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I. Introduction

The Commission proposal to establish a function of European Public Prosecutor as a means of providing effective protection for the financial interests of the Community, transcending the present tight limits on international judicial co-operation, has been duly praised.

The specific embodiment of that proposal put forward in the Green Paper constitutes, in our opinion, a step forward of immense importance, in that the concept will be accepted only if all parties feel fully at ease with it.

There seems no need to emphasise the importance of the questions which arise as the proposal is read. That importance is self-evident. Nor is there any need to emphasise how greatly the future model of the European Public Prosecutor will be impacted by the choice of the one or the other of the alternatives put forward, as each of the points listed in that proposal is examined.

What should be stressed, by contrast, is the extraordinary endeavour of innovation which is revealed, going well beyond the present system of judicial co-operation, in the idea of the figure of a European Public Prosecutor.

Despite the novelty of the proposal, it is notable that the topics considered are presented in a well-ordered manner and that the questions up for discussion are covered exhaustively. That aspect, in addition to demonstrating the very high level of legal knowledge of those drafting the paper, is of great assistance to the study of it and the consequent reflection before selecting the appropriate option.

Nevertheless, the well-deserved praise given to the proposal should not obscure the fact that, as we will be expounding in our responses to the various questions, there are underlying obstacles and drawbacks in the way of the implementation of the proposal. If nothing else, the particularly unique features of
the legal procedural system of Spain gives warning of various pitfalls in the way of trying to make it co-exist with the model of the European Public Prosecutor which is proposed.

The search for an integrating approach which will bring together the different interests involved - Community and national - undoubtedly constitutes the next exciting challenge.

The various ideas and considerations in this commentary, in the form of responses to the questions posed in the Green Paper, are directed towards meeting this challenge, and as may be expected, this commentary will not give a specific answer to the initial and general question, since this is implied within the remainder of the replies.

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

There is no doubt that the success or failure of the European Public Prosecutor is intimately bound up with the decision on the limits and content of the function’s legal status. The viability of the model and, even more importantly, its credibility, depend on the degree of independence and on the selection of powers - in short, the autonomy - which it is decided to grant to it.

From this point of view, the general design put forward by the Green Paper is to be praised, in that it lays down as basic principles for the actions of the European Public Prosecutor those of independence, hierarchy, unity of action and impartiality, all for the purpose of ensuring respect for fundamental rights. Basically, each of these aspects is correctly defined.
However, respect for the hierarchical principle requires giving concrete form to the mechanisms which will govern the relations between the European Public Prosecutor and the Deputy European Public Prosecutors: for example, how internal exchanges of views between them are to be handled or the existence of the concept of disagreement with an instruction from the European Public Prosecutor (when and under what conditions will dissent be possible and what will be the procedure for expressing that dissent).

Similarly, it appears reasonable to specify the status of the Deputies (point 4.3), and in particular their functions (purely administrative or also judicial?) and their relation (hierarchical, non-hierarchical?) with the Deputy European Public Prosecutors.

We have no objections with regard to the method of appointment and the length of the mandate of the European Public Prosecutor, since the system selected both reflects and ensures his independence, although it does appear reasonable that it should be possible to propose various candidates.

With respect to removal from office, the option chosen, of assigning the competence for this to a Community judicial body, appears well-chosen to guarantee that same independence. This system would thus eliminate the uncertainties which would inevitably arise under certain circumstances if a system for dismissal similar to that for appointment were to be chosen. It would indeed be desirable to stipulate the content and scope of the various causes for removal from office (what is meant by “grounds” or “serious misconduct”), which will undoubtedly require development of appropriate legal rulings.

On the other hand, although consideration is given to the disciplinary responsibility of the European Public Prosecutor, nothing is said about his possible criminal liability: grounds, penalties and the body to which he will have to answer.
With respect to the status of the Deputy European Public Prosecutors there is a need to take measures to safeguard their independence, if the proposal is not retained that their appointment should be within the remit of a Community body, rather than of the Member State from which they come. And, in any event, if this latter procedure is upheld, there will be a need to specify the procedure for implementing such a proposal. Obviously, the establishment of a selection process, whether or not on a competitive basis, in each Member State would represent an additional guarantee of his independence. And, as has already been said with regard to the European Public Prosecutor, it would be advantageous if several different candidates could be proposed.

Special attention needs to be paid to the question of whether the European function entrusted to the Deputy European Public Prosecutors should be exclusive or not.

The approach of assigning them an exclusively Community function does have indubitable advantages. Among the reasons arguing for that approach are the possibility that the Deputy European Public Prosecutors could become totally and fully specialised; and that that they would not be subject to two different hierarchical superiors, the European Public Prosecutor and the Chief Prosecutor of their own country. Such an approach would imply a strengthening of the independence of the Deputy European Public Prosecutor with respect to the national interests of the Member State from which he comes.

However, assigning a double function to the Deputy Prosecutors, that of prosecuting those actions which harm the financial interests of the Community on the one hand and, at the same time, that of prosecuting those other activities which are held to be illegal under the relevant national legislation, would make it easier to deal with the so-called hybrid cases. This system would make it possible
for the same Prosecutor to prosecute in all cases of related crimes falling under two different forms of criminality, Community and national.

Further, both the fact that the jurisdiction of the European Public Prosecutor sometimes obtains provisionally, pending the appearance of new information during the progress of the investigation which may confirm it, or the opposite, and the fact that both Community and national financial interests are often present, closely related, in various of the spheres which fall under the protection of criminal law, also support the idea that a European and a national mandate for the Deputy European Public Prosecutors could be compatible.

Nevertheless, it is important not to minimise the fundamental difficulties which would arise in the event of possible conflicts in the performance of their mandate, owing to their situation of being in two different hierarchical systems, Community and national, nor the obstacles in the way of establishing mechanisms suitable for solving such situations.

In consequence, it may not be inappropriate to incline towards the first of the options put forward, in other words that of assigning the Deputy European Public Prosecutors an exclusively Community mandate.

Finally, it appears a very positive idea to provide the European Public Prosecutor with his own budget, charged to the General Budget of the European Communities.

III. Questions 2 and 3: Harmonisation of substantive law. Offences for which the European Public Prosecutor should have jurisdiction. Adoption of common rules on penalties, limitation, liability of legal persons and other subjects.
The questions which are posed in questions 2 and 3 of the Green Paper have a common denominator - the necessary degree of harmonisation of the substantive law which will fall within the jurisdiction of the European Public Prosecutor - and this makes it advisable to consider them together.

The creation of a European Public Prosecutor with specific responsibility for pursuing crimes against the financial interests of the Community will require harmonisation of the substantive criminal law, if his action is to be effective and not to encounter excessive problems due to the existence of national borders and different national systems of legislation. This appears to be a principle beyond discussion.

However, despite the scale of the issue, there is a need to examine in detail the degree and scope of such harmonisation, in which there are after all a variety of issues and problems.

As a starting point it may be pointed out that as a general approach, a cautious path should be followed. In other words, we consider it preferable to start by assigning to the European Public Prosecutor some highly circumscribed responsibilities relating to crimes which directly impact the financial interests of the Community (fraud relating to Community subsidies and illegal avoidance of Community taxes) and then, in an evolving dynamic, after analysis of the result, to move ahead with broadening those responsibilities to other areas.

In fact, this way of proceeding would make it possible in the future, provided that the experience had been positive, to assign new responsibilities for topics which immediately come to mind during any consideration of the idea of cross-border and common prosecution of certain crimes. There can be no doubt that some criminal activities - relating to the environment, Euro counterfeiting, trafficking in persons, sexual exploitation, etc. - which may be committed by
organised groups and extend beyond the frontiers of a single Member State, could be brought into the responsibilities of the European Public Prosecutor.

However, at the very early stages of the Institution, and in conformity with the approach put forward by the Green Paper, we consider it prudent initially to set up the post of the European Public Prosecutor by way of a highly restricted circle and absolutely clearly defined scope of responsibilities, without prejudice to the subsequent gradual widening thereof.

On the other hand, it has to be cautioned that the criminal offences that the Green Paper lists using the generic descriptions of fraud, corruption and money laundering are formulated excessively broadly. Some very loose definitions are established, allowing some very broad and not well-defined forms of conduct to be included.

Harmonisation of the offences which would be assigned to the European Public Prosecutor would require a very high level of accuracy in defining them: scale, whether or not there was intention, purpose and conduct would have to be defined in such a way that a differentiation would be sharply drawn not only relative to minor criminal offences or infractions but also, and fundamentally, relative to those unlawful acts of an administrative kind that normally underlie the definition of a criminal offence. For that reason, the principle of legality would require, if the problems which are in existence today are not to be perpetuated, that the codification of those forms of criminal conduct would be based on a definition of certain criminal offences that would be common to all Member States.

There will be some problems in the area of harmonisation of certain definitions of criminal behaviour. Thus, while not attempting to be exhaustive, it may be pointed out that:
The crime of money-laundering as relating always to profits coming from a previous or underlying crime (in Spain, this underlying crime has to be classified as “serious” in terms of Article 301 of the Criminal Code and has to fall within the parameters established by Articles 13 and 33 of the Criminal Code) raises the difficulty of establishing a category broad enough to be valid under all systems of legislation. For that reason, abandoning such a formulation in the light of the difficulty of establishing a uniform category for all of the Member States, we consider it more appropriate to reference the underlying crime in terms of the nature of certain criminal offences (for example those arising from crimes involving fraud relating to Community subsidies).

With respect to “corruption” it is not indicated whether this refers to Community officials, which, in principle, would appear to be a logical demarcation of jurisdiction or, alternatively, to the officials of any country in relation to the performance of duties having to do with Community tasks, functions or responsibilities.

The definitions referring to Community-related fraud should deal in a uniform manner with the scale of the fraud, its determination as it relates to the particular taxes involved and, in general, have an absolutely specific formulation. In our view it is these types of crime that initially should form the jurisdictional area of the European Public Prosecutor. This approach may be aided by the circumstance that it is in those areas that some harmonisation already exists, and that it will be easier to establish a greater degree of harmonisation in the future.

Some of the categories which are listed in the Green Paper, specifically in section 5.2.2., such as “market-rigging,” “conspiracy”
and “abuse of office,” constitute concepts which - unlike, for example, money-laundering or fraud relating to Community subsidies - do not easily fit into a single category under our system of criminal law. The penalties meted out to such offences are covered in a way which cannot be identified easily or directly, using such terms. We point this out here because it seems to render more difficult the harmonisation of such forms of unlawful conduct. Harmonisation will be an easier task where it relates to unique definitions of criminal behaviour in each State, with an identical or similar *nomen iuris*, than in the situations where the response under criminal law is fragmented into precepts of very different content and structure among the various systems of legislation, which, in our opinion, is the case with the items listed above.

All of the above should be taken to mean that areas of jurisdiction should be assigned to the European Public Prosecutor progressively, starting on a very cautious or limited basis with those criminal offences which allow of a high degree of harmonisation, specifically cases of fraud relating to Community taxes and subsidies. We consider such harmonisation in the definition of those specific crimes to be absolutely essential.

With regard to the actual scope of the European Public Prosecutor’s jurisdiction, once the circle of Community offences has been delimited which are to be assigned to him, a major problem arises with respect to the handling of the national offences related to them. On this question, which is directly related to the sphere of jurisdiction of the European Public Prosecutor, in order to avoid unnecessary repetition we refer to our answers to questions 6 and 10.

Further, with regard to harmonisation of other distinct aspects of the description and definition of forms of unlawful conduct, we have to draw a distinction between the following questions.
In the area of penalties, there can be no doubt as to the advantages of and justification for harmonising those which correspond to Community offences, not only as to their minimum limit - as is suggested in the draft Directive of 23 May 2001 - but also as to their maximum limit. In any event, a total harmonisation would in practice require, and this is something going beyond the possible scope of action, that the national systems of criminal law should have identical rules on specific delimitation of penalties and also on the procedures for carrying them out. In any event, although the differences in the carrying out of penalties can be lessened by way of the Conventions on the transfer of sentenced persons and by way of the possibilities which are offered for the future by Article 4 of the European arrest warrant, it is our view that harmonisation in this area is not an essential issue at the present time and that, on the contrary, attention should be focused fundamentally on those aspects which determine whether or not a criminal offence obtains, particularly within the system of limitation or of regularisation (if this should come about) of Community taxation, and, on the other hand, in the supplementary consequences for the Community of the penalties.

The period of limitation on crimes against the Community, the juridical system underlying it and specifically the durations thereof, have to be understood, as is cogently stated in the Green Paper, as one of the fundamental issues of harmonisation. Further, the differences in the way this matter is regulated among the Member States create a highly complex situation in the event of hybrid crimes against the Community, or crimes carried out on the territory of more than one Member State, in that the shorter durations of limitation laid down by one State may impinge on a crime which is still undergoing trial in a different one.

Finally, we consider it important to establish a harmonised system of Community penalties entailing a curtailment of rights or legal disqualification of natural or legal persons responsible for the Community offences which fall within the remit of the European Public Prosecutor. This would entail exclusion from the
European public service, from access to grants or from access to public contracts if Community financing is applied for.

IV. Question 4. When and by whom should cases be referred to the European Public Prosecutor?

The Green Paper takes as its starting point a distinction between information and referral, differentiating between them on the basis of the person or authority transmitting or notifying the *noticia criminis* to the European Public Prosecutor.

As put forward in the text, “information” is understood as meaning any form in which a person causes the *noticia criminis* to reach the European Public Prosecutor, while “referral” according to the wording used would be the “official information laid before him by a public authority for the purposes of proceedings to be taken. Upon receiving a referral the European Public Prosecutor would therefore be obliged to give a reasoned reply to the request put to him.”

Although the definition is not particularly clear, it does appear to differentiate between informing and referring with the objective of distinguishing the consequences for or obligations on the European Public Prosecutor which the two differing means of transmission of the information would entail, in that only the second option would oblige the European Public Prosecutor to give a reasoned reply, whether an investigation of the facts alleged was undertaken or not.

While it is the case that, in reality, official information submitted by a public authority should be handled somewhat differently, if only because of the greater degree of knowledge which those authorities might have about the facts reported, a private individual who reports facts of which he has become aware should also receive a response. To this end there should be a formal system for handling
information or accusations submitted by citizens with a view to ascertaining respect for effective judicial safeguards and to guarantee transparency in the action of the European Public Prosecutor. This means that, once the facts had been submitted as a complaint to the European Public Prosecutor, the accusations or information would have to be recorded, and once they had been studied and evaluated there would then be a decision whether or not to open proceedings, a decision for which reasons should always be given.

In the event that proceedings are not undertaken owing to the fact that the European Public Prosecutor considers that the case does not fall within his jurisdiction, he would have automatically to send the complaint back to the competent authorities of the States in which the acts in question had been committed.

This initial decision under which the European Public Prosecutor examines his own jurisdiction and decides whether or not it is appropriate to open an investigation, may generate jurisdictional conflicts, both positive and negative. Leaving aside the question of the hybrid cases, this will make it essential to make arrangements as to the form in which such conflicts shall be resolved and the body to do so. Given the context in which this will take place, it does not appear appropriate that the resolution of these questions should fall to a national authority. Rather, a judicial authority at the European level appears the preferable choice.

This would be a matter of interpreting the scope of jurisdiction of the European Public Prosecutor, which means that probably the Court of Justice of the European Communities would be the most appropriate body to decide to whom falls the investigation of the facts, when there is no agreement between the European Public Prosecutor and the national judicial bodies.

On the question of whether or not it would be obligatory to refer matters to the European Public Prosecutor, it does not appear that assigning jurisdiction for
initiating proceedings relating to a certain category of crimes to the European Public Prosecutor should entail any modification to the general arrangement established in the national systems of legislation covering the obligation to report or the duty to prosecute criminal offences that falls to certain authorities and officials. Specifically, Article 259 of the Criminal Procedure Act of Spain provides for a fundamental obligation on any person who witnesses the commission of criminal acts to report them to the competent authority. This does not mean that the accuser has to be aware of the jurisdiction of the European Public Prosecutor, since the citizen will fulfil his obligation by reporting the facts to any competent authority: police, judiciary or a body under the Ministry of Justice.

The actual obligation of referral is vested in the authority that, knowing of facts falling within the jurisdiction of the European Public Prosecutor, has to refer them officially so that the investigation may commence. This obligation should also apply, naturally, to Community or national officials who have knowledge, through their work, of the commission of acts prejudicial to the Community's financial interests.

This should be accompanied by the establishment of a “referral” obligation on the part of the judicial bodies or those under the national Ministry of Justice which, as we have pointed out, would require the immediate abstention on the part of the bodies that were cognisant of such acts, as soon as it became clearly evident that they fell within the jurisdiction of the European Public Prosecutor.

On the other hand, provision should also be made for the European Public Prosecutor to be able to require abstention on the part of the national authorities investigating any matter which falls within his jurisdiction if these authorities do not submit the case to him voluntarily.

These questions entail a special difficulty in legal systems such as that of Spain in which the prosecutor can investigate but not initiate proceedings. In
Spain, the initiation of proceedings, strictly speaking, is the absolute and exclusive function of the examining magistrate. This derives from the provisions of Article 785 bis of the Criminal Procedure Act, which obliges the prosecutor who is investigating any acts presumed to be criminal to submit to the magistrate all of those investigations once he has become aware that that magistrate has initiated proceedings with respect to those same facts.

Probably, and within the general context that for the past two years the option has been under consideration in Spain of assigning the responsibility for initiation of proceedings to the Ministry of Justice, this may be a new step, together with the jurisdiction over lesser matters, to assign the function of initiating proceedings in this type of crime to the Public Prosecutor’s Office, in this case to the European Public Prosecutor, who under the design proposed in the Green Paper would enjoy all the guarantees of independence and impartiality necessary in order to conduct his work of initiating proceedings.

The Green Paper favours the option of systematic intervention as a matter of priority by the Ministry of Justice for those cases which fall with its jurisdiction, and therefore the initiation of proceedings should fall as a priority and exclusively to the European Public Prosecutor, with the traditional systems, such as that of Spain, in which initiation of proceedings is under the authority of a magistrate, being modified accordingly.

Under this system, and without prejudice to the review and authorisation of those proceedings, which may entail an impact on fundamental rights, the magistrate will authorise the practice of such proceedings, which in some cases will be executed directly by the Prosecutor, or else, when the legislation applicable so stipulates, the magistrate will carry out or maintain a review of these actions, transmitting the result to the European Public Prosecutor so that it can be incorporated in his proceedings.
This cannot be approached in any other way if the aim is to have a unified procedure for initiation of proceedings covering all the territory of the Community. Whatever the location where the evidence is obtained or whatever the nationality of the magistrate authorising or reviewing the performance of the proceedings, these have to be placed at the disposition of the European Public Prosecutor so that later they can be presented before the selected judicial body, in conformity with the rules laid down for the prosecution of the acts in question.

V. Question 5: Should the European Public Prosecutor be guided by the mandatory prosecution principle, as proposed by the Commission, or by the discretionary prosecution principle? What exceptions should be provided for in each of these cases?

The Commission asks whether the European Public Prosecutor should have only an option to act, or an obligation to act. Regardless of the system which is in force in each Member State, the establishment of the European Public Prosecutor requires that the choice between mandatory action and discretionary action must be made at Community level.

The Spanish Prosecutor is bound by the principle of mandatory prosecution, such that, as is laid down in Article 105 of the Criminal Procedure Act, the officials of the Ministry of Justice are legally bound to undertake all of the actions under criminal law which are considered to be fitting. This, however, should not prevent the possibility of maintaining for the European Public Prosecutor a principle of mandatory prosecution qualified with certain exceptions.

Other possible exceptions to the principle of mandatory prosecution, such as the proposal to proceed against a person only as regards a sufficient portion of the charges brought against that person, could be taken into account provided that such a possibility of action was also specifically provided for. In any event, those
decisions of the European Public Prosecutor will have to be taken with appropriate justification and will have to be subject to review upon the request of those involved.

The out-of-court settlement as a way of avoiding a trial altogether is not provided for in the legislation of Spain and does not appear compatible with the principle of mandatory prosecution. Although its effectiveness in securing repayment is beyond doubt, we take the view that establishment of an out-of-court settlement which will permit closure of proceedings upon repayment of the amounts that have been stolen by fraud would not be in the interests of crime prevention in general, would generate a sensation of impunity and would be difficult to accommodate in legal systems such as that of Spain dominated by the principle of mandatory prosecution. However, the payment of the amount owed or the reparation of the damages could be considered to be a circumstance attenuating the criminal liability and bringing about some reduction in the penalty to be imposed, with such an arrangement being made before the oral proceedings, but any such settlement would always have to be within the trial process already under way.

VI. Question 6: Treatment of hybrid cases.

The issue raised under the heading of this question, relative to how jurisdiction is to be distributed between the European Public Prosecutor and the national jurisdictional authorities in the treatment of hybrid cases, constitutes perhaps one of the most complex issues of the European Public Prosecutor project as put forward in the Green Paper. This topic, in addition, is closely related with question 10 and, fundamentally, with the choice of the model of European Public Prosecutor that it is intended to design.
The presumption underlying the problems which are tackled in this section is the existence of hybrid cases. These are understood to be those criminal schemes constituted by various “Community offences” (for example, fraud against the Community treasury) which are committed in conjunction with various offences which we might describe as “national offences” (for example, fraud relating to national taxes or forgeries of national documents).

There is a need to indicate the scope of the jurisdiction of the European Public Prosecutor with respect to such crimes. Here, it is appropriate to establish two premisses:

- the advisability of centralising the hearing of the facts in a single court. This solution is set out in Article 6 of the Convention of 26 July 1995 on the protection of the European Communities’ financial interests. It appears, as is discussed under question 10, a logical principle to avoid serious practical problems of double jeopardy, res judicata and duplication of rules on evidence and procedural matters. All in all, division or fragmentation of the continuity of action is both operationally harmful and complex.

- the advisability of avoiding solutions which involve establishing relations of subordination or of hierarchical superiority of the European Public Prosecutor over the national Prosecutor, which would undoubtedly be a source of numerous conflicts.

In our examination of the attribution of jurisdiction, we will make a distinction between Community offences and national offences.

Firstly, with respect to the assignment of jurisdiction for hearing “Community offences” the Green Paper lays down the principles of systematic intervention, with primacy. This means that the existence of Community offences determines that
there is a need to call on the European Public Prosecutor to act, and that his intervention implies that there will be no intervention by the national Prosecutor. The implementation of both of these principles is considered appropriate.

The complications seem to appear in the establishment of the principle of subsidiarity, according to which the European Public Prosecutor can, in the event of certain Community offences, decide when the jurisdiction for hearing them falls to the national Prosecutor. Such an assignment of the functions of the European Public Prosecutor to the national Prosecutor should be carried out under criteria which are absolutely rule-bound. It is not acceptable that the European Public Prosecutor should be able to decide on the jurisdiction of the national Prosecutor at his own discretion. The distribution of jurisdiction with regard to Community cases has to be absolutely laid down in advance.

The solution of assigning completely, uniquely and entirely the hearing of all Community-related cases to the European Public Prosecutor, beyond considerations of operativity in the very first stages, appears fundamentally the solution that is most consistent with the final establishment of the structure of the European Public Prosecutor.

However, if this solution is not accepted, or at least not initially, out of the factors set out in the Green Paper for assigning Community offences to the national Prosecutor only the following is considered to be well-founded: the existence of a Community offence produced or committed entirely within the territory of one Member State, which would be assigned to the jurisdiction of the national Prosecutor of that State.

We consider the other options for making this assignment to be ill-founded. Thus, if crimes committed in different countries are involved, the cross-border impediments to prosecution will exist qualitatively to the same extent regardless of the amount of the fraud, and thus this factor cannot be used to decide on where
the jurisdiction shall lie. In any event, if such a criterion is selected, it is our view that the financial threshold will have to be fixed in advance by the legislature rather than being decided by the European Public Prosecutor on the basis of discretionary criteria as to the “severity” of the amount involved. In any event this amount will still entail the problems which ensue if this figure is determined on a variable basis in the course of the investigation, with the resultant undesirable effect of a change of the competent Prosecutor (European or national) in the event that a change in this amount caused it to exceed or fall below the pre-set limit.

Finally, the doors which are left open to the European Public Prosecutor to apply the principle of discretion or of utility in deciding not to prosecute Community offences, which we consider to be correct, must be applied, as the case may be, to reach a decision not to prosecute, but never to reach a decision to assign the prosecution to the national Prosecutor. The criteria of discretion applied by the European Public Prosecutor in order not to prosecute Community offences cannot revive the jurisdiction of the national Prosecutor to prosecute such crimes against the Community (which appears to be suggested at the end of section 6.2.2.2 (a) of the Green Paper).

With regard to the second of the groups put forward, the criteria for jurisdiction with respect to national offences related to Community offences, the question is certainly enormously complex.

Where it proves possible to sever the prosecution as between Community offences and national offences there will be no question: the national Prosecutor will hear separately such national offences as can be severed. But, it is known that in practice it would very frequently be the case that such severing would prove to be impossible or at least very difficult. It is sufficient to note that not only will the interlinkage determine the need for joint prosecution in order to avoid duplication of evidence and the rupture of the continuity of action, but also on many occasions this interlinkage will have a decisive influence on the level of penalty to be
imposed (situations relating to property crimes, medial crimes, mass or continuous crime, etc.).

If, as will frequently be the case, the offences cannot or should not be severed the question becomes complex and we take the view that the Green Paper does no more than point out its complexity without searching for a possible solution. It should be cautioned that this is one of the points that will not be easy to resolve and that it will arise frequently in practice.

One possibility would lie in the assignment of the national offences related to Community offences to the jurisdiction of the European Public Prosecutor. This would be a widening of the circle of his jurisdiction. There arises the problem, not insurmountable, that the handling and investigation of related national offences follows the handling of the Community offences, but we do not think that there is a problem here if it has been thus decided in the Community regulations. Finally this turns out to be the simplest and most logical solution. Nevertheless, one difficulty may be perceived: if the case is heard in a single Member State, there is no problem in hearing in that State all of the cases covering the Community offences committed in that country or in any other Member State, and also those covering the related national offences committed in the country where the case is heard; but there remains the question of how to prosecute the remainder of the related national offences. This latter point would admit of three solutions: for them to be prosecuted separately by the national Prosecutor in the Member States where they were committed; for them not to be prosecuted through application, where it was appropriate, of the principle of utility; and, finally, for them to be tried jointly with the remaining Community offences, with the rules on international jurisdiction being modified accordingly. This latter solution would not be at all easy to implement.

Finally, in the distribution of jurisdictions the Green Paper points to the necessity for systems of dialogue between the European Public Prosecutor and
the national Prosecutor, but this solution is merely indicated without any of its basic features being developed. This issue, relating to the model of the European Public Prosecutor and the relations between the European Prosecution Service and the national prosecution services, should have been developed in greater specific detail, as it constitutes one of the keystones of the system envisaged.

VII. Question 7: Does the proposed list of investigation measures for the European Public Prosecutor seem to you to be adequate, particularly as a means of overcoming the fragmentation of the European criminal-law area? What framework should be envisaged for investigation measures?

Taking as a starting point the fact that the European Public Prosecutor will have to direct and co-ordinate investigations into the facts which fall within his jurisdiction, it is obvious that he has to be able to utilise any investigation measures provided for in national legislations.

It does not appear necessary to determine an exhaustive catalogue of measures that the European Public Prosecutor can use. It will be sufficient to provide that the European Public Prosecutor shall be able to investigate using all of the measures permitted in the legislations of the States in which he is acting.

In principle, the provision in the Green Paper that in every case the legislation of the Member State of the place where he is acting shall be applicable appears logical. This should not give rise to problems in a Europe which is decidedly advancing towards the creation of a common judicial area, where the scope of application of the principle of mutual recognition of court decisions has to be and is in fact becoming a reality, to an ever-greater extent.

In order to facilitate the execution of the measures ordered or requested by the European Public Prosecutor, there will be a need for the greatest possible
homogeneity in the provision of those same measures in all of the Member States. Additionally, the trend towards homogeneity in guarantees of fundamental rights in the form in which those measures are authorised or executed will have to lead in turn to general recognition of the validity of evidence obtained under the legislation applicable in any Member State.

It will be necessary to distinguish those measures which can be put into practice directly by the Prosecutor as they do not impact fundamental rights, the general recognition of which should not raise any particular problem, from those which, since they do impact one or other of those rights, will require judicial authorisation and review. Here, the guarantees still present certain differences in the legislations of the various States.

Without undertaking here an analysis of the topic of the validity of evidence obtained legally in a Member State, which is covered in another section, and starting from the general principle already pointed out that action and execution of measures shall in every case be in conformity with the legislation of the country where the action is taking place, some of the dispositions laid down in the Convention of 2000 to overcome possible problems of validity of evidence in judicial assistance in criminal matters might be applied, at least in exceptional cases, to the actions of the European Public Prosecutor.

In fact, the Convention of 2000 contains a reversal of the traditional rule that letters rogatory shall be executed in conformity with the rules of the requested State, by establishing in its Article 4 that this judicial assistance shall be provided in conformity with the rules of the requesting State provided that the formalities and proceedings are not contradictory to the fundamental principles of the law of the requested State. Even taking the view that what is involved here is not a situation of international judicial assistance and that the Deputy European Public Prosecutor will be acting with the same powers as any other national Prosecutor, in certain cases, keeping in mind the place in which the trial is going to be held, it
will be possible to request the practice of any proceedings in conformity with the rules of the State in which the trial is probably going to be held, without this raising any more difficulties than when an international letter rogatory is executed in conformity with the Convention. In other words, it will be possible to request the execution of any measure in conformity with the body of laws and regulations of the State in which the evidence is going subsequently to be presented and evaluated. Once execution has been requested in conformity with those rules, and with reasons given, the responsible authorities will have to comply with what has been requested except where this contradicts the general principles of the law of the State in which this takes place.

It is evident that this procedure will have to be followed only in exceptional cases, but on the basis that the office of the European Public Prosecutor will be a body established in each of the States, there should not be any more difficulties than those which may be encountered by the judicial authorities of another Member State when they request any type of judicial assistance.

VIII. Question 8: What solutions should be envisaged to ensure the execution of investigation measures undertaken by the European Public Prosecutor?

It is obvious that the European Public Prosecutor will require the cooperation of the national authorities and officials in order to perform his duties of initiation of proceedings. The relationship of the European Public Prosecutor with the national investigation authorities will depend to a large degree on the option which is chosen with regard to the status of the Deputy Prosecutor. If it is intended that the latter will keep the same responsibilities and powers as he would have as a national Prosecutor, a portion of the issue is resolved.
In any event, we consider that the European Public Prosecutor should not have fewer responsibilities and powers than those falling to the judicial body with responsibility for initiating proceedings at the national level, subject to the requirement to seek judicial authorisation for those measures which may impact fundamental rights.

Of the three options presented in the Green Paper, the third, namely that the European Public Prosecutor should comply with the same system of relations in existence between the national judicial authorities and the national investigation authorities or officials, appears the most appropriate. The Deputy Prosecutor and the European Public Prosecutor would in any event have the same powers as the national Prosecutors with regard to ordering and directing the investigative police force or any other authority, official or agent of the authority in the execution and assistance necessary to carry out their investigations.

**IX. Question 9: On what terms should the European Public Prosecutor be able to take a decision to close a case or commit it for trial?**

The preparatory phase or evidence-gathering activities of the European Public Prosecutor directed towards the determination of the facts and identification of the perpetrators should conclude with a decision to seek committal to trial, and to arraign those responsible, or else to close the case.

Once the investigation or evidence-gathering proceedings have been started, whatever name is given to this preparatory phase of investigation of the facts and accumulation of evidence, these processes, in observance of legal certainty, should conclude with the adoption of a formal decision, supported by reasons, either to close the case or to seek a committal for trial; alternatively, when the facts do have criminal features but do not fall with the jurisdiction of the
European Public Prosecutor, the matter should be remitted to the competent national authorities.

The reasons for which a case may be closed have to be clearly stipulated. Firstly, the Prosecutor will have to be able to assess the investigative steps taken and decide that it is appropriate to close the case, in the absence of sufficient evidence of criminal activity in the acts reported or because the perpetrator or perpetrators cannot be identified.

On the other hand the standard reasons for termination of liability, such as the limitation period, decease or pardon, etc., given that we have decided on the principle of qualified mandatory prosecution, have to be specifically stipulated. This is particularly so if, as is allowed for in the Green Paper, a harmonised system of limitation periods is set up for those cases which relate to accusations that are within the remit of the European Public Prosecutor.

Additionally, since the European Public Prosecutor’s closing of the investigation proceedings is not a judicial decision in the strict sense, the effects of such closure will have to be determined with clarity, as it must not convey the same meaning as an acquittal or a “stay of legal proceedings.” For that reason, we consider that in maintaining the principle of legal certainty and respect for the principle of “no double jeopardy” this closure should not be considered as final. Rather, the possibility should be maintained of reopening the investigations in the event that new information should appear or that the perpetrators should be detected or identified, and that during such phase the period of limitation should not be running.

The decision to seek committal to trial must also be subject to review. It must be borne in mind that the decision to submit the accused to a trial is a very serious matter and the majority of the national legislations of the Member States
do provide for some type of judicial review of this intermediate phase of the process.

X. Question 10: Criteria for the choice of the Member State of trial.

The tenth question of those formulated makes reference to the choice of the Member State in which the trial shall be held and to the factors underlying that choice. The review of the decision taken by the European Public Prosecutor is tackled in a specific section on review of the activity of the European Public Prosecutor with which we have also combined our response to questions 12, 13 and 14.

One idea is basic to the development of the suggestions which are formulated pursuant to this question: the choice of the one or the other Member State in which to hold the trial is not neutral. On the contrary, that choice directly and essentially affects a person’s fundamental rights.

In a judicial area which is not totally but only partially harmonised there are various fundamental rights which are affected by the choice of the Member State in which the trial is to be held. We may mention, although without attempting to be exhaustive:

- The right to a judge of first instance stipulated by the law;

- The principle of legality in the form of the right to procedural due process since the procedure to be followed for the holding of a trial will be that specific to each country;

- The principle of legality in the form of a guarantee of execution, in that the execution of the penalties which may be imposed will be carried out
in principle by the rules on penal process of the country in which the trial is held, without prejudice at a subsequent time to the application of possible Conventions on the transfer of sentenced persons;

- The principle of legality in its double aspect of definition of unlawful conduct and stipulation of penalties, since, even if the issues of conduct and penalties were to be completely harmonised, there will always remain elements of the general portion of the criminal law applicable and not harmonised (for example, attenuating or aggravating circumstances, rules on individualisation of the penalty, etc.). All of that being additional to the possible existence of crimes related to Community offences in which there is a disparity as to whether or not they are considered to be criminal, with the penalty applicable to them perhaps being very different from one Member State to the next.

- Finally, some questions such as the language in which the trial is to be held, whether or not an interpreter is present, or the fact of the defendant’s being resident distant from the location where the trial is to be held, entailing the need for him or her to travel to the location of the court for the length of time that the oral proceedings will take, have a direct or indirect impact on the right to defence and undoubtedly on the choice of the defence lawyer.

For all of those reasons, the question of whether the European Public Prosecutor may have total discretion in the choice of the State in which the trial is to be held has to be answered in the negative. Furthermore, the terminological question appears to be of particular importance here: it is not a matter of “selection” of the Member State by the European Public Prosecutor, but of establishing some “Criteria for predetermination of the State where the trial is to be held.” Not even “determination,” but “predetermination.” In other words, the establishment of the competence and jurisdiction of one State with respect to the
others has to be established before -“predetermined”- the conduct which is the subject of the trial has been committed.

The opposite approach, that of discretion on the part of the European Public Prosecutor in the choice of the place where the trial is to be held, would cast serious clouds of suspicion on the institution of the European Public Prosecutor itself, which would result in damage to its institutional image. It would appear to be a procedural strategist, carrying our a biased, partisan or even capricious search for a place of trial most suitable or favourable to its interests.

For that reason it has to be concluded that the procedural strategy of the parties in the selection of the place of trial cannot remain outside the circle of guarantees which surround the trial itself.

After the above introduction we shall now analyse the possible factors for predetermining the place of trial.

Two general factors are considered to be fundamental:

Firstly: We consider it advisable that the factors should be arranged in such a way as to promote the advantage of centralising the trial in a single Member State.

This is already indicated by Article 6 of the Convention of 25 July 1995 on the protection of the European Communities’ financial interests and we consider that that line should be followed.

If that approach is not followed, there will be an accumulation of the problems of determining the beginning and end of the content of each of the successive trials, taking the form of innumerable questions of double jeopardy, res
Secondly: We consider that as a general rule the principle of the “most appropriate jurisdiction for prosecution” should be pursued.

That criterion can already be found in Article 22 of the Convention on Cybercrime which makes reference to that specific phrase.

This criterion would have to be established in the form of a general principle constituting a juridical concept that would be discretionary, not arbitrary, and thus subject to judicial review under the conditions which will be described shortly.

The “appropriateness” of the jurisdiction has to be determined on the basis of one essential premiss: the predetermination factors which will cause the trial to be held in one place and not in another have to be guided by the aim of procuring the easiest performance of the trial or the objective of the correct administration of justice. Thus this interpretative criterion is established as an essential maxim for the predetermination of the place of trial, on the basis of the concurrent factors directly related with the facts to be tried, the evidence of them and the accused, to allow an appropriate performance and unfolding of the oral proceedings. The issue can be seen clearly by means of an example: if a case involved a crime committed partially in Greece and partially in England by a group of perpetrators, all of them English-speaking, ignorant of the Greek language and resident in England, it would be absurd to hold the trial in Greece and not in England simply because an instrumental company used by the accused in their operations had its purely formal headquarters there, in the absence of any essential element which would indicate a need to select Greece as the place of trial.

With those two general principles being established, the task of fixing the specific criteria, which necessarily have to be imbued with a certain degree of
flexibility, to make real and give form to those two general criteria, constitutes one of the major challenges of the Community legislation alluded to in the draft Green Paper.

Specific criteria for the predetermination of the jurisdiction of the trial:

One inescapable criterion is that of the place where the criminal acts were committed. When such acts have been committed in a single Member State, that would be the one - and we consider that it would be difficult for it to be otherwise - that would display the competence and jurisdiction for prosecuting those acts. In our judgment no question arises in such a situation.

The question really arises - as is indicated in the Green Paper itself - when what is involved are hybrid cases. These have to be understood as relating to acts committed in various Member States, and it is these that generate the question of to which of such States the trial should be assigned.

It is worth pointing out that in practice the problem of determining the place of trial will normally present itself with the following situation of a criminal act or set of acts, which are described as a hybrid case: various “Community offences” (for example: fraud relating to Community subsidies, etc.) committed in different Member States; in turn, generally such crimes are committed together with related offences, which are other “non-Community or national offences” (for example, fraud relative to national taxes or forgery of identity documents, etc.), which may also have been committed in various countries; and additionally the investigation of all of the web of acts has entailed the initiation of investigative or evidence-gathering actions (entries and recordings, interception of communications, etc.) in various such countries.

Against this background a double question arises; firstly, in which place will the trial be held and secondly, whether in this trial only the Community offences
will be heard or also the related offences and, in the latter case, whether all or only some of them, namely those committed in the State in which the trial is taking place. This second question, which is certainly complex and very closely related with the present one, is considered in the section dealing with Question 6.

We consider well-founded the view put forward in the Green Paper that merely because investigative actions have been undertaken in a Member State (for example, entry and recording) this is not a factor which will determine that the trial will be held in that location.

Another important question to be resolved in this area is that of whether the criteria or factors which are set up in order to decide the State of trial have to be in a pattern of subsidiarity, under which the second criterion will apply only if the first one does not, and so on successively with all the criteria, ordered hierarchically, or whether, on the other hand, the criteria selected have to be formulated as alternatives, in such a way that the European Public Prosecutor will weigh them all together and will combine them with the two general criteria laid out earlier to determine the most appropriate jurisdiction, centralising the trial in the Member State in which the correct and orderly performance of the administration of justice is possible. The solution under which the criteria should be alternatives appears preferable, given that a greater degree of flexibility will make it possible to weigh more pertinently in each case the general principles laid down earlier, avoiding totally rule-bound formulae which in certain cases could cause an illogical choice to be made in the selection of the place of trial.

With respect to the specific criteria which, drawn up as alternatives, are considered appropriate to determine the place of trial, we should like to indicate these two:

- The location of the greatest economic impact of the crime or crimes committed. This criterion covers to some degree, although going beyond
it, the traditional criterion for the greatest punishment (in force in Spain in Article 18 of the Law on Criminal Procedure for related crimes), in that it takes into account the gravity of the acts, but not by way of a comparison between punishments related to the crime which, if there is not total harmonisation (referring not only to the minimum limit of the punishment but also to the maximum limit), gives rise to enormous problems in the task of comparison.

- The location where the principal evidence of the crimes committed is found. (This is identical with the criterion established as primary in the legislation of Spain, Article 15 of the Criminal Procedure Act, in those cases where the place where the crimes were committed is not known).

- The place of residence of the principal defendant or of the majority of the principal defendants.

The above three criteria - based on Article 26 of the Corpus Juris - would, if handled as alternatives, make it possible to comply satisfactorily with the general principle of the most appropriate jurisdiction for the correct performance of the administration of justice.

Together with the listed criteria, there are also traditional criteria, used in certain legislations, which we consider to be of little relevance. For example:

- The place of detention (used in the legislation of Spain in the Article 15 already referred to, when neither the place where the acts were committed nor the place where the evidence appears are known) which we feel adds nothing to those already listed. If the detention is purely circumstantial, the criterion would become irrelevant through being illogical (for example, if the defendant was detained after fleeing to a third country absolutely without any links to the web of criminal acts). If
the detention is not circumstantial, and connects the detainee with a place related with the facts and appropriate for prosecution, then that place will already be covered under one of the criteria laid down above as being valid.

- The country of nationality of the defendant or the principal defendants. The same applies to this criterion as to the previous one. If the nationality really is not a circumstantial factor and is not unrelated to the facts of the case, the place to which such a factor points will already be covered in one of the other criteria already described as being valid.

XI. Question 11: Do you think that the principle that evidence lawfully obtained in a Member State should be admissible in the courts of all other Member States is such as to enable the European Public Prosecutor to overcome the barrier raised by the diversity of rules of evidence?

It is evident that one of the fundamental obstacles in the way of effective investigative action by the European Public Prosecutor is rooted in the differences extant among the various national legislations with regard to practices on evidence.

That is why the proposal contained in the Green Paper of establishing the principle of automatic mutual admissibility of evidence represents a solid and well-chosen solution, to the acceptance of which there can be no objection.

There is a need to distinguish between the gathering of evidence during the phase of investigation or examination and the practice relating to evidence during the actual course of the trial.
With relation to the first point, during the investigative phase the evidence should be handled in conformity with the national legislation of the State in which it is obtained. and a national court in one Member State must be obliged to admit any evidence legally handled in conformity with the national law of any other Member State.

That principle does not in fact lack precedents. As an example, it is sufficient to cite Article 3.1 of the European Convention on mutual assistance in criminal matters or Article 10.4 of the Convention drawn up by the Council on mutual assistance on criminal matters between the Member States of the European Union, in which the underlying assumption is the application of the national legislation of the country in which the proceedings are taking place, which will unfold in conformity with its requirements.

The Supreme Court of Spain, in analysing the value of evidence obtained in other States, has on various occasions ruled in this direction, consolidating a uniform jurisprudence, according to which it is the legislation of the country in which the evidence is obtained and handled that has to govern the way it is obtained and handled “in the manner established by its legislation,” which means in consequence that, within the scope of the European judicial area, it is not appropriate to undertake evaluations or distinctions with regard to the guarantees of impartiality of some or other judges nor of the respective value of the acts formally presented before them (SSTS 2459/2001 of 21 December, 315/2001 of 3 May, 43/2001 of 19 January, 1615/2000 of 16 October and 552/2000 of 29 March, among others).

Also, STS 340/2000 of 3 March points out that evidence obtained outside Spain does not have to pass through the filter of the regulations of Spain, since it has to be in accordance with the rules and guarantees governing the obtaining of evidence in the country in which it has been obtained or presented, provided that the principles and rights that are proclaimed in international treaties such as, in
In this case, the European Convention for the Protection of Human Rights and Fundamental Freedoms have been observed.

It follows from this that the review of the legality of the evidence that falls, as appropriate, to the judicial authorities of the country in which it is handled cannot be repeated by a court in another Member State, not even if the latter is the one where the trial is to be held in which the evidence in question is to be used. The latter court could only negate the validity of the evidence if the way it was handled had violated fundamental rights among those recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This would make it possible for that Convention to be considered as the true yardstick of the validity of the evidence as handled in another Member State.

However, it must not be forgotten that, as has already been pointed out elsewhere, Article 4 of the Convention of 2000 lays down, reversing the traditional rule under which the practice of letters rogatory shall be in conformity with the rules of the requested State, that judicial assistance shall be provided in conformity with the rules of the requesting State, provided that the formalities and procedures are not contrary to the fundamental principles of the law of the requested State. Such a provision would without doubt avoid or help to resolve the potential conflicts which might arise in this area.

With respect to the practice concerning evidence during the actual oral proceedings, the national legislation of the State in which the trial is being held will have to rule, and at the same time it is this legislation that will be taken into account for evaluating its evidentiary value.
XII. Questions 10 (2nd part), 12, 13, 14: Review of the activity of the European Public Prosecutor.

The situation put forward in the Green Paper, of a European Prosecution Service as the Community body for centralised performance and direction of judicial investigations throughout the territory of the Union, carrying out its activity before national courts and tribunals of the Member States - without the provision of a parallel Community judicial structure - brings forth certain specific problems with regard to the review of the Prosecutor’s activity.

His decisions with regard to the investigative acts, to impacts on fundamental rights, to the closure or pursuance of the case and the committal for trial, to the selection of the prosecuting body, and so on, need to be subject to review.

What sort of review?

In general, review of the activity of the Prosecutor, in the various options which have been found in a comparison of laws, takes place on two levels: internal review, which is performed on the basis of the revising decision of the hierarchical superior who becomes involved either automatically or else at the request of an interested party, and external review, pursuant to a decision of a jurisdictional body.

Without prejudice to the provisions for internal review which are essential features of the proper functioning of any Ministry of Justice of a hierarchical character, it seems evident that it is essential to establish mechanisms of external review based on the intervention of a jurisdictional body. Only this option will guarantee genuine review, given the risk of disproportionate or arbitrary action.

But which jurisdictional body?
In the situation which arises if harmonious coexistence is created between a Community body - the activity of which is the object of the review - and national judicial organs in which it is intended to locate the jurisdictional decision on the specific case, the question then arises of identifying the jurisdictional body which should carry out that review and defining the mechanisms or instruments to make the review effective.

The option of a Pre-Trial Chamber of the Court of Justice of the European Communities in which to locate the review of the activity of the European Public Prosecutor presents numerous advantages, inasmuch as its centralised action with respect to the entire territory of the Union would allow it to intervene with supranational authority in the final resolution of the various disputes which may arise. Such centralisation would be outstandingly useful in the event of complex transnational cases impacting two or more States. Its rulings on the closure of a case - taken with or without calling on the principle of discretionary prosecution - or on arraignment and committal for trial, on the determination of the national prosecuting body (avoiding negative jurisdictional conflicts), and so on, would resolve the severe problems which would be caused by inserting the activity of the European Public Prosecutor into the sphere of action of the national jurisdictional bodies. The added value contributed by a single and specialised body, having a single view and jurisdiction over the entire territory of the Union, makes this option the ideal choice.

The intervention of the Court of Justice in questions of assignment of jurisdiction, in the area of protection of financial interests and in the area of international judicial co-operation within the context of the third pillar does not fall outside the regulatory dispositions of the EU. It may be recalled that the actual Council instrument of 26 July 1995 which established the Convention on the protection of the European Communities’ financial interests states in its Article 8 that any dispute having to do with Articles 1 to 10 of the Convention - including
with regard to co-operation in investigations, judicial proceedings, mutual assistance or transfer of proceedings - not resolved by negotiation can be referred to the Court of Justice. This is confirmed in Article 8 of the First Protocol of 27 September 1996 and Articles 13 and 15 of the Second Protocol of 19 June 1997. Additionally, on a general level, the Court of Justice has jurisdiction for guaranteeing observation of the legal system in force as the law of the Union and in the interpretation and application of it (including with respect to the regulatory instruments which constitute a principle or foundation in the context of the third pillar relating to judicial co-operation in matters of criminal law).

For that reason, to go a step further with the assignment of specific areas of jurisdiction to the Indictments Court or by creating the Pre-Trial Chamber already referred to - on the model of what is intended for the International Criminal Court\(^1\) - would be neither ridiculous nor unjustified. Thus the groundwork would be laid for further steps in this same direction of making possible a minimum structural presence in the form of a jurisdicitional body at Community level.

The argument that this would involve modification of the Treaty does not appear to be an impediment, since that is also an inescapable requirement for creating the actual function of the European Public Prosecutor itself and the broad process of reform would allow this innovation to be tackled also.

If the option absolutely has to be exercised at the national level, the initial observation is that it is impossible to envisage findings valid for all imaginable situations. There will be a need to identify the type of procedural activity with a view to stipulating the situations which will need to be reviewed and the body or bodies which will be required to do so.

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\(^1\) The statutes of which – approved on 17 July 1998 by the Diplomatic Conference of Plenipoten tiaries of the United Nations on the establishment of an International Criminal Court - have been ratified by all of the Member States of the EU, which may be taken as indicating the acceptance of this model as being a particularly appropriate manifestation of international joint action in the field of criminal law.
In practice this implies an effective diversification of the review. In order to make our comments more systematic, we may approach the question by referring in separate sections to the activity undertaken in the investigation phase, to the decision on closing a case or proceeding to arraignment and on the selection of the Member State of trial.

1) Activity of the European Public Prosecutor during the investigation phase.

In general, the procedural arrangements which fall within the system of investigation by the Ministry of Justice customarily distinguish between the acts which the Prosecutor is able to perform on his own, those which he can undertake following the issue of an order or judicial authorisation or, as appropriate, subject to subsequent judicial validation, and those where it is proper for the judge to undertake them on his own or which are undertaken inside a court setting.

Such a schema could be applied in tackling the question of the review of the investigative activity of the European Prosecution Service.

The lack of jurisdictional authorities makes it essential that, if the proceedings to be undertaken entail an infringement of fundamental rights or if it is desired that they shall have evidentiary force in the future - as pre-litigation evidence or written pre-litigation evidence - it shall be necessary to call on a judicial decision or judicial guidance.

A) Acts which impact fundamental rights

The actual design of the model put forward for discussion by the European Commission favours making a distinction between the treatment to be given to those procedural acts which impact fundamental rights and that which is specific to the others which do not fall into that category.
For the actions which entail an infringement of those rights, the Green Paper examines almost without alternatives² the option of the intervention of a judge of freedoms on the national level. Given an abstract definition of the jurisdictional review body in conformity with the typical process model in which the investigative activity is within the remit of the Ministry of Justice, the question will be centred on stipulating that body in each of the countries as a function of their specific procedural system and judicial organisation.

This task of definition will not raise too many problems in those systems which have been set up on the model which we might call that of the “examining prosecutor” (for example, Germany, Italy or Portugal), since these already have the function of the judge of freedoms (whatever may be the title used). However, in the systems of the “examining magistrate” type such as that of Spain, that approach will unavoidably involve designating the specific body already in existence that will carry out such a function (Central Examining Magistrate of the National High Court or any of the examining magistrates with jurisdiction on the basis of the territory involved³) or else creating a body ex novo exclusively to carry out the function. In either case, for obvious reasons arising out of the stipulations of the European Convention on Human Rights this judge will have to be distinct from the jurisdictional body with jurisdiction for the prosecution of the matter at hand and will have to review the legality, necessity, suitability and proportionality of the measure, in conformity with the parameters of the European Convention on Human Rights and the case law of the European Court of Justice which interprets it.

² See section 6.4.2. While from the theoretical point of view the posibility is given of accompanying the European prosecutor with a Community jurisdictional body entrusted with excising this function of the judge of freedoms, it is pointed out that that would imply creating a common legislation relating to investigation measures and that that is not the wish of the Comission.

³ A function which he will have to carry out while making it compatible with his other jurisdictions.
For reasons of centralisation, specialisation and uniformity of rulings, it appears logical and preferable to locate that function in a single-person judicial body with jurisdiction over the entire national territory, with a possibility of appeal against its rulings to a hierarchically superior collegiate body. In the case of Spain, assignment of those functions to the National High Court (and within that to a central judge appointed to be the national judge of freedoms) would contribute to empowering action against organised crime and would avoid the disparity of views which might be caused if any examining magistrate (professional or lay) from any location in the territory of Spain were to be appointed as the judge of freedoms, since the latter’s decisions would be subject to appeal before the relevant Sections of each of the Provincial High Courts. In addition, this would facilitate co-ordinated action in those situations in which it was necessary to undertake synchronised actions (such as recordings) in different parts of the national territory, and would be consistent with the concept of the National High Court’s having jurisdiction for the cases under Article 65. 1 (c) and (e) and 2 LOPJ.

Under the principle of acting in conformity with the national law of the territory in which the action is taking place, in those cases where “validation” or intervention a posteriori is permitted in urgent cases that would continue to be permitted, but in Spain the review has under all circumstances to be before the action, for constitutional reasons, which means that it will be essential for the jurisdictional body functioning as guarantor of freedoms to act a priori.

With a view to causing the least impact on national laws and regulations, the appeals against the rulings of the national judge of freedoms would have to be the same as those provided for against the similar decisions, brought by those currently subject to that decision (examining magistrates in general and Central Examining Magistrates in particular).

With regard to the possibility of action in transnational cases by national judges of freedoms belonging to different Member States, the most reasonable
solution among those put forward in the Green Paper is that of making it possible for the European Public Prosecutor, through the Deputy Prosecutors as appropriate, to choose to concentrate his requests before a single national judge of freedoms, whose decision would be recognised throughout the territory of the Union - on the basis of mutual recognition and the single area for investigation and judicial action in this sphere - or to address several judges when the circumstances of the case and the possible State of arraignment and prosecution made this advisable. That would also make it possible to reach the appropriate choice between the necessities of handling the evidence in conformity with the rules of the place of arraignment and in conformity with the requirements of the State to which the judicial body with jurisdiction for the prosecution belongs.

Under the conditions described and in explicit reference to question 14, fundamental rights would be sufficiently guaranteed.

B) Acts which seek to display evidentiary weight.

In the pattern which can be deduced from the proposal in the Green Paper, the underlying purpose of the activity of the Prosecutor consists in verification of the circumstances which lie around the perpetration of a punishable act and which are of significance in deciding whether an arraignment should be brought for that act against a certain person or persons.

To that end, the content of that activity is based on carrying out the investigative acts necessary to determine the existence of a crime and to ascertain the person responsible, with a view to drawing up the arraignment and bringing together and/or securing the sources of evidence which will subsequently be used in the oral proceedings.

In consequence, any act performed by the Prosecutor which seeks to have value as pre-litigation evidence or pre-litigation written evidence will require
intervention and review by a jurisdictional authority. In the investigative phase, that intervention and review may be assigned to the same judge of freedoms specifically appointed to the function of investigating those acts which impact fundamental rights.

C) Acts which do not entail infringement of fundamental rights nor seek to have evidentiary weight.

In principle, given the value of the acts of this kind which the Prosecutor may carry out, the current national situation on this issue could be maintained, without any need to open up additional appeals procedures nor to provide for the intervention of the national judge of freedoms over and above that which is strictly necessary to safeguard the liberties which fall under his jurisdiction.

In any event, it appears that the provisions of Article 785 bis of the Criminal Procedure Act relating to the cessation of investigative activity by the Prosecutor upon initiation of proceedings by the examining magistrate should not have any impact on a preliminary investigation by the European Public Prosecutor, and thus the aim of his investigative intervention would not be frustrated thereby.

2) Decisions on the closure of a case, committal to trial or preparation of the arraignment.

Once the investigative activity has been concluded - or while it is still going on if a reason arises for closing the case - the European Public Prosecutor will be required to take another important decision: whether to arraign or to close the case. The importance for the situation and rights of those affected by the trial make it necessary to establish a review mechanism for that situation.

The preliminary investigation by the Prosecutor or his activity before the examining magistrate has to provide the Ministry of Justice with the elements
which it can use as evidence in the oral proceedings and bring to the magistrate the arguments necessary for deciding whether there are sufficient grounds to reject the decision to arraign because that decision had been inconsistent or unfounded, or to proceed to prosecution if it is confirmed that evidence that a crime has been committed, and that the defendant is responsible, are both present.

The Prosecutor, once he has been provided with the sufficient elements by the investigation undertaken, has to give a judgment on whether it is fitting to close the case for procedural reasons, to do so for legal or substantive reasons, for factual reasons, by application, as the case may be, of the principle of discretionary judicial action⁴, etc., or else to present the arraignment against a person or persons, with the committal for trial following. Logically, the prosecutor will not be infallible in this area either. For the same reason that the system of appeals is established as a means of rectification, given the possibility of judicial errors, there arises the need to articulate formulae for correction of the errors that the Prosecutor may possibly make in his juridical evaluation of the facts or his assessment of the evidentiary elements which are simultaneously present.

The review of this activity of the Prosecutor may, as generally occurs, be established at the two levels referred to earlier: internal, existing most particularly in the context of Prosecutor’s Offices with a hierarchical structure and organisation - almost all cases, except for Italy - which operates on the basis of the revising decision of the Prosecutor’s hierarchical superior, who comes into play either automatically or at the request of one of the parties; and external, which is based on a final decision of jurisdictional bodies.

Basically, the solutions for external review of this specific aspect which we have found in our comparison of systems of law have fallen into three models:
- Automatic review by the judge of the ruling of the Prosecutor’s Office on whether or not an arraignment is to be brought. The judge, by way of a preliminary hearing, can revise the decision to arraign, rejecting the committal of the matter to trial, or the decision of the Prosecutor’s Office to close the case, determining that the investigation should be completed (the Italian system).

- Consideration by the judge of the decision to close the case only at the request of the prejudiced party, who has to be notified in advance of such a decision (which may lead to a proceeding under which the decision to arraign or to ratify the decision to close the case is forced on the court) and automatic consideration of the decision to prepare an arraignment, elucidating - by way of a procedure requested where appropriate by the person subject to the proceedings, although not yet accused - whether or not the decision is well-founded, before the case moves on to the prosecution phase (the German system).

- Establishment of a genuine supplementary *judicial examination* at the request of the prejudiced party - by way of the assistant prosecutor - in the event that the decision was to close the case, or of the defendant, where it was to proceed to the arraignment, so that the judge may resolve whether or not to open the prosecution phase on the basis of the result thereof. Without prejudice to whether or not the examination is called for - since that is optional - the judge will analyse, as the initial act of the prosecution phase, and before it continues, whether or not the arraignment is well-founded (the Portuguese system).

Out of the above, the option that appears preferable in relation to the activity of the European Public Prosecutor would be that of the jurisdictional review of the decision to close the case at the request of the prejudiced party and the automatic review of the decision to proceed to an arraignment. Simplicity and balance are sufficient arguments to support a solution of this kind.

\footnote{Provided that this is allowed for in its pure form and in its qualified form.}
If the possibility is ruled out of such activity being performed by the Pre-Trial Chamber of the Court of Justice - an option which we consider preferable owing to the added value that would be entailed in entrusting the task to a single body which would promote a uniform and specialized view throughout the territory of the Union - the national jurisdictional body which would have to carry out this task in Spain might be placed within the National High Court for reasons similar to those put forward in relation with the national judge of freedoms. As is said in the Green Paper, the jurisdictional review body could be an “ad hoc court or the trial court itself.” Once again it appears fitting that in Spain the jurisdiction for prosecution of European-level fraud investigated by the European Public Prosecutor should be located in the National High Court.

Naturally, the body which reviews the opening of oral proceedings could be a body from a State different from the one to which the judge of freedoms concerned belongs and will have to come from the Member State with jurisdiction for the prosecution, which relates to the question of the “selection” of the Member State where the trial is to be held.

3) Selection of the Member State where the trial is to be held

In this specific area of activity a preliminary remark appears called for: the question of review is intimately linked with the decision on the criteria, since the review will be more or less intense in a direct ratio with the degree of hierarchical ranking that there is among the criteria chosen.

If the decision is for a closed system of criteria ranked in order of preference, the review by definition will have more elements where it will come into play and will be more intense.
If the selection is based on a large number of alternative and open criteria, the topic of how and by whom the review is to be carried out will be less significant.

Generally speaking, the view may be expressed once again that, in any event, the review has to be external and entrusted to a jurisdictional body. The definition of the review depends on the option which is chosen with regard to the system of selection.

The Green Paper considers as the first option the establishment of a system of free selection by the European Public Prosecutor on the basis of the idea of trust in all of the systems and the essential community of principles which lies beneath the appearance, at the formal level, of diversity in the procedural systems of the EU Member States. But it might be replied that, in fact, this situation would render a genuine review impossible and in practice would end up by producing an unacceptable risk of arbitrary action.

Given the importance of the interests at stake, especially for the defendant, it is necessary to start out from a design of counterweights as is demanded by any procedural system based on respect for guarantees. The selection of the State determines the national law applicable and also the national case law with reference to evidence and substantial elements of the applicable definitions in criminal law, and in a scenario of less than complete unification this brings forth a special set of problems. Since there is a possibility that the situation most favourable to the views of the Prosecutor could be selected, a review mechanism has to be established.

Even assuming the best of intentions in the European Public Prosecutor - as has already been said - he will not be infallible and for that reason, it is necessary to establish mechanisms for review of his decisions. If it is held that certain criteria have to be present and that there has to be a proper relationship
between the place selected and the essence of the acts which are the subject of the prosecution, it is impossible to waive such a review.

Finally, the most appropriate choice appears to be to make the selection subject to reviews of motivation and absence of arbitrariness and consideration of both sides. The problem which thus arises as the most pressing is that of deciding to which jurisdictional body to assign this review.

Basically, it would appear that there are two essential options:

Option A) Assignment of the review to the national prosecuting judge of whom the European Public Prosecutor requests a committal for trial, who will analyse his specific jurisdiction, either automatically or at the request of one of the parties.

Option B) Assignment of the review to the Court of Justice of the European Communities and, as the case may be, to a new body: the Pre-Trial Chamber already referred to, similar to that set up in other manifestations of the internationalisation of the prosecution of crime, such as the International Tribunals for Rwanda and for the Former Yugoslavia and more recently the International Criminal Court.

The first option, that of the national Judge, would have the advantage of simplicity and of less impact on the current structure of the Union, but would have the enormous drawback that it might lead to situations similar to negative conflicts of jurisdiction, which might cause the European Public Prosecutor to roam before the judicial authorities of various States without any of them accepting his jurisdiction, leading - if we take into consideration the present international regulatory situation - to slow processes of achieving consensus on jurisdiction.
The question is important. Various Conventions have attempted to avoid similar situations, but it is sufficient to recall the failure of the Convention on Transfer of Proceedings of 1972 which, in spite of the desire to promote the jurisdiction of any State and despite the fact that its Article 8 contained numerous related criteria for asserting jurisdiction - criteria basically identical with those contained in the Green Paper and in the 1995 Convention on the protection of financial interests - was not able to avoid conflicts, principally because while it was drawn up within the Council of Europe, very few States, either in the larger Europe or within the European Union, ratified it. Even between those that did ratify it, the difficulties of reaching agreement in the cases with the greatest degree of conflict were evident.

Option B), the creation of a Pre-Trial Chamber, has the drawback that there would be a need for a structural modification of the Court of Justice and of the Treaty itself, but this argument - as we have already had occasion to say - is not an impediment, since the establishment of the European Public Prosecutor will also require modification of the Treaty. Why not make use of the same moment to carry out both reforms, laying the bases of a Community judicial superstructure for protection of the financial interests of the EU? The process for the inclusion of the European Public Prosecutor in the Treaty is sufficiently broad to permit that. The point made in the Green Paper that this has not been included in the Communication from the Commission is not particularly problematical if the debate which the Green Paper generates is truly open⁵.

For the purposes that are relevant here, the advantages would be beyond doubt, since the intervention of the section of this supranational body would bring about a flexible jurisdictional review of the prosecutorial pleading and would resolve any dispute on a definitive basis.

⁵ See on this Pre-Trial Chamber VAN DER WYNGAERT, in his study entitled “Corpus Iuris, European Prosecution Service and National Judge. Towards a European Pre-Trial Chamber”
In addition, having a Pre-Trial Chamber in the Court of Justice of the European Communities would bring enormous benefits in many other aspects of review or authorisation of the activity of the Prosecutor, as has already been set forth (review of guarantees in conformity with the parameters of the European Convention on Human Rights, review of decisions to close a case or to proceed to an arraignment, review of the application of the principle of discretionary judicial action as appropriate, etc.).

As a possible alternative, the Green Paper puts forward an option which we might entitle *hybrid*, that of granting review to the national prosecuting body, which at the same time as it decided on the committal for trial would also review the jurisdiction, with the Court of Justice stepping in only if negative conflicts of jurisdiction arose.

This solution appears acceptable as the lesser evil in the event that it is decided to rule out the prior jurisdiction of the Court of Justice, which as has already been said would be more flexible - both in time and procedurally - and would provide a greater general benefit, as well as constituting a further bold step towards the establishment of a genuine process of procedural unification in the handling of European-level fraud. Selecting this hybrid solution might create the possibility of appeal both by the Prosecutor and by the other parties against the initial decision of the national judge before his hierarchical superior. Only after the latter’s decision, and if this situation were repeated in at least one other Member State, would there then be the possibility of taking recourse to the Court of Justice, which is justified by the need, once the question has been raised before one Member State, to exhaust the national jurisdictional procedure in that State.

There is a need to be aware in any event of the possibilities for delay which may result from this solution.
XIII. Question 18: Procedures available for judicial review of acts done by the European Public Prosecutor or under his authority in the exercise of his functions.

As a general rule, the necessity of setting up a system of appeals distinct from the one already in existence in the national bodies of laws does not arise if the option of placing the review under the authority of a Community jurisdictional body is ruled out.

Naturally if the choice is - as we have suggested as a hypothesis that might actually be advantageous - to create the Pre-Trial Chamber or to assign to the Indictment Court of the Court of Justice of the European Communities specific areas of jurisdiction with regard to the review of the activity of the European Public Prosecutor, it will be necessary to supplement the design by setting up a system of challenges to the decisions taken at the indictment stage, which might start out from an initial possibility of revision by the level taking the initial decision and a subsequent review by the hierarchically superior level.

If review is assigned to national bodies, it is necessary to take as a basis the adequacy of the system of national appeals against the decisions of the judge with jurisdiction with regard to rulings on deprivations or restrictions of liberty or curtailments of other fundamental rights, or of the jurisdictional body for review of closure of a case or committal for trial and preparation of the arraignment. The same would also apply to the rulings of the jurisdictional body for review of the selection of the State of prosecution. It will not be necessary to add possibilities of appeal to those already provided for simply because the European Public Prosecutor is involved.

As it would be desirable to have the minimum harmonisation which is called for given the non-suspensive character of such appeals, such a solution would entail an impact on the national appeals system, which would raise the question of
whether in the light of the task to be performed it would not be necessary to harmonise the appeals system in all aspects, or at least in its basic structure, since divergences between countries might cause an effect of flight in one direction or the other related to the intervention of the jurisdictional bodies of certain States, owing to the features of their system of challenges. Once again the need arises to define degrees of harmonisation or unification, balanced against the aim of causing minimum impact on national legislations.

The decisions on investigative acts which do not impact fundamental rights adopted on the authority of the Prosecutor himself would not be subject to challenge. The restricted power of the Prosecutor and the limited value of the acts carried out in this way make this appropriate. The solution proposed in the Green Paper is identical with that which applies to the models of preliminary investigation under the responsibility of the Prosecutor and the consequent arrangement for investigation by the Spanish Prosecutor in conformity with Article 785 bis of the Criminal Procedure Act.

The response to question 18, all in all, is already contained in the earlier sections and reference should be made to the observations made there.

Some questions, however, do merit a specific response at this point.

1.- The recognition of rights of the Communities with respect to appeal against decisions to close a case taken by an impartial and independent Prosecutor is essential, but in the option selected it would be sufficient to allow a right of raising their disagreement on this issue before the jurisdictional body for review of closure of a case. This would not imply acceptance of their status as victim or prejudiced party in the criminal trial in question.

2.- It is essential to recognise a right of appeal of the defendant with reference to the jurisdictional ruling on the selection of the State of prosecution.
This is demanded by the importance of the decision, whether the choice is for the Pre-Trial Chamber or for a national body as the guarantor of the review of that selection. Undoubtedly, the possibilities for delay would be greater with the option of assigning the task to national bodies.

3.- The European Public Prosecutor must have a recognised entitlement to file an appeal against the national jurisdictional rulings at least in the same situations, with the same requirements and under the same conditions as apply to the national Prosecutors.

Madrid, 11 July 2002