SPEECH OF THE SPANISH ATTORNEY GENERAL AT THE 4th ANNUAL MEETING OF THE NETWORK OF SUPREME COURT ATTORNEYS

"FROM RECOMMENDATION (2000) 19 TO A EUROPEAN PUBLIC PROSECUTOR'S OFFRICE"

Rome – Italy
27 may 2011.

Dear friends and colleagues:

There are many speakers on this roundtable and many issues to be considered, and little time available. So I will go straight into the substantive part of what I have to say, after putting on record my sincere thanks to the *Procuratore Generale della Corte Suprema di Cassazione di Roma*, my good friend Vitaliano Esposito, for this opportunity of speaking to you all and of enjoying these days in the beautiful, immortal city of Rome.

Let me start by highlighting what I regard as my key message: we are at a crossroads in the history of public prosecution services, and for that reason we cannot pass up the chances offered to us by these times to ensure that our institutions emerge strengthened from this period of change.

Accordingly, from the sound basis offered by the Council of Europe at the dawn of the new century to the exciting future possibilities opened up by the Lisbon

Treaty, the time has come to take bold, resolute steps, while safeguarding the essence of our task as public prosecutors, to adapt to the challenges of the times, and thereby to make the very most of the institutional possibilities presented by the framework of European integration. I firmly believe that those of us who are responsible for running the institutions directly affected by these new horizons must, for this very reason, do all we can, first of all, not to hold back the trend that is emerging, and, if possible, to actively further it.

As I say, I see this opportunity as another step in a steady progression over the last few decades, and thus we have a well-established trend, not subject to opportunistic short-term impulses.

Europe has gone from spilling its blood in wars that can only be called fratricidal – for any war between Europeans should really be called a civil war – to embarking on one of the most exciting and novel processes in humanity's political history. As pointed out by Robert Cooper (*The Breaking of Nations,* Atlantic Books, 2004), if Westphalia marked the birth of the modern state, the Treaty of Rome marks that of the post-modern state, a conscious effort to go beyond the traditional nation-state.

And, in order to truly exist, this post-modern state requires suitable support from the quarter which has so far received least attention: the judicial sphere, and, as regards what is at issue here, support from public prosecution services in their European dimension.

Though the possibility of setting up a European Public Prosecutor's Office is the clearest example of this, it is worth noting that it is not the only one. Other initiatives have arisen in recent years which clearly show that the European integration process is also penetrating this judicial sphere, until lately circumscribed by the Member States, jealous of such a major facet of their sovereignty.

Coinciding with Recommendation (2000) 19 of the Council of Europe, the EU Member States decided to provide their judicial bodies with the vital instrument that was the 2000 Convention, in which direct communication between judicial agencies became the ground rule for cooperation. Shortly afterwards the first instruments based on the principle of mutual recognition began to appear, with the 2002 Framework Decision on the European arrest warrant and surrender procedures, changing and enhancing the prospects for cooperation between judicial agencies. Along the same lines we are now witnessing with interest an attempt to adopt another instrument – the European investigation order – which may be crucial in allowing us, perhaps definitively, to move to a new model of mutual recognition in matters of cooperation, leaving the traditional letters rogatory as something merely residual in the EU sphere.

And I believe we should be aware, and legitimately proud, that as European public prosecutors we have spearheaded this trend, accompanying the continual improvements at procedural level with structural and institutional changes as have proved necessary to make the most of those improvements. And this network's very existence, promoted and sponsored by our dear friend Jean Louis Nadal, is good proof of that. The same goes for the development, unthinkable just a few years ago, of the Consultative Forum mechanism, soon to hold its third meeting under the aegis of the Hungarian

prosecution service, and which has already announced its next meeting for December, sponsored by the Polish prosecution service.

Along with all this I should not fail to mention the major role played, and to be played in the future, by Eurojust. Article 85 TFEU provides a basis for development to complement the path already embarked on by the new 2008 Eurojust Decision, so that Eurojust may be finally consolidated as the true organ of judicial cooperation within the EU.

Accordingly I believe that we face two challenges of the first order. The first concerns precisely the development of Eurojust and the opportunities arising in view of the greater powers envisaged in TFEU, and, in particular, given its novelty, the possibility of Eurojust becoming the real decision-making body in the resolution of conflicts of jurisdiction within the EU.

But it is equally true that Eurojust's current structure and nature are not suited to such a qualitative leap in its functions. Eurojust came into being as a third-pillar intergovernmental body, and giving it decision-making powers of this scope will unavoidably require it to be bolstered by a clear integration into the judicial sphere, so that it may justifiably make decisions binding on the various national jurisdictions. This task must be closely monitored by the attorneys general of the various Member States, given, as it is worth recalling, that in practice Eurojust brings together the EU's judicial investigation agencies, and these are chiefly prosecution services, from whose ranks come the various National Members forming the Eurojust College.

Together with the above, the second major challenge stems from the truly qualitative leap made by the Lisbon Treaty in article 86 TFEU: the possible creation of a European Public Prosecutor's Office. As I have said in various forums over the last few years, the differences of nature, scope and powers between Eurojust and a European Public Prosecutor's Office are such that only with a qualitative leap – a paradigm change – will we be able to progress from articles 82 and 85 (improved cooperation based on the mutual recognition principle and bolstering of Eurojust) to article 86 (creation of a true European Public Prosecutor's Office). So I do not share the view of those who wish to arrive at a European Prosecutor's Office by strengthening the powers of Eurojust. This may be necessary, but it will never take us to a European Public Prosecutor's Office, for a strengthening of Eurojust must necessarily be quantitative, whereas a shift according to article 86 is, as I say, qualitative in nature.

There are many theoretical grounds for advocating the creation of a European Public Prosecutor's Office (enhancement of the European judicial area, visibility of the European construction process, etc.), but today I would like to give some eminently practical arguments, taken from recent events.

Some of those present will recall the scandal uncovered in the European Parliament concerning a pretended British lobby group which allegedly managed to get certain MEPs to seek or accept amounts of money for their services. Well, this is a good example of the absolute unsuitability of the current framework in which, at least in theory, the EU Anti-Fraud Office (integrated in the European Commission), OLAF, conducts administrative inquiries for referral to national jurisdictions once signs of criminal responsibility have been detected.

In the case in hand, OLAF began its inquiries even though it was clear from the outset that, in some cases, the existence of a criminal component was highly likely. In parallel, some national jurisdictions began criminal proceedings which must necessarily draw on the inquiries – which, as we said, are "supposedly" administrative – conducted by OLAF. As if this were not enough, Eurojust has intervened, starting proceedings in view of the possible existence of conflicts of jurisdiction, and so I am told that Eurojust and OLAF have decided to set up a sort of working group to coordinate the latter's investigative activities regarding judicial proceedings for whose coordination Eurojust is competent.

This picture leaves much to be desired as regards the clarity needed in the division of functions, and seems unlikely to enhance efficiency in the prosecution of the cases in hand. Would it not be much more reasonable for the matter, as a case which may on the face of it affect the EU's financial interests, to be conducted from the outset by a European Public Prosecutor's Office, backed by the work and accumulated experience of OLAF, as if it were a real criminal or financial police? Would we not avoid costly duplicated proceedings and gain clarity for all those involved, naturally including the alleged culprits, who would know from the start what kind of proceedings and liabilities they were facing? I am pleased to see that these questions are being echoed by MEPs, and some political groups in the Parliament have spoken up, in response to this case, to stress the need to seriously work towards the prompt creation of a European Public Prosecutor's Office.

And to conclude where I began, allow me a final reflection: the new body will be novel and revolutionary, but it will remain a prosecution service. So all the safeguards

judiciously provided by Recommendation (2000) 19 for all public prosecutors in Europe will fully apply. Accordingly from the Spanish prosecution service we have asserted that the European Public Prosecutor's Office should be independent, and comply with point 11 of the Recommendation in that appropriate measures should be taken "*to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference"*; or point 16, in that it is necessary for public prosecutors to *"be in a position to prosecute without obstruction public officials for offences committed by them."*

In the document of conclusions on the European Public Prosecutor's Office that we published in 2009, we said, verbatim, that *"The European Public Prosecutor's Office should act independently, both of Member States and of EU institutions and agencies. Its actions should be governed by the principle of impartiality in relation to all the parties involved."*

Only in this way will we get a European Public Prosecutor's Office to perform its function, and not to do so as a foreign body incrusted in Member States' criminal judicial systems but as a natural outcome of a process of development tied in with all the advances and achievements that all our prosecution services have made over the years.

I said at the start that many of the changes that have occurred have come about almost inadvertently, perhaps as a result of what authors such as Paul Seabright *(The Company of Strangers,* Princeton University Press, 2004) call "tunnel vision" – that ability of individuals to contribute to broad consequences within being fully aware of

what their contributions involve. Now, on the other hand, the leap involved in setting up a European Public Prosecutor's Office will require foresight and specific decisions. Some of these will be in our hands; others will rest with higher bodies in our respective systems. In any event I hope we will all be up to the challenge that we face.

Many thanks.