

Centro di Diritto Penale Europeo

Initial impressions of the Green Paper on the establishment of a European Public Prosecutor for the criminal-law protection of the Community's financial interests.

Alessandra Geraci, Stefano Massimino and Carmen Toro

The Centro di Diritto Penale Europeo (Catania) has responded to the call to play an active part in the debate surrounding the "Green Paper on the establishment of a European Public Prosecutor for the criminal-law protection of the Community's financial interests" submitted to the Commission last December by setting up an *ad hoc* study group made up of lawyers, investigative and adjudicating magistrates and young researchers set to give mature reflection to the issues raised in this document. The following brief considerations resulted from an initial exchange of ideas between members of the group. They deal with some of the basic issues of the Commission's proposal regarding the extent of the future EPP's jurisdiction, its internal structure, rules on admissibility of evidence obtained abroad and whether the option of the principle of mandatory prosecution should be adopted, albeit in a form allowing for some refinement.

Extent of Jurisdiction of the European Public Prosecutor

The question of the EPP's jurisdiction is one of great interest but also an extremely delicate issue, not just politically but also in respect of the standard of overall coherence required for the proposed model. The shock reaction seen in some Member States in the course of the on-going debate, now of some years' duration, on the results of the studies devoted to the *Corpus Juris* certainly favour, in common with the Commission, stringent restriction of future Community criminal jurisdiction over the protection of Community financial interests so as to dispel any fears that the adoption of a project of this sort could lay the foundations for a progressive and unwanted encroachment of Community powers within this area. Nevertheless, the amount of criticism arising from a substantial section of Italian criminal justice doctrine, claiming that criminal-law protection of Community financial interests cannot alone justify the implementation of such an ambitious project requiring, as it does, substantial alteration of existing national systems, shows that this solution lends weight to certain objections which similarly tend to tarnish the image of the Community integration process. It is thus logical to maintain that the project actually targets what may be considered a supranational judicial asset *par excellence*, namely Community financial interests (which undeniably lie totally in the hands of the Communities, although European institutions have hitherto left anti-crime protection of this asset to be dealt with entirely by different national systems); it should, however, be considered equally important for the proposed system to cover, either at the outset or subsequently, basic interests which may be properly described as supranational judicial assets. Under the circumstances, the key question arising is obviously one of "selection" of the Community judicial assets justifying criminal justice action at Community level according to the principle of subsidiarity. It would follow that, apart from financial interests, Community-wide judicial protection should definitely target say, the single currency and Community administration but some consider that the list might also cover the European financial market and climate.

It would therefore be desirable if, alongside the debate on the Green Paper, the Commission were to promote deliberation on matters of principle involving exponents of the main European legal traditions, aiming to pinpoint Community judicial assets and address ways of harming these assets which may merit recourse to criminal law according to the principle of *extrema ratio* and retaliatory action at Community level under the principle of subsidiarity simultaneously. The proposed system will only be able to respond to the dual set of requirements associated with both certainty under law and coherence of the Community integration process so long as it is set up in accordance with the results of this deliberation.

Powers of the European Prosecution Service

The EPP would be set up as a body tasked with directing investigative and penal functions within a common space corresponding to Community territory. As such, the list of EPP's "powers," while subject to scrutiny regarding the list of investigative provisions, does not appear excessive or unreasonable and raises no particular issues with regard to the Italian criminal justice system. The Italian Public Prosecutor does, in fact, have the distinguishing characteristic of remaining the "*dominus*" in enquiries, being entrusted with primary responsibility in the conduct of preliminary enquiries and hence empowered at the actual trial phase, assuming a naturally adversarial role *vis-à-vis* the defendant.

Assuming, then, that the EPP's specialist jurisdiction relates to severe types of offence damaging to Community financial interests, and prevails over that of national authorities, it would appear fitting for the former to have just as narrow a scope for action as the relevant national authorities in this particular area¹.

This is also implied by the need to safeguard the independence in the operative phase of the appointed European prosecutor, which would be jeopardised were the latter to call upon national authorities to take certain steps, these national authorities being heavily dependent on the executive (i.e. the Member States) in some instances.

Interface with national criminal justice systems

The Green Paper emphasises a number of times that one of the key principles underpinning the proposed appointment of an EPP is that of subsidiarity. In addition to the political implications associated with this principle, it should be pointed out that it will assume a key role in liaising with national criminal justice systems and, consequently, in choices regarding the internal organisation and relations between the appointed prosecutor and appropriate national authorities.

An overview of the specific functions of the European prosecutor, "centralising at Community level only as strictly necessary" would point to a definition of deputy EPP's prosecutors assigned a more active role "in the field." The appointment of deputy EPP's in the different Member States with exclusive powers of investigation and execution of criminal justice therefore appears completely consistent and is certainly compatible with our national system.

The introduction of such agents would guarantee deterrence against Community-wide fraud in view of the European prosecutor's currently effective function of directing and co-ordinating enquiries as well as the competence and knowledge of national

¹ It is difficult to be sure about the meaning of this sentence

systems which have jurisdiction with regard to such offences, thus constituting the best vehicle for liaising with Member States' judicial systems. In this connection it should be stressed that under the Italian system the Constitution defines the relationship of the Public Prosecutor to prosecution as an obligation upon it but not necessarily exclusive to itself. In fact the appointed legislator, in 1988 actually went further than constitutional requirements, stipulating the Public Prosecutor's exclusive entitlement to criminal prosecution, withdrawing any special rulings which either assigned or appeared to assign a similar entitlement on others. This exclusivity does not appear to argue decisively against the institution of a European prosecutor, however, seeing that, as stipulated by ordinary law, partial exclusions do appear to exist under our system according to rulings on the jurisdiction in criminal matters of a Justice of the Peace entitling an injured party to an immediate appeal to the Justices. In view of the above, no real problems over linking in with the Italian criminal justice system arise such as those which may well beset an arrangement whereby the Public Prosecutor may enjoy powers different from or inferior to those of the European prosecutor model described in the proposal.

*Structure of the European prosecution service
Independence, appointment and removal from office.*

The first remark is methodological and applies to the legal basis of provisions defining the status of the EPP.

The Commission is, in fact, proposing that rulings regarding the status and terms of appointment and eventually dismissal of the EPP should adopt the founding European Community Treaty as their legal framework with the addition, by a revision of these treaties, of Clause 280a. By contrast, clauses applying particularly to internal relations between the European prosecutor and deputies on the one hand and between the former and the appropriate judicial or police bodies on the other would observe the more appropriate legal principles of case-based law, thus allowing Member States to deal with any problems according to constitutional law.

This choice appears to be quite consistent with the duties and privileges planned for the EPP. It should first be remarked that actually incorporating all provisions applying to the European prosecution service into the Treaties would delay and complicate the operation of the body in question on account of the testing out of national constitutional procedures required. This structure would therefore be confined to rules such as those actually applying to guarantees of independence and appointing and removal from office procedures, which are crucial to the overall structure of the proposal.

Secondly, the likelihood of regulations governing functional roles and relations between the European prosecution service and national authorities require revision or adaptation just as the DPP becomes operational means that the provisions of case-based law are to be adopted as the basis for joint decision making, being the most suitable vehicle for the setting up of an effective European prosecution service. The concept of guaranteed independence adopted by the Commission appears sufficiently broad to take into account the impartiality considerations evolved by the European Court of Human Rights; it dwells on the absence of connections between the parties in court cases as well as institutional and functional independence, with special reference to possible interference on the part of Member States and Community institutions.

The guarantee of independence of the EPP is closely linked with terms and procedures for the appointment to the position and removal from office, especially as far as disciplinary liability is concerned.

Some doubt also attaches to the non-renewability of the post of EPP in view of potential effects on the issue of continuity and effectiveness of the functions performed, seeing that the European prosecutor determines policies in criminal matters, albeit within the boundaries set by Community legislators. These provisions, nonetheless, which have as their *ratio* the primacy of guaranteed independence, appear to be offset by providing for the renewability of the mandate of Deputy Prosecutors which, as already stressed, figure as the most active bodies in the field. As regards disciplinary liability of the European prosecutor, it may be considered fitting that the terms for exercising such action be stipulated under that same Article (280 a).

As far as provisions on the independence of deputy EP's are concerned, however, it should be stressed that these should be compatible with the situation of inherent or functional dependence of prosecutors in a number of Member States.

Under the Italian system, in particular, the Public Prosecutor's independence is a constitutional principle ensuing from both progressive assimilation of its institutional office into that of the adjudicating magistrates and a professional administration completely detached from the executive power and fairly close to an autonomously functioning judiciary.

*Internal organisation of the European prosecution system
and the hierarchical role of the European Public Prosecutor*

The managerial and co-ordinating role of investigative and prosecution activities assigned to the European prosecutor which, in the Green Paper, constitute his hierarchical role of issuing instructions of a general or specific nature addressed to deputy EP's, appears to be compatible with the requirement of observing the principle of subsidiarity.

Under the Italian criminal justice system the independence from the executive arm enjoyed by the Public Prosecutor accounts for the lack of hierarchical relationships between different investigative departments. Although the organisation of the State Prosecutor's office has maintained a pyramidal structure, the model selected is actually distinguished by complete internal independence between departments of various levels. It is the heads of the different departments who organise and co-ordinate activities within departments.

These remarks on the internal independence of investigative magistrates do not, all the same, amount to a definite objection to a planned hierarchical power structure headed by a European prosecutor. It should be pointed out in this context that the Constitutional Court did deliver a determination on this issue (No. 52, 1976), stating that "unlike the provisions of the Constitution applying to judges, guarantees of independence referring to the State Prosecution system apply to the institution viewed as a whole, not to magistrates viewed as individuals."

It should also be mentioned that a trend towards greater centralisation had recently been in evidence in the Italian system, especially with regard to proceedings in matters of organised crime, with the setting up of a central body co-ordinating all enquiries regarding such matters, headed by the Direzione Nazionale Antimafia (DNA) with its local arms, the Direzioni Distrettuali Antimafia (DDA), which have been set up at the courts of all regional capitals. Special powers are assigned to the

Procuratore Nazionale Antimafia for launching investigations; to further these he can, amongst other things, temporarily avail himself of the services of DNA and DDA magistrates, issuing special instructions to them for the purpose of dealing with conflicts and co-ordinating enquiries effectively. Although the relationship between the Direzione Nazionale and the Distrettuale Antimafia cannot be strictly described as hierarchical, the powers vested in the person of the anti-mafia Procuratore Generale (Chief Anti-mafia Prosecutor), offering a twin-track approach to the issue of Mafia crime, could serve as a yardstick measuring how far the EPP's hierarchical powers would be compatible with the Italian system.

Mandate assigned to European prosecutors

Various factors argue in favour of opting for an exclusive mandate. It should be remarked that this option alone can help to render the guarantee of independence effective. Should the deputy, in fact, continue to operate in the capacity of national Public Prosecutor under a system whereby he is inherently or functionally dependent on the executive body, the guarantee of independence could easily be vitiated in judicial practice, severely weakening operation of the European prosecution system and hence deterrence of Community fraud.

The hierarchical role of the European prosecutor, moreover, according to which the deputy has to adhere to relevant directions on the one hand and the essential provision of types of disciplinary liability assigned to the deputy EPP's on the other can only co-exist with an exclusive mandate. More particularly, provision for a cumulative mandate combined with duties performed under the original legal framework could raise serious problems over coordination with the types of disciplinary liability stipulated within the said provision, compounded by the possibility of enforcement of disciplinary action at national level.

The option of a cumulative mandate, however, is not decisive for the purposes of dealing with hybrid cases. It follows that, for reasons already stated and seeing that European must necessarily prevail over national jurisdiction, all collaboration and dialogue with the appropriate national authorities could apparently progress with their functions remaining completely autonomous, based on a mechanism compelling national authorities to apply to the EPP in cases where his jurisdiction is recognised, whether exclusive or not.

Provisions for preparatory investigations

The provisions for preparatory investigations listed in the Commission's Green paper appear adequate to ensure a common legal area for criminal enquiries and prosecution. The Italian judicial system is known to accept evidence submitted with strict observance of the "natural" rules of hearing oral evidence and of examination as lawfully obtained evidence. This guarantee should be assured in the interests of a fair judicial process, even before consideration of any other requirements arising from exercising the right to evidence. This, however, does not imply the adoption "*sic et simpliciter*" of our own model, but the setting up of a specific procedure at Community level modelled, amongst other things, on the provisions set out in statutes of international criminal jurisdictions of more recent origin. This applies principally to Community preparatory investigations left up to the European Prosecution System (gathering or seizure of information, hearings or examination of individuals, etc.) in which no coercive powers are applied and which can be easily modelled on provisions

contained, for instance, in the Convention of 29th May 2000 on legal aid in criminal matters. As regards preparatory investigations affecting the “*status libertatis*” (with the exception of bail and detention on remand), and personal property, these should be adopted, under the instructions of the European Prosecution system, by the appropriate authorities but should also be submitted to the judge of freedoms or some other national adjudicator. Simply ascertaining the existence of a set of regulations governing preparatory investigations to which the European Prosecution service could refer in order to test the viability of the principle of mutual recognition would therefore not suffice. It is, however, essential for individual national legislature to guarantee the rights of the defence and rule against any evidence obtained unlawfully as unusable or inadmissible. It is only then that the principle of mutual recognition would not appear as the free flow of evidence flawed from the start, but would be anchored to a solid regulatory foundation which could be established by the European Convention for the Protection of Fundamental Rights and statutes of international judicial authorities. This is especially true for measures affecting the “*status libertatis*” which the European Prosecutor can ask the national adjudicator to have adopted, since he alone is empowered to do so. In any event, should no enactment be achieved in any sector whatsoever, Member States should, explicitly recognising limits to the principle of mutual recognition of evidence (if obtained otherwise than in accordance with fundamental rights, including those of the defence), define the guarantees for the defence of the accused on the basis of “*traditional*” rights and the Statutes of appropriate international judicial bodies.

Admissibility of evidence

It could hardly be claimed that the principle whereby evidence lawfully obtained in a Member State should be considered admissible before the courts of any other Member State overcomes the obstacles facing the European Prosecution service of different standards for admissibility of evidence on the one hand and its usability on the other. To resolve the *impasse* it is not enough simply to refer to the concept of mutually agreed admissibility formulated by the Tampere European Council, according to which “evidence gathered lawfully by the authorities of a Member State should be considered admissible before the courts of the other Member States, taking account of the regulations applying in the said States” (Conclusion No 26 of the Chair of the Tampere European Council). This should be supplemented by explicit recognition of the duty to respect the principles set out in Article 6 T. U. E. of the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Basic Freedoms. This “*common judicial connective tissue*” both could and should be supplemented by *ad hoc* Community regulations which govern arrest warrants or European-style records of evidence insofar as these can serve as evidence usable in proceedings.

In other words, the whole system may be perceived as a pyramid where the *Grundnorm* consists of the principle, to be deduced from the rulings set out above, whereby “evidence lawfully gathered by the authorities of a Member State shall be admissible before courts of the other Member States, taking account of the regulations applying in the said states and on condition that they do not violate the fundamental rights of the individual and the defence.”

Solving the problem of admissibility of lawfully gathered evidence in a Member State does not resolve that of the usability of the evidence in a different Member State. To conclude, it would appear from the above that a balance has to be achieved between

the principle of mutual recognition of lawfully obtained evidence and the need to dwell not merely on the formal element of “legality” but also on the issue of respect for fundamental rights during evidence taking. This balance will always be “dynamic,” not “static,” *in fieri*,” in that it will have to be sought in the day-to-day activities of the European Prosecution service.

In fact, it will be possible to consider evidence gathered in a different Member State admissible but only usable insofar as it is lawfully assembled in the State which has jurisdiction. Records of evidence or interviews gathered at the enquiry phase, for instance, will be usable in Italy solely for the purpose of disputing a case but will not qualify as proof. The circumstances under which enquiries are conducted by the EPP will certainly not, moreover, allow for the enactment of rules on judicial exemptions entailing illogical discriminatory treatment of defendants.

Notably, the standard for usability of records is particularly strict under our system, in that Clause 191 of the Penal Code sets out the general principle of unusability of evidence obtained in breach of restrictions laid down by law but without making any distinction between those offences breaching constitutional rights and other offences.

* * *