# The Future European Public Prosecutor´s Office

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# FROM EUROJUST TO THE EUROPEAN PROSECUTION SERVICE IN THE EUROPEAN JUDICIAL AREA. THE BEGINNING OF A EUROPEAN CRIMINAL PROCEDURAL LAW?

## 1. *The* ius puniendi *of sovereign States and European integration: Impossibility of Community* Criminal Law?

Thomas HOBBES wrote «*Covenants without swords are but words*». In mid-twentieth century, thanks to the lucid and visionary ideas of the founding fathers of the European Community, they achieved not only the EC Treaty but also a constitutional charter of the EU. In any case, they did not take into consideration the issue of safeguarding Community Law, except in matters of freedom of competition, for which reason they chose competence of full safeguard of the European Commission.

They quickly realised that the relationship between the Community policy and national safeguarding systems should be more specific. In any case, there was a ten year wait to see this aspect effectively covered. This subject clearly appeared in the case law of the European Court of Justice (ECJ) for which national law, in terms of criminal and criminal procedure law, could be an obstacle to European integration (negative integration). In the field of the free movement of capital for example, opposing criminal provisions could not be applied.[10] Later on, in several key decisions,[11] the ECJ clearly established that the safeguarding systems of the Member States equally constitute an instrument to cause respect for the Community policy (positive integration). The Member States must safeguard the Community interests and this duty must be carried out in such a manner that: 1) there is no discrimination between national goods and similar Community goods and 2) whether *de iure* or *de facto*, in theory and in practice, proceedings and sanctions must be effective, proportional and dissuasive. This means that Member States always have the freedom

[10] CJEC, 23rd February 1995, Bordessa et al., case C-358/93 et C-416/93, Rec. p. I-361.
[11] The most important one is CJEC, 21st September 1989, Commission vs. Greece, Case C-68/88, Rec. p. 2965.

to choose between Civil Law, Administrative Law and/or Criminal Law, but the choice must always meet the aforesaid control criteria.

This was precisely the issue with a French case involving strawberries where these criteria were actually controlled by the Community judge.[12] The French authorities were regularly subjected, during the 80's, to strike action by unhappy farmers who attacked lorries that transported Spanish strawberries, even burning the strawberries. The French police took verbal action and recorded some of the activities on video. Therefore, there was enough evidence to punish the perpetrators, but the French Public Prosecution Service systematically decided to shelve the cases because, if there had been effective prosecution, they risked disorder. This decision caused dissatisfaction and anger among Spanish producers of strawberries, carriers, buyers and the European Commission. Despite the complaints from the European Commission, France carried on shelving cases without instituting them. The Commission raised an action against France[13] before the ECJ. The ECJ decided that France had infringed the Treaty, namely the free movement of goods [14] and Community loyalty[15], as the cases were systematically being shelved: Criminal policy and the policies on shelving cases without prosecuting them may, therefore, in certain cases, be considered or determined by Community requirements and by the protection of Community legal rights.

The Community policymaker has fulfilled even more of the Community case law requirements related to the duty of safeguarding Community interests in several fields. Community directives and regulations include provisions on prohibition and material obligations, which contemplate duties, subjective elements (negligence, intention, etc.), powers in the investigation, penalties. Community Law therefore presents an unlawful act and a definition of insider trading and money laundering[16], without imposing any obligation, in any case, on the Member States of protection by Criminal Law.[17] Community Law con-

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[12] CJEC, 9th December 1979, Commission v France, Case C-265/95, Rec. p. I-6959.

[13] Based on Article 226 EC.

[14] Article 28 EC.

[15] Article 10 EC.

[16] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial systems for the purpose of money laundering, OJEC 1991 L 166/77 (it includes the statement by the representatives of the Governments of the Member States meeting within the Council) and proposed Directive of the European Parliament and of the Council amending Council Directive 91/308/EEC on prevention of the use of the financial systems for the purpose of money laundering.

[17] The European Commission has attempted through several proposed directives to establish the criminal procedure but the Council of Ministers has systematically transformed these provisions into neutral and non-criminal obligations. See for instance the proposal for a Council directive on prevention of the financial systems for the purpose of money laundering, COM (90) 106 final, OJEC 1990, C 106, p. 287.

tains also several provisions in the field of agricultural policy[18] and common policy in fishing[19] in terms of obligation to impose penalties. These sanctions, such as fines and exclusions from the system of subsidies, are designed as administrative sanctions or sanctions *sui generis*. Member States are free to establish civil, administrative or criminal penalties. The Community policy-maker, therefore, has regulatory powers focused on the implementation and set in motion of protection systems in the Member States. These must present results, but they are free to choose the instrument to be used. Furthermore, the EC has regulatory powers in other matters such as freedom of competition and other specific fields in which the EC has powers in administrative, independent or subordinate investigation. Commission inspectors may investigate in an autonomous and independent manner[20] or they may be accompanied by national inspectors in matters under their control[21] in companies, checking the accounts, examining the aims, etc. The Commission does not have powers to carry out judicial investigations and it does not have functions of judicial police officers, several regulations contain the obligation to make the information obtained during the course of an investigation or a suspicious audit available for the Commission, even if this information is under reporting restrictions[22]. The inspection powers of the Commission are, therefore, restricted to administrative investigations. All penalty sanctions, except for those related to freedom of competition are, at the end of the day, imposed by administrative or judicial national authorities.

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[18] VERVAELE, J.A.E., Poderes sancionadores de/y en la Comunidad Europea, hacia un sistema de sanciones administrativas europeas, in *Revista Vasca de Administración Pública, 1994,* pp. 167-205.

[19] Council Regulation (EEC) No 2847/93, establishing a control system applicable to the common fisheries policy, OJEC L 261.

[20] Council Regulation related to controls and verification made by the Commission for the protection of the financial interest of the European Community against fraud and other irregularities, OJEC 1996, L 292. Cfr. VERVAELE, J.A.E., *Hacia una agencia europea independiente para luchar contra el fraude y la corrupción en la Unión Europea*, in *Revista del Poder Judicial,* Madrid, 1999, pp. 11-34 (=in this volume, pp. 243-268).

[21] For instance, in Regulation No. 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field, OJEC 1991, number L 67/11.

[22] Cfr. Regulation No. 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field, OJEC 1991, number L 67/11 and Council Regulation 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJEC 1997 L82. VERVAELE, J. A.E., *Regulación comunitaria y aplicación operacional de los poderes de investigación, obtención y utilización de pruebas en relación con la infracción de intereses financieros de la Comunidad Europea*, in *Revista Vasca de Administración Pública*, 1998, pp. 307-347.

The truth is that Community Law has not contemplated the developmei of supranational protection systems. EC Treaties offer an insufficient basis i this matter and neither the Maastricht Treaty nor the Treaty of Amsterdam hi provided any change in this subject. It is not explicitly necessary to direct harmonise national criminal law and criminal procedure in Community La The protection is done within and for the Member States that apply nation procedures and penalties. The EC, on the one hand, has recognised to a larg extent the criminal sovereignty (*ius puniendi*) of the Member States but, c the other hand, national authorities and national legal systems have Communi functions. Criminal law, the criminal procedure, the police, the Publ Prosecution Service and the criminal judge area integrated in an autonomoi Community legal system. The measure according to which criminal law ar the criminal procedure safeguard Community Law depends, in principle, c the selection of the Member State (indirect harmonisation). In practice, in th economic and financial field, but also in terms of the environment, publ health, etc. criminal law and criminal procedure are always present at the f refront and the inclusion and exercise of *ius puniendi* must, therefore, ful the Community obligations of results. The increase and deepening of the ir pact of Community law on national criminal law and on criminal procedu result from the case law of the Court of Justice, an impact that is strongly u derestimated by a large number of criminal lawyers[23]. Recently the Europe: Court of Justice[24] recognised direct competence of the European Communi to harmonise national criminal law, provided this harmonisation is necessa for the fulfilment of Community policy. The European Community may pre cribe the classification and obligation to include criminal penalties. The co tent of the criminal penalty (what penalty and the minimum and maximu

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[23] This is some of the research done in relation to European criminal law: Cfr. DANNECK G., Strafrecht der Europäischen Gemeinschaft, in ESER/HUBER (eds.), *Strafrechtsentwicklung Europa*, 1995; GRASSO, G., *Comunita Europee e diritto penale. I rapport tra l=ordinamento com nitario e i sistemi penali degli stati membri*, Giuffrè, 1989. There is a version in Spanish: GRAS *Comunidades Europeas y Derecho Penal*, translated by García Rivas, University of Castile Mancha, Cuenca, 1993. P. FIMIANI, *La tutela penale delle finanze comunitarie. Profili sostanzi e processuali*, Giuffrè, 1999; BERNARDI, *Principii di diritto e diritto penale europeo*, Ann dell=Università di Ferrara, Sezione V, Scienze Giuridiche, vol. 11, 1988; BERNARDI, *Verso u codificazione penale europea? Ostacoli e prospettive*, Annali dell=Università di Ferrara, Sezic V, Scienze Giuridiche, Saggi 111, 1996; VERVAELE, J.A.E., *La fraude communautaire et de dr pénal européen des affaires*, Paris, 1994, p. 436 ; PICOTTI, L., *Possibilita e limiti di un diritto nale dell=Unione Europea*, Giuffrè, 1999 ; GRASSO, G., *Prospettive di un diritto penale europ* Giuffrè, 1998.

[24] Cfr Cases C-176/03 and C-440/05 of the European Court of Justice. See also J.A Vervaele, The European Community and Harmonization of the Criminal Law Enforcement Community Policy: Ignoti nulla cupido, in Dannecker/Kindhäuser/Sieber/Vogel/Wal Festschrift fur Klaus Tiedemann, Verlage Carl Heymanns, Luchterhand und Werner, 2008 (to published).

penalties) must be drafted within a framework decision of the third pillar of the European Union and it must be unanimously voted on. Until the entry into force of the Treaty of Lisbon, already signed and at the ratification phase, the work will have to be done on combined proposals of Community law and EU law.

Direct or indirect harmonisation of criminal law and national criminal procedure law to achieve greater equivalence among the criminal systems of the Member States is only one aspect of the impact of the European integration on the criminal system. Police and judicial cooperation in an integrated common area is highly relevant. What have been the stages of the classical inter-governmental cooperation towards new ways of operational action of the police and judicial authorities in Europe?

## 2. Economic integration and enhanced police and judicial cooperation: Criminal law in the EU

Based on the customs union, internal market, free movement of goods, services, labour and capital, and thanks to the disappearance of internal borders, intra-Community exchange has grown considerably. The introduction of the Euro accelerates this progress even more. We are witnessing the gradual birth of a European common market and a European capital market which, in the medium term, will lead to greater mobility of natural and legal persons. They may freely offer services, establish themselves anywhere in the EU. Economic integration is, therefore, an irreversible reality. Intra-Community activity is, thus, a transnational activity with important consequences for the protection thereof. For the first time specific national decisions have an effect on the entire territory of the EU. If the Securities and Exchange Commission of France decides to authorise a foreign exchange broker, the authorisation will be valid for the entire internal market, therefore, for Germany or Spain (the authorisation is a European passport). This also means that infringements may lead to the suspension or withdrawal of the authorisation, which will have an effect on the entire internal market. Secondly, natural and legal persons carry out activities anywhere in the sense of the internal market, activities that are carried out within certain legal guidelines in accordance with the different national legal systems. Protection of transnational activities implies, therefore, by definition, the need to gather information, to implement control measures or to investigate within the territory of the various Member States, resorting to operators, regimes and diverging legal powers. When imposition and enforcement of penalties correspond to different powers, they also play a role.

Despite the increase and strengthening of economic and monetary integration, the European criminal scenario is highly divided. This is an effect linked to the weak European political integration. The regulatory scheme related to

material criminal law, but in particular to criminal procedure, has so far seen great differences, even if it is necessary to recognise that the Convention on Human Rights has had an effect on harmonisation in essential aspects[25]. This is explained by the fact that, on the one hand, the Member States have not been aware enough of the impact of integration on justice and on criminal law and that, on the other hand, they have been defensively reluctant in order to preserve the sovereignty of the criminal law scope.

Despite this, the Member States are aware that the *ius puniendi* may not be enforced on a penal island whose borders are closed. The inter-dependence of United Nations had become highly relevant. Therefore, the Member States, since the 1980's, have had the green light to intensify the various methods of judicial cooperation. In this respect, several limitations on the Member States were imposed, outside the structure of the EC and within an inter-governmental context. The Schengen Conventions (1985 and 1991)[26] constitute a landmark in this development. Schengen presents the merit of having given shape to police cooperation and of having made judicial cooperation in criminal matters operational. These two aspects have been attained by introducing direct cooperation, without diplomatic intervention, and by avoiding any kind of reservation (for instance, in terms of indirect taxes). This is an important step forward with regards judicial cooperation in criminal matters[27].

This development has been reinforced after the entry into force of the Treaty of Maastricht (1992) and the creation of the European Union (EU). The EU, apart from the regulations of the EC (First Pillar), includes a Second Pillar (cooperation in matters of common foreign and security policy) and a Third Pillar (police and judicial cooperation in criminal matters). The Third Pillar takes up again, as a priority, immigration, policy on visas and judicial cooperation in civil matters, as well as police cooperation (with the commitment that Europol will be created), customs cooperation and judicial cooperation in criminal matters. The Second and the Third Pillars are clearly inter-governmental. The powers of the classical Community operators (Commission, European Parliament, Court of Justice) are very restricted. Community regulations, linked to the implementation of Community legislation and to the extension to the internal legal system, do not apply here. Within the scenario of the Third Pillar

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[25] DELMAS-MARTY, M., *Raisonner la raison d'État. Vers une Europe des droits de l'homme* Paris, 1989.

[26] Agreement among the governments of the EU States, Benelux, German Federal Republic and the French Republic, made in Schengen on 14th June 1985, *Vid.* Text in *Revue générale de droit international public*, volume 91, 1987, p. 236. Convention for the application of the Schengen agreement of 14th June 1985 related to the gradual elimination of common border controls, made in Schengen on 19th June 1990. *Vid.* Text in *Revue générale de droit international public*, volume 95, 1991 (2), p. 513.

[27] European Convention on judicial cooperation in criminal matters of 20th April 1959 which came into force on 12th June 1962.

several important Conventions have seen the light in terms of judicial cooperation: The Europol Convention until entry into force[28], the 2000 Convention on Mutual Assistance in Criminal Matters[29] and the Naples II Convention on mutual assistance and cooperation between customs administrations[30]. These latest conventions considerably open the path towards transnational protection as pro-active or special investigation techniques have been introduced in letters rogatory, for instance, interception of communications, infiltration, placing of tapping devices, controlled orders, etc. In relation to the Third Pillar of Maastricht, also some conventions have been adopted which include certain aspects of material criminal law and criminal procedure in the Member States. This is direct harmonisation in terms of *ius puniendi*. The Convention on fraud[31] and its first protocol on corruption[32] constitute good examples. The same happens with the action plan adopted in the fight against organised crime[33], which has led to an assessment of the judicial cooperation systems of the Member States. The last thing about the Treaty of Maastricht, the first steps were taken towards some operational cooperation methods which are not linked to the sovereign of the Member States: Europol and the European judicial network[34]. In any case, it is important to highlight that neither of the two has executive protection powers. Therefore, it only involves police and investigation actions.

The Treaty of Amsterdam (1998) has maintained the structure of the Third Pillar but it has transferred non-criminal matters (for instance, immigration and visa policy) to the First Pillar. Moreover, these provisions and those of the new Third Pillar form part of an area of freedom, security and justice (article 61 TEC). Likewise, the areas acquired from Schengen have been included. Also, the position of the main Community operators has been reinforced, in line with the idea that the rules of the game gradually abolish Community rules. On the other hand, in several Member States (namely, the United Kingdom) the position adopted is *out*, with the possibility of being included later (*opting-in*). The area of freedom, security and justice happens to be an essential aim in the EU: To maintain and develop the Union as an area of freedom, security

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[28] Minutes of the Council of 26th July 1995 establishing agreements on the basis of article K 3 of the Treaty on European Union for the creation of a European police office (Europol Convention), OJEC 1995 C 316/1.

[29] Convention on judicial cooperation in criminal matters between the Member States of the European Union, OJEC C 197, 12.07.2000.

[30] Naples II Convention, Council Act, OJEC 1998 C 24/1.

[31] Council Act establishing the First Protocol to the convention on the protection of the Communities' financial interests, OJEC 1995, C 316.

[32] OJEC 1996 C 313/1.

[33] Action Plan to combat organised crime, High Level 1997 Group, 9th April.

[34] Joint Action of 29 June 1998 on the creation of a European judicial network, OJEC1998, L 191/4.

and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (article 2 TEU). Police cooperation and judicial cooperation in criminal matters are covered by Title VI TEU, articles 29a-33.

Article 29 explicitly contains the following aims:

To provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

– Closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;
– Closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32;
– Approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31 e).

These three central themes of criminal policy are developed in articles 30-31:

Article 30: 1. Common action in the field of police cooperation shall include:

*a)* Operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;
*b)* The collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data;
*c)* Cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research;
*d)* The common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

Article 31: Common action on judicial cooperation in criminal matters shall include:

*a)* Facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;
*b)* Facilitating extradition between Member States;
*c)* Ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
*d)* Preventing conflicts of jurisdiction between Member States;
*e)* Progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

It is important to highlight that competence in terms of direct criminal harmonisation of criminal law and criminal procedure has an important role in the Treaty on the EU (TEU). The fight against crime and ensuring the security of the citizens occupies a central place. Terrorism, trafficking in persons, offences against children, illicit drug trafficking, illicit arms trafficking, corruption and fraud are explicitly mentioned, but this list is not complete. In the meantime, there are proposals related to the protection of the Euro[35] and the fight against serious crimes in environmental matters[36]. Secondly, the Treaty of Amsterdam presents the legal basis to start police and judicial cooperation operations in criminal matters. The main aspect in this field is drafting cooperation in operations, understood as the implementation of operational activities of joint teams. Cross-border operations do not go further than this, as it is contemplated in article 32 TEU: The Council shall lay down the conditions and limitations under which the competent authorities referred to in Articles 30 and 31 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. Negotiations on the matter are still underway and they confirm national sensitivities. The Treaty of Amsterdam constitutes an important step towards the construction of an area of freedom, security and justice but it may not be conceived as a European common judicial area. The concept accepted by the Treaty of Amsterdam[37] does not abolish, from the point of view of the basic starting points, the classical concept

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[35] Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJEC L 140 of 14.06.2000 .

[36] Initiative of the Kingdom of Denmark with a view to adopting a Council Framework Decision on the fight against serious infringements against the environment, OJEC C039 of 11.02.2000.

[37] Cfr. Also the Action Plan on the area of freedom, security and justice, Council and Commission, 3rd December 1998, OJEC C 019.

of cooperation from one State to another State, based on national states, which have a national territory, which are looking for formulas that can be used in terms of cooperation between the police authorities and the judicial authorities[38]. Member States are still safeguarding their national sovereignty and national territory as a starting point of their criminal protection, even if it entails cross-border matters within the EU.

At the summit of the Heads of State (Council of Europe) of the Member States in Tampere (Finland) in 1999, the mutual recognition of judgments in criminal matters was defended among other conclusions; this is understood as judgments at the preliminary phase and in favour of the movement of evidence. The importance that these terms, which results from the internal economic market, may have in the field of criminal justice is not very clear unless analysed in depth. What is clear, in any case, is that the Commission and the Council have fulfilled these conclusions, which has led to the implementation of a *Scoreboard* and several initiatives of the Commission and the Council[39]. The Commission is now pursuing formulas to enforce penalties (imprisonment, fine or perpetration) within the European area, taking into account the principle of *non bis in idem*. Also, it takes up again the political issues related to arrest warrants and extradition orders.

Finally, it must be pointed out that, at the last summit of the Heads of Government, in Nice, held in December 2000, an agreement was reached on the new Treaty of Nice, which came into force in 2002. The Treaty of Nice does not introduce anything spectacularly new in relation to this subject. However, it is important to point out that the Treaty again takes up Europol and Eurojust in articles 29 to 31 TEU. The aim of Eurojust[40] is to make judicial cooperation more efficient without changing the rules of territoriality and of competence. This involves coordination between the national prosecution services, especially in matters of organised crime. In short, it can be said that, under the Treaties of Maastricht and Amsterdam, in relation to the Schengen integration in the sense of the structure of the EU, important steps have been taken towards making police and judicial cooperation operational in criminal matters and providing minimum harmonisation in the field of criminal law and criminal procedure of the Member States. In any case, it is not yet a European

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[38] Cfr. Contribution from KLIP, A., en VERVAELE, J.A.E., (ed.), *Transnational Enforcement of the financial interests of the European Union. Developments in the Treaty of Amsterdam and the Corpus Juris*, Intersentia, Antwerpen/Groningen/Oxford, 1999, 240 p.

[39] http://ue.eu.int/jai/releves/index.htm

[40] Communication of the European Commission on the establishment of Eurojust, COM(2000, 746 final; Initiative from Portugal, France, Sweden and Belgium, OJEC C 243, 24/08/2000; initiative from Germany, OJEC C 206, 19/07/2000. Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, Official Journal 2002 L 63/1.

judicial area and an area of integration in matters of criminal justice. The powers of the police, the public prosecution service and the courts are determined nationally and, in principle, are restricted to the national territory.

## 3. *Corpus Juris*: Criminal harmonisation, European territoriality and European Prosecution Service. Political context

The *Corpus Juris* project is not independent of the development which has occurred. Essentially the European Parliament, but also the European Commission, have not been able to hide their frustration at the structure in pillars, with diverging rules and, in particular, at the results of the Third Pillar very much stuck in the territorial concept of the Member States. Both institutions would have preferred to develop the Community policy in terms of justice, applying Community rules linked to the Community agenda. For a long time the Member States have been reluctant to progress in this aspect, as there would be no need to harmonise, because it would mean not to recognise the presence of the national sovereignty, for which reason, the rules of cooperation would be sufficient. It would then be enough to apply these truly and effectively. Both the European Parliament and the European Commission have always fought on this point and have adopted a position by which the financial interests of the EC (fight against fraud in the EC: subsidies, customs duties, VAT) would be insufficiently protected by the Member States in the criminal field, owing to:

- Absent or insufficient incriminations.
- Differences in relation to extraterritorial competence.
- Differences as to the procedure (competences and evidence).
- Vacuum in terms of regulations and operation of the cooperation.
- Differences related to the possibility of penalties and the degree of punishment.
- Vacuum in relation to transnational enforcement of sanctions.

In the investigation of the European Parliament on customs fraud related to traffic it appeared that, indeed, there were some material and procedural loopholes within the EU, loopholes that required complementary measures[41]. Owing to the difficult implementation of the scenario of the Third Pillar and how slow and weak the willingness of the Members States to ratify the con-

[41] European Parliament, Investigation Committee on the system of Community movement, Reporter E. KELETT-BOWMAN, Final Report and Recommendations: PE 220.895/finm 1997. This investigation confirms the results from comparative studies carried out in matters of administrative and criminal protection, previously carried out at the request of the Council and executed by groups of experts under the responsibility of the European Commission.

ventions adopted within the Third Pillar scheme was, the European Parliament requested the European Commission to carry out a study on the possibility of harmonisation of criminal law and criminal procedure, with a view to having efficient protection of the interests of the EC. This scientific study of experts has been done under the instructions of Professor M. DELMAS-MARTY between 1995 and 1996 and led to the publication of the *Corpus Juris* in 1997[42]. The 1997 *Corpus Juris* can be considered as a project with a view to attaining a European criminal justice in the sense of the EU, but it does not have as its aim the intention of being a project for European criminal law or European criminal procedure and it must not be read as such. Even if the matter is related to specialised fields such as fraud in the EC it is clear that it involves minimum harmonisation, especially within the procedural scope. The *Corpus Juris* has 35 articles, which may be summarised as follows: 1/8 articles related to incriminations (special criminal law); 2/10 articles related to general criminal law, 3/14 articles related to procedure, as regards the European Prosecution Service and the judge of freedoms, and 4/5 articles related to guarantees of the procedure and human rights. It is not surprising that the *Corpus Juris* has been the subject of important discussions not only in the academic world[43] but also in the political world and in the operational field[44]. Most of the Justice Ministers in the EU have maintained their tendency to inform their national parliament that the proposals of the *Corpus Juris* are unrealisable, because they cannot be combined with the national fundamental principles of constitutional law, criminal law and criminal procedure. On the other hand, the increase in the cooperation between the Member States will be sufficient to efficiently fight against fraud to the EC. A large number of Justice Ministers were in favour of more radical progress but this was not sustained by their prime minister and/or their interior minister.

In order to analyse if the criticism is true according to which the *Corpus Juris* would be incompatible with the national law, the European Parliament and the European Commission demanded a study by an *ad hoc* group of experts under the instructions of professors M. Delmas-Marty and J.A.E. Vervaele. The latter were in charge of analysing the compatibilities between the provisions of the *Corpus Juris* and the national rules of the Member States. At the

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[42] *Corpus Iuris*, Económica, Paris, 1997. BACIGALUPO, hacia un espacio judicial europeo. *Corpus Juris* de disposiciones penales para la protección de los intereses financieros de la Unión Europea, Colex, Madrid, 1998.

[43] The text is available in all the official languages of the EU and it has been discussed at conferences and in scientific magazines.

[44] *Vid.* The debates within the follow up of the Geneva Appel, in this appel from the representatives of the Public Prosecution Services and the first instance criminal judges for political representatives, the latter were asked to make the judicial cooperation in criminal matters an efficient instrument.

same time, a study on the problematic points specifically of horizontal and vertical (with the European Commission) cooperation was carried out within the scope of administrative cooperation, and also within the scope of judicial cooperation. This study has provided a large amount of information in terms of comparative law. Indeed there are certain points of friction between the national law and the *Corpus Juris,* but these are not as relevant as the politicians put it. The weak points are not in the material harmonisation provisions but rather in the provisions related to the national public prosecution service. A large number of points are new and unquestionably require adaptations of the national law. About these points, the intention was to look for the best synthesis between the different traditions of the Member States. Likewise, the study has led to a technical perfectionism of the text of the *Corpus Juris* and to a selection of a large number of policies that must be modified for the drafting of the *Corpus Juris* in the Member States. For this reason, the group of experts decided to improve the text of the 1997 *Corpus Juris*. This has led to a new version, the second version of the *Corpus Juris*: The 2000 *Corpus Juris*[45], published for the time being in English and in French (*Corpus Juris* vol. I)[46], with a list of the synthesis and tables on comparative law. The proposals of the national reporters have also been published in English and French (*Corpus Juris* vol. II and III). In December 2002 the *Corpus Juris* vol. IV was published, which includes specific contributions in terms of horizontal and vertical cooperation, the treatment of judicial cooperation, administrative cooperation, secrecy of the investigation, banking secrecy, appeal in terms of cooperation, etc.

*Proposals of 2000* Corpus Juris

The layout of the *Corpus Juris* is based on six guidelines and contains two parts, one on criminal law and another one on criminal procedure.

As regards criminal law, the *Corpus Juris* contemplates eight offences, four of which may be committed by anyone: Fraud affecting the financial interests of European Communities and similar offences, fraud in public tenders and competitive biddings, money laundering and concealing, conspiracy and four offences that may only be committed by national, European, or both civil servants: Corruption, misappropriation of funds, abuse of office and disclosure of secrets pertaining to one's office.

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[45] The text of the 35 articles is also available in http://www.law.uu.nl/wiarda/corpus/index1.htm; For the report on the synthesis *Vid.* the publication.

[46] DELMAS-MARTY, M. *et al.*, en J.A.E. VERVAELE (red.), *La mise en oeuvre du Corpus Juris dans les États membres*. Dispositions pénales pour la protection des Finances de l'Europe. Vol I-IV, 2000 Intersentia, Antwerp-Groningen-Oxford, 2000-2001. There is also a new version in English.

Indeed, Article 1 regulates fraud affecting financial interests and article 2 fraud in public tenders and competitive biddings. These are the basic articles (*predicate offence*); the other offences are related to these. The principle of legality implies *lex certa*, the prohibition of analogical interpretation and *in peius* retroactivity.

The underlying idea of this *Corpus Juris* of eight offences is to achieve total harmonisation of special criminal law in matters of Community fraud and corruption. This part is not excessively innovative because, in accordance with the Third Pillar, a large number of conventions impose an obligation on the Member States to adapt their criminal legislation in terms of fraud and corruption. The problem is that the Member States take long to ratify the conventions and to adapt their national legislation.

Articles 9 to 13 contain certain provisions in terms of general criminal law. This is minimum harmonisation about the subjective element, error, criminal liability (individual, of the managers of a legal person) and attempt. Both *mens rea* and negligence (recklessness or gross negligence) are considered as subjective elements. This point is also reflected on the liability of managers or all persons who exercise the power to make decisions, or important control power in a company. The fact that they fail to fulfil their obligation of supervision or control reveals the criminal liability. An important issue obviously is that the *Corpus Juris* imposes the liability on associations of persons and that this liability may be accumulated with the criminal liability of natural persons. The liability, in this case, is not based on the personal liability. Also the subjective element (*mens rea*/negligence) of an authority or of a representative of the association or of any other person who acts on its behalf or who has power of decision making, legally or in a *de facto* manner, will have to be proven.

Article 14 to 17 regulate the main and additional penalties, the degree of the penalty, the aggravating and mitigating circumstances and the rules on constructive overlapping of offences and overlapping of offences. As regards main and additional penalties, the *Corpus Juris* prescribes high maximum penalties but it must be pointed out that the principle of proportionality applies. This principle entails that the penalties must be proportionate to the seriousness of the offence, on the one hand. They must also be proportionate to the fault of the offender and to his personal circumstances, on the other hand. It is important to highlight the possibility of confiscating the products and profits of the offence; even if the subjective element has not been proven (the evidence of the objective element is sufficient)[47].

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[47] VERVAELE, J.A.E., El embargo y la confiscación como consecuencia de los hechos punibles en el Derecho de los EUA, in *Actualidad Penal*, 1999, pp. 291-315.

It must pointed out that also in the part related to general criminal law, as opposed to the part related to the special criminal law, there is minimum harmonisation. Article 35 of the *Corpus Juris* contemplates that articles 9 to 17 must be supplemented by national law, whenever necessary. Even for Articles 9 to 16 (therefore, not for overlapping), only the provisions of national law more favourable to the accused person apply (*lex mitior*).

The most innovative part is unquestionably the part related to criminal procedure. Three guidelines have been included: The principle of European territoriality, the principle of judicial guarantee and the principle of proceedings which are 'contradictoire'. In terms of criminal procedure, owing to substantial differences in the EU, that is to say differences between the common law and the continental tradition, the intention is to pursue a symbiosis between the legal traditions. Also, the idea is to pursue a usable model, linked as much as possible to the criminal justice system of the Member States. It is very easy to design an entirely supranational judiciary, with a European police force, a European prosecution service, a European judge and a European prison. A decision in this respect has not been taken yet. The procedural structure of the *Corpus Juris* is greatly linked to national criminal authorities.

One of the big problems at this present time is the division and absence of operational coordination in international matters. For this reason, the option has been to implement a central prosecution authority, the European Public Prosecutor (EPP), which does not mean that the role of the national Public Prosecution Service has been invalidated, quite the contrary. The EPP is composed of a European Director of Public Prosecution (EDPP) and European Delegated Public Prosecutors (EDelPPs) within the Member States (article 18). The powers delegated to the EDelPP can in turn be partially sub-delegated, for a limited period and in respect of a particular matter, to a national authority, (prosecuting authority, police or other competent authority (article 20) (4). The EPP, therefore, consists of all the structure of the main characters in the criminal system. The EDPP is nothing more than a central authority leading all the rest.

The EPP must be informed of all acts which could constitute one of the offences defined above (Articles 1 to 8), by the national authorities (police, public prosecutors, judges d'instruction, agents of national administrations such as tax or Customs authorities) or the competent Community body, the European Office for the Fight against Fraud (OLAF). The dossier must be transferred to this EEP (article 19). It may also be informed by denunciation from any citizen or by a complaint from the Commission. National authorities must submit to the European Prosecution Service at the latest when the suspect is formally 'under investigation', under Article 29(1), or when coercive measures are employed, particularly arrest, searches and seizures or when a person's telephone

is to be tapped. The EPP is not only a reactive authority; it may also act *ex officio* (pro-actively).

The EPP may then (article 19):

– Open an investigation and prosecute (the principle of legality in the prosecution is applied);
– refer offences which are not serious or which affect principally national interests to the national authorities;
– drop the case, if the accused, having admitted guilt, has made amends for the damage caused and, as the case may be, returned funds received illegally;
– or grant authorisation for settlement to a national authority, in accordance with the criteria set forth in the *Corpus Juris* (article 22 [4] [b]); in any case the settlement agreement must be submitted to the judge of freedoms.

In any case, the investigations related to the offences of articles 1-8 are governed by the same principles, therefore it is not important who is in charge of the investigations (the EDPP or the EDelPP). For the purposes of investigation, prosecution, trial and execution of sentences, the territory of the Member States of the Union constitutes a single legal area (European territory, article 18). The consequence of this is that the examination of the accused, the gathering of evidence, the investigation, the summons, the tapping, the appearance of witnesses, the arrests or notifications subject to judicial control may be performed by the EDPP or by the EDelPP in the entire European territory. The EDPP, the PP of Paris (as the EDelPP) only need a letter rogatory to investigate the offices of a branch office in a French bank in Marbella, Spain. The judicial cooperation procedures are replaced by European competence of the public prosecutor. To avoid that this real power in the hands of the public prosecutor (be it in the EDPP or the EDelPP) be a real danger to the freedoms in Europe, the *Corpus Juris* contemplates on the basis of the principles of judicial guarantee, that during the investigation these will be exercised by an independent and impartial judge, that is to say, by the Judge of Freedoms chosen by each Member State in the national jurisdiction (article 25bis). The judge of freedoms, who may even be an examining judge, but also a senior judge in charge of this task, must previously authorise all measures restricting rights and fundamental freedoms. Therefore, in the example, the EDPP or the public prosecutor from Paris (as the EDelPP), would need a prior authorisation from the Spanish judge of freedoms to carry out the investigation in Marbella. An *a posteriori* check within 24 hours is, however, permitted in urgent cases. The judge of freedoms may also issue a European arrest warrant, for the entire territory of the EU. The arrested person can be transferred onto the territory of the state where his presence is needed. The judge of freedoms may also control the provisional arrest.

When he considers investigations to be completed, the EPP decides whether to make a decision not to prosecute, or to bring the case to court (article 21). The EPP must ensure that no person may be prosecuted or criminally convicted in a Member State by reason of one of the offences defined in Articles 1 to 8 for which he has already been either acquitted, or convicted by a final judgment, in any of the Member States of the European Union (European *ne bis in idem*[48], article 23 (1)(b)). If he decides to forward the matter, he must submit it for the decision to the judge of freedoms, who assigns the national forwarding jurisdiction. Indeed, all offences contemplated in the *Corpus Juris* as, in application of the principle of judicial guarantee, are tried by the national, independent and impartial courts. Obviously transnational matters may be tried in several jurisdictions. Article 26 sets forth the criteria for the choice of jurisdiction. To avoid for the choice of jurisdiction to affect the rights of the accused (*forum shopping*) the EPP may take this decision.

The Committee of experts discussed the possibility of submitting the forwarding decision not to a judge of freedoms but to a European preliminary chamber, similar to the chamber created for the *ad hoc* international court for the former Yugoslavia and near the future International Criminal Court (ICC). This formula presents the advantage that it avoids the possible *forum shopping* by the EPP, but the disadvantage is that it introduces a second European instance. This solution is preferable from the legal point of view, but it has not been welcomed for reasons of political feasibility of the project.

The trial phase is governed by the principle of proceedings which are 'contradictoire': Equality of the parties and recognition of the rights to defence. Articles 26 to 34 contain the relevant provisions. Indeed, the rules are a codification of the case law of the European Court of Human Rights in the matter and also a symbiosis between the procedure in England and that of the old continent. Written evidence gathered during the preparatory phase is admissible provided that during the examination the accused is assisted by a lawyer. On the other hand article 29 defines the rights of the accused and the moment as from which these rights start to apply.

The prohibition of self-incrimination does not apply to the documents that the accused has been under the obligation to present during the administrative preliminary investigation or during the criminal investigation (be it Community or national obligations). Exclusion of evidence is contemplated when there is infringement of human rights. In any case, this evidence is not eliminated, but such evidence is only excluded where its admission would undermine the fairness of the proceedings to admit it (*Schutznorm).*

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[48] J. A. E. VERVAELE, Derechos fundamentales en el espacio de libertad, seguridad y justicia: el *ne bis in idem* praetoriano del Tribunal de Justicia, en *El proceso penal en la Unión Europea: garantías esenciales,* Coord.: M. de Hoyos Sancho; editorial Lex Nova, Valladolid, 2008.

The *Corpus Juris* contemplates in article 27 the principle of double judicial instance (appeal on merits) and some specific appeals similar to those of the Court of Justice (article 28). When the trial leads to a final conviction of an offence it must be immediately notified to the EPP and the authorities of the Member State appointed as the place of execution of the decision. Certain penalties such as confiscation, removal of rights or publication of the conviction may be carried out in one or more places other than the place of imprisonment. Judgments are automatically recognised in criminal matters. The EPP may, if there are grounds, authorise a transfer if a convicted person with a custodial sentence asks to be imprisoned in a Member State other than the one named by the conviction [article 23(1)(a)].

These rules of procedure (preliminary phase, trial phase and execution phase) may be completed by national law, should circumstances thus require.

The *Corpus Juris* contains a model, not for a centralised Public Prosecutor, supranational (*Procura Europea*), but rather a European criminal law Public Prosecutor, based on a European judicial area, for the main characters in charge of the investigation and prosecution, as well as those who are in charge of the defence. In my opinion, the model proposed constitutes a good balance of the needs to preserve freedoms; harmony between the tasks of sword and shield in criminal law in Europe. The model is based to a large extent on the existing main characters and systems of the judiciary in the Member States. In practice, the EPP may assign several matters to national authorities (EDelPP and their similar national authorities). On the other hand, despite the principle of legality in prosecution, sufficient selection filters have been introduced in the system: The immediate classification of the EPP and the national transaction. In any case, the question is if it would not have been reasonable to give to the National Public Prosecutors a margin for immediate shelving, pursuant to the principle of legality in prosecution, under the responsibility and control of the EPP. The model offers a basis for criminal policy based on the institution of the EPP and a vision thereof. On the other hand, guidelines may be established for denunciation (to the EPP) as well as guidelines for settlement, dropping the case and prosecution. Based on a good criminal policy and policy of actions required by the EPP one could attempt to make criminal judges examine relevant transnational matters. The model also presents the advantage of calling national and Community administrative authorities in the judiciary.

*The proposals and the political follow up*

During the analysis of the follow up of the *Corpus Juris*, the directorate of the European Commission, under the Presidency of Mr. Santer, was forced to

resign in block, for reasons of internal corruption and fraud scandals[49]. This led to the semi-autonomy of the anti-fraud office of the European Community (OLAF). The Committee of independent experts[50], in charge of investigating the matters that led to the resignation, in the second report, defended the introduction of the European Public Prosecutor, at least for matters related to the fight against fraud and internal corruption in European institutions. The judicial control on the OLAF would also be regulated. Also, the Committee of the Wise[51], as well as the Supervisory Committee of the OLAF,[52] recommended in 1999, each one in its own field, the creation of a European Prosecution Service competent in this.

The European Parliament fully welcomed the proposals made by the Committee of independent experts and the results obtained by the *Corpus Juris*, for which reason it demanded that the Commission drafted proposals leading to the implementation of these conclusions. In 2000 the European Commission introduced during the inter-governmental Conference (IGC of Nice) a proposal[53], in order to introduce in the EC Treaty article 280bis dealing with the institution of the European Public Prosecutor to prosecute EC fraud:

Article 280 bis:

> 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.
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> 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

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[49] VERVAELE, J. A. E., «Hacia una agencia europea independiente para luchar contra el fraude y la corrupción en la Unión Europea», in *Revista del Poder Judicial*, Madrid, 1999, pp. 11-34.

[50] Second report on the reform of the Commission, 10.9.1999, recommendation 59.

[51] Reports drafted by Simon DEHAENE, VON WEIZSÄCKER, 18.10.1999, paragraph 2.2.6.

[52] Resolutions 5/99 and 2/2000 of the OLAF Supervisory Committee, Activity Report (July 1999 to July 2000), OJ C 360 of 14.12.2000.

[53] COM (2000) 608 final.

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.

The contribution of the Commission to the 2000 inter-governmental conference proposed the integration into the Treaty of the European Public Prosecutor (appointment, resignation, mission and independence) and referred to secondary legislation in relation to the rules and *modus operandi* thereof. Secondary legislation, indeed, will define the Community offences (fraud corruption, money laundering, etc.) and the penalties for those activities that damage the financial interests of the Communities, and will determine the combination of the new Community regulations with the national criminal systems and, also, will deal with the way the European Prosecutor may intervene, as well as his powers of investigation and action before national judicial authorities. Finally, I will define the judicial control of the acts of the European Prosecutor.

The proposal presented by the Commission at the Inter-Governmental Conference was not adopted by the Heads of State and of Government gathered in Nice in December 2000. On the one hand, the Inter-Governmental Conference lacked time to examine the proposal and it expressed its intention to analyse the practical consequences further. On the other hand, Eurojust was established in the Treaty of Nice (*Vid. supra*).

## 4. The European judicial area and the European Public Prosecution Service

*Introduction*

The need to conceptualise criminal law in the European area again is real[54]. The European area requires criminal protection of the legal rights going beyond the notion of State-nation and its *ius puniendi*, to protect:

- The legal rights of the EU: The financial interests of the EU, the single currency (the Euro), internal fraud and corruption in the institutions of the EU.
- Legal rights related to transnational aspects of the internal market, customs union, common policies related to competition, the environment, food, security, etc.
- Legal rights in danger owing to transnational crimes.

Also the re-definition of territory (internal market, customs union) and the increasing integration of State-nation in this territory need powers in terms of investigation and procedure that may guarantee the legal rights in the common area. The rules of competence of the Public Prosecution Service and the Judicature must be re-defined in the light of the urgent needs. (How much longer will the citizen have to wait to see that in Europe there is efficient criminal fight against trafficking in human beings, the high rate of economic and financial crime, the serious pollution of the environment by giant shipping companies, fraudulent trafficking in animal food and in food?)Will the citizen understand that in case of forgery[55] of the Euro no solution has been provided in the European area?

*The Green Paper*

The European Commission and the European Parliament are still convinced of the need of a European judicial area, with a European Public Prosecutor and judges of freedoms of the Member States to guarantee the rights of defence and the basic rules of the due process of law. For this reason and pursuant to its action plan for 2001-2003 for the protection of the financial interests of the Communities[56], the European Commission published in

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[54] Cf. in relation to this the Information Resolution from the Delegation of the National Assembly for the European Union on the fight against fraud in the EU, Paris, 22 June 2000.

[55] VERVAELE, J. A. E., Counterfeiting the Single European Currency (Euro): towards the federalization of Enforcement in the European Union?, *Columbia European Law Journal*, New York, 2002, 151-179.

[56] COM (2000) 254.

December 2001 a Green Paper[57] in December 2001 on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor. The Green Paper is an open document that invites all interested media (parliaments, Community and national public authorities, professionals linked to the criminal procedure, university students, interested non-governmental organisations, etc.) to participate in the debate and to present their positions in relation thereto. The aim of the Green Paper is to increase and deepen the debate on the technical methods and feasibility of the proposal of the European Commission at the Inter-Governmental Conference of Nice. In other words, the legitimacy and reasons for the creation of the European Prosecution Service are premises prior to the Green Paper, extensively developed in the proposal of the European Commission of 2000. The European Commission considers a common investigation and prosecution area relating specifically to the protection of the Community's financial interests, the logical result of the Community integration. For basically common interests there must indeed be common protection. Everyone may answer the questions of the Green Paper and in Spring 2002 the European Commission organised a public hearing for this. After having gathered all the information from public and private stakeholders, the Commission drafted a legislative proposal with the intention of establishing the agenda of the European Prosecution Service at the Inter-governmental Conference in 2004, in order to include the European Prosecution Service in the Treaty of the European Community. The European Commission is convinced that the current EC Treaty, especially Article 280 EC, does not offer legal grounds for the establishment of a European criminal area which includes a common judicial authority as a prosecutor. For this reason it proposed to include article 280bis in the EC Treaty and to draft in Community regulations the technical methods of the European Prosecution Service, such as provisions related to the by-laws and the operation thereof.

### *The Green Paper in the light of the Third Pillar*

It is very important for the European Commission to take into consideration in the Green Paper the progress made since the entry into force of the Treaty of Amsterdam in matters of Justice and Interior Affairs (JIA). The Treaty of Amsterdam, among the aims of the European Union, contemplates its development as «an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration

[57] COM (2001) 715 final, cf. http://europa.eu.int/comm/anti_fraud/livre_vert/document/en.htm.

and the prevention and combating of crime»[58]. The Heads of State and of Government met in 1999 in Tampere with an exclusive agenda on the JIA policy. The European Council in Tampere made the principle of mutual recognition the cornerstone of judicial cooperation in the Union, specifying that it must 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.

On the other hand, they insisted on the free movement of evidence within the European Union. Finally, the Heads of State and of Government decided on the need to set up a coordination unit for the European prosecution service called Eurojust[59].

The European Commission considers that its proposal on the European Prosecution Services does not oppose the spirit of Tampere and completes the efforts made in areas of reinforcement of the criminal judicial cooperation. Both contribute to the area of freedom, security and justice. The Commission is of the opinion that 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 States' 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 Green Paper is, according to the Commission, included in the JIA dynamics, such as, for instance, the Council framework decision on the creation of a European warrant for arrest and extradition between Member States[60]. On the other hand, the European Commission is aware of the specific features of the proposal in relation to the Tampere conclusions. Without competing with the initiatives, more extensive *rationae materiae* in the Third Pillar, the Green Paper integrates them in the Community context of the First Pillar, adapting them to the specification of criminal protection of the Community financial interests. Therefore, the European Commission points out, 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. The European Commission also points out that the mutual recognition requires common mi-

[58] Article 2 TEU.

[59] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *OJEC* 2002 L 63/1.

[60] Proposal COM (2001) 522, approved in December 2001.

nimum rules within the scope of criminal procedural law[61]. The proposal of 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. For this reason the European Commission uses the concept of common investigation and prosecution area rather than European judicial area.

### *The Green Paper in the light of the 2000 Corpus Juris*

According to the *Corpus Juris*, the European Commission proposes material jurisdiction restricted to the criminal protection of the financial interests of the Community. Financial interests are understood here as including VAT[62]. Other basically common interests, such as the single currency, the European public service, the Community trademark etc. are merely mentioned as hypothetical examples. Clearly both the *Corpus Juris* and the Green Paper contemplate this limited material jurisdiction in order to guarantee the political feasibility of the project. However, it is obvious that the model of the European Prosecution service may be used for the protection of other common interests and that its jurisdiction may be extended.

What material criminal law must the European Prosecution Service apply? 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. As opposed to the proposal of the *Corpus Juris*, 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. 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[63]. The offences proposed are a combination of Community or Union law, the proposed directive and the *Corpus Juris*. To respect the principles that offences and penalties must be defined by law and must be proportionate to the offence, the Commission considers that

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[61] Conclusion 37 of the Presidency of the European Council in Tampere.

[62] This is important as the Member States achieved VAT that is not included in the instruments of the First and Third Pillars for the protection of the financial interests of the Community.

[63] COM (2001) 272.

it is necessary to go much further in the harmonisation of criminal penalties incurred for the offences defined here. The maximum penalties – both custodial sentences and fines – should be determined by Community legislation, taking into consideration the results from the more general debate on harmonisation of penalties, currently ongoing in the Third Pillar. In the Green Paper the Commission does not propose specific penalties and does not specify anything as to aggravating circumstances.

In terms of guilt and (criminal) liability of the (legal) persons, the Commission takes its distance towards the proposals in the *Corpus Juris* (articles 9 to 13), considering that the *acquis* and the degree of harmonisation suggested by the Commission in the proposed directive is sufficient. In other words, the Commission does not want to impose the criminal liability of a legal person and only imposes criminal or administrative liability. On the other hand, heads of businesses or other persons with decision-making or controlling powers, be it *de facto* or legally, within a business could be held criminally liable in accordance with the principles determined by the domestic law. As for rules of limitation, the Commission points out that 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, but it does not define the duration of time in general or per offence.

In terms of procedure, the model proposed follows in general that of the *Corpus Juris*.

As regards the investigation measures, according to the Commission, it is obvious that 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, according to the European Commission. For this reason, the Commission combines the concept of common investigation area with the concept of mutual recognition in the Green Paper.

In fact, there are three different types of investigation measures in the Green Paper. Firstly, there are investigation measures at the discretion of the European Public Prosecution such as gathering or seizing any useful information, hearing witnesses and questioning suspects, etc. These investigation measures do not require the exercise of any coercive power and they have the same legal scope in all the common investigation and prosecution area. For this reason, these investigation measures are considered to be Community measures. The second categories include 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 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. According to the Commission, it will be necessary to check in advance whether the domestic law of each Member State provides for the same coercive measures. For instance, in each Member State controlled deliveries must exist. The principle of mutual recognition would apply to the forms but not to the principle of review by the national judge of freedoms. If the national law of a Member State requires an authorisation from the judge for the registration of a company, the European Prosecution Service may not do without this authorisation by invoking the mutual recognition of a right of a Member State without the need of an authorisation. This example describes that the introduction of the principle of mutual recognition in investigation measures also introduces the differences of the national laws. How many differences may a common investigation area support and what is the degree of complexity of the system?

Thirdly, investigation measures ordered by the judge of freedoms on application from the European Public Prosecutor, these being investigation measures that restrict or remove the liberty of the accused, especially the arrest warrant. Here the European Commission directly refers to the Council framework decision on the European arrest warrant[64]. 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.

The criteria for choice of jurisdiction in a system of common investigation area, but with a ruling issued nationally, are a sensitive issue. For this reason the 2000 *Corpus Juris* had introduced in article 28 an appeal for the accused against the choice of jurisdiction of judgment. In the Green Paper one cannot help but notice a very sceptical opinion of the Commission on this. 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.

In terms of admissibility of evidence the European Commission does not choose extensive harmonisation or unification. It also introduces here the concept of Tampere: 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. As to exclusion of evidence, the Commission would prefer

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[64] COM (2001) 522.

the exclusion decision to be taken by the court review with jurisdiction to the committal (judge at the investigative stage of criminal proceedings or the competent judge in the merits of the case, according to the Member States). The rules governing exclusion would be those of the Member State in which the evidence was obtained. Evidence gathered in the course of an internal administrative enquiry could be made admissible on a mandatory basis in the national courts if it has been gathered without any human rights violations.

### *Green Paper, Eurojust*[65] *and OLAF*

The relations with criminal cooperation organisations instituted within the framework of the EU have been included in the Green Paper. Firstly, it is necessary to take into consideration that the creation of Eurojust was contemplated in the Conclusions of the Tampere Council of Europe and the Treaty of Nice. Since March 2001 the provision unit (Pro Eurojust) started to operate[66]. Delegations of the national prosecution services gathered in Brussels within the framework of the Council of Ministers to coordinate criminal investigations and international letters rogatory. Since early March 2002 Pro Eurojust was replaced by Eurojust[67].

The aims of Eurojust are:

*a)* to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States;

*b)* to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;

*c)* to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective[68].

These competences may be classified as non-operational. However, it is important for Eurojust, either acting as a College or through its National Members[69], to be allowed to request from the competent authorities of the Member States involved:

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[65] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *OJEC* 2002 L 63/1.

[66] *OJ L* 324, of 21.12.2000.

[67] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *OJEC* 2002 L 63/1.

[68] Article 3 (1).

[69] Articles 7 and 6 respectively. In the case of article 7 the competence is restricted to the types of crime contemplated in article 4, this being the list of competence of Europol, computer crime, fraud and corruption, the laundering of the proceeds of crime, environmental crime,

I) Undertaking an investigation or prosecution of specific acts;

II) Accepting that one of them may be in a better position to undertake an investigation or to prosecute specific acts;

III) Coordinating between the competent authorities of the Member States concerned;

IV) Setting up a joint investigation team in keeping with the relevant cooperation instruments;

V) To provide as much information as required for Eurojust to perform its duties[70].

The European Commission considers the tasks of the European Prosecution Service and Eurojust as complementary. The creation of the European Prosecution Service will allow keeping the competence of Eurojust also in terms of financial organised crime, provided the priority competence of the European Prosecution Services in matters of protection of the financial interests of the Community has been set forth. In practice, active cooperation will have to be established, including exchange of information, in the case of matters affecting the interests of the Community (First Pillar) and interests of the Union (Third Pillar).

As regards Europol, the European Commission points out the relevance of mutual exchange between the European Prosecution Service and Europol. The European Commission does not want and cannot give a preliminary opinion yet about the exact role, operational competences or not, of Europol.

It is obvious that the creation of the European Prosecution Service may have a clear effect on the current task of the OLAF. The Commission does not offer definitive options in relation to it and, in any case, wants to wait until the assessment of the new competences of internal control in the Community Institutions[71]. However, the Commission raises two suggestive questions:

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

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participation in a criminal organisation and other offences committed together with the types of crime.

[70] Article 7 (a).

[71] Regulations 1073/99 and 1074/99. Cfr. VERVAELE, J.A.E., *Hacia una agencia europea independiente para luchar contra el fraude y la corrupción en la Unión Europea*, in *Revista del Poder Judicial*, Madrid, 1999, pp.

– should be preserved or whether part of the Office should be fully detached from the Commission[72].

*Follow-up Report on the Green Paper*

In 2003 the Commission published an in-depth report[73], taking into consideration the results obtained from the extensive public consultation and public hearing. The Commission concluded that the issue of the European Prosecutor is now part of the Union's political agenda. The review of the Treaties establishing the European Communities is still an unavoidable condition: it alone can confer political legitimacy on the proposal. The Commission confirmed that a majority of the Member States was favourable to the creation thereof in the constitutional Treaty or, at least, the transformation in the long run of Eurojust into a European Public Prosecutor. The opinion of the Member States has not yet consolidated, although some of them are clearly more open now than they were at the beginning. However, there is a minority that is firmly against it. The Commission also points out the relevance of the integration of the European Prosecution Service in the criminal systems of the Member States without questioning its independence.

The Commission also confirms the need to carry on reflecting on some issues related to the European Prosecution Service, which should be reflected in the complementary law of the Union. Instead, it is necessary to develop solutions that are comprehensible to the general public and effective methods of pursuing the Union's objectives. On one hand, the constitutional Treaty, which should directly establish the function of European Prosecutor, should also ensure that its derived legislation specifies the relationship with Eurojust. Several scenarios have been outlined above (cooperation between separate and complementary bodies; institutional links; partial integration; total integration). On the other hand, the constitutional Treaty should also define the Prosecutor's material jurisdiction, in a manner that is precise from the outset but open enough to allow further development. Under the constitutional Treaty, the European Prosecutor would initially be responsible for detecting, prosecuting and remitting for trial to the national courts in the Member States, the perpetrators of offences against the financial interests of the Community. The Council, acting unanimously or by enhanced qualified majority on a proposal from the Commission with the assent of Parliament, could thereafter decide whether to extend the European Prosecutor's jurisdiction to offences against other Union interests. In response to certain more specific objections, the Commission considers that its proposed procedure for appointing the

[72] Green Paper, 7.3.2.
[73] COM (2003) 0128 final.

European Prosecutor preserves a balance between the Community institutions and that the fact that his appointment is non-renewable shields him from the risks of negative external influence. The procedure should accordingly be in the Treaty.

Finally, the Commission also realises that the introduction of the European Prosecution Service cannot be possible only being supported by the mutual recognition. This is about conflicts of jurisdiction and harmonisation of procedural aspects. Firstly, the question of the role of the Court of Justice in settling both vertical and horizontal conflicts of jurisdiction needs specific analysis. Objective criteria must govern the choice of the Member State of trial; their definition should underlie the Commission's next work on preventing conflicts of jurisdiction between Member States. *In procedural terms, two essential topics emerge from the hearing. Firstly, equivalent* protection of defence rights is recognised as one of the main concerns expressed with regard to the establishment of a European Prosecutor. It will therefore be important to incorporate the results of the consultation launched by the Commission this year by means of a Green Paper on the procedural guarantees for persons challenged in criminal proceedings to find out whether it will be advisable to go beyond the standards already shared by the Member States when establishing a European Prosecutor. Secondly, the value in a Member State of evidence gathered by the European Prosecutor in another Member State supposes an approximation of national legislation, confined to the minimum needed to implement the mutual admissibility principle. The degree of harmonisation of the law of evidence felt to be desirable should be studied in more detail in this context, in conjunction with the Commission's work programme for judicial cooperation in criminal matters.

## 5. From Eurojust to the European Prosecution Service: The design of the Treaty of Lisbon

### *The legal framework of the Treaty of Lisbon*

The negotiations at the European Convention for the drafting of the new Treaty of the EU resulted in the proposed Constitutional Treaty which died after the negative referendum in France and Holland. However, the new negotiation at the Intergovernmental Conference resulted in a very similar outcome in relation to the common judicial area, Eurojust and the Prosecution.

With regards Eurojust article III-273 of the proposed Constitutional Treaty has been literally reproduced in the Treaty of Lisbon[74] in Article 69 D:

1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

In this context, the European Parliament and the Council, by means of *regulations adopted*[75] in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

*a)* the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;

*b)* the coordination of investigations and prosecutions referred to in point (a);

*c)* the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities.

In the prosecutions referred to in paragraph 1, and without prejudice to Article 69E, formal acts of judicial procedure shall be carried out by the competent national officials.

The text of article III-274 of the proposed Constitutional Treaty on the European Prosecution Service was also reproduced but it also added a paragraph *(see below in italics)* creating an explicit legal basis of introduction through the enhanced cooperation procedure between at least 9 Member States.

Art. 69E:

> 1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish[76] a European Public Prosecutor's

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[74] The treaty has been signed by all the Member States and is now at the ratification stage.

[75] The text of the Treaty establishing a Constitution for Europe still speaks about European law.

[76] Replacing European law.

Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

*In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.*

*Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 280D (1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.*

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the *regulation* provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The *regulations referred* to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

There is no doubt; both articles are a great step forward. Firstly, it increases the competences of Eurojust. Eurojust obtains a legal basis for the resolution of conflicts of jurisdiction and, *inter alia*, it may commence criminal investigation formalities. Nevertheless, these procedural acts must be carried out by national competent officials. It is clear that the Member States did not want Eurojust to become a supranational authority with operational competence in a common area. This solution is reserved for the European Prosecution Service. The fact that the European Prosecution appears in the Treaty is already a very important step. It is also surprising that the Treaty of Lisbon has included enhanced cooperation between at least nine Member States. In other words, an

experiment could be started between States who want to advance quicker. The idea is known and was used by Schengen and for the monetary Union and the Euro. However, article 69E (1) restricts enhanced cooperation to the protection of the financial interests of the Union. To increase the competence *ratione materiae* to, for instance, transnational serious crimes, article 69E (4) requires unanimity of the European Council upon prior approval of the European Parliament and prior consultation with the Commission. This construction presents two large inconveniences. Firstly, developing a European Prosecution Service *from Eurojust* without taking as a basis the existing competences *ratione materiae* of Europol and Eurojust is a wrong channel. In fact, not only must a series of competences be assigned to an operational authority in Europe but also an authority should be created to supervise and direct the activities of Europol and OLAF. It is important to create an integrated police and judicial structure instead of several authorities that cooperate poorly. The supervision by the European Prosecution Service on Europol is also important for the development of the competences of Europol. Secondly, it is politically and legally strange to create a European Prosecution Service to fight against fraud and corruption in relation to the budget of the Union, leaving aside serious and organised crime in the European Union. It is not the signal that the public opinion expects of the Union if the idea is to make a more legitimate construction of Europe in the eyes of citizens and tax payers.

### *Waiting for the entry into force of the Treaty of Lisbon: The pro tempore change of Eurojust*

There are many signals that show that Eurojust is currently lacking infrastructure and sufficient competences to carry out its mission in the European judicial area.

The problems mentioned by Eurojust, judicial and academic experts are the following:

1. The transposition of the Eurojust Decision in the national law of the Member States is quite insufficient. Many States lack specific regulations to either regulate the competence of the College of Eurojust or to regulate the competences of its National Member. There are National Members who lose all powers of prosecutor or first instance criminal judge as they are appointed in Eurojust.
2. The insertion of the National Member in the national structure is very limited, especially in relation to operational actions (commencement of the criminal action, carrying out judicial acts). In some States the National Member has even difficulty in having access to police and judicial information in the data bank.

3. The consequence is that National Members of Eurojust do not enjoy a scheme of equivalent competences at all.
4. The competences of the College of Eurojust are not used very often.
5. The pro-active competences of Eurojust are very limited. Eurojust finds it difficult to have access to the data at the pro-active phase in the Member States and it also finds it difficult to generate important cases on time. As an authority requesting information is in a weak position. The obligation of the national authorities to inform Eurojust and to transfer cases to Eurojust is not clear at all. Eurojust cannot open *working files* in Europol either and has no access to the files in OLAF.

This analysis confirms to a certain degree the result of a recent survey carried out by Eurojust on the transposition of the Eurojust Decision in the national law and on the political willingness of the Member States to change the Decision. In general, most of the Member States and the Ministries of Justice do not want any change and prefer the status quo. In the light of this result the European Commission has openly raised a possible legislative initiative, which led to a recent legislative initiative of 14 Member States. The main ideas in the initiative to amend the Eurojust Decision are as follows:

1. Responses of Eurojust in cases of emergency (for instance, controlled deliveries);
2. Reinforce the coordination in case of conflicts of jurisdiction or refusal to execute a demand for judicial assistance;
3. Need for equivalent competences of the National Members especially in relation to cases of emergency;
4. To improve the flow of information towards Eurojust to enable the performance of its mission;
5. To reinforce the cooperation between Eurojust, the Member States and third States.

The key article in the amendment is obviously art. 90which establishes for National Members in their internal law delegated Eurojust competences:

1. To request judicial assistance (including applications for mutual recognition);
2. To order registrations and attachments;
3. To authorise and coordinate controlled deliveries.

The amendments include a cell for the coordination of emergencies, which entails the presence of a National Member 24 hours a day 7 days a week (24x7), in other words, fully available to act in cases of emergency, applying the competences contemplated in art. 9a. The members of the cell transfer will, for instance, in petitions of judicial assistance in criminal matters and in

the case of non-identification of a national execution authority (or identification on time) execute the petition.

For the time being many Member States are opposed to the idea of delegated competences for the National Members, even if it is done with the agreement of the competent national authority or at its request and on a case-by-case basis or when it is only for situations of emergency. Many member States are frightened of having a supranational authority with supranational competences and raise constitutional reservations.

## 6. Conclusions

The creation of a European judicial area in the European Union is a difficult task. Member States being frightened of losing sovereignty in terms of *ius puniendi* is understandable and it is also understandable that the amendments are restricted to small steps. However, the classical judicial cooperation in criminal matters cannot survive in a model of such integration as the model of the European Union. For this reason it is possible to imagine that elements of the *Corpus Juris* will be gradually executed.

The need for a reform is real[77], not only due to current problems but also thinking of the short-term future. The European area requires criminal protection of legal rights going beyond the notion of State-Nation and its *ius puniendi* in order to protect:

- The legal rights of the EU: The financial interests of the EU, the single currency (the Euro), internal fraud and corruption in the institutions of the EU.
- Legal rights related to transnational aspects of the internal market, customs union, common policies related to competition, the environment, food, security, etc.
- Legal rights in danger owing to transnational crimes.

Also the re-definition of territory (internal market, customs union) and the increasing integration of State-nation in this territory need powers in terms of investigation and procedure that may guarantee the legal rights in the common area. The rules of competence of the Public Prosecution Service and the Judicature must be re-defined in the light of the urgent needs. The practice with the European arrest warrant and extradition[78] shows the difficulty of having mutual recognition without the necessary harmonisation in the criminal

[77] Cf. in relation to this the Information Resolution from the Delegation of the National Assembly for the European Union on the fight against fraud in the EU, Paris, 22 June 2000.

[78] L. Arroyo Zapatero and A. Nieto Martín, *La orden de detención y entrega europea*, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2006

procedure and guarantees and without a scheme for the resolution of conflicts of jurisdiction in Europe. How long will the citizen have to wait to see in Europe an efficient criminal fight against trafficking in human beings, great economic and financial crimes, serious environmental pollution by giant shipping companies, illicit trafficking in animal food? Will the citizen understand that in case of forgery of the Euro the European Union and the Member States have not managed to draft a suitable scheme to protect the currency inside the Union and beyond its borders? Will national politicians carry on claiming that the absence of a true compass is for Brussels and will they carry on claiming that they are innocent?

The Treaty of Lisbon offers a sufficient legal basis for the necessary amendments, but the negotiations between the 27 Member States on the amendment of Eurojust clearly show that there is great need to leave aside the approval by unanimity. The Treaty of Lisbon prescribes the ordinary legislative procedure (with a qualified majority and parliamentary co-decision) for Eurojust. For the European Prosecution the only possible way seems to be that of enhanced cooperation. In any case the necessary harmonisation may be reached also with the ordinary legislative procedure contemplated in art. 82, which relates to mutual admissibility of evidence between the Member States and the rights of the persons during the criminal procedure.

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