Tilburg University

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Groenhuijsen, M.S.; Fijnaut, C.J.C.F.

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C. Fijnaut and M.S. Groenhuijsen¹

A European Public Prosecution Service: Comments on the Green Paper

1. INTRODUCTORY REMARKS

On the occasion of the Intergovernmental Conference held in Nice in December 2000 the European Commission published a Communication on criminal-law protection of the Community's financial interests, in which it advocated the establishment of a European Public Prosecution Service (PPS).² As is evident from the conclusions of the conference, the European Council did not give its opinion on this proposal, in either a positive or a negative sense. Without much ado it referred the matter back to the Commission with a request to examine the practical implications in more depth. The outcome of this is the 'Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor', which was published on 11 December 2001 and, at the invitation of the Commission, was to be commented on by the Member States and by experts and other interested parties before 1 June.³ Partly on the basis of these comments, the Commission intends to make a contribution in 2003 to the debate on the revision of the Treaties, which is currently being prepared by the European Conference chaired by Giscard d'Estaing.

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1. Prof. Dr. Cyrille Fijnaut, Institute of Criminal Law, KU Leuven, Belgium, and Tilburg University, The Netherlands; Prof. Dr. M.S. Groenhuijsen, Tilburg University, The Netherlands.
 2. The Commission published this contribution on 29 September 2000 (COM(2000) 608 final). Commission documents issued in Dutch usually refer to a '*Europese officier van justitie*' (European Public Prosecutor), but this title is not actually feasible in Dutch – 'we' do not appoint a prosecutor's office; the Dutch version of the Green Paper nevertheless uses the literal translation of the French term. The recent Dutch translation of the *Corpus Juris* rightly talks about the '*Europees openbaar ministerie*' (European Public Prosecution Service). Cf. M. Luchtman *et al.*, *Corpus Juris 2000; strafbepalingen ter bescherming van de financiële belangen van de Europese Unie*, Utrecht, Centre for Enforcement of European Law, 2001.
 3. Brussels, 11 December 2001, COM (2001) 715 final. We have taken note of the response of the Dutch government to the Green Paper, which was sent to the President of the Senate of the States General on 1 May 2002 (reference 5163468/502/PV). In the meantime comments have also been formulated by Dasec, the Dutch Law Association for the study of the protection of the financial interests of the EC. Our paper focuses on the Green Paper itself and only indirectly examines the aforementioned responses to it.

He recently announced, incidentally, that the balance of power between the European Union (EU) and its Member States in judicial matters will be one of the main themes of the Conference.

According to the introduction, the Green Paper should respond to the scepticism that has all too often greeted the proposal by 'explaining it in practical terms and considering the possibilities for the implementation of a solution which might rightly be seen as ambitious and innovatory'. The undertone of this Communication is therefore that the principle of a European PPS is no longer under discussion; all that now matters is the way in which it will actually be implemented. Anyone who still has questions about 'the legitimacy of and reasons for creating a European Public Prosecutor' is thus to some extent depicted as someone who is behind the times. We shall demonstrate below, however, that these questions are still highly legitimate.

First – slightly illogical perhaps, but in accordance with the Commission's approach – the solution put forward in this proposal will be explained. The problems to which it is intended to be a solution will then be outlined. The question of whether these problems call for this solution will subsequently be discussed, and a few of its flaws elucidated. We shall then examine some of the more fundamental issues that are under discussion in this proposal. On the one hand the Commission's preference for the principle of mandatory prosecution of offences that jeopardize the Community's financial interests, and on the other a certain degree of harmonization of criminal law and law of criminal procedure in the Member States, especially in the area of the admissibility of evidence gathered in any Member State.

2. THE APPEARANCE AND BASIS OF THE EUROPEAN PPS

2.1. What would the PPS look like?

In institutional terms the Commission sees it as a deconcentrated institution. The European Public Prosecutor, who would head the PPS, would be appointed by the Council acting by qualified majority, on a proposal from the Commission and with the assent of the European Parliament (EP), for a term of six years; the appointment would be non-renewable so as to safeguard the Prosecutor's independence. To guarantee integration into the national legal systems without – still according to the Commission – upheavals for them, the European Public Prosecutor would rely on one or more Deputy Prosecutors in each Member State. These would be national officials who conduct criminal prosecutions in the particular Member State and therefore have the relevant experience. These Deputy Prosecutors, whose term of office would be renewable, would be subordinate to the European Public Prosecutor and would be banned from receiving any instructions from their national authorities in any matter concerning the protection of the Community's financial interests. The European Public Prosecutor, and he alone, would be responsible for directing and coordinating investigations and prosecutions of alleged offences prejudicial to the financial interests of the Community. And just as the investigation – whenever the rights of citizens are at stake – must be reviewed by a national court, so too must the prosecution procedure take place before the national courts. A national judicial review of the investigation

must, however, be recognized throughout the Community with a view to ensuring the mutual admissibility of evidence between the Member States.

To enable the European PPS to operate effectively, the Commission does not think that general codification of criminal law is necessary at European level. It is of the opinion that codification in substantive and legal terms can remain limited to the proposals put forward in the Convention of 26 July 1995 and its additional protocols on the protection of the financial interests of the European Communities, which have been incorporated into the Commission's proposal for a Directive of 23 May 2001. This proposal concerns, amongst other things, penalization of European fraud and corruption, money-laundering and membership of a criminal organization. With regard to the part of the proposal concerning criminal proceedings, the Commission puts forward the idea that not only Community institutions and officials but also national authorities must be placed under an obligation to report to the European PPS any criminal offences affecting the Community's financial interests. It also clearly supports the introduction of a mandatory prosecution system for offences of this kind. It puts forward two arguments: firstly, so as to ensure – in principle – uniform proceedings throughout the EU and, secondly, so as to stress the independence of the European PPS through 'the strict application of the law'.

The Commission also proposes that the office of the European Public Prosecutor should remain limited in size – no larger than is necessary to operate effectively. Most of its resources must be concentrated at the level of the Deputy Prosecutors. Whereas these Deputy Prosecutors would be remunerated out of the budget of the individual Member States, any extra costs for the Member States as a result of the European PPS could be charged to the European Prosecutor's own budget. His budget should, in turn, be charged to the general budget of the European Communities. The location of the headquarters of the European PPS must be determined in accordance with the Community's usual procedure.

2.2. What is it based on?

If one examines the Communications published by the Commission since the late 1980s concerning the fight against EC fraud, it can be seen that until 1998–1999 it did not explicitly pronounce on the need for a European Public Prosecution Service.⁴ The suggestion to set up such a Service originates in theory from a research project – the *Corpus Juris* project – which has been funded by the Commission, partly under pressure from the EP. The report published by the study group in 1997 outlines for the first time the Public Prosecution Service.⁵ However, as indicated in the foreword to the report, the entire project was in fact based on the ideas of a senior European Commission official, Francesco de Angelis. The Commission was therefore closely

4. By way of illustration to support this conclusion, we refer to the 1994 and 1998/1999 strategy document and work programme of the Commission in this area. The strategy document does make approving reference to the support that the Commission, at the request of the EP, gave to the completion of the *Corpus Juris* project (p. 17).

5. M. Delmas-Marty *et al.*, *Corpus Juris* (Paris 1997) p. 4.

involved from the outset in developing the idea to create a European PPS.⁶ Subsequently the idea gained the support of the Committee of Independent Experts, which in 1999 investigated the organization and practices of the Commission.⁷

We do not intend to discuss here why the Committee of Independent Experts and the authors of the *Corpus Juris* project opted for the creation of a European PPS,⁸ but rather why the Commission finds it so necessary. In the Green Paper (p. 12) it initially glosses over this question and refers to its Communication on countering EC fraud, published in September 2000.⁹ For the Commission it is as if a discussion about the need to create a Public Prosecution Service is passé and all that matters now is 'the feasibility and the possible mechanisms' of such a PPS, as already mentioned in the introduction. However, elsewhere in the Green Paper (p. 9 and p. 14 ff.) the Commission appears to understand that it cannot get off so easily. The arguments as to why, in its opinion, there should be a European PPS are then discussed.

The fundamental position of the Commission is that in the fight against fraud affecting the financial interests of the EC there remains a 'need for effective enforcement activities'. Why? Because for many years it has been known that 'organized crime has been involved' in this kind of fraud. Furthermore, the cases concerned are primarily major and complex, involving the criminal courts of several Member States, in other words they are transnational in nature. Without giving any further evidence the Commission then goes on to say: 'A problem on this scale must be met with an appropriate response. This is a specific form of crime which calls for a specific response. Given its nature, the response must include a repressive dimension (...)'. Moreover, if this kind of fraud is not genuinely prosecuted in the courts, 'the credibility of European integration to public opinion could be seriously compromised'.

Following on from this the Commission then discusses the 'value added' by a European PPS. What does this entail?

In the first place, the creation of a PPS will overcome the fragmentation of the 'European criminal-law enforcement area', in which the police forces and courts of the Member States still have jurisdiction solely in their own territory, which has led to 'competing or incomplete investigations, and in some cases to none at all'. Add to this the fact that some Member States have still not ratified the Convention of 26 July 1995 and its associated protocols on the fight against fraud. However, even if this were to happen and the Directive mentioned earlier were to be adopted, these provisions would not suffice to overcome the negative effects of the fragmentation of the European criminal-law enforcement area 'since the prosecution function will still be exercised at national level'. Only with a European PPS and hence with 'centralised

6. See the foreword to the publication cited in footnote 5. The Dutch translation of the *Corpus Juris* was the work of M. Luchtman *et al.*, *op. cit.* (see footnote 2).

7. Committee of Independent Experts, Second report on Reform of the Commission, Brussels, 1999, Volume II A, pp. 188–195.

8. For comments on the *Corpus Juris* project – which naturally provides the background to this paper to some extent – refer to C. Fijnaut, *De strafrechtelijke bescherming van de financiële belangen van de Gemeenschap tegen fraude, Delikt en Delinkwent 2000*, pp. 972–988.

9. COM (2000) 608 final of 29 September 2000 (see footnote 2). It should be mentioned, however, that the Commission also devotes a few lines to the European PPS in its Communication of 28 June 2000 (COM (2000) 358 final) on the fight against fraud.

management of detection and prosecution activities' would the Community 'enjoy effective and equivalent protection of its financial interests throughout the Union'.

The second point put forward is that the traditional methods of judicial cooperation between the Member States are cumbersome and inappropriate. In this context the Commission acknowledges that cooperation in criminal matters as part of the Third Pillar will be strengthened, but that none of the relevant conventions 'gives an adequate response to the specific question of criminal proceedings for acts to the detriment of the Community's financial interests'. In particular organized crime harmful to these interests has developed in such a way that the conventional tools of mutual judicial assistance are no longer suited to the task, and the progress so far made in this area remains limited. According to the Commission, a European PPS would help to overcome these difficulties, since it 'would provide an interface between the Community and the national judicial authorities'. This would – and these are the Commission's own examples – make it easier to avoid the destruction of evidence and the disappearance of suspects.

Third, a European PPS would, on the one hand, offer a solution to the problems currently experienced in the exchange of information (relating to both administrative and criminal matters) between Member States and the European Anti-Fraud Office (OLAF) as a result of the differences between the regimes that control this form of cooperation in the Member States. On the other hand, the establishment of a 'common investigation and prosecution area' would also help to overcome the barrier of 'mutual inadmissibility of evidence', because evidence gathered under the direction of the European PPS would be accepted without any problem in the courts in the Member States.

The fourth point is that a European PPS would also provide some solace in the face of the criticism that the administrative investigations conducted by OLAF within the Community institutions are not very effective, due to the fact that criminal proceedings arising from such investigations are too dependent on the goodwill of the national enforcement authorities in the Member State where the offences were committed.

3. A CLAY BASE AND AN EMPTY FIGURE

In a letter dated 1 May 2002 from the Minister of Justice to the President of the Senate of the States General, the Dutch government announced that it judged the Commission's proposal favourably. The Minister does follow up this evaluation with a series of conditions, objections and questions.¹⁰ The list is so long that the reader gradually gets the impression that he has not wholeheartedly accepted the proposal with open arms and *con amore*, but has agreed to it more out of political necessity. Be that as it may, it is not our intention here to discuss the response of the Dutch government in depth, but rather to examine the reasons why the Commission thinks that there should be a European PPS. These centre around three issues: the scale and nature of the problem of organized crime in the context of EC fraud, the organiza-

10. See footnote 3 above.

tion and operation of mutual judicial assistance in criminal matters, and the organizational embedment of the European PPS within the EU and within the Member States.

3.1. The problem of organized crime

The driving force behind the Commission's proposal is the problem of the involvement of organized crime in EC fraud. Anyone who wants to find out how far this involvement goes, however, will find no answers either in the Green Paper or the Communications preceding it or in the reports about this kind of fraud published by the Commission and OLAF in recent years. These reports do give examples of fraud that smack of organized crime, but there are no figures or estimates of the scale of the problem.¹¹ For instance, the Commission's annual report for 2000 mentions three cases of large-scale fraud that clearly point to organized crime; however, this was three out of a total of 6,915 new cases of fraud or irregularity confronting the Member States and OLAF in that year, and which, according to the explanatory notes, were not or by no means always committed within the context of organized crime.¹² If you look at the OLAF report for the period covering June 2000 to May 2001, you see the same picture: a few significant (sometimes even the same) examples of fraud committed under the mantle of organized crime, but predominantly serious and less serious cases of 'ordinary' fraud.¹³ The conclusion is clear. The Commission is wrongly invoking the problem of organized crime to justify its proposal to establish a European PPS. Without more in-depth analysis of the scale of the problem, the need for such far-reaching intervention in the relations between the Member States and the Community or the European Union cannot be deduced from this factor.

Even if this were a large-scale problem, we have to ask ourselves whether it should be tackled in the way that the Commission proposes in its Green Paper.

This question is raised because of the position taken by the Commission, namely that organized crime in relation to EC fraud is a very special problem. Is this actually the case? According to the examples given, what this primarily involves is the smuggling of cigarettes, bananas and other goods. But there is nothing special about that at all: most forms of organized crime involve smuggling, if not of goods such as drugs and arms then of people. What is special about EC fraud is that it directly affects the financial interests of the EC. But is this sufficient reason to set up a European PPS to tackle it? Not in our opinion. Not only because the EC would thereby claim a privileged position for itself in criminal law enforcement activities within the EU, but also because it could then be postulated – with good reason – that other forms of organized crime should also be tackled in the same special way. Why EC fraud and not drug trafficking, traffic in human beings or arms trafficking? Are these less serious forms of organized crime? Are the financial interests of the EC not at stake here as well – even indirectly? But of course it is inconceivable that this path would

11. For a discussion of the older reports, see the article referred to in footnote 8.

12. See COM (2001) 255 final/2, pp. 24–27 and 76 ff.

13. See the *Activity report for the period 1 June 2000–31 May 2001*, OJ C 365/31–63, 20 December 2001.

be taken. Otherwise the horizontal fragmentation of law enforcement, to which the Commission is so opposed, would be supplemented with vertical fragmentation, as in the United States.

This question is also prompted by the characterization – in the Green Paper – of EU fraud as a transnational problem. To a certain extent this is true of course: goods are brought across international borders, money flows back along the same route, there is communication at international level, and so on. However, as with all forms of organized crime that manifest themselves in smuggling, here, too, the production and distribution of goods is normally a local matter. This means that if organized crime is to be combated effectively, national and local police forces and judicial authorities must, first and foremost, be willing and able to tackle this kind of crime locally and must have the human and material resources to be able to operate across borders or to support or facilitate others in transnational investigation and prosecution activities. In any case transnational investigation and prosecution – in whatever shape or form – of organized crime depends on competent and decisive local structures. Against this background it is positively strange that the Commission wants to set up a European PPS at all costs, albeit in the form of a deconcentrated system. Why does it not concentrate on developing organizational and normative frameworks with which the police and the public prosecution service in the Member States have to comply in the fight against organized crime? Why does it not devise – following on from the anti-money-laundering Directive – mechanisms to gain more control over the other transnational aspects of such crime, for example the transport of illegal goods? Why does it not do its utmost to encourage police and judicial cooperation between the Member States in the fight against organized crime? And why does it still devote so little attention in practice to the transnational administrative approach to organized crime, such as the one developed in Amsterdam for instance.¹⁴

3.2. The issue of mutual judicial assistance

In light of the above it is no wonder that the thought sometimes occurs that the Commission – or at least some of its officials – concentrates too much on, even seems almost obsessed by acquiring an element of power in criminal justice matters, and that its arguments are actually irrelevant. We have just discussed the argument that organized crime compels such a move (weighed and found wanting); we shall now turn to the argument that mutual judicial assistance does not operate very efficiently. Here, too, we can ask ourselves: is that really the case? On what is the Commission basing this assertion? Once again, it is not very clear, since neither the Commission nor anyone else has ever conducted serious empirical research into the efficiency of this form of judicial assistance. Naturally, problems associated with this form of cooperation are touched on time and again in Commission documents, and such problems do genuinely exist. Yet are they so huge that they impel the creation of a European PPS? In our opinion, this is not the case at present.

14. Cf. C. Fijnaut (ed.), *De bestuurlijke aanpak van (georganiseerde) criminaliteit in Amsterdam* (Amsterdam 2001).

Then there is the final report published in August 2001 presenting the results of the first evaluation of mutual judicial assistance in criminal matters, compiled by experts in the Member States.¹⁵ Naturally, problems are also brought up in this report, but the concluding remarks are positive: 'The evaluation exercise made it clear that, while mutual assistance is not without its faults, the criticism habitually levelled at it that it is slow, inefficient and powerless is excessive; in general mutual assistance does not operate as badly as it is reputed to do. In the field of drugs or serious offences under ordinary criminal law, a great majority of the practitioners interviewed consider that mutual assistance operates efficiently and to the satisfaction of the practitioners'. This conclusion is of course at odds with the position of the Commission. It therefore provides one more reason to attach little importance to this particular argument in favour of the Commission's proposal to set up a European PPS.

In our opinion the opposite should happen. Over the coming months the Commission should put all its energy into strengthening the mechanisms that have been devised in the past few years to improve the operation of judicial cooperation within the European Union: the judicial network and Eurojust. In any case it is preferable to optimize these two auxiliary structures than to set up yet another new auxiliary structure, in the form of a European PPS. Because, in essence, the European PPS is nothing more than that. Especially as this PPS – like the network and Eurojust – would ultimately very much depend on the way in which the Member States implement judicial assistance conventions. Its Deputy Prosecutors would also have to have frequent recourse to the cooperation mechanisms that are stipulated in these conventions in order to initiate the investigation and prosecution of cases of EC fraud perpetrated in several countries. In this respect it would not be substantially different from the judicial network and Eurojust. Under these circumstances it is more sensible to improve the existing bodies than to add a new one. Anyway in the long run no one would be able to make sense of the institutional framework of the EC/EU.

3.3. The difficulty of organizational embedment

The way in which the appearance of the European PPS has been described above does not actually do justice to the difficulty of its organizational embedment within the EU and within the Member States. That is why it is important to discuss this problem separately.

In the Green Paper it is assumed that the European Public Prosecutor will be an independent authority, independent both 'of the parties to any dispute in the context of adversarial proceedings and of the Member States and the Community institutions and bodies'. Apart from the fact that two forms of independence are mentioned in the same breath rather too easily, it is certain that they both raise many questions about the organizational embedment of the European PPS. Here we would simply like to raise the question: who in the EC would have ultimate political responsibility for the actions of this Public Prosecutor? In other words, to whom would he have to

15. See the Final report on the first evaluation exercise – mutual legal assistance in criminal matters, OJ C 216/14–26, 1 August 2001.

answer for his actions? The Green Paper is silent on this point and merely makes provision for his removal from office in the event of serious misconduct. One could perhaps maintain that he would have to answer directly to the EP to some extent, since his office's budget would be charged to the general budget of the European Communities. But would he then be politically responsible himself for what he does or does not do? Within the context of the European Union this is a very singular construct and one that is difficult to accept, since in many Member States the Minister of Justice has ultimate responsibility for the work of the PPS.¹⁶

As far as the Deputy Prosecutors are concerned, the impression given in the Green Paper is that the appointment of members of the national prosecution authorities to the European PPS would guarantee the so fervently desired power of the latter. Nothing could be further from the truth – in fact the opposite is true. By placing them under the authority of the European Public Prosecutor they will be reduced to being outsiders – or at least relegated to a marginal position – at national level within their own PPS. And on top of that they have no privileged relationship with the regular and/or special police forces that will actually have to conduct investigations into EC fraud on the territory of the Member States. This means that they will be faced with the well-nigh impossible task of finding human and material resources for their investigations, while having no say in how these proceed. And where in one or other of the Member States they will actually have some say or people are prepared to take into account their need for investigative resources, they will have to pursue their claims in a very competitive environment. This is because in the Member States, and certainly in the Netherlands, a fierce battle is almost constantly being waged over the scarce resources available to conduct the complex, major investigations mentioned by the Commission in the Green Paper. It is not apparent from the Green Paper whether the authors of the European PPS proposal are aware of this enormous problem – and the idea of an effective European PPS actually depends on this problem being solved. The proposal that the extra costs for the Member States as a result of this PPS should be charged to the European Prosecutor's own budget does suggest some understanding of the problem, but it is not clear, for example, whether these would cover the total cost of major fraud investigations or just the administrative costs of the Deputy Prosecutors. An omission of this kind does show that the authors of the European PPS proposal are not very familiar with the practical aspects of criminal procedure in the Member States. In this respect their construct is very much akin to an institutional illusion.

4. MANDATORY OR DISCRETIONARY PROSECUTION PRINCIPLE?

One of the most fundamental issues raised in the Green Paper concerns the question of whether all proven cases of EU fraud should be brought before the courts.¹⁷ Would the European Public Prosecutor have the power or, alternatively, a real duty to insti-

16. See, for example, C. Fijnaut, D. van Daele & S. Parmentier, *Een openbaar ministerie voor de 21ste eeuw* (Leuven 2000).

17. See point 6.2.2.1., p. 54 ff.

tute criminal proceedings? Question 5 in the Green Paper is therefore: *'Should the European Public Prosecutor be guided by the mandatory prosecution principle, as proposed by the Commission, or by the discretionary prosecution principle? What exceptions should be provided for in each of these cases?'*

The Commission's preference is for a mandatory prosecution system, modified by exceptions. The basic principle here is that the decision whether or not to prosecute must be made at Community level. The decisive factor for the Commission is that basically there should be uniform proceedings throughout the European law-enforcement area, which means no discretion for the European Public Prosecutor. This solution is explained only very briefly. We have already mentioned the key considerations: the desire to achieve uniform proceedings within the EU and the aim to stress the independence of the European Prosecutor. In fact the Green Paper adds merely the observation that there is a certain degree of convergence within the Member States in this area: everywhere a mandatory prosecution system is in operation, exceptions are possible, and everywhere a discretionary prosecution system exists, certain limitations apply. Combined with the aforementioned basic principle¹⁸ that in this area minimum discretion is best, it is logical to take the mandatory prosecution principle as the starting point for examining other considerations. In the Green Paper this is done without wasting words, and the substantive considerations are then confined to the kinds of exceptions that might be borne in mind within a mandatory prosecution system. Three exceptions are highlighted. First, steps should be taken to avoid overburdening the European Public Prosecutor with cases of minor importance. Trivial matters should not be brought before the courts. This could be ensured by setting a value threshold for fraud proceedings, or by introducing the more flexible criterion of 'minor impact' on the financial interests of the EU, which could be left to the discretion of the European Public Prosecutor. Secondly, provision might be made for an exception from the mandatory prosecution principle on the basis of the potential impact of the proceedings on the outcome of the case. This means that when a proportion of the charges brought against someone is sufficient to obtain judgment, it may be acceptable to overlook the rest of the charges. The third and final exception refers to the criterion of the effectiveness of recovery of sums corresponding to the financial interests that are violated. This concerns the possibility of an out-of-court settlement with deprivation of illegally obtained profits or advantages. By way of an explanation, the Commission adds that this would only be possible for offences relating to 'modest amounts of money' and – a prerequisite that may be regarded as somewhat shocking within our own legal system – 'where the prospect of a conviction was small'. If a case were to be dropped at European level for one of the reasons mentioned, the file should be sent – according to the Green Paper – to the national authorities, leaving it to them to decide whether there is nonetheless reason to bring such a case before their own national criminal courts.

In our opinion the Commission's reasoning is unconvincing. It is, of course, true that within the Member States there is considerable approximation in the practical application of very different principles with respect to the exercise of the right to

18. It goes without saying that a basic principle does not automatically form an autonomous *argument*.

bring proceedings.¹⁹ However, this should not make us lose sight of the fundamental – and hence persistent – differences that remain. In both theory and practice it makes quite a difference if the initial question facing a prosecution authority is whether recourse to the courts must be justified (in terms of discretionary prosecution) or whether there should be specific reasons to waive prosecution.²⁰ The Commission suggests that this is virtually academic. From the pragmatic viewpoint of combating the tiny section of crime the Commission refers to, there may be something to be said for this, but so much more is at stake here. The ill-considered choice of the Commission does not, for example, take any account of how this type of crime is rooted in the more all-embracing system of national prosecution. We shall now mention a few of the key points that have wrongly been left out of consideration in this context.

First a few words about the arguments put forward by the Commission. The desire for uniform proceedings is not in the least dependent on a principle of mandatory prosecution. If the discretionary prosecution principle has sway over the right to bring proceedings at *European level*, this can of course be applied uniformly within the Member States. And even the argument aimed at encouraging the independence of the European Prosecutor strikes us as very contrived. The experience of some (not only southern) Member States of the EU indicates that the mandatory prosecution principle can happily go hand in hand with political influence being exerted on the PPS and the well-known Dutch example demonstrates that such ‘interference’ may well be limited where prosecution is discretionary. What is more, where a European PPS were to adopt a mandatory prosecution system it would in fact become even more *dependent* in other respects: for instance on the supply of cases, which would inevitably continue to fall largely outside its sphere of influence.

Naturally, in the fight against EU fraud, the general guideline that should prevail is that violation of the European Union’s financial interests must be combated using resources, both material and procedural in nature, that are no less decisive than the measures taken to avert comparable infringements of national law. In this context sanctions must be effective, proportional and dissuasive in equal measure.²¹ From this starting point there are, however, other considerations that argue in favour of a more selective – and hence less automatic – use of the penal system. For instance, it has often been propounded that it can be of immense importance to have a free hand to some extent in the choice of administrative or penal instruments to tackle specific

19. See the classic – but now outdated – study by H.-H. Jescheck, J. Driendl & R. Leibinger, eds., *Funktion und Tätigkeit der Anklagebehörde im ausländischen Recht* (Baden-Baden 1979); and more recently C. Fijnaut, D. Van Daele & S. Parmentier, eds., *Een openbaar ministerie voor de 21ste eeuw* (Leuven 2000); D. Van Daele, *Het openbaar ministerie en de afhandeling van strafzaken in Duitsland* (Leuven 2000); and P.J.P. Tak & J.P.S. Fiselier, *Duitsland-Nederland en de afdoening van strafzaken* (Nijmegen 2002).

20. Cf. J. Reijntjes in A.L. Melai *et al.*, *Het wetboek van strafvordering*, Arnhem s.a., response 5 to Art. 167 (suppl. 120).

21. These requirements are elaborated in every book and manual on European law; see, for example, Geert Corstens & Jean Pradel, *European Criminal Law* (The Hague/London/New York 2002).

cases of EU fraud.²² This system will be thrown overboard without any explanation if the choice of a mandatory prosecution system results in criminal law in this area being unconditionally promoted to superior enforcement model.

But even if we momentarily confine ourselves to criminal law, the choice of a mandatory prosecution system in this area is a disruptive starting point. How can it ever be justified within a national legal system like the Dutch one that financial damage to the EU always, in principle, leads to criminal proceedings, but that similar harm to the Dutch State does not? To put it in even stronger terms: why should there be this drastic obligation in the event of financial loss for a legal entity, with a regime that is less oriented towards protection in cases of serious loss resulting from injury for natural persons? If there are good reasons to hold onto the starting point of a discretionary prosecution system in the most far-reaching criminal cases – it requires little imagination, in a transnational context, to think of terrorism, trafficking in women and in human beings in general, or organized crime revolving around drugs – then it is completely arbitrary to rule out, in principle, any power of balancing of interests only where EU fraud is concerned.

It is likely that the unspoken, deeper reason for this proposal lies in the desire to be better able to protect EU funds from Member States that may pay lip service to the principle of combating EU fraud, but are not very conscientious when it comes to putting that principle into practice. In the Brussels corridors of power there are actually whispers about countries (including southern ones) where the 'creative' appropriation of EU funds is regarded more as an act of patriotism than as a crime that should be vigorously combated. Would the choice of a mandatory criminal prosecution system then be an effective means of gaining better control over these recalcitrant Member States? We think not. The decision to prosecute is only part of the wider penal process. In principle there is only something to decide in this respect if the preliminary inquiry has yielded sufficient findings to make a judgment by the criminal court feasible.²³ This situation implies, with a certain predictability, that the introduction of a duty to prosecute in the aforementioned less enthusiastic Member States will lead to a kind of 'displacement effect'. If all feasible cases must be brought before the court, a different approach to criminal investigations will result in fewer cases being 'solved', so that there will be nothing more to decide with regard to possible criminal proceedings. The only conceivable remedy for this escape route is for the European Public Prosecutor to have a direct say in the scale and specific deployment of investigative resources within the Member States. But this brings us back to the problems identified in the previous section concerning the organizational embedment

22. For example Y. Buruma, 'EC Law and the National Enforcement Agencies', in M.S. Groenhuijsen & M.I. Veldt, eds., *The Dutch Approach in Tackling EC Fraud* (The Hague-London-Boston 1995) pp. 73–84. If our perception is correct, the policy of DG XX in the Commission over the past ten years has – at least in theory – been aimed at giving a prominent role to administrative law in the fight against criminal wrongdoings that affect the financial interests of the European Union. In point III.1 above we pointed out that relatively little has yet been done in practice to give this aim flesh and blood.

23. Here we give a pertinent reminder of the Commission's idea – so alien to the legal system in our view – that an exception to the mandatory prosecution principle by means of an out-of-court settlement might be acceptable if the prospect of a conviction were small.

of the Commission's proposals in the invariably nationally determined institutional relations.

The conclusion is inescapable: both in a model based on the mandatory prosecution principle and in a discretionary prosecution system, the competent judicial authorities inevitably have considerable discretion. An important advantage of working with a discretionary prosecution system is that their discretionary power in this area is evident. The advantage of transparency then means that judiciary control over the way in which that freedom is used is both plausible and practicable. This, too, furnishes further arguments not to support the Commission's proposal.²⁴

5. HARMONIZATION OF THE LAW OF EVIDENCE

As soon as serious study was first undertaken on the legal problems associated with combating EU fraud, attention was drawn to the differences between the applicable rules of law in the Member States. In so doing, the fact that it may be difficult if the relevant definitions of offences differ from one another has always been borne in mind. For that reason there has been a constant effort to insist on more common definitions of the most relevant offences (especially fraud, corruption and money-laundering). The Green Paper continues this trend in the area of substantive law: a higher level of harmonization than hitherto proposed is recommended.²⁵

Besides substantive law, however, procedural law has increasingly been the subject of critical consideration. In different countries the government can exercise very varied powers in order to obtain information about fraudulent activities. For our purposes there are theoretically two ways of limiting the drawbacks of this. The first option is to work towards harmonization of investigative powers; the second is to preserve the differences while attempting to minimize the consequences of the existence of different national systems of standardization.

In the wake of the decisions taken by the European Council in Tampere,²⁶ the Commission opts for the latter approach. The gist of the proposal is that any national court would have to admit any evidence lawfully obtained in another Member State – as well as evidence that arises from investigation of the Community institutions. The other option, Community unification of investigative powers, is rejected. It is – rightly – implied that this would be a bridge too far: it would be tantamount to general codification of criminal procedure in Europe, which would be right out of proportion to the objective and scope of the Green Paper.²⁷

To begin with, we must state that the Commission mentions some important arguments for the solution chosen. The main one may perhaps be the desire to prevent

24. Similarly, the comments by Dasec referred to in footnote 2 above; at variance with these is the aforementioned response of the Dutch government, which can 'concur with the choice of a mandatory prosecution system for the limited and separate law-enforcement area over which the EC Prosecutor would have jurisdiction'.

25. See point 5.2. of the Green Paper and point II.1 above.

26. Conclusion 36 of the Presidency of the Tampere European Council: 'evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States'.

27. See point 6.3.4. of the Green Paper.

'forum shopping'. The European Public Prosecutor must be prevented from conducting prosecutions in the Member State that has the most flexible rules concerning the admissibility of evidence. In that regard there is indeed much to be said for a certain form of recognition of acts of investigation undertaken abroad.

There is also a downside, however. The proposed solution gives rise to new problems. First there is the element of consistency within the system. In the field of EU fraud why should a fundamentally different principle be accepted than is the case in inter-State judicial assistance, where other types of serious transnational crime are involved? The problem is likewise well-known,²⁸ is being intensively studied in those sectors (even within the territorial boundaries of Europe), but for various reasons has not yet led to an approach that is acceptable to every jurisdiction.²⁹

The second problem concerns the image of the aforementioned 'forum shopping' by the judicial authorities. In the Commission's proposal a premium is actually placed on concentrating investigation activities in countries with overdue or incomplete legislation. Member States with strict rules governing exclusion of evidence or with strict standardization of special investigative powers – sometimes even with an explicit prohibition of some forms of intervention – would be rejected as a potential investigation coordination centre. And if the trial were then to take place in such a jurisdiction, that country would be faced with the obligation of accepting in court any evidence that has been obtained unlawfully according to its own criteria.

This option gives rise to a variety of difficulties of a practical nature. At present a Dutch court reviews the evidence obtained in another Member State against its own national law.³⁰ According to the Green Paper, the court should examine the legitimacy of the entire investigation on the basis of the law applicable in the country where the evidence has been gathered. This implies that the national court would have to be familiar with the law of criminal procedure in all EU Member States. If we consider how difficult it can be in practice to reach a decision on the well-known principle of dual criminality (liability to punishment for an offence that is punishable by the laws of two states) in, for example, extradition law – a mere trifle compared to the present technical problems of foreign investigations – then this augurs a great many linguistic and legal worries that the Commission does not even seem to have thought of in its proposal.

Finally, on this point there is a further dogmatic complication, which we feel has been insufficiently scrutinized. In this part of the Green Paper the Commission repeatedly mentions the 'admissibility of evidence'. This consistently refers to the method of obtaining evidence, and the definition of the problem is almost entirely

28. Summed up in a few key words, this concerns the question of the relationship between the principles of *locus regit actum* versus *forum regit actum*, supplemented with general basic standards from, for example, human rights conventions. See Y.G.M. Baaijens-van Geloven, 'Strafvordering en rechtshulp', report 3 in M.S. Groenhuijsen & G. Knigge, eds., *Het vooronderzoek in strafzaken. Tweede interimrapport onderzoeksproject Strafvordering 2001* (Deventer 2001) especially p. 366 ff.

29. Cf. J. Koers, *Nederland als verzoekende staat bij de wederzijdse rechtshulp in strafzaken*, Tilburg thesis (Nijmegen 2001) especially pp. 515–608, which contains a lot of comparative legal data and additional bibliographical references.

30. See, for example, Supreme Court ruling 18 May 1999, *NJ* 2000, 187 with notes Sch., and J. Koers, *loc. cit.*

confined to the system of standards against which the investigative acts in question have to be tested. In practice, however, the way in which the findings of an investigation may be presented as evidence in criminal proceedings in the country acting as the venue for the trial is of equal importance (in this context the Germans speak of '*Beweiserhebungsbestimmungen*'). This issue concerns the law of evidence in the narrow sense, and on that point major problems persist, even in the Commission's proposal, which have not yet been given systematic consideration. The Green Paper merely touches on the subject occasionally. Without providing much in the way of rationale, it is suggested that it would be worth evaluating whether there is a need for the European Public Prosecutor to have the possibility of applying specific procedures reflecting cross-border situations. In this connection the following is mentioned as an example: 'European record of questioning of witnesses on the basis of testimony given, and European record of questioning of the accused, including video-conferences in both cases'.³¹ It is easy to put forward such ideas almost in passing. The authors of the Green Paper do not, however, seem to be aware of the enormous implications of this kind of recommendation for the style of criminal proceedings in the various Member States. Such suggestions do not concern peripheral provisions, but strike right at the heart of the national procedural culture, which most countries would not wish to relinquish just yet.³² These types of specific procedures insidiously lead to an obligation to introduce partial codification or unification of the European law of criminal procedure, which the Commission, just a few paragraphs earlier, had said would be out of proportion to the specific objective of the Green Paper. We therefore feel that this would not be desirable, unless the dogmatic finesse of such reforms were explicitly thought through and justified.

6. CONCLUSION

Europe is in flux. Clearly, the field of criminal law is also affected by this. In that context the idea of establishing a European PPS to protect the financial interests of the EU was put forward a few years ago. That idea has recently been developed in a Green Paper from the Commission. In our present contribution to the debate we have described the Commission's conception of what this new prosecution body should look like and what its expected benefits are. On the basis of what has been discussed we have to conclude that the proposals presented are not convincing.

New European institutions should only be created if they can offer a solution to essential problems. We have argued, first, that the problems highlighted by Commission have not been rendered sufficiently credible and, second, that the recommended instrument is not the most appropriate means of combating the supposed evil. The European PPS would only be competent to deal with – to put it briefly – EU fraud, because this type of organized crime poses a particular threat that cannot adequately

31. See point 6.3.4.1. of the Green Paper.

32. The specific examples of European records of questioning would, incidentally, be easy to incorporate into the Dutch prosecution system. However, for countries where considerably greater emphasis is placed on verbal procedures and the immediacy principle, the situation may be very different.

be countered in another way. Based on all the academic research available, we have contended that EU fraud has no special characteristics compared with other forms of organized and transnational crime. What is more, little is known about the precise scale of EU fraud, and also the basic processes of this type of crime take place locally, so that efforts to combat it properly are primarily dependent on competent and decisive local (i.e. national) structures.

In so far as the problem really is important and has to be tackled on a transnational level, we have shown that little practical attention has been devoted – wrongly in our view – to the possibilities of administrative instruments. And where penal interventions are the appropriate course of action, we have recommended – based on expert reports from the EU itself – that more benefit should be expected from investments in intergovernmental cooperation in the judicial network and in Eurojust than from the creation of a European PPS. A European PPS as outlined in the Green Paper would also give rise to enormous problems in relations with national penal authorities. We have pointed out the shortcomings with regard to political responsibility for the actions of a European PPS. We have clearly explained that the construct of a European Public Prosecutor with Deputy Prosecutors in the Member States would make the latter somewhat of a ‘Fremdkörper’ within their own national PPS.

We have also shown that within the proposed organization the European Deputy Prosecutors would ultimately be faced with an impossible task because they would have no say in the deployment of human and material resources in the investigations to be conducted. On a technical front there is also much to find fault with in the Commission’s proposals. We have singled out two issues by way of illustration. If there is in fact to be a European PPS, the Commission thinks that the exercise of the right to bring proceedings should be governed by the principle of mandatory criminal prosecution. The arguments in favour of this have been examined and found to carry little weight: the principle of discretionary prosecution is preferable in this field, too. Finally, we have drawn attention to significant shortcomings in the considerations contained in the Green Paper concerning a certain degree of harmonization of the law of evidence in the Member States.

The Green Paper therefore points in the wrong direction. Implementation of the ideas it contains would in many respects be disruptive for the existing prosecution system, without the need for the proposals or the results expected having been demonstrated. The European Commission is the injured party in cases of EU fraud. The Green Paper once again shows, in particular, that it is not without risk when the victim itself takes the lead in determining the best penal response to certain types of crime.