The European Prosecutor: unification or harmonisation of substantive criminal law; criminal offences, period of limitation, liability of legal persons.

Introduction

The purpose of the Green book of the European Commission is to explain and support the idea of remedying the fragmentation of the European law-enforcement area by establishing a European Public Prosecutor. Not secondary is also the purpose of implementing a consultation process throughout 2002 with all interested circles, regardless of their public or private quality.

The most important international legal basis of this purpose is the Convention of 26 July 1995 on the protection of the European Communities' financial interests, not yet ratified by all member state (but ratified and applied by Italy by the law 29 September 2000 n. 300, regarding also the corruption of public officials). This convention mostly regards the need for unification of offences prejudicial to E.U. financial interests.

Other steps beyond, regarding the specific purpose of instituting the European Prosecutor, have been done by the Green book, that envisages a set of rules regarding this matter.

In fact, referring from this point of view to the terminology adopted by the Green Book:

"Fraud is a phenomenon that needs to be stamped out”.

The economic amount of frauds affecting the European resources is, in fact, taking for example the information from the Commission, regarding 1999, of 413 million of euros.

Aiming at the above mentioned purposes, the Green Book lays down a proposal of the Commission, mainly regarding:

a) Legal status and internal organization of the European Prosecutor;
b) Substantive law to be applied in fighting crimes;
c) Procedural law.

The focus of this report is on the perspectives regarding substantive criminal law.

From this point of view, the most important substantive criminal principles, related to the institution of the European Prosecutor could be inherent to the following items:
1) Principles related to the attempt to commit a crime.
2) Principles related to the participation in a crime.
3) Unification of the criminal rules defining the facts constituting criminal offences related to conspiracy, corruption, fraud, money laundering.
4) Unification of the principles regarding limitation periods of penal action.
5) The unification of principles regarding the liability of legal person.

So, in order not to create elective paradises of impunity in any E.U. Country and reflecting on the usual system to perpetrate crimes prejudicial to the European Community interests; crimes often requiring the collaboration among various European enterprises, established in different E.U. Countries.

In fact, the need for unification is particularly important for the aims of protecting the financial interests of the Community.

The Green book of the European Commission proposes a wide choice, to be made among the different techniques that could be used.

The first possibility is reference to the Member States domestic law purely and simply; but the Green book prefers the following other possibilities:

- either harmonisation of part of the national law, the national rules superseding the Community rules for the rest, or total harmonisation of certain national provisions;
- finally, unification, through the creation of a corpus of autonomous Community rules.

Perhaps the first choice is not suitable for the goals the institution of a European Prosecutor aims at, the other choices seeming more suitable to them.

The Green book point out that there is already consensus in the EU about a common definition regarding fraud, corruption, money laundering as resulting from the proposal for a directive of 23 May 2001, deriving from the Brussels Convention of 26 July 1995 and its protocols (in particular, Protocol of 19 July 1997 to the 1995 Convention regarding the financial protection of the Community interests).

The Green book does not specifically refers to harmonization of other principles regarding penal responsibilities.

Perhaps, if one can make some proposals not strictly limited to the matters treated by the Green Book, a closer sight could be recommended, or suggested, not only to limitation periods, whose need of unification is well considered by the
Green Book, but also to the differences still regarding other general institutions like, for example, participation in the crime or attempt to commit it. In fact, both the common definition of fraud (art. 3 of the directive) and the common definition of money laundering (art. 6) establish that the criminal acts should be punishable either as a principal offence, or as participation in, instigation of, or an attempt to commit the crime. And we should consider that some differences can be still envisaged from these points of view.

**Participation in a crime**

Italian penal code does not provide a definition of participation in the crime, even though it provides a particular discipline of many aspects regarding participation. According to Italian jurisprudence, moral participation in a crime is not necessarily fulfilled by an instigation to commit a crime; actually a consensus to commit the crime is enough, when fully realized and communicated to the material executor before the commitment of the crime, also without any moral or material support other than just the awareness of the agreement. It seems to me that the substantive law in France, for example, gives a narrower definition of moral participation. About moral participation, the French code establishes that a person is accomplice in the crime with moral participation when gives rise to its commitment by gifts, promises, threats, order, instructions, abuse of authority or power (section121-7).

Anyone can see how the French code requires more than the Italian to hold that a participation in crime is fulfilled, the moral accomplice being the direct instigator of the commitment of crimes.

Section 63 of the Spanish penal code, like Italian code, also does not provide a definition of the participation in a crime but it is quite different too from the other codes, because establishes generally that accomplices in a crime will always face a lower penalty than the one applied to the material executor.

**Attempt to commit a crime**

The Italian (Section 56) and Spanish (16) penal codes give quite similar and precise definitions of the attempt to commit a crime. The attempt is a start to the commitment, realized, according to the Italian, through material acts, clearly heading for the accomplishment of the crime; according to the Spanish, objectively heading for it.
While anyone can see how little the difference between the two codes is, on the contrary the French code (Sect. 121-5) simply defines the attempt to commit a crime as a start to his execution.

And so, just speaking about codes of the same origin of civil law; let's imagine the differences if we shift to a wider European range.

Responsibility of legal persons

The Green Book support this responsibility for crimes prejudicial to the Community’s financial interests.

In Italy we have a legislative decree regulate this matter (8 July 2001 n.231) providing a responsibility of legal persons deriving from a crime committed in the interest or the advantage of the legal person, by persons acting on behalf or in the management of the legal person, except for the case they have acted in their exclusive interest or in the interest of third persons.

This responsibility applies to any legal person, except the State, the local authorities and other non-profit public legal persons.

The responsibility of the legal person is a kind of administrative one, punished with economic sanctions and other sanctions concerning the activity of the legal person, as the suspension of the activity, the withdraw of licences, the exclusion from government grants even if already released and also the prohibition of advertising its product.

Section 19 provides the confiscation of the price or the proceeds from the crime and also the possibility to confiscate an equivalent amount of money, if the first option is not feasible.
Section 22 provides a limitation period for this responsibility of five years since the committing of the crime.

Very clear the differences between the Italian and French system.
Section 225-4 and 121-2 of the French penal code establish the responsibility of all legal persons, except only for the State, for the crimes committed in their interest by their officers and representatives.
So in the French system, only the responsibility of the State is excluded and not that of other public legal persons.
Moreover, the responsibility is established only for the crimes for which it is specifically provided and not for all kind of crimes (it is provided for the kind of crimes we are speaking about).

The economic sanction (amende) is five times as much as the economic penalty generally provided for the crime; on the contrary, in Italy there is not a strict link between the two penalties, being given to the judge the choice to apply an economic sanction ranging from 25,000 to 1,500,000 euros.

But the most interesting difference refers the evidence of innocence that can be given by the legal person in Italy (excluding the responsibility, but not the confiscation of the criminal proceeds).

Two cases are regulated:

a) crimes committed by high executives of the legal person;

b) crimes committed by persons working under the direction of those executives.

In the first case the exclusion of the responsibility is more difficult, but not impossible. The burden of the proof lies on the executives in order to give evidence that they have adopted an effective organization to prevent those events; an organization in which officer in charge of control are autonomous. If these officers have made effective controls and the author of crime has committed it escaping the controls with fraudulent behaviour, in this case the responsibility is excluded.

It seems difficult to escape this system of responsibility for the legal person; but we must consider that, very often, the crimes with the biggest impact in advantage of a legal person are committed with the participation of the top level executive.

This is particularly clear in matters regarding the corruption of public officers of the E.U. Community or the fraud in asking financial subsidies from the European Community through its export refund scheme.

The system of getting subsidies from European Community strictly affects all the organization of an enterprise, from the point of view of the choice of the type and quality of goods to product, the choice of other enterprises to associate in the business and to make affair with, the origin of gross materials and the destination of the final product, and also all the fiscal organization of the whole enterprise.
Consequently, the author of crimes related to this matter must be the top executives of the enterprise and we can’t fail to consider that top level executives are the same that, in a more or less direct way, decide the organization, the funds and the persons working in the bodies of control in the legal person; so they can calibrate their criminal activities knowing the ways and having the means to escape the control of the body that they have created.

For this reason I think that to make more effective the fight against crimes prejudicial to the economic interest of the E.U. we should support a unification of the legislation, aiming at abolishing the possibility to escape the administrative responsibility of the legal person and also providing higher economic penalties.

**Fraud**

Article 1 of the Convention has been incorporated in the proposal for a directive of 23 May 2001, whose article 3 defines fraud as “any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effects the misappropriation or wrongful retention of funds from the general budgets managed by, or on behalf of, the Community, non-disclosure of information in violation of a specific obligation, with the same effect, or the misuse of such funds for purposes other than those for which they were originally granted.”

Comparative exam of Italian, French and Spanish legislation allow to point out that, in front of the complexity and variety of the Italian and Spanish crimes directly connected to misappropriation of community funds (Section 640 bis, 316 bis and ter of the Italian penal code; section 248, 305, 306, 309, 627 y 628 of the Spanish penal code) the crimes provided by French (in particular, escroquerie 313-1) refers to a smaller number of conducts. Moreover, none of the above mentioned crimes consider the omission relating to the use or presentation of statement or documents; so, the need for unification is particularly clear.

**Corruption**

Section 4(1) of the proposal for a directive (art. 2 of the protocol of 27 September 1996 to the 1995 Convention) defines passive corruption as “the deliberate act on the part of an official, whether directly or through an intermediary, of requesting or receiving advantages of any kind whatsoever to officials, for themselves or for a third party, as inducement for them to breach their official obligations and carry out or refrain
from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community’s financial interests”.

Section 4 (2) of the proposal for a directive, which reproduces the terms of article 3 of the same protocol, defines active corruption as “the deliberate act of promising or giving, directly or through an intermediary, an advantage of any kind whatsoever to officials, for themselves or for a third party, as inducement for them to breach their official obligations and carry out or refrain from carrying out an official duty or an act in the course of their official duties in a way that damages or is likely to damage the Community’s financial interests”.

The need for unification is also more evident.

**Money laundering**

Section 6 of the proposal for a directive refers to the general concept of money laundering related to the proceeds of fraud and of active and passive corruption. So, the money laundering is defined as “the conversion or transfer of property, knowing that such property is derived from criminal activity or from criminal activity or from an act of participation in such activity; for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action or “the concealment or disguise of the true nature, source, location, disposition, movements, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity” or “the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an active participation in such activity”.

The crimes provided from Spanish (blanqueo de capitales, section 301 of the penal code) Italian (riciclaggio e reimpiego di capitali e beni di illecita provenienza, section 648 bis, 648 ter) and French codes (blanchiment, section 324) are not so far from the one provided by the Commission. There is an evident difference of penalties (the Italian reach twelve years of reclusion, that is twice as much as the French and Spanish). So a unification would be useful for the conducts prejudicial to Community interests.

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