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ASSISTANTS

COORDINATION:

Rosa Ana Morán Martínez
Prosecutor. International Department of the Spanish Public Prosecutor's Office

PARTICIPANTS:
Lothar Kuhl
Head of Unit, legal affaires OLAF

Manuel de Almeida Pereira
Case Management Analyst. Eurojust

John Vervaele
Profesor University Utrech

Jorge Espina Ramos
Prosecutor. International Department of the Spanish Public Prosecutor's Office

Angeles Gutierrez Zarza
Legal Officer EUROJUST

Amandine Honhon
Ministry of Justice, Belgium

Helena Fazenda
Prosecutor of the Portugal Republic

Isabel Vicente Carbajosa
Secretary of the OLAF Vigilance Commitee

Thierry Cretin
A Director OLAF

Robert Renier
Head of the District Prosecution Office in Slovenia

Luis López Sanz
Prosecutor of the Supreme Court and President of the
OLAF Vigilance Committee

Fernando Irurzun Montoso
Chief State Lawyer of the Supreme Court

Ignacio de Lucas Martín
Prosecutor of the Special Prosecutor's Office for the
Prevention and Repression of illegal Drug trafficking

François Badie
Prosecutor of the Supreme Court, Paris

Elsa García-Maltras
National Prosecutor Expert in EJTN

Alejandro Luzón Canovas
Prosecutor. Anticorruption Spanish Prosecutor Office

EUROPEAN PUBLIC PROSECUTOR WORKING GROUP

CONCLUSIONS

INTRODUCTION

Article 86 of the future Treaty on the Functioning of the European Union, in its consolidated version contained in the Treaty of Lisbon (article III-274), sets forth the possibility of creating a European Public Prosecutor's Office. The initiative may be summarised as follows:

Article 86

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.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorization to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and

Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

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

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

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

The description of the institution given in the Treaty is schematic. The design of the profile is left to the Regulations, which must specify all basic matters in connection with the nature and operation of the office, including its statute, competences, the rules of procedure applicable to its activities, the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

In order to attain political consensus on this matter - whether it be a unanimous agreement that allows the office to be established by common accord, or at least the necessary support for the initiative that will lead to its materialisation through enhanced cooperation - it is imperative to hold a prior debate on the issues at stake. Care should be taken to avoid an abstract discussion, however. The Member States cannot be expected to have absolute, unconditional views on the European Public Prosecutor. It is necessary to address *how* the institution is to be established before seeking a consensus. The reasonable first stage requires casting off all prejudice and unjustified support and calling a previous debate on the central matters, such as the structure and statute of the European Public Prosecutor's Office and its rules of procedure. This debate is an essential part of the process, and should even take precedence over the design of a road map.

In an initiative promoted by the Spanish General Prosecutor's Office and the Centre for Legal Studies, a group of experts met in Madrid in June 2009 with the aim of putting forward some preliminary ideas that will spark the debate on the European Public Prosecutor's Office. It is worth pointing out that the project has been included in the agenda for Spain's Presidency of the EU, to be held in the first half of 2010.

This debate is not entirely new. Many of these matters were already set out and analysed in the *Green Paper on the establishment of a European Public Prosecutor for the protection of the financial interests of the European Union*, issued by the Commission in 2001. The ideas and questions raised by this document have been very much taken into consideration by the above-mentioned group, as has the 2003 *Follow-up report on the Green Paper*, which examines the entire process and its results.

However, the current scenario is different from that of 2001, given the substantial advances in the European area of freedom, security and Justice. A considerable part of criminal legislation has now been harmonised and distances and differences between criminal justice systems have been drastically reduced. Furthermore, the principle of mutual recognition is now being applied quite successfully and steady progress is being made in this field. Developments are probably slower than would be desired, but the process is nonetheless inexorable and decisive in the construction of the European judicial area.

To add even further weight to the argument, the entry into force of the Treaty of Lisbon will bring about a system where justice and interior affairs in the EU have moved on from intergovernmental cooperation to full integration – despite the maintenance of certain safeguards- in Community law.

The conclusions we offer are mere technical propositions, consisting of possible solutions – sometimes more than one is given – to the issues before us. We have strived to make our proposals open-ended to avoid imposing limitations on an ensuing political debate. Our ideas are not intended to cover the entire spectrum of subjects that could be discussed. They are merely a reflection of what we deemed to be relevant at this stage, although we are fully conscious that a great many other points could be addressed, all of them equally valid and acceptable for these purposes.

Given that the implications of the establishment of this institution are numerous and varied, we have grouped our conclusions into five major areas with a view to facilitating subsequent work and discussion:

1. Structure and statute of the European Public Prosecutor's Office and its relations with Eurojust.
2. Competences.
3. Rules of procedure.
4. Judicial review of the procedural measures taken by the European Public Prosecutor.
5. Determination of the competent jurisdiction and exercise of criminal action. Control of the intermediate stage. The trial, admissibility of evidence. Status of the parties and other individuals or entities affected.

1 STRUCTURE AND RELATIONS WITH EUROJUST

1. 1 Introduction

Group 1 was dedicated to discuss issues related to Structure of EPPO and its relations with Eurojust. It is obvious that by addressing these topics, there was a risk of overlapping with other groups, which we have tried to avoid to the maximum possible extent. Discussions within the group were vivid and whenever unanimity or at least consensus could not be found, at least there was always a clear majority pointing towards a certain position. We will try however to reflect adequately in the following pages the various views that were presented.

A number of conclusions were reached and were shared with the other experts at a common session held during the last day of our meeting. Below all of them are listed, organised by general subjects, with a few explanatory paragraphs to help understand why the group finally came to these particular conclusions.

1.2 – Mission

In investigating, prosecuting and bringing to justice the perpetrators of relevant criminal conduct to the detriment of the European Union the EPPO should protect the common European interest. Taking instructions from nobody he/she should act within the limits of his/her mandate in an impartial and independent way, respecting the rule of law and fundamental rights.

The group considered that a clear statement about the mission of the EPPO was required and the European dimension of the purpose of the Office deserved being stressed, through a mention to the "common European interest" as the driving force behind the establishment of the EPPO, thus emphasizing the clear added value that the EPPO would bring to the field of criminal prosecution within the EU.

The note on independence was also considered to be of the highest importance, as the EPPO should not be regarded as the "executive arm" of any other European Institution. The EPPO, as an Office belonging to the judicial sphere, is to be built as an independent institution, with an independent Head Prosecutor or European Prosecutor, acting impartially (having to consider circumstances in favour and against the investigated persons in an impartial way), always under the rule of law and respect for human rights and fundamental freedoms.

1.3- Structure

1.3.1 The EPPO should be a European body, organised in a decentralised manner. It should be composed of an EPP, a limited number of deputies and a sufficient number of delegated EPPs for each jurisdiction.

This point was among the most vividly discussed in the group, as some members tended to view the EPPO not as a hierarchical structure ending in a unique Head, but a sort of collective body, whose summit would be occupied by a college of members, having the superior responsibilities as regards the functioning of the body. However, the group came finally to the conclusion that such collective structure did not fit well with the very idea of a Prosecution Office, since it would hamper the effectiveness and possibilities of swift response as required from a prosecuting body that should grant equal performance throughout the territory of the EU. The change in the denomination of this body to EPPO, from the previously used in the Green Paper of "European Prosecutor" did not seem to qualify as a valid argument against this conclusion, given that most, if not all MS having hierarchically structured prosecution services also received the denomination of Offices.

1.3.2 While being a part of the structure of the EPPO the delegated EPPs should in parallel benefit from their integration into the investigative and prosecutorial systems of their respective Member States as a national prosecutor ("double hat").

The double-hat system for the Delegates, already envisaged by the Green Paper, seemed to us the most adequate to combine the benefit s of a centralised decision-making structure with the possibilities for immediate action derived from having Delegates embedded in the various national prosecuting systems. Frictions coming from the existence of a double chain of command may be avoided by a clear definition of competence between European and domestic levels so that, given the primacy of the EPPO in its scope of competence, problems should not lead to conflicting decisions.

The fact that concrete procedural actions will be taken for prosecutors already part of the national systems has been considered by the group as a positive sign that may help overcome some reluctance from certain MS not very keen on seeing "non-national" authorities carrying out tasks so traditionally linked to sovereignty as criminal prosecution.

A role to ease any of the difficulties of this sort that may arise could be attributed to the Advisory Group we refer to in 1.5

1.3.3. Delegated EPPs may be at the same time national members of Eurojust.

As the group did not manager to agree on this point, it was submitted to the plenary session, although no decision was taken in the end. The idea of having Eurojust National members who at the same time would be Delegates may be interesting for certain MS, but would not be probably justifies if it is set as a general rule. Therefore, the group hesitated on whether to keep it a a suggestion or to delete it, as it could be derived from the other conclusions and because there were no reasons to consider this possibility as excluded from the application of the rest of the conclusions.

In any case, should this option be accepted either generally or for certain MS, the group concluded it would be another type of double-hatting as the scope, competence and duties of Delegates and National Members are different and respond to different needs.

1.3.4. Eurojust cooperates within its mandate closely with the EPPO.

It should exercise its coordination mandate and functions in full synergy with the EPPO, granting full access to information.

1.3.5. The EPPO and Eurojust shall share their secretariat, including the administrative personnel and financial resources.

These two points try to address the close relationship between EPPO and Eurojust, as it is made clear by the wording of the TFEU, while at the same time stressing the existence of separate scopes for each body, being Eurojust in charge of judicial cooperation, and the EPPO representing the direct action approach. Issues like the sharing of information or the staff

and financial resources are crucial to enhance this close relation and to avoid the creation of a macro-structure at central level that may be seen as counter-productive and prone to find more objections from certain MS.

1.4 - Functional principles

1.4.1 In order to ensure operational efficiency and the necessary unity as an investigating and prosecuting body the EPPO should exercise its functions and act in individual investigations under the hierarchical authority of the EPP. Delegated prosecutors should act under the instructions of the EPP.

The hierarchical structure is not in contradiction with a decentralised organisation allowing the existence of delegated prosecutors (Delegates) in the MS, who would be in charge of carrying out the concrete investigative and prosecutorial activities required in each case, without prejudice to the possibility of the European Prosecutor to carry them out when he/she may deem it appropriate.

According to the views expressed within the group, it seemed that a small centralised structure (the Head of the Office plus a reduced number of Deputy European Prosecutors) would be the perfect complement to this decentralised structure, articulated through the delegates. The number of delegates for each MS should be decided on a case by case basis and depending of the existing practical need for each MS.

1.4.2 The EPP and the delegated EPPs should act in full independence.

Independence, as described in paragraph 1, is attributed to the EPPO or to the EPP. Delegates cannot be deemed fully independent as they follow instructions dictated by the EPP, however, this conclusion tries to emphasize the lack of possibilities for national prosecution services to issue orders or give instructions to the Delegates as regards their duties as members of the EPPO.

1.5 - Relations with national investigation and prosecution services

1.5.1 Under the authority of the EPPO the relevant national criminal investigation services (auxiliaries of justice) are to contribute to the investigative and prosecutorial acts of the EPPO and execute all related instructions.

This conclusion is a direct consequence of the option taken by the Treaty of referring direct procedural action of the EPPO before the relevant domestic courts. Under this system it makes sense to allow the EPPO to get

all the benefits from the existing law enforcement agencies in charge of carrying out investigations in each MS. As a consequence of the primacy principle (see below, point 1.5.C), national investigation services should be under the direction of the EPPO. Just as the existence of Delegates does not exclude the possibility of direct intervention of the EPP in any MS, this use of national investigation authorities does not exclude the possibility to use EU-wide investigating actors (See below Conclusion 1.7).

1.5.2 The EPP and delegated EPPs should be granted full access to all relevant documents and information, including relevant criminal investigative files and personal data bases at national level.

This conclusion reflects the need to provide the EPPO with the necessary information and documentation to carry out its tasks. Given that each MS will recognise it as a prosecuting authority, the access to criminal files and personal data bases at national level is something that should not be contested and accepted as a logical consequence of the establishment of the Office.

1.5.3 Within the limits of his competences the EPPO shall exercise obligatory prosecution. He should investigate on a systematic basis with priority over national prosecution.

The issue of whether obligatory prosecution should be the rule or if a certain degree of opportunity should be allowed has been debated and the experts came to the conclusion that legal certainty and the need to be particularly clear as regards a newly established institution suggest obligatory prosecution as the most appropriate solution.

The EPPO should be in charge of investigating all cases that may fall within its competence and always with priority over national prosecution.

1.5.4 Cases may be referred to national prosecution services in accordance with clearly defined criteria specified in guidelines.

Despite the conclusion expressed above, the experts shared the concern of seeing the EPPO overburdened with minor cases that may formally fall under its scope of competence but that, according to its concrete characteristics, wouldn't have entity to justify the added value of a centralised European prosecutor body (let's think for example of non-complicated cases for small amounts of fraud, involving exclusively one MS). In these cases, the EPPO would be allowed to transfer the case to a certain national prosecution service. In order to avoid problems connected to legal certainty, a clear set of rules or guidelines governing these transfers should be set up in advance.

1.5.5 For the purpose of developing its investigative guidelines the EPPO may be assisted by an Advisory Council composed of the Heads of the Prosecutions Services of the participating Member States.

One of the main causes for concern is the frictions that may arise between the EPPO and the national prosecution authorities of the MS involved, Therefore, the experts consider it would be a very positive step to establish an Advisory Group or Council that would be composed of the Heads of the national prosecution services of the MS involved in the setting up of the EPPO, plus the EPP. This would significantly help improve the atmosphere of cooperation and to establish the ground for the mutual trust that lies beneath the whole project of establishing a EPPO. Some initiatives related to the creation of such a forum have already been initiated among relevant actors at EU level (Eurojust, Eurojustice), and could be a starting point for this more specific Group.

1.6 Relation with the national judge of freedoms and the trial judge

1.6.1 The measures taken by the EPPO have effect on the whole territory of the European Union or, in case of an EPPO created on the basis of the procedures on enhanced cooperation, on the territory of the participating Member States.

This conclusion aims at reinforcing the role of the EPPO as a fully competent prosecuting body, whose authority should be recognised throughout the territory of the EU. In case of enhanced cooperation, the EPPO should be recognised as a fully competent body for those MS involved, and as for the rest of the MS, should be regarded at least in the same way as national prosecuting authorities from the involved MS.

1.6.2 The competent national judge of freedoms should exercise ex-ante and, as the case may be, ex-post control over coercive measures taken by the EPPO.

Although this topic has been addressed by other groups, the feeling of the experts in Group 1, is that the main bulk of the jurisdictional control over the actions of the EPPO should be carried out by the national judge of freedoms, both from a ex-ante and ex-post viewpoint, as the best way to establish an effective control over the performance of the EPPO.

1.6.3 The EPPO should exercise the choice of the trial judge in full compliance with the rules of national jurisdictional competence while both respecting prosecutorial effectiveness and the principle of natural justice in accordance with objectively established criteria.

To members of Group 1, the need to establish rules avoiding the risks of forum-shopping by the EPPO (risk that is derived from the evident lack of

harmonisation of Criminal and procedural norms within the EU), is one of the crucial points that need to be solved in order to build a system compatible with the requirements of the Strasbourg Court. Given that it is likely that EPPO investigations are very likely to allow adjudication in several MS, it is very important to have a clear list of binding rules set out in advance, so that the risk of a EPP making choices of different jurisdictions according to unclear motivations.

1.7 Cooperation with European Bodies

1.7.1 EPPO shall rely to the greatest extent possible on assistance granted by Eurojust and the European Judicial Network. Such support should include the necessary coordination with the competent authorities in the Member States and in third countries, as well as relevant training.

The fact that EPPO is to be established from Eurojust must be visualised through a close relation between both bodies, as well as with the EJN. The valuable experience that Eurojust has gathered through the years in coordinating investigations and prosecutions should be made available to the EPPO. Training is a key issue in which the support of Eurojust could be most useful.

1.7.2 The EPPO shall be assisted within their respective competences by OLAF and Europol.

This point builds on the need to make use of the experience gathered by these specialised European offices. Obviously, the role to be played by OLAF is necessary as regards investigations of offences detrimental to EU funds, and the role of Europol would be more connected to a scenario in which the scope of competence of the EPPO may reach organised crime (eventually, only at a later stage, according to the opinion of the experts). This conclusions is complementary to the one worded at 1.6

1.7.3 In as much as necessary to complement available assistance by national criminal investigative services, OLAF may be granted, in addition to its current administrative investigative mandate and limited to the protection of the EU financial interests, specific enforcement responsibilities as an auxiliary of justice acting under the strict instruction and control of the EPPO.

As a complement to the previous conclusion, and for the cases in which the EPPO may require of the services of OLAF as a sort of judicial or financial police, additional powers should be granted to OLAF, or to certain units within it, to be in a position to fulfil this new task.

1.8 Third country cooperation

1.8.1 Eurojust should grant the EPPO the full benefit of relevant agreements and of its network of contact points with third countries.

This would be a consequence of the wider principle of transmission of information and support offered by Eurojust to the EPPO.

- Member States participating in the EPPO should grant the EPPO full benefit of all relevant agreements on mutual legal assistance concluded with third countries.

- The European Union should recognize the EPPO as a competent authority in all cooperation agreements on mutual legal assistance with third countries.

- Should it reveal necessary to establish the EPPO based on the provisions of the EU-Treaty on enhanced cooperation, the EPPO should be recognised the power to use, as a competent authority, relevant instruments on mutual recognition and mutual legal assistance in the non-participating Member States.

This set of conclusions aims at establishing the EPPO with a solid legal base as regards its role regarding mutual legal assistance requests and the use of instruments of mutual recognition. The experts considered that it was more operational to ask for declarations from MS regarding the international instruments already in force, rather than seeking signatures on behalf of the EPPO of the whole set of existing treaties.

1.9 Appointment and status of the EPPO

a) The EPP and the Delegated EPPs should present all professional and personal qualifications required to exercise the highest judicial functions in the Member State of their origin.

b) The EPP should be appointed by the Council acting by qualified majority on a proposal by the Commission and with the assent of the European Parliament.

These conclusions reflect the need to invest future EPP and Delegates with the highest possible authority, given the crucial role they will be playing within the judicial field. It has been considered by the experts that the Parliament, the Council and the Commission should have a say as a way to enhance this.

c) Delegated EPPs should be appointed by the EPP taking into account the proposals of the Member State concerned.

Although the conclusion was left open as a way to allow the diversity of organisation and structure of the prosecution services in the various MS, the experts considered that Delegates, apart from complying with the conditions set out in the first paragraph, should also be part of the domestic prosecution system, given that it is precisely this capacity what confers a special characteristic to the decentralised structure of the EPPO.

d) The members of the EPPO should receive their remuneration from the EU-budget.

This conclusion reflects the concern of the experts to grant the independence of the EPPO, through the economic independence of its members. However, it was also considered that an excessive gap between the national salary and that of the Delegates could be counterproductive. A possible solution would be to increase, at the expense of the EU budget, the national salary in a given percentage, so that the final salary would vary depending on the MS the Delegate would belong to.

2. COMPETENCES

2. 1 Introduction. Legal Framework

Article 86 TFEU states that the EPPO may be established from Eurojust "in order to combat crimes affecting the financial interests of the Union" (paragraph 1). In that case, the EPPO 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" (paragraph 2).

Art. 86 TFEU also declares that a decision amending both paragraphs may be adopted by the European Council "at the same time or subsequently", "to include serious crime having cross-border dimension" (paragraph 4).

Two possible options:

According to Art. 86 TFEU, the competences of the EPPO can be initially developed in two different directions:

1) A more reduced scope of competences, focused on the fight against the financial interests of the European Union.
2) A broader scope, that would include other criminal offences with a translational dimension.

2.2 Competences of the EPPO limited to the protection of the financial interest of the European Union.

2.2.1. Overview

A material scope clearly focused on the protection of financial interest would be in line with the original conception of the EPPO and respond to the already existing needs to effectively protect the financial interests of the EU. It also seems that a reduced scope of competences would provide for a proportionate and feasible starting point for the EPPO.

The idea of setting up a European Public Prosecutor emerged in the 70´s due to the need to protect in a more effective way the financial interests of the European Communities. According to this approach, the different proposals and initiatives for the establishment of an EPPO have been closely connected and based on the protection of the European Union´s financial interests[1].

The need to improve the protection of the financial interests of the European Union is still a real challenge for the European institutions and bodies:

- The 2007 Report from the Commission on the Protection of the European Communities financial interests and the fight against fraud stressed that the financial amounts affected by irregularities increased in 19% in total terms.

- The latest 2008 Report[2] also refers to the results of the fight against fraud and irregularities[3] and contains detailed statistics and evaluation of irregularities affecting the financial interests in the year 2008 in the areas of Own resources, agriculture, structural measures, pre-accession funds and direct expenditure as well as the major developments in the protection of financial interests. As the report itself stresses, "The EU budget is not an anonymous source of funding. It is the shared effort and commitment of EU Member States and citizens to make their vision become reality, from supporting economic and social solidarity to promoting research, technological development and training, and to supporting sustainable development worldwide. Accordingly, the Treaty calls on the Commission and Member States to coordinate their action to protect the EU budget and to counter fraud and other illegal activities affecting it.

[1] See mainly the Corpus Iuris of criminal law for the protection of the financial interests of the European Union (Study of a group of experts coordinated by DELMAS_MARTY in 1995-1996 and revised in 2001) and the Green Paper of the European Commission on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, doc. COM(2001)715 final, Brussels 11.12.2001.

[2] Commission report on the Protection of the Communities' financial interests — Fight against fraud — Annual Report 2008 Brussels, 15.7.2009 COM(2009) 372 final. See also Commission staff working document, on Statistical evaluation of irregularities, own resources, agriculture, structural measures, pre-accession funds and direct expenditure – Year 2007, SEC(2009) 1003 final, Brussels, 15.7.2009.

[3] The distinction between them being that fraud is a criminal act that can only be determined by the outcome of criminal proceedings.

- The European Parliament, in its Resolution on the Protection of the Communities' financial interests and the fight against fraud declares that, in the areas of own resources, agricultural expenditure, structural actions and direct expenditure, irregularities notified in 2007 totalled EUR 1425 million compared to EUR 1143 million in 2006.

- In the context of the current economic crisis the need to protect the EU budget and the shared interest of the Eu, Member States and citizens acquires further relevance. The European Council has pointed out the need to fight with determination tax evasion, financial crime, money laundering and terrorism financing as well as any threat to financial stability and market integrity[4]. Under those circumstances, the protection of financial interests of the European Union and of the European tax payers is specially relevant.

2.2.2. Scope of the "financial interests of the European Union"

There are different approaches about the types of offences that should be included in the general scope of "criminal offences affecting the financial interests of the European Union". A restrictive approach is given by the Convention for the Protection of the Financial Interests (PIF Convention), while a more comprehensive one is provided by the *Corpus Iuris.*

Fraud, corruption, money laundering and what else criminal offence?

In order to identify the criminal offences included in the competences of the EPPO, criminal offences include in the PIF Convention and Protocols are a good starting point for the definition of the competences of the EPPO.

These should basically cover activities constituting fraud, which according to the definition provided for in Article 1 of the Convention on the protection of the Community's financial interests of 26 July 1995 (OJ C No 316 of 27.11.1995), which entered into force on 17 October 2002, fraud affecting the European Communities' financial interests shall consist of:

"a) in respect of expenditure, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European

[4] Presidency Conclusions. Brussels European Council 19/20 March 2009. Doc. 7880/1/09 REV1. Brussels 29 April 2009, p. 16.

Communities or budgets managed by, or on behalf of, the European Communities;
- non-disclosure of information in violation of a specific obligation, with the same effect;
- the misapplication of such funds for purposes other than those for which they were originally granted;

b) in respect of revenue, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities;
- non-disclosure of information in violation of a specific obligation, with the same effect;
- misapplication of a legally obtained benefit, with the same effect."

The protection of euro should be also included in the competences of the EPPO.

The II version of the Corpus Iuris included other criminal offences: market-rigging, conspiracy, misappropriation of funds, abuse of office and disclosure of secrets pertaining to one's office.

In principle, the competences of the EPPO should cover all the criminal offences affecting the financial interests of the European Union, because they cause a detrimental to the EU financially, or because they expose the prestige of credibility of the European institutions to danger.

2.2.3. National or transnational dimension

Investigations and prosecutions affecting the financial interests of the European Communities should also cover criminal offences limiting their effects to one EU MS and the European Commission, not only criminal offences with a transnational dimension.

2.2.4. Harmonisation of the offences affecting the financial interest of the European Union?

The harmonisation of the criminal offences shouldn´t be a precondition for the establishment of an European Public Prosecutor.

However, the more harmonisation we have, the less problems and difficulties we will face when investigating and prosecuting criminal offences against the financial interests of the European Union.

In accordance with PIF Convention and Protocols, fraud, corruption and money laundering have been harmonised by most of the EU MS, although further harmonisation is needed in the case of some EU MS.

The TFEU may offer two different legal bases for the harmonisation of the criminal offences affecting the financial interests of the European Union. In the Area of Freedom, Security and Justice, article 83.1 declares:

> "*The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*
>
> *These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.*
>
> *On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act* unanimously after obtaining the consent of the European Parliament".

According to article 83.2:

> "*If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the are concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76*".

In the specific field of the protection of the financial interests of the European Union, possibilities of article 325 TFUE (in relation with the cited above art. 83.2 TFUE) should be also taken into consideration:

> "1. *The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measure to be taken in accordance with this article, which shall act as deterrent and be such as to afford effective protection in the Member States, and in all the Union´s institutions, bodies, offices and agencies.*

2. Member States shall take the same measures to counter fraud affecting the financial interest of the Union ans they take to counter fraud affecting their own finantial interests.

3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action Ahmed at protecting the finantial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, alter Consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union´s institutions, bodies, offices and agencies.

*5 .The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Art*icle"

2.2.5. Other criminal offences linked or connected to those against the financial interests of the European Union

Criminal offences linked to those affecting the financial interests of the European Union should be, in principle, brought before the same trial and examined by the same court. Special consideration should be made with the criminal offences executed in the framework of other serious forms of crime, such us drugs trafficking or trafficking of illegal vehicles.

2.3. Competencies of the EPPO extender to other serious crimes with cross-border dimension

2.3.1. Overview

Some EU MS are in favour of a broader scope of competences of the EPPO. In the follow-up report on the Green Paper of the Commission, a vast majority of respondents considered that, "if the European Prosecutor is to be created, his powers should necessarily be broader than proposed by the Commission[5]".

In the area of Freedom, Security and Justice of the EU, terrorism, sexual exploitation of woman and children or trafficking of

[5] Follow-up Report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, p. 13.

human beings are considered as extremely dangerous for the citizens, and according to this approach, the legal basis for the EPPO (art. 86 TFEU) expressly allows the extension of the EPPO competences to other forms of serious crime with cross-border dimension.

Serious crime with cross-border dimension would be easily prosecuted by the EPPO, because it will have the capacity to obtain a comprehensive overview of the cases involving several Member States. Moreover, a broader scope of the competences of the EPPO will facilitate the fight against fraud and other criminal offences affecting the financial interests of the European Union, which are frequently linked to other serious forms of crime, as we already said.

2.3.2. Scope of the "other serious crimes with cross-border dimension"

In order to define what does "other serious crimes with cross-border dimension" mean, we could refer some relevant fields of criminality already pointed out as priority of the European Union in Article 83 TFEU : terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drugs trafficking, illicit arms trafficking, cyber criminality and organized crime.

Should all these criminal offences be investigated and prosecuted at European level and by the EPPO? It appears that these criminal offences should have, in addition, a "European dimension", which would exist, e.g., when criminal offences cause an impact in the values and guiding principles of the area of Justice, liberty and security (cfr article 67 TFUE). In practical terms, an European dimension would exist when three or more Member States are involved in the offences, or when offences have their causes or effects in a Third Country.

2.3.3. Harmonisation of the other serious crimes with cross-border dimension?

The extension of the competences EPPO does not require, as a precondition, the harmonisation of the criminal offences.

However, the investigation and prosecution of criminal offences against serious forms of crime with a cross-border dimension need for a sufficiently clear and detailed common definition of the criminal offences. In that regard, it already exists European Framework Decisions concerning all of the offences provided for Article 83 TFEU.

2.3.4 Conclusions

- The initial competences of the EPPO shall cover at least the protection of the financial interests of the European Union. It will include criminal offences of the PIF Convention and Protocols (fraud, money laundering, corruption) and may include other criminal offences affecting the financial interests of the European Union (market-rigging, misappropriation of funds, abuse of office, disclosure of secrets, counterfeiting of euro). An EPPO focused on the protection of the financial interests of the EU will allow as a starting point a clearly defined and homogeneous scope of competences.

- In addition, the Member States should consider the possibility of extending the competences of the EPPO to other forms of serious crime with a transnational dimension or having special impact in the area of Freedom, Security and Justice of the EU. In particular, EU MS could pay attention to those criminal offences already pointed out as priority of the European Union in Article 83 TFEU: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drugs trafficking, illicit arms trafficking, cyber criminality and organized crime.

- Further harmonisation of *criminal offences* affecting the financial interests of the EPPO (and other criminal offences with a transnational dimension, if decided so) is not a pre-condition for the setting up of the EPPO, but might facilitate investigation and prosecution of these criminal offences. The possible harmonisation of *some general concepts of criminal law* (liability of heads of businesses, liability of legal person, aggravating and mitigating circumstances) must be also considered.

- In a particular investigation, criminal offences closely connected with those included in the scope of competences of the EPPO should be, in principle, investigated, prosecuted and brought before the court by the EPPO. Especial consideration should be taken to the criminal offences carried out by a criminal organisation. However, the need to avoid macro- proceedings must be appreciated by the EPPO and would justify the division of the investigation into different files.

3. ACTION PROCEDURE. COMMENCEMENT OF INVESTIGATIONS

3.1. Introduction

Article 86 provides the possibility of creating a European Public Prosecutor's Office for prosecuting crimes against the financial interests of the EU on the basis of special legislative procedures. It also provides the adoption of regulations that lay down action procedures for the prosecution service, including criminal procedural rules that determine its competencies for investigation.

The purpose of this section 3 is to analyse and consider the investigation procedures that can be carried out by the European prosecution service from the moment when the allegedly criminal acts

become known to when the decision is taken to file (close) the case or apply for the opening of the oral proceedings.

3.2 Principles of the investigation

First of all and by way of summary, because the issue is examined in other sections, reference must be made to the principles of action that must apply to the investigations:

The European prosecution service must proceed **independently** from the member states and the institutions and bodies of the European Union. Its actions must be governed by the principle of **impartiality** in relation to all the parties involved.

The European prosecution service must be subject to the **principle of legality**: accordingly, its competencies must be clearly defined and regulations must be provided for the cases in which, owing to their nature or the low-level economic repercussions of the facts, the decision can be taken for the corresponding prosecution to be followed up by the national judicial authorities or by administrative bodies.

The application of the principle of legality, in accordance with the terms indicated above, determines that the European prosecution service must proceed in accordance with a "**principle of priority**", which, a priori, involves its intervention in all the cases in which the investigation affects criminal infractions against the financial interests of the European Union. However, (expressly regulated) exceptions may be applied to ensure that, in application of a **principle of subsidiarity**, the European Public Prosecutor's Office transfers the investigations to the judicial authorities of the member states.

In the specific practice of its investigations and by virtue of the principle of impartiality, the European prosecution service must gather all the items of evidence against and for the suspect.

3.3 Phases of the investigation procedure

3.3.1 Commencement of the actions: sources of information and knowledge

The European Public Prosecutor's Office may start its actions as soon as it gains knowledge of facts that suggest the commission of any of the criminal infractions that fall under its competency. This information can come through a wide variety of channels, including the following:

- Reports sent by individuals or bodies corporate (banks, businesses, NGOs, etc.) sent directly to the prosecution service.

- Anonymous reports.

- Formal notice or reports sent by the institutions of the European Union, member states and international bodies (World Bank, UN, etc.).

- Actions sent to the European Public Prosecutor's Office by the judicial authorities of the member states owing to the fact that the investigation is considered to be under the competency of the European prosecution service as a result of the scope and nature of the facts.

- By operation of law, where the European Public Prosecutor's Office must play an active part in detecting and subsequently prosecuting the criminal infractions included in its area of competency.

The institutions of the European Union and the competent authorities of the member states (state administration services, police forces, tax and customs services, etc.) must notify the prosecution service immediately of any criminal act and cooperate in the ensuing investigations.

3.3.2 Preliminary assessment

Before the investigations actually begin, it is necessary to establish an initial phase of assessment to decide whether the facts fall under the competency of the European prosecution service. The said preliminary assessment is a requirement of an elementary principle of legal certainty and of the **principle of proportionality** that must apply to the prosecution service's actions.

This phase will take place when the information received is not sufficient for confirming serious indications of the commission of crimes, especially when the report comes from an "anonymous source". The credibility of the allegations must be assessed and the necessary and essential verifications must be made to decide whether there are sufficiently serious suspicions for opening the investigation.

An assessment must also be made of whether the facts that have been notified fall under the competency of the European prosecution service in accordance with the aforementioned principle of legality.

This preliminary phase must take place in a short period of time and a term must be set for its completion.

The decision taken during the said "preliminary assessment" phase (whether to file the case or open the investigation) is the exclusive competency of the European prosecution service and must not be open to any appeal whatsoever.

3.4. Investigation procedures carried out by the European Public Prosecutor's Office

The investigations of the actions opened by the European Public Prosecutor's Office are carried out by its own officers, who, as indicated,

must be national prosecutors working on the investigations under their own competencies and powers.

The European Public Prosecutor's Office's personnel must therefore be competent for gathering all the evidence, accessing public and private registers (bank information, corporate accounts, etc.), requesting expert examinations, hearing witnesses and experts, etc. Obviously, as indicated in section 1, the body will have the assistance of the administrative personnel and investigators for carrying out the investigation work and gathering evidence.

Whatsoever procedure that represents interference with fundamental rights must require the authorisation of a judicial authority. This issue is examined specifically in section 4 of this report.

With regard to the other procedures, the essential issue that arises when defining the actions of the European Public Prosecutor's Office is whether the investigations should be regulated and harmonised in some way, determining one single action procedure regardless of whether the investigations are carried out by one or more states.

The possibility of the European Public Prosecutor's Office adopting the coercive measures required for the investigation on its own behalf without judicial intervention is an absolutely necessary base principle. Taking into account that we are dealing with a space of freedom, security and justice in which the principle of mutual recognition is gradually expanding, the European Public Prosecutor's Office must be allowed to act as a competent judicial authority, issuing decisions that must be recognised and enforced, at least in the same way in which those of whatsoever other competent authority in a member state would be recognised and enforced.

Albeit based on this philosophy, which arises from mutual recognition, it would be necessary for the legislation that determines the way in which the European prosecution service is to proceed to provide minimum procedural rules to allow it to direct and organise the initial investigation phase in its entirety. Without the need for harmonising domestic procedures, the legislation must ensure that the European Public Prosecutor's Office can act consistently when carrying out investigations that do not affect fundamental rights.

Accordingly, the proposal includes the general recognition of these coercive powers of action (with the sole limits of the procedures that invade fundamental rights), which may include actions such as mandatory summonses of witnesses, requests for reports, documents, seizures, controlled delivery authorisations, etc. without the need for subsequent judicial control. In other words, these investigation measures should be controllable and carried out at the discretion of the European Public Prosecutor's Office without the possibility of whatsoever ulterior appeal against them.

The solution offered is also based on a space in which the procedural guarantees of the suspects (taking into account the progress made by the

Council in this area) would be unified and harmonised to ensure that the European prosecution service's actions include respect for the said guarantees.

3.5 Duration of the investigations. Term

The matter of whether the European Public Prosecutor's Office investigations should be subject to a term may be discussed from the point of view of the necessary effectiveness required by the inexistence of terms in view of the general difficulty associated with affairs that fall under the competency of the European Public Prosecutor's Office.

The obstacles for rapid investigation arise not only from the complexity of the facts, but also from the added difficulties of proceeding in different countries and the proposed submission to the procedural rules of the judge that is to control and authorise the prosecution service's actions when they affect fundamental rights.

Whatever the case, the need for sufficiently extensive and flexible time limits must be combined with respect for the fundamental rights of the investigated party and, more specifically, respect for the right to be judged within a reasonable term.

The balance of these two criteria and the need for complying with the terms for the lapsing of the offences, as provided by harmonised legislation or by the provisions of the applicable national law, points to an extensive term of no less than 18 months, which may be extended according to special circumstances after the intervention of the judicial authority that is competent for controlling the actions taken by the prosecution service, as examined in the following section.

4 JUDICIAL REVIEW OF ACTS OF THE EUROPEAN PUBLIC PROSECUTOR

4.1 Introduction. Legal framework.

According to article 86 *in fine* of the Treaty of Lisbon, one of the regulations envisaged in paragraph 1 for the creation of a European Public Prosecutor's Office will govern "the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions".

Having settled that certain acts of the European Public Prosecutor - which will be discussed below - will be subject to the review and authorisation of a *judge of freedoms*, it must now be specified whether this role is to be performed by an *ad hoc* community judge or by a national judge of the state where judicial measures are to be taken as part of a prosecution.

The establishment of a community judge within the structure of the EU Court of Justice has been advocated by some who believe that this is the only way to ensure the consistent application of community law. This idea is

indicative of a bold and forward-looking outlook, and in line with the undoubtedly worthy goal of attaining a single European law in matters such as arrest and detention, searches, and the interception of communications. However, a realistic take on the present situation advises against this option. The Court of Justice in its current configuration will, nonetheless, be competent to hear certain appeals where a national judge acting as judge of freedoms fails to apply community law correctly in one of its decisions.

The figure of a European Public Prosecutor is in itself highly complex, and adding further complications would be a mistake. Conferring jurisdiction in criminal matters to the Court of Justice is a controversial matter and this does not seem the right time to open that debate.

Given that the first option has, in our opinion, been ruled out, and following the opinion of the Green Paper, we believe that the role of the judge of freedoms in charge of examining the acts of the European Public Prosecutor should be played by a national judge. Apart from the complications that instituting a Community judge of freedoms could entail, there are other reasons for assigning competence to exercise judicial review to the national courts of the state where the investigation is being conducted or where the measure subject to review is to be implemented.

According to the Treaty, the European Public Prosecutor shall exercise its functions in the competent courts of the member states. It therefore seems reasonable that judicial review should be performed by a national court.

Having settled that the judge of freedoms will be based in the national courts, it is now to be decided whether its functions are to be exercised by a specialised, centralised court, or by the ordinary courts under the procedural law of each state. For the reasons we will now explain, we believe the best option is to establish a specialised court to act as judge of freedoms in respect of the acts of the European Public Prosecutor.

In order to create such a specialised court, provision would have to be made in a Community regulation requiring the individual states to organise and establish one or more specialised courts, according to their needs or to the structure of their judicial system.

The complexity of Community legislation on fraud affecting the financial interests of the EU makes it advisable to create specialised courts to take on the role of judge of freedoms with respect to certain acts of the European Public Prosecutor. Specialisation seems even more necessary in view of the fact that committal to trial may be subject to judicial review – this matter will be addressed below -, a decision with possible implications regarding the consideration of the facts under investigation as constituting a typified offence.

Moreover, establishing specialised courts in the different states would favour the consistent application of Community law and a more fluent communication between the states. Ultimately, it could open the way to the creation of a Community judge in the framework of the Court of Justice of the EU.

4.2 Judicial review of investigation measures and preliminary measures adopted or proposed by the European Public Prosecutor

One of the aspects that must necessarily be addressed when designing the judicial review of the acts of the European Public Prosecutor relates to the different measures that may become necessary in the course of the investigation.

The organisation of this review will obviously depend to a large extent on which jurisdiction will finally have responsibility for its exercise: national courts or a Community court.

In any case, it seems necessary to build this design on the basis of three basic principles:

1. The opportunity for a minimum harmonisation of the investigative powers of the European Public Prosecutor.
2. Recognition in every national jurisdiction of the same powers for the European Public Prosecutor as those held by national prosecutors.

4.2.1. <u>The opportunity for a minimum harmonisation of the investigative powers of the European Public Prosecutor.</u>

There are patent differences in the legislations of the member states regarding the requirement of court authorisation prior to taking certain measures in a criminal investigation.

There is no general rule and no shared concept of actions requiring previous judicial consent. Moreover, it should be taken into account that the very concept of judicial authority varies from one state to another. In some it includes the public prosecutor and in others it does not.

The only attempt at defining the concept of a “measure requiring judicial authorisation” in Community law is contained in the Framework Decision on the European evidence warrant. Article 2.e) refers to “search or seizure” – as an established concept for coercive measures - as “any measures under criminal procedure as a result of which a legal or natural person is required, under legal compulsion, to provide or participate in providing objects, documents or data and which, if not complied with, may be enforceable without the consent of such a person or it may result in a sanction”.

The concept draws on ECHR case law in the field of coercive measures requiring judicial authorisation.

A further aspect to be considered, nevertheless, is that this definition requires the participation of at least a senior court, a court of enquiry or a

public prosecutor. It makes no exclusive reference to courts of law or judges of freedoms.

Outside of this precedent, the only aspect where the different national legislations are unanimous is the detention of suspects and accused persons. A judicial decision is imperative in all member states for this purpose, as required by article 5 of the ECHR.

Both the Corpus Iuris and the Green Paper on the European Public Prosecutor are based on the premise that certain investigative acts and precautionary measures in the pre-trial stage will require authorisation from a judge of freedoms.

To this effect, the Green Paper establishes the requirement of judicial authorisation for measures entailing a restriction or deprivation of personal liberty. The Commission refers all other measures and acts of investigation to domestic law purely and simply, only establishing - "by virtue of the principle of minimum harmonisation of judicial review procedures" - the principle that applications for review of such measures and acts of investigation as provided in domestic law do not have suspensory effect.

We are faced with two possible alternatives to tackle this situation:

- Alternative A. Minimum harmonisation. This would consist in drawing up a list of investigative and precautionary measures which would require judicial authorisation in order to be applied by the European Public Prosecutor under any circumstances.

- Alternative B. No minimum harmonisation and referral to the domestic law of the member state where the action requested by the European Public Prosecutor is to be executed.

Reasons of legal security in the acts of the European Public Prosecutor seem to point to alternative A as the best option, i.e. the establishment of a list of measures for the execution of which the European Public Prosecutor shall require authorisation from the judge of freedoms.

This list should be based on the following classification of measures envisaged for the investigative stage of criminal proceedings, specifying the cases where previous judicial authorisation is required:

I. Precautionary measures of a personal character (deprivation of personal freedom or restriction of free circulation).

II. Precautionary measures of a material character (seizure, provision of bail or surety, securing or attachment of assets and elements of evidence).
III. Measures of a preventive character on financial activities (suspension of company activity, closure of premises, suspension of administrative licences and authorisations).

IV. Investigation measures entailing a restriction of fundamental rights (entry into and search of houses, interception of communications).

4.2.2 Recognition of the European Public Prosecutor's powers as being equivalent to those of national public prosecutors in every member state.

In consonance with the system proposed in the first part whereby a national public prosecutor would operate under the principle of dual dependency, the investigative powers of the European Public Prosecutor not subject to judicial review would be those he holds as national public prosecutor.

Another option worthy of study would be minimum harmonisation. This would not be incompatible with the principle of equivalence between European Public Prosecutors and national prosecutors in each of the territories where he operates.

It would have to be decided whether such minimum harmonisation would simply be a *de minimis* harmonisation or whether it would set the ceiling for the requirement of judicial authorisation which national legislations would have to comply with. In the latter case, the list of measures would have to be accompanied by a clause of non-regression, to ensure that it is without prejudice to any wider powers or to the exemption from judicial authorisation where national law thus provides for its own prosecutors.

4.3 Procedural articulation of judicial review by the judge of freedoms

In this respect also, the possibilities are completely different according to who is given responsibility for judicial review: the national courts or a system centralised at the Court of Justice of the European Communities.

4.3.1 Articulation of a judicial review procedure centralised at the CJEC

Undoubtedly, should the judicial review of the acts of the European Public Prosecutor be carried out by the CJEC or a specialised division of this institution, it would be necessary to create *ex novo* a set of specific procedural rules which would ideally conform to the following principles:

- The right of the accused to be heard.
- The adversarial principle.
- Substantive – not merely formal – review.
- Reasoning.

- Non-suspensory character of appeals against the decisions of the judge of freedoms.

4.3.2 Principles of the procedure applicable by a national judge of freedoms.

The Treaty does not rule out the possibility that the rules on the judicial review of the acts of the European Public Prosecutor may refer to the procedural law of the member state where the European Public Prosecutor makes use of his powers, which is also the state where the judge of freedoms conducting the review is based.

However, this does not amount to a pure and simple referral, as it may be accompanied by minimal regulation of the principles to be observed in all cases by the different national procedural legislations. Opting for this scheme would economise resources, as the opposite would be tantamount to making the creation of the European Public Prosecutor subject to the approval of a full-fledged body of rules of procedure.

These principles have already been set out in the preceding section, although some additional considerations may be made:

- The right of the accused to be heard prior to adopting any precautionary or investigation measures affecting him.

This right should not be incompatible with the exclusion of the preliminary hearing when authorising investigation measures which would be rendered completely inefficient should the suspect become aware of them prior to their execution (search warrant, communications monitoring, etc.).

- Substantive – not merely formal – review.

The judicial review exercised by the judge of freedoms must in all cases be a substantive review, observing due balance between the interest or need of the investigation on the one hand and interference with the fundamental right of the suspect on the other.

- Reasoning.

From a formal perspective, the requirement for freedoms review rulings to be reasoned constitutes the most essential instrument for monitoring the effectiveness of the substantive review mentioned above.

- Non-suspensory character of appeals against the decisions of the judge of freedoms.

The different projects and reports published to date (Corpus Iuris and Green Paper) are unanimous on the need to avoid a disproportionate system of appeals against any decision taken by the judge of freedoms.

The need to ensure the balance between the protection of the rights of defence and an efficient prosecution makes it advisable to lay down the principle for minimal harmonisation that any appeals that may be provided in the different national legislations against the rulings of the judge of freedoms should be non-suspensory.

4.4. Judicial review to decree or extend the secrecy of the criminal proceedings

The duty to inform an offender that he is subject to a criminal prosecution is a procedural obligation based on his right to know the charges against him, which in turn derives from the fundamental right to a defence and legal counsel. Thus, where a criminal report points clearly, specifically and determinedly at a given person and prosecution ensues, the public prosecutor must notify the accused of this fact and provide him with a copy of the report – as the investigation must at all times remain bound by the adversarial principle and the right to defence – provided that the offences concerned have been verified to a sufficient extent, and the identity of the person under investigation has been determined.

The public prosecutor applies this criterion when he decides, before informing the suspect that the prosecution is underway, which measures are needed to substantiate the suspicions, taking into account the solidity of the initial report and the needs of the investigation.

Subsequently to this initial *de facto* secret, the course of the investigation may require declaring the secrecy of the proceedings. This may be necessary in cases involving measures restricting fundamental rights, e.g. house searches and interception of communications, which must always be authorised by the judge of freedoms. This is also the case where inquiries are ordered into a suspect's assets, specifically requests for bank account information, which even though they are exempt from judicial authorisation, must be kept undisclosed to the suspect in order to avoid compromising the result of the investigation. In all these cases and in others where the effectiveness of the prosecutor's action requires the temporary non-disclosure to the subject of the investigation, the judge of freedoms will declare the proceedings secret for the period of time deemed necessary, and will also be responsible for extending this period where relevant.

5 THE INTERMEDIATE STAGE. DETERMINATION OF THE COMPETENT JURISDICTION AND EXERCISE OF THE FUNCTIONS OF PROSECUTOR. THE TRIAL STAGE: ADMISSIBILITY OF EVIDENCE.

5.1 Introduction. Legal framework

Paragraph 2 of article 86 of the Treaty on the Functioning of the EU states the following: 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.

One of the competences and responsibilities of the European Public Prosecutor under this article will be to exercise the functions of prosecutor in the competent courts of the member states in relation to such offences.

The tenor of the article firstly indicates that the Treaty is clearly inclined to avoid the creation of "European courts with criminal jurisdiction to prosecute such cases", opting instead for the "competent courts of the Member States".

Once the investigation has reached its conclusion, the facts in issue having been established and the evidence to be presented in the trial collected, we will now focus on the stage of the proceedings where the prosecution as such gets underway.

There are two moments before committal for trial, however, where the European Public Prosecutor must take a relevant decision. These must be subjected to specific study.

The first point worthy of attention is the European Public Prosecutor's duty to assess the findings of the investigation and establish whether the evidence in support of the charges is sufficient.

Provision must be made for the possibility that the Public Prosecutor may deem, once the investigation has been completed, that the evidence is insufficient or that one or more of the conditions for exemption of responsibility has been met. In this instance, the prosecution will most likely be discontinued.

Two possibilities are open with respect to the Prosecutor's choice to close a case or continue the prosecution: he may either be granted genuine freedom to decide, or the decision may be made subject to some type of review. In any event, depending on the role finally given to the European Commission and other parties potentially affected by the acts of the European Public Prosecutor, these could have the possibility to appeal against a decision to close a case if they find it objectionable.

There is also the issue of the extent of the European Public Prosecutor's decision power when he decides to bring charges but there is more than one competent jurisdiction. The question is whether the European Public Prosecutor should be given full discretion, even if his decision is guided by pre-established criteria, or whether his course of action should be subject to subsequent review of some kind.

Finally, the moment of exercising the prosecution function before the competent court also gives rise to a multiplicity of questions, the most important of which relate to the role to be played by the Commission and

other potential victims in the proceedings and to the form in which evidence is to be presented, admitted and assessed.

Therefore, these three fundamental issues are addressed in the following section of this report:

- Review of the European Public Prosecutor's decision to close a case.
- Determination of the competent jurisdiction.
- Exercise of the prosecution function: The standing of victims and injured parties. Committal for trial and admissibility of evidence.

5.2 Review of the European Public Prosecutor's decision to close a case

5.2.1 Causes for closing a case

A European Public Prosecutor's decision not to pursue a case may be based on causes legally established for proceedings conducted in national courts or on his appraisal of whether there is sufficient circumstantial or direct evidence to prosecute.

Obviously, a decision to refrain from prosecuting cannot be fully discretional if the proposed operation based on the principle of legality prevails, even with the application of any adjustments deemed necessary.

There is a long list of causes traditionally leading to the exemption of responsibility which need to be provided for in some way: expiry of the limitation period, death, measures of grace (e.g. amnesty or pardon), etc. Some of these will not entail any difficulties, as the case of the death of a natural person, but others, such as the expiry of the limitation period, can give rise to problems where legislations are not harmonised. The Green Paper foresaw the need to unify the limitation periods for offences within the European Public Prosecutor's jurisdiction. However, having settled that the prosecution will be exercised before the national courts, the most reasonable option is to apply the periods and time calculation methods established in the jurisdiction that is ultimately competent to hear the case.

Case closure decisions based on the result of the investigation and the insufficiency of the evidence available are a different matter and should be dealt with accordingly. If a European Public Prosecutor concludes that the investigation has not produced sufficient evidence to prove the responsibility of the suspect and therefore opts to discontinue the prosecution, his decision should in all cases be reasoned. There are two aims in this requirement: firstly, this is positive for the general monitoring of the actions of the European Public Prosecutor, and secondly it opens the way to an appeal, should this possibility finally be provided.

In any event, the decision to close a case, whether for a predefined cause or for lack of evidence, should only be subject to review to the extent that it may be harmful to the victim. Therefore, the legitimacy of the victims entitled to appeal is to be established beforehand.

Naturally, a victim's entitlement to challenge a waiver of prosecution that disagrees with their interests and expectations will depend on the solution adopted with respect to the role the Commission and other victims are allowed to play in the proceedings. This matter will be addressed below.

5.2.2 Competence and procedure for appeals against case closure

If a procedure is established for appealing against case closure or committal for trial which entitles the victims to join the proceedings as a party, competence to hear such an appeal should once again lie with the competent national courts, which would apply the procedures effective in that state.

In order for the victims to be able to exercise their right to appeal, the European Public Prosecutor must be bound by the duty to notify a decision to close a case to the Commission or any other injured party. This requirement would include the obligation to inform them of the possibility to appeal, specifying the procedure to be followed and the place where the appeal is to be lodged.

5.2.3 Effects of the decision to close a case

The effects of the decision to close a case should be predetermined and unequivocal. Such decisions have different effects in the different states of the European Union according to whether they are final or provisional. The effect of *res iudicata* of certain types of closure rulings which allows, for instance, the application of the principle of *ne bis in idem*, must be clearly defined.

Thus, it would be necessary to provide for different case closure decisions. Provisional closures, i.e. those based on insufficiency of evidence or failure to determine the identity of the offender, should be revocable in the event of new circumstances arising which allow a re-opening of the case provided that the limitation period for prosecution of the offences concerned has not expired. Closures based on predetermined causes such as death, measures of grace or expiry, would be considered final.

A further aspect to be established if an appeal procedure against case closure is established is what consequences would follow from a decision overturning the closure of a case. This is no simple matter. It would be incongruous to imagine a scenario where the European Public Prosecutor is compelled to pursue a case he has previously closed by a judicial decision against the closure. The only possible scenario would be an appeal that allows the appellant, as victim, to exercise the prosecution himself. In

principle, this would only be possible in states recognising the victim's right to exercise a prosecution function.

5.3 Determination of the competent jurisdiction.

In light of the initial premise laid down by the Treaty, namely that the European Public Prosecutor shall exercise the functions of prosecutor in the competent courts of the member states, it is necessary to decide the jurisdiction(s) before which the European Public Prosecutor will apply to send a case for trial.

In cases within the competence of the European Public Prosecutor, it will be common to see various member states claiming jurisdiction, whether over the entire case or at least a part of it. For the purposes of maintaining investigations under a single authority and also bearing in mind that fragmenting a case is usually detrimental to efficiency, the conclusion must be drawn that the European Public Prosecutor should preferably bring the case before one single jurisdiction.

5.3.1 Concentration or fragmentation of the trial

The option of unifying all proceedings under one single jurisdiction should have a preferential standing but it should not be considered the only option open to the European Public Prosecutor. The first decision to be taken when determining the jurisdiction before which the case will be taken is whether to concentrate or divide the prosecution.

The European Public Prosecutor's option to divide the case, bringing it before two or more jurisdictions, should not be discarded, provided that it is possible to do so. A variety of reasons may make it advisable to divide a case: the possibility of expiry of the limitation periods set for prosecution of the offence or for the effectiveness of precautionary measures, the will to prevent undue delay, an interest to examine witnesses or experts, etc. A further argument in favour of fragmentation may be its use in avoiding the problems associated with so-called "macro-trials". Due to the large number of defendants involved, these trials offer added difficulties. Therefore, the decision on whether to concentrate or divide the proceedings should be assessed on a case-to-case basis.

5.3.2 Choice of the competent jurisdiction. Criteria for determining competence

In any event, it must be borne in mind that opting for a concentrated prosecution entails taking a decision on which will be the competent jurisdiction from among the various options available. *Who* takes this decision and *how* is a key point for designing the rules of procedure of the European Public Prosecutor. Given the divergence between the criminal and procedural legislations of the different European countries and the limited degree of harmonisation achieved, the election of the national jurisdiction

that will be competent to try a case is by no means a trivial matter, as it directly affects the rights of both the accused and the victims.

In a genuinely common European judicial area, the most reasonable solution would be to establish a set of criteria which, applied in order of precedence, would serve to determine the competent jurisdiction. Nevertheless, it must be acknowledged that the member states have not shown themselves to be willing to accept such a procedure. In fact, a solution along these lines is not even considered in the provisional version of the Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, which is currently being drawn up by the Council. This Framework Decision simply sets out to prevent parallel prosecutions by exchanging information on a preliminary basis, and aims to resolve potential conflicts of jurisdiction by encouraging the member states to reach an agreement. No binding solutions are imposed and no criteria for determination are set, even as guidelines.

The competences ascribed to Eurojust under articles 6 and 7 of the Decision, which entitle this institution to request member states to acknowledge that one or another of them is in a better position to try a case, constitute a starting point. Indeed, use of this power over the last few years is an experience offering significant insight into how the European Public Prosecutor may operate, even though the legal bases are different in both cases, as Eurojust simply issues an opinion to be used by way of advice by the member states, whereas the European Public Prosecutor will actually take a binding decision.

In a seminar held in 2003, Eurojust debated which should be the relevant or determining criteria to decide which state is in the best position to prosecute a given offence. The Framework Decision on prevention of conflicts of jurisdiction makes reference to these criteria as guidelines for reaching an agreement between member states.

These criteria, which should simply be borne in mind, are the following:

- Territory. The place where most of the criminal activities were perpetrated.
- The location of the accused person and the possibilities for securing his or her surrender in the event of arrest.
- The need to provide assistance and protection to the witnesses
- The time within which the trial stage could be reached
- The interests of the victims
- Any problems in connection with evidence
- Legal requirements
- The severity of the penalties: proportionality
- Remedy of the effects of the offence
- The resources and costs involved

A further set of criteria that could be taken into account alongside the above are those provided in article 8 of the Convention of the Council of Europe on the transfer of criminal proceedings, signed on 15 May 1972.

And, given that the financial interests of the Union are at stake, the place where the strongest financial damage has been sustained as a result of the criminality could constitute an additional criterion to be considered when taking a decision on competency.

In conclusion, the European Public Prosecutor should operate under a set of established criteria that will not only guide his determination of the best placed jurisdiction to pursue the prosecution, but also allow the discarded jurisdictions and any individuals affected, as well as the accused and the victims, to know the reasons that have led to the final choice.

The regulations governing the activities of the European Public Prosecutor should establish a system of appeals that allows the parties affected or legitimated to challenge the choice of jurisdiction. Competence to review such decisions may be given to national courts or to a supranational tribunal, but in any case the provision of the guidelines described above will ensure that such review is more efficient.

5.3.3 Competent authority to examine appeals against the choice of the competent jurisdiction.

It has been stressed above that the decision to conduct criminal proceedings in a specific state carries crucial significance, and that its effects on both the accused and the victims are among the strongest in the entire course of the proceedings. Hence, the possibility to appeal against such decision must be established.

No appeal procedure is envisaged for any states which, despite considering themselves competent, have not been “the chosen one” in the European Public Prosecutor’s decision. The power to prosecute lies with the European Public Prosecutor according to the terms of the Treaty, and it is their prerogative to decide where this function is to be exercised within the common European area of justice.

Only the duty to respect the fundamental rights of any persons affected by the proceedings, whether as the accused or as victims, justifies the possibility to review this decision.

Two paths may be taken in this respect:

- Assign competence to hear the appeal to the same court where the trial is to be held, so that it may evaluate its own jurisdiction on the basis of the pre-established criteria.
- Assign competence to a supranational court. In our opinion this should in principle be the EUCJ.

5.4 Exercise of the prosecution function: The standing of victims and injured parties. Committal for trial and admissibility of evidence.

In this section we will discuss the time of exercising the prosecution function before the competent court, the problems that may emerge in relation to this function and the development of the oral trial.

As the official in charge of exercising the prosecution function in relation to the above-mentioned offences before the competent courts of the member states, the European Public Prosecutor must fulfil this role in accordance with the rules of procedure of the court declared competent to hear the case in hand.

The requirement to act according to the organisation and the rules of procedure of national courts was already present in the Commission Green Paper, which also stated that the differences between the member states are much smaller at this stage of the proceedings than at the preparatory stage.

Still, differences remain in certain aspects, some of which are very relevant. We will now focus on some of these points:

5.4.1 The standing of the victim and the injured parties in the proceedings.

Given that the competences of the European Public Prosecutor are strictly linked to the financial interests of the Union, the primary and almost exclusive victim of this type of criminality will be the Union itself, represented by the European Commission. However, the fact that these competences may be extended and the existence of other concrete victims in addition to the Commission advise examining the general situation of the victims.

The status of victims in criminal proceedings in the different countries of the European Union has not been harmonised. The Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings lays down a number of basic rights, including the right to be heard, to provide evidence and to be informed of any decisions that may affect them.

This instrument does not however require the member states to recognise a victim's right to initiate a civil or criminal action as part of the proceedings. Thus, these rights recognised as minimum standards for protection do not provide any additional elements that will allow us to resolve the question of the standing of victims in proceedings initiated by the European Public Prosecutor.

Moreover, the victims to whom the Framework Decision applies are exclusively, according to the definition given in article 1, natural persons who have suffered physical or financial harm. Thus, injuries to legal entities are not covered, whether they are public or private.

In most cases, however, as we mentioned above, the main injured party will be the European Union, represented by the Commission.

The question to be answered first is whether giving the power to initiate criminal action to the European Public Prosecutor precludes the need for any further action on the part of the European Union as an injured party in the proceedings.

Two possibilities are open in this debate:

- The first option, granting the power to initiate criminal action to one authority only - in this case the European Public Prosecutor - seems to have wider support. This does not mean that the Prosecutor is subordinate to or represents the Commission, although we must be aware that recognising the right of the Commission to bring action as an injured party implies adding a new element of inequality, while the reverse does not carry any significant advantage.

- The second option, allowing action to be brought by affected parties, increases inequality as it would imply recognising the Commission's role as representing the "victim". In any case, it would have the same rights it enjoys under the national law of the jurisdiction where the proceedings are being conducted. It ensues that it would only have this right in the small group of countries that recognise the victim's right to join the proceedings as a private prosecutor or at least as a civil party (in some countries the assignment of a role in the prosecution clashes with their very conception of criminal proceedings).

Since the greatest possible degree of uniformity is sought in the role of the European Public Prosecutor, and given that the *raison d'être* of the institution is the protection of the EU's financial interests, the option of not recognising the Commission's right to bring criminal or civil action alongside the Public Prosecutor has greater weight. The Commission's case would be put by the European Public Prosecutor.

As regards other victims, they would have the same rights they are entitled to under the law of the country where the prosecution is being pursued, at the most. This would imply the need to give strong consideration to the rights of victims not living in the state where the trial is held, as recognised in articles 11 and 12 of the above-mentioned Framework Decision of 2001.

5.4.2 Review or competence with respect to the committal for trial order

A European Public Prosecutor's decision to conclude the investigation stage, deeming that there is sufficient evidence to prove a suspect's

responsibility and that it is therefore appropriate to take that person to trial, must be subject to judicial review, as is established in most states, albeit with differences of a formal and procedural nature.

Irrespective of any considerations on the choice of the court competent to exercise the review, this is an a priori control mechanism that is necessary in any prosecution in application of the rules of due process. The Green Paper favoured the option that the review should be conducted in accordance with national procedures by the competent court of the state where the prosecution is being pursued.

A further possibility mentioned here for the purposes of this discussion would consist in giving some degree of competence to a supranational court. However, this does not seem a question that, if such a court is finally given review powers over the activities of the European Public Prosecutor, should be included in this list.

5.4.3 Admissibility of evidence.

One of the great challenges the European Public Prosecutor will have to face will be presenting the evidence collected in the investigation stage before the trial court.

This evidence will have been collected in more than one country, following different rules and subject to various systems, each with its own level of procedural guarantees. Any initiative to homogenise the rules on evidence is in our view destined to fail. The aim, therefore, is to establish minimum standards that allow mutual trust to grow.

The problem posed by the use of transnational evidence has been solved in most cases on the principle of adherence to the law of the state where the evidence was obtained. However, this has not always been the case and the application of standards effective in the country conducting the proceedings to evidence obtained through application of different formalities may lead to an invalidation of the evidence.

The matter is of such significance that the Treaty of Lisbon states the following in article 82:

To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

a) mutual admissibility of evidence between Member States;

The issue of admissibility of evidence is also mentioned in article 86 as one of the areas to be provided for in the regulations establishing the European Public Prosecutor's Office: 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 […]"

One of the solutions would necessarily imply subjecting all evidence to the principle of mutual recognition, as the scope of the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, is too reduced to offer a solution. Moreover, its capacity to solve admissibility problems is very limited where the evidence has been collected in proceedings initiated in a given state but are later incorporated into the proceedings conducted by the European Public Prosecutor.

In any event, the admissibility and validity of such evidence is to be established by the court hearing the case, which will be competent to decide on the evidence, its admissibility, necessity, relevance and validity in accordance with its own rules of procedure.

A further option clearly set forth in the Treaty would consist in establishing a set of general rules on the admissibility of evidence. These rules need not be very detailed or specific. A simple set of general principles that the court hearing the case could use to "filter" the evidence presented would be sufficient. Such rules would always be applied in combination with an evaluation according to the law of the country where the evidence was obtained.