



***CENTRO DI DIRITTO PENALE EUROPEO***

95128 CATANIA Via Vitt. Emanuele Orlando, 42  
-Tel. (095) 7223536; 722 6096 pbx -FAX (095) 7223526-  
E-MAIL: *prof.giovanni.grasso@iol.it*

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COMMENTS ON THE

**“Green Paper on criminal-law protection of the financial interests  
of the Community and the establishment of a European Public  
Prosecutor”**

Work coordinated by dott. Luigi Lombardo

Study group composed of:

Dott. Alessandra Geraci

Avv. Paolo Reale

Dott. Salvatore Scalia

Dott. Rosaria Sicurella

Dott. Vincenzo Ternullo

Avv. Carmen Toro

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In response to the invitation which the European Commission extended to practitioners and academics working in the sector, the *Centro di Diritto Penale Europeo*, which is based in Catania (Italy), set up a study group (made up of lawyers, judges and university researchers) with the task of furthering the study of the “*Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor*” and analysing the possible powers and the operation of a European Public Prosecutor's office with jurisdiction for offences harming the financial interests of the European Community.

The following text is the outcome of the study and debate carried out within the study group of the *Centro di Diritto Penale Europeo*.

We shall first offer some general comments concerning the plan to create a European Public Prosecutor and then outline the results of the work carried out, answering the questions put by the Green Paper in order of appearance.

### ***General comments***

The initiative of the Commission to promote the establishment of a European Public Prosecutor with the task of prosecuting more effectively the perpetrators of offences which harm the financial interests of the Community was taken in response to a need that has been widely felt for some considerable time.

The increasingly substantive role played by the Community institutions along with the introduction throughout the Union of free movement of persons, goods and capital call for the unified and effective repression of illegal behaviour which is detrimental to

Community interests. This repressive response cannot be left to the initiative of individual Member States but must be coordinated and promoted at Community level and must transcend the now obsolete conventional instruments of mutual judicial assistance.

In this sense, the establishment of a European Public Prosecutor appears to be the first step towards increasingly intense harmonisation of the systems of criminal law of the Member States. This harmonisation is the only way to avoid a situation where any ineffective enforcement by an individual State might be harmful to the Community institutions or to the other Member States, creating at the same time serious distortions of the market for goods and capital.

We certainly endorse the idea that the powers of the European Public Prosecutor should initially be limited essentially to the protection of the financial interests of the Community. However, it is clear that, once it has begun operating and if it is successful, it will be possible to assess whether its jurisdiction ought to be extended to include other fields of criminal law, some of which are clearly of Community interest (such as the issues relating to clandestine immigration).

Furthermore, the establishment of a European Public Prosecutor is fully compatible with the Italian judicial system, in which the Constitution does not reserve the exercise of the prosecution function for the (national) public prosecutor in necessarily exclusive terms, all the more as the recent reform on the criminal-law jurisdiction of the justice of the peace has introduced the possibility, for the injured party, to propose "immediate recourse to the justices".

In order to guarantee effective operation of the new Community judicial institution, we can endorse the idea that the European Public Prosecutor's office should have a central unit (the European Public Prosecutor) and territorial units (the Deputy European Public

Prosecutors), which are part of the judicial systems of the Member States, with an operative function “on the ground” and hence with exclusive powers to investigate and to exercise the prosecution function under criminal law within the extent of their individual jurisdiction.

The two-pronged system consisting of the European Public Prosecutor and the Deputy European Public Prosecutors would in our view ensure that European enforcement would be *homogenous*, as it is the prerogative of the European Public Prosecutor to direct and coordinate investigations, and at the same time *effective*, given the Deputy European Public Prosecutors’ knowledge of the national systems on which the jurisdiction relating to such offences is based. The proposed structure appears to be an appropriate means of ensuring effective meshing of the judicial systems of the Member States.

However, albeit within the scope of their respective attributions, the relationship between the European Public Prosecutor and the Deputy European Public Prosecutors should be part of a two-pronged system.

In the first place, in addition to the powers of review and coordination, we feel that the European Public Prosecutor should also have powers of investigation, which would also mean that he could undertake certain forms of substitution within the framework of the investigations conducted by the Deputy European Public Prosecutors in the various Member States. Secondly, the fact that there would be Deputy European Public Prosecutors in the individual Member States who would generally operate within the original judicial system should not rule out the possibility that these public prosecutors could also operate, by virtue of their powers of investigation, within Member States other than the Member State of origin, and this without the need for any authorisation from the Chancellor of Justice or, *a fortiori*,

from the authorities of the State in which the proceedings are to take place.

The European Public Prosecutor (central or deputy) must be given powers of action which are no lesser in scope than those assigned to the corresponding national authorities.

In this sense, there is also a need to safeguard, in the operative phase, the independence of the European judicial body to be established. If indeed the powers of investigation of the European Public Prosecutor were less extensive and incisive than those assigned to the national public prosecutors in the repression of other criminal activities, he would be unable to operate or forced to request the intervention of the national authorities and would therefore at the end of the day be dependent on the national public prosecutors, who - in turn - in certain judicial systems depend to a great extent on the executive.

According to the Commission's proposal, the rules relating to *status*, the conditions for appointment and the possible removal from office of the European Public Prosecutor, including the various forms of disciplinary liability, would need to have as their legal basis the treaty establishing the European Communities, through the introduction, by a revision of the same treaties, of art. 280a. On the other hand, the provisions concerning the internal relations between the European Public Prosecutor and the Deputy European Public Prosecutors, the relations between the European Public Prosecutor's office and the competent national institutions, whether they be judicial bodies or law enforcement agencies, would have as their most appropriate legal basis the rules of secondary legislation, given that these regulations are more likely to guarantee the link between the Community system and the national systems of criminal law.

We fully endorse this methodological approach.

On the one hand, there can be no doubt that incorporating all the provisions applying to the European Public Prosecutor into the treaties would delay the entry into force of the body in question because of the need to test out the national constitutional procedures. On the other hand, however, it is clear that the rules relating to the powers of the European Public Prosecutor and to the relations between the European Public Prosecutor's office and the national authorities could require revisions and adjustments suggested by the experience acquired through the work of the European Public Prosecutor's office, and there can be no doubt that the rules of secondary legislation - to be adopted on the basis of the codecision procedure - would be the most flexible and speedy instrument permitting any regulatory adjustments that may be necessary.

***Question 1: What are your views on the proposed structure and internal organisation of the European Public Prosecutor? Should the European function conferred on the Deputy European Public Prosecutor be an exclusive function or could it be combined with a national function?***

It is certainly essential, in order to ensure the correct and impartial exercise of his functions, to give the European Public Prosecutor the guarantee of independence.

The notion of independence embraced by the Commission is the synthesis of the principles dictated by the European Court of Human Rights not only in terms of impartiality, with reference rather to the absence of any links with the parties involved in the trial and indifference with regard to the interests in conflict (in this sense the proposal in fact refers to the impartiality of the European Public Prosecutor), but also in terms of independence (institutional and

functional) from the executive arm.

Obviously, the guarantee of the independence of the European Public Prosecutor is closely linked to the conditions and to the procedure laid down for his appointment and removal from office, in particular with reference to disciplinary liability.

Taking into consideration this aspect in particular, according to the Green Paper the body which is competent to rule in disciplinary matters should be the Court of Justice, while the basis of the disciplinary liability of the European Public Prosecutor would be determination of "serious misconduct" in the exercise of his duties.

In this regard, it must be pointed out that we feel that the term "serious misconduct" is too general. It should be given more precise content by providing specific cases of unjustified inaction or misuse of power.

The question of the choice of the body which would be given the power to start the disciplinary procedure is also a sensitive one.

With regard to the disciplinary liability of the Deputy European Public Prosecutors, we feel it is consistent with the hierarchical power of the European Public Prosecutor that it should be he who exercises the disciplinary function against Deputy European Public Prosecutors before the Court of Justice.

The problem of the disciplinary initiative in relation to the European Public Prosecutor is more complex. In this regard, such power of initiative should not be conferred upon the Council of Ministers (which is a body with considerable political connotations) or upon the Court of Justice (which would be the ruling disciplinary court). It would appear, therefore, that the only body upon which the power of disciplinary initiative in relation to the European Public Prosecutor might be conferred without any particular contraindications is the Commission, which, moreover, is the Community body which has a nominating role within the framework

of the appointment procedure and a particular responsibility with regard to the protection of the financial interests of the Community.

Nonetheless, it would be appropriate if the assigning of such power to the Commission were accompanied by the provision of a set of procedural rules which would ensure, before the case is referred to the Court of Justice, a form of adversariality between the Commission itself and the European Public Prosecutor, respecting the prerogatives of each body.

According to the Green Paper, the European Public Prosecutor should be given hierarchical power over the Deputy Public Prosecutors which would enable him to issue instructions to them, whether such instructions be general or particular.

However, the actual content of the power of directive must be specified more clearly.

Above all, it is essential to set the limits of intervention of the European Public Prosecutor when issuing general directives with regard to the lines of conduct to be adopted in the repression of Community offences.

The power of directive can in fact be reconciled with the judicial systems guided by the principle of mandatory prosecution only if the intention is to indicate the most appropriate procedural strategies for the prosecution of offences envisaged by the Community legislator, whereby the European Public Prosecutor may - at most - set a certain investigative priority in the repression of specific types of crime. On the other hand, the European Public Prosecutor must not be given the power to issue directives with regard to the choice of the offence to be prosecuted, as it is the prerogative of the legislator to determine which cases must be punished. This does not, however, rule out the possibility that the European Public Prosecutor may, within the context of a cooperative dialogue with the "legislative bodies", identify specific emergencies or inadequacies of the system of enforcement

and encourage the legislator and the competent bodies to undertake appropriate reflection.

The possible content of the particular directives which the Public Prosecutor may issue to the Deputy Public Prosecutors is yet to be specified.

Within the Italian criminal-law system, the independence which the public prosecutor enjoys in relation to the executive is accompanied, at an internal level, by the absence of hierarchical relations among the different requesting offices. In fact, although the organisation of the public prosecutor's offices has maintained a pyramidal structure, the pre-selected model is characterised by absolute independence among the offices at the various levels.

Recently, within the Italian criminal-law system, with regard to proceedings in matters of organised crime, there has been a marked trend towards greater centralisation through the establishment of a central authority responsible for coordinating all procedures concerning such criminal cases. This body is the *Direzione Nazionale Antimafia* (DNA), which is under the *Procuratore Nazionale Antimafia* (P.N.A.), of which the local interfaces are the *Direzioni Distrettuali Antimafia* (DDA), which are set up within the larger public prosecutor's offices (those which have offices in the district capitals). In particular, the *Procuratore Nazionale Antimafia* has the power to open investigations, under the terms of which he may, *inter alia*, temporarily avail himself of the services of DNA and DDA magistrates, issuing special instructions to them for the purpose of dealing with conflicts and coordinating enquiries effectively. However, there is no possibility of a hierarchical intervention with regard to the evaluations of the judges of the various territorial offices.

In the same line of thought, in our view it must be borne in mind that the European Public Prosecutor can and must exercise his own hierarchical powers in relation to the Deputy Public Prosecutors

with the sole purpose of guaranteeing the coordination of the investigations into criminal activities which cover the entire common area, it being understood that he cannot inhibit the development of a certain investigative activity and thereby influence the free determination of the Deputy European Public Prosecutors.

In relation to the problem of the exclusive nature or otherwise of the duties of the Deputy European Public Prosecutors, it should be borne in mind that several regions are in favour of the exclusive mandate option.

Above all, it must be pointed out that we feel that only an exclusive mandate can effectively guarantee independence. Indeed, if the Deputy Public Prosecutor were also to act as the national public prosecutor, his independence would be seriously in jeopardy under judicial systems in which the national public prosecutor does not enjoy independence from the executive, which would have serious consequences as it would undermine the function of the European Public Prosecutor and the repression of offences of Community interest.

It must therefore be pointed out that the hierarchical power given to the European Public Prosecutor and the necessary forms of disciplinary liability to which the Deputy European Public Prosecutors are subject can be reconciled only if the latter have an exclusive mandate. Indeed, if the Deputy Public Prosecutor had a "dual mandate" (European and national), there could be serious problems of coordination between the two forms of disciplinary liability to which he would be subject, while the possibility cannot be ruled out that the national disciplinary action might be exercised in an instrumental manner.

On the other hand, the other alternative, cumulability of mandate, is not even necessary for the handling of "hybrid cases". Indeed, precisely because of the prevalence of European jurisdictions

over national jurisdictions, we feel that any forms of cooperation and dialogue with the competent national authorities should be developed within a context of complete autonomy of functions through the provision of a mechanism that imposes on the national authorities the obligation to lay the case before the European Public Prosecutor in cases in which its jurisdiction - even if it is not exclusive - is recognised.

***Question 2: For what offences should the European Public Prosecutor have jurisdiction? Should the definitions of offences already provided for in the European Union be amplified?***

The question of the extent of jurisdiction of the European Public Prosecutor is of tremendous interest and is at the same time an extremely sensitive issue, not only at a political level, but also with regard to the requirements of general coherence of the proposed model.

The negative reactions in certain Member States to the results of the studies outlined in the *Corpus Juris* should no doubt tend to tip the balance in favour, as is currently proposed by the Commission, of rigorously restricting Community jurisdiction in the criminal-law field exclusively to the protection of Community financial interests in order to allay fears that the adoption of a project of this nature might lay the groundwork for a gradual and unwelcome encroachment of Community powers in this area. However, the many criticisms arising from a substantial section of Italian criminal justice doctrine, according to which the criminal-law protection of the financial interests of the Community cannot of itself justify the implementation of an ambitious project of the kind proposed by the *Corpus Juris*,

demonstrate that this solution lends weight to certain objections which might tarnish the image of the process of Community integration.

These objections can on the whole be extended to the proposals of the Green Paper, which, beyond the repeatedly stated self-imposed decision to restrict the project to the scope which is strictly necessary for the operation of the European Public Prosecutor, call for significant adjustments to be made to national judicial systems, if not directly at a substantive level, at any rate at the level of organisation and the allocation of the competences of the national authorities involved in the investigative activity and in the subsequent phase of the criminal judgement. It should therefore be borne in mind that, although it is perfectly logical that the aim of the project should be what is considered as the supranational “judicial interest” *par excellence*, that is, the financial interests of the Community (with regard to which the exclusive jurisdiction of the Community cannot be questioned), it should be considered just as logical that the proposed system should *ab origine* or at a later date be extended to all the fundamental interests that can be referred to as “genuinely supranational judicial interests”, that is, the interests which are under the exclusive jurisdiction of the Community and whose importance within the Community construction calls for a criminal-law response at Community level. The proposals for the rigorous delimitation of the scope of the proposals in question, which we can more than agree with, must therefore necessarily be coupled with an evaluation of the general coherence of the project, also from a theoretical standpoint, which favours the scientific legitimacy thereof in addition to its overall credibility. Although the project was initially rigorously confined in terms of *ratione materiae*, it must meet certain minimum structural requirements which do not rule out, at a substantive level, any changes which may be necessary for the

progress of Community construction, based, rather, on a genuine system of criminal-law protection of Community judicial interests.

In terms of the extent of jurisdiction of a future European Public Prosecutor, any proposal must be inspired by the fundamental and incontrovertible fact that the creation and the functioning of the Communities has resulted in - and continues to result in - the emergence of a whole series of judicial interests which require proper protection from the possible forms of aggression to which they are exposed.

The legitimacy of the choice, on which the proposed content of the Green Paper is based, of a “qualitative leap” towards a system of supranational protection of certain Community interests must therefore be subject to an examination aimed at verifying the conditions which constitute the indices which reveal the “need” for a Community criminal-law system, an examination which appears to rule out the possibility that only the financial interests meet the definition of “Community judicial interests”, justifying the decision to adopt the option of an exclusive system of Community criminal-law protection.

In this context, with regard, therefore, to the “selection” of all the Community judicial interests which authorise a criminal-law intervention at Community level, only *supranational interests* (a) *requiring a Community penalty* (b) must be taken into consideration.

a) First and foremost, these must be interests which transcend, in the relative meaning of value, the purely national dimension (and which can for this reason be defined as “supranational”), a selection which, within the vast range of interests involved in the actions of the European institutions, entails identifying a fundamental line of demarcation - albeit in a necessarily dynamic perspective, given the ongoing nature of European construction - with regard to those interests which could be defined as “common interests”, i.e. “national”

interests with regard to which the modalities of aggression and manifestation of the criminal phenomenon which concerns them - most of them transnational - elevate the fight against the aforementioned phenomenon to the status of an interest/objective of the Union (as a joint activity to be carried out using precisely the same "more integrated" instruments which are available within the framework of the *sui generis* cooperation of the third pillar).

b) Furthermore, these must be supranational interests the protection of which implies the *need for a Community penalty*, a necessity of which the assessment presents certain particular features, requiring two levels of judgement. Within the context of the European Union, the assessment required by the principle of *extrema ratio* with regard to the ratio between costs and benefits of the repressive intervention compared with alternative intervention instruments - and especially, as regards Community interests, in relation to the repression of an administrative-punitive nature which is part of the remit of the Community institutions - is such that the supranational dimension of the interests concerned must be considered, whereby this necessarily entails the subsequent judgement of the legitimacy of the Community intervention in relation to the fundamental principle of subsidiarity enshrined in art. 5 of the EC Treaty (ex art. 3B of the EC Treaty). In the light of these parameters, given certain forms of conduct which are harmful to supranational interests, the provision of an incriminating Community rule (including the legal sanctions) would be legitimate where the "beneficial effects" of the criminal-law penalty exceed any "costs" (also taking into account the status of the interest in question and the degree of prejudice caused by the conduct in question) and the effectiveness of the national repressive response of a criminal-law nature - given the forms of the aggression - is impugned from the outset by the diversity of treatment between one Member State and

the other on the Community territory.

It is therefore in this wider context that the assessment of the ineffectiveness of the existing arrangements for the protection of Community interests (and, *in primis*, of the financial interests of the Community) must be considered, which is often invoked as a necessary and adequate condition justifying criminal jurisdiction at Community level. The general framework of this reconstruction must include the considerations which were framed some time ago (also within the framework of the studies relating to the *Corpus Juris*) concerning the inadequacy of the assimilation instrument and the limits of the harmonisation technique used within the framework of the first pillar or as a component of judicial cooperation.

In the light of these considerations, a rapid review of prevailing Community law identifies with sufficient clarity, in addition to the financial interests, certain judicial interests which meet all the requirements outlined above and with regard to which the jurisdiction of the European Public Prosecutor should certainly be envisaged (possibly preceded by explicit allocation of the related criminal jurisdiction to the Community).

First and foremost, it is essential to decide on the *public Community function*. The organisation of a Community administration, as an autonomous decision-making/bureaucratic apparatus which is called upon to take all the necessary steps to implement the Community policies set out in the Treaties by exercising powers which are envisaged as public (being appropriate means having a direct effect on individuals by virtue of the particular “penetration effect” which Community measures are acknowledged as having) in fact raises the question of the protection of the public Community function in precisely the same terms as within the framework of the national judicial systems concerning the Public Administration. The *correct operation and impartiality of the Community administration*

(also including national civil servants fulfilling tasks related to the management of Community interests) are therefore essential as judicial interests inherent to the supranational organisation, which require an adequate repressive response in the face of all the actions which seriously harm such interests and which are implemented by the same holders of this function (who in this way are in breach of the principles of impartiality, probity and loyalty to the public function they exercise - as in the case of corruption, misappropriation of public funds, embezzlement, disclosure and/or use of official secrets, refusal to act) or by external third parties (who have an effect on the correct operation of the function itself - as in cases involving violence, threats or opposition against a civil servant).

In our view, it would be equally incongruous if the jurisdiction of the European Public Prosecutor were not also extended to the criminal-law protection of the European currency, the Euro, as the pivotal expression of the common monetary policy and, more especially, as the single supranational judicial interest which is readily perceived by the mass of Community citizens. In view of the creation of a single currency and the fact that it has replaced all the national currencies for exchanges within the "Euro area", it is essential to guarantee effective protection of the *legality of currency circulation and of the trust placed in the circulation of the new currency* (considerations which must be seen as valid also for forms of payment other than cash), interests which can be associated - and in a similar way to what we see at national level - with the protection of "Community public confidence" and which complement the financial interest of the issuing establishment and the interest of the individual citizens who may be harmed by the use of the forged or counterfeit currency.

On the other hand, we feel that we cannot nowadays speak of a *Community interest* which justifies, for example, an incriminating

supranational provision which imposes punishment for involvement in an association to commit offences or other forms of “anticipation” of criminal-law enforcement (including with regard to organised crime) which are not specifically geared towards protecting Community interests, such as forms of reinforced protection of such interests, which finds its own legitimisation in the status of the latter and in the presence of an autonomous public interest<sup>1</sup>.

In addition to such interests which can be defined as “institutional”, a series of supranational interests can be deduced from the provisions of the Treaties and from the secondary legislative measures on which there can and must be more in-depth reflection with regard to their possible subsequent inclusion within the jurisdiction of the European Public Prosecutor. These include no doubt the *environment* (which is the focus of fairly detailed rules by the Community institutions and even a proposal for a directive which provides for protection at criminal-law level), *fair competition* and *consumer protection* (sectors in which, moreover, the Community framework has for a long time been seen as necessary as a more or

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<sup>1</sup> This is, however, a situation that is likely to change rapidly with the consolidation of the process of European integration which - as it gradually creates “a political entity that is an authentic community of values”, the recognition of which underpins the common objective of the creation of an area of freedom, security and justice as defined by the Treaty of Amsterdam and further promoted by the conclusions of the European Councils of Tampere and Cologne - points to the gradual affirmation of “a new emerging Community public order”. In this context, cf. the Communication of the European Commission of 28 June 2000 on the “Protection of the Communities’ financial interests - The fight against fraud - For an overall strategic approach”. Furthermore, the gradual definition of such assets will certainly be significantly enhanced by the Community provisions issued within the framework of title IV of the Treaty establishing the European Communities in the fields of asylum, immigration and controls at the Union's external borders through the evident link between these issues and the notion of public order on which - notwithstanding the fact that the exclusive jurisdiction of the States to prepare the necessary domestic measures in order to maintain public order is confirmed - a future harmonising intervention of the jurisprudence of the Court of Justice can be expected, in terms which are to some degree similar to those which over 20 years ago were used in the context of the expulsion order or residence ban imposed on foreign Community citizens.

less unique regulatory source) and the *proper functioning of the financial market*.

In conclusion, in our view the jurisdiction of the European Public Prosecutor, not only with regard to the protection of financial interests *per se*, should be extended to include the repression of other forms of attack on such interests (such as, following the example of the proposals of the *Corpus Juris*, fraud in matters of procurement and association to commit offences with the intention of committing acts which constitute attacks on financial interests). However, it should also certainly extend to the protection of other supranational judicial interests which are now *acquis*, first and foremost all the interests of the public Community function (also envisaging, therefore, offences such as corruption, embezzlement, disclosure and misuse of official secrets, without the further requirement of financial interests being harmed or exposed to danger) and of the common currency (also envisaging incriminating cases based on the framework decision adopted on this matter<sup>2</sup>).

***Question no. 3: Should the establishment of the European Public Prosecutor be accompanied by certain further common rules relating to penalties, liability, limitation or other matters? If so, to what extent?***

The answer to the question under review (and more generally, the assessment of the options proposed by the Green Paper with regard to the endeavour to achieve a delicate balance, at the level of substantive criminal law, between (minimum) unification and referral

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<sup>2</sup> OJ L 140 of 14-6-2000, p. 1.

to the national legislation) must in our view of necessity be inspired by the ultimate requirement of respect for the function which has now been more or less unanimously recognised as being that of the criminal-law intervention, that is, the general and special-preventive function. In reality, this function would *ab origine* be frustrated in the event of failure to achieve unification, not only of the incriminating rule (describing the behaviour which is prohibited or imposed), but also of the penalty and of the limitation rules with regard to Community offences and of certain provisions of the general part.

In this regard, it must be pointed out that the general referral to national laws with regard to these aspects of criminal-law repression would be very problematic in terms of respect for the principle of legality insofar as the regime that would be applied in practice to the perpetrator of the offence would depend exclusively on the choice of national adjudicator by the European Public Prosecutor (a choice which, according to the proposals of the Green Paper, would be based on criteria which would leave the European Public Prosecutor a margin of discretion which is regarded in many quarters as excessive and in breach of the principle of the “natural court” which is inherent to the Italian constitutional system).

With respect to the *penalty*, if there is to be coherence with the proposals of the Green Paper with regard to the idea in principle of moving towards unification, the proposed solution of unifying only the maximum penalties and not also the minimum penalties raises considerable perplexities. Judicial practice shows in fact that in most cases the court, when setting the penalty, is guided rather by the “minimum legal terms of detention” to which is connected, on the other hand, the ranking of the protective judicial interest in the hierarchical scale of interests to be protected.

Furthermore, unification should, in our view, cover all the factors involved in the actual setting of the penalty, including first and

foremost the circumstances (aggravating and attenuating), both those which apply to all the offences considered (general circumstances) and those concerning individual cases (specific circumstances), for which the arrangements (that is, the assessment at the time of the setting of the penalty, including possible consideration of attenuating and aggravating circumstances) should be determined entirely at supranational level (in contrast to the proposal of the Green Paper, which comes out in favour of a possible referral to national law with regard to the identification of the relevant factors, i.e. the circumstances).

On the other hand, we must agree with the proposal of the Green Paper (although it is barely mentioned) with regard to the need for a unifying rule relating to the definition of the legal sanctions in the case of combinations of offences. In this regard, the solution proposed by the *Corpus Juris* (from the first version) and based on the principle of “judicial aggregation” appears to have won general acceptance during the two studies of comparative law conducted to date (except for the specific provision, set out in paragraph 3 of art. 17 of the *Corpus Juris 2000*, which, in the case of a combination of Community and national offences concerning the same acts, stipulates that the most severe penalty should be imposed, while the principle of primacy of Community law would imply the exclusive application of the penalty stipulated for the Community offence, as is, moreover, stipulated in the first version of the *Corpus Juris*).

Furthermore, the objective of prevention - in particular in its (negative) connotation of deterrence - cannot in our view be achieved without much more incisive unification, including with regard to the arrangements for the “execution of the penalty”. As emerged from the comparative studies which preceded the drafting of the *Corpus Juris*, this is an extremely sensitive aspect which might impugn the principle of certainty of the penalty (expiated), which must be

included within the framework of the general principle of effectiveness. In our view, this problem must be carefully considered because of the existence of systems (such as, first and foremost, the Italian system of criminal law) in which the competences recognised as being those of the “supervisory magistrate” can distort the setting of the penalty imposed by the sentence. Although it is always necessarily accompanied by the guarantees specific to the jurisdiction, the competences of the supervisory magistrate - whose role it is to guarantee the re-educational function of the penalty, which requires constant evaluation of the duration and intensity of the punitive treatment - cannot in our view in any way be envisaged without a form of harmonisation which homogeneously sets the limits within which this body is authorised to reduce the duration of the penalty imposed or grant the convict conditional or early release.

We must therefore say that we agree with the proposals of the Green Paper concerning the need for unification of the *limitation periods* for offences. In a general and special-preventive perspective, with regard to offences which harm the Community interests, we certainly cannot agree to rules that provide for the early termination of the prosecution due to limitation which vary from one Member State to another, with the illogical consequence of differences in the “duration” of the competence of the European Public Prosecutor on the same Community territory.

Contrary to the opinion expressed in the Green Paper and in response to the notion set out in the *Corpus Juris 2000* (art. 22 para. 2), in addition to harmonising the periods of limitation, we believe it is also essential to harmonise the interruptive and suspensive causes of the limitation. It is clear that the factors leading to the interruption and suspension of the limitation have a considerable effect on the limitation period itself as in practice they determine the actual duration thereof.

An in-depth analysis that involves the representatives of the different European judicial traditions should therefore be undertaken not only with regard to the duration of the limitation periods, but also with regard to the events (and the measures taken by the European Public Prosecutor) which determine the interruption and suspension thereof.

In this matter, the rules concerning the possibilities for seeking a review of decisions should be carefully evaluated (in this regard, the Green Paper, like the *Corpus Juris*, refers to national law, except as regards the common principle of the provision, set out in art. 27 C.J., of a second level of judgement in this matter), and it is clear that if it were established that the limitation were to have as *dies ad quem* the time when the case comes to judgement and not the exercise of the prosecution function, the period would also have to be coherent with systems like the Italian system in which there are three levels of judgement and with regard to which the same period of 5 years proposed by the *Corpus Juris* is clearly quite insufficient.

Finally, the question of the need for - and limits of - a unification of certain institutions of the *general part* must be given particular consideration.

On this issue, we feel we cannot agree with the proposal of the Green Paper that this be referred *in toto* to the national legislation to avoid the excessive involvement of different judicial systems (as we regard this “involvement” as disproportionate in relation to the objective of the establishment and operation of the European Public Prosecutor). In reality, upon more in-depth reflection, we feel it is evident that the operability of the general arrangements such as conspiracy, the attempt, the relevance of the error, etc. (i.e. all the general rules governing criminal liability) have a direct effect on the scope of the case (special part), with the consequence that widespread referral to the institutions of the different national judicial systems

would destroy many of the “benefits” of unification of the incriminating rules. On the other hand, this idea clearly underpins the proposals of the *Corpus Juris*, whereby the solutions developed may clearly not always meet with approval, but are absolutely essential. If (in our view correctly) the establishment of a European Public Prosecutor calls for harmonisation/unification of the incriminating rules, this must also include all the rules governing criminal liability.

In conclusion, in our opinion the scientific legitimacy (and judicial coherence) of the proposals of the Green Paper - which, in any case, entail the assigning of an albeit very limited criminal-law competence to the Community institutions - can only be correctly evaluated and implemented within the framework of a more general project (which, for certain aspects, can also be implemented gradually) involving a (clearly delimited) “Community system of criminal law”, which would of course have a “general part” as well as a “special part”.

The “ex-ante” evaluation of the possible options concerning the various issues raised in terms of subsidiarity of the Community intervention must be carried out in the light of the general need to guarantee the equality of European citizens before the law and full respect for the fundamental principles of criminal law in the new Community dimension (principles which are in danger of being seriously compromised if the idea of a general referral to such widely varying national judicial systems is applied).

***Question no. 4: When and by whom should cases be referred to the European Public Prosecutor?***

Moving on to the question of the procedural aspects connected

with the establishment of the European Public Prosecutor, we must first and foremost emphasise the fundamental importance of setting a procedure which will guarantee the correct and effective operation of the European Public Prosecutor, which is no less important than the question of the harmonisation of substantive criminal law. Although in fact substantive criminal law provides for repression in the case of acts which are regarded as illicit threatened only by the different incriminating rules, this repression becomes active and effective only through the trial and the trial institutions. We see in this how these institutions contribute towards and form an integral and essential part of any system of criminal law.

The harmonisation of procedures is therefore, like the harmonisation of the substantive criminal rules, an essential step in the process of harmonising the repression of offences of Community relevance in the various States of the Union.

With reference to the issues raised by the question under review, it might be pointed out that the Green Paper proposes that the European Public Prosecutor can open his own investigations: *a)* as a result of information on an offence provided by any physical person or legal person; *b)* as a result of information on an offence provided by the national or Community authorities appointed to this task (police authorities, review bodies, in general public officials); *c) motu proprio*, or on the basis of information independently acquired by the European Public Prosecutor himself.

We can certainly give our backing to the idea of applying this threefold initiative-taking structure to the investigative activities of the European Public Prosecutor. Indeed, a more restrictive choice would take away the justification for the very establishment of a European Public Prosecutor's office, which would perhaps be interested only in cases which the individual national authorities would decide to refer to it discretionally. In essence, this would negate the very basis on

which the establishment of the European Public Prosecutor is deemed to be necessary.

However, we feel that certain aspects need to be elucidated.

First and foremost, we must point out that while the ordinary citizen has the “right” to denounce criminal acts to the European Public Prosecutor, the qualified public bodies have a real “duty” to inform the European Public Prosecutor's office (it being understood that any violation of this duty would be properly punished, even under criminal law). This duty is based on the need to guarantee equality of treatment of all citizens who are suspected of an offence, who must all be punished in the same way, in harmony with the decision to favour the principle of mandatory prosecution.

In this regard, it must be pointed out that we feel it is appropriate to stipulate that the duty to provide information is incumbent on all the bodies which already have this obligation within the judicial systems of the Member States, in relation to the national public prosecutor's office (for reasons of simplification and to avoid the need for radical and in-depth reforms within individual national judicial systems).

Therefore, it should be stipulated that it is the duty of the European Public Prosecutor to examine all reports of offences which are submitted to him, to carry out the appropriate investigations and, in any case, to conclude the proceeding with a measure (case closed or committal for trial).

However, we do not feel it is necessary to impose on the European Public Prosecutor the duty to communicate the outcome of the procedure.

***Question no. 5: Should the European Public Prosecutor be guided by the mandatory prosecution principle, as proposed***

***by the Commission, or by the discretionary prosecution principle? What exceptions should be provided for in each of these cases?***

It is well known that the Italian Constitution, among the fundamental principles governing criminal jurisdiction, has adopted the principle of mandatory prosecution (art. 112). This principle of the Italian Constitutional Charter is outside the system but is the logical corollary to a number of other constitutional principles, such as: *a)* the principle of legality; *b)* the principle of equality of citizens before the law; *c)* the principle of the independence of the judiciary from the political authority. In particular, the public prosecutor's office (which is an integral part of the judiciary) is independent from any other State authority to ensure that it can guarantee the objective application of the law and the equal treatment of citizens. As a result, all those who violate criminal law therefore must be prosecuted and punished without distinction, and the public prosecutor's office cannot choose which illegal activities it wishes to prosecute, because only the law can decide which offences must be punished.

Against the backdrop of these principles, we totally agree with the proposal of the Green Paper in favour of the principle of mandatory prosecution by the European Public Prosecutor. This is in fact an essential element, which is coherent, on the one hand, with the objective of guaranteeing equal treatment of all citizens of the Union and, on the other hand, with the guarantees of independence laid down with regard to the European Public Prosecutor. There can in fact be no doubt that the principle of mandatory prosecution can shield the European Public Prosecutor from outside pressure and influence, all the more as the criminal cases involve interests and persons in different national communities or institutions.

However, it is important to take into consideration the fact that

the obligation to exercise the prosecution function presupposes the existence of monitoring of compliance with this principle. Any compulsory behaviour presupposes supervision and monitoring of compliance with the obligation concerned.

Therefore, we feel we cannot endorse the proposal of the Green Paper to give the same public prosecutor the power to take the decision to close the case. If this were to be the case, in effect, the European Public Prosecutor might decide not to prosecute when he decides this action should not be taken and without any review.

However, the decision to close the case (that is, the decision not to exercise the prosecution function) must be reserved for a trial court which must be given the power to accept or reject the request for the case to be closed submitted by the European Public Prosecutor. In essence, as stated clearly by Italian constitutional doctrine and jurisprudence, the court's review of the decision to close the case is the other side of the principle of "mandatory prosecution".

Having said that, we can endorse the idea of making some "exceptions" to the rule with regard to mandatory prosecution by the European Public Prosecutor, in order to avoid a situation where the human and material resources of the Union are used to deal with proceedings which are of little interest to European institutions. We feel that the idea of making such exceptions is compatible with the principle of mandatory prosecution, on condition that, on the one hand, the cases in which - even for an act which is defined by the law as an offence - the European Public Prosecutor may decide not to take action are sufficiently defined in advance and in theory, and that, on the other hand, in any case provision is made for the review of a court which must be given power to decide whether to close the case definitively.

In relation to the individual proposals, we feel that an exception to the principle of mandatory prosecution based on "minor impact on

the Community's financial interests" is compatible with our system. However, what is meant by "minor impact" must be defined in advance by Community rules.

This would appear to be relatively easy in the case of fraud, because it would be sufficient to set a minimum economic threshold below which the case could be closed, subject to the competence of the national prosecutor. The same might apply with regard to money laundering and fraud in matters of procurement, on the grounds of the concept of "harm or danger of harm to the financial interests of the Community", which can be quantified at a financial level by setting a minimum threshold. In all these cases, the decision not to prosecute would be grounded on objective criteria (the fact that the minimum economic thresholds are not exceeded) which are perfectly compatible with the principle of mandatory prosecution.

However, as regards the disclosure of official secrets and association to commit offences, we feel it is necessary, given the particularly serious nature of such offences, to stipulate that prosecution must always be mandatory.

In our view, the idea of allowing the European Public Prosecutor, depending on the "usefulness of the action", to act alone for certain charges (those for which there is sufficient evidence) and to decide not to carry out investigations for others is debatable. If these other charges concern very serious offences and if further investigations might yield evidence, we do not feel that it is right to allow the case to be closed, because the liability of different persons (as yet unidentified) could emerge in the course of further investigations.

The Green Paper then proposes another exception to the principle of mandatory prosecution by providing for the possibility of a settlement that can be offered to the defendant on the basis of simple reparation of the damage to the financial interests. We also feel that

this solution is debatable because if we were to allow the defendant to escape all punishment simply by repairing the damage (for example, by returning the illegally acquired funds), this would inevitably result in the criminal law being deprived of its general-preventive function, that is, its deterrent effect. Anyone intending to commit an offence would in effect know in advance that, if his crime were discovered by the public authority, the worst he could expect would be to have to return the ill-gotten gains from the operation, and not to have to incur a penalty.

One possibility, on the other hand, might be a mechanism for “conditional closure” which could be applied vis-a-vis defendants who have no criminal record, whereby provision might be made that the penalty which will be imposed with the sentence will not be enforced (or by granting the benefit of conditional suspension of the sentence or other benefits specified by the various national laws). In these objectively identifiable cases, in order to avoid the proliferation of criminal-law proceedings which are bound to lead to a sentence that will not have any practical effect, the European Public Prosecutor could be given power to request a temporary and conditional closure of the case (along with a suspension of the limitation period), while waiting to see whether the defendant commits other offences within the next five years. If so, the closure of the case would be repealed and all the offences would be prosecuted (the first offence and the later offences), and otherwise the prosecution would be terminated and the closure would become definitive.

Any other possibility of closure of the case on discretionary grounds, on the basis of value judgements, should be ruled out, because this would be conceptually incompatible with the principle of mandatory prosecution. However, this does not rule out the possibility that the requirements (with which we agree) for not taking action in cases of minor Community interest can be met by having recourse to

concepts in substantive criminal law (for example, the “immaterial nature of the facts”).

In conclusion, the principle of mandatory prosecution is a principle of a society based on the rule of law, which must be maintained. However, it is possible to combine this principle with the requirements with regard to the effectiveness of the judicial system by having recourse to possibilities for closure which are grounded on precise and objective criteria of which the application must in any case be subject to review by a court. This trial court might be found in the various places in which the Deputy European Public Prosecutors have their offices.

***Question no. 6: Given the ideas put forward in this Green Paper, how should functions be distributed between the European Public Prosecutor and the national enforcement authorities, notably in order to see that hybrid cases are properly treated?***

The relationship between the European Public Prosecutor’s office and the national public prosecutor’s offices appears to be based on two principles that we can agree with: on the one hand, the principle of the obligation to lay the case systematically before the European Public Prosecutor, where elements are required which provide a means of stabilising the connection with an offence which harms the Community financial interests, and, on the other hand, the principle of primacy of the prosecution function of the European Public Prosecutor over prosecution by national public prosecutor’s offices.

The relationship between the European Public Prosecutor’s office and the national public prosecutor’s offices could hold the solution to the problem, which we have already mentioned, of

avoiding a situation where the European Public Prosecutor must be involved in dealing with proceedings involving Community offences of minor importance. The European Public Prosecutor could in fact, instead of closing the case, hand it over to the national public prosecutor's offices competent for each territory and request that they handle the case.

It is clear that in these cases the national public prosecutor's offices would act according to the rules defined by each national judicial system and possibly even according to the principle of discretionary prosecution which might be provided for by the individual national judicial system. However, this we feel is not incompatible with the decision in favour of the principle of compulsory European criminal prosecution, on condition that authorisation is given to refer the case to the national public prosecutor's offices on the basis of objective, predefined and hence reviewable criteria.

More sensitive is the problem of the handling of "hybrid" cases, that is, cases which involve a Community offence and a national offence.

Where the handling of such cases can be divided, because the different offences are not linked in a technical sense, the European Public Prosecutor's office will handle the Community offences and the national public prosecutor's offices will handle the national offences.

If, on the other hand, there is a close link between the different offences (in the sense that the offences were committed with the same act or certain offences were committed to execute or conceal the other offences or to obtain the profit, price, product or impunity therefrom) or if there is a connection between the various offences in the sense that the evidence of such offences comes from the same source, the problem arises of coordinating the work of the European Public Prosecutor's office and that of the national public prosecutor's offices.

Notwithstanding the autonomy of the national public prosecutor's offices in relation to the European Public Prosecutor's office, we feel there can be no doubt that the ideal platform for this form of cooperation is the new "Eurojust" unit, as we will point out in reply to question no. 15 below.

On the basis of the investigations, given the autonomy of each authority, it is difficult to imagine a common prosecution mechanism involving the Deputy European Public Prosecutor and the national public prosecutors. However, this does not rule out the possibility that, once the defendant is committed for trial, the separate proceedings instituted by the European Public Prosecutor and by the national public prosecutor can be combined by the trial court and handled at the same time.

***Question no. 7: Does the proposed list of investigation measures for the European Public Prosecutor seem to you to be adequate, particularly as a means of overcoming the fragmentation of the European criminal-law area? What framework (applicable law, review - see point 6.4) should be envisaged for investigation measures?***

***Question no. 8: What solutions should be envisaged to ensure the execution of investigation measures undertaken by the European Public Prosecutor?***

The problem of the investigation measures which the European Public Prosecutor's office can undertake is of pivotal importance with regard to the exercise of the tasks expected of it.

In this regard, we endorse the idea of avoiding "European enactment", which would not be consistent with the said objective,

and instead of referring to the provisions of individual national judicial systems.

However, we feel we must point to the risk that the idea of referring to national judicial systems does not concern only the framework of the various procedural rules, but the very existence of a certain procedure. If this were the case, the European Public Prosecutor could find that he is given different powers of investigation from one Member State to another. This must be carefully avoided if his work is not to be in vain.

The idea of providing for the European Public Prosecutor to carry out the various investigative measures (searches, seizures, hearing of witnesses, etc.) according to the procedural framework of the individual Member States in which he operates must then be coupled with the need for all the Member States to have the same set of investigation measures (i.e. all, for example, admit not only recourse to conventional methods of gathering evidence, but also the use of more modern investigative technologies).

It is therefore essential to check whether the legislations of all the Member States grant similar powers of investigation and, where this is not the case, the appropriate directives should be issued in order to integrate the individual legislations.

In our view, it is certainly essential that an investigation or pre-trial measure requested by the European Public Prosecutor's office and issued by a national court be executed without the need for further procedures within the territory of any Member State and with waiver of the extradition procedures. Without the principle of executability of investigative or coercive measures relating to the investigations of the European Public Prosecutor throughout the territory of the Union, it is not seriously possible to envisage effective and timely repression of Community offences.

With regard to the judge of freedoms, who should issue the

measures restricting personal freedom and be able to review other coercive investigative measures, this is seen by the Green Paper as a national trial court which, as well as having domestic judicial functions, carries out judicial functions in relation to the proceedings handled by the European Public Prosecutor. However, it is important that this court be identified according to a precise and predetermined territorial criterion. For example, it could be identified - along the lines suggested for the judge who is competent to close the case - in that of the place in which the Deputy European Public Prosecutor has his own office.

Of course, the possibilities stipulated by the various national judicial systems for seeking a review of the measures of the judge of freedoms should be permitted.

We therefore feel we can agree with the solution proposed by the Commission of structuring the relationship between the European Public Prosecutor and the national prosecution authorities by referring to the framework which, in each Member State, governs the relations between the national public prosecutor and the national prosecution authorities. The important point is that the European Public Prosecutor should, in relation to the various national police authorities, be granted powers which are not inferior to those granted to the national public prosecutors. Otherwise, his investigative activities would inevitably be delegitimised and incapacitated.

***Question no. 9: On what terms should the European Public Prosecutor be able to take a decision to close a case or commit it for trial?***

We have already said that in our view the decision to close the case prior to the exercise of the prosecution function should always be

taken by a court, even if this is at the request of the European Public Prosecutor (see the answer to question no. 5).

*A fortiori*, following the exercise of the prosecution function, the decision not to pursue when new facts emerge in relation to the time of the exercise of the prosecution function (for example, the various causes of early termination of the prosecution) must be taken by a trial court. In these cases, the European Public Prosecutor will submit a request to close the case, on which a court (to be identified according to the different national judicial systems) will be called upon to issue a ruling. However, we do not feel it is compatible with the principle of mandatory prosecution that the European Public Prosecutor can withdraw the action by an autonomous measure which can remove from the court, which has already been empowered to handle the case, jurisdiction for examining the facts of the case.

However, as regards the decision to commit the accused person for trial, we feel it is appropriate to make explicit provision for the decision to be taken, at the end of the investigations, only when sufficient evidence of guilt has been gathered.

With regard to the procedure to be adopted for committal for trial, it must be pointed out that the Italian trial system allows the public prosecutor, in the case of less serious offences (specified with reference to the legal terms of detention), to summon the accused person directly to appear in court, while for more serious offences a simple “request for committal for trial” must be submitted which must be examined by an appropriate court at a preliminary hearing.

In this regard, we feel it is appropriate to provide for referral to the existing framework within the various judicial systems so that the European Public Prosecutor is obliged to apply the procedural rules governing committal for trial in the various judicial systems of the Member States in which the trial is to be held.

***Question no. 10: By what criteria should the Member State or States of trial be chosen? Should the European Public Prosecutor's choice be subject to review? If so, by whom?***

When complex cases are being handled which involve several Member States, the problem arises of establishing in which of these States the judgement should be handed down.

In this regard, there does not appear to be any choice but to give the European Public Prosecutor the task of deciding in which Member State the trial should take place.

However, we feel it is necessary to avoid the risk of the European Public Prosecutor being able to use the technique which has been dubbed "*forum shopping*".

Giving the European Public Prosecutor responsibility for choosing the trial court would in fact be incompatible with the principle of the "natural court", which must be predetermined by law (i.e. identifiable according to the type and nature of the offence before it is actually carried out) and not determined on a case-by-case basis. All this would be all the more serious insofar as, to determine the court of one State or another, there would be different substantive and procedural arrangements, which would inevitably affect the entire criminal-law process.

The lack of a clear-cut position by the Green Paper in favour of an absolutely unambiguous definition of these criteria is therefore disquieting. The presence of several criteria should therefore be combined with hierarchical organisation of the same.

Furthermore, this is the only solution that would permit monitoring of compliance with these criteria by the court (in contrast, this type of monitoring is inconceivable in the case of a largely discretionary choice of the European Public Prosecutor).

There can be no doubt in fact that the accused person should be given the right to contest the choice made by the European Public Prosecutor. In this case, the judge before whom the case is laid should be given the power to verify that he has jurisdiction.

If the court seised recognises its own jurisdiction, it is obvious that the trial will take place before it.

If, on the other hand, the court seised denies its own jurisdiction, in this case it should be stipulated that it has the duty to identify, in the light of the pre-selected binding criteria, the court of the Member State which has jurisdiction and that the European Public Prosecutor is under an obligation to resume the trial in this court.

More complex is the problem raised when the new seised court denies its own jurisdiction in favour of the court which has already declared that it does not have jurisdiction (i.e. “negative conflicts of jurisdiction”).

In our view, negative conflicts of jurisdiction should be resolved at Community level by referring them to the Court of Justice, which should decide - possibly also with a simplified composition, in the form of a “Pre-Trial Chamber” - in a way that is binding on all.

This procedural approach, which in practice could be particularly lengthy, should in any case be accompanied by a “sterilisation” of the limitation periods for the offences.

***Question no. 11: Do you think that the principle that evidence lawfully obtained in a Member State should be admissible in the courts of all other Member States is such as to enable the European Public Prosecutor to overcome the barrier raised by the diversity of rules of evidence?***

If the trial could take place in the Member State in which the investigations of the European Public Prosecutor's office were conducted, the national court would have to use the evidence gathered according to its own national legislation. Any problem of compatibility between the rules governing the gathering of evidence in the course of investigations and the rules governing its use in proceedings would thus basically be ruled out.

However, it is clear that the complexity of the investigations which the European Public Prosecutor may find himself involved in, and which may involve several Member States, may mean that the judgement must be handed down in a State other than the State in which the investigations were conducted and the evidence was gathered.

In such cases, the problem arises of determining the possible value in the Member State in which the judgement is handed down of the evidence gathered in the course of the investigations in another Member State. A coherent solution to this problem must be found, and there must be a guarantee of the effectiveness of the action of the European Public Prosecutor and, in the last analysis, of the criminal-law repression of Community offences.

To solve this problem, the Green Paper recommends the adoption of the principle according to which any national court to which a criminal trial is referred which involves Community financial interests must admit any evidence which has been lawfully gathered on the basis of the national legislation of another Member State.

However, in our view the problem requires a distinct analysis of the possibility for the trial court to use, on the one hand, the "predetermined" evidence and, on the other hand, the evidence "to be determined".

With regard to predetermined evidence, the principle of admissibility of evidence which has been lawfully gathered in another

Member State appears to solve the problem of usability of the evidence by the trial court. We do not believe, in fact, that there should be any problem in applying the measure that the documents or the results of a search or phone tap can be admitted in all the States of the Union, in whatever State the evidence was gathered, provided the procedure prevailing in that State has been observed.

However, the same cannot be said of the evidence to be determined, that is, the evidence which, being verbal, can be obtained in the course of the trial in court. In these cases, the problem arises of determining what value should be assigned to the statements made to the European Public Prosecutor in the course of the investigations by witnesses or by the persons being investigated, whether such statements can be given (any) value for the purpose of the judgement or should be denied any probative value before the trial court.

With regard to this problem, what is clear is that the referral to the national judicial systems cannot adequately meet the need to harmonise the repression of Community offences in that, on the one hand, there are national judicial systems which give (at least some) value, for the purpose of the decision of the court, to statements taken during the investigations. On the other hand, there are judicial systems which hold that such statements do not have any value.

However, in our view the application of the principle of free flow of evidence must in any case be coupled with the definition of a "European standard" which is based on certain common fundamental parameters which set the (necessary and sufficient) "minimum threshold" for the general admissibility and usability of evidence (which has been taken according to the procedure stipulated by the State in which it was gathered but in compliance with the minimum European requirements) in all the countries of the Union.

This solution, which is clearly exemplified by art. 32 of the *Corpus Juris*, however binding it may appear, can but enhance the effectiveness of the new European Public Prosecutor's office.

***Question no. 12: To whom should the function of reviewing acts of investigation executed under the authority of the European Public Prosecutor be entrusted?***

***Question no. 13: To whom should the committal review function be entrusted?***

During the investigative phase, along with the European Public Prosecutor, the judge of freedoms has an essential role to play. He will be responsible, on the one hand, for authorising the investigative measures which affect the "*status libertatis*" and personal property and, on the other hand, for issuing measures restricting personal liberty.

We believe that as a matter of course the judge of freedoms should be identified in the national judicial bodies assigned to this task in the different Member States according to the various judicial systems (whether with a monocratic or collegiate composition).

However, in order to guarantee effective and prompt action by the Deputy European Public Prosecutor, the situation should be avoided where he is under an obligation to refer to the judge of freedoms of the Member State within which he wishes to carry out an act of investigation.

In this regard, we believe that the best solution among those proposed by the Green Paper is the idea suggested as the "second option", that is, that each Deputy European Public Prosecutor should

apply to the judge of freedoms of the Member State in which his own office is located, which would issue or authorise all the acts needed for the investigation, executable throughout the Communities on the basis of the mutual recognition principle.

As regards the choice of the court which should be asked to review the committal for trial, clearly the fact that the different Member States have different procedures for the committal for trial must be taken into account.

In Italy, there are two distinct procedures depending on the seriousness of the offence in question. For less serious offences (assessed on the basis of the legal terms of detention), the public prosecutor can summon the accused person directly before the trial court, while for more serious offences the public prosecutor must submit a simple "committal order", which must be examined by an appropriate court within a preliminary hearing.

Certainly, it is possible to envisage the adoption of one single procedure in the case of Community offences. However, we do not believe that the establishment of a unified European Pre-Trial Chamber (at the Court of Justice) is to be recommended, not only because we believe it would not be easy, but also because the provision of a procedural phase to be implemented in a place which is far from the territory of the Member State in which the investigations were conducted, at least in part, and in which the judgement should be handed down could eventually slow down the process of defining the trial.

The other solution which involves designating the national court as the court responsible for reviewing the committal for trial (the "second option" referred to by the Green Paper), according to the different national judicial systems, not only appears easier to apply at a practical level, but could also be more coherent with the principle whereby the judgement must be handed down according to national

law. The decision whether or not to commit the accused person for trial in fact presupposes not only that the merits of the evidence gathered be examined, but also that its usability in the trial be examined (although this judgement is in our view limited by the principle of mutual recognition and the necessary respect for the European standard), and this decision must be taken by the court of the Member State in which the judgement must be handed down.

***Question no. 14: Do you feel that fundamental individual rights are adequately protected throughout the proposed procedure for the European Public Prosecutor? In particular, is the double jeopardy principle properly secured?***

The common historical roots of the national judicial systems and the ongoing process of harmonisation of the laws of the Member States have highlighted certain fundamental principles of the rule of law which are generally recognised in all the judicial systems of the Member States.

These include the principle of “*ne bis in idem*” (double jeopardy), that is, the right of the accused person not to be liable to be tried or punished again in criminal proceedings for an offence for which he has been finally acquitted or convicted. This principle is reiterated, *inter alia*, by art. 50 of the Charter of Fundamental Rights of the European Union.

It is clear that this principle must also apply to actions taken by the European Public Prosecutor’s office, whereby it must ensure that it cannot institute court action against a person who has been finally acquitted or convicted (that is, the case has already come to judgement) for the same offence.

However, the possibility for the European Public Prosecutor's office to take action a second time against the same person and for the same offence would be expressly upheld if a definitive sentence has not been handed down following judgement, but the case has merely been closed at the request of the European Public Prosecutor or the decision has been taken not to pursue due to insufficient evidence by the court which commits for trial. In these cases, as there has been no judgement, the principle of "*ne bis in idem*" would not be breached, and, in the event that new evidence comes to light, the accused person could be tried (for the first time) even for the same offence for which he was (only) investigated previously. However, the criteria and the conditions would have to be rigorously defined.

***Question no. 15: How would the relationship between the European Public Prosecutor and those involved in cooperation in criminal matters in the European Union be best organised?***

Certainly, the European Public Prosecutor would have to mesh with the other parties involved in cooperation in criminal matters within the framework of the European Union.

It is clear that, *de iure condendo*, as we have already mentioned, ideally a unified system of criminal law should be established for certain categories of offences covering all countries of the European Union. At the core of this system, the European Public Prosecutor would be responsible for promoting and coordinating the work of all the other parties involved in cooperation in criminal matters.

However, it is equally clear that the existing situation - at a historical and political level - is not such that this objective can be achieved in the short or medium term. Accordingly, the establishment

of the European Public Prosecutor should be accompanied by procedural rules or mechanisms which define the limits of his action in relation to the action undertaken by the parties involved in cooperation in criminal matters within the framework of the European Union.

Of particular importance is the definition of the relationship between the European Public Prosecutor and the new European judicial cooperation unit ("Eurojust"), for which plans were made in the conclusions of the Tampere European Council (Presidency conclusions no. 46) and in the Treaty of Nice (articles 29 and 31 of the treaty establishing the European Communities (amended)) to facilitate cooperation among the judicial authorities of the Member States and to promote the effective coordination of prosecution with regard to serious crimes and, most especially, organised crime.

It is obvious that, within the process of Community construction, Eurojust - which is made up of 15 national members (who bear the title of magistrate, judge or police official and are seconded by each Member State in conformity with its own judicial system) - is a step backwards in relation to the European Public Prosecutor's office.

This in fact presupposes the direct action of the different national public prosecutor's offices, whose activities must be coordinated. In particular, the objectives of Eurojust are as follows: *a)* to stimulate and improve the coordination of investigations and prosecutions among the competent national authorities of the Member States; *b)* to improve cooperation among the same, facilitating the provision of judicial assistance and the enforcement of extradition requests; *c)* to provide assistance to the competent authorities of the Member States in order to improve the effectiveness of investigations and prosecutions. Eurojust can, on the basis of a reasoned measure, request that the competent national authorities

determine whether a criminal investigation should be initiated, undertake a coordination activity, set up a joint investigative team and communicate the information required to carry out its tasks.

This is an extremely wide-ranging remit which, however, will become narrower once the action and role of the European Public Prosecutor are confirmed. The transfer to the European Public Prosecutor of a certain degree of criminal-law jurisdiction will in fact alleviate the problem of coordinating the activities of the individual national public prosecutor's offices, which - as we would like to see - should gradually see the extent of their jurisdiction reduced with regard to offences which harm the interests of the Union as a whole in favour of the European Public Prosecutor's office.

However, it is clear that, since this can only be achieved in the medium-long term, not only should the role of Eurojust be increasingly strengthened in the meantime, but also there is likely to be a need for coordination between the work of the European Public Prosecutor and that of Eurojust.

There is likely to be a need for coordination especially with regard to the "cross-pillar cases", that is, the (more or less complex) increasingly frequent offences which harm not only the Community financial interests (within the framework of the first pillar) but also judicial interests for which there is merely judicial cooperation (within the framework of the third pillar).

In these cases, the European Public Prosecutor, whose autonomous powers of prosecution are obviously confined to matters within the given extent of his jurisdiction, must act in close coordination with Eurojust, because only Eurojust can give the different national public prosecutor's offices the task of directing and coordinating activities, which is essential to guarantee the success of the investigative activities.

In essence, as long as the European Public Prosecutor's office

has very limited jurisdiction, its establishment does not rule out the possibility that Eurojust can play an important role, especially in the repression of offences connected with organised and financial crime, provided it is clearly defined that the jurisdiction of the European Public Prosecutor must prevail over that of Eurojust as regards the protection of the Community financial interests.

Unlike Eurojust, the European Police Office (Europol) is not only unlikely to see its own role being eroded by the establishment and the (hopefully steady) increase in the jurisdiction of the European Public Prosecutor, but it is likely to see an increase in its own tasks and functions under the impetus of the work of the European Public Prosecutor.

There can in fact be no doubt, especially with regard to investigations concerning transnational criminal activities, that the European Public Prosecutor will need, not so much individual fragmented national police forces, but rather a police force with general territorial powers covering the entire territory of the Union.

Within this framework, on the one hand, there appears to be a need to ensure that Europol is functionally dependent on the European Public Prosecutor, whose orders and provisions it must execute. On the other hand, we feel it is advisable to extend the powers of Europol and to give it not only responsibility for the interchange of information and coordination among the national police forces, but also its own police functions covering the entire territory of the Union, although the scope of its powers would be confined to matters relating to offences within the jurisdiction of the European Public Prosecutor.

In any case, the experience of the joint investigative teams (set up by art. 13 of the Convention of Brussels of 29 May 2000) should be encouraged and extended thanks, *inter alia*, to the good results achieved to date through this initiative.

***Question no. 16: In the run-up to the Commission's evaluation of the rules governing OLAF, what factors related to the relationship between the Office and the European Public Prosecutor seem most meaningful to you?***

As is known, the Community legislator has entrusted to OLAF the task of protecting Community interests against illicit acts which are punishable by administrative or criminal penalties. For this reason, OLAF has from its inception had powers of administrative investigation and is under an obligation to transmit the results of its investigative activities to the national judicial authorities. Furthermore, it plays an important role within the framework of criminal-law cooperation and can contribute towards the work of coordinating investigations and prosecutions undertaken by Eurojust concerning the protection of the financial interests of the European Union.

It is to be expected that the establishment of a European Public Prosecutor's office which is competent in matters relating to the protection of the Community financial interests affects the role currently assigned to OLAF.

In particular, with the establishment of the European Public Prosecutor, it should first and foremost be the duty of OLAF to refer to the European Public Prosecutor the results of its own investigations when these concern offences which are within the jurisdiction of the European Public Prosecutor.

It is therefore essential to allow the European Public Prosecutor to delegate investigative activities and to issue instructions to OLAF, which, in matters which are within the jurisdiction of the European

Public Prosecutor, should operate under the supervision of the latter. This supervisory power of the European Public Prosecutor over OLAF is all the more appropriate as there can be no doubt that the judicial review which, through the national judge of freedoms, is envisaged for the activity of the European Public Prosecutor will eventually also include the investigative work which is carried out by OLAF and used by the European Public Prosecutor.

This also has a number of implications at a legislative level.

As is known, OLAF is currently judicially set up as a service of the Commission, even though it has considerable independence in its investigative functions.

However, once the European Public Prosecutor's office is up and running, it will be necessary to assess whether it is appropriate to make some of OLAF directly dependent on the European Public Prosecutor, with judicial police functions, while on the other hand it could remain under the control of the Commission, with functions which are purely administrative, and support the work of the Commission in tracing the general guidelines of the fight against Community fraud.

***Question no. 17: What type of relations should the European Public Prosecutor maintain with third countries, and in particular applicant countries, in order to improve efforts to combat activities which damage the Community's financial interests?***

Up till now, the judicial assistance between the European Union and third countries has been based on international conventions signed by the individual Member States of the Union, that is, on the

basis of conventions that bind only such States, and not the Community institutions.

This judicial instrument is evidently now insufficient and can at best be used, with provision for the possibility for the European Public Prosecutor to ask the authorities responsible for prosecution in the Member States to refer the request for judicial assistance directly to the third country involved, in conformity with the applicable rules of international law.

The judicial cooperation with third countries with which the European Union has more frequent contacts, and especially with the countries applying to join the Union, should therefore be regular and continuous, not only for matters under the third pillar, but also for the many cross-pillar cases.

These countries, albeit through individual agreements signed with the Member States of the European Union, should offer an effective contribution towards the fight against organised crime - which is now moving to a global scale - and against the offences which damage or jeopardise financial resources and Community interests.

Within this framework, we believe that it is certainly appropriate to allow the representatives of the States applying to join the European Union to participate in the research committees responsible for putting together the proposal for the establishment of the European Public Prosecutor's office and defining the terms under which this office might undertake its own investigations even outside the territory of the Union.

However, we must stress the need to go beyond the mechanism of the international conventions signed by the individual Member States. Indeed, this mechanism has the effect of making the effectiveness of the action of the European Public Prosecutor dependent on the content of the individual agreements signed from

time to time by the various States of the Union, with the serious consequence that the European Public Prosecutor will have one set of powers of investigations when he carries out an investigation into Community offences committed in a certain Member State and a different set of powers of investigation (sometimes more and sometimes less incisive) when he carries out an investigation into Community offences committed in another Member State.

It is clear that this raises the question not only of the effectiveness of the European Public Prosecutor's office, but also that of the equal treatment of European citizens who, depending on the Member State which is territorially competent to take action, would be subject to an investigative action that can vary considerably in its effectiveness.

Consequently, it is appropriate to take steps to establish as soon as possible that it is the European Union itself, and not the individual Member States, which must sign international agreements on judicial matters with third countries. This will enable the European Public Prosecutor to issue international letters rogatory on the basis of one single set of arrangements and thus free himself from the provisions of the different agreements signed by the individual Member States.

***Question no. 18: What procedures should be available for judicial review of acts done by the European Public Prosecutor or under his authority in the exercise of his functions?***

As we have seen, the judge of freedoms, to be selected from the national judicial bodies, exercises supervisory functions with regard

to investigative measures, some of which it must authorise (measures which affect the “*status libertatis*” and personal property), while others it must itself issue (measures restricting personal liberty).

If the authorisation or the issuance of such measures is requested by a national court, which will apply the national law, it seems natural to establish the principle according to which, against such measures, the accused person can seek a review according to the procedures provided for by the national judicial system concerned.

However, in this regard we agree that it is appropriate to envisage minimal harmonisation of the review system, according to the principle of the non-suspensive nature of the review against such investigative measures.

Also, the possibility of seeking a review of the decision to close the case or to commit for trial should be governed by the domestic judicial system of the Member State where the trial takes place.

The Green Paper also addresses the problem as to whether or not it is appropriate to grant the Community institutions the power to propose possibilities for seeking a review of the decision to close the case taken by the European Public Prosecutor when they do not agree with this decision.

This is a legitimate concern which has its rightful place in the system outlined in the Green Paper, which vests the European Public Prosecutor with the power to issue the closure procedure himself. If, on the other hand, the power to issue the closure procedure is given only to a trial court which decides on the request of the European Public Prosecutor (which, in our view, is the most congruous solution, as it allows proper monitoring of compliance with the principle of mandatory prosecution), taking account of this “*ex-ante*” review by the court, it may be considered that there is less need for any kind of “*ex-post*” review (at a later date) of the merits of the closure

procedure.

As we have said (in reply to question no. 10), there is no doubt in our view that the accused person should be given the right to contest the European Public Prosecutor's choice of the Member State in which the trial is to be held.

However, the recognition of this right does not - in our view - mean that an appropriate means of seeking a review must be given to the accused person. The accused person can in fact contest the jurisdiction of the seised court (first the court which commits for trial and then the trial court), proposing before it an appropriate exception, on which the court must pronounce and decide, having verified that it has jurisdiction. All the means of seeking a review against sentences provided for by the various national judicial systems can then be applied against this decision.

It is only when the court first seised denies its own jurisdiction and this is denied also by the new court in favour of the court which has already declared that it does not have jurisdiction (i.e. "negative conflicts of jurisdiction") that, in our view, there is a need to resolve the issue at Community level by referring the question to the Court of Justice (which should act as the "Pre-Trial Chamber").