The Future European Public Prosecutor's Office

Directors
Jorge A. Espina Ramos
Isabel Vicente Carbajosa

Fiscalía General del Estado
GOBIERNO DE ESPAÑA
MINISTERIO DE JUSTICIA
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The views expressed by the participant´s reflect their view points and do not necessarity represent those of the institutions they belong to.

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International seminar

«THE FUTURE EUROPEAN PUBLIC PROSECUTOR'S OFFICE»

«Toda reforma fue en un tiempo simple opinión particular.
Every reform was once a simple private opinion.»

R. W. Emerson

The Italian writer Pitigrilli gave a definition of a prologue according to which it is something written after a book, placed at its beginning and not read either before or after. The authors of this work hope, obviously, that at least the third premise will not apply in this case.

It is clear for any researcher on the matter that the concept of a European Public Prosecutor's Office is nothing new. In 1997 already, with the Corpus Iuris, this possibility has been mooted in academic and practical circulars. A figure such as a European Public Prosecutor has been seen as one of the possible ways of developing a system which would better protect the public treasury of the Community and, as applicable, other legal assets which are particularly susceptible to attacks from cross border organised crime. In 2001 the European Commission presented its Green Paper on the penal protection of community financial interests and the creation of a European Public Prosecutor, and the Constitutional Treaty for Europe also referred to this figure. We do not claim, therefore, to have carried out any pioneering work with our seminar, which has now been published.

Nevertheless it should be stated that a very specific historically significant fact made this moment crucial for the holding of the meeting in Madrid on 24 and 25 January 2008, organised by the General Prosecutor's Office (FGE) and the Centre of Legal Studies of the Ministry of Justice (CEJ), with the support of the Supervisory Committee of the European Anti Fraud Office (OLAF): the signing at the end of 2007 of the Treaty of Lisbon by all Member States of the European Union, a text aiming to give the Union the institutional framework necessary for its development and adaptation to the needs deriving from expansion.

This Treaty expressly returns to the idea of creating a European Public Prosecutor's office to fight crime damaging the financial interests of the Union and, as applicable, to combat serious cross-border crime. The specific characteristics of the text presage we could encounter closer to it coming to fruition. Specifically, the possibility of creating this Public Prosecutor with the agreement of at least nine Member States through enhanced cooperation makes this

the ideal time to launch a debate which could culminate in the effective establishment of this institution.

The General Prosecutor of Spain, Cándido Conde-Pumpido was well aware of this historic moment, and using the unbeatable opportunity of the meeting of the OLAF Supervisory Committee at the headquarters of the General Prosecutor's Office, took the decision to hold this debate at an international meeting. The immediate support of the Supervisory Committee and the CEJ, along with the enthusiastic cooperation of the other institutions affected, was key to the success of this event, which counted with top experts and representatives in the field from the European Parliament, the European Commission - and particularly OLAF - the OLAF Supervisory Committee, Eurojust, General Prosecutors from various Member States, Justice Ministries and other official and academic authorities.

We would like to indicate that at the time of this seminar the brake on the Lisbon Treaty resulting from the Irish referendum had not yet occurred, but the existence of difficulties on the route to ratification was something that none of us had rejected, bearing in mind precedents for the European construction process. Participants in this process understand, nevertheless, that beginning the process of reflection and debate did not mean prejudging any political decision whatsoever in relation to the Treaty, and even now, when writing these introductory lines in the autumn of 2008 we do not know what setbacks the Lisbon treaty will suffer. What we do know is that the impulse for the creation of a European Public Prosecutor's office was not limited in the past to this tool, and neither will it be in the future.

We hope the Madrid seminar will be viewed in the future as the forum in which, with immediacy and in depth, after the signing of the Lisbon Treaty, put on the table some of the main points that European institutions needed to debate to begin the work of designing a penal system suited to the new circumstances under which cross border crime in Europe takes place.

So that the effort made in bringing together participants of such high standing, and the excellent results achieved can be appreciated by those who did not have the privilege of attending the seminary, it was necessary to properly collect and distribute the ideas and debates that arose during the seminar. This of course includes the publication you are holding now.

As co-directors of the seminar, we would like to take this opportunity to pay particular thanks to the support received from the Sections of International Cooperation and Training of the Technical Secretariat of the FGE, the FGE Support Unit; the Secretariat of the OLAF Supervisory Committee and the CEJ. Without their constant and professional work it would have been impossible to carry out this task.

We would also like to warn you that, given the format of the seminar, some parts of this book contain transcriptions of what was said during sessions, so

its final style will differ, in these cases, from the norm in written texts, although it will give an idea of the freshness and intensity of the seminar. Also, references to Treaty articles might not correspond to the final articles in the legal texts in question, since the limited time from the signing of the treaty to the holding of the seminar did not allow participants access to the consolidated version of the various treaties. Hence, for example, the references made to article 69 e) of the Treaty should be understood to mean references to article 86 of the Treaty on the Functioning of the European Union, in its consolidated version.

In any event, it must be you, the reader, who decides whether we are truly facing a historic opportunity to develop an innovative tool, and whether the time is right to overcome any inevitable reticence that goes with any change process. Not all those who participated in this seminar were in favour of the creation of a European Public Prosecutor, and we should celebrate this, as it reflects the diversity of the Union itself - properly reflected in its motto - and because as negative are the opinions that take the form of ultra Euro scepticism, as those of unthinking Europhiles who uncritically accept anything that bears the intangible label of «European».

Thus, we hope that this intellectual exercise – analysing pros and cons, advantages and disadvantages – will serve to bring our positions closer together and take rational and reasonable decisions to help the joint tasks we have been entrusted with, as indicated by the Spanish General Prosecutor in a speech to Eurojust in June 2007, to be able to offer citizens not only more Europe, but also a better Europe.

Madrid/Brussels, 23 october 2008

Jorge Espina
Isabel Vicente-Carbajosa

Programme and participants list

INTERNATIONAL SEMINAR «THE EUROPEAN PROSECUTOR'S OFFICE»

Organised by the Spanish General Prosecutor's Office and the Center for Legal Studies (CEJ) of the Spanish Ministry of Justice, in cooperation with the OLAF Supervisory Committee.

DIRECTORS:

JORGE ESPINA RAMOS

Prosecutor at the International Cooperation Section of the Technical Secretariat of the General Prosecutor's Office

ISABEL VICENTE CARBAJOSA

Prosecutor. Member of the Secretariat of the OLAF Supervisory Committee

Venue: General Prosecutor's Office. Fortuny Street, 4. 28010- Madrid

Dates: 24th-25th January 2008.

PROGRAMME

Thursday 24:

09:15 Registration

09:30 Opening Session:

- Luis López Sanz-Aranguez. Supreme Court Prosecutor. Chairman of the OLAF Supervisory Committee.
- Herbert Bösch. Chairman of the Committee on Budgetary Control of the European Parliament.
- Ángel Arozamena, Director General for Relations with the Administration of Justice. Spanish Ministry of Justice.
- Cándido Conde-Pumpido. General Prosecutor of Spain.

10:30 Introductory remarks: "The Treaty of Lisbon and the area of Justice and Interior".

- Luis Aguilera, Counsel of Justice in the Spanish Permanent Representation before the European Institutions.

11:00 Coffee break

11:30 Round Table I:

Chairman: Isabel Vicente Carbajosa, Prosecutor. Member of the Secretariat of the OLAF Supervisory Committee:

- Franz-Hermann Brüner, Director General of the European Antifraud Office, OLAF.
- Thierry Cretin, Head of Unit Direct Expenditure and External aid, OLAF.
- Rosalind Wright, Member of the OLAF Supervisory Committee.

12:30 Closing of the morning session

- Siim Kallas, Vice President of the European Commission. Commissioner for Administrative Affairs, Audit and Fight against Fraud.

13:00 Photo session and Press Conference

13:30 Lunch

15:00 Round Table II:

Chairman: Jorge Espina, Prosecutor at the International Cooperation Section of the Technical Secretariat of the General Prosecutor's Office:

- José Luis Lopes da Mota, President of the College of Eurojust. National Member for Portugal.
- François Falletti, Eurojust National Member for France. President of the International Association of Prosecutors.
- Juan Antonio García Jabaloy, Eurojust National Member for Spain.

16:00 Round Table III:

Chairman: Isabel Guajardo, Prosecutor at the International Cooperation Section of the Technical Secretariat of the General Prosecutor's Office:

- Barbara Brezigar, General Prosecutor of Slovenia.
- Fernando José Pinto Monteiro, General Prosecutor of Portugal.
- Regis De Gouttes. Premier Avocat Général à la Cour de Cassation. France.
- Rosana Morán Martínez, Prosecutor at the International Cooperation Section of the Technical Secretariat of the General Prosecutor's Office.

17:00 End of sessions

Friday 25

09:15 Round Table IV:

Chairman: Diemut Theato, Member of the OLAF Supervisory Committee.

- Enrique Bacigalupo Zapater, Magistrate of the Supreme Court of Spain.
- Professor John Vervaele, Professor at the University of Utrecht.
- Fernando Irurzun Montoro, State Advocate, Head of the State legal Service at the «Audiencia Nacional».

10:30 DEBATE, based on the previous information provided by panellists, open to all participants.

Chairman: Isabel Vicente-Carbajosa, Prosecutor. Member of the Secretariat of the OLAF Supervisory Committee.

11:30 Coffee break

12:00 Continuation of Debate.

13:30 Closing of the Seminar

- Cándido Conde-Pumpido. General Prosecutor of Spain.
- Luis López Sanz-Aranguez. Supreme Court Prosecutor. Chairman of the OLAF Supervisory Committee.
- Alfredo Ramos. Director of the Centre for Legal Studies, Ministry of Justice.

14:00 Lunch

PARTICIPANTS

- **Spanish prosecutors:**

- Mª Carmen Adán del Río (Bilbao)
- Mª José García Gómez (Ciudad Real)
- Esther González Martínez (Córdoba)
- Jose Luis Galindo Ayuda (Huesca)
- Aranzazu San José González (La Coruña)
- Francisco Javier Gutiérrez Hernández (León)
- Carmen Baena Olabe (Madrid)
- Carlos Díaz Roldan (Madrid)
- Ana Noe Sebastián (Madrid)
- Maria Antonia Sanz Gaite (Madrid)
- Myriam Gloria Segura Rodrigo (Anticorruption)
- Eduardo Fungairiño Bringas (Supreme Court)

- Francisco Jiménez-Villarejo Fernández (Málaga)
- Juan Carlos López Caballero (Málaga)
- Nicolás José Pérez-Serrano de Ramón (Mallorca)
- Mª Pilar Jiménez Bados (Santander)
- José Manuel Rueda Negri (Sevilla)
- Mª Teresa Lorente Valero (Valencia)
- Mª Teresa Vicente Calvo (Valladolid)

• **European prosecutors**
(selected through the European Judicial Training Network –EJTN-):

- Aurelia Devos (France)
- Carla Deveille-Fontinha (France)

• **OLAF supervisory committee**

- Rosalind Wright
- Kalman Gyorgyi
- Luis López Sanz
- Diemut Theato

• **OLAF supervisory committee secretariat**

- Eberhard Brandt
- Jean-Pierre Petillon
- Niina Lehtinen

• **Other participants:**

- Elisabeth Werner. Member of Cabinet of VP Kallas.
- Lotte Tittor. Secretariat of the Committee on Budgetary Control of the European Parliament.
- Detlev Mehlis, General Prosecutor's Office, Berlin.
- Amelia Cordeiro. Head of Cabinet of General Prosecutor. Portugal.
- Isabel Rodríguez Toquero. European Commission Representation in Spain.
- Tricia Howse, Fraud Review, Attorney General's Office, UK
- Cristina Fancello, Legislation and Legal affairs, OLAF.
- Antonio Salinas, Chief Prosecutor of the Anticorruption Prosecutor's Office (Spain).
- Dominic Barry, UK Liaison Magistrate.
- Samuel Vuelta, France Liaison Magistrate.
- Galileo D'Agostino, Italy Liaison Magistrate.
- Ana Gallego, Deputy Director for International Legal Cooperation, Ministry of Justice.

ARTICLE 86 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, CONSOLIDATED VERSION (ARTICLE 69.E) OF THE LISBON TREATY)

ARTICLE 69 E

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 authorisation 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.

Opening session

CÁNDIDO CONDE-PUMPIDO
General Prosecutor of Spain

Today the Spanish General Prosecutor is honoured to take part in this exciting project. The idea of a European Public Prosecutor's Office saw the light of day again a few weeks ago in Lisbon, as a project which, finally, is within the realms of possibility.

Former proposals, ideas drawn up piecemeal throughout the course of our uneven European project, have gained new meaning. The European Public Prosecutor's Office, a body with the authority and capacity to deal with crime throughout the entire territory of the Union, the route to justice within a Europe without borders.

This is no chimera or the theoretical lucubrations of a few illustrious jurists. It is the necessary response, one which cannot be put off, to a phenomenon which has not needed to wait for major political agreements or international treaties. Crime is now moving at the speed of digital communication in a continent – I would go so far as to say a world - in which borders, for these effects, are nothing more than a pale and unused shadow of their former selves as impenetrable and sovereign criminal walls.

While the values and social and economic achievements that bind us in our common endeavour are threatened by large scale crime, which ignores any geographic boundaries in a continent without internal walls (even attacking the interests of the Union itself), the creation of bodies and institutions capable of acting with the same freedom of movement in defence of law and justice cannot be a mere political strategy, but neither can it be an endlessly sought utopia. This is a basic responsibility, pertinent and urgent, for the institutions of a united Europe and the public authorities of its Member States. It is the responsibility of all, here and now, for today and for the future of our children, to preserve the liberties and well being we have won, and which inspired the founders of our present day more than half a century ago.

The Spanish General Prosecutor's Office is, as a result of its history and its key constitutional role in the Rule of Law, subject to the principles of impartiality in the application of the law and unity of action, particularly sensitive to this continental challenge. We know, from our own experience, that the strengthening of the Public Prosecutor's Office is key to achieving greater legal security, in other words to achieve the effective application of the law. And,

above all, we know that this uniform and impartial application of the law enables the principle of equality before the law of all citizens subject to the same legal framework to become a reality.

In Spain we are experiencing, right now, this strengthening process, which means consolidating a Prosecutor's Office having the ability to act flexibly and uniformly throughout the country. A structure formed in line with criteria on the specialisation of work, and resulting in a high level of efficacy in each area. And, finally, an organisation which has been geographically implemented in a pyramid structure facilitating the establishment of networks for information, interchanges of criteria and cooperation. All of the above gives the system a flexible capacity to respond, coordinated and of high technical quality. A powerful tool in the fight against increasingly complex criminal behaviour generated by our developed society.

Based on these experiences and these convictions, we believe in the future and the determinant strength of the Public Prosecutor to bring law closer to reality and vice versa. We therefore believe that the Public Prosecutor's office is the ideal institution for integrating law into society, this always having been one of the most difficult challenges facing the European legal system.

It is for the above reasons that Spanish Public Prosecutors wished to assist in this renewed and exciting idea of a European Public Prosecutor's office. And this is why we have invited you to this event in order to make the formal desire of the Union to move in this direction a reality.

The provision in the Lisbon Treaty of an alternative through enhanced cooperation does not make our goal more distant but rather, and more precisely, represents one of those solutions which are so characteristic of the construction of a united Europe. The future stands before us, and we have the legal tools available to either make the leap in one go, with unanimity, towards this future or, alternatively, we could get there step by step, on a path whose direction will depend on the initiative of the most audacious. As the Spanish poet Antonio Machado said, «haciendo camino al andar» (forging ahead by moving forward).

So, here we are, ready to explore the field, leaving no stone unturned. And to light our way, to move forward with the confident steps of somebody who knows where they are going, what better decision than to gather together all of those who can best shine a light on this first stretch of the route.

As the General Prosecutor of the Kingdom of Spain, I must therefore profoundly and sincerely give thanks, for their presence and participation in this event, firstly, to my counterparts from Slovenia and Portugal.

The General Prosecutor of Slovenia, Barbara Brezigar embodies, from her eminent legal pedigree and human qualities, the dynamism of her country which, currently holding the EU Presidency, is a perfect symbol of a regenerated and revitalised European vocation since the boost of the Lisbon Treaty.

And talking of Lisbon, my good friend and colleague, as General Prosecutor and Supreme Court Magistrate, Fernando José Pinto Monteiro, confirms once again with his presence here, the great closeness between our two countries at this time, but especially the relationship between our two General Prosecutor's Offices. All I can hope to do in these short words is list the areas in which there is day to day cooperation between the Spanish and Portuguese General Prosecutor's Offices. However, I would proudly suggest that our way of getting along and acting together, as we do with another friend and neighbour, France, is a key reference point in the construction of the joint European Public Prosecutor's Office.

To the privilege of this illustrious grouping can be added the honour that one of our own is currently presiding over the Supervisory Committee of the European Anti Fraud Office. I would like to thank him, Luis López Sanz, A Public Prosecutor of the Supreme Court, for the efforts made to bring a meeting of this committee to the General Prosecutor's Office, and welcome its members, whose contributions to this seminar will certainly be particularly valuable, as has been their help with its organisation.

The institutional presence of the European Union itself, through the participation of the Vice President of the Commission, Mr. Siim Kallas, honours us and is a reason for pride. We are also honoured at the presence of the Secretary of the Budgetary Control Committee of the European Parliament, Mr. Herbert Bösch. We have also been motivated by the encouragement and support received from our government, once more represented intelligently by the Secretary of State for Justice, the interest of the Public Prosecutor's Office and the value placed on our intervention in the democratic arena.

And I would of course like to warmly welcome and thank the representatives of Eurojust, also from its highest levels, headed by the President of the College José Luis Lopes da Mota, also a Public Prosecutor and friend. These qualities can also be found in the representative of France, François Falletti, also the president of the International Association of Public Prosecutors. It is a real honour to count among our numbers the global Head of Public Prosecutors.

This participation means the active presence of the body which, as per the Lisbon Treaty, is the leading protagonist in the process of creating a European Public Prosecutor. The idea, literally expressed in said treaty, that the European Public Prosecutor's Office should be developed «from Eurojust» requires an immediate and rigorous reflection as to the potential development and direction of this body, which has been growing within the scope of legal cooperation. As there is already work underway with this aim, I am sure that the exchange of ideas and dialogue carried out during this event will help to enrich the proposals aimed at making this goal a reality in the short term.

In short, I hope this meeting will be fruitful and satisfactory for all participants: European and Spanish Public Prosecutors, liaison magistrates and representatives of the General Council of the Judiciary and other invited bodies and institutions. We will put ourselves and our best efforts to work achieving this objective. The fact that you can work comfortably and effectively is the result of an enormous amount of effort, for which I would also like to expressly thank the technical bodies of this General Prosecutor's Office, and the Centre for Legal Studies, whose cooperation has been vital to making this event a reality.

So, welcome all, have a great stay, and here's to success. Many thanks.

LUIS LÓPEZ SANZ-ARÁNGUEZ
Supreme Court Prosecutor. Chairman of the OLAF Supervisory Committee.

His honour the State Prosecutor, the Director General for Justice, the Chairman of the Budgetary Control Committee of the European Parliament, ladies, gentlemen, colleagues;

Although as a Public Prosecutor at the Supreme Court I am at home, and this is the same room in which the Supreme Court Prosecutors usually hold its meetings, today I am speaking as the current chairman of the OLAF Supervisory Committee and would like to welcome you all and thank you for attending this international seminar on the future of public prosecution in Europe.

When, back in June last year, the General Prosecutor attended a meeting of the Supervisory Committee, in Brussels, a start was made to establish the bases and foundations of the seminar we are inaugurating today.

At this meeting the General Prosecutor expressly invited the Committee to hold some of its regular meetings in Madrid. Yesterday, this cordial invitation was honoured and the Supervisory Committee had the chance to hold its ordinary meeting for January in the same room we are occupying today.

As I said, it was in June, in Brussels, that the idea of holding this seminar was first mooted. There we had the chance to swap ideas and opinions on matters of mutual interest, while among these, also, arose the possibility of looking in greater depth at the creation of a European Public Prosecutor's Office, taking advantage of the opportunity provided by the approval of the Lisbon Treaty, upon which we agreed to hold this seminar.

Its organisation is framed within the General Prosecutor's Office Training Plan on the basis of courses organised by the Center for Legal Studies of the Ministry os Justice (CEJ), the General Prosecutor´s Office and, also, on this occasion with the cooperation of the OLAF Supervisory Committee.

I would like to pay special thanks to the General Prosecutor and the CEJ for their enthusiasm in organising the seminar and extend this thanks to the two co-directors; Jorge Espina, Prosecutor at the Technical Secretariat, and Isabel Vicente, Prosecutor and member of the Secretariat of the Supervisory Committee. I have been able to observe their work, and that of their staff up close, and this acknowledgement is well deserved.

The idea of establishing a European-wide Public Prosecutor's Office is not new and going back several years we can find reflections, studies and proposals which deal with the substance of this issue in depth. Here it is worth mentioning as a first step the work that culminated in the «Corpus Iuris», in their 1997 and 2000 versions that contain a range of criminal provisions – both substantive and procedural – for the protection of the financial interests of the European Union. Also of note is the so-called «Green Paper on the Creation of

a European General Prosecutor», presented by the Commission in December 2001, and its follow up report published on 19 March 2003; documents and work in which many present at this seminar participated actively. Neither can we forget the formal agreements reached by the European Union itself for the establishment of joint action in areas of freedom, security and justice, such as those resulting from the 1999 Amsterdam Treaty, the conclusions of the Tampere Council held in that same year, the Hague programme adopted by the Council in 2004 and even the hopes of the failed 2005 plan for a European Constitution, as well as specific anti-fraud regulations.

In these introductory, opening words, I would like to say a few words on the role the OLAF currently plays in the fight against fraud and other forms of corruption that affect the community budget and, above all, about the position of the OLAF in the midst of a process leading us to a European Public Prosecutor's Office.

The OLAF Supervisory Committee is ideally placed to point out and suggest, based on evidence and experience, some thoughts about the current status of the office, and also about its future in terms of cooperation with national authorities and other key players in the European Union involved in the fight against fraud and corruption. It should be emphasised that the supervisory board is chosen by the joint agreement and decision of the three institutions (Council, Parliament and Commission), from independent persons, and that it aims its rulings and reports at these three institutions.

From this point of view, and looking at it objectively, the OLAF is currently the most effective tool in the fight against fraud, corruption and any other illegal activity that affects and works to the detriment of the financial interests of the Union, as can be deduced from the rules governing it, on the basis of regulation 1073/99. The OLAF boasts a consolidated structure with broad experience and clear skills, both in terms of its external and internal investigations, particularly in the latter. I believe this experience is too important to waste.

Article 69.E of the Lisbon Treaty, which deals with the creation of a European General Prosecutor's Office to fight against fraud affecting the financial interests of the Union, without prejudice to any subsequent expansions to its powers, expressly refers to Eurojust and Europol, but does not mention the OLAF. The issue I wish to look at here is the position and place held by the OLAF in respect of the future European Public Prosecutor's Office.

We will have time to debate this issue during the seminar, but I find it difficult to imagine a European General Prosecutor's Office fighting violations of the European Union's financial interests without the assistance of the body which has been carrying out this role to date.

On this closing note, I hope this seminar is a success and helps to keep this debate alive and, I hope, is continued with similar initiatives in other Member States, or within the various European institutions themselves.

Thank you very much.

Madrid. General Prosecutor's Office, 25 January 2007.

HERBERT BÖSCH
Chairman of the European Parliament's Committee on Budgetary Control

General Prosecutor
Director General
Chairman of the OLAF Supervisory Committee
Ladies and Gentlemen

I consider Madrid to be an excellent place to start discussions on how to build a European Prosecutor's Office on the basis of the Treaty of Lisbon of December 2007.

I happily recall that *Spain was among those six Member States of the Union which received the idea of a European Public Prosecutor very favourably right from the start.* Already in 2002, the Spanish General Prosecutor's Office contributed a comprehensive written commentary to the Europe-wide public consultation on the basis of the Commission's Green Paper on the European Prosecutor.

It is therefore a pleasure and an honour for me to participate in this seminar and I would like to thank the organisers for their initiative.

As some of you may know, *the European Parliament, in particular its Committee on Budgetary Control, has pioneered the idea of creating a European Prosecutor over the past decade,* together with the European Commission.

Looking back to 1998, when Parliament adopted its first Resolution on «Criminal proceedings relating to the protection of the Union's financial interest», and at the numerous resolutions in which we further developed Parliament's views on the concept of the European Prosecutor, I am convinced that we can learn lessons from history.

I would therefore like to start with *two lessons learned from history,* from a Parliamentarian's Perspective.

Afterwards I will address the *main challenges, which, in my view, lie ahead of us today.*

Before going into detail, let me be very clear about one thing: at this stage, the question must no longer be: do we need a mechanism such as the European Prosecutor? We must remember that we still have no mechanism to make sure that offences against the EU's financial interests are actually brought to court.

Therefore, the question we face today is rather: How shall we realise this concept?

I don't deny that there are plenty of questions ahead of us. Let's therefore start with...

LESSONS LEARNED FROM HISTORY

Lesson 1: It is worthwhile fighting for a long term goal

Politics is known to be a short-lived business. However, *the European Prosecutor is the best example of where perseverance is rewarded.*

Let me recall the legal situation when we spoke about the Corpus Juris proposals in the mid-1990s: The Union was functioning under the Maastricht Treaty of 1993, which for the first time contained some limited provisions on cooperation in the field of justice and home affairs. Before, this criminal justice was regarded as a classical domain relating to Member States' sovereignty.

Supporting the Corpus Juris and the idea of creating a European General Prosecutor's Office, as Parliament did whole-heartedly in 1998, was definitely revolutionary. The Corpus Juris suggested that the European Prosecutor should have Delegated Prosecutors in each Member State, investigating and prosecuting precisely defined offences against the EU's financial interests and this should be controlled by judges of freedoms in each Member State.

In the following years and until today two institutions, Parliament, at the initiative of its committee on Budgetary Control, and the Commission, kept the momentum going.

In several resolutions we further developed the concept of criminal law protection of the Community's financial interests. So when the intergovernmental conference met in 2000 to finalise the Nice Treaty, *Parliament was in a position to request in very specific terms the insertion of a new legal base for the European Prosecutor in the Treaty.* Following Parliament's resolutions, the Commission had even submitted a specific text proposal for the inclusion of such a legal base to the intergovernmental conference. When the heads of state and governments failed to agree on the European Prosecutor in the Nice Treaty, Parliament did not accept that the European Prosecutor was left out. It *supported the Commission's Green Paper of 2001,* and called on the Convention for the Future of Europe to include the European Prosecutor in the forthcoming institutional reform.

With the Convention for the Future of Europe the story of the European Prosecutor became a success story. The Members of the Convention wrote a legal base for the European Prosecutor in the draft constitution, which was signed by the heads of state and governments in Rome in October 2004.

Certainly, they did not place the Prosecutor in the context of the Communities' competence for the protection of the financial interests in Article 280 EC Treaty, as we had suggested. They introduced the *concept that the European Prosecutor should be established «from Eurojust».*

But the main elements were there, and these elements remained in the Treaty of Lisbon which we have in front of us: the text provides for the possibility of creating a European Prosecutor, whose mandate should be to investigate, prosecute and bring to judgement offences against the Communities' financial interests, and who shall exercise the functions of prosecutor in the courts of Member States in relation to such offences.

If Parliament can claim today that it has a big share in this success story, it is due to one specific member, the chairwoman of the Budgetary Control Committee up until 2004, who was the driving force behind the resolutions I mentioned before. Diemut Theato is here among us as a Member of the OLAF Supervisory Committee today.

This gives me the opportunity to congratulate you, Diemut, and to thank you for your hard work, your patience and sometimes your stubbornness. You have been rewarded, as we can see from the Lisbon Treaty.

In the current legislature we have continued to fine tune our ideas on how the financial interests can best be protected, and in a resolution of 2005 Parliament, following a report I prepared, called on the Council and the Commission to table concrete proposals concerning OLAFs future role with regard to the European Prosecutor and Eurojust.

This brings me to the second lesson.

Lesson 2: We do not need to start from zero again...

...but we can build on a decade of intense debate, nurtured by Parliament.

I would just like to give one example, the question of links between a European Prosecutor and Eurojust.

For obvious reasons the experts writing the Corpus Juris could not foresee that today, we would have to consider how to establish the European Prosecutor «from Eurojust». When heads of state and governments, at the Nice Intergovernmental Conference, had to choose between a far-reaching notion to set up a European Prosecutor and the less ambitious proposal to set up Eurojust as a coordinating body, they went for the latter. Eurojust came into being in 2002.

Tackling the relation between the two today, we can build on ideas we have already developed. In reaction to the Commission's Green Paper on the Prosecutor, Parliament commented extensively on Eurojust. It stated that setting up Eurojust was not sufficient, particularly since Eurojust had no power to bring cases to court. One of Parliament's more practical ideas was *that the tasks of the European Public Prosecutor might be taken over by a strengthened Eurojust provided that Eurojust transferred to the first pillar and that there*

would be special emphasis on the protection of the financial interests of the Community.

This shows that at an early stage Parliament made itself familiar with the idea that there is a close link between Eurojust and the European Prosecutor. *This is just one example where Parliament did not stick to the Corpus Juris, but closely followed the new developments. Therefore, Parliament now has many weapons in its armory for the forthcoming work.*

On this basis I would like to address the main challenges we are facing today.

I SEE THREE PRINCIPAL QUESTIONS:

1. **How to define the relations between existing EU institutions and a future Prosecutor?**
2. **How to get Member States on board?**
3. **How to set a firm agenda?**

On the first question: How to define relations between existing EU institutions and a future Prosecutor?

I consider we have to be *courageous* in finding a logical solution for the relations between OLAF, Europol, Eurojust and the European Judicial Network. The unsystematic proliferation of EU bodies in this area must cease.

At the same time, we have to be *careful* not to throw out the baby with the bathwater.

Among the bodies which I have just cited, OLAF is the only one which has gained experience as an investigative body specialising in the protection of the financial interests. *Thus OLAF's know-how should be reflected in the new institutional architecture.*

As to the relations between all these bodies, many different ideas have come up during the discussion on the Commission's green paper on the European Prosecutor and later on. There is an urgent need to further elaborate on these ideas. We need to find *a model which would allow for efficient cooperation, while at the same time providing for mechanisms to control the measures of the different bodies and ensure the protection of the rights of the individual.*

We cannot today predict if, in the future, OLAF will become Europe's financial police, nor Europol Europe's general police, and Eurojust, together with the European Judicial Network a new European Prosecutor's Office.

I note however that the Treaty of Lisbon would provide for a change of Article 280 EC Treaty, which is the legal base for the OLAF regulation. Criminal

law measures would no longer be specifically excluded. This may facilitate the legislator's work when it comes to revising the relations between OLAF and Eurojust.

As there are legislative proposals on the table to revise the legal bases of OLAF and Europol, including initiatives from France and 13 other Member States to revise the legal basis of Eurojust and the European Judicial Network, dating of 7 January this year, it is high time to think of a coherent strategy.

On the second question: How to get Member States on board

The draft legal base for establishing a European Prosecutor, as suggested by the Convention and taken up by the Treaty of Lisbon, sets a high bar for establishing such an office. Apart from the consent of the European Parliament, such a decision requires *unanimity in the Council,* which means the consent of each of the 27 Member States.

However, the Treaty of Lisbon provides for a «get out». *If unanimity cannot be achieved, a group of at least 9 Member States may go ahead and create a European Prosecutor through so-called enhanced cooperation.*

It is hard to predict if this possibility will be a chance or a trap. It may be a change to make the European Prosecutor become a reality. But it may be a trap, since the activities of such an office could be limited forever to a small part of the Union's territory.

I read that the President of Eurojust, *José Luis Lopes da Mota,* who is among us today, in a recent press interview, considered it more likely that the European Prosecutor would be set up by a small number of Member States.

I would not be so pessimistic from the outset. At the time of the public consultation on the Commission's Green Paper, six of the then fifteen Member States were in favour of the creation of such an office in principle.

Meanwhile, times have changed considerably.

Already two times, in Rome and in Lisbon, the Member States, with their signatures, subscribed to the possibility of creating such an office.

I also see signs of sympathy for a European Prosecutor in certain «new» Member States. Some of them cooperated actively with OLAF throughout the enlargement process and established new structures for protecting the EU finances in their countries. They may be more open towards the idea of establishing a European Prosecutor than some «old» Member States. It would be interesting to hear from OLAF representatives, in the course of our discussion here in Madrid, if they observe those tendencies in their work with candidate countries.

The upcoming second report on the implementation of the Convention on the Protection of the European Communities' financial interests and its proto-

cols will give us an important insight on how seriously the now 27 Member States take the protection of the Union's financial interests.

In any case, I consider that each of the 27 Member States should be given the opportunity to take a position in a new consultation, based on a solid Commission proposal.

This leads me to the third question: How to set a firm agenda?

Today we do not know if and when the Treaty of Lisbon will enter into force. But we have to be prepared.

Therefore my specific question to Commissioner Kallas today is: *Is the Commission willing and able to present a White Paper before the end of the current legislature,*

firmly laying down how an European Prosecutor under the Treaty of Lisbon would function and what the role of OLAF, Eurojust, the European Judicial Network and Europol would be?

On the basis of such a White Paper we could have a broad public consultation, such as the one we had on the Green Paper, including consultations of representatives of all Member States. This would allow us to start with the legislative work in the new legislature, provided the Treaty of Lisbon comes into force.

In the meantime, however, we must not waste time. And we must have a «plan B» in case the Treaty of Lisbon does not enter into force in 2009.

Therefore I suggest that we start working on the institutional architecture right now. We should deal with the current proposals on modifying Eurojust's and OLAF's legal base in a coherent way, and also include the other bodies as mentioned earlier.

Perhaps, reinforcing Eurojust, which could initiate proceedings especially in cases concerning the protection of the Union's financial interests, and which should cooperate closely with OLAF, is the way forward for the moment. As I said earlier, Parliament had already considered this an option some years ago. Interestingly, the Commission, in its communication of October 2007 on the role of Eurojust also considered this possibility, but as a longer term prospect.

I personally think *we should go for a practical medium term solution, pending the long-term solution which the Treaty of Lisbon suggests.*

Thank you for your attention.

ÁNGEL AROZAMENA
Director General for relations with the Justice Authorities

Good morning, first I would like to pass on my apologies for the absence of the Secretary of State for Justice, Julio Pérez Hernández, and his regrets that he could not be here this morning with you, while thanking you, on behalf of the Ministry of Justice, for the invitation and the words of the General Prosecutor.

I will be avoiding an analysis of the technical questions arising in respect of the design of the intended European Public Prosecutor's Office, as these will be answered in this seminar by some extremely authoritative figures. What I would like is for the intervention by the Ministry to convey a feeling of hope, because in a topic such as the one concerning us today we are at a crossroads, at a time in which the desired and imminent decision to be taken by the European Union requires us to reflect on it, and nothing better aids reflection than looking back to see how much the EU has achieved. This will encourage us to look to the future with a commitment to all push in the same direction.

We need to look back some eight years, as although it was at the Nice conference of 2000 that the European Union proposed to the possibility of establishing a European General Prosecutor to fight against fraud, this initiative was nothing new. Rather, it referred back to a report the previous year, in 1999, when the European Union's commission of wise men complained that the legal framework available to date for the fight against fraud was incoherent and incomplete and proposed as a solution the measure, requiring an amendment to the Treaty, of a single and indivisible European Public Prosecutor working through the anti fraud office (OLAF), and the National Information and Investigation Brigades. This Public Prosecutor was intended to remedy the division of the European penal area, while effectively putting a brake on the phenomenon of fraud against European finances, superseding methods of international legal cooperation which, although existing, were deemed to be insufficient.

Looking back at the efforts made, we can see that some valuable work was carried out, and in December 2000 the European Commission presented the proposal for the creation of a Public Prosecutor's Office in Nice, at the Nice Conference. Efforts continued – the idea was not abandoned by the Commission and in December 2001 the so-called «Green Paper on the penal protection of financial community interests and the creation of a European General Prosecutor». Next, throughout 2002, there was a broad debate in Europe on this topic. As a tool for this debate, the Commission published the Green Paper, based on the original proposal of establishing a future European Public Prosecutor's Office, assigning to the so-called Delegate Prosecutors the carrying out of specific criminal procedures in each State, but under the hierarchical direction of the

European prosecutor, which would have the power of internal organisation of his department, to give instructions to European Public Prosecutors, and to define guidelines in criminal matters within the limits established by community legislators.

The debate was carried out in all areas affected on the eve of the two successive expansions - first to twenty five and then to twenty seven members, and always from a viewpoint of the necessary constitutional review of the treaties. This European constitutional review, that the Green Paper felt was necessary for the introduction of the new post, of the European Public Prosecutor was, as we have stated, first took form in article 274 of the Treaty establishing a Constitution for Europe, which envisaged, in quite a detailed way, the creation of this Public Prosecutor's Office from Eurojust, and basic regulation of its competence, which was to be exercised in cooperation with Europol and which, over time, could be expanded to other crimes than attacks on the financial interests of the Union.

Nevertheless, the failure to ratify the planned European Constitution, and here I would like to quote the words of Minister Fernández *Bermejo, «again frustrated the creation of this supra-national body».* But I would also like to emphasise the fact that in the process of approving a new constitution, this is not vital, and continuing with the words of the Justice Ministry *«there is always a way, and in Europe decisions are always being taken without constitutions».* This was unfortunately evident when, very recently, the Lisbon Treaty of December 2007, replacing the failed constitution, sought to unblock the process of European Union, thus modifying the European Union Treaty and the Constitution of the European Community. Article 69 e) rescued and reproduced the words of the failed article 274, stating that the Council could create a European Public Prosecutor's Office from Eurojust and envisaging that at least nine Member States could also carry out such an act via the enhanced cooperation procedure, a technique consistent, as you will be aware, with an institution initially entering into force only between certain countries, without prejudice to subsequent expansions, a system which has had satisfactory results in the setting up of other aspects such as the European Arrest warrant.

So this is the path we have travelled, so quickly, over these last eight years, leading to the crossroads we now stand at and which I referred to at the beginning of my speech. A situation in which, having reached the legal provisions for the institution in article 69 e) of the Lisbon Treaty, it is pending detailed regulatory developments to enable its articulation and operation. Meanwhile, the debate commenced by the Green Paper is already extremely advanced, and the public consultation held about the European Public Prosecutor's Office has been joined by all interested parties, such as national parliaments and governments, institutions, community bodies or related professions.

The results of this debate were shown in the follow up report and the Green Paper presented by the Commission in Brussels in March 2003, and which showed evidence of a certain significant divergence of opinions between Member States with, as you will be aware, those in favour, those who were more sceptical, and others rejecting it. Rejection of the proposal was based on the argument that an opportunity should be given to judicial and police cooperation bodies already in existence, referring in particular to Eurojust, Europol and the 2000 Convention on judicial assistance in criminal matters between the Member States of the European Union.

This is, in sum, the backdrop against which this important seminar is being held, a backdrop against which the Commission may, to choose between them, ask experts and national political bodies to come up with initiatives and criteria for aspects pending regulation. Thus, and with these words I would like to end my contribution, the investigation and training acquired in this matter being so important, from the Justice Ministry I would like to wish the participants success in this seminar, whose title says it all, that is to say seeding the idea of the need we all have to come up with proposals about the European Public Prosecutor which, overcoming State particularities and differences, will be useful to the construction of the united Europe we have been working towards for so long. Thank you and good day.

Introduction

THE LISBON TREATY AND THE AREA OF FREEDOM, SECURITY AND JUSTICE

LUIS AGUILERA RUIZ

Justice Counsellor with the Permanent Representative of Spain in the European Union

THE LISBON TREATY AS A SOLUTION TO THE FAILED EUROPEAN CONSTITUTION.

Introduction

Less than two months after 13 December 2007, Heads of State and Government of the European Union solemnly signed, at the Monasterio de los Jerónimos in Lisbon, the «EU amending treaty and the European Community Treaty», now known as the «Lisbon Treaty».

Said act represented, like none other in the recent past (Luxembourg and the Hague in 1986, Maastricht 1992, Amsterdam 1997 or Nice 1999) the confrontation of two concepts of European construction: between those who see it as a progressive process of political integration and those who prefer to limit the process to consolidating the most legally developed free exchange area on the planet.

At this time, just over three years had passed since the same protagonists – or their immediate predecessors – signed, on 29 October 2004 in Rome the «Treaty Establishing a Constitution for Europe», or Constitutional Treaty, and only two since its ratification process was derailed after the two consecutive blows by the French referendum (29 May 2005 - 54.87% of votes against) and in the Netherlands (1 June 2005 - 61.6% of votes against), which led to a few months of difficult uncertainty in most European capitals, and relief in others, whose leaders were saved from the task of presenting their European colleagues with an even more categorical rejection than the ones mentioned above.

The bewilderment of European leaders, in particular those whose citizens had voted for the Treaty, was transformed over the months into the conviction that the controversial Constitution for Europe had, if I can continue with my railway metaphor, been shunted down a dead end.

In the European Council of June 2005, a few days after the Dutch upset, the Heads of State and Government issued a declaration seeking to open up a period of reflection on «the future of Europe», in which they implicitly blamed the failure of the French and Dutch referenda largely on citizens being poorly informed of the «added value» of the Constitutional Treaty.

The search then began for a graceful solution to the problem, soon focusing on rescuing the sumptuous framework the Constitutional Constitution had designed for the future of the Union, framing it in a more sober but, as far as possible, equally functional way.

The next steps were taken by the European Council on 15 and 16 June 2006, which entrusted the rotating presidency with the presentation, in the first half of 2007, of a report «drawn up on the basis of extensive consultation in Member States», and giving concrete proposals for a way out of the impasse.

Finally the German presidency (first six months of 2007) submitted a report to the European Council on 21 and 22 June calling for the rapid convening of an intergovernmental conference which, returning to the classic system for amending treaties (and therefore waiving any «constitutional» aspirations), would draw up a draft amending treaty conserving, as far as possible, the advances made in the 2004. Said report listed a series of elements that inevitably had to be sacrificed (the symbols of the Union, treatment of the primacy of Community Law and the status of the Charter of Fundamental Rights, significant terminological changes, the delimitation of competences between the Union and Member States, and the role of national parliaments) that would be necessary for the future success of the plan.

The European Council then convened the Intergovernmental Conference (IGC) called upon to draft the new amending treaty. The working method adopted was notable for the granting of an extremely tight deadline to finish the work (October 2007) and, above all, by a clearly defined mandate.

The rapidity of the work of the IGC, which for the most part met the deadlines laid down, can be explained by a methodology which avoided as far as possible public debates and, fundamentally, by the detail and clarity of the mandate passed down, a work of true German engineering which left little room for negotiation between the various participants.

Finally, the text was adopted by the extraordinary European Council meeting on 18 October in Lisbon, signed as has been stated on 13 December and then published in the Official European Union Gazette (DOUE 2007/C 306/1, 17 December 2007).

Ratification of the new Treaty

Once signed the Treaty was to be ratified by Parliament in those Member States where the holding of a referendum was not a constitutional requirement (as in Ireland, for any treaty involving a transfer of powers).

Initial forecasts were for the process to be concluded on 1 January 2009, the date on which the treaty could enter into force.

At the time of writing these lines, only Hungary had fully, last 17 December, met these requirements, its Parliament having simultaneously approved a constitutional reform whose entry into force was linked to the Treaty, and which was the chance to overcome certain obstacles put in place by the Hungarian constitution in terms of the transposition of judicial cooperation tools.

Barely had 2008 began before certain parties were already calling into question the envisaged schedule, and started to talk about mid 2009 as a more realistic estimate for the entry into force of the new treaty.

In principle no great upsets were envisaged for the ratification process, despite the uncertainty of the Irish referendum (the latest surveys showed 62% of undecided voters, reminiscent of the Treaty of Nice in 2001). The Irish government could be planning to delay the referendum until the end of 2008 to benefit from the positive effect of prior ratification by a majority of Member States.

For its part, the Czech Republic has asked its Constitutional Court to rule on the value of the Charter of Fundamental Rights, which will once and for all determine the schedule and begin the ratification process.

ESTIMATED SCHEDULE OF RATIFICATIONS AND PROCEDURES IN THE 27 MEMBER STATES

AUSTRIA	June 2008	2/3 majority in both chambers
BELGIUM	Process begins spring 2008	Simple majority (7 parliaments)
BULGARIA	until Q1 2008	Simple majority
CYPRUS	after March 2008	Absolute majority
CZECH REPUBLIC	unconfirmed	Simple majority or 3/5
DENMARK	by March 2008	Simply majority with 50% quorum
ESTONIA	by May 2008	Simple majority
FINLAND	begins spring 2008	2/3 majority

FRANCE	by February 2008	3/5 majority
GERMANY	May 2008	Simple majority
GREECE	unconfirmed	Simple majority
HUNGARY	ratified 17/12/2007	(94.47% of votes in favour)
IRELAND	referendum in May	Simple majority
ITALY	unconfirmed	Simple majority
LATVIA	commences in January 2008	Simple majority
LITHUANIA	before October 2008	Simple majority
LUXEMBOURG	by June 2008	Simple majority
MALTA	by June 2008	Simple majority
NETHERLANDS	unconfirmed	Simple majority in both chambers
POLAND	possibly February 2008	2/3 majority with a 50% quorum
PORTUGAL	unconfirmed	Simple majority
ROMANIA	unconfirmed	2/3 majority in both chambers
SLOVAKIA	unconfirmed	3/5 majority
SLOVENIA	begins January 2008	2/3 majority
SPAIN	end of 2008	Absolute majority in congress (L.O, Art. 93 CE)
SWEDEN	end of Autumn 2008	Simple majority
UNITED KINGDOM	commences December 2007	simple majority in b oth chambers

Main institutional and horizontal changes

Before actually looking at the reforms which will most directly affect the area of Freedom, Security and Justice, it might be useful to go over some other more general modifications contained in the new treaty, significant institutional changes in some cases, merely terminological in others, but which will affect denominations that have been used for years.

Starting with the latter, the EU Treaty will become the Treaty on the Functioning of the European Union (TFEU) The terms «Community», «European Community» and «European Communities», «EEC» as well as the adjective community, will disappear to be replaced by «Union», «European Union» or «of the Union».

Neither will there be a «common market» but rather an «internal market». Other less eye catching changes, yet ones which reveal the scope of the reform in terms of legislative procedures are the substitution in the Treaty of the terms «joint decision making procedure» or «procedure in article 251» with the expression «ordinary legislative procedure».

The new terminology will codify denominations as yet unsupported in treaties, such as the «European Council» and references to the Court of Justice of the European Union. Also, the «Court of First Instance» will become the «General Court».

As for institutional reforms, the following are of note:

- Unification of treaties, getting rid of the EU Treaty/Treaty of the European Union (with the exception of the EURATOM treaty, which will remain as a sectoral treaty). The European Union will gain its own unique legal personality, and will be assigned the broadest powers to act, recognised in each Member State.
- The removal of the structure of community pillars, understood as the co-existence of contiguous structures, each with its own powers and procedures; there will be a single institutional framework, although certain specific procedures will remain, particular in what is today referred to as the second pillar (foreign policy and joint security).
- The Parliament, the institution considered to be the main beneficiary of the reform, will see a significant expansion of its legislative power, joint decision making becoming the ordinary procedure in almost all areas. Also, the procedure for determining the number of seats, which cannot exceed 750, is modified, with a range by Member State of between 96 and 6. The President of the European Commission will be formally elected, rather than the appointment made by the European Council merely being approved (this in practice being merely a slight strengthening of its position in this election, which de facto will continue to rely on joint decision making with the Council).
- As for the European Council, it is definitively institutionalised, creating a permanent President (in place of the current rotating presidency); the President will be elected by the Council itself for a period of two and a half years, with the possibility of re-election once only. His role will be to prepare and organise Council meetings, guaranteeing the continuity of its work, facilitating consistency and consensus within same and reporting to the parliament at the end of each meeting. He will likewise by the representative and public face of the European Union externally, an area where of particular note is the creation of the Union's own foreign affairs department.

Also, the position of the High Representative for Foreign Affairs and Security Policy is strengthened: despite not being called a Minister for Foreign Affairs as per the Constitutional Treaty, this person will be elected for 5 years

periods, and will add to his current functions that of presiding over the Council on Foreign Relations.

- The composition of the Commission will be affected: once the lengthy transition period has been completed (up to November 2014), there will not necessarily be one Commissioner per Member State, its number being reduced to, at most, 2/3 of Member States. The selection will be rotational, with strict equality between states; this could in principle lead to a composition without the presence of any German, French, British or Spanish Commissioner which, despite the inherently independent nature of the position, is difficult to imagine today. As we will discuss later in greater detail, the Commission will expand its usual functions into the field of police cooperation and judicial and penal matters, practically the only areas excluded from its ordinary jurisdiction being foreign policy and joint security and macroeconomic aspects.

Despite this, it is felt that it is the Commission which will benefit least from this reform, not only due to the reduction in the group of Commissioners (which could of course be seen as a benefit), but due to its loss of effective power, and the greater controls it could be subject to as a result of the aforementioned changes, with the permanent presence of the European Council and the appointment of the High Representative as the ex officio Vice President of same.

- The legal value of the EU Charter of Fundamental Rights: as already provided for in the Constitutional Treaty, the Charter is integrated into the Union's primary law, acquiring legal value, which it lacked to date. However, it is not included textually in the treaty, acquiring its legal value pursuant to an indirect reference in the new article 6 of the Union Treaty:

> The Union recognises the rights, freedoms and principles laid down in the Charter of Fundamental Rights on 7 December 2000, as adopted on 12 December 2007, and which will have the same legal value as treaties.

Another notable advance in this direction is the future signing up of the European Union to the European Convention of Human Rights, as per the new Treaty.

It should be said that in relation to the Charter of Fundamental Rights, advances anticipating this reform have been verified, with the creation of the Agency of Fundamental Rights of the European Union by Regulation (EC) 168/2007 of 15 February, whose main task is to advise institutions and bodies of the Union in this respect, as well as Member States inasmuch as community law applied to them. This body, which was launched on 1 March 2007, will have to await the approval of a framework working programme setting out its priorities for the 2008-2013 period, this approval being envisaged for June of this year.

THE AREA OF FREEDOM, SECURITY AND JUSTICE

As is well known, the Area of Freedom, Security and Justice (hereafter AFSJ) encompasses not only matters currently integrated within the third pillar – judicial, penal and police cooperation - but also those that had been included in the European Community Treaty by the Treaty of Amsterdam – asylum, immigration, borders, visas and civil judicial cooperation.

This is one of the areas which will see the most profound changes with the entry into force of the new treaty, changes that will particularly affect police and penal judicial cooperation.

The modifications we refer to below will not surprise those who are familiar with the AFSJ of the Constitutional Treaty, which were almost entirely reproduced in the new reform treaty. This explains why there weren't too many surprises during the negotiation process, the only significant debates of the ICG focussing on the reworking of the clause known as the «Emergency Brake» and the extension of the United Kingdom and Ireland's opt outs.

Main modifications

• Full communitisation of the AFSJ and the extension of the joint decision making procedure.

The «communitisation» of the AFSJ matters commenced in Amsterdam, via the inclusion of provisions relating to penal and police cooperation in the Treaty on the Functioning of the European Union (TFEU).

Thus we see the disappearance of the «third pillar» which has contained these rules since its creation, in favour of the amended Heading IV of the TFUE, under the heading «Area of Freedom, Security and Justice», which has 24 articles divided into 5 chapters:

– General Provisions
– Polices relating to the control of borders, asylum and immigration
– Judicial cooperation in civil matters
– Judicial cooperation in penal matters
– Police cooperation

Alongside this it saw the extension of the joint decision making procedure (now called the «ordinary legislative procedure») to almost all these matters, new proposals being subject to joint legislation from the European Parliament and the Council, which will vote by qualified majority. It is important to note that this will particularly innovative the areas of asylum, immigration and control of external borders, as well as in terms of penal and police judicial cooperation, currently governed by the requirement of unanimity in the Council and mere consultation of the Parliament.

As relevant exceptions to this rule, unanimity will continue to apply in the Council subject to consulting Parliament in specific aspects of civil judicial cooperation (issues relating to family law with cross border repercussions, although specific aspects of same may, by unanimity, be subject to joint decision making), penal judicial cooperation (creation of the European General Prosecutor or, once created, extension of his powers) or border control, asylum and immigration policies (provisions on travel or residency documents).

However, the application of the joint decision making process to penal judicial cooperation is notable for the so-called «emergency brake» procedure. If a Member State feels that a proposal being negotiated affects fundamental aspects of its criminal system, it may ask for the matter to be submitted for the consideration of the European Council, suspending the procedure for a maximum of four months. During this period:

– the European Council may reach an agreement by which the plan is returned and the procedure continued

– in the absence of an agreement, strengthened cooperation will apply if at least 9 Member States so desire

This system, which was aimed at overcoming the reticence of many Member States when faced with the communitisation of such sensitive matters, is already covered in the Constitutional Treaty, but not in the same way; there, in the event of a disagreement in the European Council, the body can return the initiative to the Commission or group of States that proposed it so they can submit a new plan, this possibility having now disappeared, to the potential detriment of the search for consensus and the Commission's proposal powers.

Another two modifications deriving from this communitisation affect the right of initiative: unlike other community areas, it is not the exclusive responsibility of the Commission, but is shared with Member States (a quarter of same can also submit proposals, a limitation which did not exist until now), and the type of regulatory instruments which become community instruments (regulations, directives and decisions), the framework decisions, conventions and joint positions characteristic of the third pillar disappearing.

- Court of Justice

Another crucial aspect of «communitisation» is the extension to these matters of the ordinary jurisdiction of the Court of Justice, which will have full jurisdiction to examine and interpret the validity of acts adopted in any of the ambits of the AFSJ, through any of the procedures currently regulated by articles 220 et seq of the European Community Treaty (prejudicial questions, appeals for annulment lodged by institutions or Member States, appeals by individuals against decisions that affect them directly, etc.).

This gives rise to the possibility of the Commission submitting complaints against Member States for not transposing regulations on judicial and police cooperation to the Court, an option unavailable to date.

Said extension has a significant exception that will prevent the Court from ruling on the validity or proportionality of operations carried out by the police or other bodies with coercive powers in a member state, or from ruling on the execution of the responsibilities incumbent on Member States with respect to maintaining public order and safeguarding internal security.

In relation to the powers of the Court of Justice in the AFSJ, it should be remembered that a proposal to amend a Statute is currently on the table, aimed at creating an abbreviated or emergency procedure to settle prejudicial matters arising in the AFSJ ambit, with the aim of avoiding dilatory procedures in the originating member state. A political agreement on this matter is envisaged for June 2008.

Also currently on the table is a proposal from the Commission to modify the system of prejudicial matters relating to visas, asylum, immigration, border control, the protection of the rights of third party nation citizens (displaced people and refugees) and civil judicial cooperation, subjecting them to the general regime, so that their interposition is not limited to the supreme jurisdictional bodies of each Member State, as is the case now (an issue which could have particular repercussions if we consider, for example, procedures for expelling foreigners).

- Strengthening the role of national parliaments

With particular intensity, in relation to proposals on penal judicial cooperation, the role of national parliaments has been strengthened by extending the deadline granted to them from the transfer of any new proposals to claim an infringement of the principle of subsidiarity. Should such a claim be made, the Commission will be obliged to reconsider its proposal and, if it maintains its position, to issue a reasoned dictum justifying its compatibility with the principle of subsidiarity. The proposal could finally lapse if the Council or Parliament dissent from the Commission's dictum.

A particular example of this strengthening affects civil judicial cooperation, where any national parliament has a right of veto to initiatives aimed at submitting certain aspects of family law to the joint decision making process.

All of this seeks to combat, in a modest way, the oft referred to "democratic deficit" of the European Union, in fields traditionally at the heart of state sovereignty.

- Enhanced cooperation

Specific procedures are proposed for the application of strengthened cooperation in penal judicial cooperation, both in relation to proposals on

mutual recognition and the harmonisation of substantive law, as well as through the creation of a European Public Prosecutor, which has its own particularities.

In both cases, this possibility is linked to the application of the aforementioned «emergency brake» in the event that the European Council does not reach an agreement within 4 months of the mechanism being launched; in this case there is the possibility of at least 9 states informing the Parliament, the Council and the Commission of their desire to established strengthened cooperation, not requiring in this case the regulatory authorisation of the European Council, which is deemed to have been already granted.

These changes will facilitate the use of a resource not used to date by judicial penal cooperation, but which in practice has been proven to be increasingly necessary given the lack of agreement between Member States as to the direction of same.

- European General Prosecutor

The new Treaty maintains the same provisions relating to the creation of a European Public Prosecutor as the Constitutional Treaty: the Council may create, via regulations adopted unanimously and through Eurojust, a European Public Prosecutor to fight against crimes against the financial interests of the Community. If this is not achieved, strengthened cooperation may apply for at least 9 Member States.

The European Public Prosecutor will be competent, in cooperation with Europol, to investigate crimes against community financial interests, as well as to bring the relevant criminal actions against the jurisdictional bodies of Member States. Secondly, the European Council will be empowered to, also unanimously and subject to consulting the Parliament and the Commission, extend the powers of the Public Prosecutor to the fight against serious crime of a cross-border nature.

- New objectives for penal judicial cooperation

The criminal areas in which progress can be made are expanded both in terms of the harmonisation of substantive criminal law (becoming terrorism, people trafficking and the sexual exploitation of women and children, the illegal trafficking in drugs, the unlawful trafficking of arms, money laundering, corruption, falsification of means of payment, computer crime and organised crime), and procedural criminal law (regulations on the mutual admissibility of evidence, rights during the criminal process and the rights of victims of crime).

These areas can be expanded by the unanimous decision of the Council, subject to approval by the Parliament.

- Committee for operational matters

Mainly aimed, although not solely, at issues relating to police cooperation, the new Treaty envisages the creation of a Standing Committee responsible for

boosting and intensifying operational cooperation in terms of internal security, no referred to as the COSI (Standing Committee on Internal Security).

- Special regime governing the United Kingdom and Denmark in relation to participation in the AFSJ and the Schengen agreement.

The regime of selective opt ins and opt outs already applicable to these three Member States in relation to various aspects of the AFSJ and the Schengen agreement will not only be replaced by the new Treaty, but will be extended, this being, in terms of the United Kingdom and Ireland, one of the few aspects modified in the changeover from the Constitutional Treaty to the Amending treaty, a modification which could overshadow a general appraisal of progress in the AFSJ.

To summarise the position of these Member States, the United Kingdom and Ireland in principle «enjoy» an absolute opt out in respect of any initiative relating to any of the areas of the AFSJ (expanding that laid down in the Constitutional Treaty, where the exclusion did not cover judicial penal cooperation), which they may waive at will be notifying their intention to participate in any new proposal.

Likewise, and in relation to provisions already adopted without their cooperation, they may at any time request inclusion, although in this case it will be subject to the express authorisation of the Council, which might request compliance with certain conditions within a specific deadline.

It should be recalled that in the new Treaty, Britain and Ireland's opt out from the Schengen agreement has been maintained, with an analogous regime of selective participation at will, although in this case the possibility of participating in specific proposals must be authorised by the Council unanimously.

An interesting fact about the Irish and British position in relation to Schengen pertains to the recent ruling by the Court of Justice on 18 December 2007, in cases C-77/05 and C-137/05, which confirms that the right of the United Kingdom and Ireland to participate in specific initiatives is limited to the scope of said agreement, in which their participation was already accepted by the Council.

A similar opt out applies to Denmark in relation to AFSJ provisions (with the exception of the visa system or measures on a standardised visa model). In this case, it is interesting to mention that Denmark is currently reconsidering its special status in this and other ambits of the Union (AFSJ, Euro, etc.), its government having announced the possibility of carrying out consultation leading to full Danish participation in the AFSJ in the EU within a few years.

An important aspect common to these special regimes is the provision by which acts adopted after the entry into force of the new Treaty, which modify measures in force in the AFSJ, will not bind any of the states with an opt out. Nevertheless, if the Council, at the proposal of the Commission, considers that

non participation makes the application of the existing measure unviable for the other Member States or for the Union, they will be invited to participate in the new measure, and if they do not accept, will cause the exclusion of the original measure they did participate in.

This appears to be a vital precaution, to avoid the extension in practice of the opt out system benefiting these three Member States.

Conclusion

From a viewpoint committed to European construction, these modifications can be seen in a positive light.

The abandonment of unanimity for the adoption, in particular, of penal cooperation rules appears absolutely vital, especially after the expansion of the Union from 15 to 27 Member States, a need exemplified perhaps best of all by the recent failure to adopt a Framework Decision intended to, at least, harmonise guarantees in the criminal process.

This optimistic view of the reform could be overshadowed, as has been warned by various analysts, by the risk of division coming from both the option of enhanced cooperation on offer and the opt out of certain Member States from the future development of the AFSJ, or the so-called «variable geometry» applicable to the Schengen agreement (with the participation of Norway, Iceland, Switzerland and Liechtenstein, or the exclusion of the United Kingdom and Ireland).

The risk exists, but even greater is the risk of paralysis or even regression inherent in maintaining the current situation; in this case the new Treaty should be seen as the lesser of two evils, which will make it possible to unblock the development of the AFSJ in an area as important for the common future of Europe as penal judicial cooperation.

Round Table I

ISABEL VICENTE CARBAJOSA

Prosecutor. Member of the Secretariat of the OLAF Supervisory Committee

I would like to present the speakers at this round table as well as say a few words about the body headed by Mr. Brüner, and the OLAF Supervisory Committee on which Mrs. Wright works.

Mr. Brüner, Franz-Hermann Brüner is the Director General of the OLAF, has been a Public Prosecutor for many years, and Director General of the OLAF since 2000. He is currently in his second term of office after being re-elected by the European Commission with the agreement of the Parliament and the Council to return to lead the office for a further five year period. Thus, we are currently in his second term of office.

Mr. Brüner heads an office of 350 people, located in Brussels, and the European anti fraud office has among its staff judges, prosecutors, police, auditors, tax inspectors, information analysts and participants from tax authorities, that is to say, an extremely diverse workforce from the entire European Union.

I would like to emphasise, although the Chair of the Supervisory Committee has already done so this morning, a few ideas for clarification:

Firstly, the fact that the OLAF is the only supra-national body in the European Union which, located within the Commission, has competence to carry out investigations. While OLAF regulations state that this competence is administrative in nature, in many cases it has clearly penal consequences, as it investigates possible acts of fraud, corruption and irregularities that affect community financial interests, that is to say, affecting the community treasury.

Therefore, the line between administrative fraud and penal matters is extremely fuzzy. Administrative violations are investigated, but these could end up being criminal fraud. Corruption is always criminal, and in many other irregularities against the community treasury, its commission is aided by the falsification of documents, embezzlement of public funds, that is to say conduct which often ends up in Member State courts, given that what the OLAF does is carry out a preliminary investigation, a preliminary procedure and when it detects that there are the effective elements of a criminal violation, it passes the case on to the judicial authorities of Member States so they can continue the investigation.

I would like to highlight this specific and exclusive characteristic of the OALF, as the OLAF also renders assistance and cooperation in criminal matters

to Member States. However, not only does OLAF do this but so, undoubtedly, does Eurojust, which was specially created for this. However, OLAF also has powers of assistance to the competent authorities of Member States, and often these competent authorities are judicial authorities. Therefore it has two facets: that of investigation and assistance; and a third facet also being that of the analysis of information, which is also being carried out at the moment, of course within the scope of its powers, by Europol. But I wanted to explain a little about the fact that the OLAF contains these three essential aspects for judicial cooperation and investigation in the ambit of European Union Justice.

And the second characteristic I would like to look at is the independence of the investigations carried out by OLAF. As I have said, the Director General, Mr. Brüner, was appointed by the Commission with the agreement of the Council and the Parliament, and is expressly mandated by OLAF regulations. Community legislators have expressly made it clear that the Director of the office will not request nor accept instructions from any government or any institution, body or organisation when carrying out its duties to initiate and make investigations. Therefore this express reference to impartiality and independence as to what is to be investigated is something that characterises the European anti fraud office. Not only is this reference contained in regulations, but a body was also created to strengthen the independence of the office, this being the Supervisory Committee whose task, which I will explain later when presenting Mrs. Wright, is to regularly oversee OLAF investigations to strengthen its independence, watch how the OLAF is investigating and to effectively check that it is working strictly within the realms of legality.

The second speaker at this round table is Mr. Thierry Cretin, also a Public Prosecutor, who has been Deputy General Prosecutor in Lyon and a National Expert in the General Secretariat of the Council for the Fight against Organised Crime. He has worked with OLAF as a General Prosecutor in the magistrates' unit and is current the head of a unit whose aim is to investigate fraud that may have occurred through the use of funds handed over directly to applicants for aid in carrying out projects in the European Union, and with money given as external aid to third countries, also outside the borders of the EU, in Eastern Europe. He has 20 investigators under him and will be explaining, I believe, the more practical, real side of his experience in supra-national investigation in the European Community.

The third speaker is Ms. Rosalind Wright, also a Public Prosecutor. She has been the Director of the ***Serious Fraud Office,*** equivalent to the Anti-corruption office, for England, Wales and Northern Ireland, for six years. She is a ***Queen's Counsel,*** which is the highest legal position in the British judicial system, is currently a member of the Supervisory committee, but was its Chair during its first two years. As Chair she led the sessions of this committee

which, as Mr. López stated this morning, comprises five experts, five legal experts external to institutions, chosen by them – by the Parliament, the Council and the Commission - and has as its object, its mission, the strengthening of the independence of investigations of the OLAF through the regular control and examination of its investigations, to see how they are carried out. The committee issues opinions which are sent to the Director General to explain its observations, how things can be improved and how the Director General should organise and improve investigation mechanisms within the office. At the same time, as it is inspecting the work of the office, there is a certain similarity with our national General Prosecutor's Office, as naturally it is a control body to ensure investigations are carried out in line with the principles of legality, impartiality and independence, that should govern the investigations of the European anti fraud office, and any investigation carried out by the future European Public Prosecutor, if this position is decided upon.

Without further ado I would like to give way to Mr. Brüner so he can explain his opinions about the OLAF and the future European Public Prosecutor's Office. Thank you.

FRANZ-HERMANN BRÜNER
Director General of the OLAF

Introduction: The pilot area of a future European Public Prosecutor's Office must be the protection of the EU financial interests. The EU has already invested an important effort into a better protection of its financial interests: OLAF, through its investigations, and together with Eurojust, through its role in mutual legal assistance within the EU, have considerably contributed to a situation, which increases the chances of successful criminal law follow-up. But I believe our record could become even better if there was a European Public Prosecutor's Office.

OLAF performance showing an increase in the results of the fight against EC fraud:

Statistical data in the OLAF activity report 2006 already underpin that the bulk of OLAF's follow-up work concerns financial recovery and judicial activities. These account for over 70% of the follow-up activities undertaken. In average since 2004, OLAF cases have led national judicial authorities to issue per year 25 convictions imposing imprisonment and financial fines up to 200 Million Euro. Also the recovered sums lost due to criminal activities to the detriment of the financial interests correspond to approximately 200 Million Euros per year. More specifically, in 2006, a total of 106 actions corresponding to 35 decisions were undertaken in the area of the protection of the EC's financial interests. A significant proportion of these actions resulted in financial penalties (36). The two other most frequent actions were damages (23), suspended sentences (21) and imprisonment (20). The suspects were acquitted in only 4 cases.

Structural shortcomings to the existing means to improve the protection of the financial interests:

The tasks assigned to OLAF and Eurojust are essential for fighting better criminality affecting the financial interests. But they **are fragmented and incomplete to provide a full overview and a European** approach:

- OLAF undertakes administrative investigations and assists judicial authorities.
- Eurojust, for example, was not designed to gather evidence that would be admissible throughout the Community or equipped with the power to direct prosecutions.

Even reinforcing the existing instruments may help only partially, since we would continue to lack an overall European approach to criminal procedural law and to the law of evidence.

Need to overcome existing limits of judicial co-operation:

Despite the on-going efforts in the third pillar to enhance judicial co-operation, national legal systems have proved sometimes ill-equipped to respond to the transnational nature of economic criminal activities owing to the principle of territoriality of the law of criminal procedure and the diversity of rules governing the production of evidence. All too often these factors ensure that investigations/prosecutions are not launched or completed, as the problems involved in obtaining evidence may deter national judicial authorities and cause them to drop cases related to European goods.

The territoriality aspect is also of importance as regards the choice of jurisdiction.

- Linked to the complexity of cases, jurisdictions may aim to decline their responsibility for dealing with fraud cases and thereby cause a negative conflict of jurisdiction that requires solutions. Only clear rules and a clear application for both type of conflicts of jurisdiction applied commonly for all perpetrators of illegal activities affecting the EU financial interests seem to ensure fairness all over Europe.
- By virtue of the transnational **ne bis in idem** rules within the EU, there may be a risk of forum shopping by the presumed accused, who will try to settle in that Member State, where this is possible and the fine is lowest, thereby excluding other jurisdictions from sentencing him.

A European Public Prosecutor's Office would allow overcoming these limits due to the possibility to **concentrate proceedings i**n one Member State and thus excluding conflicts of jurisdiction.

Dealing with overloaded criminal justice systems:

It is known that national criminal justice systems, including the advancing role of prosecutors, are overloaded with cases. OLAF has to deal with such overloaded systems in its daily work and is often confronted with the frustration of its investigative efforts, despite the good will of co-operation at its national partners, due to simple overload of work-load. There is a number of cases for which national prosecutors decided not to proceed with charges transmitted by OLAF. OLAF's 2006 Annual Activity report states that out of 28 such cases, at least 4 are not taken up for low priority given to these cases by the national authorities, 9 for the lack of evidence or mainly the difficulty to

further obtain evidence in a mutual judicial assistance context and finally 11 for having passed the limitation periods. For the remaining 4 cases, national authorities have no justification on why the cases were not followed up on a national level.

A European Public Prosecutor's Office would have a complete overview on cases related to the financial interests and could thus allocate resources more efficiently than Member States' national judicial authorities separately based on their partial view of events.

Conclusion:

The existing division of labour between OLAF preliminary investigations and following national criminal procedures have led to an improved situation. The help of national judicial authorities and European authorities, such as Eurojust, is essential to a further improvement on an operational basis. Yet, despite the successful work of OLAF data at our hands support the thesis that the strict conceptual separation of preliminary administrative investigations at European level and national follow-up in criminal investigations risk to reduce the efficiency of fraud prosecutions.

Expectations:

On the basis of the daily experience of OLAF, a European Public Prosecutor's Office must be a complement to existing institutions at the EU level concerning justice and police co-operation, with the following value-added: A European Public Prosecutor's Office must have a complete overview and, connected with that, be able to actually perform, that is to direct, investigations and prosecutions. It must work transnationally and be horizontally interlinked with the national criminal systems.

ANNEX

Case example 1: Corruption in procurement

FACTS:

The Commission is implementing part of the budget to provide itself or third partners with goods or services.

A local staff member dealing with procurement of specific goods cedes to the temptation to be corrupted in order to render an award «favourable» to a certain company. The person is not of the nationality of the place of work and does not have its centre of living in the concerned country. Due to the corrupted procurement, the EU does not obtain best value for money for a given contract and suffers reputational harm.

Value added by OLAF and Eurojust:

Following up on a denunciation by a company having lost the award, OLAF opens an investigation and collects information. The file should be handed over to national judicial authorities, yet, it remains to be chosen whether to those of the country of action, of the country of the «damaged» companies, of the country of the living of the staff member or of the country of the centre of living. OLAF contacts Eurojust to select the best suited national judicial authority willing to deal with a case.

Possible value added by a European Public Prosecutor's Office:

Apart from being capable to collect the information itself, the European Public Prosecutor's Office is foreseen to bring to judgment the perpetrators of a crime against the EU financial interests. Thus, there is no need to «convince» an overburdened national prosecution service to deal with a specific case, but the possibility to introduce objective and fair criteria for selecting the appropriate jurisdiction.

Case example 2: Imports in the framework of preferential trade arrangements

FACTS:

An agricultural good originating in some African countries may be imported into the Community free of import duty within the framework of a

quota system. Imports under this arrangement are subject to the presentation of an import license and a proof of origin.

A company in one Member State imports these goods, originating in a South American country and processes them in a second Member State, before being imported to a third Member States declared as originating from Africa. This resulted in the evasion of import duties could not be considered as originating in countries to which the favourable import regime applies. Therefore, import duties should have been paid. False movement certificates are presented at import to disguise the real origin of the goods.

Value added by OLAF and Eurojust:

Given the actual transfer of goods between various jurisdictions and the devising of false certificates, national customs services inform OLAF on suspicious commercial transactions. OLAF, based on its powers for external cases and assistance to national authorities, renders the information available to other custom services, thereby allowing them to monitor in a co-ordinated way the flow of goods. Once the evidence is collected in different jurisdictions, it is used in these jurisdictions for making them available to the national authority prosecuting the persons responsible in the concerned company at its seat via mutual assistance co-ordinated by Eurojust.

Possible value added by a European Public Prosecutor's Office:

The goods are not only imported on the basis of false declarations and artificial circumstances, but even processed in another Member State. Thus more than one company is involved. A European Public Prosecutor's Office would easier handle the evidence collected in different EU Member States and use it before the court competent to deal with the persons responsible in the concerned company without the need to further mutual assistance. He could use the same evidence in the other Member State to launch public action against those having possibly contributed to processing the goods, without there being a need for new assistance cases.

THIERRY CRETIN
Head of Unit, OLAF

THE FUTURE EUROPEAN PROSECUTOR

As soon as it is ratified by the Member States, the Treaty of Lisbon will open up the possibility of a European Public Prosecutor's Office. To be more accurate… it will once again open up this possibility, given that it was already included in the Constitutional treaty that the French and Dutch referenda voted down. This is just as well, as it is a necessity when fighting against more serious forms of crime.

We have known since the days of the French chemist Lavoisier that «nothing is lost, nothing is created, everything is transformed». The same goes for the European Public Prosecutor: come the time of his establishment, nothing is going to fall into his lap as ready, complete, finished and abstract as a gift created for the *homo europeus.*

Due to the European legislator's preferences, this Public Prosecutor will come out of Eurojust, but it seems essential to me to say that the European Public Prosecutor's Office will be much more rounded if the experience accumulated by other organisations that devote their time to community and international research is taken into account. The Anti Fraud Office for instance.

There are three reasons that support this view.

- The framework of the material jurisdiction of Eurojust encompasses crimes of fraud, corruption and other offences which are detrimental to the financial interest of the European Union.
- I have also noticed that the duties of Eurojust include various roles such as the investigation, prosecution and trial of the accused, ensuring the coordination of the operational activities of the national authorities, setting up joint teams of investigators whenever possible, sharing information, assisting, etc.
- The third reason relates to things I have always believed: that regardless of the country, the place and the legal system, one cannot make accusations or judgements without first of all establishing the facts through an inquiry.

I would now like to emphasise the following:

- Firstly, for the past 9 years, the OLAF's area of competence has included the protection of the European Union's financial interest, including the fight against fraud and corruption.
- Secondly, since its creation, the OLAF has contacted the national authorities, whether administrative or judicial, every day to swap information,

coordinate investigations and sometimes to set up joint national, administrative and communitarian investigation teams, some of them with the judiciary, len.

- Thirdly, the OLAF is an organisation which has always been devoted to investigation, which emphasizes its familiarity with the subject.

What am I telling you here?

That there is an opportunity to be exploited by drawing on the best of the experience accumulated through the years.

What I am also saying is that «nothing is created from nothing» and that the OLAF's experience is a resource which must be used as its experience grows with every year that passes.

Administrative investigation and judicial consequences

Our speciality within the OLAF is administrative investigation, but I would like to go a little further and focus on the legal consequences of the OLAF's investigation. Although the scheme of the trial itself has not been regulated as such, neither has Regulation 1073/1999 kept quiet regarding the probative value of the reports the OLAF submits to the national or European authorities.

There are some important aspects to bear in mind.

- In article 9.2, it is said that the reports drawn up by the OLAF will constitute evidence that is admissible in the administrative or judicial proceedings of Member States according to the same terms and conditions as the administrative reports written by the inspectors or national Administrations.
- In addition, article 10 specifies that the OLAF is entitled at any time to share the information obtained during external investigations to the competent authorities of the Member States (§ 1) and that in the case of internal investigations, any information likely to give rise to criminal diligence must be shared with the judicial authorities of the relevant Member State (§ 2).

My conclusion is that even though European legislators did not quite define the exact procedure Office investigators should follow, neither did they omit to state which level should be granted to actions by OLAF with regard to probatory value and to which extent national and European authorities should take their conclusions into account. This is the proof that they want the Office's work to be taken into consideration.

A multiple reality

We have several intervention areas. Although there is only one Anti Fraud Office, their scope of action is specifically diversified: agriculture, customs, direct costs, external assistance, various structural funds and internal investigations.

Customs and agriculture

In those two areas, the Office's work consists mainly of coordinating the investigation activities of the various Member States affected by those imports and organising, if need be, a joint mission with the economic agents of the exporting countries and in full cooperation with the competent authorities.

Structural funds

A few words on structural funds.

In this area fraud, comes in multiple typologies which are as varied as the minds of the fraudsters. In fact, many of these matters are of the criminal kind: fake invoices, cons, abuse of assets, etc.

Direct costs and external assistance

Here we enter an area which is under the sole responsibility of the Commission, rather than shared with the national authorities, given that these funds are managed by the Commission– alone- in order to keep expenditure under control. The Office is a protagonist in terms of the investigations pursuant to irregularities and any fraud affecting these expenditures as it constitutes the Commission natural body of investigation. A priori, there is no reason for a national authority to take the initiative regarding such matters.

There are numerous subject matters relating to direct costs and external assistance, thus leading Office investigators to all the countries in the world to which European monies might be allocated. More often than not, those matters are of the criminal kind.

Internal investigations

To conclude, let's talk about cases opened for offences committed within European institutions, many of which end up on the table of the Brussels or Luxemburg Public Prosecutor.

Those various experiences have taught us that the most difficult thing is without a doubt the coordination of the judicial authorities with the 27 Member States. It is true that the substantive laws vary from one country to another, but this is not the area where the greatest discrepancies are observed. Globalisation, international conventions and development as a whole have largely contributed to a relative levelling of substantive law in recent decades, in Western and central Europe at least. The same cannot be said of procedural laws as these concentrate all of the particularities of a country's legal culture.

But the problems are not limited to procedural laws. It is often the case that our files are of no interest to the legal authorities of the Member States where the events occurred. The reasons for this are several:

- Other priorities which depend on national and local politics,
- Work overload in the area of common right delinquency,
- Failure to understand European fraud files. It is necessary to acknowledge that some types of frauds fall into areas requiring specific technical expertise, little-known amongst legal professionals.

With regard to national administrations, OLAF faces other issues as a result of its contacts with the services of Member States, namely:

- National priorities do not always coincide with the tensions and orientations of the European investigation bodies and can in fact be altogether divergent.
- The administrative culture of a recent history whose evolution towards a more modern public operation is a very slow process.

I have hereby emphasised, though all too succinctly, what I wanted to tell you regarding the incredible experience we have accumulated in this very complex area which blends the administrative and the judicial, a phenomenon which might become the day-to-day reality of the future European Public Prosecutor.

The subject of the trial

The OLAF's primordial function consists in carrying out the investigation and verification of fraudulent or irregular actions on behalf of the communitarian Administration and, where appropriate, sharing information regarding offences that may have been committed with administrative and legal authorities.

The issue of how the evidence is used is not raised, in the same way, depending on whether the evidence collected by the OLAF is used in administrative or judicial proceedings.

Administrative use of the administrative evidence

Whether European or national, the role of the Administration is to fulfil functions of control and surveillance. And the European Commission is the guardian of the Treaties and executor of the budget exercises the same function.

What must be clear is this: in most cases, the conclusions the OLAF draws from its investigations suffice to undertake subsequent administrative action. If the issue is to recover a non eligible expenditure, results obtained by the OLAF's investigators tend to be enough for the Commission paymaster to issue a collection order and, in the case of litigation, the issue is dealt with either in the framework of the specific administrative proceedings or through the application of proceedings prior to exercising an action before the Court of Justice of European Communities.

In fact the administrative evidence, which is of lesser quality than it would be in a judicial context, is sufficient for the exercise of administrative action. Of course there is a tendency towards increasing and reinforcing procedural requirements in the context of administration. This is the key point; as soon as the requirement for evidence increases, the issue becomes more complex. This is what happens when using administrative evidence for judicial purposes.

The judicial use of administrative evidence

The legal tools OLAF has access to do not allow it to go beyond the phase of serious evidence, even in the best case scenario. The mission of the OLAF as an investigatory body does not actually include reaching the highest steps of the judicial process in its priorities as these fall under the exclusive competence of the legal authority. Its main goal is simply to fulfil its administrative role, to verify any facts that might be useful to the administration and find them when needed in order to help it fulfil its missions of control prevention and sanction.

In fact, even though these might arise from the same approach, to state a fact, to research it is essentially a mission quite unlike demonstrating that a fact constitutes a person's proof of guilt.

According to the institutions of the Member States, the OLAF adapts its operations and its relations with the local authorities. Cooperating with justice can take various shapes depending on the legal standards and goodwill of said authorities.

The most typical kind of cooperation we offer Member States consists of providing the local prosecutors with the conclusions drawn from our investigations, in the shape of reports, as soon as our operational activities are completed. A follow-up is usually ensured by the magistrate unit of the OLAF, more specifically by the member of this unit who is familiar with the law of the country in question and usually a national thereof. The downside to this approach is one that cannot be ignored: the OLAF is no longer in control of the investigation which therefore becomes the responsibility of administrative or judicial national authorities. When this is the case, the OLAF's role is to share events of varying degrees of complexity with other authorities, with the added responsibility of occasionally providing expertise in fairly technical aspects of the European regulation.

When faced with this particular situation, we came up with the idea to suggest to our administrative partners and the competent public prosecution office (our legal partner) to work more closely and in a more concerted manner by setting up joint investigation teams bringing together both European and Romanian investigators. This is why we train those joint teams both on an administrative level and on the subject of the anticorruption Prosecution Service. In any case, results have proved conclusive.

What are the main advantages of this collaboration?

- All of the investigators work under the scheme of national procedural law.
- The OLAF's investigators are ascribed to the operations and their names are listed on the deed drawn up for the procedure.
- As a consequence, the issue of abiding by local regulations immediately becomes obsolete given that it is applied by instances with the authority to do so.
- Any evidence collected is immediately available to the national authorities, allowing a considerable amount of time to be saved. The OLAF is no longer required to draft a report to be presented subsequently to the OLAF's whole internal administrative process.
- The OLAF is also in possession of a copy of the procedure and at the same time, so that based on those documents it is able to take all actions deemed useful with regard to collecting the monies to be recovered.
- Those OLAF investigators who find themselves in the background from a legal and apparent standpoint still play a very active role in the management and assistance provided to their Romanian counterparts.

Please find below of the solutions the OLAF has come up with, but bear in mind that it is always necessary to customise solutions.

Independence and neutrality

Before concluding, I would like to say a few (too few) words regarding the experience that has been accumulated in terms of the OLAF's independence.

Year after year, case after case, we have been capitalising on everything to do with the subject of independence, given that we specifically learn never to cross the line that separates cooperation from independence. Cooperation without the loss of responsibility. Making the best out of cooperating with our partners whilst maintaining neutrality. This is going to be something to bring the future European Public Prosecutor.

Conclusion

I started this presentation by mentioning a French chemist. The idea was that the European Public Prosecutor would be created ex concreto and not in abstracto.

I would like to conclude with a Spanish poet, Antonio Machado, by saying that «*you make your path as you walk*».

At the OLAF, we have done a lot of walking these past 9 years and we are still walking. There is a use to be made from the added value of our mistakes and our successes.

«*Looking back, one sees the path that should never be retraced*» the poet says. This is not our case! The path can in fact be retraced but it must be adapted to the new legal framework of a European Prosecution Service. Leave the OLAF's tracks on the ocean of investigation and forgetting about them of failing to use them would be

A waste of time
A waste of citizen's money
A shame,
A mistake perhaps.

ROSALIND WRIGHT
Member of the Supervisory Committee of the OLAF

Fraud against European financial interests is a major problem[1] and one to which the Supervisory Committee of OLAF, the European Anti-Fraud Office, is very much alive. We, the current members of the Supervisory Committee, have been in post for two years and have been in a unique position to evaluate the effectiveness of the legal framework and the investigatory and enforcement machinery in place to tackle the problem of this form of fraud. The remit of OLAF set out in Regulation 1073/99, is to conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community. It has no power to prosecute. But its limitations extend further. In particular, I have been disheartened by the limitations placed on OLAF by the relevant regulations which disempower OLAF from ensuring the effective follow-up of their investigations by national judicial authorities. It is entirely in the hands of national judicial authorities as to whether any individual case is further investigated by local law enforcement, let alone whether the perpetrators are brought to court; neither OLAF nor any of the EU institutions are empowered to require, compel, demand, insist on – still less, coerce those national authorities to take any action, even if OLAF's administrative investigation has made out a *prima facie* case. Certainly the introduction of a European Public Prosecutor, to which OLAF would have a close liaison, would enable OLAF to influence the decision to prosecute the criminal fraud cases it investigates and give it very much more control over the outcome of its investigations.

In addition, although, since the Green Paper of 2001[2], judicial co-operation between member States has been significantly improved, notably by the creation of Eurojust and the enhancement of the functions of the European Judicial Network, members of which I am delighted to see here today, the cross-border and sophisticated nature of this form of crime and the participation in it by professional criminals who, are highly sophisticated and well-

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[1] In evidence to the House of Lords European Union Committee on Financial Management and Fraud in the European Union OLAF, at the end of 2006, Deputy DG Nick Ilett estimated the maximum figure of fraud against the expenditure side of the budget as EUR 2 billion; the Green Paper – referred to below, estimated the losses through fraud in 1999 at EUR 400 million. Nick Ilett's evidence is at: (http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/270/6102401.htm)

[2] Commission of the European Communities, Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, Dec.12, 2001, COM (2001) 715 final, ss. 1.2, 3.

funded, has become even more apparent and the problem has been exacerbated.

The creation of a European Public Prosecutor's Office (EPPOO) is intended to increase the likelihood of effective prosecution and penalties for fraud against the European budget and eliminate the uncertainty and the element of chance that presently exists. The function of the EPPO, in the words of the Treaty of Lisbon, Article 69E is to be –

> «…responsible for investigating, prosecuting and bringing to judgment … the perpetrators of, and accomplices in, offences against the Union's financial interests … It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.»

The enthusiasm across much of Europe's legislators and parliamentarians which greeted the proposals, both back in 1997 when Professors Delmas-Marty's and John Spencer's work on *Corpus Juris* was published and, later, with the refinements in the Green Paper, has not been shared by the common law jurisdictions of the United Kingdom and the Republic of Ireland. The objections which have been put forward with some vehemence, in both our Houses of Parliament can be summarised as follows:

- The EPPO must be supported by its own judicial and legislative framework – the Corpus Juris of Delmas-Marty's and Spencer's thesis. This would involve major changes in laws and procedures. Corpus Juris seeks to intertwine the inquisitorial and adversarial/written and oral traditions in Member States. The result would be more akin to the Continental European than the Anglo-Saxon model. There would need to be significant added value to justify changes of such magnitude.
- The EPPO would be accountable to the European Institutions, but not to national Law Enforcement Officers or to Parliament.
- Practical difficulties could arise from the sharing of information between the EPPO and national authorities; and tension could arise for national prosecutors acting for the EPPO (if that is to be the model), between their domestic role and their role as agents of an EU institution. Moreover, the proposals do not provide a coherent approach to situations where fraud against the EU budget involves non-EU as well as EU jurisdictions[3].

These objections were echoed in submissions by the England and Wales Criminal Bar Association, by JUSTICE and by several other organisations, put forward to the House of Lords, who considered the proposals in 1999[4] and

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[3] http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xix/15207.htm

[4] European Union Committee, 9th Report (1998-99): Prosecuting fraud on the Communities' finances-the Corpus Juris (HL 62)

concluded that no sufficient case had been made out for the creation of a European Public Prosecutor. The House of Commons two years later was «oncerned to see that so much effort appears to have been expended on the details of this impractical proposal, when this might have been better directed towards the prevention of fraud affecting the Community's financial interests.» They also considered that «he proposal raises more problems than it solves and [they] noted with particular concern its effect of putting the prosecution function beyond the reach of democratic accountability, either to national parliaments or elsewhere»

JUSTICE, the British section of the Intentional Commission of Jurists, noted that –

> «[The proposal to create an EPPO] raises serious issues about the possibility of 'forum shopping' so that the Prosecutor could take advantage of different standards in burden of proof, mode of trial, sentencing and admissibility of evidence that apply across the European Union. The notion of prosecuting a case in a national court according to specific rules of procedure and judicial review applicable only to the European Public Prosecutor creates an unjustifiably complex system of European and national criminal laws and procedures. JUSTICE believes that such a model would be unworkable and could present a danger of watering down procedural safeguards, in particular in relation to admissibility of evidence. The establishment of a European Public Prosecutor's Office must involve strict rules governing the selection of jurisdiction and a provision on double jeopardy that would prevent national prosecutors re-prosecuting an offence that had already been dealt with by the European Public Prosecutor...
>
> The need to establish a European Public Prosecutor's Office has not yet been demonstrated. It is difficult to see how, in the model set out, the European Public Prosecutor would add any practical value to the role of Eurojust. JUSTICE believes that if a European Public Prosecutor's Office were to be established to meet a genuine need, it would need to be accompanied by the establishment of a European Court of Criminal Justice and a coherent set of procedural rules with adequate safeguards for the rights of the defence»[5].

Unease was expressed by many who made submissions to the Lords' examination of the feasibility of the EPPO. In particular, the threat to habeas corpus (no detention without charge or sentence), enshrined in English law for centuries, was cited as a major obstacle. The proposal for a «Juge des Libertés» who would have the power to order a suspect to be kept in custody without charge pending the conclusion of possibly protracted investigations was a major stumbling block for many common-law jurists.

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5 http://www.justice.org.uk/images/pdfs/futureofeurope.pdf

The UK Government also noted that «Creating a EPPO on a first pillar legal base «would be a significant departure from the current treaty arrangements which are based on the principle that the application of national criminal law and the national administration of justice are not matters for the European Community, but cooperation between Member States in relation to the criminal law should take place intergovernmentally on the basis of Title VI [of the EU Treaty].» Bearing in mind that the UK Government has now signed the Lisbon Treaty without insisting on an opt-out in relation to Article 69E, as it has done in relation to a number of other parts of this Treaty, are we to conclude that its position has softened in this regard?

Much of the antagonism to the notion of an EPPO expressed by parliamentarians and by jurists in the UK can be explained by the disparities which exist between the common law and the civil law. Corpus Juris is based on the civil law model and therefore unfamiliar to those versed in the common law.

The other major objection is that the proposal to create an EPPO is taking the proverbial sledgehammer to crack a nut. In other words, making enormous and fundamental changes to the legal system of England and Wales (and those of Scotland and Ireland as well) for the purpose of tackling one specific offence: fraud against the Community budget. When international fraud against individual citizens and businesses within all EU members and those outside the EU has reached such prodigious proportions, is it appropriate to make these far-reaching changes and limit their application to this form of crime? What would the British electorate think? There is already considerable scepticism in the national UK press in relation to «overnment from and by Brussels» This would be seized upon by leader-writers as yet another, expensive and major attack on the ability of the UK to conduct its own criminal investigations and prosecutions of its subjects without being controlled by an unaccountable Euro-appointed official who would have the power to prosecute in UK courts. There is a suggestion, in Article 69E(4) that –

> «The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 [the reference to combating crimes affecting the financial interests of the Union] in order to extend the powers of the EPPO to include serious crime having a cross-border dimension and amending accordingly paragraph 2 [the functions of the EPPO] as regard the perpetrators of, and accomplices in, serious crimes affecting more than one member state.»

This possible extension to the powers of the EPPO has very far-reaching implications for national law enforcement agencies and may bring with it far more problems even than those anticipated by the common, law jurisdictions with regard to investigation and prosecution of crimes against the financial interests of the European Union. As the Criminal Bar Association for England

and Wales noted in their submission to the Lords Select Committee, in relation to the original proposals in the Green Paper,

> "These proposals would have a major impact on our national prosecuting agencies, including the CPS [Crown Prosecution Service] and its head, the DPP, the police and Customs and Excise, the judiciary, the courts and the legal profession. It would also have an equally profound effect on suspects and defendants who would be subject to the new regime»[6].

However, it must be acknowledged that fraud against the Community budget must be addressed robustly, and that those who commit major fraud to the prejudice of EU financial interests are prosecuted. If this is not happening at the moment, will the introduction of the EPPO solve all the problems? Judicial and intergovernmental co-operation in the fields of law enforcement and investigation is at last being taken seriously and colleagues from Eurojust and the EJN will explain how it can be strengthened. We now have a network of liaison magistrates, which we did not have in 1997, when proposals for an EPPO were first mooted and the EPPO appeared to be the only panacea. We now have the European Arrest Warrant, working, perhaps, surprisingly, very well. Do we actually still need the EPPO at all?

The problems we face without an EPPO can be summarised as follows:

- Inconsistency in legislative provisions in Member States
- Inconsistency in policy by national law enforcement agencies
- Jurisdictional problems where there are cross-border offences
- Obstacles to transmission of evidence

If there were clear indications that Member States were failing to a significant degree to follow up recommendations from OLAF to investigate and to bring to justice cases involving their nationals against whom OLAF had found substantial evidence , the case for the introduction of a regime as is suggested in the Green Paper and in the Treaty of Lisbon would be a strong one. However, OLAF's statistics do not bear this out. To quote Nick Ilett's evidence to the House of Lords in October, 2006 once more,

> «Te are happy that most of the cases which we refer to national jurisdictions lead to prosecutions; not all, but most ..Over the last six years ...e are aware of 851 different judicial actions. ...These related to 563 separate investigations. Of these 851 judicial actions, 313 are still being prosecuted in the Member States; 450 are still under investigation by the Member States... [8] have been dropped for a variety of reasons. So that gives you an order of

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[6] http://www.criminalbar.com/86/records/

magnitude. Certainly three out of four we would expect to see to go to court on average»[7].

I suggest that the problems I have referred to above which might support the case for an EPPO, could, with dedicated application and work by prosecutors and law enforcement agents as well as by national and EU legislators, be overcome without the need to create an EPPO, whether within or separate from Eurojust. A separate structure, as suggested by JUSTICE, in its submission which I referred to earlier, whereby a European prosecutor, based in one centralised office, could be charged with the responsibility of taking on investigations and then prosecuting cases before a newly created and special European criminal fraud court might be a feasible and workable proposition. Nevertheless, that is not provided in Article 69E. We must be practical and develop a mechanism for fighting the very real menace of fraud against EU financial interests which will command the confidence of all Member States and, above all, will provide a truly effective solution.

[7] http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/270/6102401.htm

Closing of the morning session

CÁNDIDO CONDE-PUMPIDO
General Prosecutor of Spain

Many thanks to Isabel Vicente for coordinating the round table, as well as to Mr. Brüner, Mr. Cretin and Mrs. Rosalind Wright as representatives of the OLAF at this table. We now have the opportunity, and may I say the satisfaction and honour of receiving the Vice President of the European Commission, Mr. Kallas, the Commissioner for Administrative Affairs, Audits and Fraud. No further presentation is needed as you will all be aware of the important role he plays in the Commission, and the influence he could have on the development of all tools relating to the fight against fraud. As I say, it is an honour and a delight, and I feel the seminar can only be enriched, in a highly relevant manner, by the presence of the Vice Chairman of the European Commission. Mr. Kallas has the floor.

SIIM KALLAS
Vice President of the European Comission

Ladies and Gentlemen,

As Vice-President responsible for Administrative Affairs, Audit and Fight Against Fraud within the Commission, I would like to enrich your discussion with a flavour from outside the criminal law sphere.

I would like to recall the issues at stake, the history of the project «European General Prosecutor», look at the benefits it would bring for the protection of the financial interest, but also plead not to forget short term necessities.

- the protection of the EU financial interests, to speak in terms used by economists, is a specific «European good». Only around 20% of EU budget is managed directly by the Commission, the vast majority of 80%rest by Member States. Revenue comes from taxpayers across Europe. This makes our control framework more complicated and there is often not sufficient 'ownership' in Member States for money from Brussels.
- This remoteness is compounded by the fact that the Commission depends essentially on Member States authorities for sanctions. It is a ty-

pical EU dilemma: the Commission has great interest in effective fight and deterrence, but lacks the required competences. The Member States have the competences, but often do not have a sufficient interest in a particular case.

- In the light of free movement across the EU, which sadly is also exploited by criminals, there is increased need for cooperation and coordination in the joint fight against fraud detrimental to the EU budget. The trend of organised crime towards defrauding funds, as well as experience of cases such as the one on adulterated butter, with widely differing treatment in various Member States, must lead us to reflect on developing at European level robust structures to effectively counter this fraudulent conduct.

Over the last decade, the protection of the financial interest of the EU started to become a motor for criminal law activities at the level of the EU. Allow me to give a short

HISTORY OF THE FILE

Corpus Juris

In the beginning of the nineties, academics devised a complete concept for the improvement of the criminal-law protection of the financial interests of the Community, including institutional issues. Their ideas were set out in what is known as the Corpus Juris (1997).

Committee of independent experts

You may also remember the committee of independent experts which was established in the wake of the resignation of the Santer Commission 1999. In the same year 1999 OLAF was set up in today's form.

The committee asked the right questions. I quote from the wise men's report in September 1999

5.11.15

How can quasi-criminal investigations in UCLAF (Olaf's predecessor*), the need for some judicial control over such investigations and more effective criminal prosecutions of EU fraud be reconciled with the principle that criminal jurisdiction is and for the foreseeable future will remain a prerogative of national legal and judicial systems?*

It finds that:

5.12.3. (…) The convenient fiction that OLAF is a purely administrative service also exposes the European Union to a dual risk: firstly that OLAF will enjoy de facto criminal investigation powers without proper supervision; secondly, and conversely, that prosecutions for EU-related fraud will continue to be handicapped by the inability of national prosecutors to come to grips with internal EU and/or trans-national cases.

The committee recommends the establishment of a European prosecutor, to fulfil tasks of supervision of OLAF and enhance the effective prosecution of fraud against the EU budget.

I very much share the view expressed by the committee. There is a clear problem of follow-up of cases at national level and, while we absolutely need to avoid political interference, it is an essential principle of justice that a prosecutor or judge controls and instructs an investigative body.

The Green Paper

The Commission persisted in its efforts to make further advances with the reflections and published in 2001 a Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor. The approximately 200 responses, published in 2003, were to a great extent favourable to the creation of a European Prosecutor.

From the European Convention to the Reform Treaty

Nearly in parallel to the public debate, the discussion on the European Prosecutor found its way into the European Convention and the 2004 Treaty establishing a Constitution for Europe, from where it ultimately has found its way into the Treaty of Lisbon (Article 69e). Importantly, if there is no agreement on creation of a Prosecutor at EU-27, the Lisbon Treaty would allows it to be set up via a reinforced co-operation of at least 9 Member States.

That is where we stand today: a provision in a future Treaty to allow us to establish the European Public Prosecutor's Office.

On this possibility there are two schools of thinking: A General Prosecutor with competences restricted to PFI or broader mandate to encompass organised crime.

In line with my portfolio responsibility, let me address the first. There are several.

OPERATIONAL ADVANTAGES OF AN EUROPEAN PUBLIC PROSECUTOR'S OFFICE IN THE FIELD OF PROTECTING THE EU FINANCIAL INTERESTS

More effectiveness with improved and accelerated EU-wide prosecutions

The defence of the EU financial interests is currently entrusted to national criminal investigation and prosecution, OLAF carries out administrative investigations, and European courts in Luxembourg are in charge of staff issues.

But, in spite of much improved judicial co-operation, national legal systems have proved sometimes ill-equipped to respond to the challenge of fighting crimes against the EU financial interests. Issues arise about different policies between the national authorities and the Community. This is nobody's fault: the national judicial authorities must continually arbitrate between competing priorities where resources are scarce. With increasing workload, it is difficult for them to take on the protection of Community interests as a priority considering the particular challenges this involves.

The EU's financial interests are not by their nature subject to a higher crime exposure than national public funds. But in the light of the complexity of the EU system and legislation their chances of success seem to be diminishing in the face of sophisticated offences with language, procedural and jurisdiction problems, as is typical for economic crimes on a trans-national level. Specialised prosecutors would be much better equipped to address them. Fighting crime affecting the EU funds requires knowledge of very technical fields of law such as customs, international trade, EU financial rules on grants and public procurement, etc.

As a further improvement, we should enhance the management of investigation and prosecution throughout the EU. It should not be a taboo to consider centralising the information flow and decision making related to these activities. At the same time, the European investigation and prosecution mechanism must be compatible with the trial stage remaining entirely in national hands.

A single office, such as the European Public Prosecutor's Office, should be set up where it is likely to be speedier, more specialised and more efficient than two or more national bodies co-operating. An investigation and prosecution swiftly and easily dealt with at European level could help to counter the abuse of the fundamental freedom, under which also criminals are allowed to freely move from one jurisdiction to the other.

WHAT SHOULD BE THE ADMINISTRATIVE AND INSTITUTIONAL STRUCTURE OF A FUTURE EUROPEAN PUBLIC PROSECUTOR'S OFFICE'S?

Does it pay off to establish European Public Prosecutor's Office for the protection of the financial interests, considering the needed infrastructure?

A simple approach is to measure the benefit in terms of the potential loss the EU budget faces without more efficient procedures. According to the data at our hands[8], the total EU budget affected by criminal activities reported – thus not even considering those numbers not reported – amounts to a minimum of 60 Million Euro in a best case scenario – per year. This amount deserves investigation on whether prosecution is appropriate, and recovery will of course be attempted. The specialised knowledge and resources of a European Public Prosecutor's Office would allow this problem to be addressed more cost-effectively than is possible for national authorities.

The provision in the Lisbon Treaty provides for an establishment of the European Public Prosecutor's Office «from Eurojust». Although the relation between Eurojust and the future European Public Prosecutor's Office is not yet clear, the wording implies that the European Public Prosecutor's Office should draw on existing resources and structures, in the first place those up and running at Eurojust.

Furthermore the European Public Prosecutor's Office will obviously take advantage of the European and national structures in place.

How would OLAF fit into the concept of a future European Public Prosecutor's Office?

OLAF is currently part of the European Commission. It undertakes administrative investigations independently and assists judicial authorities. Both these activities are compatible with a EPP, which could draw on OLAF's investigative work and experience. However, there is room to consider a tighter link: Possible scenarios could be to place OLAF under the control of the European Public Prosecutor's Office insofar as its investigative activities are

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[8] The present financial perspective envisages an annual budget rise in 2004 prices from 120 Billion Euro in 2007 to 126 Billion Euro in 2013. From the Commission annual report 2006 on the fight against fraud, the Member States report suspicions of fraud with regard to 0,05 % of the funds dedicated to the common agricultural policy, 0,53 % of the structural and cohesion funds. Assuming the lowest percentage of suspected fraud, namely that of the agricultural policy, the estimated fraud figure of 0,05 % as significant for the overall budget, the loss amounts to 60 Million Euro in 2007 or 63 Million Euro in 2013. Considering instead the estimated loss to fraud for structural funds as significant, 0,53 % of the total budget are effectively lost through criminal activities, in which case the amounts to be considered are 639 Million Euro in 2007 or 671 Million Euro in 2013.

concerned. In such a case, OLAF would no longer perform «administrative» investigations but «judicial» activities and thus face a new challenge.

The Commission at this moment is entirely open to assessing the advantages and possible political and structural implications of the possible scenarios.

CONCLUSION: A LOOK TOWARDS THE NEAR FUTURE

There are clear advantages from the Commission's point of view in establishing the European Public Prosecutor and the Commission will further develop the project. It would fulfil the twin function of ensuring the timely and independent supervision, currently absent, of investigations and also facilitate the effective follow-up and prosecution of fraud cases.

However, I have no illusion as to the difficulties and length of time laying ahead of us for the establishment of an EPP. I note that the development of legislation and innovation in the area of the protection of the financial interests process has stalled since 2000. The Commission faces great difficulties in persuading Member States in the Council of the need to pass and ratify new legislation in this area (OLAF regulation, Mutual Administrative Assistance for VAT fraud, 2nd Protocol on the Financial Interests).

I hence have to caution against betting all credibility of the European fight against fraud on the EPP as our single horse. We have to persevere in improving the current system for the short term needs of the effective PFI– the current system must be reformed in smaller steps too.

We need better governance of the fight against fraud at EU level:

1. In May 2006 the Commission has tabled a proposal to strengthen OLAF's efficiency, procedural rights of persons under investigation and the institutional setting, including the role of the Supervisory Committee and accountability vis a vis the institutions. Unfortunately progress is still outstanding.
2. We are also seeking greater cooperation from the Member States at judicial and administrative level: the May 2006 proposal also looks at better cooperation and prosecution of misdoings by National Courts. Our Anti-Fraud Office is in the unenviable situation of not having the powers itself to carry a case to the end. When OLAF finishes its work, the file is handed over to national justice, and it may take years to have a result. As a very minimum we are now requesting national competent authorities to systematically give feedback on follow-up, administrative or judicial, given to OLAF files.
3. Thirdly the Commission is convinced that police and judicial cooperation in the EU has already been improved by the establishment of Eurojust,

and by extending Europol's role. Public prosecutors, judges and police officers from the Member States working together facilitate liaison. More can be done to cooperate amongst the European bodies.

Ladies and gentlemen,

The misuse of EU money is not a lesser crime. It is a matter not only for the Commission but for everybody across Europe.

We have to succeed in fighting fraud and achieve deterrence by speedy and effective sanctioning.

The success and credibility of further European integration will crucially depend on whether we can succeed in increasing understanding of the need for a European area of freedom, security and justice and trust in the way the European Union institutions work.

The establishment of the European General Prosecutor's Office needs profound analysis and dialogue with competent national authorities, to which this event contributes.

I therefore thank you for this occasion to collect valuable views and hope to have contributed to your debates. With the project of the European General Prosecutor something new has been started. With this seminar new impetus has been given.

Round Table II

JORGE ESPINA

Prosecutor at the International Cooperation Section. General Prosecutor's Office–. Spain.

Good afternoon. We will now continue sessions with the second round table. I was going to say some, but in fact all aspects have been presented already. We have discussed them during the sessions, and all that remains is for me to emphasise the fact that obviously the possibility provided by the Treaty of Lisbon for a future European Public Prosecutor, the outlook provided by Eurojust, is clearly one of the fundamentals that we need to take into account when beginning any discussion, any reflections as to the real possibilities it offers, because as we already know it must be created through Eurojust.

To achieve this we have the President of the Eurojust College, the National Member for Portugal, Mr. José Luis Lopes Da Mota, who has extensive experience and can thus give us an unbeatable view of the subject, which we will complement with the views of Mr. Falletti in his dual role as National Member for France of Eurojust and, as was indicated beforehand by the General Prosecutor, also currently the president of the International Association of Public Prosecutors; and finally we also have the always welcomed intervention from Juan Antonio García Jabaloy, the National Member of Eurojust for Spain, who will complete our Eurojust trident, from whom we expect to obtain sufficient details to expand our knowledge. I also hope they will spur on subsequent debates, during tomorrow's sessions, with respect to all aspects that have been debated and put on the table during these sessions. Without further ado I therefore give the floor to José Luis Lopes da Mota.

JOSÉ LUÍS LOPES DA MOTA
President of the College of Eurojust
National Member for Portugal[1]

EUROJUST, SEED OF THE FUTURE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

The Treaty of Lisbon, and, in particular, the creation of a European Public Prosecutor's Office, are central to the construction of a European criminal judicial area.

The nature of the role of a European Public Prosecutor's Office poses questions on how to integrate this new body in the European judicial area currently under construction, which is more far reaching than judicial co-operation in criminal matters between the Member States developed under the current framework of the Treaties (articles 29s EU Treaty and 61s EC Treaty).

The fight against serious and organised transnational crime as an objective of the EU must take into account the principle of subsidiarity, and requires the creation of European bodies.

Eurojust, the first European body with competences in criminal matters, was set up in order to achieve three objectives: to improve the co-operation between the national competent authorities; to stimulate co-ordination of investigations and prosecutions of serious crimes involving two or more Member States; and to support national authorities when dealing with serious cross-border cases.

Recent developments in the European judicial area clearly show that Eurojust contains the foundation for the establishment of a European Public Prosecutor's Office. The Convention on the Future of Europe, launched in 2002, continued the decade-old debate and allowed the discussions to be consolidated and clarified, specifically regarding the '*Corpus Juris*' project and the Commission Green Paper on the European Public Prosecutor. The outcome of these debates can be found in article III-274 of the Treaty establishing a Constitution for Europe and in article 69-E[2] of the Treaty establishing the European Community (new Treaty on the Functioning of the European Union) as amended by the Treaty of Lisbon, signed 13 December 2007: A European General Prosecutor's Office may be established *«from Eurojust»*.

In 2002, the Member States could only envisage Eurojust as a judicial co-operation body. Today we see a more ambitious concept – the creation of the European Public Prosecutor's Office from Eurojust.

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[1] The views expressed here are solely those of the author.

[2] Article 86 of the Treaty on the Functioning of the European Union (Consolidated version as amended by the Treaty of Lisbon).

Eurojust represents a new dimension to the traditional horizontal co-operation between the Member States tackling criminal problems from a local and national perspective. Together with other initiatives, Eurojust works towards promoting a new overall European approach to cross-border crime by contributing to the development of a European criminal justice area, based on the different national legal systems of the Member States.

The creation of the European Public Prosecutor's Office will face new challenges. The starting point should be to identify and address the main questions opened by the Lisbon Treaty. These questions are focused, essentially, around six points: the adoption of the legal instrument setting up this new body, its organisation and operation, its competences, the rules on criminal proceedings that must be observed, its capacity for investigation and the jurisdictional control of acts which affect fundamental rights.

First point: Regarding the legal instrument setting up the European Public Prosecutors' Office: In the absence of unanimity, the decision of at least nine Member States will suffice, which will limit the territorial area in which the European Public Prosecutor's Office has competence to act. This limitation will necessitate a reflection on the relationship with those States that do not participate in the establishment of the European Public Prosecutor's Office, on the area of direct relationships between those States and also on the area of relationships with and through Eurojust, with which all of the States currently participate.

Second point: With regard to its organisation and operation, the need to determine the way in which the European Public Prosecutor's Office should be structured and how the European Public Prosecutor's Office should operate, taking Eurojust as a starting point.

It will be important to determine how the organisation and operation of Eurojust will influence the organisation and operation of the European Public Prosecutor's Office, both at the internal level and in its relationships with the Member States' authorities, or within the Member States themselves, taking into consideration the position and role of Eurojust's national correspondents.

It will also be important to address the terms under which relationships between Eurojust and the European Public Prosecutor's Office are defined in the future. These relationships must take into account the differences relating to nature and competence, and the need to optimise resources and exploit synergies between the two bodies, based on existing structures, experience and relationships between Eurojust and national authorities.

Third point: With regard to competences, the establishment of the European Public Prosecutor's Office will take place in two different phases because the Lisbon Treaty introduces the establishment of a European Public Prosecutor's Office in a first phase, competent to deal with crimes affecting the financial interests of the Union. Later, the powers of the EPP Office may be extended to include serious cross-border crimes. First, the types of crime relating to the

protection of the EU's financial interests must be defined and harmonised, taking into account the existing legislation on these matters and not ignoring the need for an effective protection of the euro through the European criminal law. With respect to this point, Eurojust's competence must be stressed in relation to these forms of criminality, and also in finding coherent solutions which should preserve the existing competences of Eurojust regarding the countries that do not participate in the European Public Prosecutor's Office. Then we will see if the Member States are ready to take the next step by extending its competence to investigate and prosecute serious, cross-border criminal activity.

Fourth point: There will be a need to consider which criminal procedural rules are necessary for the European Public Prosecutor's Office to exercise its functions, including those rules relating to territorial competence and conflicts of jurisdiction. Legal clarity is required. It will not be possible for the European Public Prosecutor's Office to work solely with applicable Member States' procedural criminal rules on a case by case basis, as this may create irresolvable problems regarding trans-national investigations and prosecutions. In order to prevent these kind of problems, the experience of Eurojust confirms the need for basic common rules for cases falling into the competence of the European Public Prosecutor's Office. Experience also demonstrates the need to take into account the relationships with national procedural laws, not only in the preliminary phase of the proceedings, but also during the trial phase, where the p**roblems relating to the validity of evidences must be considered.**

Fifth point: The debate must also focus on investigation capacity. The point is to know which entities and authorities must carry out the investigation and collect evidences under the direction of the European Public Prosecutor's Office, in such a way that its legal powers become effective. Without this, the European Public Prosecutor runs the risk of being a head without a body, legs or arms, incapable of moving or taking any action. In this context it will be important to analyse and define the roles of OLAF and Europol and the strengthening of their competences. OLAF must continue to exercise an essential role in the area of administrative inspection and in the detection of criminal offences which will be the competence of the European Public Prosecutor. But its role should not end there. OLAF might become an essential support for the European Public Prosecutor's Office, for example it could be granted powers to carry out or participate in criminal investigations, under the direction of the European Public Prosecutor's Office, eventually in collaboration with Eurojust, Europol and the national police authorities. Also with regard to Europol, the development of operational powers in liaison with the national authorities, when conducting investigations under the direction of the European Public Prosecutor, must be examined. Finally, the relationship between the European Public Prosecutor's Office, national public prosecution services and other national and local authorities must not be forgotten. The investigations are still to be conducted at a

local level, and it is at this level that the effectiveness of the European Public Prosecutor's Office will be demonstrated. Eurojust's experience in co-ordinating investigations and prosecutions has shown that adequate solutions are needed in order to conduct effective investigations and prosecutions.

Sixth point: Finally, there is a need to consider the jurisdictional control of actions taken by the European Public Prosecutor's Office that may affect the fundamental rights of individuals. The point is not only to know which tribunals or judges should exercise such control, but also how to ensure this control, especially how the protection of fundamental rights translates into procedural rights. The Treaty of Lisbon introduces significant advances in this field, by recognising the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU, which shall have the same legal value as the Treaties, and by the adherence of the EU to the European Convention on Human Rights (article 6 EU Treaty), which will form the basis for a common European legal framework. Here, too, Eurojust is in a position to offer its expertise in matters related to the protection of individual rights in the area of judicial co-operation. It will be difficult to organise the judicial control of cross-border investigations and prosecutions at a local level. A comprehensive strategic approach is required in order to avoid the risks of a lack of unity, coherence and effectiveness. Taking into account these risks, one should not exclude the possibility of creating a judicial authority with territorial competence equivalent to that of a European Public Prosecutor with competence to authorise specific co-ordinated actions on a trans-national level.

The proposal to create a European Public Prosecutor's Office outside of the framework of the Area of Freedom, Security and Justice was always controversial. I refer to the efforts of the 'Corpus Juris' project and the proposals of the Commission Green Paper to establish the Office of the European Public Prosecutor on the basis of the Treaty on European Communities (article 280 or a new article 280A). The Intergovernmental Conference, which prepared the Treaty of Nice, chose not to support the Commission's proposal to insert a new article 280A and decided to include Eurojust in the Treaty on the European Union (article 31.2).

The issue was addressed by the Convention on the Future of Europe, which prepared the Treaty establishing a Constitution for Europe. A legal disposition on the creation of a European Public Prosecutor's Office from Eurojust was integrated into the text of the Constitution. The Treaty of Lisbon was inspired by the text of the Constitution and went a step further. The Treaty of Lisbon anticipated a special procedure, through which the European Public Prosecutor may be established on the basis of a request of at least nine Member States. In spite of the complexity of the issues to be addressed, this special legislative procedure may allow the acceleration of the establishment of a European Public Prosecutor's Office in the short term.

Effectiveness against crime must be sought within a legislative framework of criminal procedures which, according to the famous, emphatic assessment of Professor Henkel, constitutes 'applied constitutional law', demonstrating the importance and sensitivity of the project.

The challenge presented is related directly to the evolution of the EU. The Treaty of Lisbon reflects this evolution by linking the European Public Prosecutor's Office to the Area of Freedom, Security and Justice, an area of shared competences between the EU and the Member States[3].

The issue of the European Public Prosecutor's Office must be analysed in this context. It is neither a technical question nor a purely rhetorical exercise, but, rather, must take into account the framework on the basis of which the construction of Europe takes place.

In addition, I would like to make a further observation regarding the proposal to create a European Public Prosecutor in accordance with the Commission's Green Paper and the creation of Eurojust.

The Green Paper constitutes an important element which must be taken into account. It is a proposal which is both ambitious, because its concept is a body with procedural authority, and limited, because its powers are limited to a specific type of criminality related to the protection of the financial interests of the Communities. Although this proposal does not take into account all the progress in the area of the Third Pillar after the Treaty of Amsterdam entered into force (specifically, the creation of Eurojust), it must now be considered within the framework defined in the Treaty of Lisbon.

When compared with the proposal contained in the Green Paper, Eurojust presents a fundamental conceptual difference. Eurojust is based on different national legal systems, co-operating together, forming the basis of the European criminal judicial area, and has the flexibility to adapt itself to the systems of every Member State. Acting as an autonomous body, its competence covers all forms of serious and organised crime, including criminal offences against the EU's financial interests. It is established on an asymmetric principle reflecting the differences between the judicial systems of the Member States, providing the flexibility to be operationally effective.

These key concepts of asymmetry and flexibility have moulded Eurojust and inspired its relationships with the authorities of the Member States, and must continue to be considered when examining the creation of the European Public Prosecutor's Office from Eurojust. These factors will also benefit the operation of the European Public Prosecutor's Office in its relations with national authorities and with Eurojust.

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[3] Article 4.2 of the Treaty on the Functioning of the European Union (Consolidated version as amended by the Treaty of Lisbon).

Any future development cannot ignore the main differences in criminal policy that represent the creation of the European Public Prosecutor's Office and of Eurojust.

Although there may be an area of overlap in their mission, their functions are different. Eurojust, as a body of judicial co-operation, has as its objective the improvement of co-ordination and co-operation between national authorities; the European Public Prosecutor's Office aims to centralise criminal procedures and investigations and to direct Public Prosecutors responsible for the proceedings.

Regarding the conditions, the creation of regulations and procedures in criminal law, necessary for the European Public Prosecutor's Office to exercise its functions, one must consider the progress already achieved, specifically in the areas of harmonisation of legislation, and the application of the principle of mutual recognition of judicial decisions.

The creation of a European Public Prosecutor's Office is a complex project. Its creation must be realised from Eurojust –a logical solution that I support for reasons of coherence and practicality.

Eurojust is still a recent organisation at the stage of consolidation and development. As it is well known, a proposal amending the legal instrument setting up Eurojust is currently under discussion in the Council, the aim of which is to overcome the existing difficulties and to create conditions in which its effectiveness can be improved. The proposal was presented by 14 Member States and was the result of an assessment carried out by Eurojust and Member States through a questionnaire and a seminar held in Lisbon with the support of the Portuguese Presidency, and the Commission's Communication of October 2007 on the Future of Eurojust and the European Judicial Network.

I am convinced that the experience gained by Eurojust and the progress it has made form a fundamental basis upon which we can contemplate answers to questions relating to the conception, organisation and operational conditions of the European Public Prosecutor's Office. In particular, I would like to emphasize the experience gained on an operational level and the internal development of the organisation of Eurojust, in particular the technological development facilitating the exchange of information with national authorities and the development of relationships with national authorities, third States and other European bodies and institutions.

In this context, I would refer to the relationship with the Commission, and especially with OLAF. Given the importance that the creation of the European Public Prosecutor's Office assumes in the area of protecting the EU's financial interests, I am firmly convinced that the moment has arrived in which we must begin to prepare, together, a future that has already begun. This also means that we must continue to walk down the road which, as the poet Antonio Machado would have said, is made by walking, a road illuminated by a lighthouse, and that lighthouse is the Treaty of Lisbon.

FRANÇOIS FALLETTI
Eurojust National Member for France
President of the International Association of Public Prosecutors

I am especially pleased to have the opportunity being given to me today to speak with an audience of such renowned experts and discuss such an important issue. I am truly glad that this meeting is being held and would like to thank the organisers, and in particular, Mr. Cándido Conde-Pumpido Tourón, the Spanish State Public Prosecutor, who drove this important initiative forwards, and the OLAF Security Committee.

Of course, we could be surprised at dealing with the topic as it has become so ordinary. Indeed, a number of texts and analyses have been written on this issue since the mid-1990s. But is it not merely one of those great illusionary ideas that flower in every field but that only survive due to their inherent utopian nature? There would, of course, be many arguments against that statement. In particular it is worth highlighting the fact that the principle behind the creation of the European Public Prosecutors Office, subject to various conditions is included in consecutive European Treaties, which were the Draft Treaty on the European Constitution (whose fate we are all aware of) and the recent Treaty of Lisbon, adopted in December 2007 by the Heads of State and Government.

I would like to go over certain aspects of the problems that have brought us here today. Firstly, I think it is interesting to analyse the motives that lead the idea of creating a European Public Prosecutors Office to be considered every now and then. Secondly, I will present how much progress has been made over recent years and its limitations. Finally, it would be very useful to clarify the advantages of the creation of said European Public Prosecutor's Office.

But, first and foremost, I think it would be interesting to go over the motives that always keep this issue at the fore: obviously, the first thing that comes to mind is the fight against fraud perpetrated against the European Union's interests. When managing said fight, the Union's Member States do not always guarantee the diligence that Institutions in Brussels expect of them. Of course, that situation has lead many experts to conclude that the only way of making significant progress is by creating a European Public Prosecutors Office responsible for managing investigations and the necessary procedures within European territory. On this point, there is no need for me to refer to the information provided today by OLAF's representative, specifically, that Office's Director Public. In fact we are very well aware that the fight against fraud in the Union's budget could be better organised, especially in judicial terms. That is nothing new. Moreover, we've been calling for it for more than ten years now.

My experience in Eurojust has enabled me to find the same problems in many other fields. For example, I could refer to one aspect of the traffic having a very significant impact on the European Union in the form of transit from point place to another: every day, thousands of trucks cross Europe's internal borders, covering hundreds of kilometres North to South, East to West, and vice versa. Sometimes, prohibited merchandise is to be found in those trucks (narcotics, counterfeit products, smuggled tobacco products, stolen goods, etc...). What is most worrying of all, those transportations also affect human beings in the context of illegal immigration and prostitution. The discovery of said types of trafficking in goods or people handling can be made in at least two ways:

The discovery can be made as the result of a random police or customs inspection. In that case, the prohibited merchandise is seized and the driver is taken before the courts once attempts have been made, using international letters rogatory, to obtain more information as to the incident's context. Nevertheless, the results of such international investigations are often limited. That has led in many articles in the press and, in fact, a positive result in a strictly national sense. Unfortunately, we are also very well aware that if we don't detain the hauliers and the people they are carrying, this trafficking will just continue.

The discovery can also be made during transport, when certain information allows the shipment to be pursued and the place of interception to be selected. In that case, the driver is also charged and the merchandise confiscated. However, attempts are sometimes made to go further, guaranteeing the traceability of the route from its starting point to its destination, trying to identify and arrest as many of the people involved as possible and confiscating not only the merchandise being transported, but also the trafficking group's funds and resources. I don't have to say that this focus is, by a wide margin, the more efficient of the two as it leads to the thorough dismantling of the network. That is what we have observed at Eurojust. Where it is possible, it is truly encouraging.

Another example: an international prostitution ring transports women from outside of the European Union and forces them to work as prostitutes in cities in different Member States. A network has been organised so that said prostitutes do not stay in the same place for very long, but instead are moved from city to city. Furthermore, financial networks are set up so that the illegal profits obtained are sent back to the country of origin of those running the system. Obviously, a local investigation into the problem can only obtain very limited results. It is clear that the local gang boss could be arrested, and that would be a satisfactory result for the city in question, but the network's activities will continue as its nucleolus would remain intact. In that case, a hierarchical investigation by legal authorities is also essential.

I could give thousands of examples of this kind which I have learned about thanks to my experience with Eurojust and which I knew about previously at a national level. In that sense also, we could agree that things are better than they were a few years ago; there is still a lot to do in order to reach an appropriate level of efficiency with regards to the power and flexibility of networks. Despite the work undertaken by Eurojust, OLAF, Europol, etc., we have to admit that the national focus, which is pre-eminent in analysis and decision making, is limited and no longer provides enough solutions.

There is no doubt that we have made great progress: Eurojust, sticking with that young Unit, has made noteworthy progress in the fight against cross-border crime within the EU. In fact, in five years, Eurojust has built the device and the logistical base necessary to guarantee the co-ordination of investigations and legal action at a European level. From now on, the 27 Member States will have at least one representative within the Unit in order to undertake structured proactive and reactive co-operation on a daily basis in a climate of confidence and positive collaboration between the appropriate legal authorities depending on the investigation or procedure in question. The number of cases that Eurojust is working on has been progressively increasing The Unit took on more than 1,000 new cases in 2007, compared with the 100 it took on five years ago. Thus, in just the last year, Eurojust has been involved in a third of all the cases in its history. Furthermore, the Unit applies its attributed powers to those cases, in accordance with the definition of the Decision which created the body on the 28th of February 2002, and strengthens its knowledge of criminal activity in Europe in order to create an increasingly dynamic focus in its coordination missions.

Nevertheless, that is not enough: the main proposal at the time Eurojust was created states that the national level is the uppermost level in the decision making process as Eurojust only has powers to encourage and support co-operation. Eurojust's involvement in any case can be rejected at a national level. The application of co-ordination measures requires agreement to be reached between the appropriate national authorities. That occurs often, but not always, in the context of Eurojust's actions. It is possible for certain national priorities to clash with unquestionably promising initiatives at the European level. The application of complex measures in emergency cases, such as deliveries under surveillance, infiltrating networks of joint investigation teams, is often subject to multiple factors that are unfathomable given the legal or practical nature of the difficulties.

The undertaking of simultaneous investigations in different countries with regards to a single terrorist or criminal network leads to adjustments being made as information is received. However, on many occasions, that is not the case and a single suspect can be interrogated several times by different investigators without any real co-ordination, which can lead to different versions

being obtained and create an undesirable feeling of celebrity with respect to the interested party. Do I need to continue explaining the current situation? It would be easy, but I'm sure it wouldn't be useful, especially given the very little time I have. Furthermore, it should be highlighted that, paradoxically, the global levels is where we have gone furthest through an integrated focus: the creation of the International Tribunals for the former Yugoslavia and Rwanda and the creation of the International Criminal Court are examples that bear witness to the International Community's ability to recognise interest in a measure organising the establishment of procedures to ensure and overarching vision and focus, showing us to be effective in the face of certain criminal activities. There is no doubt that we do not fully utilise the breadth of specific integration offered by the EU at the current time in all of the areas under the joint control of the Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg.

That is to say, in my opinion, the creation of a European Public Prosecutors Office would provide great advantages in the fight against cross-border crime. Firstly, here in Europe we would finally have a place where all data on legal processes concerning cross-border organised crime and terrorist would have to be brought together. As a result, we would gain an overall view of criminal activity and the groups committing such crimes at a European level. We should bear in mind, furthermore, that criminal gangs do have that overall view when they commit their crimes and they make great use of the differences between legislation and law and order practices between countries. Nevertheless, it is no too much to expect that some Member States support this measure. At the end of the day, this work would not replace the work undertaking in the political arena, as data on legal processes are different from those processed and compiled in the framework of police co-operation, especially with regards to Europol.

The European Public Prosecutors Office institution would also have the added advantage of removing certain complex procedures from national organisations' plates. That is a major difference from the current Eurojust Unit which only encourages national authorities to take interest beyond just their national investigations and in aspects of networks which only partially affect them.

In France, we saw this type of reform in 2004 when 8 specialised jurisdictions were created in the fight against organised crime. Centralisation has been in place since 1986 with regards to fighting terrorism. You may think that the jurisdictions losing a part of the powers that *a priori t*hey had would only take part in the reform through gritted teeth. However, things turned out good as the strengthening of the resources given to the new jurisdictions led to a generalised feeling that things were being handled better than in the past, which was in fact the case. Furthermore, specific protocols were introduced to deter-

mine the types of issues to be attributed to the new jurisdictions and those that should still be covered by their predecessors. Everyone very quickly realised that there was still enough work to go round. Therein is a huge difference with Eurojust, as I have just highlighted, as the derived measure of this Unit's intervention often leads to increased workload for magistrates who don't always have the time or logistics required at the national level.

There would also be at least a third incentive for the creation of a European Public Prosecutors Office: the application of this overall focus to countries outside of the EU. Indeed, we are often aware that criminal networks have their bases in third party countries, either because the illegal trafficking begins in those countries or because the criminal activities are recycled there. It is clear that collating data and creating an overall vision of the outstanding processes for specific illegal activities is designed to significantly increase efficiency in the fight against cross-border crime.

However, that does not mean that everything would be centralised in one place, risking the creation of a legal monster. It would simply facilitate the coordination of legal investigations and actives in the corresponding area of Europe, allowing national authorities to act in accordance with traditional methods so long as the measure in question seemed pertinent and with full knowledge of cause. Equally, in such cases as using a national focus is not considered appropriate because it would be too limited with respect to the nature or size of the network, they could be developed within said European Public Prosecutors Office.

I am convinced that we have to be able to say what is necessary based on the realism and pragmatism. And that goes for Europol, Eurojust, the OLAF or any other organisation, we all feel divided when analysing the situation: on the one hand, we are wish to underline the unquestionable successes that we have achieved in our areas and, on the other, we have to admit that there is room for improvement. Thus, we have to admit that the European architecture in our field is the result of successive initiatives that were not conceived using a single plan. That is true of the three Units I've mentioned, the European Judicial Network, liaison judges, and especially with regards to the police and customs co-operation centres. The respective areas of bilateral and multilateral co-operation continue to be confused and often depend on individual initiatives.

In my opinion, an important point is the description of the advantages provided by European structures in the eyes of European citizens who are too persistent in believing that their security depends on national authorities who know and communicate their actions a great deal. Those self same European citizens have mostly unaware and undervalue European organisations, regardless of what those organisations do. As a result, in my point of view, it is vital that we increase awareness of the European context where organisation with

specific tasks are working and which have a direct bearing on normal citizens in their home countries.

Equally, I believe that after this seminar we should continue reflecting on these issues within the technical groups. It is true that the creation of a European Public Prosecutors Office will lead to many questions with regards to the principles of practical order. The *Corpus Juris* can offer many answers to those questions, but there may be other answers, such as, in accordance with the terms of the Treat of Lisbon, which sets out the creation of the Public Prosecutor, and because of the relatively recent creation of Eurojust.

No questions should be left unanswered become «demonised». The European public Prosecutor's Office would be, in any event, very innovative and require a lot of rigorous preparative work. That work should not be uselessly delayed by ideological debates, but rather, be focused on legal and practical aspects. The motor of reform is obviously gains in terms of efficiency, simplification and the protection of rights.

Finally, I believe that it is urgent for the work often undertaken in parallel to European Institutions to modernise OLAF's founding regulations, to modify the Europol Agreement by the Third Pillar Decision, and to strengthen Eurojust's powers and clarify the relationship between that organisation and the European Judicial Network to be undertaken with the objective of establishing the architecture that should be adopted and with a joint focus. The issue at stake is making each of these structures as efficient as possible and creating the best possible complementary joint working conditions.

I would thus call for pragmatic and focused work to be undertaken. In conclusion, the idea of a European Public Prosecutor's Office has been discussed for some time now, and I wonder if we are not becoming attached to a utopia that we would like to see created. If we really believe that this is a true step forward for potential victims of criminal networks and for to protect citizens, then we should introduce the appropriate measures to achieve it.

JUAN ANTONIO GARCÍA JABALOY
Eurojust National Member for Spain

Thanks Jorge. Good afternoon. Firstly I would like to offer my sincerest thanks to the General Prosecutor, the International Cooperation Section of the General Prosecutor's Office and the OLAF Supervisory Committee for the invitation to participate in this seminar. After what my colleagues have already said, there clearly isn't that much left for me to say from the viewpoint of Eurojust as to the possible contribution of the European Public Prosecutor's Office. I will use the short time available to me, and I hope the moderator will give me slightly more than the four minutes that remain, to talk, indeed make a short presentation, to put a series of notes and issues on the table for reflection.

Jorge Espina, when he contacted me, referred not only to the fact that we would be discussing the possible future European Public Prosecutor, but he also said that we would be looking at the implications of the plan to reform the Eurojust Decision, and how the future Public Prosecutor's Office could affect this pending reform. Thus I would like to refer to three points: firstly, extremely briefly, I would like to discuss the viewpoint of Eurojust in relation to the reform of the Decision, coordination with the European Judicial Network and finally I will say a few things about the future European Public Prosecutor's Office.

The planned reform of the Decision creating Eurojust, on 28 March 2002, is inevitable, but I should mention one important thing, which is that in relation to this project there is a communication from the Commission in October 2007, which has been assumed in its entirety by the draft reform in use in the European Council, yet actually goes much further, that is to say it reforms or seeks to reform in much greater depth Eurojust, and above all the status of the National Members of the Eurojust College. From Eurojust, and having regard to the document on the proposed reform, we can do no more than applaud it, simply because it solves many of the problems we encounter on a day to day basis in our daily operations and actions.

What is the fundamental problem? The fundamental problem is that not all National Members have the same powers in their respective states. This, as you may well understand, is a serious problem when it comes to operating and perfecting the cooperation required of us in Eurojust. There must therefore by a significant strengthening of the powers of National Members, therefore of the powers referred to in article 6 of the Eurojust Decision, and we feel the reform proposals on the table to be a very good idea, that is to say the initial establishment of a same term of office. A period of four years has been mentioned. We are lucky because Spanish law, which governs the status of National Members,

also specifically establishes a period, not of four years, but of three, renewable for a further three.

We also consider as fundamental the fact that it is necessary for at least one assistant to assist (as per their name) the National Member in his functions. This position is also provided for in our national legislation, thus we are ahead of the game in this respect and we feel a requirement for at least one assistant for each delegate would be ideal.

We also feel it is very important for the National Member to be given greater powers to demand proper execution of a letter rogatory. This, for practical effects, means being able to obligate the competent national authorities so they have to make a request for judicial assistance through Eurojust, and if they do not do so, justify why not, on the one hand, and vice versa. I return to our law, which also has the benefit that when the National Member receives from Spain any type of letter rogatory, among his powers is that of being able to divide it, correct it or modify it so it can be executed in the best way possible and more quickly, reporting or informing on this modification or division to the competent authority which issued it.

And we also feel it absolutely necessary for the submission of information to Eurojust to be entirely effective and real. We need to have information – this is key to our operation - in two specific areas in particular: when joint investigation teams are created, and in criminal cases, on organised crime, which affect more than two Member States.

All of these are proposals which appear to be covered both in the communication from the Commission and the draft reform in the hands of the Council, and which we feel to be perfectly suitable. This is, as I say, a minimum basis.

In the longer term, to our way of thinking it would be absolutely necessary for the National Member of Eurojust to have, in their corresponding state, in their corresponding member state, the same powers and a Public Prosecutor in certain applicable cases referred to in the draft reform in article 6.a.2. That is to say, in the event that the national authority competent to carry out a specific investigation does not do it in time and does not justify why it has not done it, then in this case the National Member of Eurojust would have the opportunity or power to initiate an investigation which was not initiated on unjustified grounds.

It would also be absolutely necessary for the National Member of Eurojust to have the power to actively participate in the joint investigation teams created within each Member State, and above all the capacity to access all records. This seems extremely simple, but not all National Members have the power, for example, to access DNA records or prisoner records. We feel this to be fundamental, although we also note that at the last COPEN meeting on 8 January in Brussels there were certain delegates such as those from Finland

and the United Kingdom who were not in favour of this total access by a National Member to said records.

From the point of view not of our specific actions as a National Member, but the actions of the College, that is to say Eurojust as a College, we also see as fundamental and extremely positive the proposed reforms which refer to the binding nature that decisions of the College must have in two specific areas: firstly in terms of the resolution of potential conflicts of jurisdiction arising, and in relation to the creation of and participation in by Eurojust of a joint investigation team.

We also see as absolutely necessary the fact that Eurojust should receive letters rogatory issued by third party countries (and here I am talking about non EU countries, in cases also provided for by the reform project in article 9.4 specifically). That is to say if such a letter has been or is to be sent from this foreign state to the European Union to two or more states in the European Union, and this is very easy to understand: coordination and cooperation is achieved through a body such as Eurojust, and not having a posteriori coordination between two or more EU states which have received the same letter rogatory from a third party country.

And in relation to the above, we also see Eurojust liaison Magistrates as a very good idea. We also know that not everybody is unanimous in this area. There are indeed opinions to the contrary, according to which if there are already liaison Magistrates appointed by each State, why do we need Eurojust liaison Magistrates? To our way of thinking the issue is simple, that is to say in areas of transnational criminal organisation involving various Member States with third party countries, something not negligible. It is not a merely hypothetical future task but rather something practical that we see every day in our work at Eurojust, for which the good work carried out by a liaison judge is insufficient, as clearly his capacity for coordination and collaboration is limited to two States - the State which appoints him and the State where he carries out his responsibilities. We also know that at the last meeting I referred to in Copen, Brussels was somewhat reticent when it came to the creation and potential creation of such liaison Magistrates.

What is happening with the European Judicial Network and Eurojust? We think it is a good idea for the national coordinator of the Judicial Network to be a Eurojust correspondent at the national Eurojust office when created. We also feel it fundamental for the two institutions to coexist. These are two distinct institutions that were created for totally different purposes, and what has happened recently is that people have detected a possible absorption of cases by Eurojust that should in reality pertain to the European Judicial Network. We have also noted this absorption, perhaps as a result of the inadequate operation of the judicial network or network contact points in certain states, and therefore in the event of inadequate management of a specific

case by the network contacts there is the option of resorting to a body which in principle has operational guarantees of proper performance, which is Eurojust.

And having discussed these premises, that is to say the positive aspects of the possible reform in respect of the National Members of Eurojust and the Eurojust College, there are three or four things to say about the European Public Prosecutor's Office. Both on behalf of Eurojust, as a National Member of same and personally, the idea of a European Public Prosecutor's Office is a fantastic one. I give it my full support, but as my colleagues have already perfectly expressed how a European Public Prosecutor is seen from the Eurojust point of view, I will play devil's advocate and put forward a few points for reflection: Firstly Eurojust and the potential European Public Prosecutor are two completely distinct things. The creation of Eurojust and the possible creation of a European Public Prosecutor are the response to two absolutely distinct penal policies. Eurojust was created with an extremely precise function and purpose of cooperation and coordination, as was emphasised by certain delegations such as Finland, Germany, Ireland and the United Kingdom in the meeting I will refer to yet again at Copen in Brussels on the eighth of January of this year. Eurojust is like no other institution in the criminal systems of Member States, and even less like Public Prosecutors and Public Prosecutors Offices.

The fundamental points of this European Public Prosecutor's Office should be centralised management of certain procedures, it should be a body which is independent of the different states, should have the authority to lead investigations and to bring criminal cases, initially in relation to the financial interests of the European Union, and then, as we feel is absolutely necessary, and as was said by François Falletti, in relation to organised transnational crime, all through representative Public Prosecutors from Member States and, something which is problematic but also fundamental, it should have decisive authority over the competent national jurisdictions. This is essential, that is to say it is a question of the authority to decide whether a jurisdiction is competent and secondly to impose this decision whatever the opinion of the national authorities. This being said and I believe that this is how the European Public Prosecutor's Office should operate, there are a series of serious problems; clearly constitutional problems.

We could discuss here, but unfortunately we are running behind schedule, how so-called fundamental rights in the criminal process would be affected, and I am referring for example to the ordinary judge predetermined by the law. We could also discuss here the possibility that criminal procedural and substantive rules could be included directly in a constitutional treaty for the European Union without being contained previously in the respective basic rules of Member States.

And what José Luis said beforehand appears fundamental to me – we all agree. What will happen to the jurisdictional control of the actions of the European Public Prosecutor? The transnational nature of investigations and procedures to be followed in this European Public Prosecutor's Office are poor bedfellows, which is not to say they are totally incompatible, with national and necessarily fragmented control of cases, it therefore being impossible for a national judge to understand a case in all its complexity. What happens in this case? As François said, a European judge is created, a new position, new competences are given to the European Court, the Court of Justice of the Communities, which would involve a total change to its competences. We need to look at this issue as I do not feel a European Public Prosecutor's Office can exist without a body having jurisdictional control of the actions of said Public Prosecutor's Office.

And I would like to finish with two or three conclusions: firstly, from Eurojust we feel that the creation of the European Public Prosecutor's Office is entirely possible; secondly the experience of Eurojust in European judicial matters should serve as a basis for this future Public Prosecutor's Office, as no other institution is in a better position or better suited to host this future European Public Prosecutor's Office, and I won't repeat here what my colleagues have said.

I also feel it is necessary, as José Luis said, and more so after the expected change to majority voting regimes in 2009, for all Member States to participate from the outset in this future European Public Prosecutor's Office, that is to say I do not feel it is an insurmountable obstacle.

And thirdly, time is needed, and in this respect we feel that the proposal by the European Council on reforming the Eurojust Decision is not a suitable basis for the creation of the European Public Prosecutor's Office. This reform, much as it strengthens the powers of National Members, can not be any more than a quantitative change or increase in powers, and not qualitative, that is to say not of sufficient scope or conception to be able to speak, with this reform alone, of a European Public Prosecutor's Office.

And finally, we need full harmonisation of substantive penal legislations, at least in terms of the crimes which would fall under the jurisdiction of this European Public Prosecutor - certainly in terms of the protection of the financial interests of the community (as per the 1995 protocol and the two additional protocols), although in terms of organised trans-national crime almost nothing has been done - only in terms of terrorism and narcotics. And now I will leave you to it. Thank you.

Round Table III

ISABEL GUAJARDO

Prosecutor at the International Cooperation Section of the Technical Secretariat of the General Prosecutor's Office

Good afternoon, as I have just been handed the baton from my colleague, we will move on to the last table, with which we will end this day's sessions.

This table, following the model of previous ones and the excellent speeches that all participants have been lucky enough to hear, these contributions will be complemented with the views and outlooks that, in relation to the important process to create a European Public Prosecutor's Office, some of the other key players, fully involved in the work of developing and achieving the creation of the European Public Prosecutor's Office may have.

This table includes representatives from national Public Prosecutor's Offices, who will undoubtedly contribute to providing an important overview; there are also representatives from key players who are directly and clearly involved in the work to create this EU body which, with the Treaty of Lisbon, means the laying of foundations which are stronger for the possibility of creating a European Public Prosecutor's Office.

I would like to thank from the Spanish General Prosecutor's Office, the General Prosecutor of Slovenia, Ms. Barbara Brezigar, the General Prosecutor of Portugal Mr. Fernando José Pinto Monteiro, the Prosecutor with the French Court of Cassation Mr. Regis De Gouttes for their participation, as well as my colleague Rosana Morán from the International Cooperation Section of the Technical Secretariat of the General Prosecutor's Office for representing its viewpoint. Now, as I said I will give the floor to the first of the speakers.

BARBARA BREZIGAR
General Prosecutor of Slovenia

The International seminar on possibilities of establishing European Public Prosecutor came just in right time – after the signatures were put under Lisbon Treaty, after the amendments of Eurojust Decision were prepared and after our discussions on the issue Bringing the Prosecutors Public closer to EU structures held during the 10th Eurojustice conference in October 2007 in Portorož.

In the field of judicial cooperation in criminal matters, in particular in regards to the decision on the future role of the Eurojust and the possibility of establishing the European Public Prosecutor, important decisions that concern prosecution services of our countries will be taken in near future.

According to Article 69D of Lisbon Treaty, the mission of the Eurojust will be to support and strengthen the coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the bases of operations conducted and information supplied by the Member States' authorities or by Europol.

According to Article 69E of Lisbon Treaty the Council may establish European Public Prosecutor's Office from Eurojust in order to combat crimes affecting financial interests of the Union. If European Public Prosecutor's Office is established it shall be responsible for investigating, prosecuting and bringing to judgement the perpetrators of offences against the Union's financial interests and shall exercise the functions of prosecutor in the competent courts of the Member State. There is also a possibility to extend the powers of the European Public Prosecutor's Office to serious crimes having a cross-border dimension (Art 69 E, par 4 of Lisbon Treaty).

If the decision on establishing European Public Prosecutor's Office is taken, there will be a need to determine the general rules applicable to the European Public Prosecutor's Office, the conditions for performing its functions, the rules of procedure, the rules governing the admissibility of evidence and the rules applicable to the judicial review of procedural measures taken in the performance of its duties.

Draft amendments of Eurojust Decision that are being discussed in the present are in line with the Lisbon Treaty. According to draft amendments each Member State shall designate a national correspondent for Eurojust and set up a Eurojust national coordination system to ensure coordination of the work. The national correspondents shall be responsible for the functioning of the Eurojust national coordination system.

It is clear to me that the future of Eurojust is closely linked with possible establishment of European Public Prosecutor. It is probably true that the two

bodies will have to work side by side. It is most likely that Eurojust will continue to work on the support and strengthening of the coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime. And it is likely that European Public Prosecutor will become a kind of 28th National Member and will sit in the College when the protection of the financial interests of EU is discussed or maybe College itself will act as the European Public Prosecutor and the prosecutors within the national offices of Eurojust will act as deputies of European Public Prosecutor and will represent European Public Prosecutor at national levels.

If and when the decision on establishing European Public Prosecutor is taken, the Member States will have to determine the 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, the rules of procedure 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. Given the diversified nature of criminal procedure codes of Member States the answer to these questions and the preparation of these rules represent a vast task.

I am firmly convinced that these are the reasons for Prosecutors General of EU to play a major role on European parquet and that there is an urgent need for closer involvement of Prosecutors General into EU structures. At the time being this is not the case. These are the reasons for our involvement in developing the European instruments in the fight against cross-border crime, terrorism, organised crime and crimes against financial interests of EU. It seems to me especially important that EU is drafting instruments that will make every day work of prosecutors more efficient and cost saving and will speed up their work. It is of great importance that Prosecutors General are involved into discussions and work on EU level. This way than they can influence the decision making process and stress the importance of the efficient implementation of EU instruments and the importance of the training of prosecutors.

The discussion at the 10th Eurojustice Conference in Portorož expressed a general consent for the idea of bringing prosecutors at the highest level closer to EU structures. But it was also stressed that the concept of the Eurojustice conferences will be continued in the present form.

In conclusion I would like to say that Eurojustice should continue to meet in autumn each year for seminar type of meetings. Prosecutors General of EU countries should begin to convene one meeting per year in April after the issuing of OCTA (in form of Prosecutors Public Task Force).

Slovenia will, based on its programme during the Slovenian presidency of the Council of the EU, organise the meeting of Prosecutors General of the EU Member States most probably in April this year. Decisions that affect our work are made in Brussels on daily basis but so far the Prosecutors General have not

participated in the negotiations. We have assessed that such meeting and such cooperation is necessary in view of numerous new instruments that have already been adopted and those that are in process of adopting and impose new assignments and competences on the prosecutors in the frame of international judicial system. Prosecutors are faced with practical problems when implementing new instruments and therefore it is extremely important to ensure their cooperation in the adoption phase of the documents that affect their work. This will guarantee that our arguments will be heard. Periodical meetings would assure the Prosecutors General to have regular overview of the activities concerning common matters. With the exchange of experience and good practice we will be able to contribute to the creation of effective instruments and the improvement of the existing ones. A similar need was detected by the police chiefs and therefore the Police Chiefs Task Force has regular meetings once during each presidency where they address current EU issues that effect their area of work. I believe that prosecutors should do the same. This way we will increase the importance and the influence of the Prosecutors General in the decision making process.

FERNANDO PINTO MONTEIRO
General Prosecutor of Portugal

50 years elapsed between the signature of the Treaty of Rome in 1957, which involved 6 countries, and that of the Treaty de Lisbon which applies to 27 countries.

Since the Treaty of Maastricht (1993), the economy no longer constitutes the Member States sole common objective, the main common interest now being the matter of judicial cooperation.

Not until the Treaty of Amsterdam (01.05.99) however did the Union make it one of its objectives to «offer citizens a high degree of security in an area of freedom, security and justice, allowing Member States to coordinate their activities in the field of criminal and legal justice through the prevention of -and fight against- racism and xenophobia», an objective which will have to be achieved mainly through the prevention of-and the fight against- transnational delinquency, terrorism, human trade, child abuse, drug and weapon trafficking, corruption and fraud.

The foundations for the inclusion of judicial matters as matters of common interest are further reinforced by growing globalisation and the progress of relations between member States with the gradual removal of the borders between them.

In an effort to enforce the Treaty of Amsterdam, the so-called Tampere Conclusions were drawn up (and adopted by the European Council on 15 and 16 October 1999), which might be considered the Union's first genuine political programme regarding criminal matters, seeing as these provide a fundamental boost to the development of legal cooperation in terms of criminal matters and constituted the basis for the Union's work in the field of Justice until the Hague Programme was approved in 2004 – strengthening freedom, security and justice in the European Union.

In addition, the aforementioned Tampere Conclusions gave rise to the creation of Eurojust, the reinforcement of the European Judicial Network and the principle of mutual recognition as a cornerstone for judicial cooperation between member States. With its institutionalisation by the Treaty of Nice (01.02.2003), Eurojust was given status as a Community agency.

The objective to offer citizens a high degree of security in an area of freedom, security and justice, codified in the Treaty of Amsterdam and developed and defined in the Hague Programme, lay down the foundations for a growing communitarisation of criminal justice.

The rise in organised and transnational delinquency is imposing cooperation between member States of increasing magnitude whilst providing new tools and novel means of cooperation.

It is common knowledge that the evolution of society in all its aspects, from economy to customs, technological advances or even crime, progresses faster than Laws do. Timeliness is essential; otherwise we may come to face what the author qualified as a backlash of reality against the Codes.

This is the context in which the figure of European Public Prosecutor comes into play. In the mid-nineties, a team of criminal law experts drew up a body of procedural and substantive rules on the request of the European Commission and Parliament, which constitute guidelines akin to a Penal Code and European criminal proceedings on a European level for the repression of offences harmful to the financial interests of the Community. This work which is known as Corpus Iuris, recommends the creation of a consolidated communitarian judicial area, typifying eight criminal offences and proposing the insertion into national systems of a European Public Prosecutor's Office, with delegates in each Member State, in charge of criminal investigation and prosecution.

In the year 2000 a proposal was presented before the Intergovernmental Conference in Nice for the creation of a European Public Prosecutor's Office destined to «the most effective fight possible against fraud and corruption in detriment of the financial interests of the European Union», the intention being to remedy the fragmentation of the European criminal law enforcement area and the inadequacy of classic judicial cooperation methods between Member States.

Nevertheless, the Intergovernmental Conference rejected said proposal as it considered that a deeper understanding of the practical implications of the creation of European Public Prosecutor's Office was required.

In continuation to these works, in 2002 the Commission presented the Green Paper on European Public Prosecutor and held an open court on the subject which gathered political representatives and delegates from the legal and judicial community of all Member States, and was attended by representatives of the Crown Prosecution office of the Republic of Portugal.

The Commission closed with the confirmation of the need to set up a European Public Prosecutor's Office. The Eurojust Project and the European Public Prosecutor's Office will complement one another. While the European Public Prosecutor's Office will consolidate criminal proceedings in a specifically communitarian, more limited area, Eurojust will be devoted to working with traditional cooperation tools in the broader area of serious kinds of crimes.

The Commission even presented guidelines for the Prosecution Service pursuant to the substantive and procedural schemes.

It is nevertheless true that the States were not unanimous with those guidelines; indeed, despite the majority of the States supporting the concept of the creation of the European Public Prosecutor's Office, some States rejected

the idea, considering among other things that the existing cooperation tools were sufficient with regard to offering solutions appropriate for the intended purpose.

It is therefore necessary to assess the current situation in terms of the protagonism of the European Public Prosecutor.

Now that several years have passed since the Treaty of Amsterdam and the Tampere conclusions, objective analysis leads us to the conclusion that despite the fact that the recent Treaty of Lisbon codifies, in its article 69E that «In order to counter the infractions that prejudice the Union's financial interests, the Council has the right to create, through regulations adopted in accordance with a special legislative process, a European Public Prosecutor's Office from Eurojust», several issues remain unresolved.

Up until now, unanimity has not been achieved with regard to the European Public Prosecutor's Office scheme or status; neither have any clear conclusions been drawn in terms of the added value of the European Public Prosecutor's Office, a matter which is linked to the problems pursuant to the relationship of this organisation with other European bodies like Eurojust, the OLAF and Europol, as is the need to avoid the multiplicity and the superimposition of structures.

All of these issues were reflected in the Treaty Project establishing a European Constitution, as well as in the different version thereof.

As is known, the Constitutional Treaty failed to enter into force.

The Treaty of Lisbon however maintains the standard that intended the creation and jurisdiction of the European Public Prosecutor's Office.

In the event that a policy of caution, in which progress is achieved in small steps, prevails, this would set forth a potential «enhanced cooperation» between a minimum of nine Member States.

Due to the anticipation of the failure to reach the consensus required for the unanimous constitution of the European Public Prosecutor's Office, the viability of a «two speed» judicial cooperation that allows the States that so desire (a minimum of nine) to cooperate amongst themselves on the basis of the European Public Prosecutor's Office creation project has already been established.

In the event that a «reduced» jurisdiction is chosen, aforementioned article 69E sets forth the main purpose of the European Public Prosecutor's Office to be the fight against offences that prejudice the Union's financial interests, although it leaves the door open to the fight against serious forms of crime of the cross-border kind.

On the other hand, the reinforcement of the functions of Eurojust (article 69D of the Treaty of Lisbon) may constitute a «trial» for a broader operation of the future European Public Prosecutor's Office.

Several citizens of Portugal, the country to which the signature of the Treaty Lisbon is partly owed, occupy positions of relevance within the European Union.

The President of the European Commission, the President of the College of Eurojust, the Public Secretary for the European Judicial Network and the President of the European Court of Auditors are all Portuguese.

All of the endeavours of this country lead us to the certainty that Portugal will play a relevant part in the institution of a future European Public Prosecutor's Office.

For this concept to come to fruition it is necessary to proceed with the small- step policy, the only one to appear viable to me given the divergences that continue to exist.

There is no doubt that the difference between the legal systems of the various countries will continue to exist, as will their cultural differences, which implies major obstacles.

We must not let these obstacles stop us and we must not surrender as we patiently build the future.

I would like to leave up in the air any questions that seminars like these will no doubt help clarify.

RÉGIS DE GOUTTES
Premier Avocat Général à la Cour de Cassation. France

It is a great honour for me to talk to you on behalf of the Public Prosecutor of the French Court of Cassation within the framework of its international seminar, and I would like to thank you enormously for inviting me.

This seminar is particularly welcome as it was organised in the month after the signing of the Treaty of Lisbon on 13 December and, pending its entry into force, was organised for the coming year.

None of us had any doubts that the Lisbon Treaty marked an important stage in the construction of the European Union and, more particularly, in the construction of a «European judicial areas», that harmonised area made so necessary by the opening up of borders and freedom of movement, something that could no longer be reconciled with the maintenance of «judicial borders», above all in criminal matters.

Looking in particular at the development of Eurojust and the project to create a European Public Prosecutor, which is what is of interest to us here, I think it is useful to take the opportunity in this seminar to talk again about three issues:

– 1st issue: What is the current status of Eurojust and the project to create a European Public Prosecutor?

– 2nd issue: What does the Treaty of Lisbon say in this respect?

– 3rd issue: What is the outlook and expectations for the future in this area?

I. 1ST ISSUE: WHAT IS THE CURRENT STATUS OF EUROJUST AND THE PROJECT TO CREATE A EUROPEAN PUBLIC PROSECUTOR?

A) In relation to the project to create a European Public Prosecutor, its history, as we have seen, is already quite long, as it was initially conceived by the «Corpus Iuris» for the protection of the financial interests of the European Union, published in 1999 under direction of Professor Mireille Delmas-Marty, then returned to and expanded in the «Green Paper» of the Commission of 11 December 2001, which fully codifies and defines the powers and operating method of the European Public Prosecutor. This matter was returned to in the Constitutional Treaty in the form of a Public Prosecutor to be created from Eurojust, via a decision taken unanimously by the Council and after approval from the European Parliament.

We will see in this respect that the new Treaty of Lisbon was inspired, to a large extent, by the plan for a Constitutional Treaty for Europe.

However, as things stand it must be said that since the failure of the Constitutional Treaty in 2005, and with the expansion of the European Union to 27 Member States, the idea of a European Public Prosecutor has been put on hold or at least had its progress halted, despite the efforts of the Commission.

B) In terms of Eurojust, whose creation dates back to the Treaties of Tampere in 1999, and Nice in 2001, and whose affective application began in 2002, we can say that an assessment of this judicial cooperation unit can be broken down into «strong points» and «weak points»:

1) The strong points of Eurojust are:

a) firstly, its ambitious objectives, which involve encouraging and improving judicial cooperation between national authorities; facilitating mutual assistance in judicial matters and supporting the competent authorities in strengthening their judicial investigations and actions;

b) secondly, another strong point is the existence of a «college» of national magistrates which, rather than being a mere grouping of national professionals in the criminal justice field, has the elements of a type of European judicial agency;

c) thirdly, it has the benefits of favoured communication with the anti fraud office (OLAF) and Europol, as well as the signing of various agreements for cooperation and the exchange of data with third party countries and external bodies;

d) Finally, it boasts a number of practical successes:

- among which we can find numerous bilateral cases, but also a growing number of multilateral cases, such as the sinking of the «Prestige» in November 2002, which involved three countries (Spain, Greece and France), and in which case the Eurojust College adopted in 2005 a collective decision that Spain was the best country to hold the case.
- but also the system for the exchange of data relating to the management of cases and their deadlines.

2) I would list three weak points of the Eurojust system:

a) on the one hand, actions by National Members, like that of the College, are carried out on a consensual basis, national judicial authorities not having the obligation to submit to requests from Eurojust or its National Members, and said solutions can be nothing more than mere pressure applied by counterparts;

b) also, so that members can be conferred real judicial faculties, such as the right to issue an international letter rogatory or the authorisation to

carry out a supervised handover at a national level, they need to obtain the approval of all Member States, and said judicial authority must be recognised by the remaining Member States. Accordingly, few states have used this option which, nevertheless, is the best way to strengthen the task of coordinating and boosting Eurojust;

c) finally, the operational cooperation of Eurojust with the OLAF and Europol is notable for its complexity, given that these three bodies have different operating rules and guidelines.

Also, certain bilateral cases processed by Eurojust could also be processed by «liaison judges», of which there are currently many in Member States.

It is therefore necessary to take these weaknesses into consideration with the aim of seeking ways and means to give a further boost to Eurojust.

II. 2ND ISSUE: WHAT ARE THE NEW PROVISIONS IN THE LISBON TREATY RELATING TO EUROJUST AND THE PLAN TO CREATE A EUROPEAN PUBLIC PROSECUTOR?

A) In relation to Eurojust, article 69 H (83) of the Treaty of Lisbon contains two essential innovations:

1) The first relates to decision making by qualified majority, and not by unanimity, as was the case beforehand, in line with the main advance contained in the new Treaty, which affects the entire area of judicial cooperation in penal matters.

For Eurojust, this possibility of adopting decisions by qualified majority is an extremely significant step forward. It even goes way beyond the «enhanced cooperation» mechanism, as it allows for the inclusion of more states.

Accordingly, we can say in this respect that the Treaty of Lisbon has been very kind to Eurojust.

2) The second innovation comprises the assignment of greater powers of judicial cooperation and coordination, especially in respect of the implementation of criminal investigations and judicial actions carried out by the competent national authorities, and the resolution of conflicts of jurisdiction, as well as cooperation with the «European Judicial Network» and its «contact points» designated by Member States.

B) In respect of the project to create a European Public Prosecutor, article 69 I (86) of the Lisbon Treaty includes three very important indications:

1) Firstly, the Council can create a European Public Prosecutor based on Eurojust through the adoption of regulations;

2) Secondly, the Council will rule unanimously on this matter, subject to approval by the European Parliament.

Nevertheless, in the event of disagreement there is the possibility of resorting to «enhanced cooperation» at the request of nine Member States, something which has interesting possibilities;

3) Thirdly, the European Public Prosecutor will only be competent in matters involving the protection of the financial interests of the Union. In order to expand said competences to serious cross border crime, the Council must rule unanimously subject to approval from the European Parliament, and after consulting the Commission,

resorting to «enhanced cooperation» not envisaged here, making such an expansion of competence much more random.

III. 3RD ISSUE: WHAT IS THE OUTLOOK FOR THE FUTURE?

A) In light of the Treaty of Lisbon, it should be stated:

1) that this new Treaty, like the former Constitutional Treaty, assigns primacy to Eurojust, to which it entrusts greater powers and which is the necessary springboard towards a European Public Prosecutor;

2) that, on the contrary, the project to create the European Public Prosecutor, depending in principle on a unanimous decision by the Council, and currently limited to the fight against crime involving the financial interests of the Union, is relegated to second place as a means of creating a strengthened Eurojust.

B) Under these conditions, taking into account our interest in the project to create a European Public Prosecutor, we feel it appropriate to prioritise our resources on the preliminary issue of strengthening Eurojust and rationalising its relations with competent European bodies in similar fields.

In effect, we need the Eurojust unit (which, we should remember, has certain weaknesses), improving its operation if we need to move towards the creation of a European Public Prosecutor.

C) According to this viewpoint, France, along with other Member States, has seen fit to support the draft Decision by the Council currently under consideration on strengthening Eurojust and clarifying its relations with the European Judicial Network.

– The objective of this project is basically to strengthen the powers of Eurojust and the European Judicial network, as well as give its additional func-

tions greater coherency, taking into account the fact that cooperation in penal matters has evolved greatly since the creation of these two bodies.

– The measures put forward refer especially to the following points:

1) the creation of an emergency coordination cell allowing Eurojust to intervene in situations categorised as urgent;

2) the expansion of the Eurojust College's power of intervention when there is a blockage, when the national authorities affected and National Members cannot reach an agreement;

3) the creation of a common basis for the granting of judicial powers to National Members as judicial authorities, such that the execution of this power is no longer at the discretion of Member States;

4) the setting up of a national system for the coordination of Eurojust in each member state, particularly with the aim of providing Eurojust with details of criminal investigations on a national level;

5) the obligation, for national authorities, to pass on data to Eurojust, in particular in terrorism related matters, to allow this unit to find links between pending cases;

6) strengthened cooperation with third party states, enabling Eurojust not only to contact liaison judges of a third party state but also to coordinate the execution of cooperation requests coming from a third party state, and which must be executed in various Member States;

7) finally, improved relations between Eurojust and the European Judicial Network mean, on the one hand, that the Secretary of the European Judicial Network is included in the administration of Eurojust, as was decided in 2002, and on the other, an obligation is created for both bodies to establish a reciprocal information system, also creating an intersection on a national level between both structures, such that cooperation is facilitated and properly directed to national authorities through Eurojust or the European Judicial Network, according to the characteristics of each specific case.

All of these measures should make it possible, in our opinion, to strengthen the effectiveness of the operational function of Eurojust and, at the same time, prepare the ground for a future European Public Prosecutor.

Finally, I should add that, with the same objective, we must not forget the role that other players in the field of judicial cooperation, and all parties participating in the necessary «mutual trust» and common judicial culture, can play: liaison judges, legal training schools and European jurisdictional networks such as those already in existence, for example between Presidents of Supreme Courts and those already planned for Public Prosecutors, as per the upcoming initiative of the Public Prosecutor of the French court of cassation.

ROSA ANA MORÁN MARTÍNEZ
Prosecutor at the International Cooperation Section of the Technical Secretariat of the General Prosecutor's Office

1. Introduction

The invitation to present the position of the Spanish General Prosecutor's Office on the issue of a European Public Prosecutor at this round table is one of the greatest challenges I have had to face in my years with the International Cooperation Section of the Technical Secretariat, given the status of my participating colleagues and the relevance of the topic we will be discussing. Accordingly I would like to thank the coordinators of the seminar, my colleagues Jorge Espina and Isabel Vicente for their proposal to my boss, the General Prosecutor, for trusting me to put forward the ideas of the Public Prosecutor's Office heads.

The task entrusted to me is to give a few pointers as to the position of the Spanish General Prosecutor's Office in relation to the future European Public Prosecutor, and bring to the debate some key issues, albeit of course non exhaustively. I will seek to be as original as possible, which I am sure I, and all of us, will manage, as the institution itself is an original one and, as Hölderlin said »We are original because we do not know», and it is true that we know little about the potential future of this institution, to the point of not even knowing if it will come to pass.

In any event, what is clear is that the future of this institution depends on us, the contributions that we, as magistrates, as EU officials, as politicians, as Public Prosecutors, make while the Treaty is being ratified. Thus it is important that we all start the reflection process and can convince European society of the added value of an institution such as that proposed by the Treaty.

2. Innovations in the Treaty relating to the Area of Freedom, Security and Justice

All advances in what was, at least until the Lisbon Treaty enters into force, the third pillar, comprising justice and interior matters, the entire construction of the European area of freedom, security and justice have been in the intergovernmental field, always respecting the absolute sovereignty of Member States in terms of criminal jurisdiction. Therefore, starting from the conservation of state sovereignty for the definition and punishment of crime, one could not talk of real integration in this respect.

European progress in criminal matters has traditionally been reduced to strengthening formulae for cooperation, and this aspect, strengthened cooperation, is essentially that contained in the future Treaty, in Art. 67.3 of the con-

solidated version after Lisbon, which states: *«The Union will strengthen to guarantee a high level of security, via means of preventing crime, racism, xenophobia and the fight against them, measures of coordination and cooperation between police and judicial authorities and other competent bodies, as well as through the mutual recognition of judicial resolutions in criminal matters, if necessary, via the coming together of criminal legislations.»*

However, and although not mentioned in this generic reference of article 67, where however it continues to insist on two of the cornerstones of the development of the judicial area, which are the principles of mutual recognition and approximation of criminal legislations, Treaties represent a veritable revolution, a real sea change in terms of the exclusivity of state sovereignty in penal matters. This point is represented in the new Treaty by the mention of a European Public Prosecutor as an EU body with capacity for action throughout the whole of Europe. Thus, Art. 86 of the future Treaty states:

«To deal with infractions that damage the financial interests of the Union, the Council may create, via regulations adopted in line with special legislative procedure, a European Public Prosecutor from Eurojust»....

What is more, it will be a real change if this Public Prosecutor, intended initially only to defend the financial interests of the Union, ends up having power to investigate serious crimes affecting various Member States, which is an express possibility as per Art. 86.4 of the Treaty, which states:

«Simultaneously or subsequently, the European Council may adopt a decision modifying section 1 with the aim of expanding the powers of the European Public Prosecutor's Office to the fight against cross border serious crime, consequently modifying section 2 as it relates to the perpetrators and accomplices of serious crimes that affect various Member States.»

The modification of the Treaty is not limited to that laid down in Art. 86, but also affects the text of article 325 of the future integrated Treaty, which corresponds to Art. 280 of the currently valid Treaty. Art. 280, which is an express obstacle to the creation of a European Public Prosecutor inasmuch as what measures to take against fraud, establishes limitations in section 4, which states that *«Said measures do not refer to the application of national penal legislation or the national administration of justice».* This phrase has been removed in the Lisbon Treaty, which in turn adds an express reference to the possibility of action against fraud through Union bodies. That which has been agreed goes well beyond the initial proposal from the Commission to add an Art. 280 bis contemplating the creation of a European Public Prosecutor, as it even envisages the creation of other bodies or institutions in the future.

The actions of this European Public Prosecutor which, as Art, 86. 2 states: *As applicable, in cooperation with Europol, will be competent to discover the perpetrators and accomplices of crimes against the financial interests of the Union defined in regulation as per section 1, and to initiate criminal procee-*

dings and request the commencement of an oral hearing against them. It will bring, before the competent jurisdictional bodies of Member States, the criminal action relating to said crimes» , this being the first significant transfer of jurisdictional or quasi jurisdictional competences in criminal matters.

It is true that the greater level of transfer of national competences will depend essentially on the subsequent development of this European Public Prosecutor in regulations establishing its status, structure, conditions for carrying out the role, organisation, principles of action, procedural rules applicable to actions, jurisdictional control formulae etc. Key matters that the Treaty does not deal with, being those subject to debate on the Commission's Green Paper[4] the *«Green paper on the penal protection of financial interests and the creation of a European Public Prosecutor»,* whose sensible reflections could serve as a basis for the debate we are currently holding.

To reach an agreement on the institution, a unanimous agreement making it possible to create the body in general terms, or at least an agreement sufficient to create it through enhanced cooperation, it is vital to debate the «how». There are no absolute or unconditional political positions in this matter, because any position necessary involves a debate on the structure and procedures for the actions of the European Public Prosecutor. To reach an agreement, it is therefore necessary to carry out a joint reflection, and this seminar is a good start to this potentially long and costly debate, and will be the first occasion for key players in the Administration of Justice and the Union to discuss the position of the European Public Prosecutor after being referred to in the Treaty of Lisbon.

There are many topics to discuss – all you need do is look at the number of questions deriving from the Commission's Green paper to conclude that it is impossible to deal with them all at this time. The various tables have been looking at different matters, and our contribution to this table must also, of necessity, be limited. The reflections of the Spanish General Prosecutor Office at this time cannot focus on analysing the possible effectiveness of this position for the defence of financial interests, because this topic is disputed between representatives of the OLAF and its supervisory board, or on a historic vision of the entire process, or the theoretical examination of the procedure for its creation, already expressed in the debate. Our contribution should mainly focus on looking at how this Public Prosecutor will interact.

In 2002, the Spanish General Prosecutor's Office organised, alongside the OLAF, a meeting to deal with the questions deriving from the Green paper. This debate, in which I was lucky enough to participate, resulting in the report

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[4] Green paper on the penal protection of community financial interests and the creation of a European Public Prosecutor, presented by the Commission on 11 December 2001. COM (2001) 715 final. {0><}0{>http://ec.europa.eu/anti_fraud/green_paper/document/green_paper_en.pdf

drawn up by the Spanish General Prosecutor's Office, and sent on 11 July 2002 to the OLAF as a further contribution to the dialogue under way. This report, which can still be consulted on the OLAF web site, contains some reflections on the compatibility of the European Public Prosecutor with the Spanish system for the administration of justice, and which remain valid, although this period has seen changes both to the approach to the position of a European Public Prosecutor and our national law, allowing for new considerations to be brought into play.

From this starting point, I would like to introduce the following topics into the debate:

- Creation from Eurojust
- Structure and operation of the European Public Prosecutor

3. **Creation from Eurojust**

A speech made by Hans Nilsson, from the Public Secretariat of the Council, at the Eurojustice conference held in October 2000 in Santander, when the debate about the creation of Eurojust was just beginning, showed that in terms of the fight against organised crime in Europe there were two ideologies, that of maintaining the idea of strengthening cooperation between the competent authorities, and that seeking to harmonise regulations and the creation of supra-national institutions. The creation of Eurojust, announced then[5], was the meeting point between these two ideas: for some Eurojust was the beginning, for others the end result.

After these seven years, and all the ups and downs of the process of European construction, there was evidence of a certain triumphalism for those for whom Eurojust was merely the beginning. If the European Public Prosecutor is eventually created, then clearly Eurojust is not the end, and neither possibly is the European Prosecutor. There are always more ambitious viewpoints proposing the construction of a common European jurisdiction in criminal matters.

Perhaps we are once again at that meeting point where for some a Public Prosecutor with exclusive competence in terms of financial interests is the end, and for others the beginning of a body which will gain greater powers in terms of trans-national organised crime, and which could act before European criminal courts to judge this type of crime, as the next step.

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[5] In October 1999 the Council of Tampere authorised the creation of Eurojust. The Commission announced its creation on 22 November 2000. COM (2000) 746 final. In this area, initially the Provisional Unit of Eurojust was created in a ruling by the Council of 14 December 2000. Until finally the Council approved the decision of 28 February 2002 «creating Eurojust to strengthen the fight against serious crime».

In any event, the first clues given by the Treaty are that the creation of the European Public Prosecutor will be carried out from Eurojust. This position of Eurojust, as the seed for the creation of an institution with greater and very different powers was also referred to in Art. III 274 of the failed constitution, but despite continuing in the new text, it is not easy to interpret the meaning of this phrase. In principle, various questions arise:

– Should the European Public Prosecutor have a structure similar to Eurojust?

– Will Eurojust lose its coordination powers inasmuch as these are assumed by the European Public Prosecutor?

– If we end up getting a general European Public Prosecutor for all states, with competence to hear all serious cross border crime, will Eurojust continue to exist?

We should not forget that Eurojust is also referred to in the Treaty of Lisbon, specifically consolidated in Art. 85 of the final consolidated version, which describes its functions as *«the support and strengthening of coordination and cooperation between national authorities responsible for investigating and pursuing serious crime affecting two or more Member States, or which should be pursued according to common criteria».*

But Eurojust is not a conditional, nor suggested as a temporary structure or a step towards the creation of a European Public Prosecutor, but appears to be an institution intended to last, and at this time in particular is being encouraged. As we know, the Council is currently debating a proposed modification to its legal basis, with the aim of granting it greater powers.

The Commission effectively announced in 2006 that it was preparing a Communication on the future of Eurojust and the European Judicial Network (EJN). After a reflection period of more than a year, with contributions from Eurojust and the EJN[6], with external contributions such as those, among others, put forward at the Seminar organised in Vienna in September 2006, the Commission finally published and sent to the Council and the Parliament its Communication dated 23 October 2007 on *«The role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union.»* In this, the Commission announced the need to mo-

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[6] Some of the various contributions to this extensive debate are:

Conclusions of the Vienna Seminar of the 25th and 26th of September. Seminar on the future of Eurojust and the EJN in 2020.

EJN Vision Paper approved at the plenary meeting in December 2006

Contribution by Eurojust to the Commission's communiqué issued on 20 September 2007.

Conclusions from the Lisbon Seminar, «Eurojust: Navigating the way forward» EUROJUST 63. EJN 38.

dify the Eurojust Decision, with the main object being to grant greater powers both to National Members and the College, as well as establishing new bases for its relationship with the EJN, Europol and OLAF and liaison Magistrates.

On this basis, various states have submitted to the Council a proposal to modify and not replace the Eurojust Decision, known as the Eurojust II project, and another document, project EJN II, for the full modification and replacement of the Joint action which created and regulates the European Judicial Network, of 29 June 1998.

Therefore the Union, at the same time as launching the concept of a European Public Prosecutor, is seeking to strengthen its originating body, essentially granting greater powers to the College and its National Members, and seeking to better connect this body with those it interacts with in the process of coordinating international judicial cooperation: the EJN, OLAF, Europol, liaison judges etc.

Of course the initiative was necessary, Eurojust's effectiveness depending to a great extent on the reform of the powers granted to the College and National Members, and has thus been enthusiastically received by most Member States. However, despite considering that this is a generally positive initiative, being particularly useful, for example, in the provision for the creation of an urgent response cabinet - a type of standing Supervisory team - or the improvement of systems for exchanging information, from a technical point of view it is necessary to look more carefully at where the powers of an institution such as Eurojust could lead.

In the dispute between the creation of a European Public Prosecutor with its own investigation resources, or the concept of a body to coordinate penal judicial cooperation, Nice saw the proposed creation of Eurojust as a body to strengthen cooperation through its coordination. However, the Treaty has already put forward the idea of a true investigative and accusatory body – the European Public Prosecutor, with Eurojust essentially intended to facilitate its evolution and conversion into a European Public Prosecutor's Office. It isn't a question of creating bodies by an alluvial process, but rather reflecting and moving on a step by step basis to create a fertile environment and experience for not more but better institutions.

I do not have exhaustive knowledge of the Council's evolution in the proposed reform of the Eurojust ruling, but I would like to say that a modification of the scale proposed, which grants real investigative powers to National Members will require, in Spain and other countries I believe, an in depth reform of its national regulations. It should be recalled that in Spain, although the National Member must originally belong to the judicial or prosecution profession, he loses this category after being appointed a National Member and

starting to report to the Ministry of Justice[7]. It is unimaginable in our system for a body located in this way in the executive ambit to have functions such as those proposed for the National Member to initiative investigations, order seizures, controlled handovers etc. The concept of judicial competences by delegation is also a particularly complicated concept in our system. Accordingly any reform of the decision must by necessity involve Eurojust coming close to national Public Prosecutors, thus becoming the true source of a European Public Prosecutor's Office.

Also, the Eurojust proposal seeks to expand, but also to standardise, the different powers of National Members, so initial recognition could be frustrating if not impossible. Thus in the wording of Art. 9.6 of the new proposed Eurojust decision it is established that when constitutionally, in relation to the division of competences between courts and Public Prosecutors, it is impossible to confer on National Members any of the proposed powers, at least the possibility of asking the competent authority to do so is recognised. This means giving up on the idea of equalling the powers of National Members. We think it is necessary to assess and consider whether it would not be a good idea to lower expectations about the powers to be granted to National Members in favour of greater uniformity between all of them.

I would also like to remind you that, despite work continuing on the modification to the Eurojust decision, what is true is that the Lisbon Treaty states in article 85.2 that:

«Within the context of the criminal actions covered in section 1, and without prejudice to Art. 86, formal and procedural acts will be carried out by the competent national officials».

This provision is difficult to square with the proposal for a decision that could enable a National Member of Eurojust to adopt a formal procedural act such as the emission of a letter rogatory, a seizure or authorisation of a controlled handover. It is true that the different concepts of what should be understood by criminal procedure in the European Union are also concepts of variable geometry, but a more in depth look should be taken at each of these new powers of National Members.

All these obstacles relating to the powers of National Members will not apply to the European Public Prosecutor if the approach to its structure and organisation is in line with the proposal made in the Commission's Green Paper, in which the European Public Prosecutor would act through the national Public Prosecutors themselves, which will be appointed as representatives of the European Public Prosecutor's Office. Furthermore, as provided for,

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[7] Art. 1. 2 of law 16/2006 of 26 May, regulating the status of National Members of Eurojust and the relations of this body of the EU, states «The National Member of Eurojust is related organically to the Justice Ministry».

and depending on the workload or the option chosen, these representative European Public Prosecutors could combine their role as a European Public Prosecutor with that of a national prosecutor in other cases not falling within the jurisdiction of the former.

The formula determining the status, structure and functioning of the European Public Prosecutor is therefore the very foundation of any agreement as to its creation.

4. Status, structure and operation

For the determination of specific matters relating to structure and competence, article 86.3 of the future Treaty refers to the regulations which create them. The impossibility of reaching an agreement prevented a more concrete structure, as the Commission proposed after the green paper reflection period[8], planning that the treaty text itself should refer to basic issues such as guarantees of independence and impartiality, as well an appointment procedure which ensures transparency and balance between community institutions.

Therefore the question remains open. The Commission's green paper proposed that appointments be carried out by the Council by qualified majority at the proposal of the Commission, and subject to a favourable dictum from the European Parliament. The conditions for appointment, reflected in the treaty, required a person offering a guarantee of independence, meeting the conditions required for the carrying out, in his respective country, of the highest judicial functions.

The guarantee of independence also took the form of two essential matters – the impossibility of accepting any instruction and the establishment of a non renewable deadline for executing related cases together and a transparent procedure, with the intervention of the Court of Justice, for dismissal. All these issues are keys to guaranteeing an agreement on the institution, and the option contained in the green paper appears perfectly balanced.

What is true is that in the denomination of the institution, a European Public Prosecutor is no longer referred to, as in the green paper, but rather a European Public Prosecutor's Office. This fact, alongside the reference to its creation from Eurojust, seems to reflect a certain desire to create a collegiate body in which there would undoubtedly be a chairman or director appointed with guarantees of transparency and balance with respect to the opinion of institutions, but with skills for the management of a body that could probably

[8] See point 4.2 on the follow up report on the green paper on the protection of community financial interests and the creation of a European Public Prosecutor of 19 March 2003. http://ec.europa.eu/anti_fraud/green_paper/suivi/suivi_en.pdf

operate with certain characteristics of a collegiate body requiring, in certain circumstances, a collective decision to be made in line with any operational rules established.

This possibility clearly has little to do with the concept of the General Prosecutor's Office in Spain, and the general idea of Public prosecutors, as except on very rare occasions, the General Prosecutor's Office is an essentially hierarchical body, making it unlike Eurojust. Accordingly, in principal the Spanish General Prosecutor's Office would be more in favour of a hierarchical and decentralised structure, similar to the proposal in the green paper, pursuant to which the European Public Prosecutor's Office, rather than a collegiate body, would be formed by a European Public Prosecutor as a director and a series of delegates that, in line with the proposal in the green paper, would be Public Prosecutors from Member States, and who would act in line with the principle of unity of action, reporting hierarchically to this European Public Prosecutor.

The articulation of this principle of hierarchical dependency, especially if the proposal of compatibility of the functions of a European Public Prosecutor with those of the national Public Prosecutor could be carried out by taking into account the structure of the Spanish General Prosecutor's Office, which has significant experience in the specialisation and creation of Delegate Public Prosecutors. These delegate report to both the Chief Public Prosecutor of the territorial Prosecution service they are covered by, and the head of the Special Public Prosecutor's Office they belong to. Experience shows us that there are certain difficulties but precisely thanks to this experience, we know that such a proposal is perfectly possible.

Delegate European Public Prosecutors will retain their own status and act with their own competences in relation to internal actions, encouraging the action of the European Public Prosecutor, who will act as a coordinator, or rather director of these procedures, so it won't be necessary to standardise the functions of the different Public Prosecutors in the different states, but rather each one would act pursuant to the rules governing criminal procedures in their own countries.

This formula does not appear likely to cause excessive difficulties or generate the possibility of the delegate European Public Prosecutor acting in certain circumstances outside of his territorial ambit subject to the express authorisation of the European Public Prosecutor, and in cooperation with the European Public Prosecutor of this state. In a European judicial area with its basic operating principle of mutual recognition, and with joint investigation teams already in place, this option should not face too many obstacles.

More difficulties arise when it comes to choosing the place of trial. Given that one of the main difficulties facing the fight against community fraud or organised cross border crime is the fragmentation of jurisdictions, the idea of

the European Public Prosecutor has as one of its main objectives that of overcoming this dispersion, resorting at each time to a single national jurisdiction, best suited to hear the case.

At the moment, cases of jurisdiction conflicts have no solution other than the application of the international *ne bis in idem* principle, as regulated by articles 54 et seq of the Shengen Agreement Application Convention (CAAS), which in many cases does not avoid a double trial or, of course, the fragmentation of cases. Also, the decision creating Eurojust gives this body the option of making recommendations to the competent state authorities as to the best state jurisdiction to hear a case. Eurojust even has guidelines which cover which criteria this proposal should be based on.

Of course in a Europe with non standardised penal jurisdictions - not in terms of the definition of crimes, punishments or criminal procedures, the decision that one state and not another should hear a specific case is by no way minor, and the possible impact on the fundamental rights of accused and victims is one of the key obstacles to enabling the European Public Prosecutor's Office itself, without adequate common rules, to decide the jurisdiction before which the oral hearing should be heard.

The Green Paper already defended the need for the European Union to establish a series of criteria for the determination of the competent jurisdiction. This issue is vital above all for states linked to the principle of legality, and probably the creation of a European Public Prosecutor's Office must be indivisibly linked with the establishment of these criteria, which must be mandatory and not merely guidelines.

Another of the options put forward by the green paper is the assignment of the decision to a community body. This would involve subsequently regulating procedures for transferring jurisdiction and procedures.

These and many other questions have been raised and will be debated over the next few days, such as the treatment of mixed cases, the judicial control of the actions of the European Public Prosecutor, the validity of evidence obtained by the Public Prosecutor in other states etc. All of this should be agreed, as was stated, before the European Public Prosecutor's Office is created, and the solution must come from a combination of criteria seeking effectiveness and respect for fundamental rights, but also starting from the need to find a formula capable of respecting the diversity and legal traditions of each state.

Whether the European Public Prosecutor's Office becomes a reality or not, and how quickly it is established, will depend on a range of necessary circumstances, which could lead to consensus as Article 86 requires unanimity of the Council and the adoption via regulations adopted as per a special legislative procedure. The possibility of setting up a European Public Prosecutor's Office using the method of strengthened cooperation brings greater hope of

seeing this body operating, and is perhaps the most reasonable formula, following the traditional philosophy of the Schumann declaration of «step by step» construction.

The initial creation of a partial European Public Prosecutor's Office through strengthened cooperation, and perhaps only with initial competence to hear crimes against the financial interests of the Union will serve as a test bench to convince sceptics of its benefits. However, on the other hand respect for differences is the basis for the construction of the area of freedom, security and justice, as per Art. 67, and finding a formula capable of respecting the diverse European legal cultures is the only way of getting countries to sign up to it. It probably isn't the easiest route, but the aim should be to achieve a common European Public Prosecutor's Office and not to follow the route of strengthened cooperation - easier but certainly frustrating for the construction of a true European Union.

The Lisbon Treaty gives us the chance. This morning Antonio Machado has been quoted repeatedly, and I would also like to close my speech with some words by him on the need to seize the day:

… I asked the dying April afternoon,
«Does happiness finally come near to my house?»
The April afternoon smiled, «Happiness
passed by your door,» and then, sombrely,
«It passed by your door. It doesn't pass twice…»
(Del Camino. Antonio Machado)

Round Table IV

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Introduction of the Round Table IV

Over the years since their foundation the European Communities and now European Union have –apart from integrating new Member States– acquired more and more competencies in practically all political fields, with one important exception. Indeed, so far the European Union does not dispose of a true and comprehensive criminal law, nor a code of penal procedure nor a criminal court.

Still today the majority of criminal law matters fall under the prerogative of national sovereignty of the Member States who are only gradually prepared to transfer investigative and criminal elements to the European level. Moreover, due to the different national legal systems, penal provisions have been developed only fragmentarily on account of political necessity, such as the European arrest warrant, being an intergovernmental agreement not yet adopted by all Member States.

The debate about a European criminal law and criminal prosecution was roused mainly by the question of how to protect the European financial interests, when –with a growing budget and the opening of the internal market– transnational misuse and fraud rose alarmingly. But tools for preventing and combatting this phenomenon were very limited. From 1989 onwards a number of legal provisions proposed by the Commission were often hesitently treated by the Council, not to speak of being adopted.

On the request of the European Parliament in 1995 the Commission set up an international group of law experts to examine the feasibility for harmonising the scattered system of conventions and protocols, most of them not ratified by the Member States. The outcome of the expertise under the direction of Professor Mireille Delmas-Marty was the publication of the *Corpus Juris*

in 1997, proposing penal provisions for the purpose of protecting the financial interests of the European Union[1].

We have the great pleasure to welcome amongst our speakers of today one of the co-authors of the *Corpus Juris* –Professor Enrique Bacigalupo Zapater– as well as two other outstanding personalities– Professor John Vervaele and the State Advocate Mr Fernando Irurzun Montoro –who have worked since then on the scietific and practical development of the Corpus Juris.

Why were the financial interests chosen as the topic for the expertise? The answer is given in the Explanatory Memorandum of the *Corpus Juris:* «The budget, defined as «the visible sign of a true patrimony common to the citizens of the Union», is the supreme instrument of European policy» [2]

The Memorandum analyses and elaborates on three options that had been developed to remedy the main reasons for the lack of a just criminal law system on Community level : the principles of assimilation, cooperation or harmonisation, or their combination. Based on the judgement of the Court of Justice in 1989 –the famous Greek or Yugoslavian maize case[3]– sanctions and penalties had to be «effective, proportianate and deterrent». Although these guidelines found their expression in Article 209 A of the Maastricht Treaty progress could only be noted as to administrative law and sanctions – the criminal justice still lags behind. Neither the Amsterdam Treaty of 1998 nor the Nice Treaty of 2001 –despite some advances– provided a true solution of the problems in their Article 280, former Article 209A.

Meanwhile a number of bodies have come into existence in the Union, most of them on intergovernmental level, such as Europol, Eurojust, the European Judicial Network –and OLAF within the Commission. But after the collapse of the Constitution Treaty legislation for creating a true area of freedom, security and justice has still to be enacted. Hopes are set now on the Reform Treaty of Lisbon.

About ten years after its publication the study of *Corpus Juris* may experience a revival, although it has already served as an important reference for researchers and practitioners throughout the years. In its 35 rules, each of them completed by remarkable comments, it sets out a model for a European penal code, without neglecting the demands of sovereignty and subsidiarity of the Member States.

In its two parts on Criminal Law[4] and on Criminal Procedure [5]respectively the proposed rules seem apt to be transformed into European law.

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[1] *Corpus Juris* portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne,Ed. Economica, 1997.

[2] *Corpus Juris*, p. 12.

[3] *Corpus Juris*, p.14.

[4] *Corpus Juris,* p. 44 and following pages.

[5] ***Corpus Juris*** p. 80 and following pages.

The most widely and controversially discussed example represents the introduction and creation of a European Public Prosecutor in Rule 17 and the following Rules. Meanwhile the Commission has published a Green Paper on this subject matter.

Now, 15 years after the Maastricht Treaty's three columns-structure will be abolished by the Lisbon Treaty a wide field of legislation in criminal law matters seems to have been opened.

In the course of the Round Table IV of this seminar we will be taught by our speakers how far the *Corpus Juris* has influenced the new Treaty.

Questions arise on the consequences of the revised Article 280, where the criminal law reservation has been cut off. The European Public Prosecutor's Office shall be embodied and conferred to Eurojust. Europol will get operational tasks in cooperation with national police forces. Which will be the future role of OLAF with its rich experience in detecting and combatting fraud and irregularities detrimental to the European budget?

Light will be shed on these and other questions –I am sure– by our distinguished speakers.

ENRIQUE BACIGALUPO
Magistrate of the Supreme Court of Spain
Professor of Criminal Law

It seems to be impossible to address the *future European Public Prosecution* Service without first taking into consideration the position of Criminal Law in the institutional structure of the EU and without taking as reference the *Corpus Juris introducing penal provisions for the protection of the financial interests of the European Union,* which is the first document that explained the concept of the European Public Prosecutor for the protection of the financial interests of the EU.

The original idea of the Treaty of the European Economic Community completely excluded criminal law from the powers of the Community. However, since the Judgment of the Court of Justice delivered on 21.09.1989 (known as the Greek maize case) the Community has implemented several strategies[6] which have included, with various degrees, criminal law as a means of protecting its financial interests. Progress made in European integration has determined a parallel increase of the role of criminal law, as its reference framework has been the notion of an *area of freedom, security and justice* since the 1997 Treaty of Amsterdam (art. 29).

The *Treaty of Lisbon,* which amends the Treaty on the European Union and the Treaty establishing the European Community, has strongly promoted the establishment in the medium or long term –this will depend on the requirements as seen by the Parliament and the Council– of European Criminal Law. To a large extent, the Treaty has designed the legal basis (one could say constitutional) of the European Union to implement a European criminal legal scheme to guarantee a common area of freedom and security, in accordance with art. 2 TEU, based on three points:

– M*utual recognition* of judgments and the harmonisation of legal rules of the Member States (art. 69 A (1));

– The *establishment of minimum rules* related to criminal proceedings (art. 69 A (2)) and material criminal law (69 B (1)), whenever necessary.

– The establishment of a *European Public Prosecution Service* for the prosecution of crimes against the financial interests of the Union.

The harmonisation of *criminal law* contemplated in the Treaty of Lisbon is two-fold:

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[6] See E. Bacigalupo, in *Bernd Schünemann* (Hrsg./Ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, 2006, p. 81 and the following pages.

1st: Article 69 A (2) provides for the possibility of directives referred to as criminal procedural law if these facilitate the mutual recognition of judgments and judicial decisions. These directives may refer to the following matters:

– Evidence,
– Rights of individuals in criminal procedures,
– Rights of the victims of crime
– Any other specific aspects of criminal procedure

2nd: Article 69 B, for its part, refers to *criminal material law* and provides for the possibility for the Parliament and the Council to define offences and sanctions (1) in the *areas of particularly serious crimes*, (2) with a cross-border dimension, (3) resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

The provision defines the cases that must be considered as *particularly serious crimes:*

Terrorism
Trafficking in human beings
Sexual exploitation of women and children
Drug trafficking
Arms trafficking
Money laundering
Corruption
Forgery of means of payment
Computer crime
Organised crime

This list, which defines the subject matter of European criminology, is not final and is almost certainly not complete, because (a) the Council with the approval of the Parliament may expand the list to cover other crimes (art. 69b (1) [3]) and, (b) when necessary, 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 area concerned». Among these areas subject to harmonisation measures we find, e.g., those related to Directives or proposed directives that constitute the *Plan to Modernise Company Law in the EU*[7] (which is related to accounting matters, audits and annual accounts [Directives 2006/46/EC; 2006/43/EC; 2005/56/EC; 2006/68/EC; 913/2004/EC; 162/2005/EC, Proposed Directive on exercise of cross-border voting rights of

[7] Securities and Investments Board (initials in Spanish, CNMV), Spain, *Informe de Gobierno Corporativo de las entidades emisoras de valores admitidos a negociación en mercados secundarios oficiales del ejercicio de 2005,* p. 12.

shareholders]). These matters are criminally protected in most Member States (e.g. in *Germany, Austria, Spain* and *France)* but this protection is not harmonised at all, for which reason it would be appropriate to have minimum regulations applicable in all Member States.

As it can be seen, the plan for the future EU criminal law defined in these provisions of the Treaty of Lisbon, to a large extent, already contained in the failed Proposed Constitutional Treaty, is substantially similar in structure to the ***Corpus Juris*** 1997 and 2000 versions, although the latter only protected the financial interests of the EEC. It could be said that the basis for a plan to protect freedom and security through criminal law has essentially been arranged in the *Corpus Juris*. Furthermore, the *Corpus Juris* was based on three elements: a) a series of common criminal offences, b) a set of procedural rules for their application and c) the concept of the European Public Prosecutor.

It is true that there are still some *differences,* particularly in relation to the *extensive list of rights recognised by law* subject to European protection. Since 1989, when the works leading to the criminal protection of the Community's financial interests commenced, until now, the role of criminal Law in Europe has substantially increased. To a large extent this can be explained as the consequence of the institutional transformation undergone by the EEC, initially restricted to a common market, in a Union «creating an ever closer union among the peoples of Europe» (art. 1 TEU).

In the new institutional situation of the EU, however, it is not easy to justify the maintenance of two different scopes of financial interests and protection of other legal rights in the EU, as mentioned in art. 69 B 1. (2). Based on this distinction, the powers of the European Public Prosecutor –in principle– appear to be restricted to criminal offences against financial interests. This limitation of the powers of the Public Prosecutor possibly derives from the *Corpus Juris* model, but it is not a proposed Corpus Juris. It may not be justified today if, as opposed to what was happening when the *Corpus Juris* was drafted, the legal rights relevant in Europe and the Community interest in criminal policy protecting them, is an explicit aim of EU criminal policy. The Treaty recognises it somehow. Following the same line, art. 69 E (4) of the Treaty of Lisbon provides for the possibility of the European Council extending the powers of the European Public Prosecutor's Office in the fight against *«serious crime with a cross-border dimension».* The increase of powers of the European Public Prosecutor's Office was discussed at a public hearing on the Green Paper of 16th and 17th September 2002 at the European Parliament. A considerable number of speakers insisted on the need to increase these powers, especially as they considered it necessary to efficiently fight against fraudulent offences, in particular fraud or embezzlement[8].

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[8] See Follow-up-Mitteilung , Grünbuch, Vorlage der Kommission, 2003, p. 14.

Nevertheless, it is not possible to exclude the consideration that extending the powers of the European Public Prosecutor's Office to the other criminal offences enumerated in art. 69 B 1 (2) may oppose the *principle of subsidiarity* (art. 2, TEU) as in the current situation the aims sought, that is to say the fight against serious cross-border crimes, may be attained by the Member States, especially through the principle of mutual recognition of judgments and judicial decisions and the resulting waiver of the principle of double incrimination.

The model of the Treaty of Lisbon does not follow the model of the *Corpus Juris* with regards the aspect relating to the regulation of the rules of the commonly named –in Europe– *«general criminal law»* (omission responsibility, grounds for justification, subjective element, error, attempt, perpetration and participation, occurrence of unlawful acts). The manner in which national laws regulate these matters differs and the practical consequences are not relevant. Indeed, nothing prevents these matters from being subject to harmonisation in the texts of the Treaty of Lisbon, but there is a certain (unwritten) tendency to assume that this is not essential[9]. The general rules indeed are repeated in each of the offences and which, for practical reasons only, are classified as a group in a separate chapter. Although there is great uniformity around the structure of the general law of the Member States, there are also specific differences that determine modifications in the application of punishment which are perceived in certain particularly relevant cases. Legislative systems of error, concepts of mens rea, negligence, perpetrator, participant, attempt, which were defined in the Corpus Juris, are not the same in the Member States and referring to the provisions in each State will lead to unequal application of Law against which the European Public Prosecutor will not be able to do anything. Therefore, the decision to deal with these matters in each rule or of doing it in the general part should be covered by art. 69 B (1) of the Treaty. Already existing models: There was a proposed general part of administrative sanctioning law (conceptually similar) in 1990 (drafted by Giovanni Grasso, Klaus Tiedemann and Enrique Bacigalupo). For its part, the 1995 PIF Convention establishes that perpetrators and attempts will be punished, although these concepts are not defined.

From the point of view of organisation of the judiciary in the Member States, the appearance of a European Public Prosecutor with powers to prepare, investigate, prosecute and charge before the competent national courts requires somewhat complex coordination with national public prosecutor's offices. The position of the Prosecutor differs from one law to the other. In national laws where the concept of the examining judge (as in the case of

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[9] See Grünbuch zum strafrechtlichen Schutz der finanziellen Interesen der EU und zur Schaffung einer E. Staatsanwaltschaft (KOM (2001) 715.

Spain) is maintained, the position of the public prosecutor cannot be compared with that of the German or Italian public prosecutor. It is essential to bear in mind that Member States have introduced offences to their criminal legislation which affect the financial interests of the EU and this also determines that the national public prosecutor will be under obligation to prosecute the offence. In the case of States where the principle of opportunity governs in relation to bringing a criminal action, it is probable that the problem is less complex, because the national public prosecutor may step aside in the procedure whilst procedural momentum is in the hands of the European public prosecutor. However, the problem would be to know if the dismissal of action by the European Public Prosecutor would exclude the possibility that the national public prosecutor could carry on with the prosecution. I leave the matter open if in this case art. 54 of the Convention implementing the *Schengen Agreement (ne bis in idem* principle) applies, which would probably prevent the national public prosecutor from carrying on with the prosecution.

This fast approach to the problems of coordination proves that, without questioning the feasibility of the concept of the Public Prosecutor, one must carefully think how it can be implemented in the different national systems, giving beforehand the solution to potential problems in order to avoid practical difficulties which may lead to frustrating the institution.

In any case, consideration on the need of a European Public Prosecutor's Office restricted to prosecuting offences against the financial interests of the EU should not be excluded. Currently these offences form part of national laws, as they were imposed by the 1995 PIF Convention. Therefore, a European Public Prosecution Office would be unnecessary because the prosecution of these offences is done in each State by the national Public Prosecutor's Office. This consideration should not be omitted. The question would be: Is it necessary to have a European Public Prosecutor's Office to do what national Public Prosecutors are already doing? The answer lies in taking into consideration the principle of subsidiarity.

The idea of a European Public Prosecutor's office restricted to offences against the financial interests of the EU, which was the most widespread in the *Corpus Juris,* was justified by the institutional framework at that time. I believe that we should not stop asking ourselves if in the current state of affairs is still justified. But, these considerations should not necessarily lead to abandoning the idea. Maybe we should think of a European Public Prosecutor's Office with broader powers.

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

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

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

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

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[10] CJEC, 23rd February 1995, Bordessa et al., case C-358/93 et C-416/93, Rec. p. I-361.

[11] The most important one is CJEC, 21st September 1989, Commission vs. Greece, Case C-68/88, Rec. p. 2965.

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

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

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

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

[13] Based on Article 226 EC.

[14] Article 28 EC.

[15] Article 10 EC.

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

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

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

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

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

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

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

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

The truth is that Community Law has not contemplated the development of supranational protection systems. EC Treaties offer an insufficient basis in this matter and neither the Maastricht Treaty nor the Treaty of Amsterdam has provided any change in this subject. It is not explicitly necessary to directly harmonise national criminal law and criminal procedure in Community Law. The protection is done within and for the Member States that apply national procedures and penalties. The EC, on the one hand, has recognised to a large extent the criminal sovereignty (*ius puniendi*) of the Member States but, on the other hand, national authorities and national legal systems have Community functions. Criminal law, the criminal procedure, the police, the Public Prosecution Service and the criminal judge area integrated in an autonomous Community legal system. The measure according to which criminal law and the criminal procedure safeguard Community Law depends, in principle, on the selection of the Member State (indirect harmonisation). In practice, in the economic and financial field, but also in terms of the environment, public health, etc. criminal law and criminal procedure are always present at the forefront and the inclusion and exercise of *ius puniendi* must, therefore, fulfil the Community obligations of results. The increase and deepening of the impact of Community law on national criminal law and on criminal procedure result from the case law of the Court of Justice, an impact that is strongly underestimated by a large number of criminal lawyers[23]. Recently the European Court of Justice[24] recognised direct competence of the European Community to harmonise national criminal law, provided this harmonisation is necessary for the fulfilment of Community policy. The European Community may prescribe the classification and obligation to include criminal penalties. The content of the criminal penalty (what penalty and the minimum and maximum

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[32] OJEC 1996 C 313/1.

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

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

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

Article 29 explicitly contains the following aims:

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

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

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

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

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

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

a) Facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;

b) Facilitating extradition between Member States;

c) Ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;

d) Preventing conflicts of jurisdiction between Member States;

e) Progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposals of 2000 Corpus Juris

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The EPP may then (article 19):

– Open an investigation and prosecute (the principle of legality in the prosecution is applied);

– refer offences which are not serious or which affect principally national interests to the national authorities;

– drop the case, if the accused, having admitted guilt, has made amends for the damage caused and, as the case may be, returned funds received illegally;

– or grant authorisation for settlement to a national authority, in accordance with the criteria set forth in the *Corpus Juris* (article 22 [4] [b]); in any case the settlement agreement must be submitted to the judge of freedoms.

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

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

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

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

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

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

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

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

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

The proposals and the political follow up

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

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

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

Article 280 bis:

> 1. To contribute to the attainment of the objectives of Article 280(1), the Council, acting on a proposal from the Commission by a qualified majority with the assent of the European Parliament, shall appoint a European Public Prosecutor for a non-renewable term of six years. The European Public Prosecutor shall be responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community's financial interests and their accomplices and for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences in accordance with the rules provided for by paragraph 3.
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> 2. The European Public Prosecutor shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries. In the performance of his duties, he shall neither seek nor take any instructions. The Court of Justice may, on application by the European Parliament, the Council or the Commission, remove him from office if he no

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

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

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

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

[53] COM (2000) 608 final.

> longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the regulations applicable to the European Public Prosecutor.
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> 3. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular:
>
> *a)* Rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community's financial interests and the penalties incurred for each of them;
>
> *b)* Rules of procedure applicable to the activities of the European Public Prosecutor and rules governing the admissibility of evidence;
>
> *c)* Rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.

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

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

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

Introduction

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

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

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

The Green Paper

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

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

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

[56] COM (2000) 254.

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

The Green Paper in the light of the Third Pillar

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

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

and the prevention and combating of crime»[58]. The Heads of State and of Government met in 1999 in Tampere with an exclusive agenda on the JIA policy. The European Council in Tampere made the principle of mutual recognition the cornerstone of judicial cooperation in the Union, specifying that it must also apply to pre-trial orders in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable.

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

The European Commission considers that its proposal on the European Prosecution Services does not oppose the spirit of Tampere and completes the efforts made in areas of reinforcement of the criminal judicial cooperation. Both contribute to the area of freedom, security and justice. The Commission is of the opinion that one of the main vectors of the establishment of an enforcement system for the criminal protection of the Community's financial interests while fully maintaining the jurisdiction to try and judge cases at national level is the principle of mutual recognition of court decisions between Member States. This principle presupposes mutual trust in the Member States' legal systems and a shared fundamental basis. It implies that there would be no further need for additional decisions to validate or register judgments for enforcement.

The Green Paper is, according to the Commission, included in the JIA dynamics, such as, for instance, the Council framework decision on the creation of a European warrant for arrest and extradition between Member States[60]. On the other hand, the European Commission is aware of the specific features of the proposal in relation to the Tampere conclusions. Without competing with the initiatives, more extensive *rationae materiae* in the Third Pillar, the Green Paper integrates them in the Community context of the First Pillar, adapting them to the specification of criminal protection of the Community financial interests. Therefore, the European Commission points out, while Eurojust, according to the Tampere conclusions, is to exercise powers conferred on it in a wide-ranging judicial cooperation context, the European Public Prosecutor would be a Community authority with his own enforcement powers in the specific area of protection of the Community's financial interests. The European Commission also points out that the mutual recognition requires common mi-

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[58] Article 2 TEU.

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

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

nimum rules within the scope of criminal procedural law[61]. The proposal of the Commission goes further as regards the preparatory stage of trials relating specifically to offences against the Community's financial interests, proposing a degree of procedural harmonisation. Acts done by the European Public Prosecutor, subject to review by the national judge of freedoms designated for the purpose, would then be valid in all Member States as acts done by a common body. For this reason the European Commission uses the concept of common investigation and prosecution area rather than European judicial area.

The Green Paper in the light of the 2000 Corpus Juris

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

What material criminal law must the European Prosecution Service apply? The Commission is of the opinion that establishing a common investigation and prosecution area relating specifically to the protection of the Community's financial interests does not necessitate the general codification of the Member States' criminal law. As opposed to the proposal of the *Corpus Juris*, the Commission considers that such harmonisation must be proportionate to the specific objective of the criminal protection of the Community's financial interests and proceed on a variable degree of intensity depending on the areas concerned. For the definition of these offences, the Commission could prefer a high degree of harmonisation corresponding to a level of precision no less than that of its proposal for a Directive[63]. The offences proposed are a combination of Community or Union law, the proposed directive and the *Corpus Juris*. To respect the principles that offences and penalties must be defined by law and must be proportionate to the offence, the Commission considers that

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

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

[63] COM (2001) 272.

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

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

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

As regards the investigation measures, according to the Commission, it is obvious that the European Public Prosecutor could not operate if he had access to coercive measures defined solely at national level without any mutual recognition. The effect would be that no change was made to the situation involving international letters rogatory and extradition. The common investigation and prosecution area would be substantially devoid of substance. But, on the other hand, there can be no question of codifying the criminal law in Europe, according to the European Commission. For this reason, the Commission combines the concept of common investigation area with the concept of mutual recognition in the Green Paper.

In fact, there are three different types of investigation measures in the Green Paper. Firstly, there are investigation measures at the discretion of the European Public Prosecution such as gathering or seizing any useful information, hearing witnesses and questioning suspects, etc. These investigation measures do not require the exercise of any coercive power and they have the same legal scope in all the common investigation and prosecution area. For this reason, these investigation measures are considered to be Community measures. The second categories include investigation measures subject to review by the courts: subpoenas, house searches, seizures, freezing of assets, interception of communications, covert investigations, controlled or supervised

deliveries, etc. The applicable national law at the warrant stage would be that of the Member State of the forum, and at the execution stage it would be that of the Member State of the place for execution of the investigation measure, assuming that this is a different Member State. On this basis, the warrant and the execution should be mutually recognised and evidence should be mutually admissible as between the Member States. According to the Commission, it will be necessary to check in advance whether the domestic law of each Member State provides for the same coercive measures. For instance, in each Member State controlled deliveries must exist. The principle of mutual recognition would apply to the forms but not to the principle of review by the national judge of freedoms. If the national law of a Member State requires an authorisation from the judge for the registration of a company, the European Prosecution Service may not do without this authorisation by invoking the mutual recognition of a right of a Member State without the need of an authorisation. This example describes that the introduction of the principle of mutual recognition in investigation measures also introduces the differences of the national laws. How many differences may a common investigation area support and what is the degree of complexity of the system?

Thirdly, investigation measures ordered by the judge of freedoms on application from the European Public Prosecutor, these being investigation measures that restrict or remove the liberty of the accused, especially the arrest warrant. Here the European Commission directly refers to the Council framework decision on the European arrest warrant[64]. The European Public Prosecutor should be able to apply to any relevant national judicial authority for the issuance of an arrest warrant in accordance, *mutatis mutandis*, with the Commission proposal for a framework decision on the European arrest warrant.

The criteria for choice of jurisdiction in a system of common investigation area, but with a ruling issued nationally, are a sensitive issue. For this reason the 2000 *Corpus Juris* had introduced in article 28 an appeal for the accused against the choice of jurisdiction of judgment. In the Green Paper one cannot help but notice a very sceptical opinion of the Commission on this. Basically, introducing review on this basis would weaken the principle of a common investigation and prosecution area. It would open the way to systematic challenges by the defence for potential dilatory purposes.

In terms of admissibility of evidence the European Commission does not choose extensive harmonisation or unification. It also introduces here the concept of Tampere: The prior condition for any mutual admissibility of evidence is that the evidence must have been obtained lawfully in the Member State where it is found. As to exclusion of evidence, the Commission would prefer

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[64] COM (2001) 522.

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

Green Paper, Eurojust[65] and OLAF

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

The aims of Eurojust are:

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

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

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

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

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

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

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

[68] Article 3 (1).

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

I) Undertaking an investigation or prosecution of specific acts;

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

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

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

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

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

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

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

First, there is the question whether OLAF should be given judicial investigation powers within the Community institutions and bodies, for the establishment of a European Public Prosecutor guaranteed by a national judge of freedoms or a special chamber of the Court of Justice would open the possibility of judicial review over the Office. Depending on the answer to that question, it will be necessary to consider whether OLAF's functional duality – currently a Commission department enjoying independence in its investigative function

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

[70] Article 7 (a).

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

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

Follow-up Report on the Green Paper

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

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

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

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

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

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

The legal framework of the Treaty of Lisbon

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

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

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

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

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

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

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

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

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

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

Art. 69E:

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

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

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

[76] Replacing European law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. **Conclusions**

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

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

– The legal rights of the EU: The financial interests of the EU, the single currency (the Euro), internal fraud and corruption in the institutions of the EU.

– Legal rights related to transnational aspects of the internal market, customs union, common policies related to competition, the environment, food, security, etc.

– Legal rights in danger owing to transnational crimes.

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

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

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

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

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

BIBLIOGRAPHY

Corpus Juris

BACIGALUPO, *Hacia un espacio judicial europeo. Corpus Juris de disposiciones penales para la protección de los intereses financieros de la Unión Europea*, Colex, Madrid, 1998.

BELL, E., A European DPP to Prosecute Euro-Fraud?, *Criminal Law Review*, 2000, 154-168.

DE ANGELIS, F. / SICURELLA, R., Vers un espace judiciaire européen? *Corpus Juris* portant des dispositions pénales pour la protection des intérets financiers de l'Union Européenne, en *Revue du Marche Unique Européen*, 1997, 298.

DELMAS-MARTY, M., The European Union and Penal Law, *European Law Journal*, 1988, 87-155.

— *Corpus Juris, introducing penal provisions for the purpose of the financial interests of the European Union*, Economica, Paris, 1997.

— *Verso un spazio giudiziario europeo. Corpus Juris contenente disposizioni penali per la tutela degli interessi fmanziari dell'Unione Europea*, Giuffrè, 1997.

— Guest editorial: combatting fraud, necessity, legitimacy and feasibility of the Corpus Juris , *Common Market Law Review*, 2000, 247-256.

DELMAS-MARTY, M. / J.A.E. VERVAELE (eds.), *The Implementation of the Corpus Juris in the Member States*. Penal provisions for the purpose of the financial interests of the European Union, vol. I -Synthesis, Intersentia, Antwerp-Groningen- Boston, 2000 (It contains the 2000 Corpus Juris, the final summary and the summary of comparative law).

— *The Implementation of the Corpus Juris in the Member States*, Intersentia, Antwerp-Groningen-Boston, 2000, vol. II-III (it contains contributions of national law).

— *The Implementation of the Corpus Juris in the Member States*, Intersentia, Antwerp-Groningen-Boston, 2001, vol. IV (it contains specific contribution on administrative and criminal cooperation, both horizontal and vertical).

FOURGOUX, J. C., *Un espace judiciaire contre la fraude communautaire: un corpus juris entre rêve et realité*, Recueil Dalloz, 1997, 348-350.

HUBER, B., *Das Corpus Juris als Grundlage eines Europäischen Strafrecht*, MPI, 1999.

SPENCER, J. R., *The Corpus Juris Project and the fight against budgetary fraud*, Cambridge Yearbook of European Legal Studies, Hart, 1999.

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

— Regulación comunitaria y aplicación operacional de los poderes de investigación, obtención y utilización de pruebas en relación con la infracción de intereses financieros de la Comunidad Europea, in *Revista Vasca de Administración Pública*, 1998, 307-347.

WHITE, S., Protection of the Financial Interests of the European Communities: The fight against fraud and corruption, in *Kluwer Law International,* 1998.

— EC Criminal Law: Prospects for the Corpus Juris, in *Journal of financial Crime, volume 5/3, 1998. E. Bell, Criminal Law Review.*

European Criminal Law

ARANGÜENA FANEGO, C., Cooperación Judicial Penal en la Unión Europea: La orden Europea de detención y Entrega, Lex Nova, 2005

ARRANGÜENA FANEGO, C., Garantías Procesales en los Procesos Penales en la Unión Europea, Lex Nova, 2007

ARROYO ZAPATERO and A. NIETO MARTÍN, La orden de detención y entrega europea, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2006

BERNARDI, A., Principii di diritto e diritto penale europeo, en *Annali dell'Università di Ferrara,* Sezione V, Scienze Giuridiche, vol. 11, 1988.

— Verso una codificazione penale europea? Ostacoli e prospettive, en *Annali dell'Università di Ferrara*, Sezione V, Scienze Giuridiche, Saggi 111, 1996.

BERNASCONI, P., *Rogatorie Penali Italo-Svizzere. La nuova legislazione svizzera e il segreto bancario*, Giuffrè, 1997.

BÖSE, M., *Strafen und Sanktionen im Europäischen Gemeinschaftsrecht*, Carl Heymanns Verlag, 1996.

DE GUTTRY, A. / PAGANI, F., *La cooperazione tra gli stati in materia di confisca dei proventi di reato e lotta al riciclaggio*, CEDAM, 1995.

FIMIANI, P., *La tutela penale delle finanze comunitarie. Profili sostanziali e processuali*, Giuffrè, 1999.

GALGO PECO, A., Derecho penal supranacional y cooperación jurídica internacional, Cuadernos de Derecho Judicial, General Council for the Spanish Judiciary, 2004.

GRASSO, G., *Comunita Europee e diritto penale. I rapport tra l'ordinamento comunitario e i sistemi penali degli stati membri,* Giuffrè, 1989. There is a version in Spanish: GRASSO, *Comunidades Europeas y Derecho Penal*, translated by García Rivas, Cuenca, Univ. de Castilla la Mancha, Cuenca, 1993.

GRASSO, G., *Prospettive di un diritto penale europeo*, Giuffrè, 1998.

HECKER, B., Europäisches Strafrecht, Springer, Heidelberg, 2005

JOKISCH, J., *Gemeinschaftsrecht und Strafverfahren*, Duncker & Humblot, 1999.

MORENO CATENA, V. & ARROYO ZAPATERO, La prueba en el espacio europeo de libertad, seguridad y justica penal, Thomson-Aranzadi, Navarre, 2006.

NIETO MARTÍN, A., *Fraudes comunitarios. Derecho Penal Económico europeo,* Praxis, 1996.

PICOTTI, L., *Possibilita e limiti di un diritto penale dell'Unione Europea*, Giuffrè, 1999.

PRADEL, J. / CORSTENS, G., *Droit pénal européen*, Dalloz, 1999.

RIZ, R., *Diritto penale e diritto comunitario*, CEDAM, 1984.

SATZGER, H., Lehrbuch Internacionales und Europäisches Strafrecht, Nomos, 2004

SCHÜNEMANN, B., Alternativentwurf Europäische Strafverfolgung, Carl Heymans Verlag, Köln, 2004

SCHÜNEMANN, B., Ein Gesamtkonzept fur die Europäische Strafrechstpflege, Carl Heymans Verlag, Köln, 2006.

TIEDEMANN, K. & A. NIETO MARTIN, Eurodelitos. El derecho Penal económico en la Unión Europea, Publications from the University of Castile-La Mancha, Cuenca 2004.

VALENTINI, C., *L'acquisizione della prova tra limiti territoriali e cooperazione con autorita straniere,* CEDAM, 1998.

VERVAELE, J.A.E., *Fraud against the Community. The Need for European Fraud Legislation*, Kluwer, 1992.

— *La lutte contre la fraude a la TVA dans lUnion Europeenne,* Maklu-Bruylant, 1996.

— *Administrative Law Application and Enforcement of Community Law in the Netherlands,* Kluwer, 1994.

— *Compliance and Enforcement of European Community Law*, Kluwer, 1999.

— *Transnational Enforcement of the Financial Interests of the European Union. Developments in the Treaty of Amsterdam and the Corpus Juris*, Intersentia, 1999.

VERVAELE, J.A.E. / KLIP, A., *European Cooperation between Tax, Customs and Judicial Authorities,* Kluwer Law International, 2002.

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THE EUROPEAN PUBLIC PROSECUTOR AND THE INSTITUTIONAL LABYRINTH

I. Introduction

The organisational or institutional structure of police and judicial cooperation as well as the criminal protection of the financial interests of the Community have already been explained; this can be found in the Treaties in force and the recently adopted Treaty of Lisbon.

Going back to this, the EU currently has, based on the Treaty of the EU, two main organisations, Europol and Eurojust, two structures without legal personality, the European Judicial Network and the Police Chiefs Task Force, and the Treaty of the European Union has created a committee of representatives of the Members States –the Committee of Article 36– which has so far focused on carrying out legislative functions. We have to add, under the umbrella of the Treaty of the Community, the European Anti-fraud Office (OLAF).

The changes introduced by the Treaty of Lisbon, which in this field has maintained the same line as the failed Treaty establishing a Constitution for Europe, consist of creating a new coordination structure between the Member States through an Internal Security Committee (COSI); the full incorporation into the Community framework of a Europol reinforced in its powers; granting real powers to Eurojust to commence and coordinate investigations or to resolve jurisdictional problems between Member States; and establishing the legal basis for a possible creation of the European Public Prosecution Service[80].

II. Critical points in the organisational structure.

The main characters in the judicial action implemented by the European Union do not allow a clear definition of programme characteristics to be con-

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[79] The opinions expressed in this paper are personal and only compromise the author.

[80] More details on this design can be found in «El diseño institucional de los órganos de cooperación en materia policial y judicial penal: COSI, EUROPOL, EUROJUST y el Fiscal europeo», Fernando Irurzun Montoro, within the collective work «El derecho penal de la Unión Europea. Situación actual y perspectivas de futuro. Ediciones de la Universidad de Castilla-La Mancha, 2007.

sidered as a system. There are plenty of duplicities in the powers or lack of definition of their scope. It lacks a connection with the judicial system of the EU and of the Member States.

I will not speak now about the legislative or organisational faults or amendments that could be raised. I will not speak either about what in my opinion are greater legal obstacles resulting from the various national criminal legal systems which, at one point, will have to make us reflect from a political point of view if one decides to carry on designing a true European Area of Freedom, Security and Justice[81].

I will now try to explain a criminal matter or investigation that proves that the current structure has faults. I will do so, but allow me to exaggerate a bit without reaching the point of being a caricature.

Let us imagine that in any first instance criminal court in Spain a criminal procedure has been commenced for fraud in the Corporation Tax or Value Added Tax. Let us imagine that this fraud was committed by a corporate milk producer and that during the investigation it is discovered that the method used for this fraud does not only involve the tax but also the way the milk is bought and sold through conduit companies. This is done in order to avoid the quotas imposed on milk production for each farmer and to avoid payment of the so called milk tax which, according to Community Law, must be borne by farmers if they exceed the production capacity established for each Member State. Let us complicate the matter further for this first instance criminal judge.

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[81] In the work mentioned in the previous footnote, I mentioned that the obstacles are the following:

Firstly, the difference in the criminal action systems between the Member States. The twenty-five Member States have legal traditions based on the principle of public action mixed with others that restrict this type of action.

Furthermore, apart from the criminal prosecution systems based on the principle of legality, others accept the principle of opportunity, with extensive power of disposition of the action by the Public Prosecutor.

The difficult coexistence between Public Prosecution Offices which have very different characteristics must not be considered irrelevant either, in that they depend on the Executive Power. For us a Public Prosecutor must be independent but, in other Member States, very close to us, the Executive Power may instruct the Public Prosecutor.

A fourth factor to be taken into consideration is the clear tendency of the EU law and, in general, of all international law, to extend the extraterritorial jurisdictional power, without regulating, at the same time, a system of preferences and, least of all, a method for the resolution of conflicts.

Finally, the distorted importance of the different structures of the police in the Member States as a criminal investigation department, its different sections and different powers, must not be considered to be irrelevant. Jointly with detailed regulations which genuinely express the principle of positive relationship between public powers, others maintain, because of their past or because they have a different legal evolution, a clear trend to reluctantly regulate when it comes to police powers and their prior judicial control.

Instead of a Spanish company this is a multinational that operates in different Member States of the EU and in Switzerland using the same modus operandi.

If the judge in this case is highly diligent and believes in the European Area of Justice the judge may feel tempted to, at least, notify the authorities of these States and coordinate the investigations.

He/she will then have some questions: Who do I send this to? Eurojust, the Judicial Network, OLAF? Can I use these jurisdictions for my relations with Switzerland?

If actions are offered to the damaged parties and the conclusion is that the financial interests of the Community have been affected, will he/she offer the actions to the OLAF or the European Commission?

If he/she wants the data to be subject to analysis by Europol because of the dimension of the matter, does he/she address this authority directly? Does this damage the work carried out by Eurojust or the OLAF?

The uncertainty increases if, before taking these steps, he/she realises the procedural effects, for instance, in terms of evidence, which any of the above decisions may entail.

He/she may have devoted an invaluable amount of time to solve these legal issues and this could affect the taking of evidence or, we mustn't forget, the freedom of the suspect may be restricted with preventive detention.

This is a pre-fabricated example that only illustrates, in my opinion, the inconsistencies and weaknesses of an institutional design which, if one is optimistic, one could conclude that it is complex and should be re-directed or revised.

III. **Conclusion: Causes and remedies**

Let us forget about this exaggerated example but let us keep the message of the existence of an organisational or institutional design that must be considered.

The reasons for this situation are due, in short, to three factors that we must accept, as they are a consequence of the process of European construction which needs no revision and which has also given us the success we enjoy today:

First.–The generation of cooperation authorities owing to «bureaucratic barrage», suddenly or as a result of the needs or urgency of each political moment, without any prior design of the system as a whole.

Second.–The legislative method of the EU, essentially of a diplomatic basis with increasing parliamentary participation, which sometimes chooses ambiguity or lack of clarity which are two bad partners in the legislative method

and particularly damaging if we are talking about a criminal or procedural rule.

Third.–The need to build from a diversity of traditions and national legal systems using the method of unanimity.

What, then, are the solutions or remedies for this situation? In my opinion, it is essential to re-direct it towards formulas that introduce some rationality towards more extended bureaucratic trends. Another alternative is to trust that the pieces will start to fit in time through methods of coordination, cooperation protocols, willingness from all stakeholders and waiver of any kind of prominence at each stage of the proceedings.

If you allow me I would prefer a much simpler formula of the organisational design of the cooperation in criminal matters. On the one hand, with a powerful Public Prosecution Service, with initial restricted powers, that integrates Europol and some of the current or future tasks of Eurojust and the OLAF. A police-public prosecution service formula already described at some point and tried in some federal states.

A European Public Prosecution Service subject to democratic responsibility before the Parliament and the Council of Ministers that would define the principles of the European criminal policy and its strategic priorities. But this would not introduce into the organisational design a role of the Executive which a long time ago was decided should gradually disappear from the judicial cooperation in the European Area.

A second component would be that certain quasi-jurisdictional functions of Eurojust should be split up and reinforced. This would not only create a stage of proceedings where jurisdictional conflicts would be resolved but it would also give it an arbitral role in the judicial cooperation, which reinforces the trust between Member States within the framework of mutual recognition of judgments. In short, an organisation which, in the medium term, may end up being a specialised jurisdiction of the Court of Justice of the European Union.

The aim seems to be too ambitious and political resistance or bureaucratic obstacles must not be hidden. I admit that even the mere re-direction will require us to take one step at a time, without rushing, as it is normal in the Community. As other speakers have already mentioned, we must accept that in the Europe-27 probably, just like in cycling, a breakaway must be arranged and the rest will have to follow as a pack. To forge a path and not only to feel happy that one is walking, but that something else is needed: One must want to leave the labyrinth.

Thank you very much.

Debate

ISABEL VICENTE CARBAJOSA

Prosecutor. Member of the Secretariat of the OLAF Supervisory Committee

Good morning once again. Let's now start the debate session on everything we discussed and everything we put forward yesterday and this morning. I'd just like to raise a couple of quick organisational points: remember that you can speak in German, Portuguese or French. Please tell those sitting in the seats behind that if they wish to use the microphones and sit around the table, that's fine.

With nothing else to add, let us now begin the debate. I think that in order to discuss the issues broached yesterday and today, we could start from three essential perspectives: there have been many comments and many speeches that have made allusions to clear political issues in regard to the creation of a European Public Prosecutor's Office. There have also been many references, and therefore we need to delve into the matter of procedural issues, of procedural problems and difficulties that the creation of this EPPO would imply. Meanwhile, this morning Fernando explained to us some of the more significant institutional issues affecting this multiplicity of entities operating in the same area, or involved in very similar things, in which there may be an overlapping of functions. I would therefore like to indicate these three main areas: political, procedural, and institutional.

I would like to start by making a reflection, or rather, a question aimed particularly at those speakers who participated in the this morning's round table, but naturally open to all participants, which is the issue that article 69 e) of the Treaty implies the possibility of creating a European Public Prosecutor's Office from nine Member States in regard to the financial interests of the EU. Because it seems that with article 69, the Member States have said: the European Public Prosecutor's Office is a possibility, do not worry. This possibility may be that we're going to start with nine Member States, and you can begin to think about implementing it for the protection of financial interests, as though to clear the way for its introduction.

The question I would like to ask is whether this proposal should be aimed at just nine Member States... and I'll put this question to you. How do you view this proposal? Do you see it as an incentive for creating the EPPO? Or more as a deterrent that would halt its creation?

Because if we see that a Public Prosecutor's Office can be effectively implemented in only nine Member States to combat crimes against financial in-

terests, which nine Member States are going to want to implement it when it is precisely the financial interests of the EU that they have in common? That is, the EU budget affects everybody as everybody contributes to the EU budget. It is not something exclusive to nine or to a small group of countries. So, we have all Member States contributing equally –in terms of duty, not quantity, of course– to the EU budget and yet, it is suggested that nine of them –to simplify, to facilitate the persecution of crimes committed against this budget– can establish a European Public Prosecutor's Office. In other words, these nine countries are supposed to be able to carry out the persecution of these crimes more quickly, more decisively and, with the EPPO, identify the perpetrators, prosecute them, recoup, replace the funds... But "is" it convenient that this only happens in these nine Member States and not in the others? Wouldn't this imply discrimination, so to speak, to apply criminal justice to the offenders, to the criminals, to the perpetrators of such crimes in these nine States and not in the others? Especially given that the EU budget is something so complex and Co-Managed by the Member States, and so, it would not only be a question of collaring an individual criminal, but it could have many implications for national governments.

So, the first question I'd like to ask is whether the very establishment we could introduce to protect the financial interests of the EU would constitute an incentive for those nine Member States or, on the contrary, a deterrent. What do you think? Yes, Mr. Fungairiño.

– [Eduardo Fungairiño] Yesterday we addressed this same topic, trying to determine whether it would represent a step forward or backwards, as we have just said. It was also questioned whether the European Public Prosecutor's Office should be proposed, or rather, implemented in a global sense, that is, for all large crimes, let's call it, international crimes listed under article 23.4 of our Organic Law: genocide, terrorism, crimes against people, trafficking in human beings, illegal immigration, child pornography, money counterfeiting, etc. or whether the Public Prosecutor's Office should be limited to strictly financial interests.

I think that perhaps, following on from Fernando Irurzun, taking his idea that this labyrinth shouldn't become more and more complex, and that we mustn't end up like the mythical Greeks Daedalus and Icarus, burning our wings like Icarus; I think the proposal must have more of a modest inception. Modest in respect to its nine members. Is this discrimination? I don't think so. Because whether we like it or not, Europe operates at several speeds. Not all European States have adopted the Euro; some countries have now joined the Euro, countries that have my utmost respect, but which in reality hold little demographic significance, such as Cyprus and Malta. I don't think about going to Cyprus or to Malta because they have the Euro, but maybe to Slovenia, yes.

And also, for example, not all European countries have joined the Schengen Agreement. Schengen is directed at the initial States; I think these were Germany, Benelux and France, who were then joined by Spain, Portugal, Greece, etc., but those of the nine out of the 27 are still yet to participate in the agreement. And the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland have also not joined. Therefore, it's clear that there are different speeds for different matters, so there's no cause for alarm.

I think it should be brought in specifically for these nine based on this system of enhanced cooperation and that we should, as they say, start pedalling, or else just set the ball rolling to see what happens. And if it works well, then within five or ten years I think we can look to extend the system to other countries. My idea is that –not for other crimes, maybe because it's not necessary and we would be disproportionately increasing the competence– but the creation of a North-American-style federal system, a federal constitution with state jurisdictions, I think Europe is not a federal-style union in which this system could work. I believe that for larger crimes, for heinous international crimes, the courts are already in place: the International Criminal Court already handles genocide, crimes against humanity, etc. Then there's the United Nations Committee against Torture, as well as other ad hoc tribunals; I think we must acknowledge the fact that they do their job extremely well, those such as The Hague tribunals and the national courts, or what we might call subsidiaries of The Hague, established in the territory of the former Yugoslavia.

I also recall a session that was held in the European Parliament, examining the initiative of certain Spanish parliamentarians to see whether terrorism should be considered among the crimes dealt with by the International Criminal Court. I received the incredible honour of being invited to the Parliament and I gave my opinion that terrorism should not form part of the Criminal Court, because terrorism, thanks to the strong international judicial cooperation we are now seeing in Europe, is well handled by the national courts. It is now a local issue that's tackled by local authorities. And it is being well controlled with international judicial cooperation. International and, more specifically, European: European Arrest Warrant, Agreement 2000, etc.

Therefore my answer is yes. Let's go, or let whoever has to go, let's approach these nine countries that will provide the initial drive for this, as it was described, modest European Public Prosecutor's Office, and then let's see what happens. Thank you.

– [Isabel Vicente] Thank you. Yes, I was looking at it especially from this perspective, not only do they all receive EU funds, but the economy of many countries clearly depends on EU funding. Therefore, if persecution is made highly effective in one country, then the same country is also applied sanctions by the EU. So I'd say the question was exactly this, that the issue of this type

of crime could also create a situation whereby these nine countries are throwing stones at their own roofs, so to speak.

– [Fernando Irurzun] Well, before accepting the challenge of entering into the debate, a very brief excuse, or clarification, on my part, especially after hearing Madame Theato on my excessively provocative tone, from the previous speech. It was supposed to form part of the setting, and I hope that's how everyone understood it.

Entering into the debate, I'm not fully convinced that the only possible interpretation of 69 e) of the Treaty is that which restricts enhanced cooperation to the financial interests of the EU. Since everything in law is debatable, or almost everything is debatable, in my opinion, just as the group of States can add other crimes to the competency of the Public Prosecutor's Office, enhanced cooperation can also be introduced. What concerns me now is the increasing circulation of this single interpretation of the precept that says that if enhanced cooperation exists, it can only apply to financial interests. I don't think this is the intention of the text or the only possible interpretation, and I also think it would go a little against the logic of the system.

And why has this competency been placed as the initial obligatory competency? Is this a trap? No, everything can be used –especially in diplomatic negotiation– everything can be used as an element for, I wouldn't say to cheat, but for gaining positions of withdrawal; however, the reason for which this competency is included as a genuine competency of a potential European Public Prosecutor's Office is –and I'll stick up for the system a little here– a systematic one. After many years, we've finally managed to at least identify an area in which criminal protection is of common interest among institutions and States. Thus for this reason, if an EPPO is to exist, it would only be logical that it has this competency, as it would be very hard to justify if not based on a common interest among everyone, but on something else.

That said, everyone will be able to choose whether to use it to cheat and, let's be honest, starting out focusing on the financial interests of the EU is more difficult in the political sphere, without considering the bad ideas behind it, and I even remember seeing professor Bacigalupo and many of those here in the audience for the Green Paper, where a large amount of criticism derived, as I recall, from certain Member States whose reasoning was thus: How can the EPPO be necessary to combat a purely economic issue in the form of EU-based fraud and not to fight terrorism? That is, it's a rather contradictory thought process, but we must recognise that the reason for protecting financial interests is a logical, conceptual reasoning of the system. One lecturer has already spoken out about the need to define a genuinely European common law and another, also European, but less genuinely so, for other interests.

Politically, I'd say it seems difficult to submit to public opinion a European Public Prosecutor's Office just for financial interests, but then I don't necessarily believe we need to extend its competency universally. In my opinion, we simply need to look at the Eurojust annual report to work out when we need to coordinate and cooperate more closely in criminal investigations. By using the Eurojust report, we can identify two or three recurrent areas. It is clear that in general, economic fraud is the most recurrent area and I would even say that drug trafficking, which tends to be very closely linked to other types of economic fraud, is also a recurrent issue. Terrorism? Come on, I don't think our cooperation in this respect could get any more coordinated than it is.

The data is right there; I think we simply need to analyse it to pick out the areas in which the European Public Prosecutor's Office would be useful. I don't think it would be a trap at all, but what we do need is the will to start putting it into effect, bit by bit, but doing it right –a point on which I agree with the two speakers who came before me. What we must avoid is simply creating an entity without the necessary legal tools that it needs, which is where we are falling short at the moment.

A large number of the problems that arise with Eurojust derive not from the fact Eurojust or the states themselves lack the will, but because they lack the legal tools they need to do what they want to do. Let me give an example: it would be ideal to concentrate all investigations into one country with which all the others then cooperate, but our legislations do not have the systems in place to pass jurisdiction to the other states, so we just couldn't do it. I know there are alternatives, but let us remember that these alternative we're using, such as in Spain, really don't seem to provide the legal certainty or sufficient protection of the person on trial, which at the end of the day is what we have to take into account.

– [Isabel Vicente] Thank you Fernando. I'm not sure whether Mr. Vervaele would like to add anything...

– [John Vervaele] OK, thanks. I completely agree with you but for a couple of minor points, not in disagreement, but elaborating on the idea. I say this as I'd also put down Schengen, the Euro zone, the same arguments, and even the third pillar. It's not that we are all in the same boat, because there are the 'opting ins', 'opting outs', etc. It's not ideal, of course, but then nor is it impossible. First and foremost I'd say go for it, we need to experiment with the concept. Of this there is no doubt. It will not be perfect by any means, as it is too new. But then I wouldn't say it is discriminatory based on the arguments put forward.

I would add one element: certainly, an experiment that affects the public freedoms of citizens and affects the procedural rights of defendants has to correspond to the State's classic legal principles of *lex certa*, *lex previa*, for

example. That is, the experiment must be governed by this regulation, otherwise it would be discriminatory. Both citizen and the defendant need to know in advance whether this is in force in this country or in that country, and how this model affects them. So in this sense, with this condition, it is not discriminatory.

Perhaps the element of the ICC, the International Criminal Court, is very influential on serious crime, for certain serious crimes, but then the ICC's Rome Statute establishes it as a supplementary system. This means that the Member States of the European Union must be capable, institutionally speaking, of handling this type of crime. It's all too easy to say «we have an International Criminal Court for that». No: we have to assume the first line of responsibility. In EU countries, the ICC exists only for exceptional cases or for national or regional incapacity. And no, we cannot reverse the argument, exactly.

The text of 69 e) can be read politically and it can be read judicially. We know that the text is the result of different proposals. Proposals were put on the table that included a broader field of application and a broader subject matter, yet increasing restrictions have again been put on this text. It is perfectly clear that section 1 of article 69 e) limits it to financial interests and reinforced cooperation is in that article. It's like if I were to produce a piece of judicial literature, but limited its field. This is unfortunate because a European Public Prosecutor's Office needs to be developed, which to me doesn't seem wrong, based on Eurojust. Eurojust has competency that covers far broader matters. Therefore, there is a strange contradiction in the text. Politically speaking, I see this as very unfortunate, but judicially that's the way it is. In my opinion, the problem we face is a judicial one. That's all for now.

– Thank you very much. I think Mr. Enrique Bacigalupo would like to go ahead.

– [Enrique Bacigalupo] No, I think article 69, interpreted literally as you have done, presents no real difficulties, in my opinion. However, in section 4, it is possible to extend the competency to a great extent, in other words, procedures that practically prevent us from reaching a solution.

But truthfully, I believe my colleagues' speeches have proven that the issue needs to be reconsidered, as John Vervaele affirmed that the position of Holland is contradictory, stating on the one hand that, «*we don't want a hybrid institution like the European Public Prosecutor's Office*» while adding, on the other hand, «*we defend the federalist position*». The word federal is a diplomatically uncomfortable word in Europe.

But the way I see it, Europe is not a federation, but it does have the criminal problems of a federation. In a certain sense, *Corpus Iuris* was thought out as a number of regulations with validity within the European territory. There was therefore a strong federalist element, but it was not explicitly stated.

However, European politics has taken different routes. We've always said that we don't want to unify regulations; we've also tried to look for words that are diplomatically more appropriate; we've talked of harmonisation, yet no one knows what it means to harmonise criminal regulations; we've spoken about approximation, but surely this is even worse? Because, what does it really mean to approximate criminal regulations? I mean, these are concepts that have no definitive judicial validity and only serve to resolve diplomatic assemblies.

Then there was an illusion, this illusion of national judicial traditions. If we analyse European criminal law, deep down it follows similar ideas, particularly on a continental front. Look at the problem of the UK, where differences can be much more significant in terms of terminology than in the truly conceptual. As such, in the European Union, it is been said that: we don't want regulatory unification; we want the creation of new bodies. But surely this offers no more of a unified solution? We create these bodies, such as Eurojust, the European Public Prosecutor's Office, and all those mentioned with extraordinary precision by Fernando Irurzun, yet I don't think they provide any kind of solution, not through a European Public Prosecutor's Office, which poses a great inconvenience for all national systems as it will be very difficult to implement and, ultimately, what needs to be reconsidered is a minimal modification of regulations. Then –and this is the advantage of a Federal System– then, the national courts will apply it to their own systems, with their own means.

There are problems in regard to the attainment of evidence, which is a very serious problem. In practice it is a problem of the Supreme Court with, for example, Germany, because in Germany there are certain measures that can be taken without judicial participation through a resolution from the prosecutor or from an official of the public prosecutor's office. As it turns out, here we demand that all proof be obtained with the judge's participation. Therefore, of course, giving validity to evidence obtained in different conditions reduces what is here considered as a guarantee for the citizen. And in this sense, I do not agree with our legal system when it says that if it has been lawfully obtained at the place of origin, then it is also valid here. I have my doubts.

As such, I think we'd have to stop creating bodies and start thinking about European law from a different perspective. I know that this poses serious political difficulties. The *Corpus Iuris* failed in large measure because it referred to financial interests. And the response was therefore: if what you want to resolve is an issue of subsidy-related fraud, the best thing to do is to withdrawal the subsidies. This was the economic argument and, facing reservations about the *Corpus Iuris*, there appeared this third pillar, which resolved absolutely nothing. This is the problem.

I think we probably need to reconsider this problem from other perspectives. I remember the discussion about the *Corpus Iuris* perfectly well, as do

you John, and I know most of the criticism had nothing to do with criminal law, but with opposition to the economic policy of subventions. Please excuse my elaboration. Thanks.

– [Isabel Vicente] Thank you very much, and not at all. Juan Antonio.

– [Juan Antonio García Jabaloy] Thanks, Isabel. Regarding the thoughts raised by Fernando Irurzun, from the perspective of Eurojust I'd like to say the following: firstly, I agree almost 100% with him, in his acknowledgement that everything needs to be taken step by step, that the future European Public Prosecutor's Office could in principle pursue solely financial interests, while I also agree with what he said after that. Looking at the Eurojust annual reports, we can see that the crimes which would fall under the competency of this EPPO, taking into account the number of points and the methods of coordination required, would involve large-scale economic crimes and crimes of drug trafficking. But what I do not completely agree with is what he followed this up with, that is, regarding terrorism. Terrorism, particularly seeing that the annual reports and Eurojust itself as yet do not indicate such high figures of these types of crime, is exactly why we have such serious problems with cooperation in these types of crime. In other words, we have very good police cooperation; there is very strong bilateral cooperation in one specific case –that of ETA terrorism, between Spain and France; but beyond this– and I am speaking from the perspective of Eurojust and from the perspective of the anti-terrorism prosecutor, and he is here too, the ex-chief of the anti-terrorism prosecutor's office –when we're speaking of international terrorism, these are seen as serious problems in terms of coordination.

Let me add to this the fact that in today's world, any crime that implies a supranational threat, I believe, is without doubt international terrorism. It would be a question of thinking seriously as to whether this type of crime, that is, international terrorism, could be one of the basic or one of the more important issues of this EPPO.

– [Isabel Vicente] Thanks very much. I would just like to give a short reflection before returning to the issue mentioned by Mr. Bacigalupo regarding the unification of regulations. In reality, we can see that the problem lies with procedural rules, rather than those of a substantive nature. In reality, both, but to make progress in terms of cooperation, coordination, and especially for the future European Public Prosecutor's Office, the most important thing is to establish common procedural rules during the instruction face, as proposed by the Commission.

With the unification of procedural rules, we've seen how difficult it can be to reach an agreement between all Member States because, for example, when the commission worked on the Green Paper for procedural guarantees, it

eventually became a book of 'minima', purely because it had to be unified for all Member States and since they were so different, it finally became a book that established certain guarantees for which many of these members, as I recall in Spain, said: but, well, it's just that we have many more procedural guarantees than those established in here, so it's just not worth it. Therefore, the question or reflection I would like to put to you right now is: could we not use the very creation of this European Public Prosecutor's Office, according to article 69, to unify these procedural rules, to create this common framework of procedural rules in relation to these issues of investigation into such crimes? Because what article 69 states is that there will be a regulation in place and it will be the public prosecutor's office that is in charge of identifying the perpetrators and accomplices of such violations, including starting the procedure and filing the lawsuit application. We could somehow exploit this opportunity, while at the same time pushing forward these procedural rules and, particularly, determining which role should be filled by the European Commission, which has always facilitated matters concerning the implementation of all kinds of legislation.

Enrique, thanks.

– [Enrique Bacigalupo] I believe the most important unifying factor in Europe in regard to criminal procedure is the European Court of Human Rights based on the interpretation of article 6. And probably the only thing left to unify, going beyond the fact that the principles as such are more or less guaranteed, would be certain guarantees regarding the very attainment of such rules. I believe this with respect to the possibility of –if you'll excuse the term– a rapprochement in procedural affairs.

But I don't think the Public Prosecutor's Office is precisely a factor of the unification of rules; the Public Prosecutor's Office should have to request the application of regulations from the courts, but as a factor unification, I don't think it should have sufficient competency for that. Therefore I'd say that this problem is not going to be resolved through the public prosecutor's office. I believe the problem will persist.

– [John Vervaele] I think that here we need to take a look at articles 69 e) and 69 a) at the same time. Because in 69 a), for the first time, there is a well detailed legislative base resting on ordinary legislative procedures, or rather, a co-decision for harmonising procedural rules, for standardising rules for mutual acceptance of evidence and regulations governing peoples' rights during criminal procedures. Yes, I personally think that to guarantee mutual trust between the states, between the authorities of those states, and to establish duly equal procedures between the states, we need to enter into this matter, whether it be alone or with the public prosecutor's office, but in any case –this is

my belief– without this the public prosecutor's office cannot function, it simply cannot function. For me it is a dead end.

– [Fernando Irurzun] Firstly, I'd like to give a quick response in regard to the problem of terrorism. Just a few words with respect to the meeting mentioned by Eduardo Fungairiño. Why –and I will use this opportunity to forewarn against the defects of the system– why is such a meeting held? Again, there is a growing urgency to make a decision. Large-scale terrorist attacks continue to occur: 9/11, a huge reaction from the EU, expediting the definition of terrorism and the European arrest warrant. 11 March in Madrid, political unrest, and the «what do we do now?». Because if we've already done all of this, then we need to do something, because now it has reached Europe. It is often the temptation of officials, myself included, of politicians, of the media, to demand spectacular interventions. So somebody puts his mind to it to see what he comes up with. Let's say the competency for terrorism must come from the International Criminal Court... No, let us all be rational for once. If we have some relatively acceptable regulations, let us first put them into practice. Then, when they really go wrong, let us see what else we can do.

Because, and here I go along with what professor Bacigalupo has just said, the non-diplomatic among us in Brussels ask the diplomatic a critical and provocative question, which is: what is the diplomatic solution in the face of a problem? There are only two methods and only two tools in the diplomatic method: international cooperation, or an international meeting and a new body. And thirdly, therefore, let us not keep falling into this trap. Let us accept that the principle of proportionality forms part of the general common principles of all our states and of the EU as a whole. And, as such, there are proportionate answers to everything.

I am not convinced that while we need to closely tighten cooperation in regard to terrorism, this implies the need or demand for an international Public Prosecutor's Office. Regarding the particular problem of the need to lay down rules: during negotiation of the failed framework decision on procedural guarantees, certain realities were brought to light, since the EU method is like a steamroller, in that once it starts, once it is set in motion, there's no stopping it, it's impossible. And this, in creating criminal judicial rules, is a grave mistake.

The debates revealed that there are fewer differences, or fewer problems than those commonly spoken about and for those for which rules are created. I would go so far as to say that if we officials were capable of disobeying instructions, we would soon reach an agreement regarding the four points on which we really need to somehow agree. Had those involved in the negotiations been asked, we would have agreed that we need to resolve four or five problems, and that probably none of them has anything to do with that framework decision. Trials in absentia, that's obvious; acceptance of evidence;

delimiting the right to not plead guilty; submission of documents, which is a real problem... and there are practices within our basic legislations for the persecution of economic crimes that are prohibited in the Member States, and we except them as obvious and necessary or indispensable. And there's more. Dare I say it: when will we see the day that the lawyer goes into to the police station to visit the defendant? Honestly, that's it, those are the problems.

And anyway, although that was the conscience of the officials negotiating, the debate does not sway entirely in that direction. I had a French colleague, a judge, who I presume still works as a liaison magistrate in Rome, Emmanuel Barre, who I was lucky enough to meet up with in Brussels and who, when matters touched on this subject, always used this expression: «I feel like an alien because we spend all day negotiating on things that have absolutely nothing to do with the reality right before our eyes, the one we truly need to fix». This may be something of an exaggeration, like perhaps some of the comments I have made this morning, but let us focus on what's important and let us not try, using this diplomatic method, to create new bodies to solve significant problems. I don't think that's the answer. Let us solve the problem, but through the right channels.

– **[John Vervaele]** Isabel, may I add something to that?

– **[Isabel Vicente]** Of course.

– [John Vervaele] Let me go back to the reference made by Mr. Bacigalupo to the legislation of the European Court of Human Rights as a possible aid to common regulations. Of course this legislation, this common property, is extremely important, but it has its limits: two limits which, in this context, are in my opinion very important.

Firstly, I think we know that the jurisprudence of the Strasbourg Court regarding the pre-trial phase, the instruction and investigation phase, is quite limited, while at the same time it also places emphasis on the need to make sure the entire process is fair, with substantial differences concerning which law to apply and in which trial phase. In other words, the common asset there is weak.

Secondly, and even more problematic: the European Convention on Human Rights is certainly not designed as a model of European integration, as a model of common space. It is designed to place marginal control over the application of human rights in a country. The principle of *Ne bis in idem* gives a good illustration of this. *Ne bis in idem* contains jurisprudence; there is a principle of *Ne bis in idem* in the archives of the European Court of Human Rights, in the convention, in its protocols, which have to be applied in each state... but this doesn't solve the problem of *Ne bis in idem* in cross-border terms. As we've seen, the Court of Justice in Luxembourg has had to intervene.

In other words, the concept of a common space creates real problems that could not and will not be resolved through the instrument of human rights of the European Convention. It needs to be handled using either the legislative plan or the jurisprudential plan, for me, both within the same context of European integration.

– [Isabel Vicente] Enrique, of course.

– [Enrique Bacigalupo] No, I'd just like to clarify that I agree with what John Vervaele is saying. All I said is that the European Court of Human Rights was a more important factor of unification than a potential European Public Prosecutors Office, that's all I wanted to say. Of course, we then also have other important discussions with the Court.

– [John Vervaele] I was not criticising you personally, I was merely indicating that the European Court of Human Rights has so often been used as justification for failure to create truly equal regulations within EU law. In other words, the Strasbourg acquis is not, in my opinion, an adequate means of fixing problems.

– [Isabel Vicente] Thank you very much, I'd like to pass this over to Mr. Detlev Mehlis, and then to Mr. Regis de Gouttes.

– [Régis de Gouttes] Thanks very much, ladies and gentlemen, dear colleagues. I've listened to Spain, to the United Kingdom... Ladies and gentlemen, I'd like to make a few short comments, which I promise to keep as succinct as possible, as a person who, from Berlin, at the Exterior Department of the General Public Prosecutor's Office, follows all that goes on in Brussels very closely, which is later transferred to our national department, and as such, this is something we later have to live with.

In the past few days we have listened to some very interesting analyses, but I think we need to debate about the practical application of the EPPO, as to whether or not it is viable. As a prosecutor, I value these analyses, but they must not end up blurring our vision or even leading to the prohibition of what we're trying to achieve, if it's what we truly want to achieve. I therefore ask the question: do we want a public prosecutor's office? If the answer is yes, we would then need to ask why and, most of all, when. From the analysis carried out, I have learned what would need to be done if a Public Prosecutor's Office were established. There may be a number of competencies (terrorism, international crime, money laundering, human trafficking, etc.) and we would request that the EPPO, if created, be given its own procedural law and, moreover, that it be given as many personnel and resources as possible to really create a public prosecutor's office within the next 50 years.

So, why don't we limit it to the areas where it's most needed? That is, to international crime, so that there are instruments in place that, I'm not saying are perfect, but that function correctly. We have the European Court of Justice, we have Interpol, we have liaison magistrates, we have Eurojust, the Judicial Network... I agree with our colleague from Eurojust, in that it doesn't all work perfectly. In fact, in Eurojust, there are also countries that do not function in the same way as, for example, those of us here at this table, but that doesn't threaten the efficacy of the institution; they work well and they work correctly, therefore I don't see any added value the EPPO would bring from my perspective in these matters.

Where there does exist a judicial void, not an operational void, like that to be filled in OLAF investigations, is in the processing of all fraud-related matters, as this places a judicial burden on all colleagues who have to process these cases in the different Member States. There exist highly judicial aspects of EU law for those which do not have specialists in the public prosecutor's offices of the different states and, if anyone has to take these routes, well, it implies a significant loss of personnel skills, of time, to really be able to tackle this issue. And I think this is where there is an urgent need for the creation of an EPPO, in this area. I believe the additional value is provided by the very ability not only to complete criminal processes more quickly, but also to create a public prosecutor's office with a specific scope, demonstrating to potential offenders a resolute image of the EU in tackling these punishable crimes, allowing us to give off a strong signal.

Now, it has also been pointed out that there would be procedural difficulties if this EPPO has no penal base. That said, my belief is that we try it with what we have, because different criminal laws do not really differ that much. Of course, common law differs, but not that much. What is proposed by Germany could be applied by the Netherlands, and what is taken in, for example, in a court in another country, well this could also be taken into account in another.

What cannot be asked of prosecutors is that they try to comprehend the procedural rights of 27 members states, because this would turn it into a multinational institution and, more often than not, when no progress is made, a pre-trial question can be put to the Court of Justice. So, I don't see them as insurmountable difficulties, I don't see it.

I believe it's something we need to act upon with determination. Someone said something yesterday, I think it was, that we shouldn't put the baby in the bath once the water has drained out... only in our case, the baby is already eight years old, already grown up. So, it may be time to take him out of the tub. We may even find, in doing so, that he's become a young boy, a wonderful young boy that runs around and which may even become a valuable instrument for the prosecutor's office. Thanks.

– [Isabel Vicente] Thank you Mr. Mehlis. I'll now pass this over to Mr. Regis De Gouttes, followed by Mr. Falletti and then Ms. House.

– [Régis de Gouttes] Thank you Ma'am. I'd like to make two short observations in French. First observation: earlier, professor Vervaele pointed out that in order to move forward with the creation of the European Public Prosecutor's office, we would have to start by strengthening the mutual trust, and I would say that to strengthen, or rather, to improve mutual trust, we would first have to improve training, European judicial training. I believe we need to place emphasis on this aspect.

Judicial training on a national level, but particularly on a European level. And, well, you already know that different suggestions have been made; for example, creating a Superior Institute of Judicial Training, a European Institute... but I'd like to place emphasis on training itself. The training of judges is an incredibly important aspect and I reiterate that we have to place great emphasis on this.

Secondly, another more realistic observation: concerning the extension of competences of the future European Public Prosecutor's Office. We have to be realistic; right now, if we take the Treaty of Lisbon, we can see that to increase the competences of the EPPO and to make sure it covers international crime, we would need a decision from the Council of Europe. Moreover, a unanimous decision from the Council, followed by an endorsement from the European Parliament after consulting with the Commission. And I may be talking right now in front of the other participants, but I do not believe we can draw upon reinforced cooperation, and this makes this extension of competencies more difficult. I repeat: we have to be realistic.

For this reason, I will go back to my previous idea: we need to strengthen Eurojust. That is, we need to strengthen Eurojust, OLAF, the European Judicial Network... That's where we need to start. I think this is the channel that will open us up to the Treaty of Lisbon and, I repeat, I believe we have to be realistic. Thanks.

– [Isabel Vicente] Thank you very much, Mr. Falletti, over to you.

– [François Falletti] Thank you ladies and gentlemen. I would like to go back to one of the points mentioned earlier. If a European Public Prosecutor's Office is created for the purpose of combating fraud and protecting financial interests, would this be discrimination? I don't think so, because the judicial situation will change with the Treaty of Lisbon and sure, today, the Court of Justice can control the quality of protection offered by a country in respect to its financial interests and, specifically, whether there is a lack of efficacy at the port of entry into the country. That is today; but tomorrow, we will have a much more satisfactory judicial support, because the treaty of Lisbon explicitly

states that the European Public Prosecutor's Office can be created specifically for fraud against financial interests within the EU. If the EPPO is more effective than other systems, then better still –this will only help reinforce its position.

I am not particularly concerned at how this body is to be set up alongside Eurojust. I believe its work can be effective. The Treaty talks about a Public Prosecutor's Office created based on Eurojust. And the way I see it, with the experience of Eurojust we can imagine how it would work: there would be a Public Prosecutor's Office that would group together nine or more countries, through reinforced cooperation, and this public prosecutor's office would be associated with the coordination work of Eurojust. If there were two or three other countries affected, for example, by a certain case. We must also consider that the Eurojust database, the investigations database, can also be used. At present, we exchange information on investigations between three or four countries involved in the investigation. This is where there would be an exchange of data between the EPPO and the two or three other countries affected by the investigation. I believe this is a regime that could be well adapted and could work perfectly.

I'd like to go back to what was said by Juan Antonio, to find out the extent of the competency of this prosecutor, of this European public prosecutor's office. I believe the issue of terrorism would have to be placed in another field. That is, terrorism also exists for Eurojust, it's something over which Member States want to maintain control until the last minute and want to understand. I'm not saying we should not attempt to fight terrorism in these decisions, perhaps considering it has a separate issue, because it is a very delicate issue. But there is certainly a need, in this sense. There are seven or eight countries which sadly have experience, broad experience in this issue, but then we have sleeping cells in all countries. Perhaps we need to tackle it as a separate issue.

As for the material competences of the public prosecutor's office, well, I'm not entirely satisfied with the argument put forward by Regis De Gouttes. Because reinforced cooperation may pose difficulties, such as for serious crimes, as reinforced cooperation is explicitly set out for the EPPO in regard to the protection of financial interests, I mean, that's what it's for, that's what it is set out to do. I think it would be important to consider giving this EPPO more competencies, and not to limit it entirely to financial interests.

In my speech yesterday, I illustrated the limitations that the system would face, including with a very strong judicial network; even still, I think there would be limitations, difficulties. And we have seen occasions in the past when a state has wanted to hold the reins in an undercover agent operation. At best, a detainee would go through several inquests, in numerous investigations, and would have to be interrogated several times. Sometimes there are cases of crime in which it is considered appropriate to act on a national level,

overlooking European intervention; therefore in this sense, a European public prosecutor's office may also contribute, in no small way, towards serious crime.

But there are judicial problems, and since we have some eminent teachers, well I hope they can find the solution. I don't know.

I will conclude by reiterating what I pointed out yesterday. We would have to specifically illustrate or argue as to why we need this backing that the EPPO would offer. I think in regard to the financial interests of the EU it has a better argument. We've been working on this matter for ten years, the arguments are well known, they're out on the table. I think most people are convinced of the additional value an EPPO would bring to this area of financial interests. But what we need to focus on now is the value that serious crime would bring to other areas, specifically based on the experience of Eurojust. Thank you very much.

– [Isabel Vicente] Thank you Mr. Falletti. Before continuing along these lines, I'd like to pass the debate over to Ms. Tricia House, if she would like to speak?

– [Tricia House] Thank you very much. I'd like to go back to what was said by Mr. Mehlis, that is, in regard to practical experience. The practical experience of the different institutions, as also mentioned by Mr. Irurzun and which, to a certain degree, is called into question because we have dedicated so much time to this baby of eight, or which is now eight years old. We've set-up bridges between different legal systems, different jurisdictions, while the differences we've had and that we continue having have surfaced.

We are academics, we love to debate and we love to get into Byzantine discussions about the sex of the angels, and whether it is article b), a) or one article or another, 69 a), 69e), well, no, I don't agree, because with these bridges we've built, I think we've strayed even further away from what we once dreamed of many years ago.

We started in '77 with EU-based fraud, taxes, drug trafficking –i.e. very clearly defined fields– and now, we've been approaching Europe bit by bit, trying to make things work, and we've come much closer than with the *corpus iuris*, the Green Paper, etc. And it is for this reason that I say no to these things.

Everyone in Europe uses, for example, telephonic interceptions through phone tapping, gaining information that can then be made available to another country. And suddenly, we see how valuable this is, and so we change our legislation to adapt it to these procedures being used. So, I could complain, for example, I could say, «It's just so difficult to create this figure of the European public prosecutor's office». But it seems we've caught a glimpse of another alternative which to me personally, is far better, because since 1990 in England

and also in Ireland, which has a more traditional law, we have changed our legislation, we have adopted the European Arrest Warrant, for example, and it works, it works. No one would have thought it possible, but it works. This has implied a change in procedures, and, why did we do it? To accommodate this need, this glaring need, for a rapid exchange of prisoners. I could mention many areas that have been brought significantly closer to the European way of doing things.

And in Europe, there has also been a certain movement, for example, towards the more bureaucratic way of doing things. I'd like to say to Mr. Irurzun, for example, that his laboratory case is absolutely real. About a month ago, I came across the same case, we went to Eurojust, and yes, Eurojust, Europol, the European Judicial Network –all of these exist, we can use all of these channels, these institutions for achieving different objectives. If I want to help with mutual assistance I can go to the European Judicial Network; if I want to coordinate activities in different Member States or joint investigations, I'd go to Eurojust; if I want intelligence, then I go to Europol; it's very easy and it works perfectly, believe me, there's no problem.

I'm not saying there's no margin for improvement and I agree with what Mr. De Gouttes said, that is, regarding combined judicial training. This would work perfectly, or rather, it works for prosecutors, for attorneys... I mean, when you work together you have a better understanding of things, and when you understand things this creates trust and avoids such distress, like saying, «My God, I've got to send a prosecutor to Germany, what are they going to do to this poor guy, and now I have to send one to Greece and I don't trust their legal system». As it is, judges are becoming younger and younger, more confident, more self-aware; this is the channel we use –not the creation of a European public prosecutor's office.

– [Isabel Vicente] Thanks very much. This is bound to stir up a debate... Mr. Jiménez-Villarejo, it's with you.

– [Francisco Jiménez-Villarejo] Yes, well, as a Spanish prosecutor who is always on-site, working in a Public Prosecutor's Office which is lucky enough to lie on the shore of the Mediterranean, but which encounters day to day problems, I've experienced many different feelings; the feeling of being truly proud and satisfied at seeing the creation of the European legal area, which I also believe is certainly a privileged space of cooperation, of legal cooperation; but then I've also felt deceived, for having believed that certain economic and security proposals have prevailed at so many decisive moments; economic and security proposals that have certainly been driving forces since the Single European Act, the Common Market or the Internal Market, through to the European Arrest Warrant and the success it has seen, about which we are all very happy, but that certain phases or prerequisites were missing, such as se-

curing a set of regulations, if not harmonised then at least approximated, but in any case comprehensible and compatible in terms of procedural guarantees, in terms of jurisdiction –as highlighted by John– and in terms of the acceptance of evidence.

What does this have to do with the European Public Prosecutor's Office? Well, in my opinion, a lot. Clearly, there have been instruments that have served temporarily to improve cooperation, but I believe the very principle of mutual recognition of judicial decisions establishes, or should establish, that the co-existence of these instruments and these judicial co-operators and specialised structures, particularly in terms of cooperation, does not make sense, since this specialisation, which is recommended by the Council of Europe in the Recommendation of October 2000 for public prosecutors, does not comply with the very existence of the mutual procedure of judicial decisions.

All legal agents in the investigation phase should already be specialised in this matter, we should have already passed this stage. At present, I believe the Treaty of Lisbon is an occasion for suppressing the pillar structure, for establishing the European public prosecutor's office in a way that is more accessible, and I just want to point out that, of course, I'm in favour of the EPPO; but I also want to put forth other arguments that have already been mentioned; such as necessity, although it is limited to a few certain crimes of a principally economic nature, which can be extended to cross-border crime, and to which I would also add serious organised crime; it is the repercussions that this model could have on the national public prosecutor's offices as a model of investigation, as a model of approximation of the differences in terms of structure, organisation, competency and functions between the European public prosecutor's offices.

Of course, being aware of the difficulties deriving from the eminence of security proposals and economic proposals, as I've said, and from the dimensions acquired by the EU in recent years, reaching 27 and which may even be extended further. But this establishment of a reference as a model of investigation, as a model prosecutor's office, I believe is extremely interesting, extremely positive and I see it as a long-term vision. Obviously in the short term we have to take it step by step, as we've said so often, which is the key to building the European legal area. That's all.

– [Isabel Vicente] Thank you Paco. I'd like to put to you all another question closely related to what was said by Ms. House, Mr. Mehlis and Mr. Regis De Gouttes, who have talked a lot about mutual trust. Don't you think that mutual trust is still more utopian than the European Public Prosecutor's Office? Because I think the authorities, based on our experience, the national judicial authorities and particularly the police authorities are very jealous of the information they have and of the information going around. Including in the Member States themselves; within each of the Member States this mutual trust

does not exist, and is something we need to generate among national judicial and police authorities. Therefore this mutual trust, as a method to achieve in the short– or medium-term, rather than in the long-term as you have suggested, is it less utopian than the EPPO? And Mr. Falletti, I'd also like to hear your comments in regard to the organisations already created: Eurojust, Europol, or the mutual trust between these organisations, which even have overlapping competences, which is proving difficult to construct.

We have agreements we have to sign, raising awareness, interpreting data, exchanging data with Europol. Europol complains of national policies that do not mandate all the data they have, they do not approach Europol as an organisation that, in principle, had to work to carry out its functions.

Therefore, I wanted to put forward these two questions: firstly, that of mutual trust, which has often been proposed as an alternative to the European Public Prosecutor's Office –is this not in reality more utopian than the Public Prosecutor's Office itself? And secondly, as explained by Mr. Mehlis, and on which I would like to elaborate so that our Spanish colleagues may have the opportunity to give their opinion. As we can see, in reality Mr. Mehlis has suggested that we could create a public prosecutor's office, since procedural legislation does not contain so many differences and that we could fix these with what is available in each Member State.

And simply from the organisation of article 69 e) for the Spanish General Prosecutor's Office, for the Spanish procedural law, it implies a problem, given that here the prosecutor does not inquire, does not investigate. Therefore, the continental differences –I'm not talking about Europe and the United Kingdom, but continentally– go much deeper than it seems, because many have an investigative judge (France, Spain, etc.); and then there are the systems, the statutes of these public prosecutor's offices in each of the Member States, France, Germany, Spain, Italy, Portugal, which appeared to follow a more similar procedural regime, but are very different. What do you all think about this issue? How are the national level and the issue of mutual trust connected? Thank you very much.

My co-director...

– [Jorge Espina] I'd like to quickly focus on the thread of your suggestion, and talk a little about mutual trust because, in fact, I believe it has been a problem that I have eventually had to recognise, has not been as serious as we had feared, but which we have felt in the development of all instruments of mutual recognition, especially taking into account the enlargement of the European Union.

We need to be realistic and we need to recognise that many of the States, many of the new Member States, are so far away from the common standards of Europe's original 15, and I believe this is also detrimental to the effectiveness of the basic foundation of mutual trust, which is at the base of this prin-

ciple of mutual recognition. In any case, that said –and I certainly believe this is one problem we are going to continue arguing about– practice, fortunately, I believe is showing us that this difference is becoming smaller and smaller and, fortunately, as I said –and this in itself is a success of the process of integration and enlargement– such differences are not so great in number.

But at the same time, in relation to what Ms. House said earlier, it is fundamental to improve what we already have, which has been said several times over the last few days and during each of these sessions. The issue is that the creation of the European Public Prosecutor's Office implies a qualitative leap forward, taking us to a different level, to a different model, to a change of paradigm, you could say, and enables us to move up a gear. Of course, I think there are many faults, yet many of the faults of these bodies operating today are not attributable to them. During these last few days we have listened to complaints, and we've heard complaints in the past, for example, from OLAF, regarding a lack of information, a lack of feedback on what we receive at the national jurisdictions and from that, obviously, we're the ones responsible rather than OLAF itself. It is also a fact, if we look at Eurojust, that there is a need to improve many aspects, and the proposed Decision moves us forward in this sense, even if I personally think it has gone too far, that we have perhaps taken it up too many notches, and that it hasn't been taken into account –as my colleague mentioned yesterday– that there are many legal changes that need to be made to sustain this possible reform, and in some cases we could even encounter institutional problems that are difficult or even impossible to resolve.

But as I say, recognising that this is the case, what we're talking about is effectiveness, because I shall repeat what I said earlier: this does not involve doing it just for the sake of it, but to make sure it truly serves a purpose. Yesterday Mr. Brüner mentioned that there is a sentimental element among certain Member States that opposed the EPPO System. We should not allow, a sentimental element that leads us to support anything European or which comes from Europe. We're going to be serious, we're going to be reasonable and we are simply going to accept the changes that bring additional value and which, therefore, motivate us to improve the effectiveness of our work, which is ultimately what we are all looking for. Thank you.

– [Isabel Vicente] Thank you Jorge. I shall now hand it over to Mr... There are three participants who have requested to speak: Mr. Petillon, Rosana Morán and Ms. Theato.

– [Jean-Pierre Petillon] if you will allow me I'm going to speak in French. I was very interested by what Mr. De Gouttes had to say, with the term «training». I have worked for the OLAF for six years. I started out like Isabel as a judge, and we have come to realise that since only very recently, this com-

munity world was completely unknown, not only to my French colleagues, for example, but unknown by judges from other countries. If I were to ask, «how much is the EU budget?» If I ask this as a point-blank question, I'm certain that no one will know. The EU budget is €126,000,000. Of this €126,000,000, 6% is reserved for administrative costs, for EU administration. Of the remaining 94%, around 14% is spent directly by the EU, while the remaining 80% is shared to cover costs between the Member States. I'm simply mentioning this as a challenge, and to put figures to this challenge.

I had a French colleague who I called on the telephone because we were working on a case. The OLAF sent it to the French jurisdiction and he asked me, what is this OLAF? And of course, having being asked this, I thought something here needs to be done. A colleague from the French National School for the Judiciary –where we received an education exclusively for French judges– and I said to ourselves, we need to get our colleagues into this. And the benefit of having a very small group is that you can really create an exchange of opinions, create bonds, where people get to know each other, I don't know, Italians, French, Germans. This creates bonds between people. Perhaps in the future there will be Spaniards too. Everyone knows how important it is to know, to have a face, to know that there's someone just a phone call away. This is fundamental.

So, the objective of the training was to answer the question: what are the EU goals? The goals of protecting the community's financial interests. I believe that this, inevitably, and at least this is what I think, will create the need to advance even further, because protecting the financial interests of the EU can only be done, not only through the creation of a European public prosecutor's office, but would require the involvement of our colleagues. Judges will need to be trained and to me this is paramount. We must not forget that Member States have to provide the same level of protection as they do for their own budget, that is, they have to protect the EU budget just the same as the national budget. This obviously requires training.

Frankly, I don't believe we can avoid the creation of a European Public Prosecutor's Office, like Mr. Falletti said, we need to be reckless. We need to have the courage and, as it was said before, simplify, this is absolutely certain, because if we multiply Eurojust, Europol, OLAF, Public Prosecutor's Office, etc. I shall not go on... well, we'd create a super complex network, whereas what we need to do is simplify. I must stress that the figures I mentioned are extremely important, and that the EU's financial interests clearly need protection, no? Because Member States have a responsibility over the funds they receive from the EU budget. On the one hand, cases dealt with by the Commission make up just a small part. Approximately 14% of the budget is distributed by the Commission, that is, on investigation, transport, etc. These are community funds. Contracts set up by the Commission, paid for by the Commission and,

I hope, controlled by the Commission. And right there, that's where OLAF plays a vital role. Because we're the only ones who have the knowledge, the knowledge necessary to do this, we know our way around the EU terrain. For example, I could go to a directorate general tomorrow, I could call, request a document, and there'd be no problem. But if a national judge wants to go today, he has to go through the channel of international cooperation, or super-complex channels; but if tomorrow there exists this role of the European Public Prosecutor, his work will be very easy. It would facilitate the lives of many people. This is what I wanted to say. Thank you.

– [Isabel Vicente] Thanks very much, Mr. Petillon, for illustrating just what we're talking about in terms of figures, which is very important. I shall now hand over to Rosana Morán and then to Ms. Theato.

– [Rosana Morán] In the debates over the last few days, as always, opinions appear to arise from both extremes. Once again we are hearing those who agree that cooperation is sufficient, whilst hearing those who think that to create a European Public Prosecutor we need to unify criminal law, the general part, the special part and procedural law. As always, I believe we will conclude that the correct position is always somewhere in the middle, and in this sense, I'd like to contribute two things.

One: cooperation itself has improved, there are now many institutions and, best of all, this cooperation works. But there are questions that international judicial cooperation in the purest sense cannot resolve. There is one issue that I would like to bring up, that is, the fragmentation of jurisdictions, which is impossible to resolve through the channel of cooperation. We cannot resolve "it" passing different rulings for the same type of criminal organisation, as this causes huge problems in global criminal prosecution and to the concrete cas, and I believe that for this reason it is essential to create this role of the European Public Prosecutor who can decide in which jurisdiction the final sentence is to be passed.

Although yesterday I ran out of time, I wanted to look at the analysis of these issues of conflicts of jurisdiction, and in which the role of the European Public Prosecutor should be combined with the creation of certain regulations for determining jurisdiction within the European legal area. And I shall reiterate that this is exactly one of the essential issues for making the European Public Prosecutor work. But from the other perspective and, you might say, as an opposing opinion, there are those who consider that for the European Public Prosecutor to work, we need a unified a criminal law and a unified procedural law.

I wanted to emphasise that, in conformity with the Treaty of Lisbon, the first article that would appear from the Treaty on the Functioning of the European Union, which is article 67, insists on the creation of a space of

freedom, security and justice in respect of fundamental rights, but also in respect of the different legal systems and traditions within the Member States. This does not imply unifying –we cannot harmonise everything. We have to respect different legal traditions and, from this perspective, I believe there is another issue that needs to be resolved, and which is effectively based on mutual trust, which is the issue of acceptance of evidence. This morning, from the perspective of a Spanish prosecutor, we've heard a judge from the Supreme Court whose hypotheses regarding the acceptance of evidence obtained obroad have so far, fortunately, not come into fruition, because this idea is not in reality based on mutual trust. So far, in fact, our Supreme Court as always maintained that evidence obtained within a country that respects the guarantees of the European Convention on Human Rights may be used in Spain and may be accepted as valid proof. And in this sense I believe that if there are any obstacles, we would probably have to establish certain minimal rules which respect, more than anything, the differences between judicial authorities and legal investigation systems. Since 1959, we have had different legal authorities in terms of cooperation. It has never created problems and we have respected these differences. We cannot believe we can impose, on all countries, our system of a judicial reviewer who gains access to accept, or an investigative judge who accepts, or who authorises all entries and records, all telephone authorisations. We have to respect legal traditions and, from this perspective, knowing we are all countries that belong to an area like Europe, guaranteed by the European Court of Human Rights and, fundamentally, based on the Treaty of Lisbon, with a mandatory Charter of Fundamental Rights, we're all going to fall under a blanket of basic respect for such rights and we must not overstep the limits or demand such maximum guarantees in this sense.

I also do not believe that the European Public Prosecutor's Office be built on the basis of the absolute unification of procedural law. I agree with Detlev Mehlis, who yesterday highlighted the possibility of implementing a coordinatin, prosecutor's office, or rather than coordinating, directing... because we already had bodies in place that coordinated prosecutors and deputy prosecutors. I believe that with certain minimum regulations for resolving conflicts of jurisdiction and certain other issues, simplifying, as Fernando put it, we could, at least, begin to work.

– [Isabel Vicente] Thank you very much Rosana for this clarification of ideas and for reminding the Commission that it must at least rethink its precepts in the Green Paper and go one step further in regard to the delegates and the prosecutor operating in Brussels or Luxembourg. Now let us hear from Ms. Theato.

– [Diemut Theato] I'm going to talk in my native language, which is German. The question of mutual trust, it seems as though this has been one of the prerequisites of the European Union from the start. There were many agreements that were based entirely on mutual trust, which is why they were created. The EU has grown and has expanded its competences to such an extent that we now need some rules. And I am extremely happy that the Treaty of Lisbon exists. To be honest, I would have preferred a Constitution, but the Charter of Fundamental Rights already has a binding nature and I believe this is something we need to emphasise.

In regard to the Treaty of Lisbon and, in particular, to matters concerning the European Public Prosecutor's Office, I believe that we shouldn't fall into excessive authoritarianism and that every procedure should be carried out with the same emphasis. I would perhaps spread into different temporary spaces. For example, the protection of financial interests is maybe something that has been talked about, using so many of the EU's resources, that I think this is where we really do have the recognised usable experience and, at the same time, the financial interests of the EU is something that exists as a European policy and as a renowned European territory. In other words, what we need to avoid is taking backwards steps.

And with regard to the EPPO, I believe there would be no problem. Now, are there other serious crimes to be included now or added later? Well, I think this is something that will have to be addressed according to the debate, to the progress, to the perspective. I believe that if, at any given moment, the need should arise to change the Treaty, then it should be done, but I would take advantage of this broad framework, that is, I wouldn't use it up right now, but I would gradually take it forward, step by step. That would be the approach I would take. And also, as Tricia said, this gives us a focus on being more pragmatic, in the sense of establishing rules.

We have rules in the European Union. Whether administrative rules and criminal provisions, etc. can be placed under the same umbrella, I don't know. I believe it's been like some kind of game of competency, of putting some rules with others, which takes me back to something I said before: we have rules in the OLAF. We already know that OLAF is completely different to Eurojust because it's not within the framework in which it was created. It was an emergency aid, the Commission was forced to quit and to look at how to combat fraud which was of course given... it was a creation that could not be made independently because the Treaty needed to be changed, which is impossible in such a short space of time. So it was annexed; it could've been annexed to the Court of Accounts, but in fact it was created as some kind of annex to the Commission. That is the reality. And so my question to the Eurojust experts is thus: where would you place OLAF? Will it continue to run as an independent department? Will it become an autonomous organisation?

An independent unit that, within that framework of its possibilities and if the EPPO is created, would participate? Would it be a financial police, or would Europol handle this? In other words, there is a whole range of open questions.

I thank Eurojust for allowing us to hold a meeting with the experts, between the Director and the experts of Eurojust and the Supervisory Committee, because as a member of the Supervisory Committee, my question is this: what will happen to OLAF? Because its political base, regulation 1073, of '99, is under review, it's pending review, so does the legislator work over this, does the Parliament continue working on this or do we leave it to one side until we work out where OLAF is to fit in? Or does OLAF just disappear from the map...? I mean, at the moment, anything is possible. And if there is a review of regulations, in this case, I would direct it, I would aim it at a potential future role of OLAF to take advantage of it for the fight against fraud and violations of the European Union. Thank you very much.

– [Isabel Vicente] Thanks very much Ms. Theato for once again highlighting these issues affecting the organisations currently in operation. I'd like to remind you all, in regard to what will happen to OLAF, that also under article 280 of the Treaty of Lisbon, the Commission retains special competences of combating fraud and of close collaboration with the authorities of Member States. OLAF is Commission, therefore it retains these competences. Just to give a small reflection on this matter. I don't know if Mr. Falletti, as a member of Eurojust, would like to give any reflections as to what was said, to this thread put forward by Ms. Theato; if not, others are of course also invited to depict –we're not giving prophecies here, or making presumptions– but to describe the framework in which you would put this. Mr. Falletti, would you like to respond or give Ms. Theato any ideas as to how you see this issue?

– [François Falletti] I have listened to a number of interesting ideas, which has given me some equally interesting trains of thought, and I believe we have to start working specifically on what we need to build. We have to start building.

I said something yesterday –perhaps somewhat frankly– that was pretty much definite. If it's of no interest, then there's no need to look into it any further, but... if there is a need to create a European Public Prosecutor's Office, we have to analyse it specifically to work out how it is to go ahead. And there are many possible channels: first, we have to determine the architecture, the conjunction between Eurojust, Europol and OLAF, we work out whether we need to amend any regulations, even perhaps framework regulations. We have to work out whether we need to prepare legal devices with more time, to reflect on any possible difficulties we would have to resolve. Because I think it is very important to ponder this even further, to look deeper into this.

– [Isabel Vicente] Thank you very much for this elaboration on the thought. I'm told it's already 1:30. So, I'd like to thank you all very much for your participation in the debate and remind you, or simply announce, that the idea of arranging this debate and this seminar was not so that they would end here; on the contrary, it was our intention to make this a starting point for discussion that will go on through this entire period leading up to the signing of the Treaty because, once it is ratified, there will still be a lot to talk about, but right now I think it's very useful too hold prior debates, prior reflections, and the aim of the General Prosecutor's Office and the Supervisory Committee, and of course of the Ministry, was mainly to ensure that this was nothing more than a starter's gun for ongoing debates that we hope will be held throughout this year. Naturally, we're willing to keep open this hot debate. With respect to Eurojust and the OLAF, I would also like to reiterate that the Supervisory Committee understands that it is also its role and its job to try and pool positions and to maintain contact and communication between these two bodies that work toward the same goal, from perspectives that may seem different, but which in reality are exactly the same. With nothing more to add, I'd like to hand it over once more to Jorge Espina...

– [Jorge Espina] I'd just like to say, before the official conclusion to this event, that since our intention, as Isabel just said, is that this seminar does not end here but that it becomes a starting point and may be used by others as a reference, we're going to make every effort to release a publication as soon as possible including all the contributions made. If any of you feel that you've not had the opportunity, due to the lack of time, to share any thoughts with the rest of us on any topic, I encourage you to submit them in writing over the next few days and we'll do whatever we can to include them in the publication that will be released in due time, which you each will receive, and which we will try to distribute as widely as possible, in order to make sure that this is not left behind in the middle of nowhere, but continues onwards. That's all from me.

Closing Session

ALFREDO RAMOS
Director of the Centre for Legal Studies

The Honourable Attorney General
The Honourable President of the OLAF Supervisory Committee
The Honourable Magistrates, Prosecutors and European Institution Representatives
Authorities
Ladies and Gentlemen

Allow me to express my deepest satisfaction, as Director of the Centre for Legal Studies and as co-organiser of this seminar, at the presence here today of the General Prosecutor and the President of the OLAF Supervisory Committee, as well as offering my sincere appreciation for the attendance of all of you. This is particularly extended to the participants at the Round Tables and the speakers who, over these intense past two days, have come forth and expressed themselves at this seminar.

The Centre for Legal Studies feels particularly bound by the duty that brings us here today, in performance of the role it has been assigned for the ongoing training of Prosecutors, Legal Secretaries, State Attorneys and, in collaboration with the Autonomous Communities, all personnel at the service of the Justice Administration.

According to its functions, the Centre for Legal Studies includes in its training programmes important topics related to corruption, spanning organised financial crime through to terrorism, human trafficking and drug trafficking, which as a result of the so-called process of globalisation incorporates complex forms of cross border crime and, more generally, analysis and research into the growing issue of internationalisation of criminal activities which international legal cooperation seeks to resolve.

As such, with great satisfaction and clearly within its strategic lines of operation are issues such as the one being addressed here today, as well as the collaboration with other institutions and, most of all, with the General Prosecutor´s Office through its Technical Secretariat. Also an essential component of the organisation of this seminar is OLAF, an office which since 1999 has played a decisive role in anti-fraud administrative investigations within the EU.

I am certain that meetings such as this will give great incentive to the so-called Third Pillar of the European Union, which as you will recall emerged in 1993 with Title VI of the EU Treaty as the first decisive step towards effectively

consolidating the European space of freedom, security and justice, a notion incorporated by the Treaty of Amsterdam, of 2 October 1997, which –lest we forget– aims to be more than just an area of judicial cooperation: in effect, it expresses the eagerness for a systematic exploration of the EU.

With this we now unite to contribute to one of the objectives set forth in chapter IV of the Treaty of Lisbon, of October 2007, referring to the field of judicial cooperation in criminal matters; and which, as you will also remember, calls on the European Parliament and the Council to ensure that the EU adopts the necessary measures to support the training of judges and personnel at the service of the Justice Administration, among others.

This commitment particularly extends to the enactment of directives concerning the mutual acceptance of evidence, to the rights of the defendant during criminal procedures to the rights of victims and to the establishment of minimum regulations for defining criminal violations and penalties; it also bears particular weight in the area of terrorism, the trafficking in human beings and the sexual exploitation of women and children, illicit drug and arms trafficking, money laundering, corruption and forgery of methods of payment, computer crime and organised crime.

These objectives require intermediary support to facilitate coordination and cooperation between all EU Member States, adding substantial powers, perhaps even redefining some, to the different instruments that the EU already has in its possession.

I refer in particular to Eurojust (an entity created by way of Ruling 2002/187/JAI, of 28 February), as a result of the initiative of the European Council of Tampere (of October 1999) and later backed by the Treaty of Nice, of 26 February 2001, as you will recall; to Europol, resulting from the European Council initiative of 1991 and created in 1995 (and fully operational since July 1999) as I'm sure you will also remember; and, furthermore, to the strengthening of the European Judicial Network, among others.

We therefore need must aim to contribute to the creation of a European Public Prosecutor's Office, firstly to guarantee protection of EU financial interests and secondly, in what we hope to be the not-too-distant future, to broaden EU powers in the fight against serious cross-border crime.

I am certain that these few days will produce a significant input of ideas to influence possible directives and models that may be introduced and progressively add substance to tackling the thrilling challenge of creating a European Public Prosecutor's Office.

Moreover, they will help outline the principal objectives of its functions, beyond the essential persecution of fraudulent activities within the EU, helping the Community to respond to cross-border crime and tightening the bonds of

international legal cooperation between the different Public Prosecutor's Offices of each Member State.

Paths of reflection such as those indicated by the Green Paper and in subsequent bids ranging from the Treaty of Amsterdam to the more recent Treaty of Lisbon, passing through the Conventions of Tampere, help strengthen our awareness of what it means to hold European citizenship, with effective and certified rights and duties, and with institutions in place that guarantee their protection.

You have all collaborated in the rigorous work carried out over the past few days here in Madrid at this seminar which, for the record, has constituted a wonderful forum of deliberation, dialogue and participation.

In appreciation of your efforts and of the presence of each and every one of you, I would like to take this opportunity to encourage you to pursue your goal of ensuring that as soon as possible, the European Public Prosecutor's Office becomes a reality.

Thank you very much.

LUIS LÓPEZ SANZ-ARÁNGUEZ
Supreme Court Prosecutor. Chairman of the OLAF Supervisory Committee

To the Honourable General Prosecutor and the Honourable Director of the Centre for Legal Studies:

We herewith bring to a close the International Seminar on the future European Public Prosecutor's Office; two days of intense work, of which I sincerely believe we must give a positive evaluation.

We have listened to opinions and shared reflections on a matter that is of great interest both in terms of its content and considering its different focuses; but in all certainty, this variety of contributions and their differing approaches have given this seminar special value as the first forum for debate on the future European Public Prosecutor's Office resulting from the recent Treaty of Lisbon.

Based on their knowledge and experience, all contributors and participants have expressed the possible benefits, obstacles or complications that the creation of the EPPO may imply to the reinforcement of the common activity of EU Member States to enable effective corporation in the areas of freedom, security and justice. These contributions give us an initial insight into the problems that the creation of the EPPO may face, but also help us to foresee the measures and proposals necessary to steer clear of these obstacles and overcome such problems.

As has always occurred in this long process of forming a united Europe, the steps to be taken are evaluated on different levels; while some may be bold and near unattainable, others prove too short. Nonetheless, experience proves –as it has for the past 50 years– that a united Europe is taking forward steps which, though small and seemingly insignificant, when put together shape the reality that is the European Union. As regards the European Public Prosecutor's Office, the Treaty of Lisbon is a more sufficient step forward to preserve certain ideals introduced some time ago with the «Corpus Iuris» and the «Green Paper for the protection of the financial interests of the EU». Moreover, the Treaty brings forth a substantial difference: the specific provision in its article 69.E that enables us to switch from hypothetical reflections to the gradual and effective adoption of agreements and measures for turning this concept into a reality.

At this seminar there has been mention of the difficulties that already exist and which will certainly arise upon implementation of the EPPO. Some have even indicated that differences in special criminal legislation and, most of all, the diversity of procedural systems in force in each of the Member States make the project nonviable. Others have suggested that a European Public Prosecutor's Office for protecting the financial interests of the EU is superfluous and unnecessary because, in their opinion, there already judicial and police cooperation mechanisms in place that have successfully helped combat serious crimes such as terrorism and drug trafficking.

Faced with these standpoints, other speakers and participants at the seminar have given strong support to the creation of the EPPO despite acknowledging the existence of the problems mentioned. The speech of the Vice President of the European Commission Mr. Siim Kallas proved to be the most informative and demonstrated the unfaltering will of the Commission to carry forward this idea.

Aware of such difficulties or of a lack of interest by certain States, the Treaty of Lisbon has incorporated two important amendments that have been the subject of much discussion in the past few days. Firstly, and considering the foreseeable lack of unanimity, it establishes the possibility of working towards a European Public Prosecutor's Office adhering to the reinforced corporation procedure, based on the agreement of at least nine States. Secondly, and as a note of precaution, the treaty tackles the creation of the EPPO with some formerly limited competencies to «*combat violations that are detrimental to the EU's financial interests*», while leaving the door open for a further expansion of competencies to fight other forms of serious and cross-border crime.

From the speeches given at the seminar we can extrapolate another conclusion: the implementation of the European Public Prosecutor's Office requires all institutions and organisations currently involved in common activities regarding justice and in the fight against fraud affecting the EU budget. We have heard the opinion of prominent members of Eurojust, of the OLAF and of the European Judicial Network and, although they have been absent, we have received references to the role of Europol. From all these interventions, we have come to the conclusion that both in general and in particular, each and every one of us has an important role to play in the creation of the EPPO.

In any event, it has been made clear during the seminar that all of these institutions and organisations are going to need substantial reforms in their current regulations in order to adapt to the demands that, in substance and in form, a future EPPO requires. To this end, great effort must be put into specifying their respective functions and, once and for all, establishing systematic criteria for the attribution of competencies. Once a programmatic agreement has been reached concerning these issues, the road towards a European Public Prosecutor's Office will be a much clearer one.

This now brings me to the end. There have been references to some great poets in the past few days; I however shall take a more prosaic approach with a vignette of cartoonist «El Roto», published many years ago and which I have on display in my office, in which the main character eloquently says: *«Let's not kid ourselves; justice is only a state of mind».*

Let us hope that the EU enters a state of mind capable of rousing the will of its institutions towards an authentic and effective common criminal policy.

Thank you very much.

CÁNDIDO CONDE-PUMPIDO
General Prosecutor of Spain

Dear friends,

All of us gathered here today well know that the European Union has needed to shake off the lethargy by which it has been burdened in recent years following the rejection of the constitutional text by the EU citizenship. The Treaty of Lisbon helps restore our faith that the EU continues to move forward, a task to which we at the General Prosecutor's Office have sought to contribute by re-launching the debate on one of the key institutions contained in the Treaty and by which we are directly affected: the figure of the European Public Prosecutor's Office (EPPO).

Herbert Bösch, president of the European Parliament's Committee on Budgetary Control, manifested how the formation of the European Public Prosecutor's Office is an example of the triumph of perseverance. In this case, the perseverance of the European Commission and especially of the European Anti-Fraud Office (OLAF) and its Supervisory Committee based on the need for the EPPO has led to its shaping into the European Constitution and, following its failure, its entry into the Treaty of Lisbon.

It is a real triumph, or better said, the beginning of a triumph. To ensure this hope is realised with the constitution of a European Public Prosecutor's Office, we must accept that its creation still depends on many determining factors. One of particular importance is the emotional rejection of losing the «sovereignty» of which OLAF Director-General Hermann Brüner gave mention in his speech. Of course, such forms of defensive emotion are surmountable; we need only recall the emotional repudiation generated by the loss of the peseta, the franc, the lira, the mark, etc., all of which were in any case destined to be replaced by the Euro.

We must therefore seek to overcome this sentimental opposition, since I am convinced, furthermore, that it does not come from European citizenship, but from the fear of certain governments of the loss of control: the inevitable resistance to a shift of power.

The main conclusion from our debates is that there are genuine problems to overcome in regard to protecting the financial interests of the EU and combating organised crime; as such, the founding of the EPPO is both useful and necessary, although the notion of its creation is not an unconditional one. Any standpoint must be subject to questioning in terms of its development and structure. To reach a consensus on these issues, we need to examine the different options available and discuss them together, undertaking a path of reflection to which we aimed to contribute with this seminar - our first opportunity

since the incorporation of this office into the Treaty of Lisbon - to bring together on this matter certain figures that are key to its development.

I hope that the resulting contribution proves useful to support this enduring posture of the Commission which became the Green Paper and I hope to see the debate launched today continue. I would also like to urge other affected parties to create forums for further reflection on this matter.

The foreseeable constitution of an EPPO through the enhanced cooperation method gives us a better idea of the likelihood that this public body will become a functional reality, insofar as being the traditional form that continues applying the Schumann «step by step» construction process.

All that remains is for me to reiterate the appreciation I gave when opening the seminar to all participants. Thanks to their presence and with their help, I believe we have achieved a positive result that will also be published. I would like to give special thanks to the members of OLAF, of the Supervisory Committee and of Eurojust for their support and collaboration. Of course, I would also like to thank Don Alfredo Ramos of the Centre for Legal Studies who is with us today for his vital support, without which this seminar would have not taken place. Thanks to all attendees for their interest and participation in the debates. Finally, I would like to offer my most sincere appreciation and congratulations to the two co-directors, Jorge Espina and Isabel Vicente; it has without doubt been their enthusiasm and tireless work over the last few months that has enabled us to come together and reach our conclusions on the forthcoming inauguration of the European Public Prosecutor's Office.

«Today, the clouds bore me...»

RAFAEL ALBERTI

Today the clouds bore me
flying, the map of Spain.
How small on the river,
and how huge on the meadow
was the shadow it cast!
I, on horseback, in its shadow
looked for my town and my house.
I entered the courtyard where once
there was a fountain of water.
Even though the spring was gone
the fountain kept on echoing.
And the liquid that flowed no more,
flowed back to bring me water.

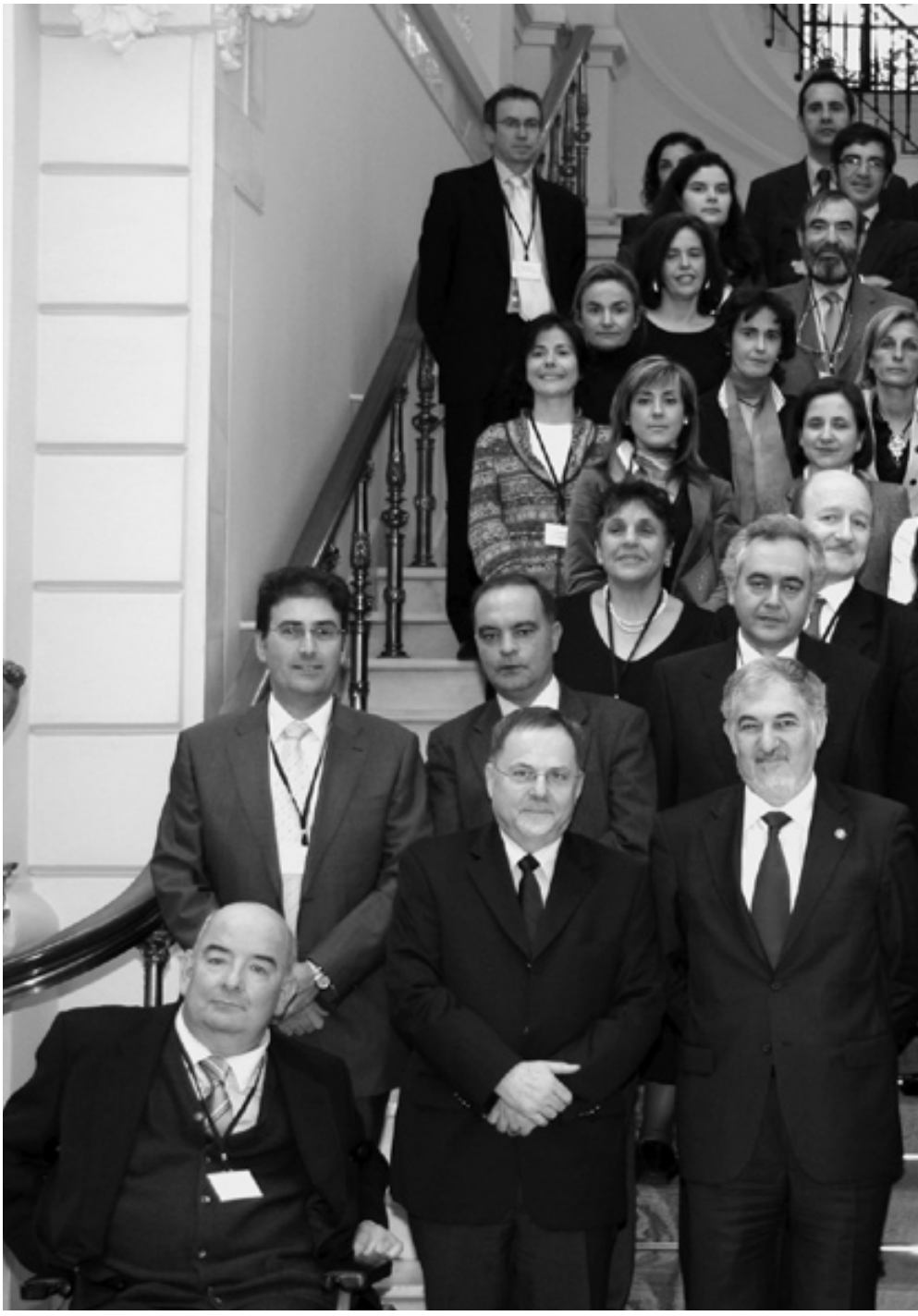
I assure you that one day, some years from now, when the European Public Prosecutor's Office is up and running, when you come back to Spain, you may return to this house, to the office of the Spanish General Prosecutor's Office and, in this courtyard where we've spent the last few days, talking and drinking coffee, you will listen to the fountain.

The sound you will hear will bring you back to these days, a sound from which will spring affection and the memory of Spanish Prosecutors who in these recent days have tried to make you feel at home.

Thank you very much.

Press conference, offered by Siim Kallas, Cándido Conde-Pumpido and Herbert Bösch.

Supervisory Committee of the European Anti-Fraud Office (OLAF)



Family picture of the Seminar «The European Prosecutor's Office».

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