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European Prosecutor' Office in Draft Treaty establishing a Constitution for Europe

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Introduction

This article presents issues related to creation of the European Public Prosecutor's Office as an authority responsible for combating offences affecting the financial interests of the European Union. A possibility to establish such an Office was included in the Article III-274 of Draft Treaty establishing a Constitution for Europe[1].

The Member States fulfil their obligations as regards protection of the Union's financial interests in different manner. There are variety of offences against the EU' budget in particular Member States' legislations and different penalties which are adjudicated. These dissimilarities concern even a possibility to penalize particular type of behaviours and prosecute it by national enforcement authorities[2]. Moreover, Member States apply classical methods of intergovernmental co-operation in criminal matters to detect and prosecute perpetrators of offences against the Union's financial interests. As known, police and judicial co-operation in criminal matters is based on principle of granting an *ad hoc* assistance. This method is commonly recognised as a time-consuming, complex and therefore inefficient. It shall be also noticed that 80 % of offences against the EU budget have a trans-border dimension, which means that it concern more then one Member States. Often, criminality against the EU' financial interest is related to organised crime. This diversity of legal instruments and measures is managed by about 450 administrative and judicial authorities, which – before previous enlargement of the Union – were carrying out tasks to protect financial interests of the EU. Finally, it must be added that the Member States, despite their legal obligations, are reluctant to provide the European Commission with data concerning the criminal proceedings conducted by their prosecuting and judicial authorities in cases involving the Union' financing. In the Commission's view, even if an exact volume of this criminality remains unknown, the number of offences is vast. The Commission estimates that only one on four cases in which actions of national prosecutor is required is actually sent to the court.

This leads to the situation in which the Member States' borders are open for criminality but closed for national law enforcement authorities. Ironically, there is a free circulation of goods, service, capital and person in Europe, as well as criminality. Free circulation, however, does not concern prosecutors and judges.

The Commission believes that the European Prosecutor Office may be a remedy for a fair protection of the Union's financial interests. A novelty of this idea consists an intention to change a traditional horizontal model of co-operation in criminal matters to a vertical one[3]. In the horizontal model, the Member State's co-operation is based on a voluntary mutual assistance basis. It implies that an authority requested each time has to agree to launch an action, e.g. to grant a legal assistance, to execute a request for extradition, etc. In horizontal scheme, international bodies perform mostly co-ordination functions (e.g. Eurojust). From the

[1] The full text of the Treaty, including all annexes, protocols and declarations, is published in Official Journal of the European Union, C310 of 16 December 2004, in 21 Community languages.

[2] For example, the French customs law requires discontinuing a criminal procedure when a perpetrator pays a custom duty to the customs authority.

[3] C. Van den Wyngaert, Eurojust and the European Public Prosecutor (in :) Neil Walker (ed.), Europe's Area of Freedom, Security and Justice, Oxford University Press, 2004, p. 215.

other hand, a vertical model pre-supposes that there is a one single jurisdiction area, where one central body, *in casu* a European Prosecutor acts. This enforcement body is entitled to perform its functions directly, in the framework of the criminal procedure, without a necessity to obtain agreement of relevant prosecutor or judicial authorities of the Member State concerned. Traditional co-ordination functions are replaced in the vertical model by directly executed procedural activities.

II. European Public Prosecutor Office in the Draft Treaty establishing Constitution for Europe

1. The European Convention was requested to present the Draft Treaty establishing the Constitution for Europe. The Convention entrusted elaboration of provisions on European legal area to the X Working Group. This Group has drafted Part III of the Draft Treaty establishing the Constitution for Europe "*The policies and functioning of the Union*", Title III "*Internal Policies and action*", Chapter "*Area of freedom, security and justice*". These issues encompass traditional third pillar' matters, borders control, asylum and immigration, judicial co-operation in civil matters and judicial co-operation in criminal matters, including matters related to the criminal protection of Union' financial interests and establishment of an European Prosecutor' Office.

2. The most crucial proposal presented by the X Working Group was abolition of the three pillar architecture of the Union. "*The battle against crime is an area in which the European Union can demonstrate its relevance to its citizens in the most visible way. There are a number of areas such as cross-border crime, asylum policy or control of the Union's external borders which cannot be dealt with effectively by States acting on their own (…) In this context, it is important to make clear that the three components - freedom, security and justice - go hand-in-hand and are of equal importance. This principle should guide the Union policy in this area."* It was underlined that one of the most serious problems, hampering the development of the third pillar, was insufficient implementation of its instruments. In the Convention' opinion, all too often, Union law in that area has remained "*virtual law*": conventions not ratified by all the Member States, framework decisions not transposed or incompletely transposed to national law plus a problematic co-operation *via* Europol. The X Working Group has formulated recommendations on mutual confidence in each others' police and judicial systems. In its opinion, a mutual confidence is the *sine qua non condition* for system of mutual recognition to work effectively. The Group had emphasized that the Commission shall fully play its role as Treaty' guardian. In the Group's view, the Commission shall be competent to introduce infringement proceedings under Article 226 EC Treaty before the European Court of Justice, also in the area of the current Third Pillar[4].

3. The members of the X Working Group agreed on the objective of a more efficient prosecution of offences against the Union's financial interests. Some members of the Working Group, however, considered that a convincing case was not made for the creation of such a body and that there were strong objections on both practical and accountability grounds. A significant number of members, however, believed that current instruments are inadequate. An agreement was reached to incorporate to the Article III – 274 of the Draft Treaty a **legal basis allowing to create a European Prosecutor' Office**[5]. The Article III – 274 (2) of the Draft Treaty states that "*The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with*

[4] Final report of Working Group X "Freedom, Security and Justice", Conv 462/02, 2 December 2002, p. 1, 20, 21, 22.

[5] Final report of Working Group X (…), p. 21.

Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests." This provision is included in the Section regulating questions of judicial co-operation in criminal matters.

4. Authors of the Draft Treaty did not make an attempt to create definitions of offences against the Union's financial interests, for prosecution of which the European Prosecutor' Office would be responsible. The legislator thus ignored opinions, according to which establishment - on the European level - of definitions for offences and penalties shall facilite its application and precise competencies of the European Prosecutor' Office[6]. Competencies of that authority were described by indicating a legal good entrusted into his responsibility, *in casu* of financial interests of the Union. Two groups of provisions included in the Draft Treaty allow characterisation of this legal good: provisions on Union's finances[7] and provisions on Union as an Area of Freedom, Security and Justice[8].

5. Financial provisions of the Draft Treaty oblige the Union and its Member States to counter fraud and any other illegal activities affecting the financial interests of the Union. Measures taken in that regard shall act as a deterrent and be such as to afford effective protection in the Member States and in all the Union's institutions, bodies, offices and agencies. Member States shall take the same measures to counter fraud affecting the Union's financial interests as they take to counter fraud affecting their own financial interests[9].

This wording is almost a copy of currently binding Article 280 of EC Treaty. **Fraud** affecting the financial interest of the European Community (EC) is an act defined in the Article 1 of the PIF Convention from 1995[10]. For the purposes of the Convention, fraud affecting the EC' financial interests consists any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the Community or budgets managed by or on behalf of the EC, non-disclosure of information in violation of a specific obligation, with the same effect or finally, the misapplication of such funds for purposes other than those for which they were originally granted. Fraud affecting the EC' financial interests may consist either expenditure or revenue side of the Community budget. Each Member State must take the necessary measures to ensure that the conduct referred to above, and participating in, instigating, or attempting such conduct, are punishable by effective, proportionate and dissuasive criminal penalties. If a fraud concerns at least two Member States, those States must cooperate effectively in the investigation, the prosecution and the carrying out of the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.

Under the term "*any other illegal activities affecting the financial interests of the Union"* an irregularity affecting the Union's budget, defined in the Article 1 (2) of the Regulations 2988/95 may be classified[11]. **Irregularity** is any infringement of a provision of Community

[6] Additional Commission contribution to the Intergovernmental Conference on institutional reforms The criminal protection of the Community's financial interests : a European Prosecutor, 29 September 2000, COM(2000)608.

[7] Part Three of Draft Treaty Establishing a Constitution for Europe, Title VII „The Union's Finance", Part III of Draft Treaty Establishing a Constitution for Europe, Title VI „The functioning of the Union", Chapter II „Financial Provisions", Section 5 „Combating Fraud".

[8] Part III of Draft Treaty Establishing a Constitution for Europe, Title III „Policies in other areas", Chapter IV „Area of Freedom, Security and Justice".

[9] Article I – 53 (7) and Article III – 415 (1) of the Draft Treaty.

[10] Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995).

[11] Council Regulation 95/2988 (EC, Euratom) 18 December 1995 on the protection of the Communities' financial interests (OJ L 312, 23.12.1995).

law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure. Although the Article 1 (2) of Regulations 2988/95 clearly states that irregularity consists infringement of the provision of the Community law, the European Commission interprets that clause extensively. It focuses on emphasising the fact that provision of law aimed to protect the financial interests of the Union was infringed. It recalls the complementary character of the Community and national law and concludes that in this case a source of that law - be it Community or national - is not a decisive factor. Infringement of the national provisions, adopted to implement Community rules on the protection of the financial interests of the EU, shall also constitute of an irregularity in that context[12]. Although it is difficult to disagree with this argumentation, an excessive interpretation of the Commission may raise reservations. On the basis of the Regulation 2988/95, the Member States, executing their public powers may not be recognised as an economical operator[13].

6. Financial provisions of the Draft Treaty apply settled terminology. Unfortunately, the same may not be stated as regards the provisions of the Draft Treaty on functioning of the **Union as an area of freedom, security and justice**. The Article III-274 (1) of the Draft Treaty, describing the competencies of European Prosecutor's Office, says about "*crimes affecting the financial interests of the Union*." In the Article III-274 (2) of the Draft Treaty, also in the context of the competencies of that authority, it says about "*offences against the Union's financial interests*." Thus, two different terms were used in similar context in the framework of the one Draft Treaty' Article. Should that mean that one term constitutes a basic (e.g. offence) and the second qualified form of a behaviour (e.g. crime) ? For what reasons once the legislator talks about act "*affecting the financial interests of the Union*" and then about acts "*against the Union's financial interests*," and consequently what are the relations between these terms? Finally, what interactions does exist between "*fraud and any other illegal activities affecting the financial interests of the Union*," mentioned in the financial provision of the Draft Treaty and offences affecting them and crimes against them, indicated in the Article III-274 of the Draft Treaty ? Does it mean that the fraud against the Community financial interest, with its meaning described in the PIF Convention of 1995 may or may not constitute a crime or offence referred to in the Article III-274 of the Draft Treaty ? For what reason the term "*fraud*" was directly mentioned in the financial provision of the Draft Treaty but provisions of that Draft on Union an area of freedom, security and justice uses different wording ? Finally, shall this group of offences or crimes encompass corruption of officials and laundering of the proceeds coming from the fraud and corruption, as foreseen by the First and the Second Protocol to the PIF Convention from 1995 ? It is tough to find unambiguous and convincing replies to these questions in the text of the Draft Treaty. Nevertheless, it seems that performing of such exercise is important from the practical reasons. One may presuppose that the European Prosecutor's Office shall perform its function essentially based on the Draft Treaty provisions on functioning of the Union as an area of freedom, security and justice rather then on financial provisions of the Draft Treaty. In this eclecticism, the Legislator did not reach a pick of intelligibility and simplicity.

[12] European Commission. European Anti-Fraud Office (OLAF). Requirement to notify irregularities : practical arrangements. Working document. 19th meeting COCOLAF, 11.04.2002, p. 5.

[13] Council Conclusion dated on 14th June 1995. Declaration is attached to the Protocol DOC Council FIN 233, No 8138/95, Section 9, Articles 1 i 7.

III. Adoption of substantive and procedural criminal provisions to be applied by the European Prosecutor' Office

1. Establishment of the European Prosecutor's Office will constrain adoption of substantive and procedural criminal provisions for the protection of the Union's financial interest. It shall include common definitions of penalised behaviours, penalties to be ruled on and procedures to be applied.

2. The Article III-274 (2) in conjunction with the Article III-274 (1) of the Draft Treaty proclaims that the European Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgement, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the European law establishing that Office. In accordance with the Article III-274 (3) of the Draft Treaty, European law establishing that Office shall determine the general rules applicable to it, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. It follows from the above, that procedural criminal provisions may be issued on the basis of the Article III-274 (3) of the Draft Treaty. It shall be noticed that the Commission intended to include an unequivocal legal basis allowing to issue both substantive and procedural criminal provisions, in the draft Article 280 a (3) of the EC Treaty, as proposed in 2000[14].The Convention has only partially complied with this proposal, in the part regarding the procedural criminal provisions. It therefore seems that that the Article III-274 of the Draft Treaty may not serve as a legal basis for adopting of substantive criminal provisions for the protection of the Union's financial interests.

3. As regards functioning of European Prosecutor's Office, a special attention shall be given to the Articles III – 270 and III – 271 of the Draft Treaty, allowing establishment of **minimum rules in the area of criminal law**. Incorporation to the Draft Treaty of legal basis allowing adopting of minimum rules is not a *novum*. It is a continuation of the philosophy of criminal law harmonisation, expressed in already in the Amsterdam Treaty in 1997 and in Tampere in 1999.

In accordance with the Article III-270 (2) of the Draft Treaty, to the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial co-operation in criminal matters having a cross - border dimension, European framework laws may establish minimum rules. They shall concern mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime and any other specific aspects of criminal procedure which the Council has identified in advance by a European decision, adopted by the Council unanimously after obtaining the consent of the European Parliament. Minimal rules shall take into account the differences between the legal traditions and systems of the Member States.

On the basis of the Article III-271 (1) of the Draft Treaty, the Council may adopt, in the form of the European framework law, minimum rules, concerning definition of criminal offences and sanctions. These types of rules may be adopted in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The Draft Treaty provides a catalogue of these crimes, which include: terrorism, trafficking in human beings and sexual exploitation of

[14] Communication from the Commission. Additional Commission contribution to the Intergovernmental Conference on institutional reforms. The criminal protection of the Community's financial interests : a European Prosecutor. COM (2000) 608 final.

women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. The Article III-271 (1) of Draft Treaty allows the Council to extend this closed catalogue when it identifies other areas of crime that meet the general criteria for adoption of minimum rules, namely: a particular seriousness of crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The Council may extend this catalogue by adopting unanimously a European decision after obtaining the consent of the European Parliament. In addition, in accordance with Article III-271 (1) of Draft Treaty, if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

It seems that the Article III-271 of Draft Treaty may entitle the Council to adopt a minimum rules for the offences against the Union' financial interest. One may indicate offences detrimental to Union's finance, which already now fulfil all eligibility criteria for establishment of minimum rules : particular seriousness of its financial impact, its cross-border dimension when entities from different Member States are involved and a special need to combat them on a common basis, which is unquestionable. Fraud, for example, with export refunds for agricultural product committed by a company operating in several Member States, may serve as a typical example of such an office. Cross-border character of fraud against the Union' financial interest, as well as its complex nature and involvement of organised crime are recognised as distinctive features of this criminality[15].

The X Working Group has stipulated in its Final Report that the Draft Treaty shall allow adoption of **minimum rules** when three conditions are fulfilled. It that view, minimum rules might have been established for particular serious crimes with the cross – border dimension against common European interests. Counterfeiting of Euro and protection of the Union' financial interests were given as an example of these offences[16]. Approximation of criminal substantive provision is, in that view, an instrument for accomplishment of general Union's objectives. This functional understanding of criminal law deserves a special attention[17]. Nevertheless, this idea finally was not written in the provisions of the Draft Treaty.

4. The Article III-272 of Draft Treaty states that European laws or framework laws may establish measures to **promote and support the action of Member States in the field of crime prevention**, excluding any harmonization of the laws and regulations of the Member States. It follows from the above, that in the field of the crime prevention European law or framework law may be established, while the harmonisation is excluded. Reading these provisions literally, one could state that a prohibition to adopt a harmonisation measures does not concern other fields, e.g. combating offences. If so, it could be concluded that the Article III-272 of Draft Treaty does not prohibit to adopt a harmonisation measures in the area of combating offences against the Union's financial interests.

5. In accordance with the proposal presented in *Corpus Juris* and *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, the Draft Treaty accepted **dynamic competences of the European Prosecutor's Office.** The Office, once established, may be authorised to conduct actions to

[15] Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor. COM/2001/0715 final, p. 8.

[16] Final report of Working Group X (…), p. 10.

[17] M. Wasmier, N. Thwaites, The "battle of the pillars" : does the European Community have the power to approximate national criminal laws ? ELR, No 29, 2004, p. 613.

combat offences exceeding the area of financial interests of the Union. On the basis of the Article III-274 (4) of the Draft Treaty, the European Council may extend the powers of the European Public Prosecutor's Office to include **serious crime** having a **cross-border dimension**. Extension of European Prosecutor's Office' competencies would require a European decision to be adopted by the European Council unanimously after obtaining the consent of the European Parliament and after consulting the Commission. One may assumes that eventual obstacle to extend European Prosecutor' Office' competence will result from the formal requirement of unanimity rather then from difficulties to met substantive criteria listed in Article III-274 (4) of Draft Treaty.

In this context, it shall be noticed that requirement of cross-border dimension of a crime as well as its seriousness, allows adoption of minimum rules and extension of European Prosecutor's Office' competence's.

Combating of serious crimes with the cross-boarder dimension has appeared in first drafts of the Constitutional Treaty as a European Prosecutor's Office' competence, equal to its responsibility in the area of protection of the Union' financial interests[18]. As a final point it was decided that the European Prosecutor's Office shall be responsible for combating offences against the EU financial interests in the first line, and that competence may eventually be extended[19].

5. In a wider discussion on European Prosecutor Office' competencies, there were some views that its mandate shall be wider, to encompass all offences against the Union's interest. Establishment on the European level of the body of law for the protection of the Union's budgets is no longer a *terra incognito*. Therefore, one proposed to make further step and adopt criminal provisions for protection of other common European legal goods. In that context one shall notice a distinction between "*Crime against Europe*" and "*Crime in Europe*." "*Crime against Europe*" is criminality harmful to the European legal goods as, *inter alia*, counterfeiting of Euro, crimes against natural environment, European trademark, consumers or European budget. "*Crime in Europe*" is thus criminality against typical national goods, requiring co-ordination of prosecutions at the European level. One includes to that group: trafficking in human beings, organised crime and laundering of the proceeds of crime. It is acknowledged that Community' is competent to undertake certain harmonisation measures in the area "*crime against Europe*"[20]. The most activist and rare opinions suggest that European Prosecutor's Office shall be responsible for prosecuting of all "*eurocrime*" listed in the Europol Convention[21].

6. As mentioned, the Article III-274 (3) of the Draft Treaty states that the European law establishing European Prosecutor's Office shall determine the general rules applicable to that Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance

[18] Article III – 175 of the Draft Treaty dated on 25th June 2004 r., CIG 86/04. Franco – German contribution suggesting a wide area of competences of the Eurropean Prosecutor shall be recalled. Joint French – German contribution to the European Convention on area of freedom, security and justice. Presentation of J. Fischer and D. de Villepin, Brussels, 28th November 2002, CONV 435/02, Contrib 156.

[19] Articles III – 274 (1) and (3) of Draft Treaty.

[20] M. Delmas – Marty, European Public Prosecutor and Globalisation, Agon, No 29, 2000, p. 2 and G. Grasso, Prospects and Limits of the European System of Criminal Justice (...), p 77 ; . Wasmier, N. Thwaites, The "battle of the pillars" : does the European Community have the power to approximate national criminal laws ? ELR, No 29, 2004, p. 613.

[21] M. Delmas – Marty, Guest Editorial : combating fraud – necessity (…), p. 249 ; Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM/2003/0128 final, p. 3.

of its functions. During the Convention' works it was underlined that a necessity to approximate criminal law is more urgent as regards **procedural provisions** then substantive ones[22]. In the framework of a criminal procedure, a preliminary stage of that procedure is recognised as a source of the greatest discrepancies in the Member States' legislations[23].
For this reason, some proposals of the Green Paper and the Corpus Juris concerning **procedural issues** are worthwhile to be recalled. Firstly, it was recognised that there should be an obligation for both the Community' and national authorities to refer to the European Prosecutor any fact that might constitute, or generate suspicion of an offence within his jurisdiction. Individuals, however, shall enjoy the right to inform the European Prosecutor directly. Secondly, it was planned that the European Prosecution Office shall perform its duties *ex officio*. Shared majority considered that the European Prosecutor's Office should be compelled to prosecute *ex officio*, but only in particularly important cases. There would be a financial threshold or "*criteria of gravity*" with respect to the Community interests below which the European Prosecutor could waive his right to proceed in favour of the national authorities. This would have the advantage of not encumbering his office with minor cases, which could be dealt with more effectively at national level. Next, mutual admissibility of evidence properly obtained was also recognised as a principle governing the European Prosecutor's Office functions. Admissibility of evidence shall directly relate from introduction of relevant instruments ensuring protection of defence rights in the criminal procedure. Adequate guarantees both in terms of the proper administration of justice and the fairness of the criminal procedure shall be provided. In addition, the primacy of the European Prosecutor's Office' jurisdiction was acknowledge as a mechanism settling the positive conflict of competencies in hybrid cases, which involve both national and Union's interests. A decision settling negative conflicts of competencies would remain in European pre-chambers. Last but not least, a question of the protection of individuals' rights in the criminal procedure was one of the most essential issues in the contest of the establishment of the European Prosecutor's Office. European Prosecutor should be able to use a full range of investigation measures and coercive powers that exist in all Member States to prosecute similar financial offences. Therefore, it is intended that national judges of freedoms shall be entrusted with powers to control the application of any coercive measures and powers by the European Prosecutors[24].

IV. Functioning of the European Prosecutor's Office

1. The Article III-274 (1) states that a European Public Prosecutor's Office may be established "*from Eurojust*". Eurojust, the European body for enhancement of judicial co-operation, is an organisation functioning in the framework of the third pillar of the European Union.
Raison d'etre of Eurojust is improving the co-ordination between the competent authorities of the Member States, of investigations and prosecutions conducted by them, improving co-operation between the their competent authorities, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests and supporting otherwise national authorities to render their investigations and prosecutions more effective. It follows from the above, that Eurojust acts in the context of investigations and prosecutions, concerning two or more States.

[22] Final report of Working Group X (...), p. 11.
[23] G. Dona, Towards a European Judicial Area ? (…) p. 290.
[24] Follow-up report on the Green Paper (...), p. 17.

Most activities performed by Eurojust have **co-ordinating and facilitating character**[25]. Eurojust is not entitled to directly conduct activities neither through representatives of Member States, nor through Collegium. Performance of procedural actions in the framework of judicial procedures remains in exclusive competences of the national law enforcement authorities of the Member States[26].

According to Article 31 of the EU Treaty, Eurojust conducts activities "*in cases of serious cross-border crime*." On the basis of the Decision establishing Eurojust, it is **competent** to deal with the types of crime and offences in respect of which Europol is competent to act[27], as well as computer crime, fraud and corruption and any criminal offence affecting the Community's financial interests, the laundering of the proceeds of crime, environmental crime and participation in a criminal organisation[28]. On request of the Member State, Eurojust may conduct activities in all categories of crimes. Due to the fact that the Eurojust' competencies are described by a catalogue of offences, some Authors recognise that a restriction formulated in the Article 31 of the EU Treaty is rather virtual[29].

Eurojust may also act at the request of an individual Member State or the Commission. Eurojust also has the power to request that a Member State undertakes an investigation, but such a request is not binding.

As regards functioning of Eurojust, each Member States delegates to that body its representative: a prosecutor, judge, or police officer. National law of each member of Eurojust determines area of his individual competencies and his status. National mandate thus directly influence powers that each representative of Member States posses while conducting activities in the framework of Eurojust. In other words, members of Eurojust are only entitled to perform activities allowed by their national legislation. Eurojust has a legal personality and, similarly like Europol, is located in Hague.

In some Authors' view, establishment of Eurojust is did not bring a real progress as regards effectiveness of prosecution; instead it rather shapes common judicial culture[30].

2. Draft Treaty preserves Eurojust' mandate and **modifies its operations.** In accordance with the Article III-273 (1) of Draft Treaty, European laws shall determine Eurojust tasks, which may include initiation of criminal investigations, as well as proposing the initiation of prosecutions, conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union. Eurojust competencies are maintained as regards co-ordination of investigations and prosecutions and strengthening of judicial co-operation, including by resolution of conflicts of jurisdiction and by close co-operation with the European Judicial Network[31]. As presently, Eurojust shall conduct its activity through national officials delegated by Member States. Eurojust's structure, operation, field of action and tasks will be determined by European law[32].

[25] Article 4 (2) Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002). Article 6 of the Council Decision of 28 February 2002 setting up Eurojust.

[26] Article 7 of the Council Decision of 28 February 2002 setting up Eurojust.

[27] Article 2 of the Europol Convention of 26 July 1995.

[28] Article 31 of the EU Treaty in conjunction with the Article 3 and 4 of the Council Decision of 28 February 2002 setting up Eurojust.

[29] K. Lankosz (red.), Traktat o Unii Europejskiej. Komentarz, Warszawa 2003, p. 416.

[30] M. Delmas – Marty, European Public Prosecutor and Globalisation, Agon, No 29, 2000.

[31] Some Authors recognise a possibility, in certain time perspective, to join Eurojust and European Judicial Network (S. White, The European Prosecutor : extension of Eurojust or 'prolongation' of the Corpus Juris proposals ? p. 34).

[32] Aricle III – 274 (1) and (2) of Draft Treaty.

3. Associating of Eurojust' and European Prosecutor' Office' was a natural choice. Experts elaborating the Green Paper have underlined common links between these two entities, however they proposed to separate their functions[33]. It was stated that the European Prosecutor's Office shall be responsible for conducting of preliminary procedures in cases of precisely listed offences, and Eurojust fulfil co-coordinating tasks in cases of serious criminality.

3. Except mentioning of interrelations between the European Prosecutor's Office and the Eurojust, Draft Treaty does not contain any provisions on **practical organisation and functioning of that Office**, leaving these issues to be regulated by the European law establishing it.

Since the Draft Treaty remains silent, some ideas included in Corpus Juris and Green Paper on the criminal-law protection of the financial interests of the Community on functional aspects of European Prosecutor's Office deserves mentioning.

As regards organisation of that Office, majority of the conceptions propose its decentralisation. In that model, the European Prosecutor would be in charge of the European Prosecutor's Office. He or she would entrust performance of duties to Deputies, who would operate within the territory of their respective Member States. Deputies Prosecutors would report to the European Prosecutor as regards their functions and organisation. Conceptions that they should be given a *mix status* (half European as regards their functions and half national in the administrative aspects) was rejected as a possible risk for their independence. Deputy Prosecutors would be authorised to apply all legal instruments available to their national colleagues, including those elaborated at the European level (e.g. European Arrest Warrant).

It was proposed that criteria for appointment of judges of the European Court of Justice shall apply for election of the European Prosecutor. European Prosecutor would be nominated by the Council among the persons, whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence. The Commission would present the list of candidate. The term of this non - renewable function was proposed to be six years. Deputies Prosecutors might have been nominated by chiefs of their national prosecutor's offices[34].

Independence of the European Prosecutor' Office from European institution and from Member States was commonly recognised as an indispensable feature of that Office. European Prosecutor shall be obliged to neither seek nor take instructions from any body in performance his or her functions. In order to ensure that independence, it was proposed that European Prosecutor may be dismissed by the Court of Justice acting on request of Parliament, Council or Commission, if he or she no longer fulfils the conditions required for the performance of duties entrusted or if he or she is guilty of serious misconduct. The principle of non-reappointment was indicated as another guarantee of independence. However, a suggestion to *expresses verbis* ensures European Prosecutor's independence in Draft Treaty provision was not taken[35].

According to the Article III-274 (1) of the Draft Treaty, establishment of European Prosecutor' Office requires a unanimity of the Council and content of the European Parliament. X Working Group has commented that settlement in following words : "C*urrent situation where unanimity governs all decision making in co-operation in criminal matters*

[33] Follow-up report on the Green Paper (...), p. 10 – 12.

[34] Follow-up report on the Green Paper (...), p. str. 10 - 11.

[35] Communication from the Commission - Additional Commission contribution to the Intergovernmental Conference (...).

cannot endure if, after enlargement, the Union is to preserve and strengthen its capacity to protect the citizens against serious cross-border crime. Therefore, the members of the Group are conscious that strong efforts must be made to extend decision-making by qualified majority voting and co decision, which is to become the standard legislative procedure of the new Constitutional Treaty (…) already today the unanimity rule slowed down negotiations and impoverished considerably the content of the acts adopted"[36]. The Commission expressed similar views. *„If the Convention were to confine itself to give the Council the power to create a European Prosecutor at an unspecified later stage by unanimity, this would be to make an empty promise, as the principle would need to be ratified for a second time at Union level*"[37].

Requirement to obtain unanimity is disappointing. It seems that lavishing of unanimity among the 25 Member of the Union will probably leave all these conceptions, as crucial they may be, in the area of academic discourse.

Conclusion

It is almost a truism to state that when disputes on fragmentarisation of the European legal area are blooming, the criminality cross the borders of the Member States and the Union. Practical possibilities of a single State to counter specialised and organised financial crime are almost marginal. Discrepancies between criminal law of the Member States as regards typology of crimes, its constituent elements and different penalties do not only detriment financial interests of Union, but also hamper achieving Union's general objectives.

Convention has limited itself to only adopt in the Draft Treaty a legal basis for establishment of European Prosecutor's Office. This approach taken will in fact compel a new discussion on shape and operating of that Office to be launched. Observing histories of Corpus Juris project or Green Paper proves how difficult is may be to reach any compromise at this regard.

It seems that the Political Masters of the Union still do not perceived that organisation as a complete system, which effective functioning is a must. If that would be so, then creation of common mechanisms for protection of collective financial interests – and it is an objective to be achieved by establishment of European Prosecutor – would not be a riot. It seems that as long as fragmentised thinking on the Union' functioning will prevail, supported by the national fears and interests and celebrity of national sovereignty, as long more general conception will face major difficulties. One shall finally become accustomed that existence of European legal goods require its protection on a European level, how difficult it may be. In that context, adoption in the Draft Treaty a legal basis for creation of European Prosecutor's Office is a progress. One may only hope that a requirement of unanimity will not make it to be an illusion of progress.

Literature

The European Prosecutor: extension of Eurojust or 'prolongation' of the *Corpus Juris* proposals?

Gabriele Dona, Towards a European Judicial Area? A Corpus Juris Introducing Penal Provisions for the Purpose of the Protection of the Financial Interests of the European Union, European Journal of Crime, Criminal Law and Criminal Justice, Vol. 6/3, 1998.

Mirelle Delmas – Marty, Guest Editorial: combating fraud – necessity, legitimacy and feasibility of the Corpus Juris, Common Market Law Review, No 37, 2000.

Mirelle Delmas – Marty, European Public Prosecutor and Globalisation, Agon, No 29, 2000

[36] Final report of Working Group X (...), p. 13.

[37] Follow-up report on the Green Paper (...), p. 20.

Christopher Harding, Exploring the intersection of European law and national criminal law, European Law Review, Vol. 25, 2000.
Kazimierz Lankosz (red.), Traktat o Unii Europejskiej. Komentarz, Warszawa 2003.
Hans G. Nilsson. Eurojust – the beginning or the end of the European Public Prosecutor, Europarättslig Tidskrift: 2000, årt. 3, n 4.
White Simone, The European Prosecutor: extension of Eurojust or 'prolongation' of the Corpus Juris proposals? Gilles de Kerchove, Anne Weyembergh (ed.) L'espace pénal européen: enjeux et perspectives
Brendan Quirke, Fraud against European Public Funds, Crime, Law and Social Change, No 31, 1999
Martin Wasmeier, Nadine Thwaites, *The « battle of the pillars » : does the Euroepan Community have the power to approximate national criminal laws* ?, European Law Review, 2004, no 29.
J.A.E. Vervaele, Toward an Independent European Agency to Fight Fraud and Corruption in the EU ? European Journal of Crime, Criminal Law and Criminal Justice, Vol. 7/3, 1999.
Christine Van den Wyngaert, *Eurojust and the European Public Prosecutor* (in:) Neil Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford University Press, 2004.

Dokumenty

Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor. COM/2001/0715 final.
Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM/2003/0128 final.
Ten reflections on Draft Constitutional Treaty. Study of the European University Institute CONV 703/03.
Communication from the Commission - Additional Commission contribution to the Intergovernmental Conference on institutional reforms The criminal protection of the Community's financial interests: a European Prosecutor. COM/2000/0608 final.
European Commission. European Anti Fraud Office (OLAF). Requirements on notification on irregularities. Working document. 19th COCOLAF meeting, 11.04.2002.
Final report of Working Group X "Freedom, Security and Justice", Conv 462/02, 2 December 2002.
Report from the Commission. Implementation by member States of the Convention on the Protection of The Euroepan Communities' Financial Interest and its protocols. Article 10 of the Convention. COM (2004) 709 final.