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ARTICLE

National prosecution authorities and European criminal justice system: the challenges ahead

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Abstract The author gives an overview from his standpoint as General Prosecutor of Spain of the various instruments used by the national Public Prosecution services within the European Union to exchange information and coordinate their activities. He stresses the need to go even further by creating new tools to coordinate the activities of prosecuting authorities, not merely through the strengthening of Eurojust, but also by bringing together the heads of Public Ministries and Directors of Public Action so that their experience can be taken into account by the European Union institutions in charge of defining political priorities in the field of criminal justice. He also elaborates on the prospects of establishing a European Public Prosecutor's Office, an idea that has been included among the priorities of the upcoming Spanish Presidency and which is firmly supported by the author.

Keywords Treaty of Lisbon · European Public Prosecutor's Office · Criminal justice system · Coordination · Prosecutor · Eurojust · Criminal policy · Eurojustice · Networks

"There is not a more accurate test of the progress of civilization than the progress of the power of cooperation"
John Stuart Mill

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1 Introduction

In the following pages I will try not only to describe the current situation as regards the relations between the various Public Prosecution services within the European Union, but also to shed some light on the way ahead, remaining aware of the difficulties that must be overcome but, at the same time, persuaded as I am of the need to react in a decisive manner.

In my view, the new horizon for development both in the general field of Justice, and in particular that part of it which matters to European Union prosecution authorities, leads me to describe this moment we are living as without doubt involving a truly historic opportunity. When confronted with historic challenges, those who have the responsibility for directing the institutions affected by these new horizons, have the duty, in the first instance, to do their utmost not to become a hindrance to the evolving trend, and, if possible, to become driving forces of such development.

It would be a serious mistake to think that in the twenty-first century we can continue the fight against criminality with the same means that were available to us in the nineteenth or twentieth centuries. We all know that when criminality reaches a trans-national level, the operational capacities of criminal networks become global, involving the use of complex financial operations, and having access to means that some states are not in a position to offer their police and legal authorities. Thus, criminal networks acquire a capacity which challenges both national and international authorities. With the elimination of borders for the free circulation of citizens, goods and capital within the territory of the European Union, their role in controlling the expansion of criminal networks has, unfortunately, also been eliminated.

In such circumstances, a *logic of global responsibility and aspiration* must be adopted rather than a *logic of local entrenchment,* to use the words of the Polish sociologist Zygmunt Bauman.[1] Global problems admit only of global responses and, therefore, the only solution lies in improving coordination between the bodies that are entrusted with combating criminality at national level, and by firmly strengthening the role to be played in the combat against criminality by the supranational authorities.

In the last century, Europe experienced one of the most exciting and innovative processes in political history. It is astonishing how a project which was created with specific objectives—namely, to avoid future wars in Europe, by sharing the control of the resources linked to the use of force (coal, steel and nuclear energy)—has evolved into a model of integration which finally encompasses some 500 million citizens. As Robert Cooper[2] has put it, if Westphalia marked the birth of the modern state, the Treaty of Rome meant the birth of the post-modern state, a conscious effort to go beyond the traditional nation-state.

Despite the success of this model, integration has not been achieved homogeneously in all aspects, and the division of the European Union into the three pillars established by the Treaty of Maastricht is firm proof of that. Although diagrams in textbooks tend to present three identical columns, in reality the second and third

[1] *Bauman* [1].

[2] *Cooper* [2].

columns are much weaker than the first, so that the actual structure of the Union is far from a balanced picture insofar as concerns the importance of the three pillars.

A few years ago, during the process of building the European Union, the obstacle of the so-called "*democratic deficit*" was overcome, in an effort to compensate for the historic weight of executive power in that process of integration. We achieved something which would not have been thought of previously: a European Parliament elected directly by all European Union citizens, the powers of which are becoming settled and are growing steadily. Nevertheless, another deficit exists: the judicial deficit. But now the time of the Third Power has come, and this explains a whole series of concurring and converging initiatives, some of which I will be mentioning below.

However, the proposed technical solutions do not always find an echo from the political players who are called upon to adopt them. As has been rightly written by Flore and Biolley[3]: "the fact that a criminal jurisdiction of European dimension is theoretically necessary does not necessarily imply that its implementation is politically realistic". And that is precisely why those who are closer to practice are constantly calling attention to the benefits of a policy based on increasing levels of cooperation, and, where necessary, even to take firm steps going beyond mere cooperation between the member states in order to promote action directly through the institutions at a European level.

Finding themselves precisely at these crossroads, Public Prosecution services constitute a central pillar of the Rule of Law. These institutions have increasingly become a cornerstone in their own right, as their traditional role has become clearly more and more centred on promoting the action of justice in defence of legality, as the Spanish Constitution states. This is a function which entails in itself a certain institutional profile, characterised by an autonomy sufficient to enable the maintenance of legality and justice, free from interference or interests alien to our mission.

In order to better present my views on this topic, I will consider the recent history of the relationships between the various Public Prosecution Ministries as divided into three different stages, as follows: (a) the intercommunication stage, (b) the coordination stage, and (c) the direct action stage.

But before elaborating any further, there is one more point I would like to mention. For obvious historical reasons, in the Spanish General Prosecutor's Office we have specific knowledge of the existing circumstances in Iberoamerica, and I cannot resist drawing your attention to a particularly interesting and paradoxical fact: the model being developed in Iberoamerica to govern cooperation and mutual relations in the field of justice, although inspired by the European model (for example, we have IberRed mirroring the European Judicial Network), has gone further than the European model as regards levels of institutional representation.

The basis for this is a coordinated effort, jointly carried out by the three principal networks which articulate the Iberoamerican Community of Nations: The Conference of Ministers of Justice, the Iberoamerican Judicial Summit and the Iberoamerican Association of Public Ministries (presided over by the Spanish General Prosecutor's Office since 2007); thus bringing about greater progress than that which has been

[3] *Flore/Biolley* [4].

achieved in a much more solid institutional framework, such as the European Union, where paradoxically more advanced economic, social and political levels than those of the Iberoamerican Community have not led to comparable levels of rapprochement between the justice administration systems, and more specifically, between the Public Prosecution Ministries of the member states. The European Union could and should therefore spare no efforts to improve this situation.

Without any further introductory remarks, let us now look at each of the stages to which I have referred above, in order to explain the reasons why I consider that the first stage which I mentioned—communication between Public Prosecution Ministries—having already demonstrated its efficiency, is not sufficient to tackle the challenges we are facing; why the second stage—coordination—deserves immediate attention to the various aspects of its development; and finally, why it is necessary, regarding the third stage—direct action of a supranational character—that firm steps be taken, so that such direct action becomes a reality in the short term, if possible, rather than in the medium term.

2 The intercommunication stage

The stage of intercommunication, a stage for the exchange of mutual experiences and rapprochement of the various Public Prosecution services, was the first step that needed to be taken given the multiplicity of different unconnected prosecutorial systems within the European Union, where the powers of the various public prosecution services varied greatly. Despite that diversity, the bodies in charge of investigations, criminal prosecutions and of implementing criminal policy, as defined by each member state, still had homogeneous elements that have made possible an rich exchange of experiences regarding a large variety of matters.

Nowadays, the formalisation of international relationships is inevitable, even among institutions that have not been conceived for those specific purposes but which converge at international level, as a result of the need to work better in a domestic environment. Such formalisation, particularly in a Europe with a long vocation of unity, requires an essential complement—which consists of direct personal contact. It is undeniable that the paths to solving some problems which otherwise could take months because of bureaucratic formalities, can be found while having a quick coffee or during a conversation while having a meal with the relevant colleagues from the other member state.

Throughout the years, meetings such as those carried out by the Eurojustice Conference, an informal forum which gathers European Union Prosecutors General, as well as some delegates from third countries as observers, have made it possible to establish fluent channels of communication, to exchange experiences and to facilitate cooperation. It is not uncommon to take advantage of these annual events to hold bilateral informal meetings, which contribute enormously to facilitating and speeding up contact between public prosecution ministries, often in relation to operational matters of major importance or urgency.

Topics which could wrongly be regarded as ‘minor’, or of little importance, are not excluded from being addressed in these international forums. As an example, at the

Eurojustice meetings held in Slovenia in 2007, and Edinburgh in 2008, issues such as petty crime, or the use of information communication technology were included in the agendas. All of this was without prejudice to dealing with serious institutional questions—as we will see later—, and in this way contributed to boost actions aimed at reinforcing the position of the public prosecution services, when facing the challenges presented by the construction of the European Union.

In a more specific area, the Network of Public Prosecutors or Equivalent Institutions at the Supreme Judicial Courts of the member states of the European Union has recently been established in Paris under the auspices and at the initiative of the General Prosecutor of the Supreme Court of Paris, Jean Louis Nadal. The first meeting of the Network took place in Prague in May 2009 and the next one will take place in Madrid in 2010.

The part played by the chief prosecutors of the Supreme Courts is particularly crucial from the perspective of the contribution it makes to legal certainty, which is obviously only possible if the decisions made by judges can be anticipated by citizens. The consequence of judicial independence means that judges have full discretion within the bounds of legality to construe and apply the law without the imposition of any organic hierarchy. But there always exists a unifying mechanism in all judicial systems, usually the Supreme Courts and the Courts of Cassation. However, given that not all legal controversies have access to this last judicial resort, and bearing in mind that such courts do not usually have the ability to take the initiative against discrepancies in interpretation, the central position within the legal system of the Public Prosecution Ministry has a special significance.

The unity of the institution, its capacity to coordinate and subject the performance of its members to certain criteria, to a greater or lesser degree of intensity according to the model used in each member state, enable the prosecutor to act as a centripetal force, capable of compensating for the centrifugal effects of judicial independence, itself a healthy phenomenon. The importance of this function justifies *per se* a periodical exchange of experiences focused on this perspective, thus contributing to a transfer to European level of the unifying impulse which is already being exercised at national level.

For different reasons and complementarily to the foregoing, I also consider of major importance for the proper conveyance of information both (a) between Public Prosecution Ministries and (b) between the such Ministries and the judiciary, the opportunity which is offered biannually by the Conference of Presidents of Supreme Courts and Prosecutors General of the European Union, an event last held in Vienna in October 2008, and one which the Spanish Supreme Court and the Spanish General Prosecution Office will soon have the honour to organise, possibly, in May 2010.

The exchange of ideas between judges and prosecutors is crucial to obtain a complete image of the functioning of justice as a public service to the citizens, and these joint meetings offer a channel of direct and multidirectional communication between those who preside over the highest tribunals of Europe, and those who direct public action in each of those jurisdictions, thus conferring on it an intrinsic value, converting them into a first class tool for opening avenues of understanding, cooperation and institutional relationship. It is the only European forum shared by the highest representatives of the Judicial Power and the Public Prosecution services, and this added value is one of its most prominent features.

Finally, and apart from the above-mentioned forums, or perhaps I should say, above them all, the permanent interaction which comes about between the prosecutors of the various member states in the course of their daily tasks has to be pointed out, especially since the coming into force of the 2000 Convention on Mutual Assistance in Criminal Matters, when the principle of direct communication between judicial authorities was established, and as a result of the development of the principle of mutual recognition of judicial decisions.

The active part played by the members of the various Prosecution Offices within the European Judicial Network, the opportunities offered by international seminars such as those organised by the Academy of European Law, initiatives such as the Judicial Erasmus, or the activities organised through the European Judicial Training Network, are direct proof of the correctness of my previous statement: despite being necessary and still having much to offer, this stage of intercommunication between the European Public prosecution services can be considered as definitely settled, and now there is a need to move on to the second stage I referred to in the text above: the need to coordinate our activities.

3 The coordination stage

In my view, two fundamental mechanisms are required in order to attain the necessary level of coordination, so that the important functions assigned by law in each of the members states to Public Prosecution Ministries can be effectively carried out in a manner complying with the demands of the public.

One of those mechanisms—one of a practical and operational character—is the strengthening of Eurojust activities. The second—more institutional in nature—is based on what I see as the obvious need for Public Prosecution Ministries to constitute themselves as valid interlocutors of European Union institutions, to assist in determining the priorities in criminal policy matters at European level. We will have a brief and separate look at each of these mechanisms.

Regarding the operational strengthening of Eurojust, a few reflections can be offered on this subject, in view of the recently published Decision on strengthening Eurojust.[4]

Eurojust is the body entrusted with judicial coordination within the European Union. However, this organ was not configured with the perspective of the Judicial Power, but from that of the third pillar—although throughout the years it has been considered as a kind of representative of the criminal judicial system within the European Union, in particular as regards the role it plays as the Council's interlocutor. And that is fair. As a matter of fact, when Article 3 of the Decision says that Eurojust shall support and strengthen the coordination in investigations and prosecutions, the potential value that Eurojust can reach from the perspective of coordination of the bodies entrusted with carrying out such investigations and criminal prosecutions in

[4]Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138 of 4 June 2009, p. 14.

the member states, is being clearly pointed out. From this viewpoint, it is clear that Eurojust plays an important role regarding coordination of the activities of the Public Prosecution Ministries in the European Union.

However, the fact that the conception of Eurojust as a body derived from the Council, and not strictly from judicial origins, has encountered some consequences in certain states which can stand in the way of the development of Eurojust's new powers. In the case of Spain and other member states, for instance, the status of the National Members is linked to the executive, something I believe to be clearly inconsistent with the new operational powers under the present Eurojust Decision.

But even if we leave this problem aside, the conception of Eurojust is that of offering coordination from and for specific cases. We at the General Prosecutor's Office are perfectly aware of this important role because, under Spanish law, it falls to the General Prosecutor to receive the recommendations from the Spanish National Member of Eurojust in the framework of Article 6 of the Decision, as well as to take a decision in accord with this recommendation. Nonetheless, Eurojust lacks the authority to carry out abstract coordination tasks, or generally to deal with matters which require coordinating decisions. And it is precisely for this purpose that the second mechanism I have mentioned comes into play.

From a more institutional point of view, it is worth thinking about another possible coordination mechanism—one which could turn out being of great interest. This mechanism would need to be looked into in detail. There is no existent basis for it. It would have to be developed *ex novo* to offer the results we would expect from it. It is about creating a type of *Consultative Forum* or *High Level Advisory Group* composed of European Union Prosecutors General and Directors of Public Action. Such a forum, or group, would be in a position to offer the relevant institutions of the European Union, (specifically but not exclusively, the Council and the Parliament) the points of view of the public prosecution ministries with regard to the priorities established by the Council in criminal policy matters. It could also offer technical opinions and advice on instruments of mutual recognition, as well as on any other subjects on which the European Union institutions might be interested in consulting with it.

This initiative, which the Spanish General Prosecutor's Office firmly supports, deals basically with trying to establish a communication mechanism between high-ranking levels of the various European Union Public Prosecution Ministries, in order to improve the quality of the basis on which the European Union Council would later define policy priorities.

Consequently, it would not involve a new network or conference, along the lines of those I have referred to in the text above. Whilst those constitute ordinary channels of communication, and of exchange of experiences between the European Public Prosecution Ministries, this would be a forum or meeting which would be attended by Prosecutors General and Directors of Public Action in order to address specific subjects, give their opinions, and present their experiences in that respect. This difference merits emphasis in order to avoid any risk that this could be considered an example of an undesirable multiplication of networks and forums. It would be nothing of the kind. This initiative is substantially different. It would respond to different needs and its goals would be very specific. The European Union is constantly producing new

legal instruments, opening new fields to judicial cooperation and enabling prosecuting authorities to improve their performance and increase their efficiency. However, these tools are being developed without proper consultation with those in charge of implementing them. It seems as if we are witnessing a sort of contemporary enlightened despotism ruled by the motto (paraphrasing the original remark made by Emperor Joseph II) "*everything for the prosecutors, nothing by the prosecutors*". There is therefore a real need to involve prosecuting authorities in this process.

This is an idea which first emerged during a meeting of the Spanish and Portuguese Ministries of Justice and Prosecutors General, held in the north-western Spanish region of Galicia in July 2007, in the course of the Portuguese Presidency of the European Union. It was reflected, for the first time, in the conclusions of the Eurojustice Conference held in Portoroz, Slovenia, in October of the same year. In these conclusions, reference was made to how important it was that prosecutors general could express their standpoints before the European Union, in matters such as criminal trends, prosecutors' training, the use of financial resources, as well as regarding the Organised Crime Threat Assessment (or OCTA, as it is known by its English acronym), among others.

Following this Eurojustice Conference, the Slovenian General Prosecution Office called a specific meeting in Ljubljana which was held in April 2008, where another step was taken on the road to specifying how European Public Ministries could make their contribution. What had been agreed in Portoroz was reiterated, and the French Presidency announced its intention to call a meeting in Paris, in the month of September, to discuss the future of this initiative. I had the opportunity to attend this Meeting of Prosecutors General and Directors of Public Action in Paris (a meeting which was held prior to, and independently from, the Article 36 Committee meeting which took place the following day, organised by the French Ministry of Justice on the occasion of the French Presidency) and I had the opportunity to defend this idea.

The essential issues that I insisted on were on the one hand, the necessity of establishing a mechanism of communication between the highest authorities of the various European Union Public Ministries, so that they could cooperate in assessing criminal threats, in order to improve and widen the basis on which the Council of the European Union defines policy priorities. This is a task which until now has been almost exclusively entrusted to OCTA—high quality work which receives the support and observations of several institutions but which is essentially a product of Europol, and is of a police nature. I also argued that the role of the Public Ministries should be extended to the stages of the putting into practice of, and evaluation of priorities in the field of criminal justice, as previously defined by the Council.

A further step was also taken in this direction at the Eurojustice Conference held in Edinburgh in the Autumn of 2008, where a specific proposal to show the meeting's participants' support to this group was made. The text agreed by the Conference states that Eurojustice

"... aware of the need to provide EU structures with the viewpoints of the European prosecution services, welcomes the idea of creating a forum for EU Member States' Prosecutors General and Directors of Prosecuting Authorities, in order to offer EU policymakers a wider basis to define political priorities and common trends in the

field of criminal justice. The Conference wishes to express its gratitude to Eurojust for agreeing to provide support in the organisation of meetings of such a forum."

It is obvious that the support of Eurojust is of the utmost value, especially considering the role attributed to this body by the Council document of 22 May 2006, on the topic of the Architecture of Internal Security. The support given to this initiative by the President of the College of Eurojust, José Luis Lopes da Mota has been crucial, and I would like to take this opportunity to acknowledge it.

Further, in my opinion, from the time of next year's Spanish Presidency, conditions could be appropriate to reach a compromise with the Presidencies which will follow, in order to summon each year, together with Eurojust, a Meeting of Prosecutors General and Directors of Prosecution, so that observations and opinions on the OCTA report, as well as on any other matters, could be submitted with sufficient time to be studied and taken into consideration by Justice and Home Affairs Councils.

4 The direct action stage

In discussing new horizons for European Union criminal justice, I can not bring these reflections—centred as they are on the mechanisms of coordination for European Union Public Ministries—without referring to the most innovating element which is to be put at our disposal by the Treaty of Lisbon: the possibility of establishing an actual European Public Prosecutor's Office.

In my opinion, it is very worthwhile taking a step towards this opportunity, and the Spanish Prosecution Office has embarked upon a series of activities and studies to contribute to this process, to the extent that our modest means allow and always within the range of our competencies—a process which I hope will culminate in the creation of this body. In January 2008, an International Seminar was held in Madrid, the results of which have just been published in a book in Spanish and English.[5] The text of this book will soon be available on the web page of the Public Prosecution Office.[6] Furthermore, other activities relating to the European Public Prosecutor's Office are expected to take place in the months of June and September.[7]

This is not simply an academic discussion, because the Spanish Presidency that will begin in the first term of 2010 has included the study of the prospects of establishing a European Public Prosecutor's Office as one of its priorities.

A great deal about the future European Public Prosecutor's Office is said by what is to be Article 86 of the Treaty on the Functioning of the European Union.[8] However,

[5] *Espina Ramos/Vicente Carbajosa* [3].

[6] At www.fiscal.es. The text will also be available on the webs of the co-organising institutions, the Centre for Legal Studies of the Ministry of Justice (www.cej.justicia.es), and the OLAF Supervisory Committee (http://ec.europa.eu/dgs/olaf/sup_comm/index_en.html).

[7] A series of workshops are envisaged taking place by the end of June for the purposes of bringing forward concrete proposals for texts regulating the various aspects of the European Public Prosecutor's Office; and in October, an International Seminal is being organised on this topic. The Spanish Prosecution Service is not the only one moving along these lines, and the initiative of the French General Prosecutor at the Supreme Court, Jean-Louis Nadal, to host a Seminar in February 2010 on this topic also merits mention.

[8] Art. 86 TFEU states that:

not everything it says necessarily leads to a single interpretation, and furthermore, since it does not say everything, many details remain open to discussion. Given that various opinions are beginning to be outlined in academic and professional circles regarding the desired profiles of this body, I will conclude this paper referring to the position of the Spanish Prosecution Office in this respect.

There are some statements in Article 86 which significantly determine the potential profile of this institution. Each of these statements deserves to be studied. That is what we will do next. The Treaty situates Eurojust as the starting point from which the European Public Prosecutor's Office will be established, but discerning what consequences may arise from this is not as easy as it may seem.

First of all, the fact that the new prosecution body has to be set up on the basis of Eurojust should not—at least necessarily—create confusion between the two bodies, whose functions will be very different. According to the Treaty, the differences both with regard to the nature and the functions of the respective bodies are clear. On the one hand, Eurojust's function is, as described in Article 85.1, to support and strengthen coordination and cooperation between national investigating and prosecuting authorities. Nevertheless, it cannot carry out formal procedural acts. In its coordinating role, as stated in Article 85.2, "formal acts of judicial procedure shall be carried out by the competent national officials". On the other hand, the function that the European Public Prosecutor's Office will be called on to carry out will be, precisely, the investigation of the perpetrators and accomplices of crimes and offences committed within its competence, and the prosecution of the same.

Eurojust is a coordinating and supporting body which neither replaces, nor removes, any competence from national authorities, whereas the European Public Prosecutor's Office has its own competences in the performance of its activities which are specifically assigned, and correspondently reflected on those of the national authorities.

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 a European Public Prosecutor's 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. (...)
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.

Therefore, I am afraid I disagree with those who understand that the strengthening of the competencies of Eurojust is to be considered as a line of development of the Lisbon Treaty which is alternative to the actual creation of the European Prosecution body. Given the distinct competences of both bodies, the reinforcement of Eurojust cannot be put forward as an argument for considering as unnecessary the establishment of such a body.

Likewise, I think that the approach adopted should not lie in confusing different functions in the same body. On the contrary, the best thing to do would be to reconsider the generic reference made in Article 86 of the Treaty to Eurojust in order to create favourable conditions for future connections between the European Public Prosecutor's Office and Eurojust, which would be of an institutional and material type, budgetary and administrative, but not necessarily of a functional nature.

The position that the Spanish Prosecution Office has argued in favour of in various forums has been to apply to the European Public Prosecutor's Office a basic principle of community law that has given very good results: a national judge is also a community judge when he applies community norms. With regard to the European Public Prosecutor's Office, we envisage a minimum superstructure at European level—avoiding the creation of new uneconomic 'macro' bodies—with a European Public Prosecutor supported by a small team, and a secretariat (possibly provided by Eurojust), who would direct and instruct a number of national public prosecutors who, in turn, would act as the European Public Prosecutor's deputies and who would be appointed by the member states' competent authorities.

Such deputy prosecutors would act as national public prosecutors to all intents and purposes, with all the tasks and powers that correspond to this, although in matters within the competence of the European Public Prosecutor's Office they would act as delegates of the European Public Prosecutor and would follow the latter's instructions.

This scenario, which was already pointed out in the Commission's Green Paper[9] as one possible approach, is fundamental to the achievement of efficiency on the part of the new body. At the same time, it can help eliminate part of the reluctance that certain member states may show regarding the European Public Prosecutor's Office, which they assume would signify a clear and significant cession of sovereignty (i.e., to the extent that the national prosecution bodies would lose the possibility of prosecuting certain types of crimes).

Regarding the issue of competence, the text of Article 86 paragraphs 2 and 4 is clear and its substantive content does not leave any room for doubt in this respect. Although from the technical standpoint there may be strong grounds for taking on the totality of the competences as permitted by the Treaty, it is arguable that a practical vision would require, as a starting point, focusing solely on the core competencies—i.e., on offences against financial interests, thus avoiding any major problems in achieving a minimum consensus among member states.

At this point some reflections should be offered regarding the role of the European Anti-Fraud Office (OLAF) in the investigations to be carried out. OLAF has accumulated significant practical experience which cannot, and should not, be wasted, even if

[9] Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM/2001/0715 final).

until now its investigative experience has been limited to the administrative field. The status of OLAF—or of certain of its units—should be provided for in the future regulation of the European Public Prosecutor's Office. It should be similar to the status of a judicial or financial police of the European Public Prosecutor's Office—subject to the prosecutor's orders, and following its guidelines, so that prosecution evidence gathered by OLAF could be presented to the competent courts.

This possibility has already been pointed out by the Anti-Fraud Commissioner, and Vice President of the Commission, Siim Kallas, who observed during the sessions of the Madrid Seminar that "possible scenarios could be to place OLAF under the control of the European Public Prosecutor's Office insofar as its investigative activities are concerned. In such a case, OLAF would no longer perform 'administrative' investigations but 'judicial' activities and thus face a new challenge".[10]

Up to this point, I have dwelt briefly on questions which, in a certain sense, come predetermined in the debate, as they have been included in the text of the Treaty. However these questions are not exhaustive of the issues raised and the debate will continue, since many other matters will have to be dealt with if we want to avoid the danger of an absence of specific provisions—at least at the level of mere proposals—being used as an argument by those who do not wish to support the establishment of a European Public Prosecutor's Office.

From a practical viewpoint, we should ask ourselves what the model would be for judicial control of the performance of a European Public Prosecutor's Office. This is an issue of paramount importance, and in respect of which the Treaty remains silent. I have noticed that among the opinions that are being published on the concept of a European Public Prosecutor's Office, an idea is gaining strength which I do not consider as the most appropriate to the circumstances of this body. In certain circles, centralised control, carried out by a Court at European level is being considered. (This could be the reason why some assume that the location of the European Public Prosecutor's Office should be in Luxembourg, and not in The Hague, or in Brussels, two cities which might also be convenient as Eurojust and OLAF are already based there.)

In my view, the most appropriate system, and one in accordance with the Treaty, would be to leave normal judicial control residing at the level of the states (a) where the investigation is being carried out, or (b) where the acts from which the necessity of control originated. It is specifically mentioned in the Treaty that prosecution will be conducted by the national jurisdictions: consequently it does not seem to be necessary to opt for centralised control of a case that is going to be conducted by a specific national jurisdiction.

Centralised judicial control at European level might well be envisaged but only as a complement to the above mentioned system, for instance, for those early stages of investigations when it is not yet possible to establish which national jurisdiction will be competent regarding the case. One could also imagine the possible intervention of a centralised court to hear some types of appeals, where a body of doctrine would be created to enable the achievement of uniform responses to such basic questions as the determination of the competent jurisdiction or the validity of evidence. These

[10] *Vid.* note 6.

rulings at European level, however, should have a different scope to those decisions concerning the substance of the case (convictions or acquittals), as the latter (being issued by national Courts) should follow the ordinary path of remedies and appeals, according to each national system.

On the other hand, and as has already been mentioned in the previous paragraph, the possibility that conflicts of jurisdiction might arise following the development of the European Public Prosecutor's Office reinforces the practical need (already pointed out by academics and practitioners) of having instruments capable of providing the right solution to such questions, going beyond the current powers of Eurojust. The Council's Working Groups are currently discussing a draft Framework Decision[11] on this matter which most probably will be approved and transposed before the European Public Prosecutor's Office begins functioning. However, as far as we know from the preparatory work, its scope is not as ambitious as it should be, since it neither contributes with hierarchical criteria for determining the jurisdiction, nor does it impose solutions, but rather only a voluntary method to reach agreements.

The existence of a European Public Prosecutor's Office could be a clarifying element in this matter, since the Prosecutor would have to decide to effect a criminal prosecution before one of various national jurisdictions. Therefore, it would be in a privileged position in adopting criteria for the determination of jurisdiction. The regulations of the European Public Prosecution Office as regards conflicts of jurisdiction might become a legal text of vital importance for clarifying these questions and others. It would also help to overcome the peculiarities of each national procedural system, in order to provide the European Public Prosecution Office with instruments which allow the efficient performance of its service. Regarding this matter, the contribution of the Consultative Forum or Advisory Group of Prosecutors General I referred to previously, may turn out to be essential.

Finally and linked to the role of this consultative body, the need to articulate mechanisms to connect and relate the European Public Prosecutor's Office and the General Prosecution Offices of the states involved, so as to maintain an adequate relationship must be insisted on so as to avoid, wherever possible, the frictions which are usually inevitable in cases of dual hierarchy. The efforts I have mentioned to establish the Consultative Forum or Advisory Group of Prosecutors General, could be the basis from which a breakaway group of those prosecutors general whose states participate in the European Public Prosecution Office, would be formed. This reduced version of the consultative forum could be constituted following the example of some federal states' bodies, so that the performance of federal and national prosecutors is unified with the same criteria. The participation of this forum, acting as a sort of European Prosecutorial Council, in relation to some of the most significant decisions of the European Public Prosecutor's Office would contribute to strengthening the idea of a collegiate body, which would be inferred both from changing the name from the 'European Public Prosecutor' initially proposed, to the current 'European Public Prosecutor's Office' as mentioned in the Treaty; as well as from the condition of Eurojust, a college body, as the seeds of the new body.

[11] Initiative of the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden for a Council Framework Decision 2009/. . ./JHA on prevention and settlement of conflicts of jurisdiction in criminal proceedings, OJ C 39 of 18 February 2009, p. 2.

5 Concluding observations

I hope I have demonstrated in the previous pages that my initial statement, in which I described the present time as a historic and exciting one, is perfectly justified, in particular regarding the public ministries.

There have been important developments since the coming into force of the Treaty of Rome and there is still a long way to go in the coming years. From the standpoint of the Spanish General Prosecution Office, we shall always be in the front line trying to improve the framework of cooperation between public ministries, as the only means of giving society the efficient responses it requires.

All in all, the foregoing arguments can be reduced to something relatively simple regarding its concept, but difficult to develop in practice: we have to adapt our structures, both legal and mental, given that the improvement of international cooperation mechanisms in judicial matters, particularly concerning public ministries, has to continue.

The difficulties are many, but not insurmountable, and I am convinced that we will find suitable solutions that will allow the satisfactory construction of the European judicial area which is so essential to the citizens of Europe; where coordination mechanisms will support closer cooperation; and where interaction will be regarded as a normal element, and not as an exception to the functioning of judicial institutions.

It is hard for anyone having some knowledge about Spanish poetry not to conclude a paper like this without quoting one of our most famous poets, Antonio Machado, who depicted in a most lyrical way the spirit that should be present when pioneering new ways ahead in any human endeavour. This occurred during the International Seminar in Madrid, where he was repeatedly quoted, as he has been in other works, such as the paper written by the President of Eurojust.[12] But Machado's words—*walker, there are no pathways: pathways are made as you walk*—, describe perfectly the challenge posed to all of us by the future European Public Prosecutor's Office.

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[12] *Lopes da Mota* [5].