities within a reasonable time. This indicates that laws require investigating all the circumstances essential for the right settlement of the case. Therefore, part 2 Article 220 of the CCP establishes the right of the prosecutor to transfer only that part of the materials to the court which is important for the hearing of the case. It also points out the duty of the prosecutor to transfer all the collected materials to the court on the request of the parties of the proceedings and it is the guarantee that court hearing the criminal cases shall have enough possibilities of evaluating all the circumstances essential for the settlement of the case.

MALTA

Vide reply to preceding question.

NETHERLANDS

Pro memorie

POLAND

*A court hearing a particular case is required to deliver its verdict based on the whole body of circumstances revealed during the main trial (Article 410 of the Code of Criminal Procedure). Consequently, the court must obtain the necessary proof in order to demonstrate the actual chain of events and situation as fully as possible. The court will base its findings not only on evidence submitted by the public prosecutor but is also authorized to obtain proof "ex officio". In **b.1.4** we have referred to situations where the*

court is authorized to return the indictment to the public prosecutor or commit the public prosecutor to obtain additional proof.

PORTUGAL

That is not an issue, because the discretion is not a solution for important cases, being only applied under specific conditions, to petty criminality.

ROMANIA

One of the specific features of criminal action is that it is irrevocable and non-reviewable. According to these features, once it is initiated, criminal action can no longer be halted, restricted, revoked or withdrawn and, once it has been vested, judicial authority cannot be divested.

Criminal action must be pursued until it is exhausted.

There are exceptions to the principle according to which criminal action is non-reviewable, a principle which is correlated with that of officialness. Such exceptions are expressly and restrictively provided in Art. 10 of the Criminal Procedure Code and concern particularly cases in which criminal action is not initiated ex officio, but at the prior complaint of the injured party, and for which withdrawal of the prior complaint or reconciliation of the parties removes criminal liability.

Art. 10 of the Criminal Procedure Code regulates 12 situations or cases that prevent the initiation of criminal action or, where it has already been initiated, exercise of criminal action..

With regard to the impartiality of the work of judges in relation to the information included in the document that instituted the court proceedings, it must be mentioned that, at the time when the court proceedings are instituted, the case record contains all the data, information and evidence obtained during criminal prosecution, the interest of the public prosecutor being to present the judge with all the aspects of that case.

To this end, it is impossible not to include certain pieces of evidence in support of the prosecution or of the accused / defendant, since the defendant's counsel is entitled to attend the taking of any step of criminal prosecution.

It should be mentioned also that, through his or her counsel, the accused or defendant attends the carrying out of criminal prosecution, gradually learning of all the evidence administered during criminal prosecution.

At the end of this stage, the accused or defendant is presented, under Art. 250 of the Criminal Procedure Code and in the presence of his or her counsel, with all the evidential means administered in the case, being given a reasonable period of time to study and to make requests.

After the accused or defendant has learnt of the evidential means, a minute is drawn up and signed by him or her and by the public prosecutor, as well as by the chosen or designated counsel.

There is also the possibility of detecting data with regard to the perpetration by the defendant of another act provided in criminal law, an act which is related to the offence for

which he or she is being indicted. In this event, according to the institution of extension of criminal proceedings for other acts, which is regulated by Art. 336 of the Criminal Procedure Code, the public prosecutor may request extension of criminal proceedings to include that act.

SCOTLAND

It is not clear what is meant by this question, notwithstanding the attempt at clarification in Milena Falaschi's email of 14 January. A judge would usually have sight of all of the evidence that he is asked by the prosecution to take account of in a case. However, there are various instances where the defender is not be permitted to see certain information.

b3. Is freedom of investigation, which should be ensured via the autonomy of judicial police and/or public prosecutors, an issue that is perceived to be culturally important by judges and the public opinion at large?

BULGARIA

The impartiality of investigation is an issue public opinion at large. The impartiality of investigation was in the center of the Ovcharov-Alexandrov affair last year, which concerned alleged attempts of undue influence of the executive over the investigation as a part of the judiciary. The affair ended with the resignations of Rumen Ovcharov, Minister of Economy and Energy and Angel Alexandrov, Head of National Investigating Service.

b4. Are you aware of cases where major criminal facts (e.g. corruption and/or economic crimes) have not become the subject of a judicial proceeding because of the explicit and/or implicit intention not to prosecute such facts - on grounds unrelated to lack of evidence - on the part of entities such as the judicial police and/or public prosecutors that are in charge of bringing about and monitoring investigations?

CZECH REPUBLIC

Attention devoted to impartiality of investigation within the public opinion has been rising recently with regard to several prominent cases with political background enjoying media coverage.

DENMARK

Generally the specific topic is not debated in the public. However, the Danish legal system has been undergoing some changes due to the fact that the former legal structure was not sufficiently satisfactory.

Until 1999 the Danish Court Administration was part of the Ministry of Justice. The creation of the Danish Court Administration in 1999 was meant to ensure the courts' autonomous and independent position in the society.

Furthermore, the structure of handling complaints concerning the police has been criticised in the public debate. At the moment complaints concerning police officers are processed by the Regional Public Prosecutors. The structure has been criticised as to a certain extent the Regional Public Prosecutors and the police have a convergent sphere of interest.

ENGLAND & WALES

There is no effective debate on this issue within the UK because the perception and the reality is that the police and the Crown Prosecution Service work autonomously, without intervention by the executive.

FRANCE

no answer

HUNGARY

Yes, if freedom of investigation is an issue that is perceived to be culturally important by judges and the public opinion at large. Typically this is the case related to so called white collar offences (not to the phenomenon of terrorism).

ITALY

B3. Impartiality in investigations was implemented in full when the Criminal procedure code was amended in 1988 to introduce an adversarial system, which shaped the relationships between public prosecutors and judicial police along the lines described above and ensured that the judicial review over lawfulness of the investigations could be fully effective. All these items can be said to be generally acknowledged by the public opinion. However, certain investigations concerning senior public officials and/or politicians may happen to spark lively discussions and this is where the issue of the actual impartiality of public prosecutors continues to come up in the comments of editorialists and/or opinion-makers.

LITHUANIA

The security of the impartiality of pre-trial investigation via the autonomy of policy (institution of the pre-trial investigation) and the prosecutor's office is not a subject of discussion by the public opinion, as there are no facts of the interference into the procedural activities of the institutions of the pre-trial investigation and the prosecutor's office. There is only a particular debate on the size of the payment intended to the officers of the institutions of pre-trial investigation and prosecutors, also about the lack of pre-trial investigation officers and the necessity to increase their qualification.

MALTA

No issue on the impartiality of investigations and prosecutions exists in relation to offences in general.

NETHERLANDS

Yes is it, as a consequence of a recent case where it turned out an innocent person was convicted for murdering a child and had already served part of his prison sentence.

POLAND

In the Polish legal system the Minister of Justice is also the General Prosecuting Attorney. Consequently, this means that a single official belongs at the same time to the executive and the judiciary branches of government. There have been talks for many years about separating the powers of the Minister of Justice from those of the General Prosecuting Attorney. There were those who opposed the current situation and those who supported it. No conclusive decision on the issue has been reached by the date of this paper.

PORTUGAL

That is a issue that is currently being discussed, because there are new laws being prepared that can bring that danger to the system, concerning the career statutes and the organization of criminal investigation and internal security.

ROMANIA

The impartiality of investigations is safeguarded through the independence of the public prosecutors. The independence of judges and public prosecutors is safeguarded by the fundamental law and by the law that regulates the statute of judges and public prosecutors, and the guardian of the principle of independence of the Judiciary is the Superior Council of the Magistracy.

The impartiality of investigations, along with the independence of public prosecutors and of the police, is an issue debated by the public opinion, in particular by the media. The negative perception among the public is artificially created by the media when they present isolated cases which they interpret in a subjective manner, not objectively reflecting the overall reality.

SCOTLAND

There was discussion in 2007 regarding the position of the Lord Advocate as a member of the Scottish Government's Cabinet. On 23 May 2007 the First Minister announced that the Lord Advocate would no longer be part of the Cabinet. Otherwise, this is not an issue that arises in public debates with any frequency.