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FROM THE GREEN PAPER ON CRIMINAL-LAW PROTECTION OF THE FINANCIAL INTERESTS OF THE COMMUNITY AND THE ESTABLISHMENT OF A EUROPEAN PROSECUTOR

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0. Introduction

One of the many merits of the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor is that it has focused debate on the concrete objective, clearly defined in terms of time, of the feasibility of the plan summarised in its title, and the possibilities for its implementation.

It therefore represents a sort of (temporary) point of arrival, following an evolutionary process of more than twenty years, which has managed to overcome the initial conviction that criminal law and Community law have nothing in common. This was achieved through non-stop study and research, judgments, draft legislation and proposals for legislation with diverse legal content, which involved the Community institutions – from the Court of Justice and the Commission to the European Parliament – in addition to a significant though limited group of scholars of European law and criminal procedure,

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2 The starting point is traditionally seen as the conviction widely held until the 1970s that criminal law does not fall within the competence of the Community, but instead within the competence of each Member State, as stated, for example, in the Eighth General Report on the Activities of the European Communities of 1975, cited in the introduction to the well-known work by G. Grasso, Comunità europee e diritto penale. I rapporti tra l'ordinamento comunitario e i sistemi penali degli Stati Membri, Milan 1989, p. 1, which also provides further references to the established case law of the Court of Justice.
court officials, policemen and civil servants, all with various competencies mainly in the fight against fraud and associated illegal activities. Latterly, lawyers have also joined this group, united in the effort to find effective and workable solutions both in terms of the law and its application to make up for the lack of instruments to challenge and suppress the most serious forms of financial crime, which are having an increasingly detrimental effect on the financial interests of the European Communities.

The Green Paper, a consultative procedure intended to broaden the dialogue using the most open method possible between all the interested parties, whether institutions or not, sets out deliberately to provide the Commission with wider means of evaluating not only the objective represented by the general proposal already adopted, to establish a European Prosecutor to guarantee effective criminal-law protection of the financial interests of the Community, but also the definition of its jurisdiction, methods of operation, rules for action and finally, the legal context in which it is to operate.

But the response to the initial question posed by the Green Paper concerning the general outline for the proposed establishment of the European Prosecutor (the 'general question' to which paragraph 1 below is dedicated) requires a brief analysis of the structural, regulatory and cultural conditions on which it is based. These will also be of particular importance when it comes to answering further questions later on. However, it should be pointed out that this contribution is limited – as appropriate when comparing a number of bodies with different competencies – only to the field of substantive criminal law, which falls within the specific competence of the author; for this reason a response is only being offered for the two further questions relating to these matters, which concern the offences for which the European Prosecutor should have jurisdiction and their definitions (Question 2 in the Green Paper, to which section 2 below is dedicated); and whether there is a need to adopt further common rules other than those proposed by the Commission (Question 3 in the Green Paper, to which section 3 below is dedicated).

1. The general outline of the 'general proposal' to establish a European Public Prosecutor (general question).

The 'precondition' of the debate, essentially posed by the Commission, that it is not in question that a European Public Prosecutor should be established, since this is a general proposal that has already been adopted, seems in substance acceptable, because it can be seen that the necessary structural, regulatory and cultural conditions are already in existence.

1.1 Structural conditions

In terms of the structural conditions of the feasibility and appropriateness of the proposal, we only have to recall the current stage of development of the European common market, strengthened by a monetary union that encompasses the majority of the Member States, giving a concrete economic dimension to the territorial unity the European Union set out to achieve through the creation of an "area of freedom, security and justice" (Article 2 of the Treaty on European Union).
Using criminal law to strengthen the instruments that protect the budget and financial interests of the Communities therefore seems the logical next step in the organisation of Europe at this advanced stage of integration. Its subsequent development needs to be guaranteed as effectively as possible, if necessary by preventing and combating crime, particularly financial crime and especially fraud (Article 280 of the EC Treaty and Article 29 of the Treaty on European Union, which expressly excludes the powers of the Community on these matters).

This is crime that is organised and executed transnationally, often profiting from the vast areas of impunity that result from the lack of harmonisation and limitations on the criminal jurisdiction of the individual Member States, infiltrating the operating mechanisms of the economic and political system, and therefore representing a serious threat to the operation of the common market and Community institutions, as well as democracy based on rule of law.

Effective criminal-law protection of the Community's financial interests therefore has an importance that goes beyond the protection of its economies; it must guarantee the essential conditions of operability of European and State institutions, which are crucial to the continuing development of the current process of integration, particularly in view of the forthcoming enlargement to include a larger number of applicant countries.

1.2 Regulatory conditions

To be effective, the criminal-law protection of Community interests must be equivalent in all Member States, in line with a basic requirement for certainty and reliability of conditions that must be common throughout the Union if they are to guarantee true freedom of economic enterprise and, more generally, equal protection of citizens and the conditions of intervention of Community institutions.

The increasing size and autonomy of action of these institutions is reflected in the gradual expansion of the Community budget, which provides resources essential for implementing common policies and intervention in the areas of competence of these institutions.

It thus seems logical to recognise the competence of the Community to possess highly effective instruments of protection, such as those offered by criminal law, in view of the demonstrated inadequacy of relying on the protection of the criminal justice systems of Member States in accordance with the principle of assimilation with corresponding national interests, a principle laid down some time ago by the Court of Justice on the basis of the general obligation of Community solidarity set out in Article 5 (now 10) of the EC Treaty, and expressly sanctioned by Article 209 A of the EC Treaty, introduced in 1992 by the Treaty of Maastricht.

Today, the new Article 280 of the same EC Treaty, which replaced it in the reforms introduced by the Treaty of Amsterdam in 1997, recognises explicitly that it is the direct responsibility of the Community itself to intervene, alongside the Member States, in the

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3 Since the famous 'Greek maize' judgment of 21 September 1989, in which the Court of Justice confirmed the obligation of Member States to protect the financial interests of the Community using 'effective, proportionate and dissuasive' penalties, which should not be lower than those used as penalties for their own corresponding interests.
prevention and repression of fraud and other crimes that harm its financial interests, to
guarantee not only 'effective' and 'proportionate' but also 'equivalent' protection
throughout the territory of the European Union, obviously in line with the principles of
subsidiarity and proportionality, which should always guide Community actions, as well
as the initiatives of the European Union4.

The principle of subsidiarity, which in matters of criminal justice actually assumes a
role of secondary importance, since the use of sanctions of this type should in itself be a
response to the criterion of *extrema ratio*, becoming legitimate only when other
preventive means not associated with criminal law are inadequate. This is combined with
a need – for areas not within the exclusive competence of the Community – for the
objectives to be incapable of being "sufficiently achieved by the Member States", since
"better achieved by the Community", obviously out of respect for the *principle of proportionality*, that is, without going "beyond what is necessary to achieve the objectives
of this Treaty" (Article 5 of the EC Treaty, which also refers to the final paragraph of
Article 2 of the Treaty on European Union).

The reservation expressed in the second part of Article 280(4) of the EC Treaty –
though in truth the subject of differing interpretations5 – which states that the measures
that can be taken by the Council, using the co-decision procedure with the European
Parliament under the terms of Article 251 of the Treaty, "shall not concern the application
of national criminal law or the national administration of justice" is consistent with these
principles and should be read in the light of them.

This reservation does not in fact affect the recognition of the criminal-law
competence of the European Community, delimited by the need to protect its financial
interests. Neither can it be said that the scope of the plan for a European Public
Prosecutor is too narrow or restrictive – as some parties maintain6.

In fact, the subsidiary nature of Community competence and the existence of
approved systems for the criminal-law protection of other legal interests and property of
the person and the community, including their fundamental rights, which are certainly of
a higher order, if considered separately, than the financial interests of the Community, are
already subject to criminal-law protection in the legal systems of the various Member
States and now internationally by the additional new system set out in the Rome Statute
establishing the permanent International Criminal Court (which will enter into force on 1
July 2002).

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5 In a different sense from that asserted here, see G. Grasso, *Relazione di sintesi* in G. Grasso (ed.), *La lotta contro la frode*, cit. 393 s, especially 407 s, with further indications.

6 S. Moccia, *L’involuzione del diritto penale in materia economica e le fattispecie incriminatrici del Corpus Juris*, in N. Bartone (ed.) *Diritto penale europeo. Spazio giuridico e rete giudiziaria*, Padua, 2001, p. 33 s., 34, criticises the purported narrowness of Community political orientation, reflected in criminalistic choices, particularly in the special cases of offences in the Corpus Juris, which has put “all’apice dei suoi interessi valori di tipo economico-finanziario [economic and financial values at the top of its list of interests]".
In Europe and throughout the world, meanwhile, the fight against organised transnational crime, including computer crime, terrorism and other types of crime, still relies on diverse and more traditional instruments of international cooperation and harmonisation: for example, as articulated by Articles 29 and 31 of the Treaty on European Union7, or the Conventions of the UN and the Council of Europe, respectively, on transnational organised crime, opened for signature in Palermo from 12 to 16 December 2000 and at 'Cybercrime', opened for signature in Budapest on 23 November 2001.

For this reason the decision to limit the scope, or rather, the subject of the proposed Community criminal-law protection to the financial interests of the Community for now, which could and should be realised quickly, as set out in the Green Paper, seems to be acceptable and appropriate for the specific and limited current competencies of the Community in matters of criminal law – and conversely also for the lack of political and judicial conditions that would be required for a hypothetical general 'criminal codification' to take place at European level, or else for the proposal of a 'model criminal code' for the continent. It should be borne in mind, in any case, that these are not interests of secondary importance or a financial dimension alone, if we consider the importance and extent of the Community's responsibilities and the delicate nature of the Community decisions and policies that revolve around the budget.

1.3 Cultural conditions

With limited reference to the specific field of criminology, it seems important to highlight how the push towards the 'Europeanisation' of criminal law occurring alongside the development of the process of European integration referred to above, has already caused a move from the simple method of legal comparison, involving the juxtaposition of different legislations and experience, to a determined focus on identifying or creating models for European institutions of criminal justice, based on the intense critical comparison of a disparate assortment of solutions]. This is not limited only to continental legal systems, but extends to systems of common law, investing them not only with substantive law but also with procedural law and the different techniques of protection available, such as administrative sanctions at both a Community and national level8.

As the increasingly extensive interest in the subject on the part of criminologists in the various Member States demonstrates, it could be considered that there are already

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7 These mention in particular organised and other types of crime, and in particular terrorism, the trade in human beings and offences against minors, illegal trafficking of drugs and arms, corruption and fraud. The question of whether the fight against fraud (mentioned in Article 29(2) of the Treaty on European Union) falls within the competence of the European Union, in the context of the instruments of the third pillar, or Community instruments (the first pillar), must be resolved immediately according to the 'principle of pre-eminence' of the European Community, with respect to the objectives and instruments of the European Union, confirmed by Article 47 of the Treaty on European Union and an implicit 'condition' of the opening text of Article 29 of the Treaty on European Union.

8 See the research on the administrative penal systems of the Member States, edited by Tiedemann, Grasso and Bacigalupo; on the compatibility of the Corpus Juris with the systems of criminal law of the Member States and applicant countries (the 'monitored' study of the Corpus Juris, edited by Delmas Marty and Vervaele); the innumerable studies, articles and scientific conferences, many of them international, on the subject (e.g. Trier, 1999 and 2001).
enough cultural and conceptual instruments for the construction of a 'Community
criminal law' to proceed in a dogmatically and systematically coherent way, even if they
do not actually profess the existence of a corresponding European criminology.

1.4 The limitations of the general outline proposed: preliminary comments.

The proposal set out in the Green Paper nevertheless lends itself to a thorough review.
The general outline it presents is particularly reductionist, appearing to focus mainly
on the introduction of the European Prosecutor as a new Community institution, rather
than a body intended to apply a totally new system of Community-based criminal justice,
in a supranational context of substantive and procedural law.
The establishment of the European Public Prosecutor is given marked prominence, while
the creation of the criminal justice system according to which and in the context of which
the Prosecutor will operate is relegated to the background, seemingly reduced to a rather
sundry assortment of rules and conditions governing the prosecuting body, as if these
rules and conditions were merely 'instruments' allowing it to function properly.

Even without taking up the logical sequence of events put forward by Prof.
Bacigalupo in his report, which argues that the creation of the substantive criminal justice
system should come first and the body responsible for applying it (the European
Prosecutor) should be established only once that has been achieved, since its powers of
prosecution can only be referred to predetermined offences and penalties, it certainly
seems crucial from a political and legal point of view that the operation of the prosecuting
body and the substance of its powers should be validated before it can wield these powers
in the European criminal justice system. For this system, though not exhaustive or
autonomous with respect to the legal systems of the Member States with which it must be
integrated and interact, has sufficient characteristic features to be a 'system' in its own
right, liable to be constructed as a whole, albeit motivated from a number of sources and
principles according to clear criteria that define its outline and characteristics.

Only on this condition can it be considered that the investigative and prosecuting
powers granted to the European Prosecutor are bound to the principles of legality and the
duty of criminal prosecution, as it has been stated that they should be. This would provide
guarantees and certainty not only for defendants but also more importantly for the
independence and autonomy of the prosecuting body itself with respect to the political
and administrative power of other Community institutions and indeed the Member States,
as well as financial power in its various manifestations.

In Italy, for many years, from the systematic analysis of the rules governing our
Constitution, criminal doctrine has shown how the necessities of legality and absoluteness
of criminal law (Article 25(2) of the Constitution), which is viewed as a system in itself,
is both logically and historically bound to the principle of the duty of criminal prosecution
(Article 112 of the Constitution), on the one hand, and to the guarantee of defence as an
'inviolable right' (Article 24 of the Constitution) on the other.

It is therefore necessary that the criteria for exercising the power of prosecution be
directly linked – in limited and comprehensible terms – to the content of the definitions of
offences to be applied to concrete cases, without leaving any room for inappropriate,
opportunistic evaluations or for politically and criminally motivated decisions (or Tout
court policies) by the courts. These would expose the European Prosecutor to political
polemic and would obscure not only any common legislative parameters, but also the meaning of a 'community based on law' towards which every Community institution should be working.

1.5 Concerning the differentiated levels of harmonisation.

More specific critical observations are founded on these premises with respect to the basic choice put forward in the Green Paper (pages 34-35) in favour of 'differentiated levels of harmonisation' in which the intention is to use two different approaches together in an as yet undefined way: one of unification or 'total harmonisation', which would be limited to 'matters within the specific jurisdiction of the European Public Prosecutor', represented by the 'definition of the components of offences' or of the 'corresponding limitation periods'; the other of 'reference wholly or partly to national law' for most aspects of the (substantive) criminal framework.

But beyond the observation that reference to national law cannot be to one single 'national law' but must be to a number of different 'national laws' present in the Community, the distinction and identification of isolated areas of competence of the European Prosecutor within the criminal framework does not seem logically sustainable. Criminal law is in fact a technique for protection or a 'framework' intended to operate in very diverse areas in terms of substantive content. To be able to provide effective protection (as required by Article 280 of the EC Treaty), it must fulfil certain general conditions in terms of its ability to function as a system.

Thus, if there is no guarantee that it will be at least slightly systematic, or that the general regulations governing the conditions and limits on the imputation of liability, on which the application of penalties for the various crimes is based, can be coherently constructed as an autonomous criminal justice system, criminal law cannot guarantee the general and preventive effectiveness of the sentence itself and precludes the possibility of achieving its objective of protection, as well as its own substantive validation.

These general conditions for the operation of the system, ignored in the Green Paper, must therefore be considered an essential parameter for evaluating whether the limits of proportionality and subsidiarity of Community intervention in this area have been respected (see above, point 1.3).

Now, while it is the criterion of 'unification' (or 'total harmonisation') that not only greatly facilitates the action of the European Prosecutor, but more importantly guarantees the equivalence of protection in all Member States, as well as the absolute certainty of the system, it does not seem that we can allow an approach to resurface at the crucial moment of definition of the general conditions of criminal liability (imputability, fraud, guilt, complicity, attempted crime, liability of legal persons, etc.) that is still linked to the criterion of trust in the different frameworks of the national legal systems. This approach has already been abandoned by the Treaty of Amsterdam in order to guarantee autonomy in the direct attribution of jurisdiction to the Community, as an instrument necessary to achieve equivalent protection in all the Member States (Article 280 of the EC Treaty, examined in 1.2 above).

1.6 Concerning the general acquis communautaire in criminal law
Within the context of the *acquis communautaire* concerning criminal law in the strict sense, until now rather limited, and in the wider context of the instruments of the European Union, some fairly precise information emerges that confirms the observations made, highlighting levels and instances of total harmonisation in the context of criminal law that go further than the options outlined in the Green Paper.

In the first place, in the context of the application of non-criminal penalties in the strict sense, that is in the domain of *administrative penalties*, the Court of Justice of the European Communities has worked extensively to produce a rich and coherent *acquis communautaire* regarding certain general principles of the 'punitive' system, which happen to be equally valid – *a fortiori* for totally irrefutable reasons – in the field of criminal penalties. Such is the case with the principles of non-retroactivity, culpability, and the recognition of reasons for exclusion that are both subjective, such as mistakes, including errors of law, and objective, such as extenuating circumstances, criteria for apportioning and cumulation of penalties, etc.⁹

Following an in-depth study of the systems of administrative penalties of the Member States of the European Communities, this work has led to the issue of Regulation (EC) No. 2988/95 of 18 December 1995, in which these principles are expressly recognised in positive terms, with the effect of enabling the clear and systematic construction of a general criminal law, including the important regulation of relationships between offences subject to Community and national penalties and reference to possible concurrence with criminal offences in the strict sense.

In terms of *criminal penalties*, the current situation, in which jurisdiction is divided between Community law and instruments of the third pillar of the European Union, oblige us to look particularly at the latter, issued in vast number yet largely unratiﬁed and unimplemented to date.

In particular, the main references come from the Convention of 26 July 1995 on the criminal-law protection of the financial interests of the European Community (PFI Convention) and the related additional protocols of 1996 and 1997, stressing that the core *substantive criminal law* of these provisions was assimilated in the Proposal for a Directive presented by the Commission on 23 May 2001, on the stated assumption of Community competence in criminal law.

In all these instruments there are not only definitions of specific crimes, such as fraud against the financial interests of the Community, the corruption of public ofﬁcials including those from countries outside the Community, clarification of the definition of money laundering, which is already the subject of international conventions and Community directives, but there is also signiﬁcant regulation of *general institutions*, with particular reference to the punishable nature of *attempted crime, organised crime* in its various forms, incitement, complicity and abetting. There are even regulations governing the *wilful subjective element* and requirements specifically concerning its proof (which can be deduced from external elements), not to mention the liability of legal persons for *penalties*, though not necessarily of a criminal nature, and finally *limits on penalties*, including minimum penalties, with reference to varying levels of severity for particular offences (e.g. Community fraud in excess of a certain amount), with provision for

⁹ See the extensive analysis by S. Riondato, *Comunità europee e diritto penale*, Padua 1996.
subsidiary or prohibiting penalties and cases of compulsory confiscation, including provision for an equivalent amount.

Therefore in this context of criminal penalties or at least punishments, a level of 'total harmonisation' already seems to have been achieved even for essential institutions that are general in scope, evidently perceived as necessary objects of intervention to guarantee the functionality of the system as a whole.

1.7 Excursus on the International Criminal Court System

The new international criminal justice system outlined by the Rome Statute establishing the permanent International Criminal Court could be used as a significant reference when drawing comparisons.

A new jurisdiction has even been created for the Court, one which is independent of the jurisdictions of the individual States and the United Nations, fully endorsed by the principle of legality (see Articles 22 and 23 of the Statute), to guarantee criminal-law protection for legally protected interests, specifically assumed in its universalistic dimension, independently of the political will of the individual States, through the attribution of powers of prosecution to an independent Prosecutor's Office. For this purpose however, it has been necessary to define general principles of criminal law alongside the definitions of offences (Articles 5 to 8 of the Statute, combined with 'criminal elements') that would form a basis for the uniform application of these offences: in particular with rules on individual criminal responsibility (Article 25 of the Statute) specifically dealing with complicity and the different types of organised crime, as well as the objective and subjective characteristics of contribution to the commission of a crime (Article 25(3), which punishes not simply the commission of a crime individually or with others, but also soliciting or inducing, aiding or abetting, or contributing in any other way to the commission of a crime (paragraphs a), b), c) and d)); a specific offence of attempting to commit a crime (recognised as an action "that commences its execution": Article 25(3)(f)); setting the age threshold for criminal responsibility at 18 years; the explicit exclusion of any immunity on the grounds of official capacity (such as Heads of State or Government, etc.). It also sets out the specific criminal responsibility of commanders and other superiors for crimes committed by those under their control (Article 28); it expressly excludes the absolute inapplicability of statutes of limitations (Article 29), provides rules regarding the subjective element (Article 30) and grounds for justification or exclusion of guilt and liability (mental illness, state of intoxication: Article 31(a) and (b); legitimate defence and state of duress: (c) and (d); mistakes of fact or mistakes of law: Article 32), and in particular limiting the use of the poor excuse that the crime was committed on the order of a superior (Article 33), since this is likely to be a situation that recurs frequently in cases submitted to the Court for judgement.

Finally, as an effective guarantee of the independence and legality of the action of the Prosecutor and the exercise of the jurisdiction of the Court, not only have particular conditions been set out as regards the status of the officials (Articles 40 and 42 of the Statute), but more importantly, also as regards the autonomy of the system, which is based on the complete legal discipline of all the institutions – including general ones – necessary for it to operate as a system in its own right, including details of the rules and procedures for dealing with any loopholes and shortcomings that may become apparent as
it is applied (from the issuing of the 'elements of crimes' ex Article 9 and the 'rules of
procedure and evidence' ex Article 51, to the integrating, though subsidiary, role to be
played by the Court ex Article 21, which is allowed to apply treaties and principles of
international law, and general principles of law that it may derive from national laws of
the world's legal systems).

1.8 Conclusions on the general outline of the proposal

These arguments do not intend the conclusion to be drawn that a complete and
autonomous 'criminal codification' is required to provide a legal basis that is sufficient to
ensure the effective independence of the European Prosecutor, one that safeguards its
autonomy particularly with respect to political policy or dependence on other Community
institutions; however, it seems fairly sensible to think that at least the basic rules needed
to construct an 'autonomous system' of common criminal law should be identified, even if
only to explain it.

This requirement also reflects the rationale behind Article 280 of the EC Treaty,
which by setting out the objective of 'equivalent' criminal-law protection in the territory
of all the Member States of the Community, demonstrates the unequivocal will to rise
above the previous mechanism of entrusting punitive power to the systems of the Member
States.

While intervention by the Community is justified on the grounds that the objective
cannot be achieved by action on the part of the Member States, even without doing more
than is necessary to achieve this objective, it is evident that the parameter of
proportionality must refer to the actual achievement of an 'equivalent' protection
throughout the territory of the Community. This presupposes the prior definition of
judicial rules and conditions that permit the application of an albeit limited core 'common
criminal law' suitable for the 'equivalent' repression of fraud and other crimes that are
detrimental to the financial interests of the Community, throughout the territory of the
Union.

This is the only way that criminal-law protection, selected as the best method for
guaranteeing the protection of these interests, can reach a sufficient level of functionality
and rationality as to be able to guarantee the 'efficacy' that is hoped for.

2. Definitions of offences in the Community criminal justice system (Question 2)

Question 2, 'For what offences should the European Public Prosecutor have
jurisdiction? Should the definitions of offences already provided for in the European
Union be amplified?' also appears to reflect, even in the way it is formulated, the general
outline criticised above.

The definitions of offences are in fact simply considered to be rules that 'delimit the
jurisdiction' of the European Public Prosecutor, where instead they should be defining the
substantive area of 'common' criminal unlawfulness, where responsibility for punishment
is given to the European Public Prosecutor’s Office.

At any rate, the identification of the core offences in the triad of fraud, corruption and
money-laundering definitely seems acceptable, given the connection between these
crimes and the importance they have acquired in the context of transnational crime, as
recognised not only by conventions and protocols of the third pillar, and the Commission's proposal for a directive, but also the more recent UN Convention on transnational crime.

The need for a sufficiently high level of precision as regards the definition of these offences must, however, be stressed, since they are actually to be applied, as correctly stated in the Green Paper (p. 35), both so that the principle of legality can effectively be respected in terms of special criminal law, in accordance with the requirements of Article 7 of the European Convention on Human Rights, and because the very concept of a requirement for criminal prosecution logically dictates the exact definition of the offence, thereby triggering the obligation to use it.

Concerning fraud (point 5.2.1.1 on pages 36-37 of the Green Paper) the wording proposed by the Corpus Juris is preferred, since it not only unifies the hypotheses of commission and omission with respect to both Community expenditure and revenue, but it also transforms the definition of the offence from an act to an 'endangering', enabling the threshold of the punishable nature to be lowered appropriately so that it is based on the harmful and clearly 'endangering' nature of the conduct.

However, on this matter, there seems to be less justification for making a crime of unintentional acts (committed only as a result of 'gross negligence'), given the fact that there are already administrative penalties for these, described as major 'irregularities' by Regulation (EC) No 2988/95, and given the inappropriateness of creating an offence from mere conduct, it being more in line with the principles of democratic criminal law to punish the offence of 'endangering' as a fraud.

Instead, as emerges from the text of the PFI Convention of 1995, it seems necessary to clarify the definition of the concept of fraud and its elements of proof, in view of the great diversity of precedents and regulation in the European context, and the punishable nature of complicity and incitement, and also possibly attempted crime, but only with respect to fraud.

In reality these are problems that concern the established need for a general set of rules. The same could be said of the offences of corruption and money-laundering, with respect to which the first Protocol of 1996 and the second Protocol of 1997 respectively expressly establish the punishable nature for complicity, incitement (and abetting) and attempted crime.

The importance of money-laundering within the fraud mechanism as the 'essential nucleus' of financial crime in general causes us to look at the way organised crime has become so widespread and deep-rooted within the financial system, highlighting the need for autonomous incrimination of offences committed by criminal organisations in order to launch an offensive against specific groupings at transnational level using these offences as the starting point (see point 5.2.1.3 on page 38 of the Green Paper).

Furthermore, the Community proposal should become integrated and not be left behind by the parallel process of strengthening international cooperation and the approximation of criminal legislation, which is being developed within the European Union on the basis of instruments of the third pillar (Tampere European Council in October 1999, common action against organised crime in 1998, framework proposals for
decisions on the subject), and now at world level, based on the aforementioned UN Convention against organised transnational crime, of 2000.

However, it should also be pointed out that an independent offence of criminal association, characterised by a 'stable, organised structure' as an instrument for committing over time an indeterminate amount of fraud, corruption and money-laundering, cannot be defined separately from the prior and parallel general definition of conditions and requirements for the punishable nature of these offences committed with complicity or consent or even attempted crime, which demand common requirements of definition, not only from a logical judicial point of view, but also from the point of view of choices concerning criminal policy.

For it is not possible to advocate the charge of criminal association without having first defined the relationship between this hypothetical crime and the need for criminal significance of behaviour that is more loosely described than the initial activities (attempted crime) or complicity, incitement and abetting (criminal involvement) in the aforementioned crimes, even in the light of the experience of Anglo-Saxon systems, which have recourse, for example, to that other institution, ‘conspiracy’.

Conversely, less urgent is the decision to criminalize and define other offences such as those committed by officials of Community institutions (abuse of office, disclosure of secrets pertaining to one’s office, embezzlement and others) that are not immediately related to the perpetration of fraud but have a more distant instrumental role, through the independent or premonitory behaviour of those who are theoretically opposed to the perpetrators of fraud, so as to harm the distinct good of the operation and impartiality of the Community administration.

3. The need for further common rules for the definition of a Community criminal justice system (Question 3).

The reason for the affirmative response to Question 3: 'Should the establishment of the European Public Prosecutor be accompanied by certain further common rules relating to: penalties, liability, limitation or other matters? If so, to what extent?' refers back to the statements and suggestions above, regarding the need for a general criminal definition which is either greatly harmonised or unified, though within the essential limits (e.g. fraud, error, attempted crime, criminal complicity, liability of legal persons, etc.) necessary to guarantee the correct operation of a truly autonomous common system of criminal justice: as, moreover, has already become apparent from the acquis, which has so far been built on the system of administrative penalties and the instruments of the third pillar (cf. point 1.6 above).

As far as the specific problem of penalties is concerned (point 5.3 of the Green Paper, pp. 40 s.), the need to harmonise penalties certainly seems acceptable. This dictates in turn the definition of the various types of penalty, with regard for example to the limits within which penalties involving the deprivation of personal liberty appear necessary, or even provision for cases of confiscation and confiscated property, and penalties applicable to legal persons.
However, it does not seem right to limit harmonisation to or gear it towards only the maximum level of penalties, since this level is certainly often important from a procedural point of view, but almost always of little significance in terms of actual application of the final penalty on sentencing.

If, as has oft been said, it is not only a question of defining instruments that enable the operation of an investigating body and the commencement of proceedings by the European Prosecutor, but also of guaranteeing a sufficiently equivalent and effective operation to repress crime throughout the Community, through the effective application of penalties that tend to be homogeneous, the primary condition for a penalty to be generally preventive and dissuasive is that it is sufficiently reliable and that harmonisation should start from minimum common levels.

The same is true for alternative or additional penalties, which should broadly be laid down at Community level, in particular regarding measures of exclusion from business activities or Community procedures (exclusion from European public service, from access to grants, from access to public contracts if Community financing is applied for, etc.).

One crucial problem is the matter of the liability of legal persons (point 5.4 of the Green Paper, pp. 41 s.), provision for which is made not only in the instruments of the third pillar (the Protocol of 1977), but also in other recent international agreements (the Cybercrime Convention held in 2001 and the UN Convention in 2000), and this has already led to significant approximations in European justice systems, which made no provision for it before (recently Italy, though with reference to openly administrative and punitive penalties, and Belgium).

It seems obvious that this prospect, in line with indications emerging from analyses of crime and the nature of the offences being compared, in the domain of corporate, organised crime, should lead to a clear definition within a common system, using the same conditions as competition in the 'global' market.

As regards limitation (point 5.5 of the Green Paper, pp. 42 s.) the need for an effective effort at 'total harmonisation' is accepted, but this should not be limited to the definition of the term of this (5 to 10 years), since it should also establish the rules for their expiry, suspension and interruption: reference to the Italian system is sufficient, where, pursuant to Article 160(3) of the Criminal Code, even after an interruption, the period of limitation recommences pending the trial subject to a maximum duration equivalent to half the ordinary term (established in Article 157 of the Criminal Code). So only a partial referral to national law would create immense differences in treatment from one State to the next.

As additional rules of a general nature, other than those already mentioned (concerning fraud and the subjective element, and dealing specularly with mistakes of fact and of law; attempted crime, complicity of persons and participation; liability of legal persons, limitation), it seems necessary finally to mention those concerning relations between different and potentially competing criminal justice systems. These can be the criminal justice systems of individual Member States, the Community criminal justice
system that is being defined, or the administrative authorities either of the individual Member States or of Community law.

We can start from the consideration that Article 6 of Regulation (EC) No 2988/95, in defining the system of administrative offences against the Community, correctly highlighted and considered the need for a system of regulation to safeguard the principle of ne bis in idem not only from a procedural point of view but also from a substantive point of view, in conformity with the higher requirements of reasonableness, proportion and finally fitness of punishment.

In the Green Paper the matter is not really expediently dealt with except in the 'criteria for the allocation of cases' between the European Public Prosecutor and the national prosecution authorities (point 6.2.2.2, p. 48 s.): while the question should really be dealt with and regulated upstream, to determine comprehensively what system of Community criminal justice is being defined, establishing in no uncertain terms the relationship – of subsidiarity or complementarity – that will exist with respect to national justice systems, along with any concurrence with national or Community administrative authorities.

A few indications on the matter in the Corpus Juris (Article 17(3) and (4) and Article 35) could be reviewed in this light to find a better, final arrangement.

4. Final considerations.

Finally then, we contend that, starting from the legal basis offered by Article 280 of the EC Treaty and the rationale that inspired it, recourse to an instrument of criminal justice requires a high level of harmonisation, or better still, unification, particularly in terms of substantive criminal law, leading to a minimum of common general rules that would allow the 'system' to operate as such, in line with the need for coherence, efficiency and equivalence in the territory of all Member States.

The acquis communautaire, which mostly refers to the context of administrative penalties, but which is also substantially confirmed by the requirements laid down in the instruments of the third pillar hitherto produced within the framework of the European Union, confirms the need for greater completeness in the system of punitive intervention, which cannot simply be confined to the introduction of a new investigative and prosecutorial body, the European Public Prosecutor with Community jurisdiction, around which the entire body of rules and regulations that govern its activity revolves.

First it is necessary to take responsibility for the specific nature of the definition of criminal offences, the penalties for which demand the creation of the substantive conditions that will allow for effective and equivalent final application in the rather diverse Member States.

In other words, it is not merely a case of creating a new 'repressive' authority, but effectively of creating a new common system of criminal 'law', on the basis of which punitive sanctions will be applied not only in full respect for the guarantees of certainty and equality, but also within a context of effective recognition and substantive validation, the primary conditions for their effectiveness.