The Commission’s proposal for the establishment of a European Prosecutor and for the definition of crimes which are prejudicial to the Community’s financial interests in the framework of the third pillar: the Green Paper debate.

M. Kaïafa-Gbandi  
Professor of Criminal Law  
Aristotle University of Thessalonica

The Commission offered the Green Paper as a basis for consultation in December 2001 in order to develop understanding and promote a general proposal for the establishment of a European Prosecutor for the specific purpose of criminal-law protection of the Community’s financial interests. The general proposal, which the Commission has already adopted, is the result of lengthy – and certainly arduous – scientific endeavour by groups of experts in criminal law from the Member States which presented the two versions of what is now well-known as the Corpus Juris and of the subsequent comparative studies analysing the potential impact of a European prosecutor on national prosecution systems. The Commission believes that a better-informed view can be taken on the principle following preliminary thought about the possibilities for its implementation. To that end, the Commission sets out a large number of carefully thought-out questions in the Green Paper in order to help clarify the practical implications of the proposal, as requested by the Intergovernmental Conference at Nice.

There are two important things which I think should be mentioned before discussion of the Green Paper is commenced.

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1 This paper was presented as the introduction to a meeting of academics arranged by the Athens Law Association and the Union of European Lawyers in Athens on 26 April to discuss the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.
2 The Green Paper can be found on the website http://europa.eu.int/olaf/livre_vert.
3 Further references to publications of the Corpus Juris versions are provided on p. 6 of the Green Paper.
5 Green Paper, p. 6.
6 The questions are summarised in Annex 4 to the Green Paper, pp. 95-96.
7 Green Paper, p. 7 and elsewhere.
Firstly, the question of the specificity of the proposal which, as it stands, portends a most advanced system of criminal law enforcement, coming as it does in the European Union framework within which, as we know, very systematic and advanced attempts are being made to achieve harmonisation within criminal law between the various states. In fact, the European Prosecutor and the general proposal of the Commission:

- constitute a step organised in the framework of a *structured transnational entity*,

- relate to the protection of the *equitable property of the European Union itself*, namely of its financial interests,

- require the use of special legal instruments under Article 34 of the Treaty on European Union for the activation of the specific transnational construct in the area of criminal law enforcement,

- are being discussed when the European Union already has *own institutions*, such as Europol and Eurojust, for the promotion of more effective repression of crime or, at least, for the co-ordination of repression.

To those latter institutions the Commission now proposes to add a European Public Prosecutor as a self-contained institution with *own powers* of prosecution in the case of criminal acts which are prejudicial to the financial interests of the European Union, on the basis, moreover, of *common*, identical or, at least, harmonised *rules for the formulation of those crimes* and of other necessary provisions of the general part, in order to make the combating of damage to the Community’s financial interests as uniform as possible right across the Union.

It is only to be expected that such a move should attract the attention of criminal law circles throughout the EU, given that it sends definitive messages about the direction being taken by the Union in the area of crime repression. There is therefore a need for great care, willingness to pay due heed to the problems that exist and, in particular, close adherence to the principles of the European legal culture which are expressly identified in Article 6 of the Treaty on European Union and which the Union is obliged to respect.

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8 On the various attempts at the internationalisation of criminal law and the specificity of the process in the EU context see M. Kaïafa-Gbandi, *The development towards harmonisation within criminal law in the European Union – A citizen’s perspective*, European Journal of Crime, Criminal Law and Criminal Justice, 2001, pp. 239-241, in which references to other thinking concerning the matter can be found.

The second point concerns the characteristics of the public debate which the Green Paper aspires to open up.\textsuperscript{10} I should say here that the proposal for a debate is welcome, coming as it does from the Commission as an institution of the European Communities. Nevertheless, it is very belated, and comes in any case after the Commission’s contribution to the Intergovernmental Conference for revision of the EC Treaty to provide a legal basis for the establishment of the European Public Prosecutor was not taken up by the European Council at Nice in December 2000.\textsuperscript{11} This gives rise to the impression, at least, that the public debate is considered desirable because the undertaking has not made headway and in order to find ways of getting more support for it.

That said, the main thing now is to ensure that the sought-after public debate remains open to thinking from every possible quarter and is therefore substantive, and while it is understandable that the debate should be organised around certain themes which express the Commission’s preferences in the Green paper for a very specific system\textsuperscript{12}, it must ultimately also be about issues of principle which govern criminal law enforcement\textsuperscript{13} and which are ineluctably bound up with the endeavour to establish a European Public Prosecutor as conceived by the Commission.

It goes without saying, moreover, that the substantive outcome will depend on the contribution to the debate, and also on ensuring that the best use is made of the results, and it is to be hoped that the Commission’s initiative will be successful as far as all those aspects are concerned.

After a short discussion of the main arguments of the Commission in support its plan I shall confine my contribution to the debate to an examination of the proposed schema from the standpoint of the legal basis for the establishment of the European Public Prosecutor in current law, which I consider to be of definitive importance to the whole undertaking, and of the issues of substantive criminal law which offer greater potential for harmonised development within the defined frameworks of the powers currently possessed by the European Union.\textsuperscript{14}

I. The Commission’s arguments for the establishment of a European Public Prosecutor

\textsuperscript{10} Green Paper, pp. 9-10.

\textsuperscript{11} Green Paper, pp. 6-7.

\textsuperscript{12} Green Paper pp. 9-10.


\textsuperscript{14} Articles 29 and 31, in particular Article 31(e) of the Treaty on European Union.
In examining the Commission’s arguments for the establishment of a European Public Prosecutor one notes first of all that the effectiveness of cross-border prosecution functions in the case of acts prejudicial to the Community’s financial interests, which cannot be ensured adequately because of the fragmentation of the European criminal law enforcement area, is advanced as a primary issue.\footnote{Green Paper, pp. 12-13.} It must be said here that the effectiveness of repression within a rule of law is demarcated in a very specific way by respect for fundamental rights and the guarantee principles of criminal law in general\footnote{See, in particular, I Manoledakis, \textit{Equitable property as a basic concept in criminal law}, Thessalonica 1998, p. 40. Also W. Hassemer, \textit{Die Funktionsstüchtigkeit der Strafrechtspflege}, in Lüderssen (Hsrg), \textit{V-Leute. Die Falle im Rechtsstaat}. p. 81 et seq.} which are enshrined in the constitutions of many of the Member States. In no circumstance, therefore, should the effectiveness of repression be adduced as a primary argument. Nevertheless, one can see from the internal order of Point 2 of the Green Paper that the need to increase the effectiveness of cross-border prosecution functions\footnote{Point 2.1., p. 12 et seq.} does indeed come before respect for human rights in the Commission’s thinking.\footnote{Point 2.2., p. 15 et seq.}

That would not matter so much if it were nothing more than an infelicitous ordering of the Commission’s arguments. But I fear that that is not the case. In the Green Paper the Commission does say, of course, albeit after putting the arguments for effective repression, that in the exercise of his functions the European Prosecutor will be subject to the requirement of respect for human rights, in particular as guaranteed by Article 6 of the Union Treaty, the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms.\footnote{Green Paper, pp. 15-16.} However, it ignores the fact that the institutional safeguarding of fundamental rights which is legally binding at the European Union level has not yet been achieved,\footnote{See . P. Kousis, \textit{The institutional dimension of European integration after the Amsterdam Treaty}, Thessalonica, 2000, pp. 51-52.} because the Charter of Fundamental Rights of the European Union has not acquired binding force\footnote{P. Chr. Müller-Graf, \textit{Europäische Verfassung und Grundrechtscharta: Die EU als transnationales Gemeinwesen}, Integration 2000, p. 34. O. Schmuck, \textit{Die Ausarbeitung der Europäischen Grundrechtscharta als Element der Verfassungsentwicklung}, Integration 2000, p. 48.} and the Union has not acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms.\footnote{E. Sahpekidou, \textit{The European Court prevents the accession of the Community to the European Convention for the Protection of Human Rights}, OJ Eur. C. 1996, p. 581, \textit{Fundamental Rights and Community law}, OJ Eur. C., 1997, p. 201.} However, the European Public Prosecutor, as an institution with cross-border
powers, should be bound, as such, by respect for fundamental rights in a manner which is *legally enforceable and controllable* by the citizens in the framework of the Union itself.\(^{23}\)

On the other hand, the statement that “all acts involving an element of compulsion carried out by the European Public Prosecutor should be subject to review by a court designated by the Member State as the “judge of freedoms” ”\(^{24}\) is not persuasive enough to make one confident that fundamental rights will be adequately protected, because a decisive element in the protection of fundamental rights, over and above removal of the shortcomings already mentioned in the activity of the European Public Prosecutor as it is shaped in the Corpus Juris,\(^{25}\) is *control of the legitimacy of the activity of bodies*, such as OLAF, *which carry out preliminary administrative investigation* which is not subject to the criminal pre-trial procedure (Article 25 of the Corpus Juris), in particular when *material collected by that means can be admitted as evidence* on the basis of a provision such as that of Article 32(1)(e) of the Corpus Juris.\(^{26}\)

In other words, it must be understood that the *point of reference* for the institutional safeguarding of fundamental rights in relation to the prosecution function for crime harmful to the Community’s financial interests and as regards the activity of the European Public Prosecutor cannot be selectively restricted to the area of any activity of the latter involving compulsion and must be *the activity of the Europol, OLAF and European Public Prosecutor triangle as a whole*.

An important element of the Commission’s arguments in support of the establishment of the European Public Prosecutor is *the involvement of organised crime* in fraud against the Community’s financial interests, and the statement that in consequence of that the conventional tools of mutual judicial assistance are no longer suited to the task.\(^{27}\) However, it should be pointed out that the problem raised is a much *more general* one which encompasses everything known by the name of organised crime, concerning which the European Union has already made known its strategy for the beginning of the new millennium.\(^{28}\) One therefore finds it difficult to understand why the legitimisation of criteria to serve as a basis for effective prosecution functioning is being mooted as a solution specifically for the area of organised crime.

\(^{23}\) On the deficits in guarantees between states in the area of judicial and police cooperation see O. Tsolka, *The path to the Corpus Juris: a factor in the reformulation of the procedural protection of accused persons*, in a volume in honour of D. Spinellis, p. 1190, in which the absence of the right of recourse to the European Court for injured parties in respect of harm sustained in third pillar areas is discussed.

\(^{24}\) Green Paper, p. 16.

\(^{25}\) Tsolka, volume in honour of D. Spinellis, p. 1199 et seq. (1201).

\(^{26}\) Tsolka, op. cit., p. 1195.


crime prejudicial to the Community’s financial interests and not for other areas, such as trafficking in persons, the sexual exploitation of children, drug trafficking and environmental protection, in which equitable property of far greater significance is involved. And that, indeed, when the Brussels Convention on the protection of the European Communities’ financial interests of 26 July 1995 very much improves the situation. The Convention has not been put into effect by all the Member States as yet, but only a very few states have not yet ratified it.  

As regards the argument linking fraud against the financial interests of the EU with organised crime, there are two other points that should be mentioned: firstly, many acts which are harmful to the financial interests of the European Union do not have the characteristics attributed to organised crime, and, secondly, and more important, the Commission has succumbed to temptation and deployed a vague concept – organised crime – which has yet to be given a uniform definition in the European Union framework in order to make the case for effective repression of crime. Any thinking person who reads Recommendation No 1 in the European Union strategy for the prevention and control of organised crime for the beginning of the new millennium which speaks of seeking “to establish a uniform, EU concept of the topics and phenomena relating to organised crime” can only be concerned about the haste and inconsistency of the endeavour in the case of harm to the community’s financial interests. Because, of course, one cannot put forward solutions to the problem of organised crime before having first decided what the crime consist of.

These arguments show perfectly well, I think, that the invocation of organised crime and of the need for effectiveness of repression for the purpose of promoting the establishment of a European Public Prosecutor to protect the financial interests of the European Union have only a relative value and are not convincing. Furthermore, it is important in that regard to mention the danger of the attempt to create a transnational judicial system to combat organised crime becoming a Trojan Horse as far as fundamental freedoms are concerned, and it should also be stressed that the maintenance and development of the Union as an area of freedom, security and justice in accordance with Article 2 of the Treaty on European Union must be construed in the composite manner which those three words jointly require.

30 See footnote 28.
As regards the basic arguments of the Commission in support of the proposal, it is worth pointing out, lastly, that a lot of effort is put into depicting the establishment of the European Prosecutor as an objective which does not contradict the spirit of the Tampere European Council which attached high priority to the development of an area of freedom, security and justice in the Union as provided for by the Amsterdam Treaty. The Commission attempts to promote a complementarity and specific features of the proposal in terms of the objectives of the Tampere Council and in particular as regards the establishment of Eurojust.\textsuperscript{32} However, when the Eurojust unit, which is considered a first step towards the establishment of a European Prosecutor for international crimes,\textsuperscript{33} was set up by the Council Decision of 28 February of this year,\textsuperscript{34} own prosecution and investigative powers were clearly excluded, and the application of the law of each competent Member State in regard to specific investigative acts is recognised, all of which makes it clear that despite the declared views of the Commission to the contrary the European Union has not, so far at least, had the political will to proceed with the establishment of a European prosecutor, which would not, of course, as the Commission makes out, be a mere complement to the Tampere objectives, but rather a qualitative leap forward,\textsuperscript{35} as the creation of a transnational institution with own powers in criminal proceedings vis-à-vis the Member States must obviously be.

\textbf{II. The legal basis for the establishment of a European Prosecutor}

As regards the legal basis that the Commission puts forward for its proposal in the Green Paper, it must be said that one sees a relative improvement over the possibilities that have been discussed in the past concerning the legal substructure for the establishment of a European Prosecutor. Those possibilities centred mainly on two provisions, namely Articles 280 and 308 of the EC Treaty in their operative form. Neither of the two preferences led to success.\textsuperscript{36}

Recognising that the existing provisions do not support such a step – and this, precisely, is the positive element in the Green Paper – the Commission now points out the need for amendment of Article 280, paragraph 4, of the EC Treaty.

\textsuperscript{32} Green Paper, pp. 16-18.
\textsuperscript{33} OJ L 63/6.3.2002.
\textsuperscript{35} This is recognised by the Commission. Green Paper, p. 37.
Treaty, which in its present form precludes criminal-law measures by the Community in defence of its financial interests, without, as is pointed out, prejudice to a new Article 280a, so that it lays down the conditions for the European Public Prosecutor’s appointment and resignation and determines his tasks and the main features of his function, while regulation of the status and operation of the European Public Prosecutor, the rules defining criminal offences and the rules applicable to performance of the work of the prosecutor are left to secondary legislation.\textsuperscript{37}

However, while the Commission’s position in explicitly recognising for its part that the EC Treaty as presently constituted does not permit the creation of a European criminal law area with a common judicial body, such as a prosecuting authority, and in calling for amendment of the Treaty to allow competence in criminal law matters, albeit in this restricted field, to be passed to the Community, is a positive element, the proposal can still be described as \textit{extremely problematic} in every other respect.

First of all, it should be clear that although the activity of the European Public Prosecutor is restricted to crimes against the financial interests of the European Union, the institution would, by its very nature, be involved in the repression of crime and, as such, in both form and content, falls within the issues covered by the third pillar, namely by Title VI of the Union Treaty (Article 29 et seq.), in accordance with the Amsterdam Treaty.

The Commission acknowledges this feature explicitly when it says that the institution of the European Public Prosecutor \textit{amplifies} Eurojust,\textsuperscript{38} for which, as hardly needs to be said, the Treaty of Nice made provision in Articles 29 and 31 of the Union Treaty. Provision for an institution such as the European Prosecutor must therefore come through amendment of Title VI of the Union Treaty rather than of the EC Treaty. But that would \textit{completely alter the landscape in the area of police and judicial cooperation in criminal matters} as compared with the present situation, and it is very unlikely that the Member States would wish to make a \textit{qualitative leap} of that sort. In fact, the only correct legal domain for such a step is the third pillar, and the legal instrument should be a convention which the Member States would be asked to sign and ratify, in accordance, of course, with their constitutional rules.\textsuperscript{39}

\textsuperscript{37} Green Paper, p. 18 et seq.

\textsuperscript{38} Green Paper, p. 17.

\textsuperscript{39} As far as this is concerned, it is self-evident that in the Greek case there would have to be compliance with the conditions and the procedure referred to in Article 28(2) and (3) of the Greek Constitution which, following the general revision, makes clear through an interpretative clause that the Article constitutes a foundation for the country’s participation in the processes of European integration. See Kaîafa-Gbandi, ΠXp 2001, pp. 101-102, in which other references are cited.
However, it is obvious that the Commission will not opt for that solution because the third pillar area does not permit communitised action, which means that all of the very important issues which the proposal leaves for secondary legislation could not be regulated in that way. The preference for regulating those major issues, and even the rules defining financial crimes against the European Union, through secondary legislation, makes the proposal rejectable as far as the Greek legal order is concerned at least, because the definition of the constitutive elements of the crime in the framework of legal acts of Community origin would contravene Article 7(1) of the Greek Constitution which enshrines the n.c.c.p.s. lege. In that Article the concept of law presupposes a legislative process which constitutes a genuine expression of popular sovereignty and of the democratic principle, features which, of course, the legal acts of secondary Community legislation do not have.

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40 See the analysis by I. Manoledakis, *Article 7 of the Constitution*, in Kasimati-Mavria, *Interpretation of the Constitution*, Athens 1999, p. 20, who points out that even generally accepted written international rules (Article 28(1) of the Constitution) cannot constitute a source of criminal law in Greece because the repression of crime can be formulated only by Greek law. In the view of the author, the creation of an offence by international rules in the case of conventions ratified by a law is feasible. See, however, P. Dagtoglou, *The Constitution and the European Economic Community*, in *The influence of the Constitution of 1975 on private and public law*, Athens 1976, p. 77, in which the author notes that the accession of Greece to the European Community on the basis of Article 28(3) of the Constitution creates a new, third level, legal order in Greece, namely European Community law, with legislatures situated outside the Greek framework and beyond regulation by the Constitution. In the view of the author, the revolutionary new element consists not in the content of those rules but in the method via which they reach the statute book and in the fact that they have supremacy over the rules of domestic law. Of course, when Greece joined the European Community it recognised the legal function of the latter. However, this general recognition cannot be said to suffice for the establishment of criminal offences by Community legislative acts, because the recognition of a criminal offence presupposes, as we have said, that its adoption is based on the democratic principle, a safeguard which is imposed, moreover, by Article 28(3) of the Constitution on the basis of which Greece joined the EEC.


Nevertheless, paragraph 3 of the proposed Article 280a of the EC Treaty states that the Council, acting in accordance with the European Parliament co-decision procedure, shall lay down, inter alia, “rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community’s financial interests and the penalties incurred for each of them;”. That provision makes it apparent that the aim is to bind the Member States in regard to the determination of the constitutive elements of criminal offences and the punishments incurred through acts of Community secondary legislation. This, however subverts the n.c.n.p.s.l. principle in the form afforded to it in the Greek Constitution which requires that the punishment and the separate elements of the act which constitute the crime be specified by law. In other words, if the elements of the crime were defined directly by a Community legislative act we would be bound to define them as they are defined in the act; and if the act were transposed into our internal legal order, the crime as a specific form of conduct would obviously have been determined in advance and would not be defined by law but, at best, be restated by law.  

procedure of Article 251 of the EC Treaty (European Parliament co-decision) on all the matters that relate to the European prosecution authority and are referred to secondary legislation, cannot offer a solution.

43 K. Tiedemann (FS für C. Roxin, p. 1411), commencing from the wrong starting point in assuming that Article 280 of the EC Treaty in its present form provides the Community with criminal-law powers for the protection of its financial interests, believes that the promotion of that protection via a Regulation is supportable. For an opposing view see A. Musil, *Umfang und Grenzen europäischer Rechtssetzungsbefugnisse im Bereich des Strafrechts nach dem Vertrag von Amsterdam*, NStZ 2000, p. 70, and Vogel, *Die Kompetenz der EG zur Einführung supranationaler Sanktionen*, Dannecker (Hrsg.), *Die Bekämpfung des Subventionsbetrugs im EG-Bereich*, p. 185.

44 The schema proposed by the Commission endeavours to legitimise and further promote the practice that has been followed for the specification of punishable conduct of Community concern via Directives. As we know, a Directive obliges the Member States to transpose it into their domestic law. Regardless of whether that binding force ought to be developed with reference to the result, it is true that the Community has for a long time been issuing extremely detailed Directives which negate the discretionary capacity of the national authorities, and the European Court has not so far disputed the character of those acts as Directives (see E. Sahpekidou, in Stangou / E. Sahpekidou, *The law of the European Communities and of the European Union*, Thessalonica, 2000, p. 209), and as a result attempts are made to oblige the Member States to adopt specific forms of criminal offences through Directives. See K. Tiedemann (FS für C. Roxin, p. 1404 and p. 1411) who believes that the proviso that the crime be defined by law is met when the national parliament retains the capacity in any form whatsoever for decision-making in respect of the matter, e.g. in regard to the punishments to be imposed for each crime. U. Sieber (*The development of criminal law in the framework of European unification*, Yperaspi 1993. pp. 838-839) and S. Katsios (*Money Laundering*, Thessalonica, 1998, p. 213) think along the same lines. See the main text in connection with the fact that the view mentioned above does not accord with the requirements of the Greek Constitution. See also the reservations of Musil (NStZ 2000, p. 70) concerning the upholding of the n.c.n.p.s.l. principle in the case of detailed Directives which do not allow scope for decision-making by the national parliaments. The Commission is following this practice, nevertheless, in the proposal for a Directive of the European Parliament and of the Council for criminal-law protection of the Community’s financial interests which includes all of the provisions of the Brussels Convention of 1995 and of its additional protocols in which forms of punishable conduct are defined.
On the other hand, it cannot be claimed that the proposed Article 280a, paragraph 3, of the EC Treaty would serve as ‘legislative authorisation’ and thus make it possible to adopt a criminal offence in secondary Community law, because when we speak about legislative authorisation, especially in matters of criminal law, we are accepting that it must be specific both in relation to the basic features of the punishable conduct and to the type of penalty that will be incurred.\textsuperscript{45} However, when we look at the act being proposed by the Commission we see that it is not about such a process, even assuming that the corresponding legal categories could be transferred to legislative acts of the Community, but about the transfer of criminal-law competence of a general form for the making of criminal-law provision for all of the acts which are prejudicial to the Community’s financial interests.\textsuperscript{46} Hence the incompatibility of the proposed amendment of the EC Treaty with Article 7(1) of the Constitution remains.

As has been said, the planned European Public Prosecutor is an institution which belongs irrefutably to the third pillar. This means that any communitised action providing for regulation of its status and operation must inevitably be subject to Article 42 of the Treaty on European Union. That Article provides, following the Amsterdam Treaty, for the possibility of communitised action under the third pillar, but on the basis of a specific procedure. It requires first of all a unanimous decision of the Council after consultation with the European Parliament and stipulates that this should be followed by a recommendation to the Member States that they adopt the decision in accordance with their respective constitutional requirements. And this is precisely where the problem mentioned earlier arises again for the Greek legal order. In other words, for so long as the European Union has, as at present, an organisational structure which continues to permit the democratic and rule of law deficit which is a characteristic of it, and for so long as the European Parliament has a marginal role and there is no institutional safeguarding of the fundamental human rights at the Union level, it would not be right, for Greece at least, to adopt, in accordance with Article 42 of the Union Treaty, a decision of the Council which would introduce communitised action in any third pillar area relating to the repression of crime and, in particular, to the adoption of offences.\textsuperscript{47}

\textsuperscript{45} See Androulakis, Criminal Law, Gen. Part, p. 100.
\textsuperscript{46} See paragraph 3 of Article 280a: The Council … shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular: rules … relating to fraud and any other illegal activity prejudicial to the Community’s financial interests ….
\textsuperscript{47} See M. Köhler, FS für Mangakis, pp. 761-762, for arguments on the same lines in the case of the German legal order. But see also Musil, NSiZ 2000, p. 70.
But nor, therefore, can the schema proposed by the Commission as the legal basis for the undertaking, involving amendment of Article 280 of the EC Treaty and the addition of a new Article 280a, be acceptable, because it communitises third pillar material without recourse to the stipulated procedures. Nor, however, in my view, could the orthodox route of communisation in regard to the specific material through Article 42 of the Union Treaty produce a result at the present time.

At the same time it is worth emphasising that the attention that has to be paid to ensuring that material to be regulated is correctly placed among the various pillars of the EU edifice is not a piece of legal positivism in which the dynamic of developments and the potential for alterability of the objective of individual pillars are ignored. In other words the fact that the third pillar, which encompasses police and judicial cooperation in criminal matters, constitutes a field of intergovernmental cooperation and furthers its objectives on the prevention and combating of crime through closer cooperation between the national authorities and simple approximation of the criminal-law rules of the various Member States is not fortuitous. In fact, the criminal law, in addition to being a quintessential manifestation of state authority, expresses more than any other branch of law the legal culture of its state of origin; but it also has a greater need for the safeguarding of specific guarantee principles than any other branch of law. Convergence in the area of crime repression must not, therefore, be pursued hastily or by imposition, because that could have very bad repercussions. Convergence, above all here, must be achieved by gradual steps and primarily through approximation at the level of authorities. The attempt to deal with a subject such as the establishment of a European Public Prosecutor through the first pillar is wrong, therefore, because as well as everything else it ignores that essential aspect.

In the present situation the only feasible schema for the establishment of such an institution appears to be a convention under which the Member States would cede competence to the Union in the criminal law area in question on the basis of their constitutional rules, with the crimes, the entire procedure for the activity of the European Public Prosecutor and the judicial review of that activity also being determined by the convention. However, I do not think that

50 Articles 29, 31 and 34 of the Treaty on European Union recognise this need. Nevertheless, it is very interesting that the framework decision proposals on terrorism and the European arrest warrant and extradition show the same inclination as Directives in that they seek to bind the Member States to the choices of the European Union through very detailed regulation of the matters that they cover, which is why objections of the same sort are being levelled against them.
51 On this point see Manoledakis, Yperaspsi 1999, p. 1100, who maintains that it does not make sense to speak of a single European criminal-law area in the absence of a unitary European state. On the same subject see also Köhler, FS für Mangakis, pp. 762-763, and KritV 2001, p. 311.
the Union is ready for a step of that sort in the present situation, given what has already been said, particularly as regards the institutional protection of fundamental rights and the continuing existence of the deficit in terms of the democratic principle and the rule of law in the Union.\textsuperscript{52} And the step itself would still be a qualitative overshoot of Title VI of the Union Treaty.

\textbf{III. The proposals in the area of substantive criminal law}

Reading through the proposals on substantive criminal law in the Green Paper one notes a pervasive line of thinking according to which the interventions in the area of substantive criminal law which are considered desirable for the protection of the Community’s financial interests must provide “the minimum needed for the European Public Prosecutor to be able to operate effectively …Once the Prosecutor has been established … experience will show whether it is necessary to amplify the minimum needed …”.\textsuperscript{53} Clearly, substantive criminal law is being deployed to further criminal law procedure,\textsuperscript{54} and this reversal of the traditional relationship of the two branches\textsuperscript{55} simply confirms that the Commission’s prime concern is the effectiveness of crime repression. However, \textit{criminal law, by definition, exists so that offences can be clearly and safely specified, and not so that just as much as is necessary for the operation of a prosecuting authority can be laid down}. That sort of approach, which makes substantive criminal law dependent upon and the tool of the procedure of criminal law, is pregnant with danger for the rule of law and should certainly be avoided.

Of course, the Commission is clear about its concern to ensure the most restricted intervention in substantive law and distances itself from the higher level of harmonisation of the general criminal law proposed in the Corpus Juris drafts,\textsuperscript{56} obviously in order to evade, for now at least, objections which are not pertinent to its basic objective. It predicates a \textit{special total harmonisation or

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\item \textsuperscript{52} On the progressive strengthening of state authorities in the institutional edifice of the Union see G. Papadimitriou, \textit{Supranational and state authorities in the EU}, Athens 2000, p. 22 et seq.
\item \textsuperscript{53} Green Paper, p. 34.
\item \textsuperscript{54} N. Paraskevopoulou …… (to be published in IIXp).
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unification “in matters within the specific jurisdiction of the European Public Prosecutor, such as the definition of the components of offences and the corresponding limitation periods” and considers an approach involving “reference wholly or partly to national law … to be the most suitable method for determining general rules in matters going beyond the protection of the Community’s financial interests.”

However, as well as creating contradictions, this position gives the reader the impression that it is not fully understood which general rules relate or do not relate to the area of protection of the Community’s financial interests.

In fact, it is clear from the deliberations of the Commission that harmonisation or unification in matters of the definition of such things as participation, the content of mens rea and, in particular, of gross negligence, and of fraud, in relation to the financial interests of the European Union are “outside” the area of protection of the Community’s financial interests and do not need to be specifically regulated, and that reference to the national legal orders is sufficient. However, in our view, the content of mens rea and what does and does not constitute attempt or participation clearly are determinative of the area of protection of the Community’s financial interests when they relate to specific crimes. The resort to the national legal orders for those aspects will leave open a large number of areas of differentiation in the Member States, there will be no equivalent protection of the Community’s financial interests and the equal treatment of litigants to which the Commission refers selectively in furtherance of the argument for the single arrangement on limitation will be challenged in connection with a series of other matters, such as those that have been mentioned.

Those factors make it clear that the Commission’s choices lack internal cohesion, cannot serve the objectives which the Commission itself invokes and, essentially, do not change the situation in the area of substantive criminal law in relation to the Convention of 26 July 1995 and its additional protocols. To the extent, moreover, that the Commission recognises that the criminal law diversity of the separate legal orders should continue to exist, one cannot understand why it is necessary to move towards a qualitative overshoot of such proportions at this stage, particularly when the adoption of Eurojust will bring new opportunities for assistance in the prosecution of cross-border financial crime and of organised crime and while so much is already being done to develop better interventions in the area of mutual judicial assistance in criminal

57 Green Paper, pp. 33-34.
58 Even the Corpus Juris, despite the advanced form of unification of the rules in the general part, is unable to avoid points on which the separate national legal orders will necessarily differ in view of their differing perceptions, such as concerning the system of the dependence of participation on physical authorship. (see Kaiafa-Ghandi, nXp 2001, pp. 105-106).
59 Green Paper, 40.
cases\textsuperscript{60} and arrangements for mutual recognition of final verdicts in the same area.\textsuperscript{61}

Without prejudice to this basic position, I will make a number of short observations on the arrangements proposed for substantive criminal law on issues which I consider important, given that the way to the harmonisation of criminal law in the EU is left open by Article 34 of the Union Treaty independently of the schema set out in the Commission’s proposal in the Green Paper.

First of all I want to mention the mentality which pervades the definition of the most basic of all the crimes which are of concern to the Commission, namely that known as fraud affecting the EC’s financial interests. In the Commission’s proposal for a Directive this offence retains the form given to it by the Brussels Convention of 26 July 1995\textsuperscript{62} and is a hotchpotch of different forms of conduct harmful to Community property\textsuperscript{63} which may not even involve the misleading of another person but are included under the heading of fraud against the Community’s interests all the same. Obviously, the provision is indicative of the attempt to devise a common approach for different forms of criminal conduct such as fraud and smuggling, but as such it sacrifices a substantial degree of accuracy in formulation and, through its title in particular, equalises entirely different forms of conduct with fraud. Hence we see a manifest alteration of the traditional function of the definition of the crime, because the definition no longer focuses so much on accuracy and on conveying a clear message concerning systematically different categories of offences as on providing the greatest possible universal penal coverage consequential on damage to the budget of the European Communities.

\textsuperscript{60} Act of the Council on mutual judicial assistance in criminal cases, 2000/C197/01.


\textsuperscript{62} It is worth mentioning that in the Green Paper the Commission puts its faith in the agreement between the Member States on specific offences achieved through the Brussels Convention of 26 July 1995 and its additional protocols which relate to protection of the Community’s financial interests, and that it mentions the acquis (Green Paper, pp. 34-35). However, we should not ignore the fact that the proposal in the Green Paper for the regulation of these matters by Community secondary legislation, even without the widening to encompass other offences or possible regulation of a general part that the Commission is talking about, would function in a totally different way if provisions of that sort were to be introduced through a Directive. The binding force of a Directive, the deadlines for transposal and the preclusion of reservations which distinguish it from the legal instrument of a convention easily explain the difference in the result and show why the Member States must be on their guard.

\textsuperscript{63} See the analysis by Ch. Mylonopoulos, Crimes against ownership and property, Criminal Law, Special Part, Athens, 2001, p. 423, the paper The dogmatic foundations of criminal law in the new millennium by the same author which was read to the Association of Greek Criminologists and published in Criminal Law in the New International Environment, p. 54. See also I. Anagnostopulos, Fraud and Community fraud, ΠΧπ 2001, p. 759, and O. Tsolka, Fraud against the financial interests of the European Communities, ΠΧπ 2001, p. 753.
This approach is taken even further in the relevant Corpus Juris proposals. The draft proposes two extensions of the offence, namely the affirmation of it in a circumstance in which the Community’s financial interests may be damaged and in a circumstance in which it is perpetrated as a result of gross negligence. The conversion of the specific wrongful act into a crime of endangerment brings the offence forward at a very premature stage with the result that the causal relationship between the illegal conduct and the contingent result is essentially rendered superfluous, since the harm to the Community’s financial interests as a magnitude which did not occur but which could have occurred depends on many parameters which as a general rule are uncertain.

Furthermore, a crime of fraud due to gross negligence, in addition to being logically irreconcilable with the classical meaning of fraud at least, creates a serious problem – as does the extension of the offence in the area of endangerment – by violating the Community principle of equal treatment in the protection of the Community's financial interests. The legal orders of some Member States, such as Greece, do not provide protection for state property to an extent which justifies choices of that sort.

However, we also find indifference as regards the conclusions of, and, in particular, the limits set by, the penal dogmatic with reference to the major crime of money laundering. Here we meet the familiar provision of Directive 91/308/EEC that the offence “shall be regarded as such even where the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country.” For the provision to be correct, however, it should be made clear that the crime cannot exist if the activity which generated the property is not an offence in the country in which it took place. In other words, the double offence is made into a necessary element by the very nature of the crime because its dependent character makes it obvious that there cannot have been laundering of proceeds when the proceeds were acquired lawfully in the place in which they were acquired. But it seems that this substantive element is being inactivated in the cause of effective repression.

Lastly, from the standpoint of the methodology being promoted for the offence, there is another factor which arises in regard to the crime of bribery of a


65 See Manoledakis, op. cit. p. 100, and Kaïafa-Gbandi, IXp 2001, p. 107, on this problem from the standpoint of the Member States in relation to the equality principle.

66 On the importance of the penal dogmatic and, in particular, of the limits that it sets, see N. Androulakis, The penal dogmatic and its repercussion in practice 50 years on – an example (awaiting publication).

67 Stree, Sch-Schr, StGB, p. 25. Aufl., Art. 261, Rn 6.
Community official and which looks as if it might be passed on to other Community level offences that are being created. The principle pole of the wrong inflicted by that offence is, of course, harm to the lawful good of the Community’s services, whereas the possibility of harm to the Community’s financial interests is added simply to justify including the offence within the perceived understanding of crimes against Community property. On that basis, however, one could widen the scope of those crimes to include a large number of other acts and end up with a miniature Community criminal law code selectively consisting of various crimes which may be prejudicial to other equitable property but are converted into crimes against Community property through addition of the factor of possible endangerment of that property, as is shown, moreover, by the offences being proposed on the basis of the Corpus Juris and which the Commission mentions in the Green Paper.

By proceeding in that way the Commission can no longer claim to be concerned exclusively with the protection of the financial interests of the European Union and seek communitisation for that protection. This comes out sharply in the discussion of the definition of “conspiracy”, which is the basic problem in the definition of organised crime and a factor in a vary large number of offences over and beyond financial crimes against the Community. Nor, indeed, can the assumption that one does not have to wait until the Community suffers financial damage before prosecuting those intent on such acts be used as an argument for a possible formulation of conspiracy, since those acts, such as, in particular, fraud against the Community’s interests, are also punishable at the stage of attempt.

Lastly, as regards the other pole of the crime, namely the penalties, it is important to remember when considering the proposals in the Green Paper that

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68 Green Paper, p. 36.
69 Green Paper, p. 37 et seq.
70 Green Paper, p. 37.
71 Green paper op. cit.
72 Here it is worth pointing out also that in regard to the fundamental issue of the determination of criminal liability as individual or collective the position of the Commission on the question of any establishment of the criminal liability of bodies corporate is not absolutely clear. In the Green Paper proposals the Commission appears to take a position in favour of such liability when it says that “legal persons should be liable for commission, participation (as accomplice or instigator) and attempts as regards fraud ….” Nevertheless, on the basis of Article 9 of the proposal for a Directive on the criminal-law protection of the Community’s financial interests it can be maintained that it is possible for the Member States to restrict their action to administrative sanctions. The position in favour of the imputation of criminal liability to legal persons has been much criticised from a theoretical standpoint, and there is no need to analyse here the problems that would be generated by such a move (see Kaïafa-Gbandi, ΙΙΧυ 2001, p. 103 et seq., in which other bibliographical references are provided; also, recently, Köhler, FS für G. A. Mangakis, pp. 752-753 and p. 763). For the sake of the representatives of the Commission I will reiterate the basic themes of this objection in the light of its specificity in the case of Greece: a) the self-standing criminalisation of actions of legal persons is contrary to Article 7, paragraph 1, of the Greek Constitution, because legal persons as such never perpetrate, and pursuant to that provision the crime and the punishment are contingent on the
any attempt to harmonise the separate national systems in the direction of current or new, principal or additional, penalties, cannot disregard principles which may be enshrined in the constitutions of the Member States, such as in the case, for example, of the proposal in the Corpus Juris for the ordering of confiscation against a person who is not convicted because of lack of mens rea or insanity, even when the confiscated objects do not represent a threat to public order.\footnote{For an analysis of the matter see Kaïafa-Gbandi, ΠXp 2001, p. 103 et seq.} Above all, however, it cannot disregard the principle of proportionality of the penalty to the offence and to the fault of the offender in favour of what is manifestly a desired dissuasive\footnote{Green Paper, p. 39.} effect of the penalties.\footnote{See Köhler, KritV 2001, p. 310.}

To sum up, one could say that as well as not being harmonious with the Tampere conclusions the preferences expressed by the Commission in the Green Paper in connection with the provisions in the area of substantive criminal law which are necessary for the activity of the European Public Prosecutor subordinate criminal law to criminal law procedure, are not convincing as regards the restriction of the undertaking exclusively to the protection of the Community’s financial interests, disregard important limits which have been elaborated by the penal dogmatic of the European area, and are not safeguarded against the possible violation of criminal law guarantee principles which are enshrined in the constitutions of various Member States.

Those observations do not mean that we should avoid recognising one very important positive contribution of the Green Paper, namely the very fact that it opens up a public debate on crucial issues of crime repression in the EU. That debate could provide important opportunities for creative thinking at the level

perpetration of an act. Where there is absolutely no nucleus of an act, neither a person nor any other entity can have committed a crime. The hypothesised act of a legal person is a fiction, and criminal liability cannot be attached to that person for the purpose of overcoming whatever difficulties of proof may arise in relation to the perpetration of the crime by a natural person; b) the introduction of criminal liability for legal persons is contrary also to the constitutionally enshrined principle of fault, because punishment of a legal person cannot be founded on the substructure of an internal relation of the accused person to his act on the basis of which it would be possible to attach blame to the person. Hence the entire category of accountability for the act as a fundamental pole of the crime is absent, with the result that punishment is imposed without the concurrence of fault. In this regard it has very rightly been noted that “There are no substantive criteria which explain why law can be deemed criminal law where the concept of the act is redundant, where the distinction between instigation and participation is completely absent, where there is no place for intent, negligence, the conscience of the wrongdoer and no ground for waiving the imputation. The criminal law that is concocted by establishing the criminal liability of legal persons is something like that. In such a form of law there are no self-evident factors and all the fundamental guarantees which the criminal law offers are absent, and this means that the argument of those who prefer criminal liability of legal persons to administrative liability on the ground that the latter does not afford the guarantees of the former lacks force. The Commission should therefore not persist with a solution of unification of the separate criminal law systems as regards recognition of the criminal liability of legal persons, especially when there are legal orders, such as that of Greece, with constitutional provisions which do not allow of that liability.
of principles, particularly concerning the endeavour to harmonise the criminal
law of the European Union. Those principles are vital to us at this point in time
because the intense activity that is taking place in the third pillar area cannot
continue to evolve unless it is given an overall and systematically structured
shape in which the cherished tenets of our European legal culture are respected.