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GREEN PAPER

**on criminal-law protection of the financial interests of the Community and the
establishment of a European Prosecutor**

(presented by the Commission)

CONTENTS

1.	Introduction.....	5
1.1.	The origins of the Commission’s proposal to establish a European Prosecutor.....	5
1.2.	Reasons for presenting a Green Paper at this stage.....	6
1.2.1.	Fraud against the Community’s financial interests: a phenomenon that needs to be repressed	7
1.1.2.	The question of a European Public Prosecutor: an ongoing debate.....	8
1.3.	Objectives of the Green Paper	9
1.3.1.	To extend the debate to all interested circles	9
1.3.2.	To explore the proposal’s feasibility	10
2.	The premises of the debate	12
2.1.	Value added by the European Public Prosecutor: the arguments for the Commission’s 2000 proposal.....	12
2.1.1.	Overcoming the fragmentation of the European criminal law-enforcement area.....	12
2.1.2.	Move beyond the cumbersome and inappropriate traditional methods of judicial cooperation between Member States.....	13
2.1.3.	The judicial follow-up to administrative investigations	13
2.1.4.	Reinforce the organisation and effectiveness of investigation activities within the Community institutions	15
2.2.	Respect for fundamental rights	15
2.3.	Relationship with Europe’s political priorities in matters of justice and home affairs	16
2.3.1.	Complementarity with the objectives of the Tampere European Council.....	16
2.3.2.	Specific features of the proposal in terms of the objectives of the Tampere European Council.....	17
2.4.	Legal basis	18
3.	General outline	20
3.1.	Material jurisdiction confined to the protection of the Community’s financial interests	20
3.1.1.	Specific responsibility of the Communities	21
3.1.2.	Maintaining the current scope of protection of the Community’s financial interests	21
3.2.	Towards a common investigation and prosecution area.....	23
3.2.1.	The powers of the European Public Prosecutor: centralised direction of investigation and enforcement	24

3.2.2.	A harmonious relationship with national systems of criminal law	25
4.	Legal status and internal organisation	27
4.1.	Status of the European Public Prosecutor.....	27
4.1.1.	Principle of independence.....	27
4.1.2.	Conditions for appointment and removal from office.....	27
4.1.3.	Hierarchical role of the European Public Prosecutor	28
4.2.	Decentralised organisation of the European Prosecution Service.....	28
4.2.1.	Principle of decentralised Deputy European Public Prosecutors.....	29
4.2.2.	Subordination to the chief European Prosecutor.....	30
4.3.	Means of action of the European Prosecution Service.....	31
5.	Substantive criminal law.....	33
5.1.	Choice of legislative technique: Community unification or harmonisation of national legislation.....	33
5.2.	Common definitions of offences	34
5.2.1.	Offences for the protection of the Community's financial interests, on which the Member States are already in agreement.....	35
5.2.2.	Offences above and beyond the protection of the Community's financial interests..	37
5.2.3.	Offences that might be envisaged for the protection of the Community's financial interests	38
5.3.	Common penalties	39
1.4.	Liability of legal persons	40
1.5.	Rules of limitation	40
6.	Procedure	42
6.1.	Information and referral.....	42
6.2.	The preparatory stage	43
6.2.1.	Fundamental rights	44
6.2.2.	Opening of investigations and enforcement proceedings.....	45
6.2.3.	Conducting investigations.....	49
6.2.4.	Outcome of prosecution.....	53
6.3.	Trial stage	55
6.3.1.	Choice of Member State of trial.....	55
6.3.2.	Exercise of the prosecution function.....	57

6.3.3.	The European Communities, victims in accordance with the ordinary law	57
6.3.4.	Law of evidence	58
6.3.5.	Factors causing early termination of prosecution	60
6.3.6.	Execution of the judgment	60
6.4.	Guarantee of the involvement of a court	60
6.4.1.	Functions of the court	60
6.4.2.	The designation of the judge of freedoms	61
6.4.3.	Designation of the court to review the committal	62
7.	Relations with the other parties involved	64
7.1.	Cooperation with Member States' authorities	64
7.2.	Relations with those involved in cooperation in criminal matters in the European Union	64
7.2.1.	Eurojust	65
7.2.2.	Europol	66
7.2.3.	European Judicial Network	66
7.3.	Relations with Community institutions and other bodies	67
7.3.1.	General	67
7.3.2.	Future role of OLAF	67
7.4.	Relations with third countries	68
8.	Judicial review of acts of the European Public Prosecutor	70
8.1.	Reviewable acts of the European Public Prosecutor	70
8.1.1.	Acts of investigation entailing a restriction or deprivation of personal liberty	70
8.1.2.	Other acts of investigation	70
8.1.3.	Case closed or not pursued	71
8.1.4.	Committal for trial	71
8.2.	Right to review	72
8.2.1.	Review under domestic law	72
8.2.2.	Review by the Court of Justice	73
9.	Conclusion	75

1. INTRODUCTION

The need to prosecute perpetrators of fraud affecting the financial interests of the European Communities more effectively has led the Commission to propose establishing a European Public Prosecutor with responsibility in this field. Its proposal deserved closer attention and wide debate, which is why the Commission is presenting this Green Paper today.

Although it is based on a general proposal already adopted by the Commission, this paper is offered as a basis for consultation like any other Green Paper. At a second stage, the idea is that a better-informed view can be taken on the principle following closer preliminary thought about the possibilities for its implementation.

1.1. The origins of the Commission's proposal to establish a European Prosecutor

In the context of the Nice Intergovernmental Conference, the Commission proposed, as a response to fraud against the Community's finances, to remedy the fragmentation of the European law-enforcement area by establishing a European Public Prosecutor.¹ The protection of the Community's financial interests is a specific enough concern to warrant a specific response transcending the limits of traditional judicial cooperation.

Historically, the idea of specifically furthering criminal-law protection of the Community's financial interests arose following the allocation of own resources to the Community, with a first draft amendment to the Treaty dating from 6 August 1976.² It evolved further with the signing of agreements and similar instruments, and in particular the Convention of 26 July 1995,³ adopted in the context of justice and home affairs cooperation (the third pillar) but not yet ratified by all the Member States. It was first formalised in the Amsterdam Treaty, which provided a legal basis for the Community legislature to establish rules of limited scope for the criminal protection of the Community's financial interests. On this basis, the Commission recently adopted a proposal for a Directive.⁴ This specificity of the criminal-law protection of the Community's financial interests lies at the basis of the proposal to establish a European Public Prosecutor.

This proposal was preceded by detailed preparatory work. For almost ten years now, at the request of the European Parliament and the Commission, groups of experts in criminal law from all the Member States have been working on the subject of the criminal-law protection

¹ Additional Commission contribution to the Intergovernmental Conference on institutional reforms - *The criminal protection of the Community's financial interests: A European Prosecutor*, 29.9.2000, COM(2000) 608. See Annex 1. This contribution amplifies the Commission's Opinion given under Article 48 of the Union Treaty on the convening of a Conference of Representatives of the Governments of the Member States to amend the Treaties, *Adapting the institutions to make a success of enlargement*, 26.1.2000, COM (2000) 34, point (5)(b).

² Former draft Treaty amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those treaties, COM(76)418, OJ C 222, 22.9.1976.

³ Convention of 26 July 1995 on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 49) and its additional protocols (OJ C 313, 23.10.1996, p. 1; OJ C 221, 19.7.1997, p. 11; OJ C 151, 20.5.1997, p. 1).

⁴ Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests, presented by the Commission on 23.5.2001 (COM(2001) 272).

of the Community's financial interests.⁵ The result of their work, welcomed by the European Parliament⁶ and the Commission, was a proposal for a set of rules for the criminal-law protection of the Community's financial interests, the well-known "Corpus Juris". They were based on a vast comparative study of national systems of criminal law which concluded that the project was feasible.⁷

But the debate cannot stop there. In 2000 the Commission presented its contribution. It is conducting its reflections, not proceeding from any particular national model but seeking the system best matching the specific requirements of the objective of protecting the Community's financial interests and aiming at the highest levels of protection of fundamental rights.

1.2. Reasons for presenting a Green Paper at this stage

The Commission's contribution to the Intergovernmental Conference for revision of the EC Treaty to provide a legal basis for the establishment of the European Public Prosecutor⁸ was not taken up by the European Council at Nice in December 2000. In the first place the Intergovernmental Conference was not given the necessary time to examine the proposal. The need for more detailed study of the practical implications was also expressed.

But the underlying philosophy remains unchanged. And there were some encouraging reactions. In accordance with its action plan for 2001-03 on protecting the Communities' financial interests,⁹ the Commission therefore undertook to adopt this Green Paper in order to clarify its ideas and to widen the debate.

The point is to respond to the scepticism which has all too often greeted its proposal by explaining it in practical terms and considering the possibilities for the implementation of a solution which might rightly be seen as ambitious and innovatory.

⁵ Comparative analysis of the reports by the Member States on the measures taken at national level to combat waste and the diversion of Community resources: Summary paper, European Commission, 13.11.1995, COM(95)556 ; see also several studies commissioned by the Commission: Comparative study on the protection of the Community's financial interests, 3 volumes, 1992-1994; Study on systems of administrative and criminal penalties in the Member States of the European Communities, 2 volumes, 1994; Out-of-court settlements in the European Union, 1995.

⁶ Resolution on the creation of a European legal and judicial area to protect the European Union's financial interests against international crime, European Parliament, 12.6.1997 (OJ C 200, 30.6.1997, p. 157).

⁷ Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union, under the responsibility of M. Delmas-Marty, Economica, Paris, 1997. In response to these recommendations, the experts more recently revised the Corpus Juris (<http://www.law.uu.nl/wiarda/corpus/index1.htm>) and completed a comparative study on the need for it and its legitimacy and feasibility, analysing the potential impact of a European Prosecutor on national prosecution systems: *The Implementation of the Corpus Juris in the Member States*, M. Delmas-Marty / J.A.E. Vervaele, Intersentia, Utrecht, 2000 (4 volumes). For the purposes of this Green Paper, all references are to this second version, known as the "Florence version", of the Corpus juris, unless otherwise specified.

⁸ COM(2000) 608, already referred to.

⁹ COM (2000) 254

1.2.1. Fraud against the Community's financial interests: a phenomenon that needs to be repressed

Fraud is a phenomenon that needs to be stamped out. In the current general context of a stronger international fight against financial crime, the scale of illegal activity to the detriment of Community funds is worth remembering.

The proportion of all the cases of irregularity detected by the Commission and the Member States which entail criminal proceedings - i.e. where there is intent - was *estimated* by the Commission and the Member States in 1999 at around 20% of known cases and nearly 50% of the corresponding amounts. The scale of fraud affecting the Community's financial interests detected by the Member States and by the European Anti-Fraud Office (OLAF) in 1999 was estimated to account for a total of €413 million.¹⁰

Frauds in 1999	Number of cases	Amount (€ Mio)
Reports from Member States	1.235	190
OLAF investigations	252	223

Overall, these cases represented fraud with an impact on European own resources of some €122 million (or 0.9 % of traditional own resources) and on expenditure of €291 million (or 0.3 % of the budget), €170 million of which was in the area of agricultural expenditure, €73 million concerned external action by the Communities and €48 million in the field of structural actions.

Every year since 1991 the Commission has given a description of the fraud phenomenon with statistics and examples in its annual report on the protection of the Community's financial interests and the fight against fraud.¹¹

The administrative detection facilities in the Community have been refined over the years.¹² There has also been an enhanced effort to prevent fraud in the context of the reform of the administration of the Commission, of which OLAF's anti-fraud strategy is a component.

But prevention and detection are not enough by themselves. The need for effective enforcement activities remains. It is known that organised crime has been involved in numerous cases that have come to the knowledge of the Commission departments over the years, and especially of the Unit for the Coordination of Fraud Prevention (UCLAF) set up in 1988 and replaced in 1999 by the European Anti-Fraud Office (OLAF), with independent investigative powers. Fraud affecting the Community's financial interests primarily concerns major cases involving the criminal courts of several Member States. They are complex and distinctly transnational in nature.

¹⁰ European Commission, Protection of the Communities' financial interests and the fight against fraud, annual report 1999, COM(2000) 718, points 4 and 5.

¹¹ European Commission, Annual report 2000: protection of the Communities' financial interests and the fight against fraud, COM (2001) 255.

¹² The Cologne European Council in June 1999 welcomed the rapid creation of OLAF and the legal framework accompanying it, called for by the Vienna European Council in December 1998.

A problem on this scale must be met with an appropriate response. This is a specific form of crime which calls for a specific response. Given its nature, the response must include a repressive dimension, in accordance with the requirements introduced by the Treaty of Amsterdam. Article 280 of the EC Treaty now requires protection of the Community's financial interests to be effective, dissuasive and equivalent in all the Member States. In these circumstances, the Community must guarantee to Member States and Europe's taxpayers that offences of fraud and corruption are genuinely prosecuted in the courts. Otherwise the credibility of European integration to public opinion could be seriously compromised.

1.2.2. The question of a European Public Prosecutor: an ongoing debate

The debate on the establishment of a European Prosecutor did not wait for the Green Paper before taking off.

At European level, the limitations on national law-enforcement areas faced with transnational economic and financial crime have been denounced for years now by practitioners, judges, police forces and lawyers. From the Geneva appeal on 1 October 1996 to the recent Trier declaration on 15 September 2001 in favour of relaunching the question of the European Public Prosecutor in the run-up to enlargement of the Union, via the Strasbourg Manifesto of 20 October 2000, professional circles have taken the subject up in several Member States. In a more latent way, the question is now near the top of the list of popular concerns, no longer being confined to specialist or academic circles.¹³

The European Parliament has played a leading role here, repeatedly calling since the 1990s for this proposal to be implemented, in order to ensure effective follow-up at the criminal prosecution stage to the prevention and administrative detection of fraud.¹⁴

More recently, the Committee of Independent Experts,¹⁵ the Committee of Wise Men¹⁶ and the OLAF Supervisory Committee,¹⁷ each in its own area of concern, recommended in 1999 that a European Public Prosecutor be established with powers to act here.

At national level, the political debate hotted up, in some Member States at least. Without claiming to be exhaustive, let us report on a few expressions of opinion here.

In the United Kingdom, the House of Lords published its enquiry into prosecuting fraud on the Communities' finances, conducted by its Select Committee on the European

¹³ An annual opinion poll conducted by the Institut Louis-Harris in eight Member States in December 2000 for *Le Monde* revealed that 68% of respondents supported harmonisation of court systems in the Member States.

¹⁴ See in particular Resolution on the Commission's annual report for 1996 (JO C 339; 10.11.1997 p. 68); Resolution on criminal procedures in the European Union (*Corpus Juris*), 13.4.1999; Resolution of 19 January 2000 on the establishment of criminal protection for the financial interests of the Union (OJ C 304, 24.10.2000, p. 126); Resolution of 13.4.2000 for the Intergovernmental Conference; Resolution of 16.5.2000 of the Commission's annual report for 1998 on the protection of the Community's financial interests; Resolution of 13.12.2000 on the Commission's antifraud strategy (OJ C 232, 17.8.2001, p.191); Resolution of 14 March 2001 of the Commission's annual report for 1999 on the protection of the Community's financial interests.

¹⁵ Second report on the reform of the Commission, 10.9.1999, recommendation 59.

¹⁶ Report by Mr Dehaene, Mr Simon and Mr Von Weizsäcker, 18.10.1999, point 2.2.6.

¹⁷ OLAF Supervisory Committee, Opinions 5/99 and 2/2000, in *Report July 1999 - July 2000* (OJ C 360, 14.12.2000).

Communities.¹⁸ The Chairman of this Committee, while not endorsing the conclusions of the Corpus Juris, recognises that the introduction of a special regime for prosecuting fraud should be considered if the efforts still to be made on intergovernmental judicial cooperation were to be delayed or to fail.

In France, the National Assembly delegation on the European Union, considering the fight against fraud in Europe, portrays the question of a European Public Prosecutor as one aspect of the choice in the field today.¹⁹ Its rapporteur concludes that the effectiveness of prosecution in this area is a real problem and that a European Public Prosecutor is essential.

In Germany, the Federal Government replied to a question from a group of members of the Bundestag regarding possible criminal-law developments at Community level, in particular with a view to protecting the financial interests of the Communities.²⁰ The reply was that, despite serious reservations on the general part of the Corpus juris study, the establishment of a European Public Prosecutor should be planned in the context of a possible sectoral unification of substantive and procedural criminal law and proceed from experience with the establishment of Eurojust, regarded by the German Government as the embryo of a future European Public Prosecutor.

The Dutch Minister of Justice has described the Commission contribution to the Intergovernmental Conference as interesting. He considers that they can usefully contribute to a discussion on the substance of measures to improve the fight against fraud in the Community and is ready to cooperate.²¹

In the broader context of the fight against crime in the European Union, certain Heads of Government now refer to various versions of the concept of a European prosecution service when speaking of their vision of Europe's future.²²

These opinions are, if nothing else, evidence both of the interest in the subject and of the need for a more in-depth debate of how a European Public Prosecutor should operate. The Commission is proposing an innovatory solution that is both narrower and more specific, in order to meet a specifically common need. Hence the reason for this Green Paper.

1.3. Objectives of the Green Paper

The nature of the Green Paper distinguishes it from earlier preparatory work. It seeks to both broaden and deepen the debate on the Commission proposal with a view to its being considered by the Convention which is to prepare for the next Treaty revision.

1.3.1. To extend the debate to all interested circles

With this end in mind, the first objective of the Green Paper is to initiate as wide a consultation process as possible throughout 2002 with all interested circles – Community and

¹⁸ Prosecuting fraud on the Communities' finances - The Corpus Juris, 8.5.1999, Select committee on the European Communities, House of Lords, London.

¹⁹ Rapport d'information sur la lutte contre la fraude dans l'Union européenne, Délégation de l'Assemblée nationale pour l'Union européenne, 22.6.2000, No 2507.

²⁰ Bundestagsdrucksache 14/4991, 14.12.2000, p. 32 et seq.

²¹ Letter to the Legal Affairs Committee of the Dutch Parliament concerning judicial cooperation in criminal matters, 5.7.2001.

²² SPD motion on Europe, presented by Chancellor Schröder on 30.4.2001 and adopted in November 2001; speech on the future of the European Union by Prime Minister Jospin, 23.5.2001.

national public authorities, crime-related professions, academic circles, relevant non-governmental organisations. The consultations will relate to the possible duties and operation methods of a European financial Prosecution Service. The Green Paper will enable the debate to be structured along a number of themes and will give it a wide audience, in the spirit of good governance.

The themes are the following:

- The premises of the debate (Chapter 2)
- General outline (Chapter 3)
- Legal status and internal organisation (Chapter 4)
- Substantive law (Chapter 5)
- Procedural law (Chapter 6)
- Relations with other parties involved (Chapter 7)
- Judicial review (Chapter 8)

On each of these themes, the Commission begins by setting out the facts that can underlie the debate. It then sets out a number of options and sometimes expresses a preference reflecting the current state of its thinking. Lastly, it raises questions on which it would be glad to have the views of interested circles. While the Commission's preferences, taken as a set, would produce a coherent system, there is no reason to believe this is the only possible system, and the debate is not closed in advance.

1.3.2. To explore the proposal's feasibility

The Green Paper also gives the Commission an opportunity to spell out its ideas looking beyond the preparatory studies that have been conducted for several years now. In its Communication of 29 September 2000, the Commission proposed including in the Treaty only the essential characteristics of the European Prosecutor (appointment, removal, duties and independence), leaving the rules and mechanisms governing the Prosecution Service's operation to be regulated by secondary legislation.

What this Green Paper is specifically about is to outline a possible scenario for the secondary legislation. This legislation should, in particular, establish Community-level definitions of offences (fraud, corruption, money-laundering, etc.) and penalties relating to activities that harm the Community's financial interests. It should determine how the Community legislation will mesh with the national systems of criminal law. It should deal with the procedures for laying cases before the European Public Prosecutor, his powers of investigation and the opening and outcome of detection activities. It should also provide for judicial review of acts done by the European Public Prosecutor.

While the debate in 2000 focused on the legitimacy of and reasons for creating such an office, the Green Paper extends it to the feasibility and the possible mechanisms for ensuring the operation of the European Prosecutor. Beyond the principle, already set out by the Commission in its Communication, the purpose here, out of a concern for the transparency of legislative preparatory work, is to consider the practical conditions for actually implementing the measures it proposes.

The Commission therefore invites your comments on this Green Paper and in particular on the questions set out in boxed items and listed in an annex.

To facilitate exchanges of views, a website is opened, hosting this Green Paper and a series of relevant links.

http://europa.eu.int/olaf/livre_vert

Until 1 June 2002, answers may be given, preferably to the following address:

olaf-livre-vert@cec.eu.int

or by post to:

*European Commission
European Anti-Fraud Office (Unit A.2)
Answer to Green Paper on the European Public Prosecutor
Rue Joseph II, 30
B-1049 Brussels*

Comments received will be published on the website unless their author specifically asks for them to be treated as confidential.

There will be a public hearing for those interested in 2002. The Commission will present conclusions, and possibly a fresh contribution, in 2003, on the basis of the answers it receives, in connection with its preparations for revision of the Treaties.

2. THE PREMISES OF THE DEBATE

In its contribution to the Nice Intergovernmental Conference, the Commission for the first time set out the reasons why the European Public Prosecutor would be an effective form of criminal protection for the Community's financial interests. The proposal is linked to a series of conditions which are worth recalling as a preliminary to the debate. Provided the Treaties are revised (point 2.4), it offers value added in relation to the current situation (2.1) with full respect for fundamental rights (2.2) and specifically complements Europe's political priorities in matters of justice (2.3).

2.1. Value added by the European Public Prosecutor: the arguments for the Commission's 2000 proposal

The exercise of the detection and prosecution functions at Community level would add value in relation to the current situation. However legitimate and irreplaceable they may be, existing systems, in the absence of a specific Community institutional structure, do not allow sufficiently effective enforcement. The Commission communication of 29 September 2000 develops and illustrates a number of arguments, which are merely outlined here.²³

2.1.1. Overcoming the fragmentation of the European criminal law-enforcement area

The involvement of organised crime in fraud against the Community's financial interests and the transnational nature of such fraud imply cooperation with seventeen legal orders applying different rules of substance and procedure.²⁴ With the enlargement of the Union, these difficulties will increase as the number of Member States and the number of operators and administrations involved in the management of Community funds rise.

The shortcomings of the current arrangements lie above all in the fragmentation of the European criminal law-enforcement area. True, exceptions from the principle of national territoriality now appear in international conventions to which the Member States are parties.²⁵ But the police forces and courts of the Member States still basically have jurisdiction solely in their own territory. This fragmentation between authorities has led to competing or incomplete investigations, and in some cases to none at all.

This is borne out by the example of completed or abandoned prosecutions cited by the Commission at paragraph 1.1 of its Communication to the Nice Intergovernmental Conference (see Annex 1).

In more specific terms, before the adoption of the Amsterdam Treaty, the signing of the Convention of 26 July 1995 and its additional protocol constituted a first major step towards the criminal protection of the Community's financial interests. But not all these instruments have yet come into force, as they have not been ratified by all the Member States.²⁶ This was one of the reasons why on 23 May 2001 the Commission presented the proposal for a

²³ See Annex 1.

²⁴ Some Member States have several national legal orders, as is the case of the United Kingdom (England & Wales, Scotland, and Northern Ireland).

²⁵ Example: Schengen Implementing Convention of 19 June 1990 (Articles 39 et seq: observation and hot pursuit); Convention of 18 December 1997 on mutual assistance and customs cooperation between customs administrations (Naples II); Convention of 29 May 2000 on mutual judicial assistance in criminal matters (controlled deliveries, joint investigation teams, covert investigations).

²⁶ At the end of September 2001 three Member States had still not notified their ratification of the Convention on the protection of financial interests, and eight still had to ratify the Protocol of 19.6.1997.

directive to enact the provisions contained in third-pillar instruments on the basis of Article 280 of the EC Treaty.²⁷

But these provisions will not suffice on their own to overcome the fragmentation of the European criminal law-enforcement area since the prosecution function will still be exercised at national level.

Thus, while retaining seventeen separate systems of criminal courts, this Green Paper sets out to show that as a result of the European Public Prosecutor and the centralised management of detection and prosecution activities the Community would enjoy effective and equivalent protection of its financial interests throughout the Union, as demanded by the Treaty.

2.1.2. Move beyond the cumbersome and inappropriate traditional methods of judicial cooperation between Member States

Some forms of international cooperation in criminal matters already exist; it can be expected that the strengthening of judicial cooperation as part of the third pillar will facilitate this process. But none of the instruments currently in force or at proposal or negotiation stage gives an adequate response to the specific question of criminal proceedings for acts to the detriment of the Community's financial interests.

Organised crime harmful to these interests has developed in such a way that the conventional tools of mutual judicial assistance are no longer suited to the task, and the progress so far made in judicial cooperation is limited. These inadequacies are the cause of delays, dilatory actions and even impunity. This is particularly harmful for attempts to reconstitute financial circuits upstream of fraud.

This is illustrated by the example of successive prosecutions cited by the Commission at paragraph 1.2 of its Communication to the Nice Intergovernmental Conference (see Annex 1).

As will be seen below, the European Public Prosecutor would help to overcome these difficulties. He would provide an interface between the Community and the national judicial authorities. In transnational fraud cases, this would make it easier to avoid the destruction of evidence and the disappearance of suspects, both of which are currently assisted by the absence of judicial cooperation between the Community and the Member States.

2.1.3. The judicial follow-up to administrative investigations

Accumulated operational experience shows how difficult it is for administrative investigations on the ground to culminate in proceedings in court. In the current state of Community law,²⁸ however effective the detection and coordination work done by the European Anti-Fraud Office, which now has a Judicial Advice Unit, criminal prosecution remains uncertain. The

²⁷ COM(2001) 272, referred to above.

²⁸ Parliament and Council Regulation (EC) No 1073/99 and Council Regulation (Euratom) No 1074/99 of 25.5.1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999); Commission Decision of 28.4.1999 establishing the European Anti-fraud Office (OLAF) (OJ L 136, 31.5.1999); Interinstitutional Agreement of 25.5.1999 concerning internal investigations by the European Anti-fraud Office (OLAF) (OJ L 136, 31.5.1999); Regulation (Euratom, EC) No 2185/96 of the Council concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292, 15.11.1996. Council Regulation (EC, Euratom) No 2988/95 of 18.12.1995 on the protection of the European Communities financial interests: OJ L 312, 23.12.1995, p.1.

Community does not have a criminal prosecution function to supplement preventive action and administrative investigation.

The transmission of information between Member States and between them and OLAF comes up against a series of barriers in the form of differing rules governing criminal prosecutions in the Member States. If, for the same offence, the inquiry is handled in some Member States by a judge but in others by an administrative authority, direct contact between the two is generally impossible in both fact and law. Moreover, not all the relevant national authorities even have access to information under the various national rules, in particular those concerning the secrecy of tax and business information²⁹ or the confidentiality of criminal investigations. The integration of the investigation and prosecution functions that the establishment of the European Public Prosecutor would achieve would iron out these difficulties.

And the diversity of national rules on evidence often means that evidence gathered in one Member State cannot be used in courts in another.

This is borne out by the example of inadmissible evidence, cited by the Commission at paragraph 1.3 of its Communication to the Nice Intergovernmental Conference (see Annex 1).

All trial courts apply the rules in force in their own country (principle that *forum regit actum*), particularly as regards evidence. They do not necessarily recognise the rules of the place where acts of investigation took place if those rules are different, with the effect that evidence gathered in that context may be inadmissible. This situation can ruin investigation efforts in transnational fraud cases.

A typical fraud case in the absence of recognition of evidence rules

In a recent case, an importer of olive oil was suspected of presenting false customs declarations to avoid paying agricultural duties (Community resources evaded). He had used a series of companies in several Member States for transport, distribution, sales and financing. The evidence was scattered over Community territory. The completeness of the prosecution file depended on being able to use the results of administrative investigations carried out by OLAF among other bodies, and judicial investigations, including the results of international letters rogatory.

When the case came to trial, the criminal in the Member State where the case was being heard held that the bulk of the evidence was inadmissible as it had been obtained by an administrative authority (OLAF) or by law-enforcement officers (crime investigation police) and not by a prosecution service or examining judges. Statements by private individuals (lorry drivers), duly recorded by law-enforcement officers, were also excluded.

This is just one case among many others. In certain Member States the rules of evidence are even stricter as regards documentary evidence and require direct oral testimony in the courts.

This Green Paper shows that the establishment of a common investigation and prosecution area guided by the principle of mutual admissibility of evidence would help to overcome this barrier. Evidence gathered as a result of acts of investigation by administrative and judicial authorities under the direction of the European Public Prosecutor, if necessary with a warrant

²⁹ Final report on the first evaluation exercise devoted to judicial assistance in criminal matters, approved by the Council on 28.5.2001 (JO C 216, 1.8.2001), heading III(e) (Tax offences): "The evaluations showed that the issue of tax offences remained such a sensitive one that mutual assistance could, on this basis be limited and slowed down or at worst be refused."

from the judge of freedoms, would be recognised as admissible evidence in criminal courts throughout the Community.³⁰

2.1.4. Reinforce the organisation and effectiveness of investigation activities within the Community institutions

For the moment there is no European judicial body with jurisdiction to conduct investigations within the Community institutions. The European Anti-fraud Office (OLAF) is still an administrative investigation service, despite the assistance it can already offer the judicial authorities. Proceedings in cases internal to Community bodies still depends on the goodwill of the national enforcement authorities in the headquarters State.

An example: fraud within the Community institutions

An internal investigation by OLAF with judicial follow-up in several Member States concerned a situation where officials were suspected of being involved in the award of Community grants to firms in which they had interests. These firms were in several Member States and even in financial centres outside the Communities.

Several obstacles have been encountered in this type of case. OLAF's administrative prerogatives are too limited to allow it to handle all the facts of the case, which may require it to question witnesses, order house searches and examine bank records, and even issue international letters rogatory.

The question of determining the national enforcement authorities before whom the same facts must be laid where several may have jurisdiction is currently a source of difficulty. The disparity between the relevant national laws is a great source of complexity where testimony gathered by OLAF is to be used in the courts as, for example, the procedural requirements of one Member State for the protection of individual rights may be regarded as inadequate in criminal proceedings in another Member State. The diversity of limitation rules can also have the effect that cases are referred out of time. And a judicial authority might decide to close a case with no further action on the grounds that the disciplinary penalties and the fact that the official has left his post remove the need for proceedings.

The organisation and effectiveness of internal investigations in the institutions would inevitably be boosted by the establishment of a European Public Prosecutor.³¹ The Commission's proposal accordingly acts more specifically on the European Parliament's repeated request for an initiative for the establishment of a European Public Prosecutor with jurisdiction within the European Union institutions.³²

2.2. Respect for fundamental rights

The European Public Prosecutor would be required, in the exercise of his functions, to respect the fundamental rights guaranteed by Article 6 of the Union Treaty, the fundamental principles of Community law upheld by the Court of Justice of the European Communities

³⁰ Cf. point 6.3.4 (evidence).

³¹ See Opinion No 3/2001 of the OLAF Supervisory Committee of 6.9.2001 on the possible establishment of a European Public Prosecutor responsible for internal investigations.

³² Resolution of the European Parliament of 16.5.2000 on the Commission's annual report for 1998 on the protection of the European Communities' financial interests and the fight against fraud, point 2; Resolution of 13.12.2000 on the Commission's antifraud strategy, point 12 (OJ C 232, 17.8.2001, p. 192); recital 14 of the proposal for a Directive on the criminal-law protection of the Community's financial interests, as amended by the European Parliament on 29.11.2001 (PE 305.612)..

(the “Court of Justice”), the Charter of Fundamental Rights of the European Union³³ and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In particular, as will be seen below, all acts involving an element of compulsion carried out by the European Public Prosecutor should be subject to review by a court designated by the Member State as the “judge of freedoms”.³⁴

The establishment of a European Public Prosecutor would, of course, have the effect that offenders who currently go unpunished would be brought to justice: that is the purpose of the exercise. But the proposed system would also help to improve the position of accused persons.³⁵ By definition, it would reduce the accumulation of national proceedings. It would allow the preparatory stages of the procedure to be speeded up, thus speeding up proceedings generally. It should also have the effect that the national authorities would have less need to remand suspects in pre-trial custody or order other measures in restraint of freedom designed to ensure that the accused person does not leave the national territory, for there would be a substantial boost to the effectiveness of Community-wide proceedings.

2.3. Relationship with Europe’s political priorities in matters of justice and home affairs

One of the objectives of the European Union defined by the Amsterdam Treaty is its development “as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to ... the prevention and combating of crime”.³⁶

The Tampere European Council on 15 and 16 October 1999 attached high political priority to establishing this area.

The Commission contribution to the Intergovernmental Conference in 2000 was conceived as a contribution to the same general objective. It does not in any way contradict the spirit of Tampere. It complements the efforts made to boost judicial cooperation, of which the establishment of Eurojust is the latest manifestation,³⁷ by furthering integration in a specific area of shared powers between the Community and the Member States (Article 280 EC).

2.3.1. Complementarity with the objectives of the Tampere European Council

On many points, the proposal to establish a European Public Prosecutor is supported by the Tampere guidelines.

The diagnostic underlying the Commission’s proposal is basically the same. The European Council recognised that “*Criminals must find no ways of exploiting differences in the judicial systems of Member States*”.³⁸

³³ OJ C 364, 18.12.2000.

³⁴ See below at point 6.4 (freedom secured by the courts).

³⁵ In the Green Paper the concept of accused person is used in a generic sense and may correspond to various forms of status depending on the legal terminology in the different Member States. Accused person here means a person who is suspected of an offence and who has been notified by the European Public Prosecutor of the charges against him.

³⁶ Article 2 of the Union Treaty.

³⁷ Cf. point 7.2.1 (Eurojust)

³⁸ Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, point 5.

Certain general objectives are also in common, since the overriding aim is to contribute to the “area of freedom, security and justice” called for by the Amsterdam Treaty. The proposal to establish a common investigation and prosecution area would make a significant contribution in the specific matters of protection of the Community’s financial interests. At the same time the guarantee of fundamental rights, the importance of which has already been referred to, is to balance out the stronger effectiveness of enforcement measures flowing from the establishment of the European Public Prosecutor, in accordance with the Tampere conclusion that “A balanced development of unionwide measures against crime should be achieved while protecting the freedom and legal rights of individuals and economic operators”.³⁹

One of the main vectors of the establishment of an enforcement system for the criminal protection of the Community’s financial interests while fully maintaining the jurisdiction to try and judge cases at national level is the principle of mutual recognition of court decisions between Member States. This principle presupposes mutual trust in the Member State’ legal systems and a shared fundamental basis. It implies that there would be no further need for additional decisions to validate or register judgments for enforcement. The European Council has made the principle of mutual recognition the “cornerstone of judicial co-operation in both civil and criminal matters within the Union”, specifying that it will “also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable”.⁴⁰

One of the instruments available to enhance the action taken by the European Public Prosecutor will be the European arrest warrant. Identified as a priority task at Tampere, there is now a Commission proposal for a Framework Decision in a broader context,⁴¹ and keen interest has been shown by all the Community institutions, which have declared that “The European Union will accelerate the implementation of a genuine European judicial area, which will entail, among other things, the creation of a European warrant for arrest and extradition, in accordance with the Tampere conclusions, and the mutual recognition of legal decisions and verdicts”.⁴² The proposal to establish a European Public Prosecutor is part of this dynamic.

2.3.2. Specific features of the proposal in terms of the objectives of the Tampere European Council

But in other respects, the proposal amplifies the Tampere guidelines. It is on a limited scale and in no way competes with the more general initiatives that are being made in the context of the third pillar. On the contrary, it extends them by other means into the Community context of the first pillar, adapting them to the specific features of the criminal-law protection of the Community’s financial interests.

While Eurojust, according to the Tampere conclusions, is to exercise powers conferred on it in a wide-ranging judicial cooperation context, the European Public Prosecutor would be a Community authority with his own enforcement powers in the specific area of protection of the Community’s financial interests.

³⁹ Conclusions, point 40.

⁴⁰ Conclusions, points 33 and 36.

⁴¹ Commission proposal for a Framework Decision on the European arrest warrant and the procedures for surrender between Member States of the European Union, COM(2001)522.

⁴² Joint Declaration by the Heads of State or Government of the European Union, the President of the European Parliament, the President of the European Commission and the High Representative for the common foreign and security policy, 14.9.2001.

Regarding justice more generally, the European Council asked the Council and Commission to launch “work ... on those aspects of procedural law on which common minimum standards are considered necessary”.⁴³ As for the means, the Commission goes further, as regards the preparatory stage of trials relating specifically to offences against the Community’s financial interests, proposing a degree of procedural harmonisation. Acts done by the European Public Prosecutor, subject to review by the national judge of freedoms designated for the purpose, would then be valid in all Member States as acts done by a common body.

Basically, the establishment of a common investigation and enforcement area for the protection of the Community’s financial interests is not an initial experimental measure prefiguring a future component of the area of freedom, security and justice. Rather, it is the logical culmination of the process of Community integration. The effect of the internal market and the Community policies that accompany it is that the Communities now enjoy extensive financial resources of their own, and protecting them against crime now requires there to be a Community enforcement function. Where there are basically common interests, there must also be common protection.

In a nutshell, then, the European Public Prosecutor for the criminal protection of the Community’s financial interests would be part of the “Europe of justice” but less concerned with justice “in Europe” than with justice “for Europe”.

2.4. Legal basis

The proposal considered here requires that there should be a legal basis for it. Article 280 of the EC Treaty provides that measures adopted by the Community legislature to combat illegal activities to the detriment of the Community’s financial interests “shall not concern the application of national criminal law or the national administration of justice”. The EC Treaty and a fortiori the Euratom Treaty, unchanged on this point since Maastricht, do not currently provide a legal basis for a European law-enforcement area involving a common judicial authority such as a Prosecutor.

The Community Treaties would accordingly have to be amended. This is the only way of giving the proposal its proper legitimacy. The Commission has proposed inserting a new Article 280a in the EC Treaty. The proposal is that the requisite amendment of the Treaty be confined to what is necessary to lay down the conditions for the European Public Prosecutor’s appointment and resignation and to determine his tasks and the main features of his function. If the EC Treaty was so amended, similar provisions to those of the proposed Article 280a of the EC Treaty would also have to be written into Article 183a of the Euratom Treaty.

The Convention to prepare the next Treaty revision would do well to consider this question.

The amended Treaties would then leave it for secondary legislation to regulate the status and operation of the European Public Prosecutor. The proposed Article 280a accordingly provides for the European Parliament and the Council of the European Union acting by a qualified majority, to adopt the following provisions by the codecision procedure.

« 2. ... The Council, acting in accordance with the procedure of Article 251, shall determine the general rules applicable to the European Public Prosecutor.

⁴³ Tampere Conclusions, point 37.

3. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular:

(a) rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community's financial interests and the penalties incurred for each of them;

(b) rules of procedure applicable to the activities of the European Public Prosecutor and rules governing the admissibility of evidence;

(c) rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.

These rules of secondary legislation are precisely what this Green Paper is about and should at the same time determine the relationship between the Community rules and the national systems of criminal law. In this context the Green Paper should facilitate discussion of two crucial questions: how the European Public Prosecutor can be established without also establishing a special Community court with jurisdiction top review acts done by him and how far it is necessary to harmonise the law for him to be able to operate effectively.

3. GENERAL OUTLINE

Under Article 280a of the EC Treaty as proposed by the Commission, the European Public Prosecutor would be “responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community’s financial interests and their accomplices and for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences in accordance with the rules provided for by” the relevant Community legislation.

To gain a sound understanding of the position, it is necessary to begin by considering the general approach of the proposal. The Commission is adopting the following guidelines here. The European Prosecutor must have only the jurisdiction expressly conferred on him, confined to what has already been described here. In accordance with the principles of subsidiarity and proportionality, this jurisdiction would remain limited to the minimum necessary in order to ensure effective and equivalent prosecution of unlawful conduct harmful to the Community’s financial interests anywhere in the Community (Article 280 of the EC Treaty).

In this Green Paper the Commission is only proposing that Community law should determine the minimum needed for the European Public Prosecutor to operate effectively. The principle is therefore that national law applies except in duly substantiated cases where, on the ground that the European Public Prosecutor cannot operate effectively, Community law will apply.

In this spirit, the possible material scope of the jurisdiction of the European Public Prosecutor (point 3.1), acting in a common investigation and prosecution area (point 3.2), is outlined here. In particular his main powers (point 3.2.1.) and his status in relation to the national legal systems (point 3.2.2.) are set out.

3.1. Material jurisdiction confined to the protection of the Community’s financial interests

The Commission proposes that the European Prosecutor’s jurisdiction be limited to the protection of the Community’s financial interests as now limited by the provisions of Article 280 of the EC Treaty.

There are, of course, other basically common interests, such as the single currency, the European public service, the Community trademark etc. But following the same line as in its September 2000 contribution, the Commission is proposing no extension of the European Public Prosecutor’s jurisdiction to offences beyond the scope of the protection of the Community’s financial interests (other offences committed by Community staff in the exercise of their functions⁴⁴ or euro counterfeiting, a wholly new but no less important class of offence).⁴⁵ This Green Paper merely mentions these topics as hypothetical examples, to ensure that the debate is properly informed.

⁴⁴ Cf. point 5.2.3 (offences above and beyond the protection of the Community’s financial interests).

⁴⁵ Articles 3 and 4 of the Council Decision of 29.5.2000 to increase protection by providing for criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140, 2.6.2000.

3.1.1. Specific responsibility of the Communities

The European Communities have a heightened responsibility for the protection of their financial interests. The Treaty of Amsterdam introduced an express reference to this responsibility, alongside that of the Member States, in Article 280 EC.

The European Communities have been provided with a budget since the start of European integration. Under Articles 274 and 276 of the EC Treaty, the Commission is responsible, before the Budgetary Authority made up of the European Parliament and the Council of the European Union, for implementing the budget.

As regards the protection of the Community's financial interests more specifically, the EC Treaty sets tough requirements. Protection must be effective, dissuasive and equivalent in all Member States. Effectiveness presupposes that beyond the administrative detection of fraud, penalties will be genuinely imposed and enforced. Experience has shown that a credible deterrent depends on being able, in the most serious cases, to come up not only with an administrative response but also with a criminal-law response, including mandatory investigation measures and penalties extending as far as prison sentences. Lastly, equivalence implies that enforcement is homogeneous throughout the Community.

These particularly tough requirements are fully justified by the fact that Community funds have from the start of European integration constituted essentially shared interests.

However, these interests are the target of financial crime, which, in the most serious cases, is organised. This category of crime uses all the latest communication techniques. It cares nothing for frontiers and is distinctly transnational. In these circumstances, the Communities must guarantee that offences of fraud and corruption are genuinely prosecuted in the courts. The financial interests of the Communities justify particular means of protection.

3.1.2. Maintaining the current scope of protection of the Community's financial interests

There is no question of the establishment of the European Public Prosecutor extending the substantive competence of the Communities. The Community's financial interests would remain defined exactly as in Article 280 of the EC Treaty.

It should be pointed out that the financial interests of the Communities requiring protection comprise the general budget, budgets administered by the Communities or on their behalf and certain funds not covered by the budget,⁴⁶ and which are administered for their own account by Community bodies which do not have institutional status.⁴⁷ The protection of the Community's financial interests concerns not only the management of budget appropriations, but currently extends to all measures affecting or liable to affect its assets.⁴⁸

On the expenditure side, this basically means expenditure managed by the Member States subsidies paid for the purposes of agricultural guarantees⁴⁹ and structural operations.⁵⁰ Secondly, there is the expenditure directly managed by the Communities.⁵¹

⁴⁶ The Development Funds administered by the Commission and the European Investment Bank, for instance, are included.

⁴⁷ Explanatory report on the Convention on the protection of the European Communities' financial interests, approved by the Council on 26.5.1997, section III.1.1 (OJ C 191, 23.6.1997, p. 1).

⁴⁸ Second recital of Regulations Nos 1073/99 and 1074/99.

⁴⁹ European Agricultural Guidance and Guarantee Fund, Guarantee Section

An example of a case with an internal component: diversion of funds intended for external aid programmes

Following suspicions regarding the final destination of humanitarian aid under four contracts awarded by the Humanitarian Office (ECHO), UCLAF conducted an administrative investigation.⁵² One of the contracts concerned the African Great Lakes Region, and the other three concerned the former Yugoslavia, in the period from 1993 to 1995. The funds allocated to company X responsible for their performance and to offshore companies linked to it totalled ECU 2.4 million.

Initial checks in Member States A and B in 1997 revealed that part of the funds had been used to illegally finance external personnel working for the Commission in its premises and elsewhere.

An inspection mission in ex-Yugoslavia in 1998 revealed that the three contracts concerning that region had not actually been performed and that neither the scheduled staff nor the equipment has been deployed for the purposes indicated.

Disciplinary measures were taken against several Community officials for receiving payments from companies directly involved in the case where work contracted for was wholly or partly unperformed. The penalties ranged from downgrading to dismissal with part-loss of pension rights.

Although attempts were made to reconstitute the relevant expenditure, the resources deployed in the administrative investigation were inadequate to ascertain where all the money went. For example, an on-the-spot inspection into company X in Member State B on the basis of Regulation No 2185/96 in 1998 revealed no accounting records to justify the amounts paid under the contracts.

Such facts as were likely to be used as a basis for criminal proceedings were transmitted to the national prosecution authorities in Member State A and C. Court proceedings are still in motion at the time of writing.

On the resources side, this means first, revenue from duties in respect of trade with non-member countries in the framework of the common agricultural policy and contributions provided for under the common organisation of the markets in sugar,⁵³ and second, customs duties in respect of trade with third countries. The Prosecution Service's responsibility should also extend to revenue from the application of a uniform rate to the Member States' VAT bases, especially in transnational cases which are found to be particularly worthwhile treating at Community level. But the European Public Prosecutor would not have jurisdiction for revenue from the application of a uniform rate to the total GNP of Member States.

An example of an external case: VAT fraud

Apart from certain routine types of fraud (taxes evaded on sales or unjustly deducted on fictitious purchases), there is a form of fraud linked to the Community's current transitional system of value added tax (VAT) based on the principle of taxation in the country of destination. These fraudulent transactions are based on carrousels of goods and letter-box companies formed for short periods only. Criminal organisations have set up fictitious

⁵⁰ European Social Fund, European Regional Development Fund, European Agricultural Guidance and Guarantee Fund - Guidance Section, Financial Instrument for Fisheries Guidance, Cohesion Fund.

⁵¹ Policies in a variety of fields such as training, youth, culture, information, energy, environment, internal market, trans-European networks, research, external activities, etc.

⁵² This example has already been published. European Commission, Protection of the Communities' financial interests and the fight against fraud, annual report 1999, COM(1999) 590, point 2.2.5.2.

⁵³ The first two categories of own resource mentioned in Article 2(1) of Council Decision 94/728/EC, Euratom of 31 October 1994 on the system of the European Communities' own resources.

transactions to enjoy the benefit of the rules allowing VAT exemption for intra-Community deliveries and favourable exemption rules for exports. The idea here was to use false declarations as a means of obtaining refunds of VAT that was never paid in the first place.

The international VAT fraud techniques are well known. But it is very difficult in practice for a single national authority to detect cases as the accounting situation in any one Member State taken in isolation will always appear to be in order. Most Member States acknowledge that international VAT fraud is a major problem, even if national VAT fraud is currently more significant in terms of total revenue lost than international VAT fraud. International fraud particularly affects high value added products that are easy to transport quickly (for example: computer components, mobile telephones, precious metals).

The current difficulties

VAT fraud cases are by no means all identified in time or, therefore, being dealt with properly. OLAF can handle coordination only if the relevant national authorities specifically ask it to on a case-by-case basis.⁵⁴ Cases of this type are often dropped because of the transnational investigation and coordination efforts required at European level. Even with Eurojust, coordination may not be enough as Eurojust will not be systematically involved.⁵⁵ The comprehensive information available to the European Public Prosecutor and the priority enjoyed by the case before him would enable cases to be handled on a more systematic basis.

Here, cooperation between OLAF and the judicial authorities in certain Member States has been stepped up to make it easier to gather the evidence needed to commence court actions. But the European Public Prosecutor would be useful in terms of the link that he could establish between judicial and administrative (in particular tax) authorities. No national judicial authority can work direct with all the Member States' tax authorities as the European Public Prosecutor could.

Thus defined, the financial interests of the Communities require an effective protection mechanism in the criminal law. With the European Prosecutor, the Commission proposes to establish a new instrument in order to permit the Community to assume effectively one of the most demanding of its responsibilities in an area where the scope of its activity is well defined.

3.2. Towards a common investigation and prosecution area

The idea of a European Prosecutor arose from the need to resolve the now unjustifiable contradiction between the fragmentation of Community territory into seventeen different national criminal-law enforcement areas and the serious attacks on shared, specifically Community, interests.

The Commission proposes that the European Prosecution Service exercise the powers that may be conferred on it throughout the entire territory of the Communities as defined in Article 299 of the EC Treaty.

In this territory, the European Public Prosecutor would act in a common investigation and prosecution area, since his acts would have the same value in all the Member States. That is the minimum condition for the European Public Prosecutor to be able to operate. Constituting this common area represents a qualitative leap forward from mere coordination between fragmented national areas.

⁵⁴ COM(1999)590, point 2.3.

⁵⁵ See below, Section 7.2.1 (Eurojust).

Looking beyond this vital first step, the substance of the common area could depend on the options presented in this Green Paper. Its content will be determined by the degree of harmonisation of the procedure, in particular as regards investigation measures and the admissibility of evidence.

3.2.1. *The powers of the European Public Prosecutor: centralised direction of investigation and enforcement*

Specialised in the protection of the Community's financial interests but with jurisdiction for the entire territory of the European Communities, the European Prosecutor should be provided with a coherent set of powers. Before going into detail below on possible procedures, a general outline should be given of the Prosecutor's role.⁵⁶ Outline procedures are set out in an annex.⁵⁷

What is novel about the proposal is that it would place in the hands of a Community body the centralised management of investigation and prosecution in a common area. At the preparatory and trial stages, acts done by the European Public Prosecutor would be valid throughout that area. But the trial stage would remain entirely in national hands. The establishment of the European Public Prosecutor is without prejudice to deepening general judicial cooperation and to the Community-level prevention of international financial crime.

- The European Public Prosecutor would gather all the evidence for and against the accused, so that proceedings can be commenced where appropriate against the perpetrators of common offences defined in order to protect the Community's financial interests.⁵⁸ He should also be responsible for *directing and coordinating prosecutions*.⁵⁹ The European Public Prosecutor would have specialised jurisdiction, prevailing over the jurisdiction of the national enforcement authorities but meshing with them to avoid duplication.⁶⁰
- The European Public Prosecutor would have recourse to existing authorities (police) to actually conduct the investigations but would *direct investigation activities* in cases concerning him.⁶¹ It would further reinforce the *judicial guarantee* as regards investigations conducted within the European institutions.⁶²
- Action taken under the authority of the European Prosecutor, whenever it could impinge on individual freedoms and basic rights, must be subject to review by the judge performing the office of "judge of freedoms".⁶³ This review, exercised in a Member State, would be recognised throughout the Community, to allow the execution of authorised acts and the admissibility of evidence gathered in any Member State.

⁵⁶ Point 6 looks at these powers from a procedural point of view.

⁵⁷ See Annex 2.

⁵⁸ Cf. point 5.1 (substantive law).

⁵⁹ This principle is innovatory in the Community context but it is already accepted in the international legal order. The Statute of the International Criminal Tribunal, adopted in Rome on 17.7.1998, provides for an International Prosecutor with investigative powers for the purposes of prosecution in the territory of the Party States. The European Union Member States signed the Convention and the Council states that it wished it to enter into force rapidly (common position of 11.6.2001 concerning the International Criminal Tribunal (OJ L 155, 12.6.2001 p. 19).

⁶⁰ Cf. point 6.2.2.2 as regards hybrid cases.

⁶¹ Cf. point 6.2.3.2 (working relations with national investigation services).

⁶² Cf. point 7.3 (future role of OLAF) below.

⁶³ See point 6.4 (guarantee of the involvement of a court).

- The European Prosecutor would have authority, subject to judicial review, to send for trial in the national courts the perpetrators of the offences being prosecuted.⁶⁴
- When cases come to trial the Prosecutor must prosecute cases in the national courts, in order to defend the financial interests of the Communities. The Commission considers it essential that the trial stage remain in national hands. There is no question of creating a Community court to hear cases on the merits.⁶⁵

3.2.2. *A harmonious relationship with national systems of criminal law*

The national legal systems are the foundation of the structure of criminal law providing protection against cross-border crime, and they will continue to be indispensable. The proposal to establish a European Public Prosecutor aims simply to plug a specific gap. There is no plan to create a full and autonomous Community system of criminal law.

Instead, the proposal seeks to create a supplementary mechanism that would be in a harmonious relationship with national criminal justice systems by appointing Deputy European Public Prosecutors in the Member States (see next Chapter). Its ambition is to put the national courts in a position where they can actually try cases concerning transnational crime in an area where Community integration (common funds, own resources) is making isolated attempts at enforcement more and more futile. The national courts acting as courts of Community law would apply to this category of offences the same rules incorporated into the national legal order as they already apply rules of Community law in all areas where the EC Treaty operates.

But centralising the management of proceedings does not entail major changes to national systems. For several decades now there has been a trend for the various legal traditions on Europe to converge. Investigation and prosecution functions correspond to common needs and exist in all Member States. Their structures vary but have none the less tended to come closer. There are many causes for this, but the convergence is in large measure due to the fact that the Member States have accepted the fair trial provisions of the European Human Rights Convention. This is borne out by the work done by the experts representing the national systems of criminal law, in both the continental and the common law traditions.⁶⁶ The proposal aims solely to make national judicial systems more effective in an area that is now of intrinsically common concern. The European Prosecutor, then, would not so much involve a transfer of existing powers as an allocation to a particular body of national powers held in common.

General Question *What do you think of the general outline proposed for the European Public Prosecutor, in particular as regards:*

his scope of action (confined to the financial dimension of Community interests)?

⁶⁴ Cf. point 6.3.1 (choice of State of trial).

⁶⁵ Cf. point 6.3.2 (prosecutions).

⁶⁶ Cf. *The implementation of the Corpus juris in the Member States, op. Cit.*, Vol. 1, p. 42: “The result of this evolution is that, from the legal point of view, the national systems in force in Europe have become more compatible than they were previously. ... This change makes a system based on synthesis possible in the shape of a European Public Prosecutor. The European Public Prosecutor respects the principle of public prosecution (from the inquisitorial tradition) but excludes the juge d’instruction, preferring a “judge of freedoms”, to provide judicial guarantees in an impartial and neutral manner (in the spirit of the accusatorial tradition).”

his powers?

his relationship with national systems of criminal law?

4. LEGAL STATUS AND INTERNAL ORGANISATION

The possible status and internal organisation of the European Public Prosecutor are worth outlining here. The expression “European Public Prosecutor” may be used here to refer either to the proposed body or to the person heading it (point 4.1). In the former case, it is synonymous with the European Prosecution Service, including its administrative staff (point 4.3); in the latter case, it includes the Deputy European Public Prosecutors (point 4.2).

4.1. Status of the European Public Prosecutor

The European Public Prosecutor would be a law officer exercising judicial functions, and the rules governing his office, and especially the mechanisms for his appointment and removal from office, should give him full legitimacy to perform these duties.

4.1.1. Principle of independence

The Commission has proposed that a provision inspired by those providing for the independence of the Members of the Court of Justice be inserted into the Treaty, stating that “*The European Public Prosecutor shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries.*” *In the performance of his duties, he shall neither seek nor take any instructions.*”⁶⁷

This independence is an essential feature of the European Public Prosecutor. It is warranted by the fact that the European Public Prosecutor would be a specialised judicial body. He should be independent both of the parties to any dispute in the context of adversarial proceedings⁶⁸ and of the Member States and the Community institutions and bodies.

The Prosecutor should possess and should be seen to possess all the powers his office requires. He should perform his duties impartially, being guided only by a concern to see the law applied.

4.1.2. Conditions for appointment and removal from office

The method of appointing the European Public Prosecutor, and if necessary removing him from office, ought to reflect the principles of independence and legitimacy.

4.1.2.1. Appointment of the European Public Prosecutor

The Commission has proposed that the Prosecutor, meaning for present purposes the person heading the European Prosecution Service, should be appointed by the Council acting by qualified majority, on a proposal from the Commission, and with the assent of Parliament.⁶⁹ This procedure takes over certain features of the procedure laid down by the Treaty of Nice for the appointment of the Commission (qualified majority in the Council, vote by the European Parliament). It would ensure the total legitimacy of the European Public Prosecutor.

The role of nominating the European Public Prosecutor given to the Commission would proceed from its special responsibility for protecting Community financial interests.

⁶⁷ Paragraph 2 of the draft Article 280a.

⁶⁸ Cf. point 6.2.1 (general principles of the preparatory stage).

⁶⁹ Paragraph 1 of the draft Article 280a.

The Commission is proposing that the Prosecutor's term of office should be six years non-renewable.⁷⁰ The Prosecutor's term would thus be a long one, longer than that of a European Parliament or a Commission. The fact that his term could not be renewed would be a very strong safeguard of his independence.⁷¹

There is also the question whether the European Public Prosecutor should be subject to the Staff Regulations of Officials of the European Communities.

4.1.2.2. Removal from office and other grounds for cessation of functions by the European Public Prosecutor

The Commission proposes that the European Public Prosecutor should answer for his acts in the event of serious misconduct in the exercise of his functions. In the Commission's view the disciplinary mechanism for removing the Prosecutor from office should, however, reflect the principle of his independence. A decision of this kind can be taken only by a Community-level court of law, meaning the Court of Justice of the European Communities.

The draft Article 280a of the EC Treaty provides that "*The Court of Justice may, on application by the European Parliament, the Council or the Commission, remove him from office if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.*"⁷²

The general rules applying to the European Public Prosecutor should make provision for three other cases in which the European Public Prosecutor ceases to perform his functions: death, resignation and expiry of his term of office.

4.1.3. Hierarchical role of the European Public Prosecutor

The European Public Prosecutor as head of the European Prosecution Service would be responsible for directing and coordinating investigation and prosecution activities for all offences within his jurisdiction throughout the common territory defined for the purpose.

This responsibility should be accompanied by powers over the internal organisation of his service, powers of investigation, powers over the delegated Prosecutors, and power to define guidelines in relation to criminal procedure, within limits set by the Community legislature.⁷³

4.2. Decentralised organisation of the European Prosecution Service

The overall architecture of the prosecution service proposed by the Commission is based on a division of tasks between a chief European Public Prosecutor, who would provide the minimum degree of centralisation necessary at Community level, and Deputy Prosecutors, who would be integrated into the national justice systems and who would actually bring offences to trial.

⁷⁰ Paragraph 1 of the draft Article 280a.

⁷¹ For the same reasons, the prosecutor at the future International Criminal Court is to have a term of nine years non-renewable (Article 42 of the Statute of the International Criminal Court).

⁷² Paragraph 2 of the draft Article 280a.

⁷³ Cf. point 6.2.2.1 (mandatory or discretionary prosecution).

4.2.1. Principle of decentralised Deputy European Public Prosecutors

In the spirit of the subsidiarity principle, the Commission is proposing that the organisation of the European Public Prosecutor should be decentralised to guarantee integration into the national legal systems without upheavals for them. The European Public Prosecutor would rely on Deputy European Public Prosecutors in the Member States, so as to secure the link between the Community mechanism and the national systems of justice.⁷⁴

4.2.1.1. General rules applying to Deputy European Public Prosecutors

Depending on the volume of cases to be handled and the internal court organisation of the Member States, one or more Deputy European Public Prosecutors could be appointed in each Member State. The Deputy Prosecutors would be appointed by the chief Prosecutor; candidates would be nominated by their Member State of origin, from among national officials who conduct criminal prosecutions in the particular Member State and who can therefore claim relevant experience. Depending on the Member State these might be public prosecutors in the domestic system, who may or may not be qualified judges, or, in countries where an office of this kind is unknown, officials or civil servants who have been performing these duties.

The Commission does not necessarily envisage that the Deputy Prosecutors should have autonomous status. They could retain their national status in all respects regarding recruitment, appointment, advancement, remuneration, social protection, routine management, etc. Their hierarchical and disciplinary status would alone be affected for the duration of their term of office, as set out below. This would be the solution having the least in the way of implications for the law of the Member States. In any event the rules applicable to the Deputy European Public Prosecutors should be reviewed in close cooperation with the Member States, particularly in order to secure a genuine assurance of independence.

Deputy European Public Prosecutors would be designated for a specified period. Unlike the European Public Prosecutor, this term of office could be renewable, to take account of the pool available for recruitment in the Member States. This would also allow appointees to acquire a degree of specialisation in the field of the Community's financial interests while retaining their practical up-to-date familiarity with the national system.

Could this European office be combined with a domestic one? There are several options.

The first is that a Deputy European Public Prosecutor might be excluded from holding any other office. The effect would be to make them into veritable specialists. The object would be to prevent conflicts of interest and priorities in criminal policy, and ensure that the effect of the prosecutors' work was not diluted.

Secondly, the office of Deputy European Public Prosecutor might be simply a specialisation ("two hats"). Deputy Prosecutors would have a duty to prosecute unlawful conduct harmful to the financial interests of the Community, and in the second place would continue their ordinary work, which would include the prosecution of crime. The Community interest should prevail in the event of a conflict of interests. This solution has the advantage of facilitating the

⁷⁴ COM(2000) 608.

processing of hybrid cases in which both Community and national interests are at stake (see below).⁷⁵

Third option: leave each Member State free to opt between the first two options.

The disciplinary liability of Deputy European Public Prosecutors in or in connection with the exercise of their European function should be before the Court of Justice, for the sake of symmetry with the rules for the European Public Prosecutor himself.⁷⁶ As the Head of the European Prosecution Service, he would have a role to play in the disciplinary procedure. The heaviest disciplinary penalty for a Deputy European Public Prosecutor would be loss of his European function.

If Deputy European Public Prosecutors were to be able to hold two functions, they would remain liable in disciplinary matters as regards their national function, subject to sound guarantees of their independence. The relationship between the effects of the two disciplinary procedures must therefore be considered. Loss of the European function would have no impact under Community law on the Deputy European Public Prosecutor's national status. But in the event of national disqualification, the Deputy European Public Prosecutor would no longer meet one of the requirements for European office, and would therefore lose it automatically.

4.2.1.2. Role of Deputy European Public Prosecutors

The Deputy Prosecutors would have a vital role to play: anything the chief Prosecutor could do he could delegate to his Deputies. In practice they would be the channel through which he acted, because in most cases it would be a Deputy Prosecutor who would actually handle investigations or prosecutions.

Each Deputy Prosecutor would in the ordinary course of events act within his own Member State. But any Deputy Prosecutor might be authorised by the European Public Prosecutor to take action in any other Member State, in cooperation with the Deputy Prosecutor for that jurisdiction. Deputy Prosecutors would have a duty to assist one another.

Decentralisation of this kind is in line with the thinking that has governed the establishment of judicial networks between the Member States (liaison magistrates, the European judicial network, etc.).⁷⁷ No separate Community system would be introduced: the mechanism proposed is based essentially on the capacities of the Member States in the spirit of Community integration.

4.2.2. Subordination to the chief European Prosecutor

For obvious reasons of consistency and unity, however, the European Public Prosecutor should be hierarchical. At the top, the European Prosecutor would be responsible for directing and coordinating the work of the Deputy Prosecutors as investigations and prosecutions progressed. The Deputy Prosecutors, for the duration of their term of office, would be subordinate to the European Public Prosecutor on an exclusive or non-exclusive basis, depending on the option selected, and would be bound by his instructions in both general and specific matters. In any event they would be banned from receiving any instructions from

⁷⁵ Cf. point 6.2.2.2 (hybrid cases).

⁷⁶ Cf. point 4.1.2.2 (removal of European Public Prosecutor from office).

⁷⁷ Cf. point 7.2 (institutional actors in the European Union).

their national authorities in any matter concerning the protection of the Community's financial interests.

The Commission takes the view that the European Public Prosecutor should be governed by a principle of indivisibility of the kind that applies to prosecutors inside a single country, meaning that any act done by a Deputy Prosecutor would commit the whole organisation. Every Deputy Prosecutor would have the appropriate powers delegated to him by the chief Prosecutor. Under the supervision of the European Public Prosecutor, therefore, one European Prosecutor should be able to replace any other in law.

Question 1 *What are your views on the proposed structure and internal organisation of the European Public Prosecutor? Should the European function conferred on the Deputy European Public Prosecutor be an exclusive function or could it be combined with a national function?*

4.3. Means of action of the European Prosecution Service

It would then be for Community secondary legislation to determine the rules governing the European Public Prosecutor, and particularly the more practical aspects (location, budget, staffing and so on); such legislation would be adopted in accordance with Article 251 of the EC Treaty, that is to say by qualified majority in Council and codecision with Parliament.

The European Public Prosecutor being organised on a decentralised basis, the structure of the headquarters of the new body to be set up should be the simplest compatible with sound operation. The European Public Prosecutor's own staff would be small compared to the staffs of the Deputy Prosecutors, which would account for the bulk of the human and material resources needed. Synergy with existing national structures should contribute to the efficiency of the whole.

The European Public Prosecutor would have full authority over the management of human and operational resources at his headquarters. He should be assisted by one or more Deputies for these purposes.⁷⁸

The European Public Prosecutor should have his own budget, charged to the general budget of the European Communities. This budget would be managed on a totally independent basis by the European Public Prosecutor in accordance with the rules of the Treaty and the financial legislation implementing them. Each Deputy European Public Prosecutor would remain subject to national rules and be remunerated by the Member State. But if there are extra operational costs for the Member States as a result of the European Prosecution Service, they could be charged to the European Public Prosecutor's budget.

The European Prosecution Service's staff could be recruited, appointed and managed by the chief prosecutor, in the case of headquarters staff, and, in the case of decentralised staff, by the Member State in accordance with its own rules. The European Public Prosecutor's own powers in staff matters should be exercised in compliance with the relevant Community rules, in particular the Staff Regulations.

⁷⁸ Note for comparison purposes that the staff of the Prosecutor at the International Criminal Court will be recruited, appointed and managed by the Prosecutor, assisted by one or more Deputy Prosecutors (Articles 42 and 44 of the Court's Statute).

The chief prosecutor can be expected to establish his headquarters in accordance with the procedure for Community bodies, but the deputy prosecutors, at the discretion of the Member States, would be based in their respective national or regional capitals, or in any other place that might be better suited to the performance of their duties, taking account of the location of the national courts in which they would have to plead.

5. SUBSTANTIVE CRIMINAL LAW

The Commission has proposed a provision in the EC Treaty that the Council, in codecision with the European Parliament, “*shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular: (a) rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community’s financial interests and the penalties incurred for each of them;...*”.

There is a need for specific rules relating to the definition of these offences (point 5.2) and the corresponding penalties (point 5.3). The utility of providing for more general substantive rules to assist the European Public Prosecutor in his function, governing matters such as criminal liability (point 5.4) or limitation periods (point 5.5) will have to be considered in the light of the *acquis*. The question of the most suitable legislative technique arises for each of these areas (point 5.1).

5.1. Choice of legislative technique: Community unification or harmonisation of national legislation

The Commission is of the opinion that establishing a common investigation and prosecution area relating specifically to the protection of the Community’s financial interests does not necessitate the general codification of the Member States’ criminal law.

To operate effectively the European Public Prosecutor will need a set of substantive rules like those applied by national enforcement authorities.

In theory, different techniques could be combined to define such rules:

- reference to the Member States’ domestic law purely and simply (with no harmonisation);
- harmonisation of part of the national law, to an extent to be determined, with reference for the rest to the national law;
- total harmonisation of certain national provisions, the Community rules then superseding the national rules;
- unification, meaning the creation of a corpus of autonomous Community law, separate from the law of the Member States.

In practice, the *acquis* regarding criminal protection of the Community’s financial interests so far has followed the harmonisation technique, in varying degrees depending on the area. That is the technique underlying both the Convention of 26 July 1995 and its Protocols and the proposal for a Directive of 23 May 2001.

Looking further, the question of the choice of the most suitable method of establishing the common substantive law needed if the European Public Prosecutor is to operate effectively arises repeatedly in this Green Paper.

In general terms there are two distinct approaches that must be reconciled. The first is total harmonisation or unification. The European Public Prosecutor will find it much easier to act if the substantive law is harmonised or unified. Total harmonisation or unification of the law would ensure by definition that equivalence of protection throughout the Community that the

EC Treaty demands. Lastly, as far as litigants are concerned, this approach would help to establish greater certainty as to the law and simplify access to the relevant rules. But it is legitimate only if it is in proportion to the specific objective pursued: the criminal protection of the Community's financial interests. It will be all the easier to imagine if it applies in matters within the specific jurisdiction of the European Public Prosecutor, such as the definition of the components of offences or the corresponding limitation periods.

The second approach is the reference wholly or partly to national law. This would seem to be the most suitable method for determining general rules in matters going beyond the protection of the Community's financial interests, despite the diversity that it inevitably preserves in terms of the objective of attaining equivalent protection throughout the Community. The national legal orders will be all the less affected as the European Public Prosecutor will have to take account of each of them, depending on the Member State in which he acts.

The sought-for reconciliation between these two approaches entails finding an answer in every area of the substantive law to two questions: what rules should be unified or harmonised? And, in the latter case, how far should the harmonisation go? These are the questions addressed in the next few sections.

The authors of the *Corpus juris* proposed a higher level of harmonisation of the general criminal law. But the Commission considers that such harmonisation must be proportionate to the specific objective of the criminal protection of the Community's financial interests and proceed on a variable degree of intensity depending on the areas concerned (see points 5.2 to 5.5).

And it must be borne in mind in all that follows that the European Public Prosecutor must be part of an evolving dynamic. For one thing the Commission in this Green Paper is concerned to launch a debate on the minimum needed for the European Public Prosecutor to be able to operate effectively. Once the Prosecutor has been established on the basis of a sufficient set of common rules and principles, after the time needed to adopt the requisite basis and legal framework, experience will show whether it is necessary to amplify the minimum needed for him to operate.

The diversity of the national systems of criminal law should show a tendency to become less pronounced as progress is made in the broader context of the area of freedom, security and justice, with the spin-off that the European Public Prosecutor's job will become all the easier. The trust placed by the Commission in the harmonisation technique is based on this: the specific harmonisation proposed for the European Public Prosecutor will be amplified by a general evolution of his legal environment, guided by the principle of mutual recognition.

5.2. Common definitions of offences

For the definition of these offences, the Commission could prefer a high degree of harmonisation corresponding to a level of precision no less than that of its proposal for a Directive of 23 May 2001.

The effect of the principle of legality is that the prosecutor can be responsible for proceeding against only certain very clearly defined offences. If there is to be a prosecution service with jurisdiction throughout the Community, a common definition of the offences is therefore clearly an essential condition for its operation.

In accordance with the principle of speciality applied to the European Public Prosecutor, even if other offence could be envisaged (point 5.2.3), these common offences should focus on the protection of the Community's financial interests. There is already an agreement between the Member States on certain offences (point 5.2.1). Others might be envisaged (point 5.1.2), based on, among other things, the *Corpus Juris*.

5.2.1. Offences for the protection of the Community's financial interests, on which the Member States are already in agreement

There is already substantial agreement among Member States on the content of what may become the nucleus of a special criminal law in this field. The provisions on substantive criminal law of the Brussels Convention of 26 July 1995 on the protection of the financial interests of the European Communities and its additional protocols,⁷⁹ which have been wholly incorporated in the proposal for a Directive of 23 May 2001,⁸⁰ are an unavoidable point of reference when it comes to defining the offences which might fall within the jurisdiction of the European Prosecutor. They are fraud, corruption and money-laundering in connection with those offences.

5.2.1.1. Fraud

Article 3 of the proposal, which reproduces the terms of Article 1 of the Convention of 26 July 1995, defines fraud affecting the Community's financial interests, in respect of expenditure, as *“any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents which has as its effect the misappropriation or wrongful retention of funds from the general budget of the Community or budgets managed by, or on behalf of, the Community, non-disclosure of information in violation of a specific obligation, with the same effect, [or] the misuse of such funds for purposes other than those for which they were originally granted”*.

The same instruments define fraud affecting the Community's financial interests, in respect of revenue, as *“any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents which has the effect of unlawfully reducing the resources of the general budget of the Community or budgets managed by, or on behalf of, the Community”*.

Such acts must be punishable either as a principal offence or as participation in, instigation of, or an attempt to commit, fraud.

Beyond this potential *acquis*, the definition might be unified (expenditure and revenue) and broadened. Along the lines of the *Corpus Juris*'s proposal, a single definition of fraud might be adopted irrespective of the subject-matter, be it Community expenditure or revenue.⁸¹ The effect of the fraud might be extended to include the endangering of the Community's financial interests so as not to make the successful outcome of the fraudulent act a precondition for its prosecution. The element of intention might be supplemented by the taking into account of cases of gross negligence.

⁷⁹ OJ C 316, 27.11.95, p. 48; OJ C 313, 23.10.1996, p. 1; OJ C 221, 19.7.1997, p. 11; OJ C 151 20.5.1997, p. 1. See also the explanatory reports on the Convention (OJ C 191, 23.6.1997, p. 1) and the Second Protocol (OJ C 91, 31.3.1999, p. 8).

⁸⁰ COM(2001) 272, referred to above.

⁸¹ Article 1 of the *Corpus juris*.

5.2.1.2. Corruption

According to Article 4(1) of the proposal for a Directive, which reproduces the terms of Article 2 of the Protocol of 27 September 1996 to the 1995 Convention,⁸² passive corruption consists of “*the deliberate act on the part of an official, whether directly or through an intermediary, of requesting or receiving advantages of any kind whatsoever, for themselves or for a third party, or accepting a promise of such an advantage, as inducement for them to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community’s financial interests*”.

Active corruption is for its part defined in Article 4(2) of the proposal for a Directive, which reproduces the terms of Article 3 of the same Protocol, as “*the deliberate act of promising or giving, directly or through an intermediary, an advantage of any kind whatsoever to officials, for themselves or for a third party, as inducement for them to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community’s financial interests*”.

Corruption, both passive and active, must be punishable either as a principal offence or as participation in, or instigation of, the conduct in question (Article 5 of the above-mentioned Protocol).

5.2.1.3. Money-laundering

Article 6 of the proposal for a Directive, which reproduces the terms of Article 1 of the Protocol of 19 July 1997 to the 1995 Convention, refers, for the definition of money laundering related to the proceeds of fraud - at least in serious cases - and of active and passive corruption, to the general concept of money laundering as defined in the amended Directive of 10 June 1991.⁸³

The latter defines money laundering as the act of committing intentionally either “*the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action*”, or “*the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity*”, or “*the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity*”. Moreover, money laundering is to be regarded as such even where the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in a third country

Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the above-mentioned acts are also an offence.

⁸² The concept of civil servant (official) is defined in Article 2 of the proposal for a Directive, taking over the definition in Article 1 of the 27 September 1996 Protocol to the 1995 Convention.

⁸³ Third indent of Article 1 of Council Directive 91/308/EEC of 10 June 1991, as amended, on the prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28. 6. 1991, p. 77). 6. .

5.2.2. *Offences above and beyond the protection of the Community's financial interests*

Since the establishment of a European Public Prosecutor represents a qualitative leap forward towards the area of freedom, security and justice, the thinking here cannot be confined to the hypothesis of merely taking over the Union *acquis*. The European Public Prosecutor should have jurisdiction to proceed against other offences connected with the protection of the Community's financial interests, as considered above.

The definition of these common offences could be based on the progress made under the third pillar and the *Corpus juris* proposals, whether earlier definitions are to be developed or new ones devised alongside them. The Commission is particularly interested in this kind of approach.

5.2.2.1. Market-rigging

The idea of creating a Community level offence of market-rigging is worth pursuing in view of the amounts involved and the major shortcomings in the laws of a number of Member States.⁸⁴ In particular, bringing a charge of fraud is ineffective in that material damage is difficult to prove.

Getting, or trying to get, a specific bid accepted by any contract-awarding authority whatever, using means that violate Community rules on public procurement, such as an illegal agreement, might therefore be made a common criminal offence if there is actual or potential damage to the Community's financial interests.

5.2.2.2. Conspiracy

As has been shown for a number of years now by the operational activities of the Commission and the Member States, organised crime is often behind offences against the Community's financial interests. It might therefore be necessary to focus specifically on membership of a criminal organisation in order to prevent the commission of the other common offences.⁸⁵

One does not have to wait until the Community suffers financial damage before prosecuting those intent on methodically causing such damage. Moreover, the availability of an offence of this type can help to dismantle a conspiracy by leading the way up to its instigators. This solution would give practical expression in a specific area to the principle asserted by the Tampere European Council, "*deeply committed to reinforcing the fight against serious organised and transnational crime*".⁸⁶

The offence might thus be created, either as a common offence in its own right or as an aggravating circumstance in the event of one of the other common offences considered so far, of conspiracy⁸⁷ in the form of membership of a permanent organisation consisting of several persons with a view to committing acts of fraud, corruption, money laundering or any other act covered by common offences still to be defined.

⁸⁴ *The implementation of the Corpus juris in the Member States, op. cit.*, Vol. 1, Part II, Chapter 1, §I-2.

⁸⁵ See in particular Article 4 of the *Corpus juris*.

⁸⁶ Conclusions, point 40.

⁸⁷ Joint Action of 21.12.1998 adopted by the Council on the basis K.3 of the treaty of the European Union, on making it a Criminal Offence to Participate in a Criminal Organisation in the Member States of the European Union (OJ L 351, 29.12.1998).

5.2.2.3. Abuse of office

Acts done by officials to the detriment of financial interests do not always entail a benefit for them, notably in corruption cases. That is why the more general and secondary offence of abuse of office to the detriment of the Community's financial interests might be envisaged.⁸⁸

The idea would be to make it a full criminal offence for a civil servant in charge of the management of Community financial interests to act intentionally to their detriment, abusing for that purpose the powers conferred on him.

5.2.2.4. Disclosure of secrets pertaining to one's office

In the Explanatory Memorandum to the Draft Treaty of 1976 on the liability and protection under criminal law of officials and other servants of the European Communities, the Commission already stated that neither the national authorities nor private organisations should hesitate to supply confidential information to the Community authorities on the ground that breaches of secrecy are not criminal offences.⁸⁹

Consequently it could be defined as a Community criminal offence for a public servant, contrary to a professional obligation of secrecy, to divulge information acquired in the performance or on the occasion of his functions where divulging the information is or may be detrimental to the Community's financial interests.⁹⁰

5.2.3. *Offences that might be envisaged for the protection of the Community's financial interests*

For a fully informed debate, it is worth remembering that the Commission proposal could have ranged beyond the criminal-law protection of financial interests to provide for the general protection of the criminal law for the European public service, as envisaged at the beginning of the 1970s.⁹¹ This option might have founded, for example, a general reference, not tied to the Community's financial interests, to abuse of office and the disclosure of secrets pertaining to one's office, or to giving the European Public Prosecutor the power to proceed against such simple offences as theft of personal effects in the institutions, violations of data-protection or favouritism in the application of Community law.

But that is not the purpose of the Commission's proposal, which is confined to the Community's financial interests (proposed Article 280a).

Question 2 For what offences should the European Public Prosecutor have jurisdiction? Should the definitions of offences already provided for in the European Union be amplified?

⁸⁸ See in particular Article 7 of the Corpus juris.

⁸⁹ Draft for a Treaty amending the Treaty establishing a Single Council and a Single Commission of the European Communities so as to permit the adoption of common rules on the liability and protection under criminal law of officials and other servants of the European Communities (OJ C 222, 22.9.1976).

⁹⁰ See in particular Article 8 of the Corpus juris.

⁹¹ OJ C 222, 22.9.1976.

5.3. Common penalties

It is also important to establish Community rules relating to the penalties corresponding to the offences within the European Public Prosecutor's jurisdiction.

A priority harmonisation effort here is clearly justified and would by no means be in contradiction with the conclusions of the Tampere European Council that: "*with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), ...*".⁹²

Respect for the *acquis* in relation to protection of the Community's financial interests means not setting the level of criminal penalties below that which is already provided for by the proposal for a Directive of 23 May 2001 and the provisions of Conventions and similar instruments that it takes over. These instruments stipulate that the conduct referred to therein consisting of fraud, corruption and money laundering must be punishable by effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition. They provide for confiscation of the corresponding instruments and proceeds.

Article 3 of the proposal for a Directive, which reproduces the terms of Article 2 of the Convention of 26 July 1995, states that serious fraud consists of any case of fraud involving a minimum amount which may not be more than €50 000. Article 11 of the proposal for a Directive, which reproduces the terms of Article 4 of the Protocol of 19 June 1997, provides for the imposition of penalties, including those of a criminal-law nature, on bodies corporate held liable for fraud, active corruption or money laundering.

To respect the principles that offences and penalties must be defined by law and must be proportionate to the offence, restated by the Charter of Fundamental Rights of the European Union,⁹³ the Commission considers that it is necessary to go much further in the harmonisation of criminal penalties incurred for the offences defined here. But while this harmonisation effort should be pitched higher in view of the common nature of the relevant offences, it must remain consistent with the more general debate in the European Union on the harmonisation of penalties.

The maximum penalties – both custodial sentences and fines – should be determined by Community legislation, leaving the national courts free within these limits to assess the sentence actually passed. The possibility of alternative or additional penalties should also be envisaged. In particular, a Community type of additional penalty could be established, such as exclusion from the European public service, from access to grants or from access to public contracts if Community financing is applied for.⁹⁴

The effects of aggravating or mitigating circumstances on the maximum levels of penalties could be provided for in the Community legislation, but these circumstances themselves could be left to be defined by national law. Likewise, provision should be made for the penalties applicable where several offences are committed.

⁹² Presidency Conclusions, point 48.

⁹³ Article 49 of the Charter of Fundamental Rights of the EU.

⁹⁴ See in particular Article 14 of the *Corpus juris*.

The European Public Prosecutor should also be empowered to apply for confiscation of the instruments and proceeds of offences within his jurisdiction, in the spirit of the Union *acquis* here.⁹⁵ And rules governing the publication of final judgments could be devised.

5.4. Liability of legal persons

Regarding criminal liability, the Commission considers that the principle of proportionality would be respected by abiding by the *acquis* and the degree of harmonisation that it suggests in its proposal for a Directive of 23 May 2001. With the exception of the existing provisions concerning the liability of heads of businesses and legal persons, there would be a general reference to the law of the Member States. This solution, which the Commission prefers, would provide the minimum basis needed for the European Public Prosecutor to operate.⁹⁶

Articles 8 and 9 of the proposal for a Directive of 23 May 2001, which reproduce the terms of Article 3 of the Convention of 26 July 1995 and of the Protocol of 19 June 1997, already provide for a degree of harmonisation of the rules on the liability of (a) heads of businesses and (b) bodies corporate.

On this basis, heads of businesses or other persons with decision-making or controlling powers within a business could be held criminally liable in accordance with the principles determined by the domestic law, in the event of fraud, corruption or money-laundering the proceeds of such offences committed by a person under their authority on behalf of the business.

Likewise, legal persons should be liable for commission, participation (as accomplice or instigator) and attempts as regards fraud, active corruption and capital laundering, committed on their behalf by any person who exercises managerial authority within them.⁹⁷ There should also be provision for them to be liable where defective supervision or management by such a person made it possible for a person under his authority to commit the offences on behalf of the legal person.

Liability of a body corporate under paragraphs 1 and 2 does not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

5.5. Rules of limitation

Limitation in respect of offences within the jurisdiction of the European Public Prosecutor would constitute a ground for terminating the action. The rules relating to limitation vary widely from one Member State to another, and will do so even more with enlargement of the Union. Equal treatment of all litigants accordingly requires a real harmonisation effort.

⁹⁵ Council Framework Decision of 26.6.2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001, p.1).

⁹⁶ For a different approach, supporting greater harmonisation of the general of criminal liability, see Articles 9 to 13 of the *Corpus juris*, proposing that the Convention-based rules on the liability of businesses be amplified and that the bases be laid for a Community definition of *mens rea*, of mistake, of individual liability and of attempts.

⁹⁷ Whether the person acts individually or as a member of a body within the legal person. The managerial authority referred to here may be a power to represent the legal person as agent or authority to take decisions on behalf of the legal person or to exercise powers of control within it.

Preserving excessive diversity when the aim is to achieve maximum effectiveness in enforcing the law against practices harming the Community's financial interests would be a source of difficulties. If several persons are prosecuted in different Member States for committing the same offence, there is a risk of unequal treatment. Where one and the same person has committed identical offences, a prosecution that has been dropped in one Member State might still be available in another, and proceedings might be focused in that other State for that reason alone.

Moreover, the European Public Prosecutor's prosecution activities should not be hampered by an excessively short limitation period. The experience accumulated by the Commission and the Member States with the administrative detection of fraud confirms the length of time needed for investigations. The complexity of financial cases, the transnational nature of the forms of conduct concerned, and the seriousness of the offences, often involving organised crime, compound the difficulties at the investigation stage. By way of example, the *Corpus juris* argues, in respect of all the offences it defines, in favour of a period of five years out of a maximum ten.

The Commission's preference is for at least a Community definition of the duration of limitation periods for offences within the European Public Prosecutor's jurisdiction. In the absence of existing provision on this point, it wishes to consider the duration of the limitation period to be set for each of the offences, as there is no obvious identical period for all offences. For all the other rules relating to these matters, in particular the interruption of the limitation period, the possibility of referring to national law, subject to mutual recognition between Member States, should be considered.

Question 3 Should the establishment of the European Public Prosecutor be accompanied by certain further common rules relating to:

- penalties?*
- liability?*
- limitation?*
- other matters?*

If so, to what extent?

6. PROCEDURE

The Commission has proposed writing into the EC Treaty a provision that the Council of the European Union, acting in accordance with the procedure laid down by Article 251 (codecision with the European Parliament), “*shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular ... (b) rules of procedure applicable to the activities of the European Public Prosecutor and rules governing the admissibility of evidence*”; (c) *rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.*”

In order to operate properly, the European Public Prosecutor needs to have a procedural framework that meshes well with the national judicial systems. This procedural framework should be defined at the most appropriate level in accordance with the principles of subsidiarity and effectiveness in both European and national terms.

The methods identified in the previous Chapter could be combined for this purpose. Since this is necessary for the European Public Prosecutor to operate effectively, it will be essential to define a common set of European Rules of Procedure. But the total or partial approximation of national procedures may be enough if all the European Public Prosecutor really needs is equivalence between the Member States. Otherwise, reference should be made wherever possible to national law. Regarding criminal procedure, the Commission is particularly attached for the purposes of this Green Paper to the principle of mutual recognition.

At this stage the powers of the European Public Prosecutor set out in general terms above⁹⁸ and the corresponding guarantees in terms of fundamental freedoms should be analysed in greater detail as regards each stage of the procedure. The question of judicial review is considered in Chapter 8.

The European Public Prosecutor would have to direct and coordinate investigations and proceedings with a view to protecting the Community’s financial interests. To this end, having received proper information (point 6.1), provision should be made for him to carry out investigations (point 6.2), either directly or by delegation. He should also take the decision to send the accused for trial and choose the national court where this would be done (point 6.3). But in view of their impact on basic human rights, some of these acts would have to be subject a priori control by a court (see point 7.3) in order to ensure that the principles of legality and proportionality, inter alia, are complied with.

6.1. Information and referral

Unlike information, open to all without any obligation to respond, the expression ‘referral to the European Public Prosecutor’ in this Green Paper means the official information laid before him by a public authority for the purposes of proceedings to be taken. Upon receiving a referral the European Public Prosecutor would therefore be obliged to give a reasoned reply to the request put to him.

It should be made possible for the European Public Prosecutor to receive information or a referral regarding any fact potentially constituting one of the predefined Community

⁹⁸ Cf. point 3.3 (powers of the European Public Prosecutor).

offences.⁹⁹ The question then arises as to who would have the power to do this and to what extent doing so should be mandatory or discretionary.

Europe's citizens are entitled to demand a high level of protection for the Community's financial interests. Any natural or legal person, whether or not a Union resident, could inform the European Public Prosecutor of facts in his possession, by any means whatever. The European Public Prosecutor could then act as required on any information thus received.¹⁰⁰

In addition there could be a specific *obligation* for certain national and Community authorities having defined categories of powers to refer facts to the European Public Prosecutor.¹⁰¹

The Commission, on the basis of comparable obligations regularly found in national systems, has a preference for mandatory referral or information to the European Public Prosecutor by Community authorities and staff¹⁰² and by national authorities of all kinds in performance of their duties: staff of government departments, especially the customs and tax authorities,¹⁰³ police forces and judicial authorities.

The philosophy underlying the proposal to establish a European Public Prosecutor is that specifically Community interests should be matched by a European enforcement function in relation to perpetrators of offences against them. To provide for only discretionary referrals to the European Public Prosecutor would run counter to that philosophy. National enforcement authorities do not have the broad, Community-wide view of the cases they handle. What may look like a trivial case to them may well form part of a more serious complex of offences. Hence the importance attached by the Commission to the principle of systematic referrals to the European Public Prosecutor wherever the Community's financial interests are at stake.

Cases could be referred to the European Public Prosecutor by the relevant national or Community authorities, or he could take them up of his own motion on the basis of the information in his possession.¹⁰⁴

Question 4 When and by whom should cases be referred to the European Public Prosecutor?

6.2. The preparatory stage

Under Article 280a of the EC Treaty as proposed by the Commission, the European Public Prosecutor would be "*responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community's financial interests and their accomplices ... in accordance with the rules provided for by*" the relevant Community legislation. The preparatory stage begins with the first investigative measures ordered by the

⁹⁹ Cf. point 5 (substantive law).

¹⁰⁰ See, by way of comparison, Article 17 of the Statute of the International Criminal Court for Rwanda and Article 18 of the Statute of the International Criminal Court for the former Yugoslavia.

¹⁰¹ Without prejudice to obligations to report irregularities to the Commission under the Community legislation in the context of administrative and financial management and control.

¹⁰² See point 7.3 for the role of the European Anti-fraud Office.

¹⁰³ The tax authorities are subject to extensive obligations of confidentiality. But these duties of confidentiality are never without exceptions. New exceptions will have to be provided for so that the European Public Prosecutor can be given information.

¹⁰⁴ See Annex 2, first procedure.

prosecutor and ends at the point where a decision is taken to close the case or commit it for trial.¹⁰⁵

6.2.1. Fundamental rights

One preliminary point: it is clear that the European Public Prosecutor must act with full respect for fundamental rights as secured by Article 6 of the Union Treaty, the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. These principles include rights of ownership, respect for private life and the confidentiality of correspondence and communications.

The European Public Prosecutor should also act in accordance with the Treaties, particularly the Protocol on the Privileges and Immunities, and in compliance with the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities.

6.2.1.1. Defence rights and protection of the accused

Without claiming to be exhaustive, it is worth stressing the importance of certain general principles at the preparatory stage. At this stage, the European Public Prosecutor would conduct the investigations needed to ascertain the truth, gathering all evidence that will help to prepare the case. Investigations must be conducted with all due despatch¹⁰⁶ to assemble all evidence for and against the suspect.

The performance by the European Public Prosecutor of acts adversely affecting the accused would then be subject to the principle of the presumption of innocence¹⁰⁷ and the principle of adversarial proceedings. For the Green Paper the latter principle means that the parties and their lawyers are entitled to have access to the European Public Prosecutor's file. As far as the accused is concerned, it also means that defence rights must be respected, and particularly the right to make his views known on the facts concerning him.¹⁰⁸ The European Public Prosecutor should also be subject to the principle of equity and to compliance with the law as regards the fact that his conclusions must be based solely on the valid evidence before him.

6.2.1.2. Double jeopardy

Article 50 of the Charter of Fundamental Rights states that "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*". This "*ne bis in idem*" principle is widely recognised by a large number of international conventions.¹⁰⁹

The importance of applying it to the European Public Prosecutor is beyond doubt. But the question arises as to when the principle is to be applicable during the preparatory stage. The case-law on this point is not entirely clear.¹¹⁰

¹⁰⁵ See Annex 2, second procedure.

¹⁰⁶ Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47(2) of the Charter of Fundamental Rights of the European Union (reasonable period).

¹⁰⁷ Article 6(2) of the Convention and Article 48(1) of the Charter.

¹⁰⁸ Article 6(3) of the Convention and Article 48(2) of the Charter.

¹⁰⁹ See, in particular, Article 7 of the Convention of 25 July 1995 on the protection of the Community's financial interests and Article 54 of the Convention implementing the Schengen Agreement.

¹¹⁰ Case C 187/01, now pending before the Court of Justice.

But in the context of this Green Paper there is a hypothesis that can be put forward. The European Public Prosecutor should not be able to open proceedings against a person who has already been acquitted or convicted by a final judgment of a criminal court for the same offence. But he must be in a position to ascertain that the case really does concern the same person and the same offence. It might therefore be possible to provide that the European Public Prosecutor may order a preliminary enquiry, not having the status of commencement of proceedings, to ensure that the “*ne bis in idem*” principle is applied. If the enquiry shows that the case has already come to judgment, the European Public Prosecutor should abandon it. The *ne bis in idem* principle should apply also to other final decisions that preclude subsequent repeat prosecutions, such as a settlement. But if it is the investigation reveals that the national enforcement authorities have dropped the case for lack of evidence, the European Public Prosecutor may proceed at his level if he has new evidence.

6.2.2. *Opening of investigations and enforcement proceedings*

Investigations may begin only after proceedings have been commenced on orders from the European Public Prosecutor. The prosecutor would initiate enquiries only if the known facts might constitute a Community offence within the prosecutor’s jurisdiction, or at least give reason for suspecting that such an offence had been committed.

6.2.2.1. Obligation or discretion to prosecute?

Once these conditions are met, a vital question arises: would the European Public Prosecutor then have the power or the duty to proceed? In the former case, there would be a discretionary prosecution system; in the latter, a mandatory prosecution system. National systems respond to this question in different ways, but always on a hybrid basis.

Where the European Public Prosecutor is concerned, the question will have to be settled at Community level. The purpose of establishing a European Public Prosecutor is to reinforce and unify the protection of the Community’s financial interests. Basically that means uniform proceedings throughout the European law-enforcement area and therefore no discretion for the European Public Prosecutor. And the European Public Prosecutor’s independence is neatly matched by strict application of the law. The Commission’s preference is accordingly for a mandatory prosecution system, modified by exceptions.

The tendency towards approximation of national systems should facilitate this solution. The hybrid mandatory and discretionary system is now typical of the situation in the Member States. Where prosecution is discretionary, for example, the prosecutor has to state reasons for a decision to close a case without further action, and such decisions can be challenged. And where prosecution is mandatory the requirement is rendered more flexible by allowing a variety of cases to be closed subject to stated conditions.

Being subject to the principle of mandatory prosecutions, the European Public Prosecutor would have the possibility of closing a case not only on technical grounds that he cannot escape¹¹¹ but also on discretionary grounds such as those set out below.

First, the exceptions from the principle of mandatory prosecution could be designed primarily to avoid overburdening the European Public Prosecutor with cases of minor importance for the protection of the Community’s financial interests, applying the *de minimis* rule. There are several ways of going about this. A criterion such as “minor impact on the Community’s

¹¹¹ Cf. point 6.2.4.1 (closure of proceedings or decision not to prosecute).

financial interests” could be left to the discretion of the European Public Prosecutor, subject to judicial review. More specifically, a value threshold could be set, below which proceedings would be in the European Public Prosecutor’s discretion. The first is the more flexible technique; the second is stricter and entails the risk of a threshold effect, though the discretion left to the European Public Prosecutor would reduce the risk.

Secondly, provision might be made for an exception from the mandatory prosecution principle on the basis of the potential impact of the proceedings on the outcome of the case. In particular, the European Public Prosecutor could be given the discretionary power to decide to proceed against a given person only as regards a sufficient proportion of the charges brought against him. This provision could be useful if the investigations already conducted into certain of these charges appeared sufficient to obtain judgment and there are reasonable grounds for believing that further investigation would not have the effect of significantly influencing the outcome.

A third possible objective that an exception from the mandatory prosecution principle would serve is the effectiveness of recovery of sums corresponding to the financial interests that are violated. What is concerned here is the technique of the out-of-court settlement, familiar to certain Member States and at least worth discussing. Here, if the accused has repaired the loss caused, either by repaying the sums he should not have received (in agreement with the authorising department) or by paying the taxes or duties he evaded, he may be given the possibility of entering into an agreement with the European Public Prosecutor to terminate the prosecution. The accused makes a voluntary payment, and no judgment is entered. This possibility might be useful where the prospect of a conviction was small. But it is only really acceptable for offences relating to modest amounts of money. The terms of the settlement would generally have to be conceived in such a way as not to be a means of evading liability or a source of unfairness.

Whatever the grounds for waiving prosecution, it could always be provided that there may be no exception may be made in certain aggravating circumstances, as defined by reference to national law.

If the European Public Prosecutor then decided not to prosecute, he would have to close the case and, if the prosecution has already been launched, take a decision to drop it.¹¹² He would then send the file for information to the national enforcement authorities, leaving it to them to decide whether such a case, in which prosecution is not mandatory at European level, is nonetheless of interest at the national level for other types of offence (see below).¹¹³ Without violating the *ne bis in idem* principle, this might be the case if the perpetrator is already known to enforcement services for having committed other offences in the national context.

Question 5 *Should the European Public Prosecutor be guided by the mandatory prosecution principle, as proposed by the Commission, or by the discretionary prosecution principle? What exceptions should be provided for in each of these cases?*

¹¹² Cf. point 6.2.4.1 (closure).

¹¹³ This provision of information by the European Public Prosecutor should be distinguished from referrals to the national prosecution authorities where Community cases are to be shared. Cf. point 6.2.2.2(a).

6.2.2.2. Distribution of cases between the European Public Prosecutor and the national prosecution authorities

The areas of material jurisdiction of each being demarcated, there is then a need to carefully organise the practical distribution of cases between the European Public Prosecutor and the national prosecution authorities. For the sake of consistency, to limit the cases where the same conduct is prosecuted more than once. For the sake of savings in resources, to limit duplication. Out of a concern for justice, to avoid any violation of the “*ne bis in idem*” principle and to exclude the risk of negative conflicts of jurisdiction, where nobody asserts jurisdiction to prosecute. Settling this question would also facilitate the subsequent decision who is to present the prosecution case in the trial court.

a) Community cases

The principle of the European Public Prosecutor is that he is the person with jurisdiction over offences defined as such for the protection of the Community’s financial interests. That leaves the question to what extent this material jurisdiction should have the effect of allocating cases to the European Public Prosecutor on an exclusive basis or shared with the national enforcement authorities.

Rather than exclusive powers, it would be preferable to recognise two principles to enable the European Public Prosecutor to perform his role: systematic referral to him, and his primacy. First of all, as seen above, referral to him should be systematic wherever there are factors linking an offence with the Community’s financial interests. Second, the referral to him should in all logic take the case out of the national authorities’ hands if the “*ne bis in idem*” rule is applied at the investigation stage.

Subject to these two principles – systematic referral to the European Public Prosecutor and his primacy over the national authorities – the distribution of Community cases could be shared between the European Public Prosecutor and the national prosecution authorities. Under the subsidiarity principle, certain cases relating to the protection of the Community’s financial interests could be left in the hands of the national authorities.

- by applying a threshold set by the legislation, expressed for example as an amount concerned by the offence, the European Public Prosecutor being informed even so, in order to give him a full picture of the relevant forms of crime;
- on the basis of a power conferred on the European Public Prosecutor to refer cases to the national enforcement authorities;
- this power would be modulable in practice within the limits of guidelines providing, for example, for referral as the general rule where a case concerns the territory of only one Member State;
- in any case as the consequence of one of the exceptions from the mandatory prosecution principle mentioned above, except where there is a settlement.

a) Hybrid cases

The position is different as regards hybrid cases involving both a Community offence and a national offence. How will cases which call for action on the part of the European Public Prosecutor but which extend beyond his jurisdiction be dealt with?

Hybrid cases are common in practice, as most European funds are collected and managed by national authorities.

There are many examples of hybrid cases, such as the diversion of Community grants via corruption of a national civil servant, or smuggling goods and thereby evading both excise duties (national revenue), VAT and customs duties (own resources).

The simplest case is where the offences and therefore the prosecutions can be dealt with separately. The European Public Prosecutor, receiving information or a referral, would prosecute only the Community offence, leaving the rest of the case for the national enforcement authorities.

But there are also genuinely hybrid cases where the component facts are more complex. Two situations can be distinguished: a) the same conduct constitutes two offences, one of them a national offence and the other a Community offence, concerning the same interest to be protected; b) two connected forms of conduct (distinct but closely bound up) correspond to two offences, one of them a national offence and the other a Community offence. In both cases, the concentration of prosecutions can be operationally useful.

Hybrid cases cannot be handled by a national enforcement authority on its own, as the function of the European Public Prosecutor would then be devoid of substance. The establishment of Deputy European Public Prosecutors, especially if they combined national with European functions, should make it easier to handle such cases. So would the establishment of the Eurojust Unit, in areas where it is concerned.¹¹⁴ But it is still necessary to limit the risks of conflict between national and Community policies on crime and between the Community procedure applicable to Community offences and the national procedure applicable to national offences.

c) Organising the dialogue between the European Public Prosecutor and the national prosecution authorities

To settle the foregoing question, but also for more general reasons, a mechanism must be organised for consultations between the European Public Prosecutor and the national prosecution authorities, which on the basis of practical experience would gradually consolidate relations of mutual trust. Introducing an obligation to refer to the European Public Prosecutor, incumbent notably on the national enforcement authorities, should provide the basis for this dialogue.¹¹⁵ The dialogue between national and European prosecutors should be

¹¹⁴ Cf. point 7.2.1 (Eurojust).

¹¹⁵ See in particular Article 18(5) of the Corpus juris. Unlike the obligation for States to cooperate at the investigation stage with the prosecutors at the more recent International Criminal Courts (Article 29 of the Statute of the Court for former Yugoslavia; Article 28 of the Statute of the Court for Rwanda; Article 93 of the Statute of the ICC), assistance here would be provided direct between the European Public Prosecutor and the national enforcement authorities.

subject to the principle of full respect for certainty as to the law. The Deputy European Public Prosecutors would at all events have access to records of prior convictions.¹¹⁶

Given the obligation to refer cases to the European Public Prosecutor wherever the Community's financial interests are involved, the European Public Prosecutor would decide in appropriate cases to refer to the national authorities offences which affect "principally" national interests.¹¹⁷ To specify what "principally" means, the Community legislation could establish a more detailed definition and the European Public Prosecutor could issue guidelines. These should reflect the principles of the primacy of Community law over national law and the primacy of the *lex specialis* over the *lex generalis*.

On the other hand, in cases where the European Public Prosecutor did not refer a hybrid case to the national authorities, he could have recourse to a joint prosecutions scheme, involving the Deputy European Public Prosecutor and the national enforcement authorities, the European Public Prosecutor playing the lead role.

In all cases, if one of the two levels – national or Community – refers a hybrid case in its entirety to the other, the latter should conduct the prosecution in such a way as to have regard for the interests of the former.

Ultimately, if different courts were hearing cases in parallel, there should be a procedure for settling conflicts of jurisdiction in the Court of Justice, as considered below.¹¹⁸

Question 6 Given the ideas put forward in this Green Paper, how should functions be distributed between the European Public Prosecutor and the national enforcement authorities, notably in order to see that hybrid cases are properly treated?

6.2.3. Conducting investigations

6.2.3.1. Investigation measures

The European Public Prosecutor would be responsible for directing and coordinating investigations in his own areas of competence. By virtue of the presumption of innocence, the prosecutor would have to prove that the accused is guilty, examining the evidence for and against. Having jurisdiction over offences that can be quite serious, it would be right to give him access where necessary to the entire range of investigation measures available in the national system to combat this form of financial crime.¹¹⁹

He might, for instance, subject to a court warrant where fundamental rights are potentially at stake, gather or seize any useful information, hear witnesses and question suspects, subpoena suspects, conduct searches and seizures, including of correspondence, freeze assets, order phone taps or other high-tech communication interceptions, use special investigation techniques that are useful in financial cases and recognised by Convention-based law¹²⁰

¹¹⁶ See Title VI (Register of fraud prosecutions) of the Commission draft laid before the Council for the adoption of the Protocol of 19.6.1997 to the Convention of 26.7.1995 (OJ C 83, 20.3.1996, p. 10).

¹¹⁷ See in particular Article 19 of the Corpus juris, Florence version.

¹¹⁸ See in particular Article 28(1) of the Corpus juris and Chapter 8 (judicial review) below.

¹¹⁹ In this Green Paper, "investigation measure" refers to a general category of individual acts of investigation.

¹²⁰ Convention of 18.12.1997 on mutual assistance and customs cooperation between customs administrations (Naples II); Convention of 29.5.2000 on mutual judicial assistance in criminal matters between the Member States of the European Union (OJ C 197, 12.7.2000, p. 1).

(covert investigations, controlled deliveries), request the issuance of arrest warrants, probation orders or custody orders.

This Green Paper is to provide an opportunity to think in greater depth than hitherto about the judicial guarantee at the preparatory stage and on the relevant level – national or Community – at which such measures should be managed and controlled.

The European Public Prosecutor could not operate if he had access to coercive measures defined solely at national level without any mutual recognition. The effect would be that no change was made to the situation involving international letters rogatory and extradition. The common investigation and prosecution area would be substantially devoid of substance.

But, on the other hand, there can be no question of codifying the criminal law in Europe, as that would be out of proportion to the objective. The point is simply to make it easier to prosecute offences affecting the Community's financial interests and not to set up a fully-fledged European judicial system.

Mutual recognition of national coercive measures could suffice for the operation of the European Public Prosecutor provided there is an adequate set of common principles in the Member States. In this respect, apart from the fact that the Member States are subject to respect for fundamental rights, the instruments adopted or in preparation under the third pillar (freezing of assets,¹²¹ temporary transfer of persons in custody for questioning, questioning by videoconference or teleconference, controlled deliveries, telecommunications interception,¹²² European arrest warrant,¹²³) suggest that the common core of principles is in the process of consolidation, though it is too early to say just what it will consist of.

Automatic mutual recognition by the Member States of coercive measures implemented by the European Public Prosecutor subject to review by the national judge of freedoms would make it possible to escape the limitations of international letters rogatory and extradition, as the coercive measures would then be valid throughout the Communities in a common area.

To be precise, as regards the national investigation measures available to the European Public Prosecutor [see (b) and (c) above], mutual recognition would mean that, in the event of execution in a Member State of an investigation measure authorised by a court in another Member State, the European Public Prosecutor would not have to seek a fresh authorisation.

This can be illustrated by the example of searches to be conducted at three subsidiaries of the same firm, based in three Member States, A, B and C. (The assumption is that under the relevant national systems of law, searches of business premises require authorisation (warrant) by the courts in States A and B but not in State C.) The European Public Prosecutor could apply for a search warrant to the judge of freedoms in Member State A and then use it in Member State B without applying for a second warrant and then proceed to simultaneous searches in A, B and C.

The idea of mutual admissibility would also operate in relation to evidence gathered as a result of such investigation measures, as will be seen below.¹²⁴

¹²¹ Initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence (OJ C 75, 7.3.2001, p. 3.).

¹²² Convention of 29.5.2000.

¹²³ COM(2001) 522.

¹²⁴ Cf. point 6.3.4 (evidence).

But *Community investigation measures*, i.e. acts of the European Public Prosecutor [described under (a)] and therefore by definition Community acts, would have the same legal status throughout the common investigation and prosecution area.

a) Community investigation measures at the European Public Prosecutor's discretion: collecting or seizing information, hearing or questioning persons, etc.

The European Public Prosecutor's investigation measures involve no coercive power: copying or seizing information, hearing witnesses or questioning the accused with his consent. They should therefore be within his discretion. The question further arises whether visits to firms should be included, as a warrant is not required by the law of all the Member States.

In any event, these measures should be subject to a precise procedure laid down by Community law. Defence rights should be fully secured. The rights of the accused here could be inspired by the provisions laid down in the statutes of the most recently-created international criminal courts to protect the accused: assistance of a legal adviser, translation, right to silence, right to plead not guilty, prior information on rights (use of his statements as evidence, notification of charges against him, etc.).

b) Investigation measures subject to review by the courts: subpoenas, house searches, seizures, freezing of assets, interception of communications, covert investigations, controlled or supervised deliveries, etc.

The European Public Prosecutor should also be able to use coercive measures that are valid and executable throughout the Community investigation and prosecution area. But they should be subject to review by the national courts.¹²⁵ They would then be executed under the direction of the European Public Prosecutor by the appropriate authorities.¹²⁶

The applicable national law at the warrant stage would be that of the Member State of the forum, and at the execution stage it would be that of the Member State of the place for execution of the investigation measure, assuming that this is a different Member State. On this basis, the warrant and the execution should be mutually recognised and evidence should be mutually admissible as between the Member States.

It will be necessary to check in advance whether the domestic law of each Member State provides for the same coercive measures. Mutual recognition presupposes a minimum degree of harmony between national provisions relating to investigation measures. The idea is not to harmonise national rules here but to check whether at least there are national rules in each Member State to provide a basis for the investigation measures the European Public Prosecutor wishes to take. For example, if Community law is to provide legitimately for the European Public Prosecutor to have the power to intercept communications, there must be national legislation providing for this in each of the Member States.

National law would also be the basis for the decision as to the terms of the warrant issued by the judge of freedoms (prior or post facto authorisation, normal or emergency procedure, etc.). The principle of mutual recognition would apply to the forms but not to the principle of review by the national judge of freedoms.

¹²⁵ See point 6.4 (guarantee of the involvement of a court).

¹²⁶ Cf. point 6.2.3.2 (working relations with national investigation services) and point 7.3. (future role of OLAF).

In the previous example, the warrant issued by the court in Member State A may have been issued by a summary procedure that does not exist in Member State B but is recognised there under the mutual recognition principle. But the European Public Prosecutor could not simply do without a warrant in both Member States A and B on the sole ground that Member State C authorises searches of business premises without a warrant from the courts.

c) Investigation measures ordered by the judge of freedoms on application from the European Public Prosecutor: arrest warrant, probation order or custody order

The points made in the example above apply *a fortiori* to investigation measures that restrict or remove the accused's liberty. But these measures, unlike the previous ones, would take the form of orders made not by the European Public Prosecutor but by the national judge of freedoms, given their seriousness.

To obtain an arrest warrant, probation order or custody order, the European Public Prosecutor would have to apply to a court.

In particular, the Commission considers that the European Public Prosecutor should be able to apply to any relevant national judicial authority for the issuance of an arrest warrant in accordance, *mutatis mutandis*, with the Commission proposal for a framework decision on the European arrest warrant.¹²⁷

This warrant would be executable throughout the common investigation and prosecution area and would enable the European Public Prosecutor to apply for an identified person to be sought, arrested and surrendered on the basis of a suspected offence. Every European arrest warrant would be listed in the Schengen Information System (SIS). To protect his rights, the person arrested could oppose the execution of the warrant in the courts of the Member State of execution.

The European arrest warrant would render the extradition procedure superfluous in the areas within the European Public Prosecutor's jurisdiction. In particular, the principles of double jeopardy and the ban on extraditing nationals would as a matter of principle cease to operate in this context. This follows on from the Tampere conclusions, which aim to reduce the frequency of extradition requests and to develop a European enforcement order.¹²⁸

Question 7 Does the proposed list of investigation measures for the European Public Prosecutor seem to you to be adequate, particularly as a means of overcoming the fragmentation of the European criminal-law area? What framework (applicable law, review - see point 6.4) should be envisaged for investigation measures?

6.2.3.2. Working relations with national investigation services

The proposal to establish a European Public Prosecutor does not involve establishing a Community law officer to conduct all investigation measure in the Member States.¹²⁹ The European Public Prosecutor should be able to call on the national investigation, police and

¹²⁷ COM(2001) 522.

¹²⁸ Conclusions, points 35 and 37.

¹²⁹ Cf. point 7.3 as regards the more specific question of investigation measures within the Community institutions.

judicial services, possibly organised as joint investigation teams,¹³⁰ to execute measures taken or authorised by a court.¹³¹

There are several possible bases for the working relations.

In the first option, the European Public Prosecutor would enjoy a direct investigation power for the purposes of discharging his functions in relation to the Member States' investigation services.

A second option would be to provide in more general terms for an obligation for the Member States' services to assist the European Public Prosecutor. The European Public Prosecutor would be entitled to ask for the assistance of the police in the relevant Member States to undertake a search, and the police would not be entitled to refuse.

A third option would be to comply in each Member States with the system of relations between national prosecuting authorities and national investigation authorities.

By way of illustration, in this last hypothesis, the Deputy European Public Prosecutor in Member State A could ask direct for the assistance of the police like that Member State's own prosecution service, whereas in Member State B, where the national prosecution authorities have no powers to order police investigations, the European Public Prosecutor could make only suggestions to them.

The Commission's preference is for this third solution, provided the freedom of internal organisation it allows does not jeopardise the Community principles of effectiveness and equivalence. In this case the Deputy European Public Prosecutors would have the same powers in relation to the national investigation services as the national prosecution authorities.

Question 8 What solutions should be envisaged to ensure the execution of investigation measures undertaken by the European Public Prosecutor?

6.2.4. Outcome of prosecution

6.2.4.1. Case closed or not pursued

If he waives the prosecution, the European Public Prosecutor should take a formal decision to close the case or refrain from prosecuting. In all cases, this should be possible at any time during the preparatory stage. There may also be cause for abandoning the prosecution, beyond the prosecutor's control, at any time, including during the preparatory stage.¹³²

It is not necessary to return to the situation where the European Public Prosecutor decides on a discretionary basis that the case should be dropped under one of the exceptions from the

¹³⁰ Article 13 of the Convention of 29.5.2000 on mutual judicial assistance in criminal matters.

¹³¹ Although this is not the point of this Green Paper, it should be pointed out that in certain cases, strictly limited by the subsidiarity principle, the existence of investigation powers exercised at European level could help boost the effectiveness of the European Public Prosecutor. In particular this affects transnational cases concerning direct expenditure (managed by the Communities, the administrative departments of the Member States not being involved), for example where the Commission's contractors or subcontractors are in several Member States. See also point 7.3 (future role of OLAF).

¹³² Cf. point 6.3.5 (causes for abandoning prosecutions at the trial stage).

mandatory prosecution principle mentioned above,¹³³ which may arise without the prosecution actually having been launched.

The European Public Prosecutor may also be minded to take a closure decision in the course of a prosecution he has already launched.

- This would become mandatory where there was any cause for abandoning the prosecution: the limitation period has expired,¹³⁴ the accused disappears or dies or a general national measure such as an amnesty or pardon is taken.
- It should also be provided that a case may be dropped in a number of specified situations – the offence is not completed, the evidence is lacking or the perpetrator remains unidentified.

The form of the decision should be determined by a Community procedure. Provision could be made for an obligation on the European Public Prosecutor to give reasons for his decision. It would be served on the accused, the victim – meaning the Commission as representing the Communities – and the national prosecution authorities in the context of the dialogue mentioned earlier.

As has been seen, where the “*ne bis in idem*” principle allows, the discretionary closure of a case by the European Public Prosecutor would not have the effect of preventing the national prosecution authorities from prosecuting for national offences.¹³⁵ This raises the question of the effect on those authorities of the European Public Prosecutor’s decision to drop a prosecution at the end of the road. It might be logical enough to provide that where new evidence emerges the national authorities must inform the European Public Prosecutor.

6.2.4.2. Committal for trial

Alternatively, on completion of the investigation, the European Public Prosecutor could take a decision to commit for trial. For that purpose, having acted impartially and diligently, he should have acquired sufficient evidence to support an allegation that the accused has committed an offence within his jurisdiction. Having regard to the charges laid, conviction should now be more probable than acquittal.

As for the forms of the committal, the relevant Deputy European Public Prosecutor should operate in accordance with the national criminal procedure. Generally, in criminal systems, a bill of indictment states the accused’s identity, the alleged facts and the charges against him.¹³⁶ The form, the content and the review of the bill by the courts would be governed exclusively by national law.¹³⁷ So would the whole of the trial stage.

Question 9 On what terms should the European Public Prosecutor be able to take a decision to close a case or commit it for trial?

¹³³ Cf. point 6.2.2.1 (obligation or discretion to prosecute).

¹³⁴ Cf. point 5.5 (limitation).

¹³⁵ Cf. point 6.2.2.2 (b) and (c) (distribution of cases between the European Public Prosecutor and the national prosecution authorities).

¹³⁶ See, for example, Article 58(3) of the Statute of the International Criminal Court.

¹³⁷ Cf. point 6.4 (court reviewing committal proceedings).

6.3. Trial stage

Under Article 280a of the EC Treaty as proposed by the Commission, the European Public Prosecutor would be "responsible for ... exercising the functions of prosecutor in the national courts of the Member States in relation to such offences [against the Community's financial interests] in accordance with the rules provided for by" the relevant Community legislation.¹³⁸

6.3.1. Choice of Member State of trial

In complex cases involving several Member States, the European Public Prosecutor should determine the Member State in which the case is to be committed for trial.

Even when the Convention of 25 July 1995 and its Protocols have been ratified,¹³⁹ jurisdiction to try the same offence against the Community's financial interests could still be claimed by several Member States at once. The criteria for jurisdiction adopted by the Union Member States in the context of the third pillar aim chiefly to ensure that there is at least one Member State that has jurisdiction to try the offences defined.¹⁴⁰ But these criteria do not necessarily determine a *single* Member State that the European Public Prosecutor would see as the obvious State for the trial.

The logical sequel of the principle of centralised management of prosecutions is that the European Public Prosecutor should choose one of the Member States that have jurisdiction under the convention-based instruments as the one in which the case would be sent for trial. This would avoid the risk of positive conflicts of jurisdiction, where several Member States conduct their own trials. The European Public Prosecutor should be able to concentrate the committals for trial on a single Member State. He should also be able to sever the prosecution so as to send different components of a complex case for trial in as many different Member States as may be necessary. It should be possible to combine the two options.

But the choice of the Member State in which a case is sent for trial is not a neutral one in a partly harmonised law-enforcement area, since that choice determines not only the language or languages that will be used, the practicalities (witnesses, transport etc.) and the court that has jurisdiction but also the applicable national law in matters not within the common set of rules. Consequently there are two essential questions – the criteria for and the review of the choice of Member State.

The choice should be based on certain criteria, while leaving the European Public Prosecutor with some room for manoeuvre to take account of the needs of the individual case. These criteria, which should be laid down in the Community legislation, might be the place where the offence was committed, the accused's nationality or place of residence (natural persons) or of headquarters (legal persons), the place where the evidence is to be found or the place where the accused is held. In any event, the choice of a national court at the preparatory stage should not predetermine the Member State of trial.¹⁴¹

¹³⁸ See Annex 2, third procedure.

¹³⁹ The proposal for a directive of 23.5.2001 does not take over those provisions of the Convention and its Protocols which are covered by the exception provided for by Article 280(4) of the EC Treaty relating to the application of national criminal law and the administration of justice in the Member States. These provisions will enter into force only after ratification by all the Member States.

¹⁴⁰ Article 4 of the Convention of 25.7.1995 and Article 6 of the Protocol of 27.9.1996.

¹⁴¹ See point 6.4 (freedom secured by the courts).

The criteria should be weighted, as one and the same criterion might point to several places. Rather than being ranked on a hierarchical basis, they should be combined as a set of concordant items of evidence. The court chosen ought on principle to be related to the offence committed, but the European Public Prosecutor ought to enjoy flexibility to choose the forum that appears most appropriate for the proper administration of justice.¹⁴²

On the question of the review of the choice of Member State of trial, a possible first option might be to leave the European Public Prosecutor wholly responsible for the choice. The principle of mutual recognition in the European Union is now based on trust in all the national legal systems. They are based on a solid set of common principles, among which are not only the “non bis in idem” rule, applied here to the trial and judgment stage, but also the principles that offences and penalties must be defined by law, on a non-retroactive basis, and the penalties must be in proportion to the offence.¹⁴³

The foundations of adversarial court procedure are accepted by all Member States. The rights to redress and to access to an independent and impartial tribunal established by law are recognised.¹⁴⁴ In addition to the fundamental rights mentioned above as regards the preparatory stage, there are at the trial stage the principles of the benefit of the doubt and of the degree of certainty – evidence beyond all reasonable doubt – needed for a conviction.

The rights of the accused, the victims and the witnesses are guaranteed in all national systems: In particular there is the right to remain silent to avoid self-incrimination¹⁴⁵ and the right to be advised, defended and represented.¹⁴⁶

But certain arguments might militate in favour of a review of the choice of Member State of trial. If the general criminal law is not harmonised and the European Public Prosecutor enjoys the discretionary margin he needs, the Prosecutor should not be able to select a court on an unfair basis, for instance regularly avoiding sending cases for trial in Member States where the judicial system seems less promising to him. If it was felt useful to review the choice of forum, this would have to be a judicial review.

The second option consists of reviewing the European Public Prosecutor’s choice of Member State of trial and entrusting the review function to a national court. The court reviewing the accusation would obviously review its legality, notably in terms of jurisdiction, by reference to national law. The question arises whether the review should be extended to manifest errors in the choice of Member State in terms of Community law (criteria mentioned above). Even without giving the national court the power to rule against the European Public Prosecutor’s discretionary choice of forum, review of abuse or manifest error raises the possibility that one or more Member State might decline the same case in whole or in part. The jurisdiction criteria of the Convention of 25 July 1995 ought theoretically to make this kind of situation impossible. But in practice this second option does suggest that there could be a few cases of

¹⁴² The concept of the proper administration of justice embraces the principles of a reasonable period of time, fairness and effectiveness.

¹⁴³ Article 49 of the Charter of Fundamental Rights of the European Union and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁴⁴ Article 47(1) and (2) of the Charter and Article 6(1) of the Convention.

¹⁴⁵ In particular, the right against self-incrimination presupposes that the European Public Prosecutor will not use any evidence obtained under duress or constraint contrary to the accused’s own free will (ECHR, *Funke v France*, 25.2.1993, paragraph 44). But the European Public Prosecutor would be able to use data obtained from the accused by means of coercive powers but which exist irrespective of the suspect’s will (ECHR, *Saunders v United Kingdom*, 17.12.1996, para 69).

¹⁴⁶ Article 47(2) of the Charter and Article 6(3) of the Convention.

declined jurisdiction and possibly even of negative conflicts of jurisdiction. They should be settled by a Community court, and as matters stand that can only mean the Court of Justice.¹⁴⁷

There is also a third option of establishing a special Community court to review the European Public Prosecutor's choice of Member State of trial, but that goes far beyond the ambitions of the Commission proposal. But to ensure that the debate is complete, the hypothesis is considered below in conjunction with the question of reviewing the committal order itself.¹⁴⁸

Question 10 By what criteria should the Member State or States of trial be chosen? Should the European Public Prosecutor's choice be subject to review? If so, by whom?

6.3.2. Exercise of the prosecution function

The European Prosecution Service would conduct prosecutions before the national courts and in accordance with national law.

Just as it does not involve establishing a European court, the Commission proposal does not presuppose the introduction of a specifically European prosecution. It is, moreover, perfectly neutral on the organisation of trial courts. The complexity of cross-border financial cases may, of course, raise doubts as to the ability of non-professional judges to try them.¹⁴⁹ But the Commission regards this as a question for the individual Member States in accordance with the principle of subsidiarity.

The European Public Prosecutor, meaning in practice the Deputy European Public Prosecutor in the Member State of trial, would prosecute in accordance with the national court organisation and procedure. The sources of the law of criminal procedure are different from one Member State to another, but the differences are a lot smaller at the trial stage than at the preparatory stage.

The need for centralised management on grounds of effectiveness consequently does not apply at the trial stage. National law would basically remain applicable, subject to minor changes to provide for prosecution by the European Public Prosecutor in cases where the Community's financial interests are at stake.

6.3.3. The European Communities, victims in accordance with the ordinary law

The place of the victim in criminal proceedings varies sharply from one Member State to another. Some of them allow *partie civile* proceedings for compensation for loss sustained, and this procedure can go so far as to prompt the commencement of a prosecution at the victim's initiative. The advantage of the *partie civile* procedure is that there is no need for subsequent civil proceedings. In other Member States the victim can give evidence as *amicus curiae* at the trial.

In the system outlined here, criminal proceedings could be initiated only by the European Public Prosecutor, but the Community might nevertheless have an interest in being a party to the trial, given that the Prosecutor will be acting independently. There are several hypotheses worth considering as regards the defence of the Community's finances, such as *partie civile*

¹⁴⁷ Cf. point 8 (judicial review).

¹⁴⁸ Cf. point 6.4.3 (court reviewing committal proceedings).

¹⁴⁹ See, for instance, Article 26(1) of the Corpus juris.

proceedings brought by the Commission on behalf of the European Communities, or an expert or ordinary witness function for staff from OLAF or other departments.

The Commission does not accept the hypothesis of a uniform role for the Communities as victim in all cases involving the Community's financial interests. What it would simply like is for the Communities to be sure of enjoying the same rights as an ordinary victim in all the Member States.

6.3.4. *Law of evidence*

The fact that evidence gathered in one Member State is not automatically recognised throughout the Union is all too often an obstacle to effective prosecution in transnational cases. This situation makes it more difficult to make use of the findings of investigations when a case comes to criminal trial. Preserving it would ruin all efforts made to centralise the management of prosecutions with the establishment of the European Public Prosecutor. The effectiveness of the European Public Prosecutor, measured by the possibility of using at trial the evidence gathered by him, depends on this difficulty being overcome.

6.3.4.1. Admissibility of evidence

A simple reference to national law is by definition incapable of settling the question of the admissibility of evidence in a European investigation and prosecution area. It must be possible for evidence gathered in one Member State to be admitted in the courts of any other Union Member State so that prosecutions can be concentrated in the Member State where it has been decided to send the case for trial. The rules of evidence, being based on a set of comparable principles, are still too different in matters of detail for the European Public Prosecutor to be able to take them as a basis.

The European Public Prosecutor would also have the regrettable duty to choose between an abusive form of forum shopping (concentrating committals for trial in the Member State or States offering the greatest flexibility in the rules of evidence) and impunity and iniquity in prosecutions (ineffectiveness of a large number of prosecutions on account of variations in the rules of evidence).

The impasse here cannot reasonably warrant the Community unification of the rules of evidence. This hypothesis, which would be tantamount to general codification of criminal law in Europe, would be right out of proportion to the specific objective, which is solely to seek effectiveness in proceedings against certain basically common interests. There would be a danger of complexity if two systems of evidence were to coexist, one operating in Community matters and one in domestic matters.

Neither unification in the form of a complete code on the admissibility of evidence, nor a simple reference to national law but mutual admissibility of evidence is the most realistic and satisfactory solution here. Under this principle, any national court trying a criminal case in which the Community's financial interests were at stake would have to admit any evidence lawfully obtained in accordance with the law of another Member State. Under the idea of mutual admissibility of evidence posited by the Tampere European Council, "*evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States*".¹⁵⁰

¹⁵⁰ Tampere Conclusions, point 36.

In addition, it would be worth evaluating whether there is a need for a European record of questioning to serve as a model for the European Public Prosecutor where he questions witnesses himself without going through the national investigation authorities. To respect the rights of the accused, Community law should provide for the European Public Prosecutor to have the possibility of applying specific procedures reflecting cross-border situations: European record of questioning of witnesses on the basis of testimony given, and European record of questioning of the accused, including videoconferences in both cases.¹⁵¹

6.3.4.2. Exclusion of evidence unlawfully obtained

The prior condition for any mutual admissibility of evidence is that the evidence must have been obtained lawfully in the Member State where it is found. The question of the exclusion of evidence obtained contrary to the law therefore has to be considered.

The law that must be respected if evidence is not to be excluded is first and foremost the national law of the place where the evidence is situated, which integrates in all Member States the principles of Article 6 of the Union Treaty, the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It would include certain Community rules such as those governing the European arrest warrant or record of questioning where they are used as evidence.

The Commission would prefer the exclusion decision to be taken by the court review with jurisdiction to the committal (whoever that may be in the relevant Member State).¹⁵² The rules governing exclusion would be those of the Member State in which the evidence was obtained. The effect of this would be that any national court having jurisdiction in cases involving the criminal protection of the Community's financial interests would have to be familiar with the rules of evidence in the other Member States. This is a common situation in private international law. The practical difficulties here should be cleared up by progress in facilitating networking among the Member States' judicial systems (liaison judges, European Judicial Network).

Likewise, where evidence obtained in the course of a Community administrative procedure is to be used in a criminal trial, this should be conditional on compliance – right from the administrative stage if there are grounds for believing that there is a link to a criminal offence – with the constraints of criminal procedure (defence rights). Evidence gathered in the course of an internal administrative enquiry (within the Community institutions) could be made admissible on a mandatory basis in the national courts if it has been gathered without any human rights violations.¹⁵³

As for the validity of evidence (its credibility in the eyes of the court), this will obviously be within the discretion of the courts themselves, on the basis of the applicable national law.

Question 11 Do you think that the principle that evidence lawfully obtained in a Member State should be admissible in the courts of all other Member States is such as to enable the European Public Prosecutor to overcome the barrier raised by the diversity of rules of evidence?

¹⁵¹ See in particular Article 32 of the Corpus juris.

¹⁵² Cf. point 6.4.3 (court reviewing committal proceedings).

¹⁵³ For example, the obligation on Community staff to cooperate with OLAF in its internal administrative investigations must be interpreted as raising no barriers to the fundamental right, already mentioned, against self-incrimination (ECHR, *Saunders, supra*).

6.3.5. *Factors causing early termination of prosecution*

Unless the European Public Prosecutor decides to close a case without further action,¹⁵⁴ the prosecution brought will as a general rule end with a conviction or an acquittal.

But during the trial the prosecution can always be terminated for the reasons considered already in relation to the preparatory stage. For instance, the limitation period may expire.¹⁵⁵ The accused may die (if he is a natural person) or be dissolved (if it is a legal person). There may be national measure that precludes further prosecutions, such as an amnesty or a pardon. In general terms, the grounds for terminating the prosecution at the trial stage would be determined by the national law applicable to the trial.

6.3.6. *Execution of the judgment*

The Commission does not envisage giving the European Public Prosecutor a role to play in the execution of the judgment given on the merits, unlike the approach generally taken in the Member States.¹⁵⁶ The reference to national law on this point should be facilitated by the progress made since Tampere.

6.4. **Guarantee of the involvement of a court**

Since acts done by the European Public Prosecutor have an impact on fundamental human rights, they should be subject to review by the courts, whose role should be specified. The Commission has proposed providing in the EC Treaty that the Community legislation should lay down “*the general conditions governing the performance of the functions of the European Public Prosecutor and ... in particular ... (c) rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.*”

6.4.1. *Functions of the court*

In general terms, any court with jurisdiction to review acts done by the European Public Prosecutor should offer all the assurances expected from a court. It should be competent, independent and impartial in accordance with the general principles recognised by all the Member States.¹⁵⁷

The role of the court reviewing acts done by the European Public Prosecutor would be to provide the guarantee of judicial intervention. There are two distinct functions here:

- during the preparatory stage, the court reviewing coercive acts, known here as the judge of freedoms, issues or authorises, after reviewing them for legality and proportionality, those measures taken by the European Public Prosecutor involving a restriction of fundamental rights (see question in point 6.4.2);
- at the end of the preparatory phase, acting on the basis of the European Public Prosecutor’s decision to commit the case to trial, the court confirms the charges on the basis of which the European Public Prosecutor intends to proceed and the validity of the committal to the

¹⁵⁴ Cf. point 6.2.4.1 (withdrawal of prosecution).

¹⁵⁵ Cf. point 5.5 (limitation).

¹⁵⁶ The alternative option is taken by Article 23 of the Corpus juris.

¹⁵⁷ Article 47 of the Charter of Fundamental Rights of the EU; Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

trial court. The aim is to consider whether the evidence is sufficient and admissible and a proper procedure has been followed so as to avoid a flawed trial and the risk of stigmatisation of the accused (see point 6.4.3.).

6.4.2. *The designation of the judge of freedoms*

In institutional terms it is theoretically conceivable that the establishment of the European Public Prosecutor might be accompanied by the establishment of a Community judge of freedoms. But in what legal system, if not in the Community system? This solution would effectively generate an obligation to enact a full body of common European legislation governing investigations, applying to searches, seizures, interceptions of communications, subpoenas, arrest, judicial review, preventive custody etc. That is not the Commission's preference.

The judge of freedoms could very well be in the national system.¹⁵⁸ There is no need to establish a European indictments court. The Member States remain entirely free to determine the number of such courts and the way they are organised. They might, for instance, be designated in each Member State from among courts sitting in the places where the Deputy European Public Prosecutors are based. In accordance with the case law of the European Court of Human Rights, its functions should be made incompatible with those of the trial court.¹⁵⁹

From a functional point of view, the competent court would be the court the Member State to which the relevant Deputy European Public Prosecutor belongs. Several national courts may therefore be involved in the same case where action by the European Public Prosecutor in several Member States is involved.

There are three options. The first is that the European Public Prosecutor should apply to the judge of freedoms in the Member State in which he wishes to undertake some act of investigation.

The second is that the European Public Prosecutor could apply to only one judge of freedoms, who would issue or authorise all the acts needed for the investigation, executable throughout the Communities on the basis of the mutual recognition principle.

The third would be to leave the European Public Prosecutor free, within the limits set by the legislation, to combine these two possibilities. Where the European Public Prosecutor is to apply for the issuance or authorisation of acts whose place of execution is known in advance, he would have to apply to the national judge of freedoms in the Member State where execution is to take place. On the other hand, as regards acts whose place of execution is not determined in advance, the European Public Prosecutor could choose to concentrate his applications on a single national judge of freedoms, which would take a decision recognised throughout the Communities.

Take the example of a case in which the European Public Prosecutor needs to search the accused's car and home in Member State A and to intercept certain calls made from a mobile telephone. He could apply to the court for Member State A for authorisation of all these measures and search the premises in Member State A. On the basis of the same

¹⁵⁸ Subject to compliance with the provisions of Article 234 EC and the judgement of the Court of Justice in *Foto-Frost* (Case C-314/85 [1987] ECR 4199).

¹⁵⁹ See, inter alia, judgments of the ECHR of 24 May 1989 in *Hauschildt v Denmark*, Series A, No 54, and of 24 August 1993 in *Nortier v Netherlands*, Series A, No 267.

authorisation, mutually recognised, he could then search the accused's vehicle and intercept his telephone calls even though he has now travelled to Member State B.

The Commission's preference is for one or other of the last two options. They alone correspond to the principle of establishing a common investigation and prosecution area. For the sake of investigative efficiency, decisions by the review courts in all Member State should be recognised throughout that area. The mutual recognition principle applies to the operation of the national court. To ensure that the European Public Prosecutor's acts of investigation have territorial effect throughout Europe, acts issued or authorised by the national courts should be enforceable everywhere in the Community.

Once again, mutual recognition is possible because of the common core of legal principles in the Member States. The investigation measures envisaged here are provided for by the law of criminal procedure in all the Member States. They are always subject to compliance with the principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The juxtaposition of national legal systems is therefore no obstacle to mutual recognition of decisions by national courts.

International letters rogatory will no longer serve any purpose in cases involving the protection of the Community's financial interests. European law would do no more than extend the validity of decisions by the national courts throughout the Union. For the rest, domestic law would govern the procedure for issuing and reviewing decisions.

By way of example, if a search is to be made in Member State A under a warrant issued by a court in Member State B, it cannot be refused, but it must be conducted in accordance with the law of Member State A.

Question 12 To whom should the function of reviewing acts of investigation executed under the authority of the European Public Prosecutor be entrusted?

6.4.3. Designation of the court to review the committal

Several options as to the court to review the committal are conceivable in institutional terms. There are actually two basic possibilities, depending whether the court is to be European or national.

The first possibility for organising the committal review function is to establish a European Pre-Trial Chamber. This possibility was already considered above in relation to the review of the choice of Member State.¹⁶⁰ This solution might echo some of the mechanisms adopted by various international criminal bodies (the Pre-Trial Judge of the International Criminal Tribunal for the former Yugoslavia¹⁶¹ and even more so the Pre-Trial Chamber of the future International Criminal Court¹⁶²).

The Chamber would have jurisdiction to review the European Public Prosecutor's decision to send a case for trial. The European Pre-Trial Chamber's review could relate not only to the choice of forum but also to the adequacy of the evidence. It could take up cases of its own motion or on application from the accused.

¹⁶⁰ Cf. point 6.3.1 (choice of State of trial).

¹⁶¹ Article 65 ter of the Rules of Procedure and Evidence of the ICTY of 11 February 1994, as amended on 10 July 1998.

¹⁶² Articles 56 *et seq.* of the Statute of the International Criminal Court.

The establishment of a Community committals court, possibly as a specialised chamber of the Court of Justice, would have the advantage of placing the review of committals in the hands of a single, specialised court and thus securing the unity of the relevant law and practice. But the Treaty amendment needed to establish this chamber goes well beyond the Commission's contribution to the Intergovernmental Conference. So another solution must be considered.

The second possibility would be for the committal review function to be exercised by a national court designated by each Member State for the purpose. This solution would not entail establishing a new court. The type of court designated might vary very considerably from one Member State to another. Depending on the Member State, the court exercising the committal review function may be an *ad hoc* court or the trial court itself. This solution respects the variety of judicial systems and allows all manner of courts to be designated as committal review courts in the Member States.

The Commission's preference is for the second possibility. Establishing a new Community court should be avoided, provided there is an arrangement for the Court of Justice to settle conflicts of jurisdiction, which ought to be rare in practice. In any event, provision should be made for flexibility in the choice of committal review court, which should be in a different Member State from the original committal court.

In functional terms the European Public Prosecutor would apply to the committal review court in the Member State in which he is minded to send the case to trial. His choice must correspond to the Community criteria discussed above for the choice of Member State of trial, amplified as appropriate by the applicable national law, subject to *a posteriori* review by the Court of Justice.¹⁶³

Question 13 To whom should the committal review function be entrusted?

Question 14 Do you feel that fundamental individual rights are adequately protected throughout the proposed procedure for the European Public Prosecutor? In particular, is the double jeopardy principle properly secured (see point 6.2.1)?

¹⁶³ Cf. point 8 (judicial review).

7. RELATIONS WITH THE OTHER PARTIES INVOLVED

Inserting the European Public Prosecutor into the existing institutional context must be handled with care, especially in view of current developments in the European Union.

7.1. Cooperation with Member States' authorities

The establishment of the European Public Prosecutor would cause no upheavals in national investigation and prosecution systems. It should be remembered that the following functions would remain purely national:

- criminal investigation police forces;
- judicial review functions (judge of freedoms and committal review court);
- the administration of justice; and
- enforcement.

Consequently, above and beyond the distribution of jurisdiction considered here, there would have to be permanent cooperation between the European Public Prosecutor and the authorities of the Member States. Community secondary legislation would have to determine the nature of the relationship between the European Public Prosecutor and the national police and judicial authorities.

For one thing, the dialogue already mentioned between the European Public Prosecutor and the national prosecution authorities would have to be organised, and practical input must be provided, notably in the handling of hybrid cases, to facilitate mutual consultations, information exchange and assistance.¹⁶⁴

For another, regarding the execution of acts of investigation issued or authorised by the relevant national court, several options were set out above,¹⁶⁵ the objective being that the European Public Prosecutor can obtain the assistance of the national investigation authorities.

7.2. Relations with those involved in cooperation in criminal matters in the European Union

Since the powers of the European Public Prosecutor would be limited to the protection of the Community's financial interests, there should not be any difficulties in ensuring that his/her functions, which are both more integrated and more specialised, complement those of the bodies active in the area of cooperation on criminal matters. At this stage, given current developments within the third pillar of the European Union, it is only possible to identify possible food for thought. In particular, consideration should be given to developing a balanced and coherent system with the following partners.

¹⁶⁴ Cf. point 6.2.2.2 (allocation of cases).

¹⁶⁵ Cf. point 6.2.3.2 (working relations with national investigation services).

7.2.1. Eurojust

A European Judicial Cooperation Unit (Eurojust) should be set up shortly in the context of the third pillar with the purpose of facilitating cooperation between Member States' judicial authorities and contributing to proper coordination of prosecutions in the area of serious, and in particular organised, crime. The establishment of Eurojust is provided for by the conclusions of the Tampere European Council¹⁶⁶ and the Nice Treaty.¹⁶⁷ A provisional Unit ("Pro-Eurojust") was set up by Council Decision of 14 December 2000 and came into being on 1 March 2001.¹⁶⁸ This Green Paper cannot prejudge the precise role of Eurojust; the most it can do is offer a few points for reflection.

Whereas the European Public Prosecutor would be a Community authority with his/her own prosecuting powers in matters specifically relating to the protection of the Community's financial interests, Eurojust will be given responsibilities in inter-Governmental cooperation within a very broad remit.¹⁶⁹ In all logic, the establishment of the European Public Prosecutor would enable Eurojust's powers in relation to financial crime to be preserved, as long as the European Public Prosecutor's priority jurisdiction regarding the protection of the Community's financial interests was acknowledged. Alongside this clear distribution of jurisdiction, there should be active cooperation in the event of cross-pillar cases.¹⁷⁰ Consequently their functions would be complementary, the European Public Prosecutor and Eurojust, applying first- and third-pillar techniques respectively, working in their own areas for the attainment of the area of freedom, security and justice.

This complementarity means in practical terms that the European Public Prosecutor and Eurojust would have to cooperate with each other closely and on a regular basis within the limits of their respective powers, including through the exchange of relevant information. The exchange should operate in respect for data-protection principles.

Without doubt, cross-pillar cases can arise, as where there are both trafficking in drugs (third pillar) and cigarette smuggling to the detriment of the Communities' own resources (first pillar).

In the event of cross-pillar cases extending beyond the protection of the Community's financial interests, each party will have to provide value added on the basis of an exchange of information, the dialogue between the European Public Prosecutor and the national prosecuting authorities then being widened to include Eurojust.¹⁷¹

¹⁶⁶ Presidency Conclusions, point 46.

¹⁶⁷ Articles 29 and 31 of the Union Treaty, as amended (OJ C 80, 10.3.2001).

¹⁶⁸ OJ L 324, 21.12.2000, p. 2.

¹⁶⁹ Commission Communication concerning the establishment of Eurojust, 22.11.2000 (COM(2000)746). Draft Council Decision establishing Eurojust of 19.10.2001 (Document EUROJUST 12 No 12727).

¹⁷⁰ In this Green Paper a distinction is made between hybrid cases, which concern offences defined for the protection of the Community's financial interests at the same time as national offences, and cross-pillar cases, which concern the Community's financial interests but also third-pillar offences for which Eurojust is given jurisdiction. Cross-pillar cases are thus a specific category of hybrid cases: cooperation with the national prosecution authorities is always necessary, but in cross-pillar cases there will also have to be cooperation in Eurojust.

¹⁷¹ Cf. point 6.2.2.2(c) (dialogue between the European Public Prosecutor and the national prosecution authorities).

7.2.2. *Europol*

The European Police Office (Europol), set up under the third pillar by the Europol Convention of 26 July 1995,¹⁷² and which came into being on 1 July 1999, is charged with preventing and combating organised crime, in particular by exchanging and analysing information received from the Member States' police authorities. Discussions are in progress to extend Europol's powers and give it more operational tasks. For the moment, therefore, it is not possible to predict the precise role that Europol will be given.

Cooperation between Europol and the Commission, including OLAF, is planned with a view to ensuring an exchange of information and complementarity between their respective functions. Complementarity between the European Public Prosecutor and Europol must also be envisaged.

The exchange of information should be carefully designed and should operate in respect for data-protection principles. Sound cooperation should allow the European Public Prosecutor to enjoy access to all relevant data in matters of protection of the Community's financial interests.

By way of example, it is possible to imagine the case of a criminal organisation identified by Europol and engaging in illegal activities such as trafficking in human beings but also smuggling spirits; the European Public Prosecutor would need to have information on the aspects of the case concerning Community own resources.

But in return the European Public Prosecutor should supply Europol with any information that is relevant to it.

For example, when dealing with a case of smuggling of agricultural produce combined with a system for gathering and laundering illicit profits, the European Public Prosecutor should inform the European Police Office of the existence of such a system if there was a suspicion that it was being used for other illegal purposes, such as trafficking in stolen vehicles.

7.2.3. *European Judicial Network*

Via the Deputy European Public Prosecutors, the European Public Prosecutor should build up a specialised judicial network enabling to meet the demands placed on him. But every possible form of synergy with existing general schemes should be sought. The European Public Prosecutor could establish cooperation on a case-by-case basis with the liaison judges acting under the Joint Action of 22 April 1996.¹⁷³

A special relationship with the European Judicial Network might be even more helpful. The main task of the Network is to facilitate contacts and cooperation between the authorities with direct local jurisdiction, by participating in the dissemination of general information on the law and procedures applicable in transnational investigations. The Network, set up under the third pillar by means of a Joint Action adopted by the Council on 29 June 1998,¹⁷⁴ is made up of a series of contact points. These are officials of competent authorities within the Member States responsible for all or part of the Member State in question.

¹⁷² OJ C 316, 27.11.1995, p. 1.

¹⁷³ The Joint Action of the Council of 22 April 1996 formalised the practice of exchanging judges and officials with expertise in judicial cooperation procedures on the basis of bilateral or multilateral arrangements (OJ L 105, 27.4.1996, p. 1).

¹⁷⁴ OJ L 191, 7.7.1998, p. 4.

Since the European Judicial Network is concerned primarily with direct bilateral relations between competent authorities, its functions are both different from and complementary to those of the European Public Prosecutor. The Network's contact points could be valuable partners for the European Public Prosecutor, especially the Deputy European Public Prosecutors, in hybrid cases combining Community and national interests.¹⁷⁵ In practice, it is possible to envisage the Deputy European Public Prosecutors attending certain meetings of the Network (if invited).

Question 15 How would the relationship between the European Public Prosecutor and those involved in cooperation in criminal matters in the European Union be best organised?

7.3. Relations with Community institutions and other bodies

7.3.1. General

The institutions and other bodies set up by the EC and Euratom Treaties and their staff should be under an obligation to refer to the European Public Prosecutor or inform him of any fact that might constitute an offence within his jurisdiction that comes to their knowledge.¹⁷⁶

The question arises how far this information should still be sent to OLAF as the current legislation provides.¹⁷⁷

7.3.2. Future role of OLAF

The responsibility incumbent on the European Anti-fraud Office under the legislation concerns the protection of the Community's financial interests against unlawful conduct for which administrative or criminal proceedings can be taken. From its inception OLAF has enjoyed administrative investigation powers, a portion of the findings of its operational activity being intended for the national judicial authorities. The decision establishing OLAF provides: "*The Office shall be in direct contact with the police and judicial authorities.*"¹⁷⁸

The establishment of a European Public Prosecutor responsible for protecting the Community's financial interests would significantly affect OLAF's current role in that investigations and prosecutions in this area would be carried out at Community level. The substantive jurisdiction (compilation of facts) of the Office and the European Public Prosecutor would partly overlap, and the relationship between them must be clearly defined.¹⁷⁹

The current obligations to inform OLAF would have to be adapted in line with the duty to refer cases to the European Public Prosecutor. And to avoid unnecessary wasted investigation efforts, the European Public Prosecutor should be able to use OLAF's findings for his own

¹⁷⁵ Cf. point 6.2.2.2 (allocation of cases).

¹⁷⁶ The institutions are defined by Article 7 of the EC Treaty as the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors. Other bodies means all the other bodies.

¹⁷⁷ Article 7 of Regulations Nos 1073/99 and 1074/99; Article 2 of the model decision annexed to the inter-institutionnel Agreement of 25.5.1999.

¹⁷⁸ Article 2(6) of the Commission decision of 28.4.1999.

¹⁷⁹ Cf. point 6.1 (information and referrals).

purposes.¹⁸⁰ This means there must be an obligation for the Office to transmit information to the European Public Prosecutor.

While preserving the *acquis communautaire* relating to administrative checks and inspections, OLAF's status and functions would have to be reviewed in the light of the powers conferred on the European Public Prosecutor. Several options are conceivable, though detailed presentation would be out of place in this Green Paper. The Commission wishes first to evaluate the current arrangements, as required by the legislation.¹⁸¹ All that will be set out here is a few basic choices that will have to be made.

First, there is the question whether OLAF should be given judicial investigation powers within the Community institutions and bodies, for the establishment of a European Public Prosecutor guaranteed by a national judge of freedoms or a special chamber of the Court of Justice would open the possibility of judicial review over the Office.

Depending on the answer to that question, it will be necessary to consider whether OLAF's functional duality – currently a Commission department enjoying independence in its investigative function – should be preserved or whether part of the Office should be fully detached from the Commission. In any event, these questions cannot be answered before the evaluation of the current rules governing OLAF which the legislation requires the Commission to produce.

Question 16 In the run-up to the Commission's evaluation of the rules governing OLAF, what factors related to the relationship between the Office and the European Public Prosecutor seem most meaningful to you?

7.4. Relations with third countries

Within the bounds of his/her area of competence, the European Public Prosecutor would have to deal directly with third-country competent authorities in the area of mutual judicial assistance.

But mutual judicial assistance with third countries is governed by conventions to which the Member State but not the Communities are parties. The hypothesis of conventions to which the Communities themselves are parties cannot be excluded. It would be helpful if such agreements allowed the European Public Prosecutor to issue international letters rogatory to the signatory countries' judicial authorities.

But as matters stand the simplest solution is to allow the European Public Prosecutor to ask the prosecution authorities of the Member States to issue direct requests for judicial assistance to the third country in accordance with the relevant rules of international law. These authorities could be placed under an obligation to act accordingly.

Where there is routine cooperation with a given third country, it would be helpful if the European Public Prosecutor had a central contact point there for all cases linked to the protection of the Community's financial interests.

¹⁸⁰ Cf. point 6.3.4 (evidence).

¹⁸¹ This Green Paper is without prejudice to the report evaluating the application of Regulations Nos 1073/99 and 1074/99 provided for by Article 15 of those Regulations, which the Commission will prepare in the light of the prospect of the establishment of the European Public Prosecutor.

Of all the Community' relations with third countries, those with the countries which have applied for accession are of particular importance. They receive and will continue to receive significant levels of aid from the Community budget. The experts from the applicant countries have accordingly been involved in the preparatory work i.e. the Corpus Juris.¹⁸²

Question 17 *What type of relations should the European Public Prosecutor maintain with third countries, and in particular applicant countries, in order to improve efforts to combat activities which damage the Community's financial interests?*

¹⁸² Study on criminal and administrative penalties, recovery, denunciation and the Corpus juris in the applicant countries, general report, Ch. Van den Wingaert, 19.9.2001 (forthcoming).

8. JUDICIAL REVIEW OF ACTS OF THE EUROPEAN PUBLIC PROSECUTOR

The Commission has proposed providing in the EC Treaty that the Community legislation should lay down “*the general conditions governing the performance of the functions of the European Public Prosecutor and ... in particular ... (c) rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.*”

As seen above, the European Public Prosecutor would be subject to several types of review. For one thing, the judicial guarantee would be provided by the *a priori* review by the national judge of freedoms and the committal review court.¹⁸³ For another, the European Public Prosecutor could be held liable in disciplinary proceedings.¹⁸⁴ Judicial review arrangements remain to be determined.

A judicial review procedure should be available against any act done by the European Public Prosecutor that restricts individual fundamental rights.

8.1. Reviewable acts of the European Public Prosecutor

8.1.1. Acts of investigation entailing a restriction or deprivation of personal liberty

Of all the acts of investigation done by the European Public Prosecutor, those entailing a restriction or deprivation of individual liberty should at least be reviewable. These are acts ordered by the courts on application from the European Public Prosecutor: arrest warrant, preventive custody or release on bail.

In all Member States the accused now always has the right to apply for review of such acts in accordance with the procedures of domestic law, as required by Article 5(4) of the European Human Rights Convention. Establishing the European Public Prosecutor, therefore, would not entail any addition to Community law here, as a simple reference to national law would suffice.

8.1.2. Other acts of investigation

As regards acts of investigation by the European Public Prosecutor authorised by the judge of freedoms (seizure, freezing of assets, interception of communications, covert investigations, controlled deliveries, etc.), the Commission’s opinion is that the establishment of the European Public Prosecutor should not constitute the occasion either for increased opportunities for time-saving devices using new review procedures or for abolishing existing national review procedures.

The national review procedures relating to the measures concerned here vary from one Member State to another. Where they exist, they would remain available against the European Public Prosecutor.

By way of example, if a search is to be made in Member State A under an authorisation given to the European Public Prosecutor by the court in Member State B, such judicial

¹⁸³ Cf. point 6.4.2 (judge of freedoms).

¹⁸⁴ Cf. points 4.1.2.2 and 4.2.1.1 (disciplinary rules applying to the European Public Prosecutor and the Deputy European Public Prosecutors).

review facilities as exist in Member States B and A would be available against the authorisation itself (challenge to the right to search) and acts done under it (time and search procedure).

But for the sake of efficiency in action taken by the European Public Prosecutor, it would be desirable to provide for a minimal measure harmonising judicial review procedures – the principle that applications for review do not have suspensory effect.

Autonomous acts of investigation by the European Public Prosecutor (documentation, hearings and questioning, ...) would generally not be open to attack as such.

8.1.3. *Case closed or not pursued*

The decision to close a case would be in the European Public Prosecutor's discretion. But there is the question whether the Communities as victim should have standing to act against a closure decision taken by the European Public Prosecutor on a discretionary basis, in certain cases at least.

Since the European Public Prosecutor acts fully independently, the Communities might be of the opinion that a case should be prosecuted even though the Prosecutor has concluded that he could close it.

Such a divergence might relate, for example, to the adequacy of the evidence gathered. There is also the possibility that a settlement is reached by the European Public Prosecutor but on a basis which the Communities consider inadequate.¹⁸⁵

The rights of the Communities as victim are always by definition¹⁸⁶ determined by the national criminal law of the Member State of trial, which raises the question of their substance if no prosecution is brought in any of the Member States. But if the Communities were to have standing to apply for review of the European Public Prosecutor's decisions to close cases, there follows the question of the type of procedure: administrative review? judicial review? and if so, in what court?

8.1.4. *Committal for trial*

The committal order would be reviewable on the same basis in the national courts as those provided for by national law regarding committal orders issued by or for national prosecuting authorities. Basically any trial court will verify whether it actually has jurisdiction under the rules of international jurisdiction.

The only specific question regarding committals by the European Public Prosecutor is whether the discretionary choice of Member State of trial where there are several that might be "eligible" should be amenable to judicial review on application by the accused. The accused might claim an interest in the matter as the choice of State will determine the place, the law and the language of the trial.¹⁸⁷

But there are answers to all these arguments. The matter of geographic remoteness is not so important if it is borne in mind that the accused has himself been operating in several Member States and therefore accepting the risk. As for the applicable law, the principle of mutual

¹⁸⁵ Cf. point 6.2.2.1 (settlement).

¹⁸⁶ Cf. point 6.3.3 (the Communities as ordinary victims).

¹⁸⁷ Cf. Article 28(1)(d) of the Corpus juris.

recognition and the common core of fundamental rights shared by the law of criminal procedures in the Member States mean that the objection is not insurmountable. And on the language question, the right to an interpreter secured for the accused by Article 6(3)(e) of the European Human Rights Convention provides a simple answer.

Conversely, there are many drawbacks to offering the accused the discretionary right to choose the Member State of trial. The competent court would have to be determined, which once again raises the question of establishing a special Community court. It does not go without saying that the committal order directly and individually concerns the accused – which is a general condition for the admissibility of an individual action. Basically, introducing review on this basis would weaken the principle of a common investigation and prosecution area. It would open the way to systematic challenges by the defence for potential dilatory purposes. This hypothesis could therefore be entertained only within very strict legal limits.

Question 18 What procedures should be available for judicial review of acts done by the European Public Prosecutor or under his authority in the exercise of his functions?

8.2. Right to review

More generally, it is necessary to locate the entire scheme (European Public Prosecutor, judge liberties, committal review court, trial court) within the existing court systems both nationally and in the Community.

8.2.1. Review under domestic law

8.2.1.1. At the preparatory stage

In all logic, the possibilities for seeking review of decisions by the national judge of freedoms would be those provided for by domestic law. The same applies to challenges addressed not to the investigation measure as authorised by the court but to the way in which it is executed by the European Public Prosecutor. And review should be available on application by a third party affected by the measures who has no possibility of making his views known to the judge of freedoms (such as the author of correspondence that is seized).

The possibilities for review of decisions by the committal review court would be those provided for by domestic law under the options for a national court or those for Community actions under the option of a Community Pre-Trial Chamber, as the case may be.

Given the preferences expressed by the Commission, the general principle would be to refer to national law.

8.2.1.2. At the trial stage

The proposal to establish a European Public Prosecutor should not cause upheavals in the national judicial systems. The Commission is of the opinion that domestic review procedures should not be affected.

The need for equivalent protection of the Community's financial interests might justify an attempt to align the organisation of the various review procedures available in the Member States in this area. It might thus be possible to lay down a number of common principles at

Community level.¹⁸⁸ The Member States could, for example, undertake to make provision for appeal against any first-instance judgment or, in the event of an appeal by the sentenced person, the exclusion of any more severe penalty being imposed than the one already handed down. But this would not be indispensable for the efficient operation of the European Public Prosecutor; the Commission would like, in its proposals, to concentrate on the pre-trial phase.

To stay more proportionate to the objective pursued, the European Public Prosecutor should slot into the national judicial systems. This should result in provision being made for the same possibilities of review as are open to domestic prosecuting bodies. In particular, the European Public Prosecutor should in principle be able to appeal against any acquittal decision.

8.2.2. *Review by the Court of Justice*

In order to preserve the existing balance between Community and national powers, the Commission takes the view that the Court of Justice should have no power to contest decisions given by national criminal courts. The proposed arrangements must be situated in relation to the Community court system, as the former are not entirely without impact on the latter.¹⁸⁹

Under the Treaty, the Court of Justice is charged with ensuring that, in the interpretation and application of Community law, the law is observed. Consequently, as far as the European Public Prosecutor is concerned, the Court of Justice should have the power to issue a preliminary ruling under Article 234 of the EC Treaty on the interpretation of Article 280a and any Community rules adopted to implement it.

The establishment of a European Public Prosecutor would not affect review procedures in respect of a failure to fulfil obligations by a Member State (Articles 226 to 228 of the EC Treaty) or a Community institution (Article 232 of the EC Treaty) insofar as the European Public Prosecutor is not regarded as a Community institution but rather as a Community body and, moreover, the Commission retains its role as guardian of the Treaties. A dispute concerning the application of Article 280a of the EC Treaty and rules implementing it could therefore be referred to the Court of Justice solely by the Commission or the Member States, as is currently the case.

Finally, as things stand with Articles 178 and 288 of the EC Treaty regarding the Community's non-contractual liability, the Community must make good any damage caused by the European Public Prosecutor and his/her staff.¹⁹⁰

If actions for *annulment* under Article 230 EC were extended to certain acts of the European Public Prosecutor, the Treaty would have to be amended accordingly. But the Commission takes the view that judicial review should, as far as possible, occur at Member State level and that, consequently, review procedures vis-à-vis the acts of the European Public Prosecutor should be organised at the level of the national judge of freedoms (see section 7.1 above).¹⁹¹

The fact remains that, depending on the option selected, the jurisdiction of the Court of Justice could be extended to certain types of litigation. An initial hypothesis was to give the

¹⁸⁸ See in particular Article 27 of the *Corpus juris*.

¹⁸⁹ COM (2000) 34, point 5 (the Union court system), *supra*.

¹⁹⁰ Court of Justice, Case C-370/89 *SGEEM and Etroy v EIB* [1992] ECR 6211 (judgment given on 2.12.1992).

¹⁹¹ Cf. point 6.4.2 (judge of freedoms).

accused the possibility of challenging the European Public Prosecutor's *choice of Member State of trial*, a direct action being provided for, presumably in the Court of First Instance of the European Communities.

A second hypothesis was that the Court of Justice should have jurisdiction to deal with conflicts of jurisdiction raised by the European Public Prosecutor or the national courts, whether between Member States or between the latter and the Community. In particular, if the national committal review court had jurisdiction to review manifest errors in the European Public Prosecutor's choice of forum, the Court of Justice should be available to hear actions by the European Public Prosecutor in the event of jurisdiction being declined or of negative conflicts of jurisdiction subject to the principle of cases being concluded within a reasonable period of time.

In any event, none of these hypotheses would violate the principle jurisdiction to hear criminal cases on the merits lies with the national courts.

9. CONCLUSION

By way of conclusion, the Commission wishes to know the opinions of all circles concerned regarding the implementation of its proposal so that it can draw conclusions and, if necessary, present a fresh contribution in the preparations for the next round of Treaty amendments.

This Green Paper will have clarified the proposal made by the Commission in 2000. The preferences at this stage for certain options might prompt the Commission to propose adding new provisions to the Treaty to provide a legal basis for:

- the appointment of an independent European Public Prosecutor centralising the management of investigations and prosecutions and exercising the prosecution function in the competent courts in the Member States in cases concerning the protection of the Community's financial interests; and
- the adoption of a set of specific rules determining among other things:
 - the rules applicable to him, typified by a highly decentralised organisation based on Deputy European Public Prosecutors and the assistance of national investigation services in the Member States;
 - the rules of substantive criminal law to be applied by him, with a trend towards unification of the more specific among them (offences within his jurisdiction, the corresponding penalties, limitation periods) or simply towards harmonisation (liability of legal persons), and a reference to national law for the remainder, representing in fact the bulk;
 - the criminal procedure applied by the European Public Prosecutor in full respect for fundamental rights on the basis principally of mutual recognition of measures of investigation provided for by national law (searches etc.), in some cases harmonised at European level (European arrest warrant etc.), subject to review by the national judge of freedoms, and secondarily of certain Community rules (opening, closure, European model reports etc.);
 - exceptions from the mandatory prosecution principle and the distribution of cases, particularly hybrid cases, with the national prosecution authorities;
 - rules governing the admissibility of evidence, based on the principle that evidence that is admissible in one Member State should be admitted by the courts of all the other Member States;
 - relations between the European Public Prosecutor and others involved internationally, in particular the possibilities for exchanging information with respect for data protection;
 - procedures for reviewing acts done under the authority of the European Public Prosecutor, principally those of domestic law and secondarily those to be provided for, if necessary, in the Court of Justice.

The organisation of the courts (judge of freedoms, committal review court, trial court) and the trial stage, and the execution of penalties would remain entirely governed by national law, subject to the principle that the prosecution is in the hands of the European Public Prosecutor.

The proposal for Community centralisation of the management of investigations and prosecutions in the field of the protection of the Community's financial interests in order to guarantee efficient and equivalent enforcement in a common area is now opened to a great debate unconstrained except by respect for fundamental rights and the principles of subsidiarity and proportionality.

ANNEX 1
**Additional Commission contribution to the Intergovernmental Conference on
institutional reforms of 29 September 2000**

**The criminal protection of the Community's financial interests: a European
Prosecutor**¹⁹²

Introduction

In its opinion of 26 January 2000 "Adapting the institutions to make a success of enlargement",¹⁹³ the Commission suggests in connection with the protection of the Community's financial interests that a legal basis be created in the Treaty for setting up a system of rules relating to offences and the penalties that they incur, to the requisite procedural provisions for the prosecution of these offences and to the powers and tasks of a European Public Prosecutor responsible for detecting fraud offences throughout European territory and for prosecutions in the national courts. In the framework of its new anti-fraud strategy, the Commission has confirmed its wish to strengthen the protection of the Community's financial interests in this respect.

In 1998 fraud and other irregularities affecting to the Community's financial interests accounted for a total estimated by the Member States and by the Commission at over a billion euros.¹⁹⁴ The involvement of organised crime in fraud to the detriment of the Community's financial interests and the transnational character of such crime presuppose cooperation with fifteen legal orders applying different rules of both substance and procedure. The current methods of cooperation often prove insufficient to overcome the difficulties faced by the judicial and police authorities in their fight against such fraud.

These difficulties will increase as the number of Member States and the number of operators and administrations involved in the management of Community funds rise.

The powers which this Communication proposes should be vested in a European Public Prosecutor would be limited strictly to the protection of the Community's financial interests as already defined and circumscribed in Article 280(1) of the EC Treaty.

The Communication proposes that only the essential characteristics of the office would be laid down in the Treaty (appointment, removal, duties, and independence), leaving the rules and mechanisms governing its operation to be regulated by secondary legislation.

1. THE COMPLEXITIES TO BE OVERCOME IN VIEW OF THE COMMUNITY'S SPECIFIC RESPONSIBILITIES FOR THE PROTECTION OF THE COMMUNITY'S FINANCIAL INTERESTS

The shortcomings of the current mechanism are due mainly to the fragmentation of the European criminal law-enforcement area, which results from the fact that the national police and judicial authorities are empowered to act only on their own territory. The traditional methods of mutual judicial assistance and cooperation between police forces remain

¹⁹² COM (2000) 608.

¹⁹³ COM (2000) 34, http://europa.eu.int/comm/igc2000/offdoc/opin_igc_en.pdf.

¹⁹⁴ European Commission, Annual report 1998: protection of the Communities' financial interests and the fight against fraud (COM (99) 590), point 1.3.

cumbersome and are often unsuited to an effective fight against transnational fraud. And experience has shown the difficulties of making a success of administrative inquiries in terms of prosecutions.

But the Community's financial interests ought to be protected especially rigorously and in equivalent fashion in all the Member States, since the money involved represents pooled resources. Responsibility for ensuring that the Community's financial interests are protected rests on the Member States and the Community both. In these circumstances, the European Union must be able to guarantee the Member States and their citizens that offences of fraud and corruption are genuinely prosecuted in the courts.

1.1 The fragmentation of the European law-enforcement area

Article 280 EC states that measures adopted by the co-decision procedure to counter fraud and any other illegal activities affecting the financial interests of the Community "*shall not concern the application of national criminal law or the national administration of justice*". The EC Treaty as it stands, therefore, confers no powers to set up a European criminal law-enforcement area comprising a common judicial body such as a prosecutor.

The signing of the Convention on the protection of the financial interests of the European Communities of 26 July 1995 and of its additional protocols constitutes a first step towards the criminal protection of the Community's financial interests. These documents, which are the fruit of cooperation between governments under the "third pillar", are an important asset since they define fraud, misapplication of funds and corruption as offences incurring criminal penalties in all Member States.

But the Convention and its protocols have not yet entered into force as they have not been ratified by all the contracting parties. When they are in force, there will still be a degree of uncertainty as to the way in which they will be transposed into national criminal law by all the parties. What is more, these provisions alone will not suffice to eliminate the fragmentation of the European law-enforcement area as prosecutions will still be brought at national level.

Thus, given that there are fifteen different systems of criminal law, the Community has only very limited means to ensure effective and equivalent protection of the Community's financial interests in the Member States, as required by the Treaty. In the current situation, however effective the administrative coordination that the European Anti-fraud Office can generate, criminal proceedings remain uncertain. The Community does not have the instruments to supplement preventive action and administrative inquiries with a prosecution function.

Example:

The effect of the fragmentation of judicial authorities between the Member States is that there can be competing, partial or non-existent proceedings.

The ban on beef and veal exports from certain areas of the Community owing to BSE infection was circumvented by operators in three Member States when exporting to a non-member country. Commission action and the exposure of this scheme to defraud the agricultural subsidy system led thereafter to the opening of competing prosecutions in several Member States against the same offenders for the same offences. Yet although the proceedings began in mid-1997, the case has come to judgment in only one Member State.

This situation is unacceptable, in particular in areas of Community activity where subsidies are the rule, such as the common agricultural policy.

1.2 The traditional methods of judicial cooperation between the Member States are cumbersome and inappropriate

National mechanisms are the basis for criminal protection against transnational crime and remain essential. There are also international forms of cooperation in criminal matters, now boosted by the strengthened provisions for judicial cooperation under the third pillar.

But the development of organised crime to the detriment of the Community's financial interests makes the traditional instruments of mutual judicial assistance inadequate, and the progress achieved in judicial cooperation is also insufficient. There is no possibility of providing an interface between the Community level and the national judicial authorities in the Treaty as it stands.

Example:

The inadequacy of cooperation between Member States in criminal matters generates delays, dilatory actions and unpunished offences. In transnational financial fraud cases it all too often allows evidence to be destroyed and suspects to disappear. This is particularly prejudicial when it comes to reconstructing downstream financial channels used in cases of fraud against the Community's financial interests.

To take but one example, on the occasion of a public hearing before the European Parliament, a prosecutor from a Member State stated that he had had to deal with as many as 60 successive actions in the requested State in a single case likely to affect the Community's financial interests. The actions were brought one after the other to benefit in each instance from the time needed by the judge to dismiss them. It follows that, when the international letters rogatory are executed, they will generally be of no real use.

1.3 Difficulties in making administrative inquiries culminate in successful prosecutions

Numerous cases based on the Community experience in recent years thus testify to persistent obstacles in a field where precisely the specific responsibilities of the Community and the Member States create the need for a clear perception of the interests to be protected and for greater efficiency in proceedings in terms of the Community territory.

Example:

The transmission of information between Member States and between them and the European Anti-fraud Office (OLAF) is hampered by differences in the rules governing prosecutions in each Member State. If, for the same offence, the inquiry is handled in some Member States by a judge but in others by an administrative authority, direct contact between the two is generally impossible in both fact and law. Moreover, not all the relevant national authorities even have access to information under the various national rules, in particular those concerning the secrecy of tax and business information or the confidentiality of criminal investigations.

Example:

An attempt to prosecute the organisers of an major transnational fraud detrimental to the Community's own resources in two Member States, A and B, is an exemplary real case in this respect. A judge in a third Member State (C), where the accused actually resided, to whom the case was referred by the national customs authorities declared their action inadmissible on the specific ground that the certificate provided by the authorities of Member State A was insufficient for the purpose of proceedings in Member State C. This certificate confirmed, however, that the offence was punishable under the law of Member State A and referred to the penalties incurred by offenders in that State. Under the rules of

Member State C, however, the judge was unable to admit the certificate issued by the customs authorities of Member State A as valid evidence.

2. THE PROPOSED MECHANISM

In the absence of a specific Community institutional structure the existing mechanisms, however legitimate and irreplaceable they may be, amount to obstacles to prosecution by the police and the courts and advantages for the criminal. Given the design of the Treaty, therefore, the Commission recommends that in order to respond to the current situation the primary legislation should be amplified to allow the creation of an office of European Public Prosecutor, its organisation and operation being governed by secondary legislation. This amendment would be confined to protection of the Community's financial interests.

2.1 Mature and detailed preparatory study

The Commission proposal to the Intergovernmental Conference is based on detailed preparatory work. For nearly ten years now, at the request of the European Parliament and the Commission, a group of experts in criminal law from all the Member States has been working on the criminal protection of the Community's financial interests. Their work produced the proposal for a set of rules for the criminal protection of the Community's financial interests, the well-known Corpus Juris.¹⁹⁵ It recommends the creation of a unified Community law-enforcement area as regards the preparatory stages of court proceedings precisely by the harmonious insertion in the national systems of a European Public Prosecutor, excluding any communitarisation of the administration of criminal justice.¹⁹⁶

The authors of the Corpus Juris specified the possible architecture of an independent European Public Prosecutor, responsible in matters of the protection of the Community's financial interests for directing investigations and prosecuting cases in the relevant national courts and for coordination with national procedures.

The organisation would be highly decentralised. The European Public Prosecutor would be supported by Deputy European Prosecutors in the Member States so as to secure the link between the Community mechanism and the national legal systems.

2.2 The object of the reform

In this spirit, the Commission recommends the institution of an independent European Public Prosecutor to protect the Communities' financial interests.

This would supplement the reform of the Community courts as proposed by the Commission in its additional contribution to the Intergovernmental Conference of 1 March 2000¹⁹⁷ by

¹⁹⁵ Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union, under the responsibility of Ms Delmas-Marty, Economica, Paris, 1997. The Corpus Juris is also available on the Internet (<http://www.law.uu.nl/wiarda/corpus/index1.htm>).

¹⁹⁶ In response to these recommendations, the experts more recently completed a comparative study on the need for and legitimacy and feasibility of the Corpus Juris, analysing the potential impact of a European Prosecutor on national prosecution systems: *The Implementation of the Corpus Juris in the Member States*, Ms Delmas-Marty / J.A.E. Vervaele, Intersentia, Utrecht, 2000.

¹⁹⁷ Additional Commission contribution to the Intergovernmental Conference on institutional reform: *Reform of the Community courts (COM (2000) 109 final)*.

adding a judicial body with the function of bringing prosecutions in the courts of the Member States and of exercising ongoing control of criminal investigations across the Community territory in order to enforce the law and protect the Community's finances. The point is not to communitarise the administration of criminal justice, which would remain within national powers.

2.3 The methods of the reform

In the Commission's view, the Treaty will need amending only as regards the European Public Prosecutor's appointment and removal from office and the definition of his main tasks and the principal characteristics of his function, to be set out in a new Article 280a. The Treaty would provide for secondary legislation to lay down the regulations applicable to him and govern his operation.

2.3.1 The appointment of the European Public Prosecutor (paragraphs 1 and 2 of the new Article 280a)

The Commission proposes that the European Public Prosecutor be appointed by the Council, acting by a qualified majority on a proposal from the Commission with the assent of the European Parliament. The proposal, which should be made by the Commission in view of its specific responsibility for protecting the Community's financial interests, would be submitted, for example, in the form of a list of candidates from which the Council could select the European Public Prosecutor. The Commission further considers that conditions governing the removal from office of the European Public Prosecutor should be laid down (*paragraph 2 of new Article 280a*). Regarding the term of the office, the Commission proposes a non-renewable term of six years (*paragraph 1 of new Article 280a*). An essential characteristic of the European Public Prosecutor must in particular be stressed: his independence as a judicial officer (*paragraph 2 of new Article 280a*). Apart from these essential elements, the revised Treaty would leave the regulations governing the Prosecutor in respect of such things as structure, location of offices, etc. to be determined by Community secondary legislation in accordance with the procedure laid down in Article 251 of the Treaty, which calls for a qualified majority in the Council and co-decision with Parliament.

2.3.2 Conditions for the exercise of the European Public Prosecutor's functions (paragraph 3 of the new Article 280a)

With regard to the conditions for the exercise of the European Public Prosecutor's functions, a specific mechanism confined to activities detrimental to the Community's financial interests is necessary to ensure smooth operation in terms of both substantive criminal law and criminal procedure. These rules should be adopted by the Council by the co-decision procedure.

To clarify the Prosecutor's powers, offences relating to activities prejudicial to the Community's financial interests (fraud, corruption, money laundering etc.) and the relevant penalties should be defined more explicitly at Community level. It is difficult to reconcile the rigour of the criminal law with the existence of differences throughout the Community if the point is to ensure the effective and equivalent protection of the Community's financial interests. The definitions of these common offences should therefore be uniformly applicable in the national legal systems by the national criminal courts, as the ordinary courts of Community law, and this implies the adoption of specific rules. The provisions drawn up under the Convention of 26 July 1995 referred to above and its additional protocols already provide a solid basis that has the agreement of the Member States.

Moreover, the performance of the Prosecutor's duties will have to be made subject to rules of procedure (on such points as the mechanisms for referring cases to the Prosecutor, the Prosecutor's powers of investigation, or the initiation and termination of enquiries) and rules of judicial review (on such points as the review of acts done by the Prosecutor, whether or not under a warrant granted by a national judge). The Corpus Juris describes some possible options for rules of procedure and coordination with the national authorities. Rules of this kind will in any event have to be spelt out in proposals for secondary legislation, which will have to respect the national legal systems and traditions. Provision must therefore be made for the enactment of the following, by the procedure laid down in Article 251 of the Treaty:

- rules concerning offences (subparagraph 3(a) of the new Article 280a);
- rules of procedure applicable to the activities of the Prosecutor and rules governing the admissibility of evidence (subparagraph 3(b) of the new Article 280a);
- rules for the judicial review of the Prosecutor's actions, such rules being essential for the performance of his duties (subparagraph 3(c) of the new Article 280a).

These provisions of secondary legislation should also determine how this Community mechanism meshes with the national legal systems.

In conclusion, the Commission proposes that the Conference supplement the current provisions concerning the protection of the Community's financial interests with a legal basis allowing:

- the appointment of an independent European Public Prosecutor exercising the prosecution function in the courts of the Member States in the field of the protection of the Community's financial interests and within the framework of specific rules adopted for this purpose; and
- the subsequent adoption through secondary legislation of:
 - the regulations applicable to his office,
 - rules of substantive law concerning the protection of financial interests by the European Public Prosecutor (offences and penalties),
 - rules governing criminal procedure and the admissibility of evidence,
- (c) rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.

<p style="text-align: center;">Current text of EC Treaty</p> <p style="text-align: center;"><i>Article 280</i></p>	<p style="text-align: center;">Proposed text</p> <p style="text-align: center;"><i>Article 280</i></p>
<p>1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.</p> <p>2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.</p> <p>3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.</p> <p>4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.</p> <p>5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.</p>	<p>1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.</p> <p>2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.</p> <p>3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.</p> <p>4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. Without prejudice to Article 280a, these measures shall not concern the application of national criminal law or the national administration of justice.</p> <p>5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.</p> <p style="text-align: center;"><u>Article 280a</u></p>

1. To contribute to the attainment of the objectives of Article 280(1), the Council, acting on a proposal from the Commission by a qualified majority with the assent of the European Parliament, shall appoint a European Public Prosecutor for a non-renewable term of six years. The European Public Prosecutor shall be responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community's financial interests and their accomplices and for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences in accordance with the rules provided for by paragraph 3.

2. The European Public Prosecutor shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries. In the performance of his duties, he shall neither seek nor take any instructions. The Court of Justice may, on application by the European Parliament, the Council or the Commission, remove him from office if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the regulations applicable to the European Public Prosecutor.

3. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular:

(a) rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community's financial interests and the penalties incurred for each of them;

(b) rules of procedure applicable to the activities of the European Public Prosecutor and rules governing the admissibility of evidence;

(c) rules applicable to the judicial review of procedural measures

	taken by the European Public Prosecutor in the exercise of his functions.
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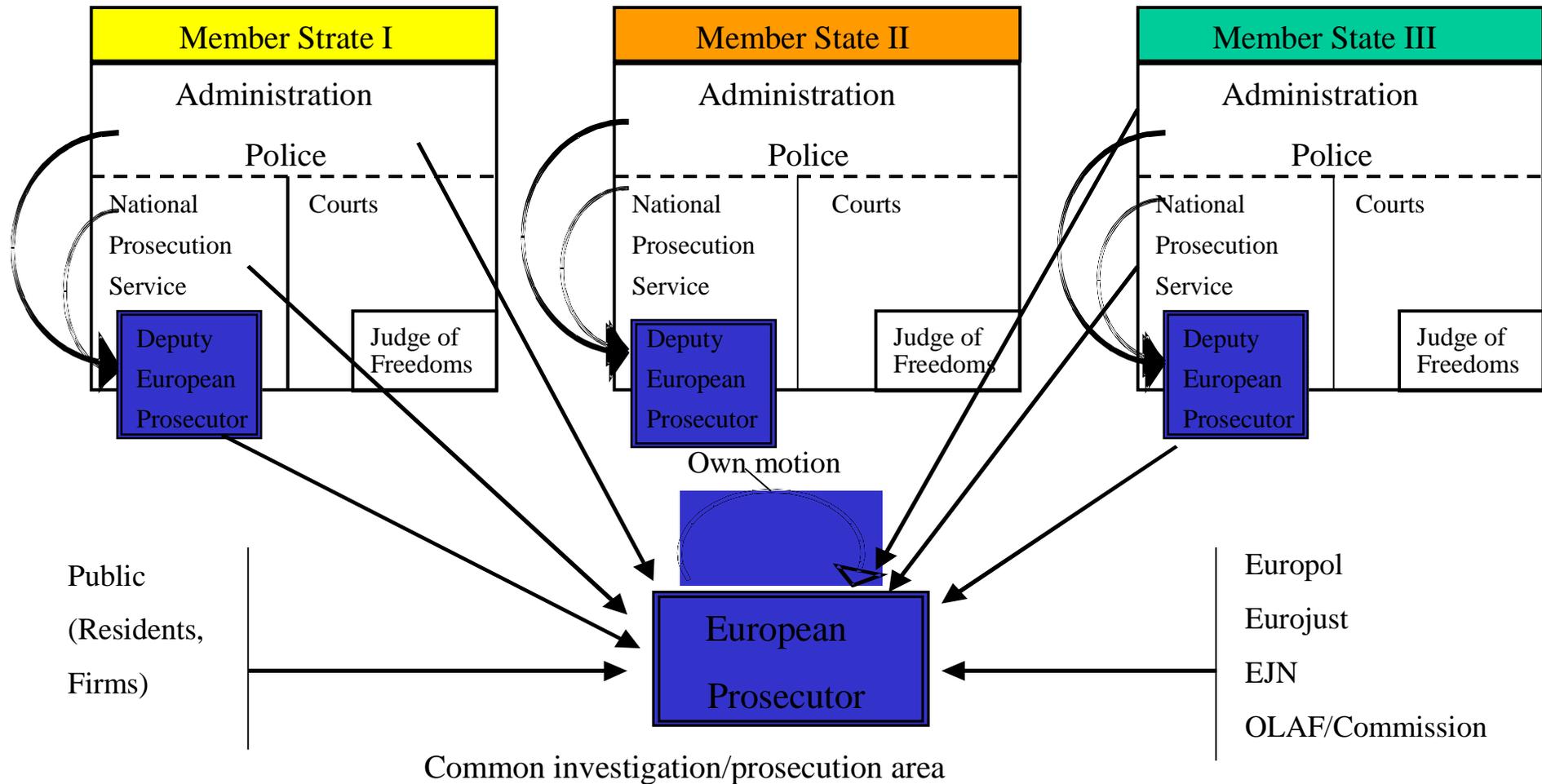
ANNEX 2

Simplified procedures

The charts below display some of the main features of the procedure that the European Public Prosecutor might follow. They reflect neither all the situations nor all the options envisaged in the Green Paper. They are here to help the reader understand the text, not to replace it.

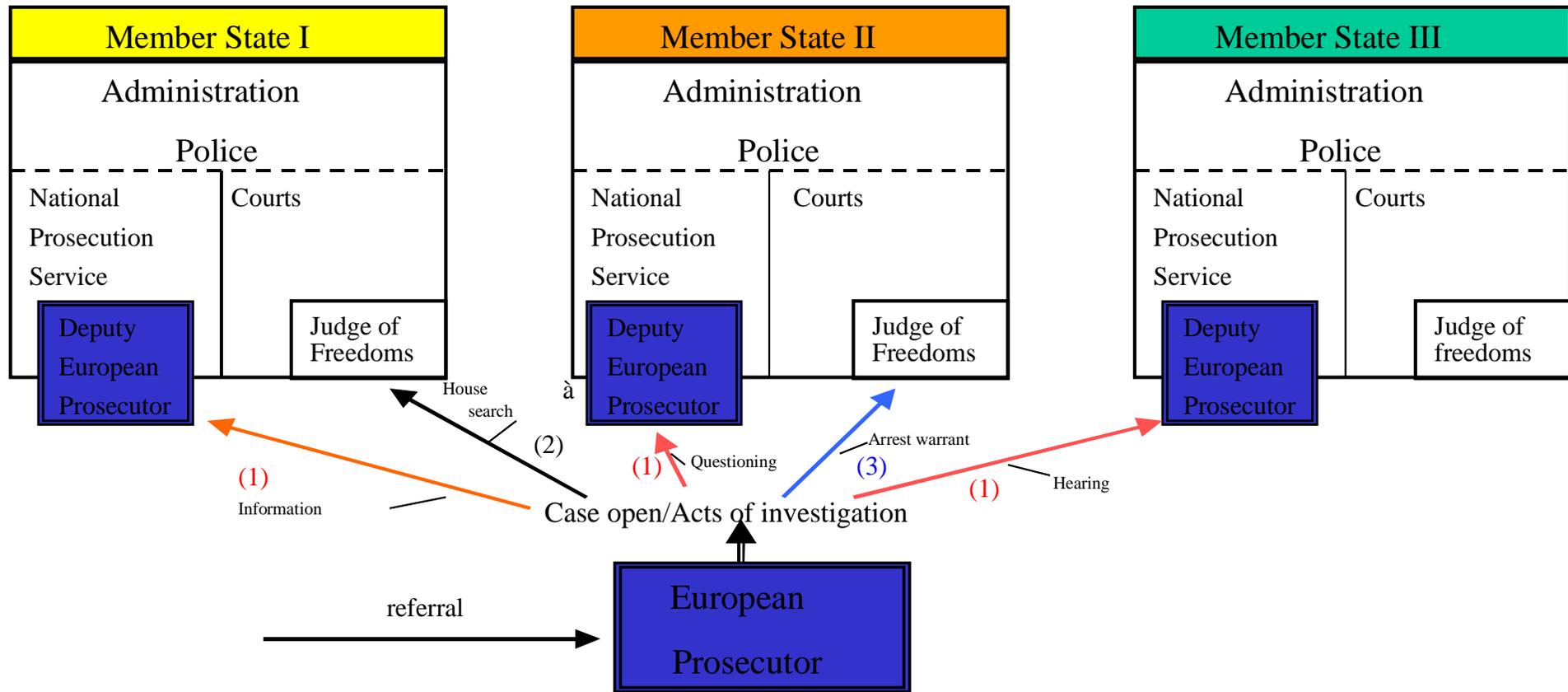
Structure of European Public Prosecutor

1. Information/Referral



This table does not reflect a specific institutional structure but a functional structure in the Member States. It does not Express a view on the authority exercising the national prosecution function or the judge of freedoms.

2. Investigation stage



(1) = Acts of investigation in the European Public Prosecutor's discretion/Legal effect in common area

(2) = Acts of investigation reviewable by judge of freedoms

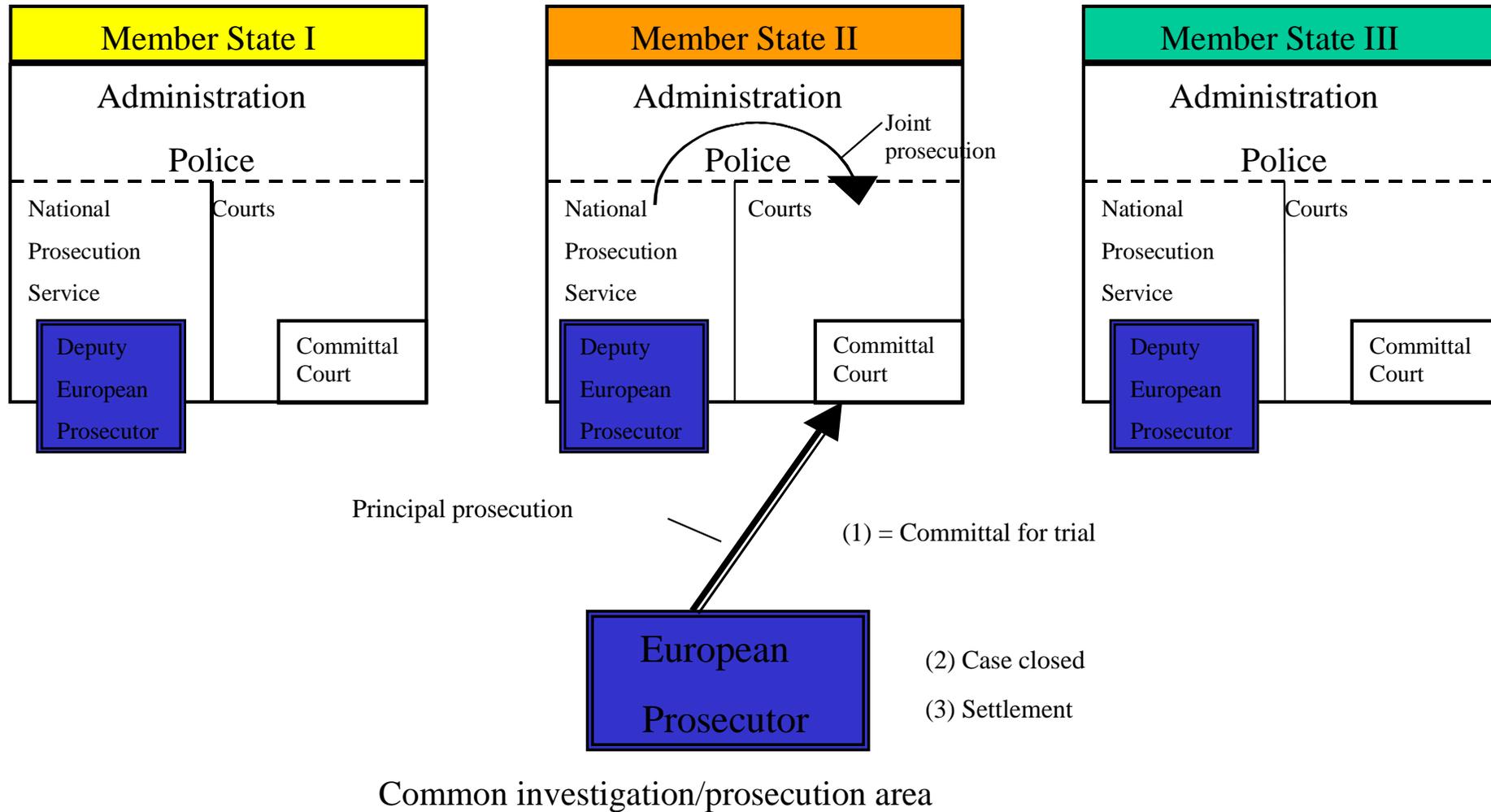
(3) = Acts of investigation ordered by judge of freedoms

} Mutual recognition in Member States

Common investigation/prosecution area

The acts of investigation are given by way of example

3. Prosecution stage



Preferred solution: single court. The European Public Prosecutor could also commit for trial in several Member States.

ANNEX 3

Hypothetical fraud case handled by the European Public Prosecutor

The example of a fraud case given here - including all facts and names – is pure fiction and has been imagined solely as an illustration for the Green Paper.

THE FACTS

Our hypothetical firm, “Meat International”, is headquartered in London and has been in the meat import-export business for years. Following a food scare in the business, it has considerably increased its imports of quality meat from Latin America, Brazil and Argentina in particular. In parallel, it has exported significant quantities of Community meat to Russia. It has used the ports of Antwerp and Lisbon for its imports and Rotterdam for exports.

Meat imports

Meat International has displayed great creativity in evading customs duties (a Community resource) to every possible extent.

- First, it has tried falsifying the nature of the goods. It has declared 20% of its quality meat imports as “offal”, subject to very low duty rates.
- Then it has falsified the origin of the goods to enjoy the benefit of preferential tariff arrangements to which it is not entitled. Argentina is entitled to export a quota of Hilton Beef to the Community at a preferential tariff rate (zero or very low customs duties). To obtain this special customs treatment, it must obtain certificates of authenticity from the Argentine Ministry of Agriculture. Meat International has systematically imported lower-quality beef from Paraguay instead of Hilton Beef. For this purpose it has used certificates issued illegally by an Argentinean civil servant, to whom they have paid US\$ 5000 per container.
- The containers were imported and released on the European Union market via the ports of Antwerp and Lisbon. Meat International Antwerp and Meat International Lisboa have filed customs declarations in their capacity as consignors. Transeurope, a haulage firm based in Madrid, was responsible for distribution from Antwerp and Lisbon to customers throughout Europe.

Meat exports

On the export side, Meat International has received subsidies (Community expenditure) to which it is not entitled.

- In Britain it has bought British meat that cannot be sold elsewhere on the Community market or exported from the Community (embargo), in large quantities at knock-down prices. The meat has been frozen and then carried illegally to Antwerp, where Label International has labelled it as meat from Belgium. It has then been exported to Russia, such exports being subsidised by the Community by its export refund scheme.

- Customs declarations have been prepared by the consignor, Meat International Antwerp. Part of the meat has been exported to Russia by sea from the port of Rotterdam, the rest being carried by road by Transeurope.

The financial loss

The gain to the firm was considerable, given the amount of customs duties evaded and refunds received. To conceal the scale of its wrongdoing, the firm set up a series of companies with no real business activity in Argentina, Europe and the Caribbean so that false invoices could be made out. The firm used these companies to make large-scale investments on the London Stock Exchange and the Lugano real-estate market. Considerable amounts of corporate income tax were thus also evaded.

CRIMINAL PROCEEDINGS WITHOUT A EUROPEAN PUBLIC PROSECUTOR

- Customs officers in Antwerp discover a container carrying quality meat from Argentina rather than the offal on the declaration. They begin to suspect that false customs declarations are being filed to evade customs duty. When Meat International Antwerp's accounts are examined, it turns out that they have been trafficking for quite some time.
- The Customs refer the case to the Belgian onderzoeksrechter (juge d'instruction). He asks the criminal investigation police to question the managers of Meat International, London, and the managers and drivers of Transeurope, Madrid; he would also like to order searches of the firms' premises. International letters rogatory are issued. Five months later, the onderzoeksrechter receives the results. He discovers that Transeurope and Meat International Antwerp (the consignor) are owned by Meat International and that there is a network set up on a permanent basis for the purpose of criminal activities.
- The Belgian judicial authorities open criminal investigations into Meat International Antwerp and Meat International. The criminal court at Antwerp convicts the managers of the two firms and sentences them to heavy fines and suspended prison terms.
- But the penalties will be difficult if not actually impossible to enforce. Meat International reacts to the news of the investigations by selling its equity holdings on the London Stock Exchange and reinvesting the proceeds in real estate in Curaçao, using its offshore firms for the purpose. Its manager, who also has Swiss nationality, has settled in Lugano following the searches. The manager of Meat International Antwerp has disappeared; so have the company's available funds.
- Meanwhile the Dutch police, during a routine check on a lorry belonging to Transeurope, discover meat with Belgian labels bound for Russia, and for some reason are suspicious. In view of the circumstances, they seize the meat. Physical checks confirm that the meat is actually of British origin and subject to embargo.
- The Dutch judicial authorities issue international letters rogatory in Belgium and Spain to gather more evidence from Meat International, Meat International Antwerp and Transeurope. They ascertain that Transeurope has links with Meat International Lisboa and that the false labels were affixed by Label International.
- The evidence is passed on to the Portuguese authorities. The Portuguese judicial authorities are informed about the case via the European Judicial Network or Eurojust. The Dutch

authorities decide to drop the case without action as the links with the Netherlands are tenuous and there is no record of previous offences.

- In Portugal, unfortunately, the Prosecution Service is faced with the problem that the evidence was not gathered in the course of action in response to the international letters rogatory in accordance with the requirements of the Portuguese law of criminal procedure. It was gathered by criminal investigation police officers and not by the Prosecution Service or an examining judge, so that the evidence is inadmissible in Portugal.
- And all the British police and judicial authorities do is execute the requests for international letters rogatory. They open no proceedings against Meat International.

CRIMINAL PROCEEDINGS WITH THE EUROPEAN PUBLIC PROSECUTOR (ON THE BASIS OF THE EUROPEAN COMMISSION'S PREFERENCES)

- The Belgian customs authorities inform the European Public Prosecutor on the basis of their suspicions regarding the firms that have filed false declarations to evade duties. The Dutch police also inform the European Public Prosecutor of the facts they have observed with the meat they have discovered, which raises suspicions of fraud against the export refund scheme. In both cases, the firms mentioned in the case are Transeurope, the carrier, Meat International Antwerp, the consignor, and Meat International.
- Because information is coordinated and centralised, the European Public Prosecutor has the advantage that he can combine information from different sources to gain a broader picture of what turns out to be a single case. For one thing, he sees the link between the two sides of the case, if only because the same firms are involved. For another, he now has enough information to realise that there is a major Community fraud case with a cross-border dimension involving transactions in many countries, which warrants investigation by him. He does not refer the case to the national authorities.
- He begins by asking the Deputy European Public Prosecutors in the Member States to seek further information about the firms concerned. The exchange of information available from the national police and judicial authorities fleshes out the file. It becomes clear that Meat International engages in extensive import business via the port of Lisbon, where it uses Meat International Lisboa as consignor. The information exchanged shows that Meat International Antwerp, Meat International Lisboa and Transeurope are all owned by Meat International.
- The European Public Prosecutor consequently suspects that there is a criminal organisation set up to commit business and financial offences to the detriment of the Community budget. To test his suspicions, he decides to order the organisation's communication (telephone, fax, e-mail) to be intercepted. He lays his decision before the judge of freedoms in the United Kingdom, the state where the main firm is headquarters, for review. Having obtained the authorisation of the judge of freedoms, interceptions are executed under the direction of the European Public Prosecutor by the competent authorities in the Member States concerned. The warrant issued by the British court enjoys mutual recognition throughout the common investigation and prosecution area. The interceptions fairly quickly provide firm evidence of the existence of the network, the scale of its criminal activity, the financial flows and the fact that the manager of Meat International is the principal perpetrator.

- Being responsible for coordinating and directing the judicial investigation, the European Public Prosecutor asks for a cross-border investigation in order to 1) question the persons who matter in the relevant firms; 2) seize the firms' accounting books; 3) freeze the firms' assets; and 4) have the managers of Meat International arrested. The Deputy European Public Prosecutors execute the requisite acts of investigation.
- An application to freeze assets is made to the judge of freedoms in the United Kingdom. He authorises the assets to be frozen and issues a European arrest warrant against the manager of Meat International. The authorisation and the warrant are enforceable throughout the common investigation and prosecution area, wherever the person and the assets concerned are to be found.
- Acts of investigation conducted in several Member States yield documentary evidence of fraudulent import and export operations, a division of labour between the firms, profit-sharing between their managers and profit-laundering. Major assets are frozen in London, while smaller sums are frozen in Antwerp and Lisbon. Documentary evidence shows that Meat International owns real estate in Lugano. To seize these assets, the Deputy European Public Prosecutor in London sends the Swiss authorities an international letter rogatory on the basis of the Council of Europe Convention on mutual judicial assistance in criminal matters and the protocol to it or a (hypothetical) European convention on mutual judicial assistance between the European Public Prosecutor and Switzerland.
- At the end of the preparatory stage, the European Public Prosecutor decides to send the chief perpetrators for trial – the companies (Meat International, Meat International Antwerp, Meat International Lisboa, Transeurope and Label International) and certain persons in positions of responsibility within them. They are accused of Community fraud and money-laundering, with membership of a conspiracy as an aggravating circumstance.
- Since the chief perpetrator has been remanded in custody in the United Kingdom, the parent firm has its head office there and most of its assets are frozen there, the European Public Prosecutor decides on the basis of criteria for assigning priority jurisdiction to prosecute in London. A court designated by the United Kingdom exercises the committal review function. He looks into three questions: 1) Was the evidence obtained lawfully? 2) Is such evidence as was obtained lawfully sufficient to justify proceedings in the criminal courts? 3) Do the courts for London have jurisdiction? The national committal review court answers all these questions in the affirmative. Since we are in a common investigation and prosecution area, the European Public Prosecutor can bring the entire case in the London court.
- The European Public Prosecutor prosecutes for the Community offences. The national prosecution service has the option of prosecuting for corporate income tax fraud. The court convicts the firms, sentences them to heavy fines and confiscates their assets. It further sentences the managers of Meat International to four years' imprisonment and the managers of the other firms to two years.
- The sentences passed in the London court are valid throughout the common investigation and prosecution area. They are executed in the United Kingdom and, on the basis of the mutual recognition principle, in Belgium, Portugal and Spain. An application is sent to Switzerland under the existing international conventions for the confiscation of the real estate in Lugano.

ANNEX 4

The Questions

General Question What do you think of the general outline proposed for the European Public Prosecutor, in particular as regards:

- his scope of action (confined to the financial dimension Community interests)?
- his powers?
- his relationship with national systems of criminal law?

Question 1 What are your views on the proposed structure and internal organisation of the European Public Prosecutor? Should the European function conferred on the Deputy European Public Prosecutor be an exclusive function or could it be combined with a national function?

Question 2 For what offences should the European Public Prosecutor have jurisdiction? Should the definitions of offences already provided for in the European Union be amplified?

Question 3 Should the establishment of the European Public Prosecutor be accompanied by certain further common rules relating to:

- penalties?
- liability?
- limitation?
- other matters?

If so, to what extent?

Question 4 When and by whom should cases be referred to the European Public Prosecutor?

Question 5 Should the European Public Prosecutor be guided by the mandatory prosecution principle, as proposed by the Commission, or by the discretionary prosecution principle? What exceptions should be provided for in each of these cases?

Question 6 Given the ideas put forward in this Green Paper, how should functions be distributed between the European Public Prosecutor and the national enforcement authorities, notably in order to see that hybrid cases are properly treated?

Question 7 Does the proposed list of investigation measures for the European Public Prosecutor seem to you to be adequate, particularly as a means of overcoming the fragmentation of the European criminal-law area? What framework (applicable law, review) should be envisaged for investigation measures?

Question 8 What solutions should be envisaged to ensure the execution of investigation measures undertaken by the European Public Prosecutor?

Question 9 On what terms should the European Public Prosecutor be able to take a decision to close a case or commit it for trial?

Question 10 By what criteria should the Member State or States of trial be chosen? Should the European Public Prosecutor's choice be subject to review? If so, by whom?

Question 11 Do you think that the principle that evidence lawfully obtained in a Member State should be admissible in the courts of all other Member States is such as to enable the European Public Prosecutor to overcome the barrier raised by the diversity of rules of evidence?

Question 12 To whom should the function of reviewing acts of investigation executed under the authority of the European Public Prosecutor be entrusted?

Question 13 To whom should the committal review function be entrusted?

Question 14 Do you feel that fundamental individual rights are adequately protected throughout the proposed procedure for the European Public Prosecutor? In particular, is the double jeopardy principle properly secured?

Question 15 How would the relationship between the European Public Prosecutor and those involved in cooperation in criminal matters in the European Union be best organised?

Question 16 In the run-up to the Commission's evaluation of the rules governing OLAF, what factors related to the relationship between the Office and the European Public Prosecutor seem most meaningful to you?

Question 17 What type of relations should the European Public Prosecutor maintain with third countries, and in particular applicant countries, in order to improve efforts to combat activities which damage the Community's financial interests?

Question 18 What procedures should be available for judicial review of acts done by the European Public Prosecutor or under his authority in the exercise of his functions?