Chapter 9
Comparisons of the organisation of the prosecution services and their functions in the criminal process

In this chapter, I will compare the four systems – Czech, French, Dutch and Polish. I will look at the organisation of the PPSs and their functions in the criminal process, as I did when I dealt with each country individually.

Firstly, the place of the prosecution service within the State will be examined (9.1). Secondly, the structure of the four countries' PPSs will be detailed (9.2). Thirdly, the relationship within these services (9.3) will be put into perspective.511 The focus will ultimately be on the functions of the PPS in preparatory proceedings and forms of review in the criminal process (9.4).512 Special attention will be paid

511 For individual details on each country, the reader should refer to the following sections – 4.1, 4.2 and 4.3 for the Netherlands; 3.1, 3.2 and 3.3 for France; 5.1, 5.2 and 5.3 for Poland under Communism; 6.1, 6.2 and 6.3 for Poland today; and 7.1, 7.2, 7.3 for the Czech Republic under Communism; and 8.1, 8.2 and 8.3 for the Czech Republic today.

512 For separate details of each country’s preparatory proceedings, the reader should refer to the following sections – 3.4.2, 3.4.3 and 3.4.4 for France; 4.4.2, 4.4.3 and 4.4.4 for the Netherlands; 5.5.1 and 5.5.2 for Poland under Communism; 6.4.2, 6.4.3, 6.4.3.1 and 6.4.4 for Poland today; 7.5.1.1, 7.5.1.3 and 7.5.2 for the Czech Republic under Communism; and 8.4.1, 8.4.2 and 8.4.3 for the Czech Republic today. For details on each country’s forms of review, the reader should refer to the following sections – 3.5.3 and 3.5.4 for France; 4.5.3 and 4.5.4 for the Netherlands; 5.6.2 and 5.6.3 for Poland under Communism; 6.5.2 and 6.5.3 for Poland today; 7.6.2 and 7.6.3 for the Czech Republic under Communism; and 8.5.2 and 8.5.3 for the Czech Republic today.
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to the major changes brought about during the democratisation process in the Czech Republic and Poland.\textsuperscript{513}

9.1 The place of the prosecution service within the State

9.1.1 The position of the PPS in the repartition of State powers and the task of the prosecution service

A constitutional reference to the PPS is not a necessity. The Czech Constitution establishes it as an institution of the executive (Article 80 under heading 3 on executive power and subheading 2 on the government), whereas other countries’ constitutions refer to public prosecutors or public prosecution only indirectly. Debate has flourished in all the countries on the issue of whether the PPS is an institution of the executive or the judiciary. As is also clearly the case in the Czech Republic, the Polish PPS belongs to the executive since the Polish Minister of Justice acts as a general prosecutor. In France and the Netherlands, public prosecutors are considered magistrates and thus members of the judiciary. However, we will see that they are subordinate to the executive.

In the Czech Republic and Poland, the prosecution service no longer consists of a political institution subordinate only to the general prosecutor. As its main purpose, the prosecution of crimes in the public interest replaced the upholding of Socialist Legality established by one party and the supervision of strict compliance thereof by society. From an offensive role in the politicisation of society by way of general and judicial supervision, the prosecution service transformed into a public institution carrying out public prosecution and upholding the laws passed by a democratically elected parliament. In addition, the transformation of the Prokuratura into an institution compatible with Western standards implied that public prosecutors integrated the protection of fundamental human rights into the discharge of their duties.

The first purpose of the PPS, established by law in all countries, is the prosecution of crimes. In addition, and to varying degrees, the public ministry also upholds the laws passed by parliament by means other than the prosecution of crimes and in fields other than

\textsuperscript{513} In order to make a realistic comparison with the three countries that do not have a federal structure, this chapter and the following only compare the Czechoslovakian Prokuratura between 1961 and 1969, when it was not a federal institution.
In Poland, the law (Articles 2 and 3, 1985 Act) provides that the prosecution service protects legality (praworządność). In the other countries, a general reference to the protection of criminal legality is made in the law (Article 31 CPC in France and 124, 1827 Act in the Netherlands); however, there are no provisions tasking the PPS to uphold the law in general. Specific legal provisions in fields of law other than criminal law task public prosecutors with upholding the law and specify the means to do so, for instance the civil or commercial codes.

A common function of all PPSs is to defend the public interest – interes społeczny (Poland), veřejný zájem (the Czech Republic), intérêt général (France), algemene belang (the Netherlands). The definition of the public or general interest differs between countries and covers different domains. However, it is apparent that in all four countries, this concept is not limited to the prosecution of crimes or the upholding of the law, although it does remain related to these tasks. This concept has a broader scope than the laws passed by parliament or the guidelines and instructions of government policies. In Poland, besides upholding legality by initiating proceedings in criminal and civil cases, the protection of the public interest can justify the intervention of the PPS in judicial proceedings in civil, labour and social insurance cases (Article 3 § 1, 1985 Act). In the Czech Republic, the PPS represents the State by protecting the public interest in cases within its competence (Article 1 § 1, 1993 Act), thus public interest is central to its duties. In France, the PPS acts on behalf of society in order to uphold the law and prosecute crimes in the general interest. In the Netherlands, in cases provided for by law, public prosecutors uphold the law in civil, commercial and administrative law. In France and the Netherlands, the general interest can justify instituting or dismissing a public prosecution, whereas in Poland and the Czech Republic, the public interest primarily justifies the commencement of judicial proceedings or the intervention of the PPS in proceedings already in process. The general interest justification for the intervention of the PPS in judicial proceedings can be compared to the interest that a private person, a victim of a crime or a tort, has to institute proceedings. The

514 PPSs also have the task of supervising detention centres.
515 However, the oath sworn in the Netherlands by every judicial officer obliges public prosecutors to obey and uphold the Constitution and other acts of law (see 4.3.5).
516 The notion of the ‘public interest’ is ill-defined and the purpose here is not to attempt a definition common to the countries studied. See e.g. Brownsword 1993.
assessments of the private interest does not only depend on the existence of an act qualified as a crime or tort, and the victim’s legal capacity to institute proceedings, but may also depend on what the victim will gain from such proceedings. Similarly, a public prosecutor can question whether it is more valuable to the welfare of society to prosecute a certain type of crime, to dismiss a case or to choose an alternative method of settlement (see 9.4.2).

Finally, the PPS in all systems strives to ensure the protection of fundamental human rights established by domestic legislation and by international legal instruments implemented in domestic law. Specific legal provisions exist in different texts or case law relating to the PPS’s obligation to protect fundamental rights. In Poland, the 1985 Act (Article 3) refers to the rights of citizens or property rights. In the Czech Republic, the 1993 Act (Article 2) refers to respect for human dignity, the equality of all before the law and the protection of basic human rights and freedoms. In France, the Constitution (Article 66) provides that the judiciary is the guardian of individual liberty within the scope of the law. In the Netherlands, the oath taken by public prosecutors and the Code of Ethics refer explicitly to the obligation on members of the PPS to discharge their duties with special attention to fundamental human rights. In particular, public prosecutors should carry out their functions with respect to general principles of law (*beginselen van een goede procesorde*). Some of these principles flow from the 1950 European Convention for the Protection of Human Rights signed and ratified by the Netherlands (see 4.4.3.2.3).\(^{517}\)

### 9.1.2 Influence of the executive on the prosecution service

#### 9.1.2.1 Authority exercised by the executive over the PPS

With the democratisation of the Czech Republic and Poland, authority over the PPS has been transferred from the representatives of the Communist party in the State organ, thus concentrating legislative, executive and judicial powers in the Minister of Justice. The Minister of Justice exercises authority over the PPS in all systems. Such authority does not necessarily mean that the public ministry is entirely subordinate to the executive. It implies the intervention of the Minister of Justice within the administration, and to varying extents within the functioning of the PPS in criminal proceedings. In all the systems, the Ministry of

\(^{517}\) ETS No 005.
Justice ensures the administration of the service (see 9.2.2 on the appointment and the responsibilities of public prosecutors).

The most important difference between the four countries concerns the functional authority that the Minister of Justice exercises over the service. In the Czech Republic, until 2002 the prosecution was completely subordinate to the Minister of Justice but then the Minister became solely responsible for the administration of the service. The prosecution authority is technologically independent from the Minister of Justice in the conduct of criminal proceedings. The Minister is responsible for the consistency of prosecution policy in the Netherlands (het vervolgingsbeleid) and France (politique d’action publique). In Poland, the Minister is legally entitled to act as a prosecutor in a case or replace a prosecutor by one of his direct deputies. As a general prosecutor, the Minister of Justice has direct deputies and is the direct superior of all national prosecutors and superior to all other prosecutors. He has the right to issue orders (polecenia) concerning the exercise of jurisdictions and functions in the prosecution service.

In order to prevent the Minister from exploiting his involvement in the functional activity of public prosecutors, democratic control of this process is imposed. In addition, as will be shown, the process differs depending on whether it falls under the principle of compulsory prosecution or the opportunity principle.

9.1.2.2 Democratic control of the executive authority over the PPS

The authority of the Minister of Justice over the PPS is limited in every country by different mechanisms of democratic control. Such control may be exercised, in particular, over the way criminal policy is enforced by the PPS, first by other members of the executive and second by MPs. Governmental accountability consists in particular of the right of the executive to appoint, sanction and recall justice ministers. In Poland, the Czech Republic and France, the President decides at the motion of the Prime Minister on the appointment and dismissal of the Minister of Justice. In the Netherlands, where there is no President, the Minister is appointed by an order co-signed by the head of the government (de minister-president) and the Queen.

In addition to their accountability to the government, justice ministers can be accountable to parliament. In Poland and the Netherlands, the Minister of Justice is individually – and collectively with the government – accountable to parliament and must answer questions raised by MPs in session. In the Czech Republic and France, every deputy has the right to interpellate the head of the government or
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one of his ministers. However, a vote of no confidence passed by parliament affects the whole government. The direct democratic accountability of the Czech Minister of Justice with regard to the activity of public prosecutors, remains limited to the general instructions he may give (see 9.1.2.4.1) and to his power over the appointment and discipline of prosecutors, particularly his right to propose the appointment of the general prosecutor (see 9.2.2). This latter situation is explained by the Minister of Justice, in theory, having no influence on the conduct of criminal proceedings.

9.1.2.3 Executive authority and the distinction between compulsory prosecution and opportunity

With the exception of the Czech Republic, where intervention is, in theory, impossible, politicians with a function in the state executive may intervene in the functioning of the PPS in criminal proceedings through the Minister of Justice. Although they are in principle motivated by the upholding of the law and general interest, political interventions can be abusive and pursue interests contrary to the general interest. The ministerial democratic accountability already described lowers the risk of abuse in political interventions. In addition, the public prosecutors’ discretion to prosecute should be noted. The more discretionary power a prosecutor has to start or stop a public prosecution, the greater the risk of political intervention. Two principles affect this discretion in different ways – the principle of compulsory prosecution and the opportunity principle. The principle of compulsory prosecution is in force in the Czech Republic and Poland, while the opportunity principle is in force in France and the Netherlands. According to the former, the organ competent to prosecute crimes is obliged to institute and to carry out preliminary proceedings as soon as there is a good reason to suspect that an offence has been committed. As a result, if a case meets all the fundamental criteria provided by law for a valid prosecution (9.4.2.3), there is in principle no room for the prosecution’s discretion to dismiss a case. This principle actually enhances the unity of the PPS in the execution of its functions in criminal proceedings because the dismissal of a case does not depend on a prosecutor’s personal opinion of whether it is opportune to prosecute or not. Intervention from the Minister of Justice should therefore not be necessary.

Besides the mere decision of whether to prosecute or not, the prosecution service’s power of discretion also affects the decision to suggest a particular penalty rather than another. With regard to this aspect of the prosecutor’s discretion, the fact that prosecutions are compulsory or opportune does not really matter.
According to the latter principle, the government or the prosecution’s functional head establishes a criminal policy setting, in particular, priorities in prosecutions. Within the limits of this policy, a prosecutor is free to decide whether to institute a prosecution against a suspect or not, even where there is no doubt that the act in question constitutes a criminal offence. In such cases, the Minister of Justice’s intervention is justified as ensuring that the personal opinions of lower prosecutors in pending cases do not abuse the system.

9.1.2.4 The role of the Minister of Justice’s instructions and the discretionary power of the prosecution authority

9.1.2.4.1 General instructions of the Minister of Justice to the public ministry

In the Czech Republic the function of the Ministry of Justice is limited to issuing general instructions concerning the administration of the PPS. In principle there is no political intervention in the work of public prosecutors. In Poland, France and the Netherlands, instructions and guidelines from the Minister of Justice, in addition to the administration of the PPS, are also intended to explain how to implement new laws and provide guidelines as to the severity or the type of sentence to impose according to the type of offence. Nevertheless, in Poland there are no sentencing guidelines for certain cases as yet. In Poland, France and the Netherlands the general guidelines of the Minister of Justice can be published or take the form of internal directives. They cannot concern specific cases, pending or not. They are binding on public prosecutors in Poland and the Netherlands if published, whereas they are in theory not binding in France. In the Netherlands some general instructions are issued by the Minister of Justice, but this occurs very rarely because they only affect situations where the Board of General Prosecutors does not agree with the Minister with regard to the prosecution of certain types of facts. In countries adopting the opportunity principle, general instructions also explain the conditions under which it is opportune to prosecute. They can guide prosecutors in the decision to prosecute certain types of crime rather than others and when to request greater severity in certain cases.

519 Nevertheless, the influence of the Minister of Justice is visible because of his power to appoint and dismiss prosecutors. In addition, the Minister decides on the budgets of the prosecution offices.
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9.1.2.4.2 Specific instructions of the Minister of Justice to the public ministry

With the exception of the Czech Republic, the Minister of Justice of the three other countries can issue specific instructions. The similarities and differences in the form of the instruction – i.e. positive, such as an order to start proceedings, or negative, such as an order to drop a case – and the procedure it follows will be considered in turn.

- Poland

By means of specific instructions, the Minister of Justice may order a prosecutor to institute proceedings against a particular person given a certain set of facts. In theory, he may also start proceedings himself.

However, only a direct superior can issue instructions affecting the content of procedural acts and the closing of preparatory proceedings or of the court procedure. Therefore, the Minister of Justice may only issue such an order in conjunction with a national prosecutor.

At the recipient’s request, all specific instructions must be in writing and state reasons for the instruction. The recipient of a specific instruction has the right to ask for the instruction to be changed or for his or her exclusion from the case.

- France

By means of specific instructions, the Minister of Justice has the right to denounce to the competent general prosecutor a fact that in his view constitutes a criminal offence, or he can order the general prosecutor to institute proceedings or cause them to be initiated, but he is not able to institute proceedings himself. If proceedings are already in process, he has the right to request a general prosecutor to take the necessary steps for his opinion to be followed.

The Minister of Justice has no right to order a general prosecutor or any other prosecutor not to institute proceedings against someone in a specific case or with regard to a specific situation. Nevertheless, once proceedings have been initiated, the Minister of Justice can always request a general prosecutor to order a chief district prosecutor to submit a written opinion leading to the dismissal of the case.

Specific instructions must in any event be in writing and added to the file. If the final recipient of the order, i.e. a chief district prosecutor, refuses to carry out the instruction, the Minister of Justice is not able
to force him to do so or to replace him. The recipient remains free to carry out the order or not. Nevertheless, this does not mean he will be immune from disciplinary measures if he commits a breach of duty by not carrying out an instruction. Depending on the circumstances of the case, for example, the mere act of disregarding an instruction does not constitute a breach of duty. However, a general prosecutor can lodge an appeal against a judgement made by a first instance court in place of a chief district prosecutor if the latter refuses to bring this appeal himself.

- The Netherlands

Specific instructions during preparatory proceedings only occur in cases where the Board does not share the Minister’s views. Such an instruction can affect a decision to investigate, charge or bring a person before the court. During the court proceedings, such an instruction could affect the filing of an indictment or the submission of a specific opinion. The Minister of Justice may also issue an instruction affecting appellate remedies against a decision taken by a judge or court, to apply for or withdraw a remedy.

The Minister can issue a negative instruction, i.e. to not prosecute a matter or to dismiss a case.

A strict procedure must be followed to validate specific instructions. Such instructions must be in writing and motivated to the Board of General Prosecutors, which then pronounces its opinion accordingly, with exceptional verbal instructions required in writing within a week. The instruction and the opinion of the Board are referred to the lower prosecutor concerned and added to the file. In addition to the latter procedure, negative instructions should be referred to both chambers of parliament with the Board’s opinion.

9.2 The structure of the prosecution service

9.2.1 The structure and heads of the offices

9.2.1.1 Structure

During the Communist period, the prosecutors were subordinated in every lower office, local, district or regional, with deputies answering to their respective heads of office, and the lower offices to the general prosecutor. There was in principle no hierarchy between the lower offices. In addition to minor domestic readjustments, such as the reorganisation of the distribution of jurisdictions – for example, in the Czech Republic local levels were included in the districts – a
major modification in the organisation of the PPS in both ex-Communist countries came in the form of the re-establishment of the hierarchy between offices. Moreover, the creation of a prosecutors’ office with an extra level of jurisdiction should be stressed. There is now a national office in Poland and there are now two higher offices with different territorial jurisdictions (in Prague and Olomouc) above the regional offices in the Czech Republic.

In the PPS structures of the four countries studied, important differences characterise the office that upholds the law before the Supreme Court. The general prosecutor and his deputies have this jurisdiction in Poland and the Czech Republic. In the Netherlands the office of the procureur-generaal carries out this task, although it is no longer part of the PPS. In France, the parquet général is formally part of the PPS but has no supervisory function over it.

In general the other prosecution offices in all four countries have the same jurisdiction as their local courts. A prosecutor appointed to a particular office carries out his duties in the same territorial jurisdiction as the court where the office is located. However, several particularities should be underlined. In the Netherlands the Board of General Prosecutors, the head of the PPS and the national and functional offices – currently included within the national office (see 4.3.1.2.2) – have general jurisdiction in specific cases, while in Poland this role is performed by the national office. The national office in these two countries centralises relations with Eurojust. In the Czech Republic, this is the jurisdiction of the general prosecutor’s office and in France of every appellate prosecutor or investigative judge. Prosecutors’ offices in Poland are separate from the court, e.g. a deputy district prosecutor can act before a provincial court. In the Netherlands public prosecutors of a certain level (district or regional) can temporarily exercise their functions in courts of the same level without restriction, and a public prosecutor of a certain level may exceptionally substitute a prosecutor of a different level.

9.2.1.2 The heads of the prosecution offices

The head of the PPS structure in the four countries differs depending on administrative or functional duties. The administrative head is the Minister of Justice in all countries. The functional head, i.e. the public prosecutor with the highest rank with supervisory duties over lower prosecutors in criminal proceedings, varies from
one system to another. In Poland, the Czech Republic and the Netherlands the supervision of the PPS remains integrated in one organ within the limits established by law (see 9.3.2). In Poland and the Czech Republic, one person, the general prosecutor, is superior to all prosecutors. In addition, the Polish general prosecutor is the direct superior to the national office and the Czech general prosecutor is the direct superior to the higher offices. In the Netherlands, a Board of General Prosecutors supervises the PPS. The French system remains structurally dispersed because the supervisory function is divided between thirty-five appellate general prosecutors.

In principle, the head of each office manages the office and is the direct superior of the prosecutors and staff within the office, but the relationship between offices is not uniform. In the Netherlands the hierarchy is only established between the Board and all other offices. There is for example no hierarchical difference between an appellate office and a district office. This hierarchical structure is in force in the other countries within the limits established by law. In France the chief appellate prosecutors are superior to the chief district prosecutors within the territorial jurisdiction of their respective courts of appeal. In Poland, the national prosecutor is superior to the appellate prosecutors who are superior to prosecutors of provincial and district offices within the jurisdiction of the appellate office. Provincial prosecutors are superior to prosecutors from district offices in the jurisdiction of the provincial office. In the Czech Republic higher prosecutors are superior to chief regional prosecutors who are in turn superior to chief district prosecutors within their respective jurisdictions.

9.2.1.3 The flow of instructions received by lower prosecutors

Concretely, a lower prosecutor receives instructions from the head of his or her office in all the countries studied. Within the limits established by law, a lower prosecutor can also receive instructions from the Minister of Justice (see 9.1.2.4) and from public prosecutors from other offices of a higher level. In the Czech Republic, the Netherlands and France instructions can only arrive from a direct superior – for example, from the Board to other prosecutors in the Netherlands, from a higher prosecutor to a regional prosecutor in the Czech Republic, or from an appellate prosecutor to a district prosecutor in France. Only in Poland, where appellate, provincial and district levels are found, can instructions originate from a superior who is not the immediate superior, such as
9.2.2 Appointment and responsibility of public prosecutors

9.2.2.1 Appointment of public prosecutors

There are particularities to the appointment procedure for high-ranking prosecutors in all four countries. After the regime change in the Czech Republic and Poland, the power to appoint general prosecutors was transferred from the President of the Republic or the Council of State, respectively, to the government at the Minister of Justice’s motion, in the Czech Republic and to the President in Poland. In France also, the government appoints the general prosecutor at the Supreme Court and the appellate general prosecutors. Only in the Netherlands are most of the public prosecutors formally appointed by the Queen; though in reality, the Minister of Justice decides all appointments because he or she is accountable to the service. The Minister of Justice in all four countries, and acting as a general prosecutor in Poland, currently appoints all other public prosecutors.

An additional state body can issue an opinion or request in support of a Minister of Justice’s decision to appoint public prosecutors. In Poland, this body takes the form of assemblies of prosecutors established at the various levels of the PPS. In France it is the section of the High Council of the Judiciary with jurisdiction over public prosecutors. Finally, in the Netherlands it is the Board of General Prosecutors. In the Czech Republic, the chief prosecutor of the superior office nearest to the office where the prosecutor is to be appointed will apply to the Minister – for example, the chief regional prosecutor heading the office established in the same jurisdiction will request the Minister to appoint a chief district prosecutor. These opinions or requests are not binding on the Minister of Justice in any of the countries studied.

All countries have a procedure to permit the temporary relocation of a prosecutor from one office to another. If the period of relocation is less than two months, this procedure does not always require the

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521 During the Communist period, the decision to appoint the general prosecutor’s deputies and the chief voivode prosecutors was taken by a different body than that which took the decision to appoint other prosecutors; today, the general prosecutor requests the Prime Minister to appoint his deputies, including the national prosecutors.

522 The Queen co-signs the order.
prosecutor's consent. In Poland the general prosecutor decides on this temporary relocation, in the Netherlands it is the Board, in France the Minister of Justice and in the Czech Republic the chief prosecutor of the office, being the immediate superior to both affected offices.

9.2.2.2 Responsibility of public prosecutors

In the two ex-Communist countries the depoliticisation of the PPS affected the professional obligations and political accountability of public prosecutors. The body charged with disciplinary sanctions followed the above-mentioned modifications concerning the power of appointment. The body taking the final decision to sanction a prosecutor depends on the latter’s rank and the gravity of the breach of duty.

All countries hold public prosecutors responsible for breaches of duty. Disciplinary sanctions vary from reprimand to dismissal. The definition of a breach of duty that can lead to dismissal remains very vague and allows the disciplinary body leeway for interpretation.

The decision to remove a prosecutor from his post is always taken by a political body. In Poland the decision to sanction a prosecutor lies with the general prosecutor (the Minister of Justice), or the Prime Minister with regard to national prosecutors and other deputies of the general prosecutor. In the Czech Republic the final decision to remove a prosecutor from his functions is taken by the Minister of Justice. However, the Minister may take this decision only at the motion of the general prosecutor or of the chief prosecutor who recommended the appointment of the affected prosecutor. In the Netherlands, the organ that appointed and recommended the prosecutor has jurisdiction to launch disciplinary proceedings for a breach of duty and to decide on the sanctions. In France the Minister cannot take any decision on disciplinary sanctions against a prosecutor unless the section of the High Council of the Judiciary with jurisdiction over public prosecutors has issued a non-binding opinion. However, all countries permit the prosecutor affected by a disciplinary decision to apply for a review of this decision.

Finally, public prosecutors may be prosecuted and are liable if they commit a criminal offence. The case of Poland is an exception here. First, Polish public prosecutors enjoy immunity against criminal prosecution for petty offences (wykroczenie) and a relative immunity against criminal prosecution for other offences. In the latter case, prosecutions are admissible only with the authorisation of a
disciplinary court. This state of affairs may raise questions with regard to the general prosecutor’s immunity because no prosecutor is superior to the general prosecutor – the Minister of Justice – and consequently possesses the right to institute disciplinary proceedings (6.3.2.1). The situation is similar in the Czech Republic where the general prosecutor may be dismissed for purely political reasons.

9.3 Relationships within the service

Under the first subheading (9.1.1), we looked at the place of the institution in the state separation of powers and the fundamental and common features of the modern PPS’s task in criminal justice. The prosecution service is an institution of the State and a representative of the general interest before courts and tribunals. This may imply a certain degree of independence and impartiality in the public prosecutor’s functions. Therefore, the relationship between the PPS and the political decision-makers of the State is a sensitive issue. By definition, the general interest is a concern common to all three powers in a democracy – the legislature, the executive and the judiciary. However, abuses of intervention by one power, such as the executive, into the sphere of another, the judiciary for instance, can happen. The PPS is therefore in a difficult position because it straddles these three powers. Under the second subheading (9.1.2) we considered the solutions found in the various countries to strike a balance between the prevention of abusive political interventions and the executive's intervention through instructions to the PPS to secure the general interest. Thereafter, the repartition of the prosecution’s functions within the institution’s structure (9.2.1) and the right to appoint and dismiss public prosecutors was addressed (9.2.2). Although differences exist between the above-mentioned issues, it will become apparent that every prosecution service functions according to general principles, such as the indivisibility and unity of the institution, and the hierarchical relationship between prosecutors implying subordination and substitution between prosecutors (9.3.1). A particular focus will be the obligation to execute orders and its limits (9.3.2).
9.3.1 Indivisibility, unity, hierarchy and substitution – the principles in the functioning of the PPS

9.3.1.1 Indivisibility and unity in the accountability of the institution

During the Communist era, all the members of the Prokuratura acted for the Prokuratura and the Prokuratura was responsible as one institution for any action carried out by any of its members – naturally, within the limits established by the prosecutors’ personal disciplinary and criminal responsibilities. It remained so afterwards. The PPS in each of the four countries is a single indivisible institution, particularly because it always represents the same unique party – society.

It logically stems from this that as far as rights and obligations provided by criminal procedure and other specific statutes are concerned, all prosecutors are entrusted with the same functions in criminal proceedings. For a court, a judge, a victim or an accused, the person acting in the name of the PPS in criminal proceedings commits the institution as a whole. No one can challenge the fact that one prosecutor starts proceedings and another one continues them.

This indivisibility and unity in the accountability of the PPS implies the notion of neutrality – also called indifference in certain countries such as Poland or France – of public prosecutors in the criminal process. The other parties or bodies involved in a case cannot request a participating prosecutor’s exclusion on the grounds, for instance, of insufficient qualification or specialisation. However, national legislation provides for several rare exceptions, such as a conflict of interest of a particular prosecutor in a case – e.g. prohibiting a prosecutor to participate in proceedings that affect him or his spouse (see in Poland 6.3.6).

The personality of the prosecutor or the nonconformity of his actions to instructions received from a superior does not affect the validity of these actions in the process. If a prosecutor prosecutes someone who is later acquitted by the court, the fact that he did not comply with the instructions of his superior cannot justify modification of the judgement. The superior can order an appeal and institute disciplinary proceedings against the prosecutor but the prosecution remains admissible and the judgement valid until it is quashed. Only the PPS as a whole is accountable for the decisions made by its members and this accountability is ultimately borne by the Minister of Justice as a member of the government, within the limits of his authority over the service (see 9.1.2.1). Nevertheless, the
accountability of the Czech Minister of Justice is limited because he does not intervene in PPS activity. He is responsible for the appointment of prosecutors and the choices made concerning the appointment of the general prosecutor. His accountability concerning the enforcement of the criminal policy by the PPS is indirect.

An interesting variation on this principle is found in the Dutch *vertrouwensbeginsel* or legitimate expectation (see 4.4.3.2.3), where a suspect enjoys the PPS’s promise that he will not be prosecuted, this may lead to a subsequent prosecution, e.g. by a lower prosecutor, being inadmissible before the court. Nevertheless, the responsibility lies not with a particular prosecutor but with the whole institution, because the promise commits the whole institution.

9.3.1.2  Hierarchy and subordination

Of course, indivisibility and unity do not mean that there is no distinction between the different ranks of prosecutors and their respective rights and obligations in criminal proceedings. The PPS is a hierarchical institution consisting of public prosecutors with different ranks implying a hierarchical subordination of lower prosecutors to their superiors. In the Czech Republic and Poland after the democratisation process, the hierarchical subordination between offices of different levels, e.g. between local and district or district and appellate, was re-established. It no longer consists of the hierarchy between general prosecutor and other prosecutors, and between the head of an office and his deputies. It should be noted that in the Netherlands the exact opposite change in the hierarchical structure has recently been implemented – i.e. hierarchical links have been severed between offices at different levels, leaving only those between the Board and all other offices (see 9.2.1). The principle of hierarchy in all the countries consists of the right of superior prosecutors to instruct lower prosecutors. Lower prosecutors are in principle obliged to comply with these instructions.

The concept of hierarchy in the institution is closely related to the concept of unity in the exercise of the prosecution’s functions. One of the tasks of the PPS is to uphold criminal law. In general, one law deals with one legal problem and is issued by one parliament. In order for public prosecutors to uphold this law and fight crime efficiently, unity in the interpretations of new or existing statutes is necessary. This aim is ensured by uniform instructions from the top to the bottom of the institution. This is one of the purposes of general instructions. Nevertheless, differences are found between the four
countries in the uniformity of these instructions. Such differences can be explained by the desire to favour local criminal policies, as in France, where a district prosecutor is not strictly bound by the general instructions of his general prosecutor. In addition, such differences can also be explained by the purpose of general instructions, which differs between the countries where the opportunity principle is in force and where the principle of compulsory prosecution is in force (see 9.1.2.4.1).

9.3.1.3 Subordination and substitution

One important difference between the four current systems and the Czech and Polish Communist systems should be stressed. The Communist system implied a strict subordination of lower prosecutors to their head of office and ultimately to the general prosecutor. Each prosecutor was subordinated to his direct superior and had to obey his orders, however, the subordination to the general prosecutor was all-encompassing and took precedence in all cases. The general prosecutor could act in place of any prosecutor or could order any prosecutor to act in particular proceedings and in a particular jurisdiction. The general prosecutor could overturn an order from a direct prosecutor to a lower prosecutor, for example. If the hierarchy between prosecutors is still a common feature of all PPSs today, especially in the Czech Republic and Poland where the general prosecutor retains a specific position in the hierarchy, all systems provide limits to subordination (see 9.3.2).

In addition to instructions issued by superiors to deputies, the hierarchical relationships between the members of the institution are illustrated by the principle of substitution. Diversity in the ranks and rights of prosecutors exists within every PPS. A certain right – e.g. a right to appeal a particular decision – may be vested in a prosecutor of a particular rank. A lower rank prosecutor may have the right to exercise his superior’s right by way of substitution and vice versa. The principle of substitution is a solution combining unity and this diversity, which is common to all systems. Substitution is a matter of internal organisation and can occur at any time during pending proceedings. It does not affect the continuation of the proceedings. Within a single office, substitution between deputies takes place as of right. In all countries, a chief prosecutor has the right to take over

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523 This does not mean, of course, that local prosecutors cannot take local circumstances into account and adapt a national criminal policy or submit these circumstances to their superiors in order for the national policy to be adapted.
the functions of his deputies or to replace a deputy with another. In principle the affected prosecutor cannot oppose the exercise of this right by his superior. Lower prosecutors may substitute for each other in any case. Outside the jurisdiction of the same office, in practice substitution does not occur unless a prosecutor is temporarily appointed or definitively transferred. In France an appellate prosecutor has no right to substitute a district prosecutor unless the latter authorises this substitution. A variation exists in the Dutch system, where a prosecutor from any district may substitute for any other prosecutor from another district as of right, or an appellate prosecutor from an appellate office may substitute for another appellate prosecutor in another appellate office as of right. No official temporary appointment is therefore necessary. In fact this provision is in accordance with a recent governmental order establishing a system of jurisdictional substitution (see 4.2.1). During substitution, the substituting prosecutor remains competent in his office, while a temporary transfer implies that the affected prosecutor temporarily loses his competence to act in his office.

9.3.2 The obligation to carry out the instructions of superiors and the limits of subordination

9.3.2.1 Instructions issued by the highest-ranking prosecutors to other prosecutors

In principle the highest-ranking prosecutors straddle the prosecution service and the executive. Therefore, it is important to distinguish them from other superior prosecutors with regard to the right to issue instructions. Whilst in the Czech Republic, Poland and the Netherlands, the functions of the highest-ranking prosecutor are assigned to one general prosecutor or a single body consisting of several general prosecutors, France has several general prosecutors distributed across thirty-five appellate prosecution offices. By inference, in France the scope of the general instructions from the highest-ranking prosecutors is limited to district offices within the jurisdiction of the appellate court where the general prosecutor is appointed. As this affects specific instructions, this scope is limited to the chief district prosecutors of the jurisdiction. In other countries the scope is national. However, the right of the French Minister of Justice to issue instructions to all prosecutors (see 9.1.2.4.2) tempers this statement. Superior prosecutors in all four countries can issue general instructions that do not affect pending cases and specific instructions that do affect pending
prosecutions. However, the scope, the purpose and the binding force of these instructions vary according to the superior’s rank.

- General instructions

One of the aims of the general instructions is to explain how to implement new or existing laws affecting criminal proceedings. The instructions may also comprise guidelines on the kinds of sentence to recommend according to the type and circumstances of the offence committed or on how to amend an opinion in a pending case if the circumstances alter the character of the case. In France and the Netherlands such instructions also affect the prosecutors’ discretion and establish guidelines for the implementation of the opportunity policy. No country requires specific formalities for the validity of general instructions, however, they are often published. They are binding on all affected prosecutors in the Czech Republic, Poland and the Netherlands. In France the binding effect of general instructions is limited by the *pouvoir propre* of district prosecutors (see 3.3.3.1). If a district prosecutor decides to oppose an appellate prosecutor’s instructions and takes a different position from his superiors, the latter have no means to overturn the decisions taken by the district prosecutor or replace him with another prosecutor, whereas in other countries the superior may substitute a deputy for the recalcitrant prosecutor. Nevertheless, the opposition of a district prosecutor can be considered a breach of duty and result in disciplinary measures.

- Specific instructions

By way of positive specific instruction, in all four countries the highest-ranking prosecutor can request information and files, order the decision to drop or dismiss a case be withdrawn and order that a prosecution be instituted or re-instituted. In principle, the highest-ranking prosecutor may also order a lower prosecutor to submit a specific opinion to a court once an indictment is filed. However, in the Czech Republic, there are doubts as to whether such an opinion can affect a decision to dismiss the case taken by a prosecutor at the hearing. Again, in France, the *pouvoir propre* of a chief district prosecutor tempers the superior’s right.

By way of negative specific instruction, in the Netherlands and France the highest-ranking prosecutor can directly order lower prosecutors not to prosecute a case. In the Czech Republic and Poland the situation is ill-defined. Although in practice such an order is extremely rare, it can only be forwarded to the direct superior of the chief prosecutor of the office with jurisdiction in the case. In the
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latter two countries the law does not really prevent or authorise the highest-ranking prosecutor to order the dropping of a case. There is no standard between countries as to the form of specific instructions. The Dutch Board and the Czech general prosecutor may issue such instructions either in writing or verbally, whereas in France they must be written and added to the file, and in Poland they must also be written and reasoned at the request of the recipient prosecutor.

9.3.2.2 Instructions issued by other superior prosecutors

Prosecutors other than highest-ranking prosecutors, with a superior rank in the hierarchy, can issue instructions with a general scope concerning certain types of cases or delegate to lower prosecutors within the limits of the PPS hierarchy (see 9.2.1). Of course, their scope can only be general within the jurisdiction where the prosecutor in question has a superior rank. Depending on the purpose of the instruction, lower prosecutors may have discretion to comply or not. Alternatively, superior prosecutors may issue specific instructions concerning particular pending or closed cases. In this way, a superior can order a prosecution instituted or not, issue an instruction on how to proceed in a case, or reinstate a dismissed prosecution. In theory, specific instructions are always binding on lower prosecutors and may be issued verbally or in writing.

In Poland only a direct superior may order the dismissal of a case, instructions are always in writing and must be reasoned at the deputy’s request. Moreover, a specific instruction must be added to the file. In the Czech Republic a specific instruction must be in writing if a superior other than the head of the recipient's office issues it or if the recipient so requests. In France the general prosecutor’s instructions are in writing and added to the file. In the Netherlands instructions from the Board may be written or verbal.

9.3.2.3 Limits of subordination

The strong unilateral central authority of the general prosecutor in the Czech Republic and Poland during the Communist period left almost no room for the independence of prosecutors in the exercise of their duties. Their subordination to their superiors was almost unlimited. In the absence of instructions from a superior, and unless the case was extremely common, every prosecutor was required to ensure that his opinion was in accordance with the views of the hierarchy. This situation changed under the new regimes. All the countries permit public prosecutors to be independent in the
exercise of their duties in the absence of instructions from a superior. Unless the case is particularly complicated, a prosecutor is not required to request instruction.

During a hearing where verbal submissions are compulsory, the participating prosecutor can set his superior’s instructions out in writing if the evidentiary status of the case has obviously changed. This right derives from the reception of the principle *la plume est serve, la parole est libre* (2.3.3.3). Under these circumstances, it should be clear that the instruction of his superior would have been different. However, the lower prosecutor must always remain loyal to his superior and must try to interpret how the change of circumstances would affect the instructions and adapt his actions accordingly. In the Czech Republic and the Netherlands an accurate set of general instructions is published. These deal with the appropriate measures a prosecutor should propose in specific circumstances. Outside the limits of subordination, prosecutors may enjoy independence, the extent of which varies slightly from one country to the other and according to the rank of the instruction’s addressee.

In the Czech Republic and Poland, if a deputy refuses to enforce a superior’s instructions, he must explain the reasons for his refusal. The refusal can bring about the replacement of the prosecutor. In France if a chief district prosecutor disregards a general prosecutor’s instructions, the latter cannot substitute for him. If a lower prosecutor refuses the chief district prosecutor’s instructions, the latter has the right to substitute for him and execute his own instructions. In the Netherlands a prosecutor technically has no right to disregard his superior’s instruction. He may instead always request to be excluded from the case.

### 9.4 The role of the prosecution service in preparatory criminal proceedings and in forms of review

Until the decision is taken to bring a criminal case to court or to take another decision, the prosecution authority is entitled to carry out the actions necessary for the discovery of the truth and the preparation of the case, and to decide what will happen to the suspect. It could transpire that a public prosecutor is the first to learn of a crime. However, in general, the police are the first state organ to discover the facts or to receive a report from a victim or witness. Unless there is sufficient information in the discovery or the report, preliminary proceedings may be necessary to discover the truth and prepare the case for settlement. In certain circumstances, despite having
sufficient information about the occurrence of a crime, the PPS, and sometimes the police, can refuse to institute such proceedings. The PPS may also have the right to dismiss instituted proceedings. In principle a public prosecutor will supervise the execution of preliminary proceedings and decide how the case should be settled. In this section a comparison of the four systems studied will underline, where significant, the modifications brought about by the democratisation process. Firstly (9.4.1), the decision to inform a prosecutor of criminal facts and the procedure to follow in doing so and the institution of proceedings will be compared. The standards and variations in the prosecutor’s right to take coercive measures and to supervise preliminary proceedings will be explained. Attention will also be paid to the various mechanisms of control affecting the prosecutor’s rights during this phase of the criminal process, available to the plaintiff, a judge or a court, for instance. Secondly (9.4.2), the various decisions and the legal basis thereof available to the prosecution service in settling a case will also be compared. The emphasis is on the decision to dismiss an investigated case, the moment of filing the indictment with a single judge or a court, and the moment the public prosecutor becomes one of the parties to the process and entitled to support the prosecution in the public interest. From this moment, the right to decide on the case is transferred to a judge or court.

9.4.1 Uncovering the facts, starting and carrying out criminal preliminary proceedings – the prosecutor’s role

9.4.1.1 The start of proceedings

The democratisation process enhanced the role of the prosecution service to the detriment of the police and other state bodies. In the Czech Republic, for example, the police must report the commission of every crime to the PPS. The inquiry – carried out by investigators from the security corps – and investigation (see 7.5.1.2) have been replaced by an investigation conducted by the police under the supervision of the PPS. In Poland the distinction between the inquiry and the investigation is still in force, though the militia has lost its powerful function (see 5.5.1.1). Today, the law provides which body has jurisdiction to start an inquiry or an investigation according to the gravity of the facts. The PPS supervises inquiries and investigations.

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524 The grounds for refusal to commence proceedings will be dealt with under the next subheading (9.4.2.3).
In France an investigation can be conducted in the form of a preliminary inquiry – the main coercive measures require the consent of the suspect or the authorisation of a judge – or of a *flagrante delicto* inquiry where the police under direct supervision of a prosecutor have greater powers of coercion without the consent of the suspect. In the Netherlands there is one type of investigative procedure providing the police with rights which are more or less coercive according to the circumstances of the case, e.g. *flagrante delicto* or otherwise. The police carry out investigations under the supervision of a public prosecutor, who must request the intervention of an investigative judge for certain coercive measures to be taken.

All systems allow either the police or a prosecutor to start proceedings *ex officio* on discovery of the facts or upon receipt of a victim’s or witness’s report. The purpose of these proceedings is to screen the facts and find evidence that a criminal offence has been committed and by whom. In addition to the police and the PPS, other State bodies have similar rights, but to a very limited extent, as provided by law.

The obligation on the police to inform a prosecutor of the report or the discovery of a fact at the outset of a case is not common to all systems. In certain systems, such as the Czech, the law provides that a prosecutor should always be informed as soon as possible or within forty-eight hours. In France only the police are under the obligation to immediately inform a prosecutor in *flagrante delicto* cases. In the Netherlands the police inform the prosecutor as soon as possible, while in Poland there is no general obligation to inform unless proceedings in the form of an investigation are necessary.

All systems permit the police and sometimes other State bodies to drop a case at its outset. In principle the PPS supervises police activity in criminal matters. However, the law provides different forms of control over the police in the exercise of their discretionary power to drop a case. Under the Czech system, the police do not need a prosecutor’s approval to drop a case. However, since a prosecutor is

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525 For the purpose of this research, *flagrante delicto* is when a suspect is caught in the commission of an offence or immediately afterwards. French criminal procedure also provides for a judicial investigation conducted by an investigative judge. However, this institution falls outside the scope of this research. The rights of a public prosecutor during the judicial investigation cannot really be compared with the rights of a public prosecutor during a police investigation in the other countries because he loses his status as *dominus litis* during the judicial investigation, see 8.4.2.2.3.
invariably rapidly informed of the report, he or she may reverse the police decision. In Poland a prosecutor does not have to be immediately informed in certain cases, but a prosecutor must always approve a police order to desist from commencing proceedings. In France it is also not always compulsory to inform the prosecutor immediately. However, in theory, the police cannot refuse to note a complaint or drop a case. Although the PPS exercises general control over the police, approval for dropping a case may be implicit in certain cases. In the Netherlands the police have the right to drop a case, but the grounds for dropping a case must comply with the prosecution policy and the guidelines issued by the PPS.

The plaintiff has a right to challenge the refusal to start proceedings in all the systems. If the police take this step, the plaintiff can report it to the prosecutor directly. The victim has at all times the right to appeal the prosecutor’s refusal to start proceedings before a superior prosecutor in all the systems. In the Netherlands this appeal can also be filed with the court. Ultimately, in Poland and France the victim of a crime for which the public prosecutor refused to start proceedings may file his own indictment with the court.

9.4.1.2 During the proceedings

After the collapse of Communism, modifications in criminal procedure have limited the right of the PPS to order coercive measures in particular. Today, in the Czech Republic and Poland only the courts have the right to order preliminary detention.

All systems have the public prosecution authority supervise preliminary proceedings and issue the orders and instructions necessary for the police to efficiently carry out proceedings. In addition to actions that the police undertake ex officio, there are also actions requiring a prosecutor’s decision and sometimes a court decision. Decisions to take coercive measures, such as custody or preliminary detention, are often made with the authorisation of a prosecutor or court.

All systems permit the police to take a suspect into custody if it is necessary and urgent and in particular if he is caught in the act of committing a felony or immediately afterwards (flagrante delicto). In Poland or the Czech Republic the immediate notification of a prosecutor is not necessary, whereas in France the prosecutor must be informed immediately of the custody. In the Netherlands, in principle, only a prosecutor may take a decision on custody.
All systems limit custody to a short period only (between twenty-four and forty-eight hours). Extensions are possible. If the circumstances of the case and/or the character of the suspect so require, preliminary detention for a longer period may be ordered, though only by a court or a judge. The prosecutor can only ask the court or the judge to order the detention. The detention period varies from one country to another, and judges or courts only decide on its extension.

9.4.2 Concluding preliminary proceedings

9.4.2.1 Preparing the indictment

In all the countries once preparatory proceedings are completed, a prosecutor decides on further prosecution. However, the police may participate to varying extents in the preparation of this decision. If there is enough evidence to prove that a specific person has committed a criminal offence, a notification of the charges and an indictment can be issued. In Poland, the Czech Republic and the Netherlands the police or the prosecutor notify the accused of the charges. Thereafter, the prosecutor issues and files the indictment with the court. In Poland the police prepare the indictment and in the Czech Republic they apply to the prosecutor with the facts, evidence lists and a possible decision on further prosecution. In the Netherlands in minor cases a senior police officer may prepare a standardised indictment under the control and responsibility of the public prosecutor, who maintains full power of decision. On the contrary, in France the police merely hand the case on to a prosecutor without submitting an application or preparing an indictment.

Irrespective of who prepares the indictment, the public prosecutor checks the legal qualification of the facts. In principle a public prosecutor is the only body that has the right to file an indictment with the court and summon the accused. From that moment and until the hearing starts, only the prosecutor has the right to withdraw the indictment. This withdrawal affects the progress of the proceedings before the court in different ways. In France, in

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526 Special statutes concerning acts of terrorism may provide for longer periods.
527 For details for each country separately, the reader should refer to the following sections – 3.4.3.2 and 3.5.1 for France; 4.4.3.2 and 4.5.1 for the Netherlands; 5.5.1 and 5.6.1.1 for Poland under Communism; 6.4.2, 6.4.3.2 and 6.5.1.1 for Poland today; 7.5.1.2, 7.5.1.4 and 7.6.1.1 for the Czech Republic under Communism; and 8.4.2.2.3, 8.5.1.1 and 8.4.2.1.2 for the Czech Republic today.
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principle, once an indictment is issued by the court its withdrawal does not affect the progress of the trial. All other countries understand a withdrawal as a signal to halt proceedings until the start of the main hearing. In Poland and the Czech Republic once the hearing has started, withdrawal of proceedings is possible unless the defendant insists on their continuation.

9.4.2.2 Out-of-court settlement, settlement and conviction without hearing

All countries display a clear tendency towards providing simplified proceedings inspired by the common law guilty plea and to limit, not to say avoid, recourse to a complete court hearing. Such proceedings are available to the PPS when prosecuting a defendant charged with an offence carrying several years imprisonment and/or a fine as a maximum penalty. When such proceedings are pursued, the decision can vary from a conditional or definitive dismissal and victim’s damage compensation to a conviction and sentence that is more lenient than imprisonment. The prosecutor takes part in this decision-making process to a different extent in each system and the conditions for the validity of the proceedings vary.

First, the PPSs are entitled to divert a case from public prosecution by means of various procedures if the accused acknowledges his guilt, the victim agrees and the accused repairs the damage caused by the act. In France, Poland and the Czech Republic the prosecutor can offer to mediate between a victim and an offender. In France for minor offences only, mediation can lead to the suspension of public prosecution as long as the limitation period permits. In Poland this only applies to offences constituting a low degree of social harm, with mediation being a step towards conditional dismissal by a court. In the Czech Republic, for offences punished by up to five years’ imprisonment, a public prosecutor can dismiss a prosecution and settle the case without recourse to a court. In the Netherlands, according to the guidelines of the PPS, a public prosecutor may recommend the settlement of a case without its prosecution to the accused and the victim of a crime if the accused repairs the damage caused by his behaviour.

In addition, cases can be settled by the PPS without a hearing in all systems in cases where the accused is charged with an offence sentenced by imprisonment for up to five years (six in the Netherlands) or a fine, by means of a conditional dismissal – e.g. undertaking unpaid community work or victim’s damage compensation – and, in the Netherlands, also through an agreement
(transactie) between the prosecutor and the accused, i.e. payment of a fine against dismissal of the case. One of the main differences between the various proceedings for conditional dismissal is in the autonomy of the prosecutor in the decision-making process. In Poland and France the court approves the conditional dismissal in a simplified hearing whereas in the Netherlands and the Czech Republic the court is in principle not involved. In all the systems, if the conditions are respected during the given probation period, no prosecution before a court will be purused and the right to prosecute expires.

Finally, in Poland and France the law provides for conviction without hearing. In the indictment, the PPS has the right to apply to the court to decide without a complete hearing. For example, the conviction without hearing is admissible if the accused acknowledges his guilt for a crime carrying a fine or a penalty of up to ten years' imprisonment in Poland and five in France. The court will decide to settle the case without a complete hearing on receiving an application included with the prosecutor's indictment. Conversely, in the Netherlands, the prosecutor can issue an order for conviction out of court and without the accused acknowledging his guilt for a criminal offence carrying a penalty of up to six years' imprisonment. However, the accused and the victim have the right to challenge such a criminal order by way of opposition (verzet) within fourteen days of the day the accused gained knowledge of the decision. If the opposition is grounded, the proceedings continue as though the defendant had received an ordinary indictment. 528 Another distinguishing feature of conviction without hearing is the right of the public prosecutor to propose a penalty that does not carry a custodial sentence.

9.4.2.3 Legal basis of the prosecutor's discretion

Of course, if the democratisation process has deeply modified criminal policies motivating the decision to prosecute – e.g. the abolition of the educational purpose of Socialist criminal law – the legal basis for such a decision remains technically similar to that in the previous system.

In applying the principle of compulsory prosecution, proceedings that do not meet one of the fundamental conditions provided by law are inadmissible and should be dismissed if already started. One of the

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528 This new institution, called strafbeschikking, replaces on many occasions the previous transactie, see 4.4.3.2.1.
most important of these conditions is a statute to proscribe the criminal behaviour and the related penalty for which a defendant is being prosecuted (nullum crimen, nulla poena sine lege). All four countries also prohibit the admission of criminal prosecution if the same accused has already been judged for the same facts (ne bis in idem), if a pardon or amnesty has been granted, if the limitation period has expired, if the perpetrator remains unknown or if the acts described in the indictment do not constitute a criminal offence. In addition to the specific national differences in the latter examples, the main difference between the different countries capable of affecting the PPS’s discretion is in the definition of a crime. In Poland and the Czech Republic one of the constituent elements of a crime is the notion of the ‘insignificant social danger of the act’ or ‘social harm’ in Poland. The relationship between criminal behaviour as defined by law within the socialist notion of ‘insignificant social danger’ remains in force in the current Czech and Polish systems. Nevertheless, prosecutors do not use the concept to outlaw persons endangering society because of their social or political affiliations. Criminal law defines precisely what kind of behaviour constitutes a criminal offence; however, such behaviour must also pose a danger to society. In France and the Netherlands the notion of the social danger is not a general constituent element of a crime. When assessing the existence and gravity of this danger, the Czech and Polish public prosecutors have a discretionary power comparable to the Dutch or French prosecutors’ appreciation of the general interest when applying the opportunity principle (see on this principle, 3.4.2.2 and 4.4.2.1).

Without prejudice to the solutions above (9.4.2.2), if a prosecution meets these admissibility prerequisites, the PPS has a duty to charge the accused and seek a conviction from a criminal court. Nevertheless, in certain cases a public prosecutor retains the right to dismiss a case despite all the prerequisite conditions being met – i.e. that the perpetrator is known and there is sufficient evidence that he has committed the offence prosecuted. In principle in Poland and the Czech Republic, once a case meets the conditions for an admissible prosecution, a prosecutor has no other option but to prosecute before the court. Nevertheless, since the collapse of Communism, sporadic legislation has enhanced the prosecutor’s discretion at this stage and provides a legal basis for exceptions to compulsory prosecution. For example, prosecutors have the right to dismiss proceedings already instituted when the consequences of the act are insignificant (in the Czech Republic) or because imposing a
penalty would be inexpedient (in Poland).\textsuperscript{529} In France and the Netherlands the prosecution can dismiss the case if it is not opportune to prosecute, though it is probably better to dismiss a case because it is in the general interest to do so. The general interest is difficult to define and often depends on the domestic legal culture, national criminal policy, local conditions, the circumstances of the case or the circumstances of the perpetrator and the victim. A common denominator in all four countries is the absence of real danger or the incidence of the criminal act on the social legal order, i.e. the criminal behaviour did not harm society. Behind the notion of the general interest there is, obviously, also the necessity for the justice administration to employ its limited human and financial resources to fight the most important and serious crimes.

It seems that all systems, whether implementing the principle of compulsory prosecution or not, converge on providing public prosecutors with the opportunity of deciding whether to prosecute. This trend is clearly illustrated by the integration of the socialist notion of insignificant social danger into the current criminal law, and in the sporadic legislation promoting exceptions to the obligation to prosecute cases that would otherwise be automatically prosecuted if the principle of compulsory prosecution was strictly respected.

9.5 The rights of the prosecution service in forms of review

In principle, on a valid indictment, the court or the judge has jurisdiction to settle the case and, following a hearing, will issue a decision, i.e. the judgement. An appeal before a superior court is available against this kind of decision when it is validly issued, in order to have the merits of the case or a part of them examined \textit{de novo} (9.5.1.1).

If an appeal is not possible, the parties to a case may file a cassation appeal with the Supreme Court on specific, limited grounds provided by law and request the re-examination of questions of law. It is also possible that new facts or circumstances unknown to the first instance judges or, where applicable, to the

\textsuperscript{529} Technically, the level of social danger established by the legal definition of a criminal offence should be distinguished from the degree of dangerous consequences caused by the act appraised by a prosecutor once proceedings are instituted. In the first case, proceedings cannot be instituted because they would be inadmissible, while in the second, proceedings instituted and admissible for prosecution before a court are dismissed because a prosecutor deems the harm caused by the offence insignificant; see 8.4.2.2.3.
appellate judges, are discovered after the decision on a case becomes definitive. Under such conditions, the reopening of proceedings may be possible (9.5.1.2).

9.5.1.1 The public prosecution’s right to challenge decisions made at the first instance

Very few modifications have been made to the procedure in force under the socialist system as regards the rights granted to public prosecutors to appeal first instance judgements. A rehearing can be requested in all countries once the court or the judge has made a valid decision on the merits. This right is available to the prosecution service whether the decision was in favour of the accused or not. In principle the time limit for filing the appeal varies from eight days (the Czech Republic) to ten days (France) and fourteen days (Poland and the Netherlands). The time limit to file an appeal commences from the moment the appellant learns of the decision. This could be from the moment the decision is served. However, there is always a public prosecutor present at the hearing when a decision is announced. If the judgement is made and announced at the end of the hearing, the time limit for appeal starts from that day. In France the general prosecutor superior to the district prosecutor who was present at the first instance hearing has two months from the date of the judgement to file an appeal.

9.5.1.2 The public prosecution’s right to challenge decisions without appeal

The repeal of the socialist legal system has brought a major modification to the forms of review available to parties against decisions without appeal. The cassation appeal as it is understood in France and the Netherlands was not available during the Communist era. Instead, an extraordinary appeal was the remedy available against a decision without appeal violating the law. However, only certain State bodies were entitled to file such an appeal. Since then, the extraordinary appeal has been repealed and a cassation appeal has been re-established in its place in the Czech Republic and Poland.

All systems provide parties with a cassation appeal against decisions without appeal to ensure the unification of case law and the correction of violations of the law. Such review is only possible on specific limited grounds provided for in the law. These grounds vary from one system to another. Various types of decision can be appealed. In Poland any decision concluding proceedings made by
appellate courts can be appealed. In the Czech Republic all acquittals, convictions and orders of dismissal or settlement can be appealed. In France all acquittals or convictions except judgements of acquittal made by a Cour d’assises can be appealed. In the Netherlands an appeal is possible against all judgements on their own merits except for misdemeanours (overtredingen), where the sentence does not impose a penalty or measure or if the sentence is minimal. All the systems provide cassation appeal to the prosecution service. The time limit to file an appeal varies from five days in France, to fourteen days in the Netherlands, thirty days in Poland and two months in the Czech Republic.

In addition, there is a system of review of definitive decisions in the interest of the law in Poland and the Czech Republic. A similar review is also available against illegal decisions that cannot otherwise be reviewed in France and the Netherlands. In every system this institution is available to a limited number of persons only. Each system either permits the Minister of Justice to file this motion where possible, as is the case in the Czech Republic and Poland, or to apply to the body entitled to file it, as is the case in France and the Netherlands. There is no time limit to file this application because the aim of the review is to ensure the unity and coherence of the case law of the Supreme Court. Therefore, a decision taken by the Supreme Court upon this kind of application should not, in principle, affect the status of the accused. A judgement of acquittal can never be turned into a conviction even if it breached the law. The Supreme Court takes a decision stating the nature of the violation of the law. Nevertheless, in the Czech Republic the Supreme Court can order a rehearing if the verdict was to the detriment of the accused. The rehearing cannot lead to an aggravation of the sentence.

Finally, if new facts or circumstances ignored during first instance or appellate proceedings are discovered after a judgement has become definitive, the proceedings can be reopened and the case judged anew under very strict conditions. This option for the reopening of proceedings is only available to the prosecution services in Poland and the Czech Republic.