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Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor
European Commission COM (2001) 715 fin

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This opinion was prepared at the request of the Special Committee for the Justice and Home Affairs Council of the Netherlands First Chamber of the States-General (upper house)

It is a response to the position of the Netherlands Government as laid before the First Chamber. This version takes account of the Government's final position as forwarded to the European Commission.

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1. The European Commission's Green Paper – background and context

The European Commission explicitly refers in the Green Paper to its proposal to the Nice Intergovernmental Conference for establishment of a European Public Prosecutor. To this end the European Commission proposed a new legal basis in the EC Treaty, to be created under Article 280a. The powers of the European Prosecutor would be expressly confined to protecting the financial interests of the Community. This proposal was not adopted by the heads of state and government at Nice. The third pillar of the Treaty of European Union (TEU) did, however, provide for the creation of Eurojust. After a brief trial period with Pro-Eurojust, Eurojust was set up under a third-pillar decision. The aim of this third-pillar body is to optimise judicial cooperation at public prosecutor level by better cooperation and support and the execution of letters rogatory (see below). Eurojust's remit extends far beyond EU fraud alone, covering the broad area of organised crime, as defined in the substantive scope of the third pillar set out in the TEU.

The European Commission is also very aware that major progress was made in the 1990s on protecting the Community's financial interests. The 1990s saw the introduction of EU regulations requiring Member States to counter irregularities over EU income or expenditure by imposing administrative measures or penalties.[1] [2] The EU's anti-fraud unit (previously UCLAF, now OLAF) was also given autonomous administrative supervisory powers in the Member States. Conventions, and related protocols, were adopted under the third pillar which require Member States, after ratification, to pursue EU fraud under the criminal law, provide for the necessary criminal penalties and make corruption by officials of Member States or supranational bodies a criminal offence. Lastly, following the resignation en bloc of the Santer Commission, an interinstitutional agreement and a number of regulations[3] gave OLAF more teeth and autonomy in tackling internal fraud and corruption.

Nevertheless the European Commission thinks it necessary, with an eye to the 2004 Intergovernmental Conference and thus the concrete proposals to be drawn up in autumn 2002, to examine the practical implications of a European Public Prosecutor in greater depth and initiate a

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1 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995, OJ L 312, 1995, 1.
2 Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996.
3 For example Regulation (EC) No 1073/99, OJ L 136, 1999, 1.

debate on the subject with all parties concerned in the Member States. It was, and is, the Commission's view that existing instruments are not effective enough in combating EU fraud. This is partly borne out by the slow and incomplete ratification of the conventions and protocols concluded under the third pillar. The main argument is that the model of traditional legal assistance between justice authorities is inadequate in a strongly integrated market, and that this fragments the European criminal-law area. This argument of the European Commission is endorsed by the findings of the Corpus Juris studies commissioned by the European Parliament,[4] by the opinions of the Committee of Independent Experts,[5] the Committee of Wise Men[6] and the Supervisory Committee of OLAF,[7] all of which advocate a European Public Prosecutor to protect the financial interests of the Community.

Others too acknowledge that traditional legal assistance between states, even at its best, is not able to provide efficient forms of criminal prosecution at European level. In the conclusions of the Tampere European Council the heads of government opted, with a view to establishing the 'area of freedom, security and justice' referred to in the Amsterdam Treaty, for mutual recognition of judicial decisions and judgments, in criminal cases too and in respect of judicial decisions taken during the pre-trial stage.

The heads of government also stressed that we must in the EU have free movement of criminal evidence, meaning that evidence obtained in one EU Member State should be admissible in another Member State. The Tampere proposals produced an avalanche of proposals, recorded on the Commission 'scoreboard'. The proposal for a European arrest warrant was one of these. And a clear formulation (and thus a legal basis) for greater transnational operational cooperation was also given to the third pillar in the Amsterdam Treaty (Title VI TEU, Arts. 29-32), compared with the third pillar under the Maastricht Treaty. The establishment of joint investigation teams is a clear example of this.

The European Commission's proposal to establish a European Public Prosecutor is consistent with the ideas expressed at Tampere, but goes a clear step further than the Tampere proposals or the *acquis* of the third pillar. It wants a common investigation and prosecution area, albeit restricted to the financial interests of the Community.

2. General position and assessment of the Netherlands Government

Analysis

The Government of the Netherlands is in principle in favour of the initiative to establish a European Public Prosecutor and thinks that it can be done by amending the EC Treaty.

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4 See M. Delmas-Marty (ed.), Corpus Juris, introducing penal provisions for the purpose of the financial interests of the EU, Economica 1997; M. Delmas-Marty & J.A.E. Vervaele (eds.), The implementation of the Corpus Juris in the Member States, vol I- IV, Intersentia, 2000-2001.

5 This committee investigated fraud and nepotism in the European Commission following the resignation of the Santer Commission. See Second Report on Reform of the Commission, 10.09.1999, recommendation 59.

6 Report by Mr Dehaene, Mr Simon and Mr Von Weizsäcker, 18.10.1999, par. 2.2.6.

7 Opinions Nos 5/99 and 2/2000 of the OLAF Supervisory Committee, in the Progress Report July 1999 to July 2000, OJ C 360 of 14.12.2000.

This starting point needs to be viewed in its proper context. Until recently the Netherlands Government always maintained that the existing body of instruments was adequate, provided it was properly used, and that there was no need for new instruments and structures, even for combating fraud in the EU. The Government had also always maintained that there was no basis in current EU law for harmonising criminal law or the law of criminal procedure and that harmonisation would have to be done under the third pillar and with due regard for the application of Community policy. The latest Government memorandum on European criminal law,[8] which states the Government's position on criminal (procedural) law as it is evolving under the third pillar and comments on the Corpus Juris study and its proposal for establishment of a European Prosecutor, says that:
'*The convention and protocols on fraud referred to above under 3, some of which were concluded at the same time as the Corpus Juris study and some of them afterwards, achieve the same objective in terms of substantive criminal law as that pursued by the Corpus Juris (…). I believe the changes to the structure of criminal prosecution advocated in the Corpus Juris must be seen as part of the idea informing the Corpus Juris as a whole, namely that Member States will not be able to combat EU fraud effectively on their own. As is apparent from the foregoing, this assumption is out of date. I also believe that realisation of the priorities chosen by the Netherlands for Tampere – the coordination of prosecutions and setting of European priorities for tackling crime – will already markedly improve the practical approach to EU fraud and so provide a better picture of what still needs to be done to move things forward. To sum up, I believe the Corpus Juris has given a useful stimulus to the debate on how European criminal law should develop further. But following the Amsterdam Treaty and special instruments for combating fraud and corruption this debate has taken a new turn.*'

The Netherlands Government thus takes an emphatically different starting point in its latest position. In the above memorandum on European criminal law the Government gives a list of criteria for assessing initiatives to harmonise legislation.[9] Criterion a) reads: 'actual scope of the problem and consensus as to the desirability of a European approach, in other words are changes needed and if so to what degree? (subsidiarity)'. By its approval in principle of a European Public Prosecutor the Netherlands Government is also acknowledging that this criterion is met.

The Netherlands Government also emphasises accountability as an essential precondition.

Lastly, the Netherlands Government stresses that a criminal-law approach is a last resort which must always be accompanied by a mix of preventive and administrative-law measures.

Opinion

I believe the Netherlands Government is making a conscious and correct choice here, based on the European dimension of the matter. Naturally this choice cannot be made from a Dutch perspective alone. The scale of EU fraud (in both income and expenditure) is serious and in some

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8 Eurostrafrecht, Tweede Kamer, 1998-1999, 26 656, nr. 1.
9 Idem, p. 6.

sectors it is tied in with organised crime. We should bear in mind here not only olive oil subsidies but also the recent issue of cigarette and alcohol smuggling or the VAT merry-go-round.

Notwithstanding the progress which has been made, notably in harmonising substantive criminal law, the fact remains that the measures taken by many Member States to combat EU fraud leave much to be desired. Despite the creation of OLAF, action against internal fraud and corruption inside the European institutions is not adequate either. OLAF is a European watchdog not an investigator, and the whole business of prosecutions, which by definition involves national investigation authorities, is awkward. Numerous studies have shown that it is very hard to bring complex cases of transnational EU fraud to court with any chance of a conviction. The fragmentation of information, lack of scrutiny, lack of coordination between judicial authorities or problems with the admissibility of evidence or the value of evidence (use of evidence obtained by surveillance in criminal cases, use of evidence obtained from letters rogatory, etc.) have in a number of major cases of EU fraud meant less than thorough investigations, problems of jurisdiction, problems with evidence, light penalties or acquittals. There are thus real inadequacies in managing the transnational European dimension. For an efficient approach which treats Member States equally, and to protect the vital interests of the Community, opting for a European Public Prosecutor would thus seem to be a legitimate and responsible choice in terms of the subsidiarity principle.

Indisputably, this means that the Amsterdam Treaty will have to be amended. This is necessary not just because otherwise there is no legal basis, either in the EC Treaty or the TEU, but also to ensure democratic legitimacy. It is a substantial step, which must be underpinned by democratic legitimacy and must thus be part of the ratification process for the next EU Treaty.

What about the Netherlands Government's marked preference for this amendment to be made in the EC Treaty (first Community pillar) rather than the TEU (third pillar)? Here too I think the Government's choice is right. It is good that policy on standardisation, prevention, supervision and investigation relating to the financial interests of the EU can be framed within one and the same institutional structure, with the European Parliament having the power of codecision and judicial control exercised by the Court of Justice. This also sets the parameters for democratic and judicial scrutiny of the new body's operations. The Government's choice of a first-pillar solution may also have been influenced by the fact that the present Art. 280 of the EC Treaty on protection of the EU's financial interests was recently interpreted, both by the Council's Legal Service and the Legislation Department of the Netherlands Council of State, as meaning that the first Community pillar *can* provide a legal basis – albeit a limited basis – for powers to harmonise criminal law. As we know, in 2001 the Commission put forward two proposals for directives designed to harmonise criminal law in relation to the EU's financial interests[10] [11] and to environmental law. These two proposals conflict with the Convention (and related protocols) on financial interests mentioned earlier and a proposal for a framework decision on the environment. If the proposal for a framework decision on protection of the environment through criminal law is approved, it seems likely that the Commission will challenge it before the Court of Justice on the grounds that the *acquis communautaire* is being infringed by the third pillar (Council). If the Court upholds that line in its case law and if the Commission can persuade the Court of the

[10] Proposal of 23 May 2001, OJ 28 August 2001, C 240 E/125-129.
[11] Proposal of 15 March 2001, OJ 26 June 2001, C 180 E 238-243.

functional importance to Community policy of harmonising criminal law for the realisation of Community objectives, it is not impossible that the Court too will recognise functional powers for the harmonisation of criminal law as falling under the first pillar.

Indeed the importance of accountability cannot be emphasised too much. It is important that there is a European Commissioner who is responsible for the policy of the European Public Prosecutor and reports on it to the European Parliament. The European Public Prosecutor himself must also give an account of his work (annual report) and policy priorities (annual programme).

I wholly endorse the reasoning of the Netherlands Government that criminal law should be viewed as the 'last resort' and should form part of a mix of measures. But I do not understand why this is adduced as an argument in the context of the Green Paper. Union policy on EU fraud consists for the moment chiefly of preventive measures (in the legislation too) and administrative instruments (harmonisation of administrative penalties, European supervision, etc.). Only with the third-pillar conventions do we find criminal-law harmonisation of substantive special criminal law added. OLAF's programme for the next few years also concentrates on prevention and administrative measures. The Green Paper is concerned only with the criminal law aspect, but that in no way means that this approach is a substitute for prevention or administrative measures. It is the missing link in the battle against serious EU fraud.

3. Specific questions raised by the European Commission in the Green Paper

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

Analysis

The Netherlands Government favours the proposed decentralised model, whereby deputy European prosecutors are an integral part of their own national prosecution services. The Government favours an 'exclusive function', allowing them to devote themselves fully to this task.

Opinion

First of all there is a question of legal language. The Dutch version of the Green Paper talks of a *'Europese officier van justitie*', a 'European (Public) Prosecutor'. It must be borne in mind that the European Prosecutor is to head up a (central) European public prosecutor's office, consisting of himself plus deputy prosecutors in the Member States. The term '*Europees Openbaar Ministerie*', or 'European Public Prosecutor's Office' would thus have been a more natural choice, and some language versions of the Green Paper do in fact use this term.[*]

[*]The English version of the Green Paper is at pains to make the point that it uses the term 'European Public Prosecutor' to mean both the office and the person who holds it

The decentralised model seems to me the best choice. After all it matters, for the influx of cases reaching the European prosecutor, that he should be permanently *au fait* with the realities of everyday criminal investigation. And many cases will by definition be hybrid cases, not confined to EU fraud alone (see questions 2 and 6). Given that many cases will in practice be dealt with by the deputy prosecutor (investigations and prosecutions), it is important that he should be part of the national prosecution service. A separate structure might cause the process to seize up.

The Netherlands Government is right to point to the potential complications of having a prosecutor who is part of the national prosecution authority but not hierarchically answerable to it. This problem is nothing new for us: we only need think of the relationship between the federal prosecutor's office and local offices in the Netherlands or between the national public prosecutor's office against the mafia and local offices in Italy. The respective remits need to be defined in specific legislation, the starting point being that the European Public Prosecutor has primacy in matters of EU fraud and can thus direct the national investigation service and also influence national policy on criminal law in this area. We already have comparable models for direction and cooperation in the area of European competition between the European competition agency and national competition agencies like the Netherlands Competition Authority (NMA). In short, it is feasible to envisage rules for this to be devised both at European level and in national criminal procedural law.

The choice of an exclusive function seems to me less convincing. I do not see why this should have to be compulsory. I do think it is important that the deputy prosecutor should have enough time and resources to deal with EU fraud properly. But there is no reason why the deputy prosecutor has to be a single individual. I do not see why a team of national officials, specialists in e.g. white-collar and financial crime, could not be responsible for fiscal fraud ('AWR' cases[••]) and at the same time be deputy prosecutors. The fact that they also investigate and prosecute direct fiscal fraud should not in itself stop them from handling EU fraud, provided they really do have the time and resources to do the Community work properly. The choice of a 'hybrid function' also has advantages when it comes to handling the influx of cases and forwarding them to the European Public Prosecutor, given that there are a large number of hybrid cases.

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

Analysis

The Netherlands Government favours cumulative powers for the European Public Prosecutor and national prosecution authority, with primacy for the European Prosecutor. The Government does, however, advocate a financial threshold and strict separation of the substantive powers of the European Prosecutor. This power is limited to a specific number of articles in the national criminal code. The Netherlands Government does not for the moment want any further criminal offences to be added.

Opinion

[••] In the Netherlands, falling under the Algemeen Wet Rijksbelastingen (General Federal Tax Act).

The choice of cumulative powers with primacy for the European Public Prosecutor is a logical consequence of the fundamental choice. The choice of a financial threshold, and this, as the Government rightly insists, as a criterion for the prosecutor's powers, is also convincing.

A difficult point, however, is the substantive demarcation of the European Public Prosecutor's powers.

It is important that the European Community should be able to act effectively against serious forms of EU fraud or complex transnational forms of EU fraud. The definition of EU fraud is part of the Community *acquis*, thanks to harmonisation via the third-pillar conventions (and related protocols). Everyone should thus know what EU fraud is, and that goes for the national enforcement bodies too. But the problem is that the Member States, even if they have already adapted their national law to the substance of the conventions and related protocols, have by no means always done this by defining separate, specific offences. And specific offences in Member States are not always offences under special law. In short, it is particularly difficult, on the basis of the arrangement suggested by the Netherlands Government, to arrive at a model which will be workable for the whole of Europe using the national legislative structure or the relationship between *lex generalis* and *lex specialis* in criminal matters. By definition not all EU frauds can be matched with offences in the criminal code. But there are plenty of offences in special tax and/or financial law which will cover them. It is of course useful to have a catalogue of applicable articles for each country, but I think the criterion has to be serious detriment to the financial interests of the Community, with a primacy rule. This means, for example, that serious VAT fraud would also by definition come under the remit of the European Public Prosecutor.

I think it would be very hard for a European Public Prosecutor (European chief prosecutor and deputy prosecutors) to conduct investigations in the common area on the basis of a highly fragmented ‘patchwork quilt’ of national penal provisions. For this reason I believe that preference should be given to the Corpus Juris, for full harmonisation of EU fraud offences and related offences. This does not mean that 'federal crimes' will be created. One can envisage a method of legislation whereby these feature under a separate title of the criminal code, with a rule that these are subject to *lex specialis*, unlike other offences, and thus also a rule that the powers of the European Public Prosecutor have primacy in respect of them.

Lastly, I do not understand why the prosecutor's remit is to be confined for the moment to EU fraud and corruption on the part of officials. Why should the European Public Prosecutor have power to deal only with corruption by EU officials and not other criminal acts by EU officials which are related to the exercise of their office, such as serious breach of confidentiality, for example? Secondly, there is the question of counterfeiting of the euro. Functionally and symbolically the euro is so closely bound up with the Community that there is an obvious parallel with the Community's financial interests here. Powers for the European prosecutor here would also have the great advantage of enabling a coordinated policy of law enforcement to be operated in respect of the euro. This would also clarify the respective remits of the European Public Prosecutor, Europol and OLAF.

3.3. Should the establishment of the European Public Prosecutor be accompanied by certain further common rules relating to penalties, liability, limitation or other matters? If so, to what extent?

Analysis

The Netherlands Government does not think that further common rules on penalties are needed.

It is also against any introduction of minimum penalties. The Government does favour the introduction of criminal-law liability for legal persons and harmonised rules on limitation. It would also like to see EU directives on criminal prosecutions.

Opinion

Remarkably, the Netherlands Government ignores the fundamental question of whether the harmonisation of sections of special criminal law (question 2) should be accompanied by (partial) harmonisation of the general criminal law. Is there any sense in harmonising offences unless one also harmonises the *lex generalis*?

The Corpus Juris opted for targeted partial harmonisation of the general section of the criminal code. The European Commission does not take this approach in the Green Paper, arguing 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'. The Netherlands Government appears to be tacitly agreeing with the European Commission, albeit with reservations.

The Government's reasoning on the harmonisation of criminal penalties is not altogether clear. If 'further' means in addition to the existing *acquis* (third-pillar conventions and protocols), then that is a cogent argument. But its arguments on Art. 280 and the principle of equivalence are strange and do not sit well in this context. Art. 280 of the EC Treaty commits Member States to proportionate, effective and deterrent action, not just to equivalence. In short, Art. 280 of the EC Treaty does not preclude the imposition of stricter penalties for EC fraud than for equivalent national fraud. Furthermore, it may be that mere equivalence does not meet the requirements of Art. 280 of the EC Treaty. The legal difficulty, as outlined in Art. 225 of the criminal code, can be got round by my suggestion of a separate title in the criminal code (see question 2).

I agree with the Netherlands Government on the criminal liability of legal persons. But its view is not supported by proper argument here. Here too the functionality of harmonisation needs to be made clear. And some Member States – admittedly an ever smaller group – are strongly opposed to the idea. I believe, though, that efficient enforcement means that the European Public Prosecutor must be able to prosecute legal persons too, rather than being able to prosecute in one country but having to leave enforcement in another country to the national administrative authorities. A diagonal model like that would be difficult to operate.

I also agree with the Government on limitation. A period of limitation scaled according to the gravity of the offence seems to me sensible and necessary.

I sympathise with the idea of not having minimum penalties, but the Netherlands is in a minority group of countries here. Also, it is odd that the Netherlands is proposing that the prosecutions policy of deputy European public prosecutors should follow set guidelines, but wants the judge to

be given full discretion. To what degree does the setting of minimum penalties infringe the basic essential principles of Netherlands criminal (procedural) law?

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

Analysis

The Netherlands Government endorses the idea of mandatory referral by national and Community authorities. It does not, however, want referrals to be made direct to the EU prosecutor, without going through the national prosecution authorities.

Opinion

I believe mandatory referral is essential to ensure the proper flow of information to the European Public Prosecutor and prevent the system from seizing up. But instruments are needed at European level to ensure that the requirement is complied with. If necessary the European Public Prosecutor must also have the instruments to demand the information he needs, including the power to instigate searches if need be. In the past, conflicts between opposing national and European enforcement agencies have arisen in a number of Member States over matters of administrative scrutiny at European level. It is important to remember that the Dutch administrative model does not work in all EU countries in the same way as in the Netherlands. National enforcement authorities may also conceal facts dishonestly.

I am not convinced that it should be mandatory to refer all cases through the national prosecution authorities and in the light of the above I think it is not wise either. In cases of doubt as to whether the European Public Prosecutor has jurisdiction, I imagine that national enforcement agencies will contact the deputy public prosecutor. If, however, it is just a question of knowing the nature and scale of misdemeanours committed on the national territory, it is feasible to have a system for doing this in conjunction with mandatory referral to the European Public Prosecutor. After all it is perfectly feasible to require the referrer or the European Public Prosecutor to send a copy of the referral to the national deputy public prosecutor. But the national public prosecutor's office, which is not able to operate totally independently of the executive in every EU country, must not be able to 'filter' cases before they are forwarded to the European Public Prosecutor. It is vital that the European Public Prosecutor too should have a comprehensive overview of the problems of EU fraud. Individual citizens and companies must also have the right to refer cases to the European Public Prosecutor. Lastly, should not OLAF, Eurojust and Europol refer cases to national prosecution authorities as a matter of course? It is of the utmost importance for the European Public Prosecutor to have full information at all times on serious forms of EU fraud and transnational cases of EU fraud.

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

Analysis

The Netherlands Government sets great store by the discretionary principle nationally, but appreciates that the system of democratic accountability and judicial scrutiny and all the associated checks and balances is far harder to establish at European level. For this reason the Government is happy to accept mandatory referral and a limited and separate area of jurisdiction for the European Public Prosecutor. In the Government's view, the consequent obligation to act on all cases strengthens national supervision of the European Public Prosecutor, because in all cases (except closures) the judge will be able to give his verdict on the action which the EU Public Prosecutor takes.

The Netherlands Government proposes that exceptions to the mandatory principle proposed in the Green Paper be limited to well founded cases of closure on technical grounds.

Opinion

In the memorandum on European criminal law mentioned earlier the Netherlands Government mentions, as one of the criteria for assessing initiatives to harmonise legislation, criterion d) 'retention of the scope to apply the discretionary principle as enshrined in criminal prosecution procedure in the Netherlands'[12]

The Netherlands Government is thus explicitly opting here for the opposite starting point. I can sympathise with that choice and the reasons adduced for it are convincing. But it seems to me wrong to decide on the basis of this that there should or can be no room for a policy of discretion or out-of-court settlement. Why should the European Public Prosecutor not be able to frame a policy of that kind? In short, I think there is scope for applying the mandatory principle, but tempered by directives which provide guidelines and allow for the possibility of a case being conditionally closed or settled out of court.

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

Analysis

The Netherlands Government argues that many so-called 'hybrid' cases can be avoided by a proper separation of powers between the European Public Prosecutor and national prosecution authorities. A routine consultation structure should be put in place to handle disputes. In truly hybrid cases (involving e.g. VAT fraud and structural fund subsidies) it should be determined right at the start which matters are to be laid before the European Public Prosecutor and which before the national prosecution authority.

Opinion

The issue of hybrid cases is indubitably one of the most difficult in the whole Green Paper and it is a substantial one. The problem of concurrent (multiple) offences is in not in fact a real problem, since the Green Paper points out that the national prosecution authorities and the

[12] Idem, p. 6.

European Public Prosecutor can both be involved in a case. What is essential is the division of powers, between the European Public Prosecutor and the national prosecution agencies, in cases of EU fraud which are criminal offences in the same way as traditional national offences, e.g. customs and tax fraud, forgery, deception, membership of a criminal organisation, etc.

Hybrid cases, which is what the majority of cases are, create problems for the division of powers and the conduct of a prosecution. Positive or negative conflicts of powers should be avoided and attempts made to avoid double jeopardy (*ne bis in idem vexari* - see question 14). Prosecutions should also be conducted as efficiently as possible.

I have already dealt with the resolution of conflicts of powers under question 2. But that will not solve every problem. For this reason the proposed consultation structure should be used to prevent double jeopardy and resolve disputes. But consultation on its own is not enough. A system of criteria must also be devised for dividing work between the European Public Prosecutor and the national public prosecutor and so avoiding duplication in investigation work.

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

Analysis

The Netherlands Government is highly critical of the passages in the Green Paper which deal with powers of investigation. The Government believes that a number of concepts are being confused here and that the position of the 'judge of freedoms' is unclear. Consequently it believes that exceptions must be built in to the principle of mutual recognition where ‘admission of the evidence would mean a fundamental infringement of the legal rules of the Member State in which the criminal case is brought'. In EU criminal cases too it must be possible to conduct a full judicial review of the investigation and evidence-gathering. The Netherlands Government rejects the idea of a European Court of Justice pre-trial chamber for this. It sees here the serious drawback that throughout the phase of the criminal investigation, progress assessments and the investigation itself would be conducted alternately by national and European prosecutors and, moreover, on the basis of legal rules which were not the same. The Netherlands Government favours review by the national judge, who can ask his foreign colleagues to verify that the evidence has been lawfully gathered.

Opinion

I fully share the view of the Netherlands Government that there are here 'a number of fundamental questions which certainly need to be addressed more carefully and in greater detail than the Green Paper has done'.

That is not to say that I agree with all the Government's criticisms. I do not think the position of the judge of freedoms is all that unclear. He is a judge who supervises procedural guarantees and fundamental rights when coercive measures are employed. In short, he must give prior judicial permission for the European Public Prosecutor (prosecutor or deputy prosecutor) to use such

coercion. Contrary to what the Netherlands Government claims, the national judge of freedoms, comparable to the guarantee function performed in the Netherlands by the examining magistrate, is very much a judge who is part of the national judiciary and applies his own domestic law to the rulings he makes.

More problematic is the mixing of the investigative powers of the European Public Prosecutor and judge of freedoms with the third-pillar concept of mutual recognition, as set out in the Tampere conclusions. The wording of the Green Paper here is clearly a compromise between the different units of the European Commission (OLAF and the unit responsible for justice and home affairs policy).

The Corpus Juris proposal also spoke of a European arrest warrant, European investigations and even a European record of questioning, in short investigation measures which would have effect within the territory of the 15 Member States. A major difference between the Corpus Juris and the Green Paper, however, is that the former has articles on the criminal-law harmonisation of defence rights and the rules on admissibility of evidence and the burden of proof. In the Green Paper the sections on harmonising criminal procedural law are omitted and replaced by automatic mutual recognition. Discrepancies between systems of defence rights and laws on evidence are likely here to bring about a situation in which defence rights may become something for the European Public Prosecutor to juggle with in his choice of forum, resulting in a downward spiral (the 'Delaware effect'). The European Commission's proposal for a European arrest warrant gave us experience enough of the far-reaching consequences which automatic mutual recognition may have for the rights of the accused. The same problems will arise with automatic recognition of a European search warrant or a European seizure order, to name but a few.

I regard the position of the Netherlands Government, that this problem should be addressed on a country-by-country basis, as unrealistic: it represents several steps back from the achievements of the third pillar and does not sit well with the conclusions of Tampere. My view is that we should work on transnational instruments of investigation, but without losing sight of the rights of the accused. This will require some harmonisation of criminal procedural law and ways will also have to be devised of allowing accused persons access to certain transnational instruments. 'Equality of arms' will have to be reconsidered in a European dimension too.

The European Commission is aware of this dimension and in 2002 published a 'Consultation paper on procedural safeguards for suspects and defendants in criminal proceedings'. This document confines itself, however, to an analysis of procedural safeguards in the ECHR and the 2000 Charter of Fundamental Rights of the European Union.

There are a few hiatuses to be noted. Under the heading 'h) fairness in obtaining and handling evidence (including the prosecution’s duty of disclosure) the consultation paper says that: 'There is a need to ensure that the rules on the means of obtaining and handling evidence and the inadmissibility of improper evidence are equivalent throughout the European Union. This is particularly important as regards jurisdiction in cross-border crime cases. Ideally, the duty of disclosure should also be the same'. The Commission also refers to 'a separate proposal for a Council framework decision on mutual recognition of pre-trial orders to obtain evidence (including for cybercrime investigation) which will cover search and seizure orders and production orders'. All this means that European investigations cannot be done without some

degree of harmonisation of criminal procedural law. The examples mentioned, the European arrest warrant and the proposal for mutual recognition of pre-trial orders to obtain evidence are excellent illustrations of the fact that devising operational investigative instruments on the basis of mutual recognition requires a substantial measure of harmonisation, which also has to take account of defence rights. For this reason it is important to look very critically at these passages in the Green Paper and to tie the proposals, which I consider justified, to the requirement of harmonised safeguards. I think that the Netherlands Government's suggestion that the power of the European Public Prosecutor should depend on investigations which only have effect in the Member State seems to me outdated and no longer defensible given the current state of developments under the third pillar.

For further analysis see questions 3.10-3.14.

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

Analysis

In the general introduction and in dealing with this question the Netherlands Government makes the point that national enforcement capacities are used, though the Green Paper says nothing more about how these are to be fed and funded. There may also be competition for resources between Community and national priorities.

Opinion

Competition is already possible, of course, between Community and national enforcement priorities. But Arts. 10 and 280 of the EC Treaty and specific Community secondary legislation place far-reaching enforcement obligations on Member States, and this already produces the necessary consequences as regards the deployment of enforcement capacity and the observance of priorities. In 1999 France was found guilty by the Court of Justice of systematically failing to pursue cases of violence by farmers against Spanish road hauliers transporting cargoes of fruit. This shows that current policy on criminal law already has a marked Community dimension.

Even so, the argument of the Netherlands Government (both in the introduction and under this question) about capacity and extra funding is most apposite. It is of paramount importance that the financial and structural support given to the European Public Prosecutor is defined clearly and that the European Public Prosecutor has the financial resources necessary to direct enforcement capacity in the Member States. Parallels can be drawn here with federal-state enforcement cooperation in the USA.

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

Analysis

The Netherlands Government favours mandatory referral with a limited power to close cases on technical grounds. For possibilities of judicial review of the decision to halt a prosecution, it

makes reference to national law (in the Netherlands Art. 12 of the criminal code). In the introduction and under this and other questions, the Netherlands raises the issue of accountability for the criminal law policy pursued. Hence its advocacy of annual reports, annual programmes, etc.

Opinion

I argued above in favour of broader exceptions to mandatory referral, thus for discretionary closure on the basis of objectively assessed criteria and scope for a policy of out-of-court settlement. It is important to be able to appeal to the judge against the decision to close a case. National law should make provision for this. It is also important that policy on closure should be known in advance and that there should be proper accountability for it. Regarding out-of-court settlements, there is a tendency in European countries for decisions on these to be taken or formalised by the judge. This would thus be one method of judicial settlement, following a request by the public prosecutor.

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

Analysis

The Netherlands Government favours the preparation of rules to determine whose powers have primacy. In the event of a conflict of powers, Eurojust could mediate. The judge on the spot could supervise, and if necessary refer the case on to a competent judge in another Member State. The starting point in the European Public Prosecutor's choice of forum and in the review by the national judge should be the desire for good justice. This review does not need a pre-trial chamber in the European Court of Justice.

Opinion

Since the Green Paper, in my opinion rightly, opts for judgment at national level, the European public prosecutor can in theory have the case tried in 17 jurisdictions (14 Member State jurisdictions and 3 in the UK). Total freedom of choice of a forum for the European Public Prosecutor is inconceivable. For this reason the choice of forum must obviously be made objectively and on the basis of criteria of priority. But we know from the present situation that this choice can never and should never be a hard and fast one. There has to be a measure of flexibility built in. In transnational cases, important common points of reference will quickly emerge in a number of jurisdictions. The decision setting up Eurojust specifically empowers Eurojust to liaise between these. The reasons for the European Public Prosecutor's choice of forum may vary widely, but unless the rules on criminal procedure are harmonised the choice will certainly not be a neutral one. In short, for the accused person the European Public Prosecutor's choice of forum is an act which has far-reaching consequences. Not to mention the fact that he has to defend himself in a foreign country, subject to a foreign country's laws. I am not convinced, though, that this means he loses his 'natural judge'. Anyone doing business in Europe runs the risk of coming up against a legal system which is not that of his own Member State. That is the case in civil law and administrative law, and I see no reason why it should be different in criminal law.

An important consideration is that this choice of forum may have very far-reaching consequences for the accused. I cannot agree with the Netherlands Government here. A choice of such importance must not, from the point of view of the accused person, be left to mediation by Eurojust.

I think a judicial filter has to be built in here, to scrutinise both the quality and admissibility of evidence and the jurisdiction/choice of forum. This function may be entrusted to a specific national judicial body (it can also be the judge of freedoms) or to a European pre-trial chamber of the kind which exists for the International Criminal Tribunal for the former Yugoslavia and is envisaged for the proposed International Criminal Court. Entrusting it to a European pre-trial chamber, preferably a special chamber of the Court of Justice, has the advantage of legal unity and certainty for the whole of the European Union. In addition, this chamber's case law will have a gradual harmonising influence on national systems of criminal procedural law (comparable to the influence of the ECHR). This legal certainty and harmonising influence is absolutely vital for building up the requisite mutual trust in each others' systems of criminal law and for maintaining a proper legal standard in transnational cases.

In all fairness, not all EU fraud cases need to be laid before this pre-trial chamber. Many serious fraud cases will be confined to just one jurisdiction and can thus be prosecuted and settled under national criminal procedural law with no need for a pre-trial chamber. For these cases it is enough for the national judge to check the quality and admissibility of the evidence. If the accused person thinks his case should be heard by the pre-trial chamber, he must be able to appeal against the public prosecutor's request to have the case dealt with by the national judge of freedoms.

The proposal of the Netherlands Government for mediation by Eurojust and possible referral by judges on the spot in no way compromises the imperatives of legal certainty and legal safeguards for the accused person.

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

Analysis

See primarily question 7. The Netherlands Government also has solutions in national law to the question of the value of foreign evidence.

Opinion

See primarily questions 7 and 10. In addition: the debate on the European arrest warrant and on mutual recognition of pre-trial orders to obtain evidence (European search and seizure orders, etc.) shows that mutual recognition can only succeed if each side has sufficient trust in the quality of the other's systems. This requires harmonisation of criminal procedural law in a number of respects – admissible evidence and the consequences of obtaining evidence improperly (thus bound up here with fundamental rights). For this reason too it is vital that in transnational cases a

single pre-trial chamber should be able to rule on the quality and admissibility of evidence. This will also develop a body of case law for the whole of the EU. This case law on the admissibility of evidence could also have major spin-off for national fraud cases involving foreign evidence and thus also for the process of review by national judges of freedoms.

3 12 To whom should the function of reviewing acts of investigation executed under the authority of the European Public Prosecutor be entrusted?

Analysis

The Netherlands Government will entrust this function either to the judge of freedoms or to the presiding judge.

It also proposes a mechanism for judicial consultation.

Opinion

In my answer to questions 11 and 12 I indicated my preference for a European pre-trial chamber. The judge of freedoms would be a possibility, but that has the drawback of fragmentation and so means less legal certainty. Entrusting this function entirely to the presiding judge seems to me a bad idea from the point of view of legal safeguards. I would have liked the Netherlands Government's proposal to include a wish for the harmonisation of criminal evidence, which it does not. Strange, since the Government refers to the consequences in its introduction.

3.13 To whom should the committal review function be entrusted?

Analysis

The Netherlands Government emphatically favours the presiding judge here and rejects the option of the judge of freedoms.

Opinion

To start with I think the choice of the Netherlands Government is not consistent here with its answers to the previous questions, where the option of the judge of freedoms is presented as a possibility.

For the rest, see my opinion under questions 7, 10, 11 and 12.

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

Analysis

The Netherlands Government believes that the Green Paper takes insufficient account of individual rights. Remarkably, though, it devotes most of its legal argument to a discussion of *ne bis in idem*.

Opinion

Under questions 7,10, 11, 12 and 13 I explain in detail that in my view neither the Green Paper nor the draft cabinet position of the Netherlands Government offers adequate legal safeguards for the accused person. Indeed, the Government position is even more laconic on this point than the Green Paper. In view of this, it is hard to see how the Government's remarks on the 'feelings of the accused person receiving judgment in another Member State' are relevant, as the Government offers no solution for dealing with the legal consequences of the choice of forum and so makes no provision either for a system of legal safeguards for the accused person. Remarkably, the Netherlands Government's proposals say not a word about the accused person's lawyer being able to examine the prosecution file, so that he can ask for certain investigations to be carried out, etc.

Ne bis in idem is indeed a recognised fundamental right, but there is much uncertainty as to the scope of the principle. What is *bis* and what is *idem*? Clearly, certain acts may lead to multiple offences. National criminal law has rules here on the cumulation of offences, *lex specialis/generalis* or concurrent offences.

The principle usually applies only to trial judgments, but in recent years the principle of *ne bis in idem vexari* (i.e. also covering investigation and prosecution) has been gaining ground too. Can a person face more than one legal process for one and the same offence? I described under question 2, in connection with EU fraud, how conflicts of powers and cumulative procedures can be avoided using *lex specialis*. Any judgment (conviction or acquittal), out-of-court settlement or closure reached in a case dealt with by the European Public Prosecutor or deputy prosecutor is deemed final and absolute, and the case cannot then be reopened by national prosecution authorities, unless of course new facts come to light. It would have to be reopened by the European Public Prosecutor.

In the case of hybrid facts the *ne bis in idem* rule does not apply, since these are not '*idem*' cases. Thus an accused person may be prosecuted for corporation tax fraud in his own country even though his EU fraud case (source of the income) was settled out of court. Currently, it could not be otherwise at national level.

3.15 How should the relationship between the European Public Prosecutor and those involved in cooperation in criminal matters in the European Union be best organised?

Analysis

The Netherlands Government points to the coordinating role of Eurojust and wants good harmonisation with the European Judicial Network and Europol. The substance of this harmonisation and cooperation is not enlarged on further.

Opinion

Eurojust is a third-pillar body with considerable coordinating and support powers for judicial cooperation in the areas covered by the third pillar. Clearly, financial crime is part of organised crime, along with drugs and terrorism. The Green Paper and the position of the Netherlands Government both present the European Public Prosecutor as a Community body with operational powers of investigation within the territory of the EU. But the Netherlands Government is too vague here and does not say enough about harmonisation and cooperation. Firstly it has to be stressed that the European Public Prosecutor has primacy in dealing with EU fraud. Eurojust, the EJN and Europol have a duty to refer identified cases of EU fraud to the European Public Prosecutor. Secondly, this means that the European Public Prosecutor must have access to information held by Eurojust, the EJN and Europol and must be able to obtain it. The European Public Prosecutor should also be able to draw on the enforcement capacity of these bodies, in line of course with their designated powers. Remarkably, the Netherlands Government makes no link between the European Public Prosecutor and the 'joint investigation teams', in which Eurojust and Europol would have to play an important role. It is obvious that these teams, when dealing with EU fraud (cigarette and alcohol smuggling, for example) should be answerable to the European Public Prosecutor. In short, the Netherlands Government is approaching the subject here from the point of view of traditional interstate cooperation, whereas the vertical model of the European Public Prosecutor is based on operational cooperation within the territory of the EU.

Further to my views on question 2 (which offences) I also think that the issue of powers to deal with counterfeiting of the euro also offers an excellent opportunity for effective transnational enforcement, whereby Europol could be given operational judicial powers, overseen by and answerable to the European Public Prosecutor.

Lastly, the ultimate aim should be to combine the third and first pillars. Ideally the EJN, Eurojust and the European Public Prosecutor should ultimately be merged into a single organisation. This would also eliminate the disadvantages of the present-day structure of Eurojust. Eurojust's existing powers are after all too modest (it cannot instigate real operational investigations in Europe, except for the right to request letters rogatory), and as part of the Council it is not an independent agency of the executive.

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

Analysis

The Netherlands Government sees no reason why establishment of the European Public Prosecutor should require changes to the status of OLAF. At the same time it emphasises the importance of combating internal fraud and corruption.

Opinion

The Netherlands Government is right that a European Public Prosecutor can be established without the need for any change in the powers of OLAF. The question is, however, whether it might not be appropriate to review OLAF's status and powers once a European Public Prosecutor exists. The same goes for Europol too. One argument for not giving OLAF and Europol

operational judicial powers was precisely the fact that there was no public prosecutor's office at European level under whose authority, direction and responsibility these special European investigators could carry out their work. Establishment of a European Public Prosecutor will render that argument invalid.

Secondly, if internal fraud and corruption in the EU institutions are to be countered effectively, the European Public Prosecutor must have a European remit to conduct investigations without constantly being hampered by the constraints of European administrative supervision. This choice might well mean a reorganisation of OLAF in its present form. Only part of OLAF, that part responsible for internal investigations, would need to answer directly to the European Public Prosecutor.

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

Analysis

The Netherlands Government thinks this is really not a priority and that the office of the European Public Prosecutor must first prove its worth within the EU.

Opinion

It is obvious that priority must be given to tackling EU fraud within the EU. Even so, the situation of the applicant countries and other third countries must not be overlooked. More and more cases of significant EU fraud are coming to light in non-Member States (e.g. Slovakia, Palestine, Kosovo). And the Amsterdam Treaty provides the legal basis for negotiating agreements on legal assistance and surrender between the EU and third countries. A negotiating mandate to that effect has just been granted for talks with the USA. In these negotiations it is important not to lose sight of the important issue of combating EU fraud. In talks on an agreement of this kind with Switzerland, for example, this might be extremely important. Such agreements should name the European Public Prosecutor as a recognised authority, enabling the European Public Prosecutor both to issue and receive requests for letters rogatory and arrests.

In the case of existing bilateral agreements between Member States and third countries the European Public Prosecutor will have to use the national authorities for such requests. National enforcement authorities would be bound by such requests and would have a duty to comply with them. In reality it may be the deputy public prosecutor who deals with them. As a part of the national enforcement authorities he is by definition also a recognised authority.

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

Analysis

The Netherlands Government names the presiding judge or possibly the judge of freedoms. National law offers the opportunity to appeal against the ruling of the judge in first instance.

Opinion

The Netherlands Government completely fails to address the issues of choice of forum, admissibility of evidence, exercise of defence rights during the pre-trial stage, etc.

In my answers to these questions (see questions 10-14) I recommended that these decisions be taken by a pre-trial chamber. I believe this fully safeguards the rights of the accused and there is no need for appeal. But if cases were to go straight from the European Public Prosecutor to the presiding judge, which is not my preference, things would be very different. In that event the accused should at least be able to appeal against the choice of forum. He must also be able to apply to a certain bodies in order to safeguard his rights during the pre-trial stage (e.g. inspection of the file, request for investigations).

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