
1. Introduction.

The European Commission [EC] published the Green Paper with the above title in December 2001. Consultation is taking place in 2002 and the EC will announce its conclusions in 2003. It is envisaged there will be a wide-ranging public debate on the content of the Green Paper, followed by proposals by the Commission to the next inter-governmental conference [IGC] for the establishment of a European Public Prosecutor.

In 1997 a body of academics produced a report entitled ‘Corpus Juris’ which was part of European Legal Area Project under the Directorate of Financial Control of the EC. The report set out a self-contained, separate body of law and code of procedure which would apply throughout the EU to all cases of fraud involving the assets, income and expenditure of the European Community. The rationale for the study was the extent of fraud involving Community funds, the need to protect them and the failure of the existing systems in Member States to do so. This failure arises from the inconsistencies and conflicts between national legal systems and the many obstacles and difficulties experienced in practice in the
enforcement of national laws in cases of fraud involving Community financial interests [call it ‘eurofraud’].

In January 1999 the CBA produced a written response to Corpus Juris, which in the light of the content and ambit of the Green Paper remains relevant and we adopt it as a pre-amble to and as part of these submissions. It is included as an appendix. It was also submitted to the House of Lords Select Committee on the European Communities [chaired by Lord Hope] which considered and produced a report on ‘Corpus Juris’ in May 1999. Oral evidence on behalf of the CBA and the Bar European Group was given by Clare Montgomery Q.C. to that committee. The HOL Report closely reflected the overall position we had adopted.


Twin concerns on the part of the EC provide the basis and the reason for the establishment of an EPP. They are the same as those underlying ‘Corpus Juris’ and they are firstly, the scale of ‘eurofraud’ [said to be 400m euros in 1999] and secondly, ineffective law enforcement in such cases throughout the EU. The latter is due, says the Green Paper, to the ‘fragmentation of the European criminal law enforcement area’ and the seventeen [or more] different national legal orders which render
traditional methods of judicial cooperation ‘cumbersome, and ‘inappropriate’.

We have no reason to doubt the scale of the problem which was acknowledged and described by Lord Hope in a debate in the House of Lords in November 1999 as ‘extending far and wide throughout the Member States and beyond’ and amounted to ‘the Community’s resources leaking out in favour of the criminal’.

As to whether the current regime is failing to work to the extent claimed is a conclusion we have no means of testing or verifying. At paragraph 2.1.2 it is said that existing cooperation in criminal matters do not give ‘an adequate response’ to the question of criminal proceedings in such cases and conventional tools of judicial assistance are ‘no longer suited to the task’. Annex 1 [submitted by the EC to the Nice IGC 2000] restates the various ways in which law enforcement is impeded or rendered ineffective because of the ‘fragmentation’ referred to and cites two specific examples. Paragraph 1.3 asserts ‘that numerous cases based on Community experience in recent years testify to persistent obstacles’ to successful prosecutions. No other supporting material is vouchsafed. The claims may be justified but in view of the fact that the establishment of an EPP and a common investigation and enforcement area is said to be the
proper response to this situation and the EPP ‘would help overcome these difficulties’, it is appropriate to pose the question as to whether the case as claimed is made out.

If one is going to assess the scope, jurisdiction and relationship of the EPP to the national legal system, one first needs to assess the extent to which an EPP is necessary to prosecute frauds because of their international dimension rather than a lack of resources available to domestic prosecuting agencies. Unless and until we can answer this question on the basis of empirical evidence, there is little point in trying to delimit the powers and functions of the EPP.

A further fundamental criticism of the EPP is the suggestion that he should be responsible for gathering ‘all the evidence for and against the accused’ (see pages 24 and 44). The Green Paper is contains numerous references to the rights of the suspect/accused under Article 6. There is no analysis of how the accused is to be given an equality of arms in terms of gathering material to further his defence. If the term ‘all the evidence…for the accused’ is to be taken literally, then the role of the EPP will violate the right to a fair trial. It cannot be for the prosecutor to determine what is and what is not evidence for the accused. This would not only offend the nemo judex rule but would in practical terms be
impossible. He cannot know what material may be useful to the defence. The defence must have a parallel opportunity of access to foreign evidence and the Courts as the EPP. How this is to be achieved is not addressed in the Green Paper. It is tempting to suggest that the judge seized of the case, either as examining magistrate, trial judge or judge of freedoms, should have the power to make orders enforceable in foreign jurisdictions to the same extent as the EPP’s. However, how is a judge in one country to rule on matters that may be the subject of legal professional privilege or public interest immunity in another country? It is commonplace for the defence to ask for disclosure of matters that the trial judge rules are the subject of PII. This is not a role that can be given to the judge of freedoms because it must be the trial judge who decides this. The trial judge cannot make orders for disclosure against, for example, a prosecuting authority or government department in a foreign country. The logical consequence of the powers given to the EPP must be to give the defendant access to the Courts in other states for the production of the evidence that he seeks. This is likely to be time-consuming, complex and burdensome, but it is difficult to see how else the rights of the defendant are to be preserved.

We also note at the outset the difficulties in properly demarcating the EPP’s scope of action and would expect inevitable conflict or overlap
between agencies and between national and transnational prosecutions (hybrid cases, briefly noted at page 48). The Green Paper describes the EPP as having a jurisdiction which would prevail over the jurisdiction of the national enforcement authorities yet mesh with them to avoid duplication. It is not clear how this aim would be achieved, particularly when the Green Paper goes on to describe the proposal of EPP as a ‘supplementary mechanism’. It would seem incorrect to describe the EPP as having a centralised management of investigation when he must rely so heavily on each national investigation agency. And it seems difficult to imagine exactly how an EPP would direct a United Kingdom police force, there being no analogous power of the Director of Public Prosecutions or Crown Prosecution Service.

3. The current arrangements for investigation and prosecution in ‘eurofraud’ cases.

Article 280 of the EC Treaty requires Member States to take measures to counter fraud affecting the financial interests of the EC and to coordinate their activities to prevent such fraud and to protect the those interests. The Green Paper proposes an amendment to this Article to establish the EPP. In 1995 the Convention of 26th July provided for a protocol for cooperation between Member States in matters of justice and home affairs [the ‘third pillar measures]. This was followed by the provisions of
the Amsterdam Treaty and the conclusions of the European Council at Tampere in 1999 attaching a high priority to such measures. In 2001 the Commission presented to the European Parliament a draft for a Directive on criminal law protection of the EC’s financial interests.

In addition there are units or departments of the Commission that have been set up by the Member States to counteract such fraud. The European Anti-Fraud Office [OLAF] currently has responsibility for the investigation and prosecution of offences in this area. The European Judicial Cooperation Unit [Eurojust] and the European Police Office [Europol] are both ‘third pillar’ measures recently established to facilitate judicial cooperation with a view to coordinating prosecutions in cases of serious and organised crime and to combat and prevent such crime.

4. The scope of the proposals for an EPP.

We examine in more detail hereafter the effect of the proposals on our national system but summarise here the areas which will be significantly affected by them.

- An EPP would be established by Treaty and Deputy EPP’s would be appointed to each Member State.
• The EPP and the European Prosecution Service will be able to exercise their powers in cases within their remit throughout the EU taking precedence over domestic law and procedures.
• The EPP would be responsible for the investigation and the prosecution of all his cases.
• There would be mandatory referral by national authorities of such cases to him.
• The territories of the EC would become for the EPP a common investigation and prosecution area.
• Offences within the scope of the EPP’s powers include any that involve the resources of the European Community whether its income [customs duties, agricultural levies or uniform rate VAT] or expenditure [agricultural, industrial and other grants and payments]. Furthermore ‘hybrid cases’ [those involving Community and other funds] would also fall within this definition in which the EPP would prosecute the ‘Community’ part. These are offences investigated and prosecuted nationally under present arrangements in particular by HM Customs and Excise.
• The EPP would use national police resources but would direct the investigations.
• He would select the Member State in which to bring the prosecution.

• The EPP would determine the charges and decide whether to commit for trial.

• His actions would be overseen by a so-called ‘judge of freedoms’.

• The Green Paper envisages common definitions of and penalties for crimes within the EPP’s competence.

• Evidence gathered during the investigation in whichever jurisdiction shall be admissible at trial provided its seizure was in compliance with the domestic law of the state where it was found.

5. The effect of the proposals.

We do not seek to offer a political view or make such a judgment of the desirability or effect of the contents of the Green Paper. However we are bound to point out the establishment of the EPP was an important part of the structure advanced in Corpus Juris about which we expressed our reservations. It is also noteworthy that Lord Hope and others during the HOL debate cited the proposals for an EPP as one of those causing the most concern [one of the others being the removal of jury trial in such cases]. The over-sanguine view of Lord Wigoder Q.C. that Corpus Juris was merely a research study and not Commission policy has proved ill-founded. In the circumstances we feel bound to point out that these
proposals would have a major impact on our national prosecuting agencies, including the CPS and its head the DPP, the police and Customs and Excise, the judiciary, the courts and the legal profession. It would also have an equally profound impact on suspects and defendants who would be subject to the new regime.

6. The questions asked by the Green Paper.

Question 1

It is difficult to see how a deputy EPP, independent of domestic investigation and prosecution agencies, could work effectively in England and Wales. We understand the force of the argument presented that there is desirability in independence, but that need is not inconsistent with the role, say, of the Director of Public Prosecutions. The EPP would be taking over the functions of the Commissioner of Customs and Excise, the DPP/CPS and (to a lesser extent) the Serious Fraud Office. He would be using the resources of Customs and the police. Given the need to share information, manpower and the fact that most offences will initially be detected by Customs and the police, it would make far more sense for the office of deputy EPP to be combined with a domestic post. This would also have the advantage of achieving the ‘meshing’ of the functions of the EPP and domestic prosecutor which is essential if there is not to be duplication and conflicts in relation to resource (see page 24).
We feel that the most appropriate structure for a deputy EPP is to combine that office with that of the Director of Public Prosecutions. It is more difficult to identify a person in Customs & Excise who could hold both offices. Combining the office of DPP with that of deputy EPP may therefore involve a change in the relationship between the CPS and Customs with the DPP assuming a superior role in European cases.

**Question 2**

As far as offences over which the EPP would have jurisdiction are concerned, we largely agree with the proposals in the Green Paper. We see little problem in a common set of offences related to fraud on the community’s financial interests. Most countries agree on the conduct that should be penalised and the Community’s financial interests should be relatively easy to define. We feel that the definition of fraud suggested is largely acceptable but that dishonesty should be an ingredient. The same is said for the offence of corruption. We think that there may be a case for having an offence of money laundering of the proceeds of community funds.

We are not entirely clear on what exactly is meant by market rigging. In so far as it involves conduct affecting community resources, we have no
objection in principle to it being included in offences liable to prosecution by the EPP.

We agree that it is sensible to have an offence of conspiracy to commit the substantive offences within the EPP’s remit. However, we do not think that is should be necessary for proof of membership of a permanent organisation to be proved as a condition precedent to conspiracy. This is an unnecessary complication serving no useful purpose.

Question 3
Common rules relating to penalties across the Community are not practical. Certainly there could be uniform maxima, but different countries have such different sentencing procedures and different views of aggravating and mitigating features, some of which are connect to their different legal systems. Further, as a matter of principle, domestic courts should have the flexibility to take into account the prevalence of particular types of offending and reflect this in their sentences. This would also avoid the unattractive prospect of different sentences being given for identical conduct within the same jurisdiction where the only difference is that the ‘victim’ is the Community’s financial interest as opposed, for example, to the domestic country’s financial interests.
However, it would be hoped that certain guidelines would evolve across the Community.

We agree that there should be uniform rules relating to liability and limitation. In relation to the latter, we would expect that smaller cases below a certain value (say Euros 50,000) would be excluded from the jurisdiction of the EPP.

**Question 4**

We can see some arguments for allowing individual complain – it would avoid any suggestion of partiality among national law enforcement officers. But on balance, we feel that it is best to leave reference of cases to the EPP to a wide variety of national law enforcement officers. Individual complaints could lead to the EPP wasting resources on private feuds.

**Question 5**

The EPP should be guided by the discretionary prosecution principle. Every prosecutor should be able to decide each case on it merits taking all factors into account. Such factors vary so enormously that to make the existence of any one criterion mandatory is bound to lead to absurd results. We feel that it would be much more attractive to have a code,
drawn up by the EPP for the deputy EPP’s to follow. Such a code would set out the criteria to be considered prior to prosecution and how these criteria should be applied.

If the EPP were to be guided by the mandatory prosecution principle, as proposed by the Commission, we strongly urge that the list of exceptions be extended to include personal circumstances (covering, for example, terminal illness).

**Question 6**

Where the same conduct constitutes both a national and a Community offence, the EPP should have precedence and make a swift decision whether to prosecute. One of the difficulties posed by hybrid cases is that there are clearly fundamental problems in jointly trying a national offence and a Community offence with different rules applicable to them. There are similarly difficulties if a Community offence is tried first followed by a succeeding domestic trial. Questions of double jeopardy, inconsistent outcomes, cost and inconvenience all arise.

**Question 7**

The concept of applying to a judge of freedoms in one country for a warrant and then executing it in another is, in our view, both unworkable
and unnecessary. If a warrant was, for example, issued by a judge in Italy to search premises in London and the incorrect address was then searched, would the individual in London have to go to Rome to the judge of freedoms there? If the individual concerned wished to challenge the legality of the search, is the jurisdiction of the High Court to be ousted? If so, this represents a wholly unwarranted restriction on an individual in this country to seek immediate redress for unlawful conduct. The EPP, given his transnational status, should be in a position to organise and make simultaneous applications before judges in member states.

We are sceptical about modelling the rights of the accused on the International Criminal Court. That Court worked on the premise that the legal system in the country with which it is concerned has broken down and/or has failed to prosecute very grave crimes. This is self evidently not the case and respect should be had for the rights under domestic law of citizens.

**Question 8**

We think that the third option is the best. This preserves the working relationship between existing authorities and would allow a working relationship between the EPP and the domestic authorities to develop.
This is a further reason for the combination of the role of deputy EPP with an existing post in the domestic country.

**Question 9**

As noted above, there should be a general discretion not to prosecute a case, subject to a code of guidance. We can see no reasons why the decision of the EPP to drop a case should prohibit domestic prosecution. Again, if the post of deputy EPP is held by a domestic prosecutor, this is unlikely to occur.

**Question 10**

In the same way that a domestic offence is usually tried by the court in whose area the criminal conduct takes place, the State of trial should predominantly be decided by examining where the centre of any fraud perpetuated on the Community exists. However, other considerations will inevitably have an impact on the decision. For example, the nationality of defendants may be an important consideration in determining where trial should take place so as to allow them the maximum opportunity to understand procedures.

We believe that there should be a right of appeal from the EPP’s decision. This could, as suggested, be to the national court or to the Judge of
freedoms, who may be seen to be in the most neutral position to
determine the matter.

**Question 11**

The answer to the question as posed must be yes – the principle that
evidence lawfully obtained in a Member State should be admissible in the
courts of all other Member States will inevitably allow the EPP to
overcome the barrier raised by the diversity of rules of evidence.
However, we express our objection to such a proposal. To try to impose
on national legal systems evidence in a form that is inadmissible to them
is objectionable in fact and in principle. Those systems are designed to
deal with particular types of evidence in the context of a particular legal
system. Their rules of admissibility and procedure are geared to those
factors. It would also make the prosecution of hybrid offences almost
impossible and slow down the evolution of the system. The EPP, being
transnational, is in a position to obtain the evidence in a form that is
admissible in the country of trial. This may mean that the country of trial
will have to be selected at an early stage in the proceedings, but that is an
advantage from the point of view of all the parties.
**Question 12**

We agree with the Commission’s proposal. If there is to be conflict of jurisdiction to be resolved by the reviewing Court, it may be sensible to require this to be done by a judge of the High Court. If it is no more than assessing whether there is a case to answer, then the procedure could mirror that in existence for the transfer of indictable only offences.

**Question 13**

We agree with the Commission’s preference for the committal review function to be exercised by a national court designated by each Member State for the purpose. If there is to be a prosecution by the EPP, it would seem that the trial court is best equipped to deal with the review of whether a case should proceed to trial. The English courts are highly experienced in establishing whether a prosecution should or should not proceed. In addition, if a Community committals court were established and endorsed a decision to prosecute to trial, that may well need to be reviewed in any event by a trial judge at national level.

**Question 14**

We do not feel that there are grave concerns about the impact of the EPP on the fundamental rights of individuals, although we would reiterate our comments on the overall impact of these proposals as set out at Paragraph
4 [The scope of the proposals for an EPP]. We do stress our concern that under any rules on the mutual admissibility of evidence there is a potential impact on the discretion of the national courts to exclude evidence. It is not clear that the trial judge will retain his overriding discretion to exclude evidence which is more prejudicial than probative or which may impact on the fairness of proceedings. This discretion should not be eroded by new rules of procedure and evidence. It must be preserved.

**Questions 15 and 16**

We deal to some extent with these questions in our introductory remarks. It is plain that there has to be close cooperation between the EPP and various Community organisations. However, it is by no means clear how these agencies would work with the EPP.

We do not know if it is proposed that the EPP should assume the directorship of OLAF.

**Question 17**

The EPP must work through national investigation agencies in order to seek relations with third countries, whether they be applicants or not. In this way, any assistance that is received will be known, for example, to
the police so that it can be evaluated in case it assists in relation to other crimes being investigated but not covered by the EPP. The EPP should be able to apply for international letters rogatory through national courts.

**Question 18**

We agree that an accused may seek judicial review in the national courts of acts of investigation entailing a restriction or deprivation of personal liberty. We agree that the establishment of a EPP should not abolish existing national review procedures.

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