

**Österreichische Vereinigung für Europäisches Strafrecht**  
**[Austrian Association for European Criminal Law]**  
**Meeting on 3-4 May 2002**  
**to discuss the Green Paper on criminal-law protection of the financial interests**  
**of the Community and the establishment of a European Prosecutor**

The Österreichische Vereinigung für Europäisches Strafrecht, with the assistance of the European Anti-Fraud Office (OLAF), held a workshop in Vienna on 3 and 4 May 2002 to discuss the Commission's Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor. Its conclusions are set out below.

**Preliminary remarks (and response to the "General Question")**

In principle the delegates supported the idea of considering European judicial organisational structures in the field of criminal law that would take precedence over purely administrative structures for constitutional reasons. There was a perceived need for the establishment of such structures to control and complement police and administrative cooperation structures and institutions at Community level, at least in the long term.

In this context the protection of the financial interests of the Community is of particular and increasing importance. From a criminal-law perspective it should not, however, be viewed in isolation and separately from other forms of economic and financial crime that are increasingly being committed transnationally and, in some cases, on an organised basis. The Community budget should, moreover, be protected primarily by stepping up prevention measures and particularly by ensuring that relevant secondary legislation precludes fraud as far as possible (see points 41 and 42 of the Conclusions of the Tampere European Council, the Council Resolution of December 1998 on the prevention of organised crime, and the Commission's comprehensive working paper of December 2000).

The national systems of criminal law and public prosecution mechanisms that have evolved in Europe must be regarded as integrated systems comprising many different interlinked substantive, organisational and procedural elements. Generally speaking these structures are probably very comparable in terms of their functionality and effectiveness but in detail they are very different.

Their harmonisation must be seen as a long-term goal. In an increasingly integrated legal area they must, however be compatible and able to cooperate; priority should also be given to their expansion and improvement. This should be done on a step-by-step basis along the lines of the initiatives already being made in the context of the third pillar towards the approximation and harmonisation of legislation, mutual recognition of decisions and more intensive cooperation (also by institutions at Community level); considerable progress has already been made here.

On the other hand, attempts to achieve a supranational codification of criminal-law provisions and to create supranational public prosecution authorities may lead to two-track procedures and to fragmentation of the law and unequal treatment at national level. In this connection the authors of the Green Paper rightly address the problem of "hybrid cases", which are a very frequent occurrence in practice.

The question of the establishment of a European Public Prosecutor should be carefully considered against this general background. It should be examined to determine whether the "added value" and increased efficiency associated with his establishment significantly outweigh the legal, organisational and financial effort required, as well as the risks and disadvantages already mentioned. The delegates did not think this basic issue had been adequately clarified. In any event it was preferable to wait and see what happened with EUROJUST, the judicial cooperation unit still in the process of being set up, before establishing a supranational Community judicial prosecution authority.

There probably needs to be a positive emphasis on the establishment of a judicial control body to deal with internal irregularities within Community institutions and to support and control any extended powers of the European Police Office (EUROPOL). The Workshop (like the Green Paper) did not, however, discuss this issue further, nor did it debate the issue of whether the establishment of a European Public Prosecutor is politically achievable.

Irrespective of whether the proposed project to establish a European Public Prosecutor is basically workable and appropriate, the Workshop discussed in detail the individual questions raised in the Green Paper.

If the project is supported in principle, the powers of a European Public Prosecutor and his standing before the national court would have to be harmonised with the national public prosecutor's status under national law. It is therefore clear that, in countries where the national public prosecutor is responsible not only for representing the prosecution but also for taking action that affects proceedings at the trial stage, the European Public Prosecutor's powers should likewise not be confined to representing the prosecution.

Irrespective of national rules there should, however, be an established principle that the European Public Prosecutor has an obligation to be objective. To make this clear in English legal terminology, the Workshop recommended that the term "prosecutor" be replaced by "procurator".

### **Response to Question 1**

Irrespective of the controversy in national law, it seems appropriate for the European Public Prosecutor to be independent. The appointment procedure proposed in the Green Paper (proposal from the Commission, assent of the European Parliament by a qualified majority) and appointment for a single, non-renewable term of office were approved. The six years proposed appeared to be a reasonable term of office.

Removal from office only by a decision of the Court of Justice of the European Communities (on application by the European Parliament, the Council or the Commission) is commensurate with the European Public Prosecutor's independent status.

On the subject of the compatibility of the office of Deputy European Public Prosecutor with a national office (as public prosecutor), the third of the options referred to in the Green Paper was generally rejected. It was argued that leaving each of the Member States to choose the legal status of the Deputy European Public Prosecutors in their area

would be the least commensurate with the independent role of the European Public Prosecutor. Whether the first option (incompatibility of the office of Deputy European Public Prosecutor with a similar office in the national sphere) or the second option (holding two functions) is preferable depends largely on the answer to Question 6, which asks how functions should be distributed between the European Public Prosecutor and the national public prosecution authorities, particularly in hybrid cases. The majority of delegates at the Workshop advocated a clear-cut division of functions but taking account of the *ne bis in idem* principle (double jeopardy prohibition). This is suggested by the first option (incompatibility of European and national offices), which largely rules out conflicts of interests and loyalty.

Objections to this option were based on the problems expected with the Deputy European Public Prosecutor's caseload in individual Member States and with the treatment of hybrid cases, where a single act constitutes more than one offence - partly at national and partly at Community level. The second option (holding two functions) would be preferable in terms of simplifying the treatment of hybrid cases, particularly if the aim was essentially for all such cases to come before the European Public Prosecutor. An unknown factor is, however, whether a Deputy Prosecutor who is "serving two masters" would be readily able to resolve conflicts of interest in the Community's favour irrespective of the fact that he was still part of the Member State's criminal justice system (this would include his hierarchical and disciplinary status). The points made in the Green Paper about the consequences of holding two functions, particularly in terms of disciplinary procedures, indicate the difficulties that would arise from the Deputy European Public Prosecutors being subject to two sets of service regulations and disciplinary procedures.

The European Public Prosecutor, as the supreme authority, must have the power to direct and coordinate the work of the Deputy Prosecutors. The first option (preferred by the Workshop) rules out any overlap of hierarchical structures in any case. The right of replacement, the chief prosecutor's right to take over proceedings and the principle of indivisibility are a consequence of the overall structure of the prosecution service.

### **Response to Questions 2 and 3:**

The offences should always relate to damage done to the financial interests of the European Community. There was therefore no objection to expanding the European Public Prosecutor's functions as proposed in points 5.2.2.1 to 5.2.2.4 of the Green Paper. A further extension of his functions as suggested in point 5.2.3. of the Green Paper cannot be approved at present, however.

The definitions of the individual types of offence must be left for a separate discussion but the requirement of intent should always be upheld.

The Green Paper does not, however, make it absolutely clear whether the provisional aim is to achieve the (greatest possible) harmonisation in the definition of offences relating to the criminal-law protection of the Community's financial interests by means of an instruction to transpose into national law or (to the same extent) by a uniform provision in Community secondary legislation that would not require transposition under the legal system of the individual Member States. In discussion of the first of these two possibilities at the Workshop the point was made that, on the one hand, a large degree of

harmonisation had already been achieved in the domain of the third pillar, particularly in the sphere of protecting the financial interests of the European Union, and that this should enable the European Public Prosecutor to pursue this aim efficiently in each Member State. On the other hand, the creation of a new European substantive criminal law (albeit covering only this protection) would lead to additional fragmentation of the law in each individual Member State. There is an advantage in the Community budget being protected by completely uniform provisions but a disadvantage in that reactions to absolutely identical punishable acts affecting the interests of different victims would be different in each individual Member State. This would probably cast serious doubt on the acceptability of such Community law to European citizens.

Continuing along the path of transposing definitions of specific offences into national law would mean there was no need for comprehensive rules on penalties, which the Green Paper says should at least be effective, proportionate and dissuasive in all Member States. If need be, the applicability of specific consequences of wrongdoing (not previously provided for in all Member States) could be established. For harmonisation in the area of criminal liability (of legal persons) reference can be made to Article 3 of the Second Protocol of 19 June 1997 of the Convention on the protection of the European Communities' financial interests. Likewise irrespective of whether a decision is made in favour of only implementing provisions or harmonisation of the law by means of Community (secondary) legislation, it will probably be necessary to define a minimum limitation period. To ensure uniform treatment under criminal law of the part of hybrid cases to be prosecuted by the European Public Prosecutor (see Question 6), uniform provisions for imposing penalties will also need to be provided where offences coincide (the "lesser included offence" principle, principle of asperity, or cumulative system of penalties?).

If a decision is made in the near future in favour of complete harmonisation of the acts deemed to be offences for the purposes of criminal-law protection of the Union's financial interests, the additional rules referred to above will not be adequate. When comprehensive rules are drafted for penalties – as they must then be – differences in the legal systems should also be ironed out in the area of the conditional pardon and conditional discharge. In addition to the areas of criminal liability, limitation and concurrent offences already mentioned, uniform provisions are required especially in relation to how criminal acts are manifested or committed (omission, attempt, forms of participation).

#### **Response to Question 4:**

The Commission's preference for facts potentially constituting one of the predefined Community offences to be mandatorily referred to the European Public Prosecutor by all national and Community authorities covers too wide a range of authorities and officials. They should be obliged only to report such suspected offences as affect their official sphere of activity (in accordance with rules comparable with Section 84(1) of the Austrian Code of Criminal Procedure). This obligation will generally exist in the case of the authorities mentioned by way of example in the Green Paper.

#### **Response to Question 5:**

The mandatory prosecution principle gives a better guarantee of uniform prosecution practice in the individual Member States than if there is discretion to prosecute. A slight limitation of the mandatory prosecution principle is, however, advisable to achieve the utmost efficiency in the Prosecutor's handling of cases (see the first and second exceptions proposed in the Green Paper) or to safeguard the Community interests that are to be protected by the European Public Prosecutor (third exception).

In the case of the first exception (*de minimis non curat praetor*) a value threshold is preferable in the interests of legal certainty.

The second exception is where only some of the charges (those that can be dealt with more easily) are prosecuted if further investigation would have the effect of not significantly influencing the judgment. Here it should be possible to reserve the right for the European Public Prosecutor to prosecute the other offences at a later date (for example, in the case of an acquittal or where the charges initially prosecuted by him were treated too leniently by the court).

There should be further discussion of the conditions for the third exception (out-of-court settlement), which appears to be important mainly in connection with the criminal liability of legal persons. Reservations were expressed firstly (because of the conflict with the presumption of innocence) about the possibility – referred to as "useful" in the Green Paper – of an out-of-court settlement in cases where the prospect of a conviction was small. Reservations were also expressed, secondly, about restricting termination of the prosecution by an out-of-court settlement to modest amounts of money (it is precisely where large amounts of money are involved and out-of-court settlements are correspondingly large that there are cost-benefit reasons for waiving prosecution).

A point is made (and is worth debating in itself) that certain aggravating circumstances should be defined where there may be no exception to the obligation to prosecute – in other words prosecution would be obligatory. It should be noted here that the definition of these circumstances by the relevant national law is not commensurate with the aim of treating attacks on the Community budget in the most uniform way possible.

### **Response to Question 6:**

While acknowledging the primacy of the European Public Prosecutor's jurisdiction over offences defined as such for the protection of the Community's financial interests, in the interests of legal certainty and uniform prosecution practice the distribution of jurisdiction should be regulated as clearly as possible and the European Public Prosecutor should have the least possible discretion to determine jurisdiction. In this respect his power to refer cases to national criminal prosecution authorities as proposed for Community cases (a) in the Green Paper seems questionable. This also applies to cases limited to the sovereign territory of a single Member State, since such a limitation is largely a matter of chance. In the case of the first and second exceptions to the mandatory prosecution principle (see Question 5) no such rule appears necessary. In a case of minor importance (first exception) which the European Public Prosecutor does not consider worth prosecuting there will probably also be no need for further criminal-law protection of the Community's interests by the national public prosecutor. In the cases covered by the second exception (appropriacy of limiting the scope of proceedings if this will probably not influence the judgment), reserving the right for the European

Public Prosecutor to prosecute at a later date the further attacks on the Community's financial interests that were not initially prosecuted (see Question 5 above) is a much better division of duties between the European Public Prosecutor and the public prosecutors in the Member States.

Jurisdiction should also be defined as clearly as possible in hybrid cases. If this is not possible because one set of circumstances constitutes offences to be prosecuted by both the European Public Prosecutor and the national public prosecutor, the European Prosecutor must have primacy – which is very much in line with the points made at the beginning. The handling of such a case by the Deputy European Public Prosecutor should enable the act to be considered under the appropriate national law in these special cases even if the Deputy European Prosecutor has no corresponding role in the judicial system of his Member State. In the context of cooperation between the European and national public prosecutors as emphasised in this regard under point c) in the Green Paper, another way of dealing with such cases would be to call in the national public prosecutor and involve him in the prosecution (solely to handle offences under national law); this would neither adversely affect the prosecution claims of Member States nor contravene the double jeopardy prohibition.

### **Response to Question 7:**

Question 7 is closely related to Question 12 (review) so the two questions were discussed together.

The Workshop delegates took the view that the investigation measures proposed for the European Public Prosecutor are adequate to overcome fragmentation of the European criminal-law area.

The measures that cannot be taken independently by the European Public Prosecutor but are approved or ordered by the national judge would have to conform to the national law of the appropriate judge. The distinction between measures to be ordered by the court and those to be approved by it has no fundamental importance in this context.

A more important issue appears to be how to achieve the widest possible homogeneity between measures throughout the Community, especially as the Green Paper itself sees this as a condition for the mutual recognition of national coercive measures. The same applies to the acceptability of the principle of the mutual admissibility of lawfully obtained evidence.

It would be conceivable for a European framework regulation to be created to give provisional validity throughout the Community to measures that are subject to review by the courts. After a brief period of time (to be specified) there should, however, be provision for the measure issued to be reviewed by a court in the State of execution (*ex officio*, at least in cases where the accused is under arrest) (see also the initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence, OJ C 75/3 of 7 March 2001).

For the purposes of the second of the options submitted for discussion, the provisional order should be issued by a single national court which has jurisdiction for the whole of

the investigation procedure and which should be selected against objective criteria to avoid "forum shopping" (see also Question 10).

The investigative measures which the European Public Prosecutor may carry out independently require comprehensive procedural rules which are only mentioned in passing in the Green Paper. Detailed consideration still needs to be given to the question of whether it is sufficient to be guided by the rules of procedure of the international courts where clarification is required. The need for regulation ranges from the rights that should be enjoyed by the accused or otherwise affected parties to legal redress against breaches of the law (appeal proceedings).

### **Response to Question 8:**

The Commission's preferred solution, namely to comply in each Member State with the system of relations between national prosecuting authorities and national investigation authorities, was also approved in the Workshop.

### **Response to Question 9:**

The act of *closing the case* is not an isolated decision but simply the opposite of *committing for trial*. Given that a "national" offence may still be suspected, the fact that *reasons* for this act *have to be stated* is nevertheless welcome. A study of cases where prosecution is waived on a discretionary basis or for other reasons reveals a factor common to both, namely, that closing the case for Community offences should not rule out *prosecution for national offences*. It should therefore be made possible for prosecution to be continued in any form by a *national public prosecutor* without contravening the double jeopardy prohibition.

It makes sense to serve the European Public Prosecutor's "decision" not to prosecute on the accused, the Commission (as representative of the injured party) and on the national prosecution authorities. See also response to Question 18.

The *reasons for closing the case where the mandatory prosecution principle applies* should clearly indicate the exemption of the reported act from punishment for legal reasons (or to be more precise, the lack of criminal-law significance from a Community offence perspective), including the applicability of a legal reason for exemption from punishment or a reason for withdrawing punishment or an obstacle to prosecution (such as the double jeopardy prohibition), and the lack of adequate suspicion of a criminal offence (evidence available).

The phrase "the perpetrator remains unidentified" used in the Green Paper is unclear. A differentiation in terms of time needs to be made between discontinuing informal inquiries concerning unknown perpetrators *before investigations* and terminating prosecution *during investigations* concerning a *specific suspect*. If the wording is intended to mean that an accused is no longer under suspicion, this is equivalent to the usual reason for terminating proceedings, that is to say in the absence of adequate factual grounds for further prosecution. If, however, it relates to a situation where the suspect has not been apprehended, there should be provision for informal (provisional) termination that allows investigations to be informally resumed at any time.

The legal effect of termination would have to be such that if new facts are, for example, brought to the European Public Prosecutor's attention by the national authorities or by OLAF he can continue his investigations after resumption (ordered by the court).

**Response to Question 10:**

The choice of Member State of trial should be based on stricter and more transparent criteria. None of the three regulatory options presented in the Green Paper seems acceptable. To avoid "forum shopping" the choice of country should be based on firm international points of reference (separately from the investigation procedure). It therefore seems desirable for the main focus to be on the **home state principle**.

The choice should be non-appealable. A preferred corrective measure would be a petition by the accused for the case to be allocated to a court of justice in another Member State (delegation petition), on which the European Court of Justice would decide (first option, page 56). A review by the national court including the choice of forum was rejected (see also reply to Question 13).

Where a number of "European offences" are connected, the principle of concentrating prosecutions should be applied, but separation should not be ruled out where it is expedient.

**Response to Question 11:**

The introduction of the principle that evidence lawfully obtained in a Member State should be admissible in the courts of other Member States would have to be preceded by harmonisation of the law of evidence. With the law fragmented as it is at present, the trial court would find it difficult even to establish whether evidence had been lawfully obtained in other countries in a particular case. The trial court judge would thereby be expected to take into account the whole of the law of evidence in the States involved in the investigation, including the rules governing exclusion, and the case law on this subject.

In view of the differences between the rules for trials and appeal proceedings in the individual States it also seems questionable whether compliance with the rules governing exclusion in the Member State is sufficient to guarantee a fair trial in terms of the taking of evidence.

**Response to Question 12:**

*See answer to Question 7.*

**Response to Question 13:**

The Workshop supported the second possibility with an explicit rule giving the accused the right *to object to the charge* (to a national panel of judges, not the trial court).

A review by the national court to include the choice of forum was rejected (see answer to Question 10: only delegation petition to the European Court of Justice).

**Response to Question 14:**

The protection seems to be basically adequate, especially in respect of the legal protection provided for measures that have an impact on basic human rights.

Where the double jeopardy prohibition is concerned, it would have to be made clear that termination is legally valid only for "European offences" (see Question 9).

**Response to Question 15:**

The specific rules for best organising the relationship between the European Public Prosecutor and those involved in cooperation in criminal matters in the European Union depend on the nature of the relevant bodies. The Workshop felt that in any event there should be a *mutual* duty to notify and inform.

**Response to Question 16:**

In view of the anticipated re-evaluation of the OLAF system, the only comments that can essentially be made are in support of OLAF enjoying criminal investigation powers, particularly for the purpose of carrying out criminal investigations within the EU bodies and institutions. If such powers were expanded, however, OLAF would definitely have to be detached from the Commission. Provision would, on the other hand, have to be made for a duty to inform the European Public Prosecutor of specific cases where criminal activity was suspected and for compliance with his instructions.

As matters stand, the European Public Prosecutor has to involve the national authorities if he does not commit for trial. The duty to report to the national authorities as set out in Article 9(3) and (4) of Council Regulation (EC) No 1073/99 concerning investigations conducted by the European Anti-Fraud Office (OLAF) should therefore be dropped unless from the outset only national interests appear to be damaged.

**Response to Question 17:**

To intensify and harmonise efforts to combat activities which damage the Community's financial interests the conclusion of judicial assistance conventions between the EU and the governments of third countries, in particular the applicant countries, is preferable to bilateral conventions.

**Response to Question 18:**

The review of autonomous acts of investigation by the European Public Prosecutor (documentation, hearings, questioning etc.) should generally not be open to attack. Harmonisation is desirable only in so far as any review procedures should generally not have a suspensory effect. In the case of all other acts of investigation, judicial review comes into play under national law anyway.

On the question of closing or not pursuing cases, the duty to serve the decision has already been discussed above (in connection with Question 16). There should be no provision for the Communities to have standing to act against a closure decision taken by the European Public Prosecutor. The fact that the European Public Prosecutor is

independent of the Commission and other Community bodies inevitably means that other Community bodies cannot impose their view of the termination of a criminal case on him. This applies not only to the issue of the adequacy of the evidence gathered but also in the case of a settlement. The possibility that other Community bodies would provide additional evidence for any resumption of proceedings was considered adequate.

There was therefore no need to answer the question as to the type of procedure by which other Community bodies should be able to apply for review of the European Public Prosecutor's decisions.

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