Criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor

- Analysis of the European Commission's Green Paper -

Budgetary Affairs Series

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Executive summary

Answers to some of the questions posed in the Commission's Green Paper

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

a) Structure and organisation of the European Public Prosecutor's office

The decentralised structure of the European Public Prosecutor's office is liable to ensure integration with national legal systems without creating a new, inflexible central authority.

The Commission proposal that the European Public Prosecutor's office should be independent is to be welcomed, as only such independence can enable the EPPO to meet the requirements imposed on it. Its independent position must therefore be guaranteed, as proposed by being enshrined in primary law (EC Treaty). Limiting the European Public Prosecutor's term of office to six years, with no option to renew it, seems likely to assist in ensuring that the European Public Prosecutor's office is independent. To ensure its independence, consideration should also be given to making the Deputy European Public Prosecutors independent of the influence of the European Community and Member States, by limiting their term of office to a specific period, too. If this term is relatively generous – we are thinking of eight to ten years here - this would enable the Deputy European Public Prosecutors to specialise.

There are no apparent grounds for applying the rules for civil servants and other employees of the European Communities to the European Public Prosecutor, as the immunity granted to these persons seems obsolete, given that the Community is growing ever more strongly together and that the proposal to establish a European Public Prosecutor's office is evidence that the Member States have confidence in one another's legal systems. We cannot see any reason either why the criminal law liability of acting civil servants should not also apply at European level, as it does in all European systems of law.

As far as the appointment of the European Public Prosecutor is concerned, the importance of this position means that he should be legitimised democratically as far as possible, which could be achieved by involving the Parliament more (and the Commission less).

To ensure that the position of the European Public Prosecutor is an independent one, he should only be capable of removal from office by the judiciary, as proposed. In particular, the removal procedure should be instigated by Parliament, but there are no objections to the possibility of it being instigated by the Council of Europe or the Commission either. The criteria for removal from office and the processes involved should be laid down precisely, for the sake of legal certainty.
There are no objections in principle at present to the European Public Prosecutor bringing disciplinary proceedings as employer or to his rights of instruction over Deputy European Public Prosecutors as far as the principle of indivisibility is concerned. Here, too, however, for the sake of legal certainty and control, there should also be provisions for an effective, independent protection in law, preferably by the ECJ.

b) Combining European and national offices

With regard to whether the office of Deputy European Public Prosecutor could be combined with their national office, or whether this should be left to the Member States, the ideal solution would seem to be that holding the European office should exclude any other. This alone can prevent from the outset any possible conflicts of loyalty or interest between holding national office and acting as Deputy European Public Prosecutor. This solution would also ensure that Deputy European Public Prosecutors were independent. The ability to pursue a comprehensive specialisation, which would seem necessary, given how complex offences against the EC's financial interest are, is another argument in favour of this solution.

**Question 4:**

**When and by whom should cases be referred to the European Public Prosecutor?**

The procedure for referring matters to the European Public Prosecutor should be along the following lines:

1. Community and national authorities should be able to refer matters to the public prosecutor, as they are often the first to discover acts which threaten the financial interests of the European Communities.

2. It is also essential for the European Public Prosecutor to be able to act on an *ex officio* basis. Another argument in favour of this is that the Commission also has the right to do so in connection with proceedings for breaches of competition law, and that competition proceedings and investigation proceedings are comparable. The European Public Prosecutor's position would be too weak if he could not use information in his possession to instigate proceedings himself.

3. Matters should only be referred to the European Public Prosecutor in precisely defined circumstances. This is in line with the system of legal safeguards of the European Union in other respects: the ECJ, for example, does not have a general clause (such as German law provides for bringing proceedings before the public courts, for example): instead, it only acts in enumerated circumstances. The same should apply to the European Public Prosecutor's office.

Matters should then be referred if

a) the interests involved are primarily Community ones, and

b) the matter is not trivial.

This would avoid overloading the European Public Prosecutor's office and ensure that it performed its duties effectively. This is particularly true if we consider that the European Public Prosecutor is to be subject to the principle of mandatory prosecution, which states that there are only a few grounds on which proceedings can be closed. This means the
European Public Prosecutor has less ability to close proceedings than the Commission in the case of proceedings for breaches of competition law, as it is subject to the discretionary principle. The aim should therefore be that national or Community authorities should filter cases before referring matters to the European Public Prosecutor.

4. To ensure that the European Public Prosecutor's office has an overview of all offences against the financial interests of the Community, however, all authorities should be under an obligation to report all relevant findings to the European Public Prosecutor, who could then assume conduct of the proceedings.

5. Making it obligatory to refer all matters to the European Public Prosecutor, even if they impinge only marginally on the financial interests of the European Communities, is inadvisable for the following reasons:

Given that the European Public Prosecutor's office is bound by the principle of mandatory prosecution, the first risk is that the public prosecutor's office would have to investigate all cases, even the trivial ones, only ultimately to close the cases, once they have been found, individually, to be trivial. Secondly, the Commission Green Paper's proposal that cases should be closed on discretionary grounds would only be possible to a limited extent. This would make it much harder for the European Public Prosecutor's office to work effectively.

The third argument against having to refer matters is that the authorities would be less eager to refer if they had the effect that the European Public Prosecutor's office was unable to settle cases referred to it within a reasonable time which could actually have been settled at national level. But such delays could be expected if the European Public Prosecutor had to deal with every single case in which the Communities' financial interests might be affected.

Other Community law procedures (such as those for breaches of competition law) do not make referring matters obligatory. Here, Member States can only refer matters to the Commission if they suspect a breach of competition law provisions (cf. Art. 3(2)(a) Reg. 17/62).

6. Limiting the obligation to refer matters to the European Public Prosecutor's office, to the effect that the only national authorities which would be bound to do so would be those which heard possible appeals as 'courts of final instance', comparable with the appeal by way of case stated procedure under Art. 234 of the EC Treaty, is not advisable. The final instance in criminal proceedings is normally a court of appeal; but appeals only deal with matters of law: they do not deal with matters of fact, as the courts of first instance do. Being excluded at this stage of the proceedings would therefore weaken the European Public Prosecutor's position considerably.

**Question 7:**

Does the proposed list of investigation measures for the European Public Prosecutor seem to you to be adequate, particularly as a means of overcoming the fragmentation of the European criminal-law area? What framework (applicable law, review) should be envisaged for investigation measures?
Under the Commission proposal, the European Public Prosecutor will be able to conduct investigations which do not involve the use of coercive force on his own authority. Where investigations are subject to the consent of the courts or an order has to be applied to for the courts, this can be done in any Member State of the EU with effect in all other Member States (principle of mutual recognition).

a) List of investigation measures

The investigation measures which the European Public Prosecutor can carry out under the Commission proposal correspond to those used at national level. They can therefore be expected to be sufficient for the work of the European Public Prosecutor's office, as they can be used to conduct investigations efficiently at national level.

b) Investigations by the European Public Prosecutor's office under Community law

As far as the admissibility of investigations is concerned, it should be borne in mind that the European Public Prosecutor cannot conduct any investigations 'at his own discretion' or on his own authority which are subject to the consent of the courts in one or more Member States. If the European Public Prosecutor were granted such powers, this could (a) put the accused in a less favourable position and (b) lead to considerable legal uncertainty in the Member States in which the consent of the courts is required under national law. In those Member States it would then, of course, depend on the offence and investigating authority whether investigations required the leave of the courts or not.

c) Principle of mutual recognition

The principle of mutual recognition of investigation measures in all Member States is also to apply to authorising and ordering investigation measures by the European Public Prosecutor's office. But this raises the risk that the European Public Prosecutor will engage in 'forum shopping'. This might be to the detriment of the legal protection open to the persons concerned, who might be compelled to resort to the courts in two different Member States in different proceedings against granting leave to and enforcing one and the same investigation. Such a situation would be unreasonable, especially in terms of protecting fundamental rights effectively (for more details see question 14). This risk can only be avoided by having detailed, obligatory rules of jurisdiction; but there is no sign of this in the Commission proposal. As national procedures and investigations differ, it cannot be assumed that the principal of mutual recognition of investigative acts is likely to overcome the fragmentation in criminal matters at the level of European law.

d) Supervising the EPP's investigations

The Commission proposal should be rejected insofar as it provides that the European Public Prosecutor's investigations will only be subject to the control of the national courts. Courts operating only at national level will of course be rooted in their national law, and as such will lack an overview of all investigations into offences against the financial interests of the Community and be unable to exercise any effective control of the European Public Prosecutor's investigations. To safeguard the purpose of the obligation to seek leave or a court order before conducting investigations, i.e. effective judicial control, jurisdictions would have to be bundled at least in individual Member States or at Community level.


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

a) Analysis

The Commission proposal on the free movement of evidence and the exclusion of evidence obtained unlawfully would in practice have three main effects, as follows:

1. Evidence obtained lawfully in one EU Member State would be admitted as evidence in court in all other Member States, under the fiction that that evidence had been obtained (lawfully) under the procedural rules of the court hearing the case.

2. Before admitting evidence obtained elsewhere in the EU, the (national) courts would have to apply foreign (criminal) procedural law to establish whether that evidence was obtained unlawfully and hence should be dismissed.

3. But there is no way in which the court hearing the case can verify whether evidence obtained under another system of law is admissible in terms of its own legal system; but such an examination is essential because evidence can be ruled inadmissible both on account of the circumstances under which it is obtained and those under which it is to be used.

It is questionable whether, in view of these effects, the purpose of evidential procedures in criminal law, i.e. to provide a reliable basis for judgement by the criminal courts in a fair hearing, can still be achieved.

This is open to doubt, given that the structures of Member State criminal procedures vary. A few case studies will illustrate aspects of this problem:

- Evidence gathered and presented may lose its context in the process of being transferred to another kind of procedure. (The Commission proposal on excluding evidence obtained unlawfully do not help here, as the evidence was [originally] obtained lawfully – the doubts as to its admissibility arise out of the circumstances in which it is to be used.)

- Evidence obtained in accordance with the rules of one legal system may not be sufficient to provide a reliable basis for judgement when viewed by another legal system, for example if the instruments which are designed to guarantee the quality of evidence at the time it is gathered do not apply. The concept of 'free movement of evidence' breaks down here, as there is no 'functional equivalent' for certain forms of evidence (see case 2 above).

- Under the rules of one legal system, admitting evidence obtained under the rules of another may appear unfair, because, in attempting to balance the interests of prosecution against other legitimate interests, the national legislators came to different conclusions. Here, too, the Commission proposal to exclude evidence obtained unlawfully do not help, as the evidence was (originally) obtained lawfully. The doubts as to its admissibility arise out of the circumstances in which it is to be used.)
The problems which transferring evidence between differently structured rules of evidential law cannot therefore be resolved by the concept of free movement of evidence: this merely corrects the symptoms, but not the cause of the problem, which lies in the different structures of national criminal procedural systems.

It would therefore seem dubious whether the Community law principle of 'free movement' can be applied to transferring criminal evidence. Evidence when gathered is not a finished product which can be released into the 'free movement (of goods)' without further ado. Whether it is to be admitted still depends on how it was obtained. This is true not only because, if evidence was obtained unlawfully, it must remain unlawful. It must also be ensured, when evidence is used, that it ensures a fair and reliable basis on which to pass criminal judgement under the rules of the system of law in which it is admitted.

b) Conclusions

The principle that evidence obtained lawfully in one Member State should automatically be admitted before the courts of the other Member States is not liable to overcome the problems involved in transferring evidence.

These problems do not (merely) arise out of the different (detailed) rules on gathering and admitting evidence: rather, their origins lie in the fact that different Member States have different rules of procedure.

As there does not seem to be any realistic prospect of harmonising national criminal procedural regulations in the near future, while at the same time there is a considerable stated need to transfer criminal evidence, consideration should be given as to whether a (single European) admission procedure should apply prior to admitting and using evidence obtained in another Member State.

The principle that evidence unlawfully obtained in one Member State should be excluded by the courts of the other Member States can only resolve the problems arising out of the 'free movement of evidence' to some extent. The principle falls down in cases where evidence is excluded, not because of how it was obtained, but because of how it is to be used.

Such a rule also creates practical problems, as the courts would usually be obliged to apply foreign law.

**Question 12:**

To whom should the function of reviewing acts of investigations executed under the authority of the European Public Prosecutor be entrusted?

The Commission proposal on supervising investigations by the European Public Prosecutor's office, as set out in the Green Paper, are inadequate.

Control at European level would be preferable to putting investigations under the control of the national courts, as it does not require any harmonisation of criminal procedural law.

Applying the principle of mutual recognition on a blanket basis underestimates the effects which would arise out of existing differences between criminal procedural standards in
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Member States. Given that the persons being investigated would be bound to have recourse to the examining courts in each national system involved, this principle would put those involved in a worse legal position. Opening up different paths in law creates unlawful certainty, and raises the risk of 'forum shopping'.

What is essential, and in line with standards of Member States' legal systems, is that supervision of the European Public Prosecutor should also be ensured by making him subject to institutions (such as reporting obligations to the European Parliament) and by including provisions on personal liability for misconduct in office.

**Question 14:**

Do you feel that fundamental individual rights are adequately protected throughout the proposed procedure for the European Public Prosecutor? In particular, is the double jeopardy principle properly secured?

*a) Protecting fundamental rights generally*

The Commission proposal that the European Public Prosecutor would guarantee the rights conferred under Art. 6 of the EU Treaty, the ECHR and the Charter of Fundamental Rights does not provide adequate protection for the fundamental or procedural rights of the individual. Simply referring to existing safeguards, such as the ECHR, which merely lay down a minimum standard, is insufficient, as it would put the accused in a worse position in many cases. What is in fact needed is a detailed catalogue of guaranteed rights. Should it prove impossible to reach agreement on an explicit catalogue of fundamental and procedural rights, it must at least be ensured that the European Court of Human Rights' interpretation of the ECHR has binding effect.

What is particularly important in drawing up a catalogue of procedural rights is to determine the precise point at which a person becomes charged and acquires rights accordingly.

In some cases, the 'principle of mutual recognition' of investigations approved in one Member State would put the accused in a worse position, and result in a lowering of existing standards.

*b) Double jeopardy*

Any provision on the double jeopardy rule must in itself prevent anyone being prosecuted twice for the same offence: that is to say, the question of whether the rule has been breached must be examined at the time a person becomes charged.

Particular care is required in formulating the provisions on the question of what acts terminating procedures should be included. As far as the substantive scope is concerned, it would be advisable to base this purely on matters of fact, not on matters of law. An exception should be introduced for abusive cases. The question of whether they apply must be justiciable. This and other problems of interpretation which might arise as the result of different Member States' traditions mean that a provision should be included conferring jurisdiction on the ECJ and making its interpretation final. Otherwise, once again, this would raise the risk of 'forum shopping'. 
**Question 16:**

In the run-up to the Commission's evaluation of the rules governing OLAF, what factors related to the relationship between the Office and European Public Prosecutor seem most meaningful to you?

The Commission's Green Paper suggests that OLAF's duties and organisational structure should be reconsidered in the light of its relations with a future European Public Prosecutor's office. Examples of the aspects which the Commission feels should be considered are:

- Should OLAF continue to be restricted to investigating matters of administrative law, even after a European Public Prosecutor's office is established?

- What should the relationship between a European Public Prosecutor's office and OLAF be?

In terms of how the Commission sees OLAF's position in terms of its relationship with the European Public Prosecutor's office, the points to bear in mind are:

- OLAF could be responsible for criminal investigations as (and possibly only as) a 'support function' to the European Public Prosecutor's office in investigations at local level

- If OLAF were granted such powers, consideration should also be given as to how this support function should be performed. One possible solution here would be to implement powers of instruction equivalent to those between the public prosecutor's office and the police in mainland European legal systems.
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Introduction

Close cooperation in the field of criminal prosecution is regarded by the EU Member States as one of the main factors in establishing a legal union. Initial proposals for a European Public Prosecutor's office were presented at the Nice summit; but no decision was made as to how to proceed further at the time, as the proposals could not be examined sufficiently. The European Commission's Green Paper on protecting the financial interests of the European Communities and creating a European Public Prosecutor's office is therefore to be welcomed as a comprehensive detailed submission for further discussion.

The need for criminal-law protection of the financial interests of the European Community becomes clear when we consider that there was a proven loss of € 413 m in 1999\(^1\). The European Parliament has raised this matter time and time again; but, even so, it should not be forgotten that setting up a European (financial) public prosecutor's office is not the only possible response to this. One alternative might be to make more use of, and develop, existing forms of cooperation, like EUROJUST. A common solution for all criminal acts, not just protecting the Community's financial interests, would also appear worthy of consideration.

The opinion presented here looks at the European Commission's ideas on setting up a European Public Prosecutor's office for criminal-law protection of the financial interests of the EC. By way of example, it takes some of the key points of the Commission proposal and subjects them to detailed examination, namely:

a) The structure and organisation of a European Public Prosecutor's office (question 1)
b) Referring matters to the European Public Prosecutor's office (question 4)
c) The scope of investigative procedures (question 7)
d) Free transfer of evidence (question 11)
e) Controlling the European Public Prosecutor's office (question 12)
f) Fundamental and procedural rights of those involved (question 14)
g) The European Public Prosecutor's office and OLAF (question 16).

Once again, this exposes the tensions between making investigations in cross-border criminal cases as effective as possible and the risks this involves to common standards of fundamental and human rights in the European Union. Nor can either question be separated from the effects on (different) national bodies of law. In the final analysis, however, this tension can only be resolved by a transparent (investigative) procedure, effective protection in law for citizens and established (democratic) controls, as the European Parliament is also demanding\(^2\). The corpus juris of criminal law provisions on protecting the financial interests of the European Union\(^3\) presented by a group of experts led by Mireille Delmas-Marty of France in 1995-6 has attempted to achieve such a balance. The provisions of this corpus juris partly match the Commission proposal; but it also goes beyond the Commission proposal in some respects, for example on the principle of mutual recognition of investigation measures,

\(^1\) Green Paper, section 1.2.1
\(^2\) Cf. the report of the Committee on Budgetary Control of the European Parliament A4-0297/98, PE225.069/fin.
\(^3\) Mireille Delmas-Marty (ed.): Corpus Juris of provisions of criminal law to protect the financial interests of the European Union, Cologne/Berlin/Bonn/Munich 1998
without making any claim to creating a uniform European criminal law or criminal procedural law\(^4\). Comparing the Commission proposal with the *corpus juris* would therefore seem most appropriate, as the present opinion does, in the search for parallels and distinctions.

\[^4\] Mireille Delmas-Marty, Corpus Juris, p.28.
Analysis

I. Structure and organisation of a European Public Prosecutor's office (question 1)

1. Question

a) Commission proposal

According to the Commission proposal, a distinction must be made between, firstly, the legal status of the European Public Prosecutor's office and the Deputy European Public Prosecutors and, secondly, the structure of the European Public Prosecutor's office as an institution.

Given that the European Public Prosecutor would be exercising judiciary authority, and in view in particular of the conditions for his appointment and if necessary removal, he must, according to the Commission' proposals, be given full legitimacy to perform these duties.

One of the essential features of the legal status of the European Public Prosecutor is that he must be independent, both of the parties to proceedings and of Member States and the executive bodies and institutions of the European Community. The European Public Prosecutor should be appointed by the Council by a qualified majority on a proposal from the Commission with the assent of the European Parliament. His term of office should be six years; and should be non-renewable for re-appointment, to ensure his independence. If the European Public Prosecutor fails in his duties, it should be possible to remove him from office on the order of a court established at Community level, i.e. the ECJ. The European Public Prosecutor should be head of the European Prosecution Service and have authority as such.

According to the proposals, the European Public Prosecutor's office should consist of the European Public Prosecutor and Deputy European Public Prosecutors who would be integrated into the national legal systems and would bring offences to trial. The European Public Prosecutor's office should be decentralised, to enable it to integrate its work in national bodies of law without causing any problems, with the Deputy European Public Prosecutors acting as links between the Community mechanism and national systems of justice. The European Public Prosecutor should authorise them to do anything he himself is authorised to do. To ensure that the European Public Prosecutor's office acts consistently, the principle must be that the acts of a Deputy Public Prosecutor are binding outwardly. To ensure that the Deputy European Public Prosecutors are independent, national service and disciplinary law should only apply to a limited extent during their tenure. The proposals also raise the question of whether the Deputy European Public Prosecutors should only work at European level, or whether they should also be allowed to continue their former national duties on a subsidiary level, or whether this can be left to the discretion of the Member States concerned.

5 Green Paper, 4.1.
b) Question

What are your views on the proposed structure and internal organisation of the European Public Prosecutor's office? Should the European function conferred on the Deputy Public Prosecutors be an exclusive function, or could it be combined with an national function?

2. Analysis

The structure and organisation of the European Public Prosecutor's office will decide how efficient this Community institution is. At the same time, however, its structure must also ensure that citizens' fundamental rights are protected effectively. The aim must therefore be to structure the European Public Prosecutor's office in such a way that it is effective without threatening fundamental rights.

a) Structure and organisation

   aa) Decentralised structure:

Following the principle of subsidiarity, the Green Paper proposes that the European Public Prosecutor's office should have a decentralised structure which should integrate it in national legal systems. It does not say anything as to what this decentralised structure should look like in detail. As well as this integration, another argument in favour of a decentralised structure is the desire to avoid setting up yet another bureaucratic, centralised and hence rigid institution. The proposals for a *corpus juris* of criminal law provisions to protect the financial interests of the European of a group of experts around Mireille Delmas-Marty in 1995-1996 also proposed a lean, decentralised basic structure for a European Public Prosecutor's office for precisely these reasons. This model proposed that the European Public Prosecutor's office and its authority be based in Brussels, with the Deputy European Public Prosecutors based in the capitals or cities where the appropriate courts of the individual Member States are based. While the fact that Europol and EUROJUST are already based in The Hague might imply that it would also be an appropriate base for the European Public Prosecutor's office, the underlying idea behind the proposals seems to be that only the European Public Prosecutor's office itself should be centralised, while the Deputy European Public Prosecutors work in or out of the Member States as a possible sensible solution.

   bb) Principle of independence

The Commission's Green Paper proposes that *one of the essential attributes of the European Public Prosecutor's office is that it should be independent, both of the parties to any dispute in adversarial proceedings and of the Member States and Community institutions and bodies*. This should be enshrined in the EC Treaty, and justified by reference to the European Public Prosecutor's office as a special body involved in the administration of justice.

As the representatives of the classical continental legal systems, Germany, Austria and France all have judiciary authorities or public prosecutor's offices as well as courts and

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6 Green Paper, 4.2.1.
7 Mireille Delmas-Marty (ed.): *Corpus Juris* of provisions of criminal law to protect the financial interests of the European Union, Cologne/Berlin/Bonn/Munich 1998.
8 *Corpus Juris*, Mireille Delmas-Marty, Art. 18, pp. 49-5.
9 Green Paper, 4.1.1.
police. All Member States define this office as a body separate from the courts which can issue instructions to the police at any time in the course of investigations. (Even if, in the case of ordinary criminal offences, at least, it normally seems in practice that the police complete their investigations first and only then hand matters over to the judiciary authority, i.e. the public prosecutor's office.) In Italy, for example, the public prosecutor's office occupies a similar position, independent of the judiciary. This would appear to be justified in view of its peculiar duplicate function of supervising the progress of investigations on the one hand but also communicating incriminating and exonerating circumstances on the other. The corpus juris proposals also say that the European Public Prosecutor's office should be independent.

To guarantee his independence, the European Public Prosecutor's term of office should be limited to six years, on a proposal from the Commission, with no possibility of renewal. Article 9 of the articles of association of the International Criminal Court (statutes of Rome) which entered into force on 01.07.2002, also provides that the prosecutor's term of office should be limited to six years to ensure his independence, with no possibility of renewal. Non-renewability is likely to ensure that the European Public Prosecutor is independent, as this means his decisions do not need to be affected by considerations of political popularity.

In line with the considerations above and the discussions in the Corpus Juris, on the other hand, it might be worth considering whether the offices of the Deputy European Public Prosecutors should be limited to a single term of office, to ensure their independence, renewable twice, depending on the term of office proposed. The Commission has not allowed for this, given the specialisation involved and that personnel resources amongst the Member States are scarce; but this argument is unlikely to be convincing if the deputies' term of office is longer - around eight to ten years or so.

cc) Appointing the European Public Prosecutor

Under the Commission proposal, the European Public Prosecutor should be appointed on a proposal from the Commission and with the assent of the European Parliament. The Commission's right of proposal is justified on the grounds that it bears particular responsibility for protecting the financial interests of the EC, and is modelled on the Nice convention proposed for appointing the Commission. While both the members of the Commission and the European Public Prosecutor are only executives, the European Public Prosecutor is capable in theory of intervening much more in the (fundamental) rights of citizens of the EU than a European Commissioner, so he must be more open to democratic control, by the European Parliament, for example. It would therefore be desirable for Parliament to play more of a role, and the Commission less. This could be done by transferring the right of appointment to the European Parliament instead of the Commission, for example. To protect its interests, the Commission could be given consultation rights. It could also be conceivable that the Commission's consent would be necessary to appoint a

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10 Gless/Grote/Heine, [Judicial control and integration of Europol] Freiburg/Breisgau 2001, p.660; §§ 141, 150, 152 GVG (Germany), § 29 StPO (Austria), Art. 31 CPP (France).
11 Karlsruhe Commentary (Pfeiffer), introduction, section 77
12 Kuhne, [Criminal procedural law], section 1272
13 Green Paper, 4.1.1 and 6.2.3.1
14 Corpus Juris, Art. 18, para. 2, p.49
15 Triftterer (Bergsmo/Harhoff), Art. 42, section 17
16 Corpus Juris, Art. 18, p.50
17 Green Paper, 4.1.2.1
European Public Prosecutor, as opposed to mere consultation rights. While this solution aims for a wider European consensus, it also strengthens the position of the executive and Commission, and does not reduce the democratic deficit which exists at Union level\(^{18}\).

While the Commission bears particular responsibility for the European Community's financial interests, this does not apply to the European Parliament's budget to the same extent\(^{19}\), so that this argument is not in itself sufficient to justify giving the Commission the right of appointment, instead of the Parliament, for example.

\textit{dd) Removing the European Public Prosecutor from office}

There is a general principle in Europe that those employed by criminal prosecution authorities are personally liable for irregularities in performing their duties under general criminal law\(^{20}\). This principle must therefore apply to the European Public Prosecutor, too. On the other hand, there must also be provision for immediate disciplinary measures to remove employees from office; while such action may be necessary, the criminal law of Member States cannot make provision for it. To ensure that the European Public Prosecutor is independent (see above), the only bodies which can remove him from office must be judicial ones. To integrate the office of European Public Prosecutor in the democratic system, removal procedures must be instigated by Parliament in particular. Because of the appointment's political significance, however, there are no objections to the European Council or the Commission being able to instigate removal proceedings either. To ensure clarity and legal certainty, the conditions and procedures for removing the European Public Prosecutor from office should be laid down in detail from the beginning.

As the political significance of the European Public Prosecutor's office means that matters must be very far advanced before removal proceedings are called for, consideration should also be given to whether other, less drastic, disciplinary or control measures should be provided for, such as official enquiries by Parliament or admonitions.

\textit{ee) Principle of indivisibility and compliance with instructions of Deputy European Public Prosecutors}

The Commission proposal envisages giving the European Public Prosecutor the right to instruct the Deputy European Public Prosecutors\(^{21}\). This is intended to ensure that the authority is managed efficiently, and that its actions present a common front externally (principle of indivisibility). This principle of indivisibility can also be found in the Corpus Juris proposals on criminal law provisions to protect the financial interests of the European Community\(^{22}\), where it is justified mainly on considerations of efficiency. It is also advisable for the European Public Prosecutor's office to be bound by the acts of its Deputy European Public Prosecutors on the grounds of legal certainty for the citizens, who cannot be expected to accept that the authority could change its decisions at any time. To ensure this principle of independence and make it workable in practice, with it being clear who takes decisions internally in cases of doubt, the European Public Prosecutor must have the right to instruct the Deputies. Such a provision would, for example, be in line with the hierarchical structure

\(^{18}\) Herdegen, [International law], sections 141, 142
\(^{19}\) EC Treaty, Art. 272; Herdegen, [International law], section 260
\(^{20}\) Gless/Grote/Heine, [Judicial integration and control of Europol], Freiburg/Breisgau, 2001, p.669
\(^{21}\) Green, Paper, 4.2.2
\(^{22}\) Art. 18 para. 4, p.50
of public prosecutors' offices in Germany and the rights of instruction for the superiors involved, which once again guarantees the principle of independence.\footnote{§ 146 GVG; cf. also Kühne, [Criminal procedural law], section 140}

\textbf{ff) The European Public Prosecutor as employer}

As the European Public Prosecutor is to be the head of the European Public Prosecutor's office, he must also supervise the staff and Deputy European Public Prosecutors. This includes – as proposed – the right to take disciplinary action. To ensure that the authority is independent, and for reasons of legal certainty, on the other hand, disciplinary measures must be open to appeal, as in national employment law. This could include a right of appeal to the ECJ. The ultimate disciplinary measure as far as the European Public Prosecutor is concerned is revoking the authority of a Deputy European Public Prosecutor, a solution which is right for the system of delegation and the position of the Deputy European Public Prosecutors, who of course are to remain primarily national figures, as this action is a serious encroachment upon the position of a Deputy European Public Prosecutor, while not encroaching on national public service and disciplinary law which revoking the European mandate would make fully applicable again. As such disciplinary action may have to be taken quickly, it would appear sensible to give the European Public Prosecutor, as head of the authority, the right to revoke the appointments of Deputy European Public Prosecutors. But for the sake of legal certainty and to bind the European Public Prosecutor himself to the rule of law, these disciplinary procedures should always be justiciable, before the ECJ for example. If the European Public Prosecutor revokes one of his Deputy's appointments, therefore, this can only be provisional until a final court ruling.

\textbf{gg) Should the rules for officials and other servants of the EC also apply to the European Public Prosecutor's office?}

As far as the question as to whether civil service regulations and those for other EC servants should also apply to the European Public Prosecutor's office is concerned, the first point to note is that these include immunity provisions for official acts as for employees of international organisations.\footnote{Art. 12(a) of the protocol on the prior rights and exemptions of the European Community of 8 April 1965} Immunity from prosecution for official acts by employees of international organisations was established to guarantee their independence from their home countries and the countries in which they are employed, whose influence was feared.\footnote{Ipsen, [International law], § 31 section 31 ff} But as Europe grows together, with increasing confidence in the quite different legal systems of the partners, this immunity would appear to have lost its justification, all the more so as the independence of civil servants can be adequately guaranteed by separate civil service regulations (see above) and limiting the term of office. In view of the aim of overcoming the constraints involved in traditional appeals and extradition proceedings by setting up a European Public Prosecutor's office, as the countries of Europe have faith in one another's legal systems, such immunity provisions would be downright absurd and inappropriate. These immunity systems contained in civil service regulations and rules for other EC employees have been rendered obsolete by the mutual trust which has been created, and they should therefore not apply to the European Public Prosecutor's office or Deputy European Public Prosecutors. Moreover, public prosecutors in all EU Member States are themselves

\footnote{23 § 146 GVG; cf. also Kühne, [Criminal procedural law], section 140}
\footnote{24 Art. 12(a) of the protocol on the prior rights and exemptions of the European Community of 8 April 1965}
\footnote{25 Ipsen, [International law], § 31 section 31 ff}
subject to criminal law, and can therefore be prosecuted as such if necessary\textsuperscript{26}. Secondly, it is assumed that criminal procedures are fair throughout the EU. Nor is the immunity contained in the regulations necessary to guarantee independence, as otherwise all national public prosecutors would have to be immune. There are no peculiar features apparent at European level. The result is that applying civil service regulations and those for other employees of the European Community appears neither necessary nor appropriate in respect of the European Public Prosecutor.

\textit{b) Combining European and national offices}

The Commission proposal include a number of options as far as combining a European with a national office is concerned. On the one hand, holding a European office could exclude any national duties. The second option would be a provision whereby Deputy European Public Prosecutors would be primarily involved in prosecuting offences within the sphere of the European Public Prosecutor, while at the same time exercising their existing national profession on a subsidiary level. The third and final option would be allowing each Member State to decide between the first and second options\textsuperscript{27}.

All three options have their advantages and disadvantages, which the Commission proposal already include to some extent. The first option has the advantage of professional specialisation and rules out possible problems of interest and priority. In view of the major practical problems involved in cross-border investigation and prosecution proceedings, which are often the result of a lack of knowledge of another body of law and of language abilities\textsuperscript{28}, the benefits of specialisation cannot be over-estimated. On the other hand, given how complex offences against the financial interests of the EC are, it would seem that Deputy European Public Prosecutors would have to be specialists as a \textit{sine qua non} for the office to work efficiently and successfully. By making it quite clear that the office is subject to the European Public Prosecutor alone, this option also makes Deputy European Public Prosecutors more independent.

One argument in favour of the second option is that prosecution 'under one roof' as it were is simple and effective, if criminal acts which fall within the scope of the European Public Prosecutor's office injure the financial interests of the Member State concerned at the same time ('hybrid cases'). The problem with this option is that combining a national office with a European one could cause conflicts of interest, loyalty and priority. It could conceivably happen, for example, that in a hybrid case, the [prosecutor's] national superiors might issue instructions contradicting the European Public Prosecutor's. In theory, such a conflict could be resolved by the European office, and hence the European Public Prosecutor's instructions, taking precedence; but such a solution seems impracticable. In view of the decentralised structure proposed (see above), and the fact that Deputy European Public Prosecutors are only appointed for a limited term of office, they are liable to be tied more closely to their own national law, and their national superiors, than to their European superior. It may also happen that, because they are closer to hand, for example, national superiors have more control over what Deputy European Public Prosecutors do than the European Public Prosecutor who is their superior at European level. Secondly, it may be difficult, precisely in these hybrid cases, which involve both national and Community interests, to decide whether a

\textsuperscript{26}Gless/Grote/Heine, [Judicial integration and control of Europol], Freiburg/Breisgau, 2001, p.669, with references
\textsuperscript{27}Green Paper, 4.2.1.1
\textsuperscript{28}Cf. in detail the Pro-Eurojust annual report, p. 13/14
given investigation should be handled under a national or European office. Not even a clearly defined relationship between disciplinary rules pursuant to national and Community law could resolve such conflicts of loyalty, as the facts underlying this distinction cannot be resolved themselves. This provision is not therefore a sufficient guarantee of the Deputy European Public Prosecutors' independence.

The main advantage of the third option - leaving it to Member States to choose whether they want their respective Deputy European Public Prosecutors to be subject to options one or two - is that it represents less of an encroachment on national sovereignty than imposing a solution. The problem with this option is that different Deputy European Public Prosecutors would then have varying status in law, as some of them would report only to the European Public Prosecutor, while others would still have national superiors, too. Even if the first option (having Deputy European Public Prosecutors act in a European capacity alone) might be more difficult to apply in hybrid cases, this solution appears the clearest, simplest and least ambiguous, and therefore offers most legal certainty. Because it is unambiguous, it would also presumably be the least problematic to apply in practice, and is therefore to be preferred to the other solutions.

II. Referrals to the European Public Prosecutor (question 4)

1. Question

   a) Commission proposal

According to the Commission proposal in its Green Paper, 'referral to the European Public Prosecutor' means the official information laid before him by a public authority for the purposes of proceedings to be taken. When a referral is made, the European Public Prosecutor must give a reasoned reply (whatever form this may take) to the request put to him.\(^{29}\)

On the question as to when matters should be referred to the European Public Prosecutor, the Commission proposes the following:

   It should be made possible for the European Public Prosecutor to receive information or a referral regarding any fact potentially constituting one of the predefined Community offences.\(^{30}\)

As to the problem of who should refer matters to the European Public Prosecutor, the Commission proposes the following:

   Any natural or legal person, whether or not a Union resident, could inform the European Public Prosecutor of facts in his possession, by any means whatever. In addition there could be a specific obligation for certain national and Community authorities having defined categories of powers to refer facts to the European Public Prosecutor. The Commission, on the basis of comparable obligations regularly found in national systems, has a preference for mandatory referral or information to the European Public Prosecutor by Community authorities and staff and by national authorities of all kinds in performance of their duties.

\(^{29}\) Green Paper, 6.1
\(^{30}\) Green Paper, 6.1
staff of government departments, especially the customs and tax authorities, police forces and judicial authorities.\textsuperscript{31}

By way of justification, the Commission says that the underlying idea in setting up a European Public Prosecutor's office is that, where the Community's own interests are involved, it should be possible to prosecute offences against those interests centrally at European level. To provide for only discretionary referrals to the European Public Prosecutor would run contrary to this principle. When cases are referred to them, it is precisely a Community overview which national prosecution authorities lack; but something which may appear irrelevant to them might be a vital point when seen as part of a complex constellation of facts. The Commission therefore considers it important that matters involving the Community's financial interests should be referred to the European Public Prosecutor's office as a matter of course.\textsuperscript{32}

\textit{b) Question}

\textbf{Who should be bound to refer matters to the European Public Prosecutor, and when?}

2. Analysis and criticism

The Green Paper's proposals are largely in line with those which a group of experts under Mireille Delmas-Marty made for European criminal procedures as part of the 'Corpus Juris of criminal provisions to protect the financial interests of the European Union'\textsuperscript{33}. Under Art. 19 of the Corpus Juris, 'the European criminal prosecution authority [ESB] would have to be informed of any acts which might satisfy the requirements of fact of Articles 1 to 8, both by the national authorities (police, public prosecutors, examining judges, national civil servants, such as tax and customs authorities) and by the competent Community organisation, the European fraud prevention unit (UCLAF). It could also be engaged by citizens or the Commission bringing charges. The national authorities are bound to transfer conduct of the proceedings to the ESB at the latest by the time formal investigations are opened for the purposes of Art. 29 para. 2 or when enforcement measures are invoked'. The words 'the ESB must be informed' and 'the national authorities are bound [...] to transfer conduct of the proceedings to the ESB' make it clear that this is intended to be obligatory. The authors of the Corpus Juris also demand that the European Public Prosecutor be informed \textit{ex officio}, i.e. without being required to do so.

\textit{a) When should matters be referred to the European Public Prosecutor?}

The first point to clarify is the circumstances in which matters should be referred to the European Public Prosecutor. Art. 19 of the Corpus Juris proposes that the European Public Prosecutor be involved if an act might satisfy the requirements of fact of Articles 1 to 8 of the substantive part of the Corpus Juris. The Commission's Green Paper also takes the view that the European Public Prosecutor should only prosecute specific, precisely defined criminal offences. This is in line with the European Union's system of protection in law in terms of referrals to the ECJ: contrary to German administrative law, for example, there is no general

\textsuperscript{31} Green Paper, 6.1
\textsuperscript{32} Green Paper, 6.1
\textsuperscript{33} Mireille Delmas-Marty (ed.): \textit{Corpus Juris} of provisions of criminal law to protect the financial interests of the European Union, Cologne/Berlin/Bonn/Munich 1998, referred to below as 'Corpus Juris'
Criminal-law protection of the financial interests …

clause as in Art. 40 VwGO, but there is an enumerative list of individual authorities. For the sake of a uniform system within the European Union, offences should be referred to the European Public Prosecutor once established.

Moreover, matters should only be referred if the interests involved are mainly Community ones and the cases are not trivial. This would enable the European Public Prosecutor to concentrate on the main cases and work effectively.

b) Who should refer matters?

When it comes to referring matters to the European Public Prosecutor, the options open are for matters to be referred by the competent national or Community authorities and for matters to be referred ex officio.

National authorities, such as administrative employees and the courts, should be able to refer matters to the European Public Prosecutor, as they are often the first at national level to be presented with acts which might injure the financial interests of the European Communities. The same applies to Community employees.

The European Public Prosecutor could also act on an ex officio basis to reinforce his position. The Commission can also be involved ex officio in cases of breaches of competition law. Given that the two procedures are comparable (see above), it would seem appropriate to grant the European Public Prosecutor this right as well. If he did not have this right, his role would be too passive: he would not be in a position to use information he obtained on acts which might amount to offences requiring the financial interests of the European Communities to be protected. Instead, he would have to wait until a national or Community authority referred matters to him. This would make it impossible for him to work efficiently, or to protect the financial interests of the European Union effectively. It is therefore essential that the European Public Prosecutor be able to act of his own accord, especially if information is passed to him by the executive bodies of the Community, but the national authorities have not referred matters to him, or have closed proceedings34.

c) Should it be made obligatory to refer matters to the European Public Prosecutor?

It is questionable whether making it obligatory to refer matters to the European Public Prosecutor is (always) beneficial.

Firstly, there is a risk that the European Public Prosecutor's office would be flooded with trivial cases and hence overloaded. Secondly, if too much had to be reported, the authorities would lose interest in reporting, because if they had to report every offence - without a settlement being reached - they would be less motivated to report cases. The authorities would not then see any point in referring matters. On the other hand, it should also be remembered that, to do its job, the EPP's office must have an overview of all offences which might affect the EC's financial interests, because something which might be insignificant at national level could seem quite different seen in the light of all the relevant offences across Europe, and could affect the picture accordingly35. To ensure an overview of all offences against the financial interests of the EU, there must in principle be an obligation to report matters to the European Public Prosecutor's office. To ensure there is sufficient motivation to

34 Corpus Juris, Art. 19, notes
35 Green Paper, 6.1
report matters and prevent interest waning in doing so, a provision might be found whereby, in cases where the financial interests of the EU may be involved, the national public prosecutor's office would remain competent, but the European Public Prosecutor would take over the case.  

We will now use a number of criteria to examine whether it is desirable that cases should have to be referred to the EPP.

**aa) Principle of mandatory prosecution and the discretionary principle**

Under the principle of mandatory prosecution, if the criminal prosecution authorities suspect that an offence has been committed, they are required to act ex officio, that is, without any charges being brought. There are exceptions to this under the discretionary principle, which gives the public prosecutor's office discretion as to whether to intervene. The discretionary principle mainly applies in Member States to trivial cases; but different Member States apply the principle of mandatory prosecution and the discretionary principle differently, although all systems of law have elements of both.

In Sweden, the public prosecutor's office must bring prosecutions, the exceptions being much narrower than under §§ 153 ff. of the German criminal procedural code. The Dutch public prosecutor's office, on the other hand, is not bound to bring charges, and can even decide not to prosecute if there is sufficient evidence to convict, or close proceedings in return for payment of a sum of money or fulfilling other conditions. In Spain, on the other hand, the public prosecutor is bound strictly by the principle of mandatory prosecution.

The Corpus Juris proposes that the European Public Prosecutor's office be subject to the principle of mandatory prosecution, but that it may (a) refer minor offences or those affecting mainly national interests to the national criminal prosecution authorities, (b) cease proceedings if the accused has admitted the offence, made reparations and has repaid the moneys obtained unlawfully where appropriate or (c) consent to a settlement which closes proceedings by a national authority applying to do so, subject to the provisions of the Corpus Juris in Art. 22 para. 2 B.

The Commission's Green Paper also argues in favour of the principle of mandatory prosecution, and in favour of closing proceedings if the following discretionary grounds apply:

a) the case is not significant enough in terms of the Community's financial interest,

b) the national public prosecutor could be allowed to prosecute someone for just some of the (alleged) offences,

c) there is a settlement.

If the European Public Prosecutor's office is to be subject to a strict principle of mandatory prosecution, it will only be able to close proceedings in a limited number of cases. If national prosecution services and Community authorities had to refer every case to it where the Community's financial interests were involved, this would risk flooding the EPPO with trivial

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36 Such a solution would also be in line with the rule in Art. 9 of the statutes of the Yugoslavia Tribunal
38 Walter Perron, [Towards a European investigation procedure?], ZStW 112 (2000), p.204, 212
40 Corpus Juris, Art. 19, para. 4
41 Green Paper, 6.2.2.1
cases. It would then be forced to close many cases, which would occupy considerable resources unnecessarily.

The principle of mandatory prosecution would in itself oblige the European Public Prosecutor to investigate a large number of cases, as the opportunities to close proceedings on a discretionary basis would be very limited. Obliging him to investigate more cases by making it mandatory to refer cases to him would impose an additional workload.

This would seem to make it difficult for the EPPO to work efficiently: so this rules out making referrals to it obligatory.

**bb) Comparison with European competition law**

A comparison with European competition law might indicate whether it would be desirable to make referrals to the European Public Prosecutor obligatory. Such comparison is appropriate because the procedures for establishing breaches of competition and criminal investigation procedures in Member States are similar, so a comparison might show how the European Public Prosecutor's office should be structured. However, unlike criminal investigations, the procedures for establishing breaches of competition are essentially aimed at reaching an amicable settlement rather than repression\(^42\).

Under Art. 85 of the EC Treaty, the Commission can act *ex officio* or on application by Member States, and by individuals and organisations concerned. Member States can make application under Art. 3(2)(a) of Regulation (EC) No 17/62\(^43\); so there is no compulsion to refer matters to the Commission. If an application is made, the Commission is bound to investigate. The Commission can meet its obligations by instigating investigations or by issuing a reasoned opinion that there are no grounds for suspicion\(^44\). Instigating investigations is therefore within the Commission's due discretion\(^45\): that is, the discretionary principle applies. Member States are most likely to involve the Commission if the offences are committed in the territory of another Member State in which they have no powers of investigation themselves, or if different Member States see the facts differently\(^46\).

Whether there is a need to make a referral to the EPPO obligatory, whereas referring breaches of competition to the Commission is merely discretionary, can be determined by comparing procedures. Competition rules are designed to protect the single European market, which would be jeopardised if only Member States were required to desist from doing anything which might impede the cross-border trade in goods and services. Companies could agree to divide the markets between them, which would put completion of the single market at risk\(^47\). Such agreements may be reached at both national and international level. The purpose of creating a European Public Prosecutor's office, on the other hand, is to fight fraud and corruption within the EU effectively. Cases of fraud to the detriment of the Communities are often the result of international crime, which is both complex and multinational, so that the divisions between different criminal law jurisdictions within the

\(^{42}\) Gless/Grothe/Heine, [Integrating Europol in the justice system], p.546
\(^{43}\) OJ L 13/204
\(^{44}\) Pernice, Art. 89, EC Treaty (old version), note 5, in Grabitz/Hilf, [Commentary on the European Union]
\(^{45}\) Cf. Art. 2, 3 para. 1 Reg. 17/62
\(^{46}\) Pernice, Art. 89, EC Treaty (old version), note 5, in Grabitz/Hilf, [Commentary on the European Union]
\(^{47}\) Brinker, Art. 81, note 1, in Jürgen Schwarze, EU commentary
European Union make it difficult to prosecute effectively. Both procedures therefore serve to protect the European Communities, and both are international in nature.

The investigative and breach of competition procedures are also comparable, as stated above. Under the territoriality principle, investigations by the national police and courts are restricted to the territory of the Member State in question. To obtain information from other Member States, the national authorities have to resort to judicial assistance procedures. While there are increasing exceptions to this rule pursuant to agreements between Member States under international law, the territoriality principle still largely prevails. As with procedures dealing with breaches of competition law, matters should be referred to the European Public Prosecutor's office if the territoriality principle prevents investigations being conducted in other Member States.

One argument against comparability is that, in competition procedures, the Commission is subject to the discretionary principle, whereas the European Public Prosecutor is to be subject to the principle of mandatory prosecution, with exceptions. This does not mean, however, that matters must be referred to the EPPO, as opposed to the Commission. As stated above, there is then a risk that the European Public Prosecutor would be flooded with trivial cases, but would have less opportunity than the Commission of ceasing proceedings. Competition law is also subject to two restrictions when it comes to prosecuting breaches of competition law: firstly, as stated above, Member States are under no obligation to inform the Commission; secondly, it is within the Commission's due discretion to decide whether to instigate proceedings. In prosecuting offences against the financial interests of the Communities, there is no provision for restricting prosecution of offences if the principle of mandatory prosecution applies. So, once again, there seems no need to make it obligatory to refer matters to the European Public Prosecutor.

In conclusion, it can be said that the procedures are comparable. There is therefore no need to make referring matters to the European Public Prosecutor's office mandatory, provided (as was stated above) that duties of information are imposed ensuring that the EPPO will be informed.

cc) Comparison with preliminary rulings procedure pursuant to Art. 234 of the Treaty establishing the European Communities (Treaty of Rome)

Other grounds for examining whether it would be appropriate to make referring matters to the European Public Prosecutor mandatory might be provided by comparison with the preliminary rulings procedure pursuant to Art. 234 of the EC Treaty. The purpose of this procedure is to ensure consistent legal practice in the Union in questions of relevance to European law. We should therefore examine whether other judicial proceedings provide for obligatory referral to the European Court of Justice (ECJ) as part of the European Union's system of legal protection.

Under Art. 234(3) of the Treaty, all national courts against whose decisions there is no judicial remedy under national law are obliged to refer to the ECJ. Other courts may so refer.

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48 Such as the convention on implementing the Schengen Convention of 19 June 1990 (Art. 39 ff. Observation and disadvantages): Convention on mutual official assistance and cooperation between customs authorities (Naples II) of 18 December 1997; Convention on judicial assistance in criminal matters of 29 May 2000 (controlled supplies, joint investigation groups, covert investigations).
49 Herdegen, [European law], note 219.
If these provisions are applied to referrals to the European Public Prosecutor's Office, the question arises as to whether, here too, matters should only be referred if a judgement is not open to any further appeal.

The main job of a public prosecutor is to establish facts in preparation for bringing charges. Judgements by the courts of final appeal in criminal law are made under appeals brought by the public prosecutor's office or the accused. In contrast to appeal procedures, however, review procedures do not consider any further matters of fact, only matters of law. So if matters only have to be referred to the European Public Prosecutor as the final instance, as is the case with the preliminary rulings procedure, he ceases to have any major effect on the process, as his main function of establishing facts has already been completed.

Making referrals to the European Public Prosecutor obligatory in the final instance alone, on which his decision is then final, must therefore be rejected.

III. Scope of investigative procedures (Question 7)

1. Question

a) Commission proposal

Under the Commission proposal, the European Public Prosecutor would be able to use any investigation measures which are also available to individual Member States in prosecuting similar financial offences. Where these investigation measures involve fundamental rights, a judge should be involved.

In the Commission's view, if investigations are to be conducted efficiently, it is not enough to be able to use enforcement purely at national level, as this cannot overcome the limits imposed by international judicial assistance and extradition. On the other hand, it is not the intention to create a 'European criminal law', which would be out of proportion to the intended aims. To resolve this dilemma, it is therefore proposed that investigation measures be mutually recognised, both in terms of opening investigations and analysing the evidence obtained from them.

To be precise, as regards the national investigation measures available to the European Public Prosecutor, mutual recognition would mean that, in the event of execution in a Member State of an investigation measure authorised by a court in another Member State, the European Public Prosecutor would not have to seek a fresh authorisation.50

According to the Commission, the European Public Prosecutor's powers of investigation should be as follows:

First, there should be Community investigation measures available at the European Public Prosecutor's discretion. This could include gathering or passing information or questioning or interviewing witnesses and accused (in the latter case, only with their consent) but also searching companies' premises if necessary. Community investigation measures should not have powers of coercion. On the other hand, the Commission also recognises that there is a

50 Green Paper, 6.2.3.1
need to guarantee the rights of the accused for Community investigative procedures as well. Given their communautaire nature, these investigation measures should have the same effects in law anywhere where Community investigations and prosecution are possible.

The European Public Prosecutor must also be able to take coercive action wherever he is able to investigate and prosecute matters. This should include investigations such as habeas corpus, house searches, confiscation, seizing assets, supervising communications, covert investigations and controlled or supervised deliveries. Such investigations must be approved by the national courts in the investigation procedure, and would then be executed by the appropriate authority, under the direction of the European Public Prosecutor. Approval should be subject to the national law of the Member State in which the investigating judge sits, enforcement subject to the lex loci. Under the Commission proposal, it would first be necessary to establish that there is a legal basis for the investigation measures in each Member State.

Investigations such as arrest warrants, custody and detention, which are particularly serious in terms of their encroachment on the fundamental rights of those involved, should only be open to judges in the investigation measures. The European Public Prosecutor would therefore have to apply to those judges where such measures involve restricting or depriving anyone of their freedom. As a general rule, an arrest warrant should be a so-called 'European arrest warrant', as the Council's framework resolution proposes.\(^{51}\)

**b) Question**

Is the list of investigations open to the European Public Prosecutor sufficient to overcome the fragmentation of the European jurisdiction in criminal matters? What rules should such investigations be subject to (governing law, control)?

2. Analysis

As with all criminal investigations, the question as to what investigations the European Public Prosecutor can use and apply at his own discretion - what measures are subject to the approval of the competent examining judge, and what measures can only be ordered by the courts, at the request of the European Public Prosecutor - is a source of conflict between the aim of making investigations (in this case, into offences against the financial interests of the EC) as effective as possible on the one hand and protecting fundamental human rights on the other, which in particular includes the right to a fair hearing and protecting personality and privacy.\(^{52}\)

**a) List of investigation measures**

The Green Paper raises the question of whether the list of investigation measures the European Public Prosecutor is to be endowed with is sufficient (see above). In principle, the Commission proposal involves enabling the European Public Prosecutor to undertake any investigation measures available to Member States in prosecuting similar financial offences. It may be assumed that the investigations open to Member States are sufficient to combat...
financial offences. Otherwise, the Member States of the Union would find it impossible in principle to investigate offences against national financial interests; there is no reason to believe that there is any general deficit in terms of the investigations available.

**b) Investigations by the European Public Prosecutor under Community law**

Under the Commission proposal, the European Public Prosecutor would not have any coercive (sovereign) powers of his own, which means that he could only conduct voluntary investigations on his own authority under Community law. In particular this would include collecting or seizing information and questioning and interviewing accused (the latter only with their consent) and hearing witnesses, although the rules of defence would apply here.

The proposal for precisely regulated Community procedures is to be welcomed, if only on the grounds of legal certainty for the accused; but the question is whether this is enough to safeguard the fundamental rights of the accused. The extent to which statutory regulations protect those they are intended to protect (in this case, the accused) is proportional to the facilities the persons protected have to protect their rights. It follows that there needs to be general protection against investigations at the European Public Prosecutor's discretion. This in turn means precisely defining the rights of defence, which must go beyond the bare minimum (the ECHR) to ensure that fundamental rights are protected at their current levels (see question 14 for further details). Accordingly, even in respect of investigation measures carried out at the discretion of the European Public Prosecutor involving no coercive power, there is a need for legal protection against failure to respect the precisely defined rights of the accused.

One example of how measures not directly involved in exercising coercion can put the accused in a worse position in law and give him less legal certainty than in the Member States arises out of the consequences of one of the Green Paper's (cautious) proposals. This considers giving the European Public Prosecutor the right to search companies in the course of investigations without first obtaining a court order, as not all Member States require a warrant. In Member States where a court order is always required for company searches, the legal certainty available to the accused is necessarily reduced if the European Public Prosecutor does not require a warrant. In those Member States, granting such authority would put the accused in a worse position and hence reduce legal certainty. Having national and international search warrants running in parallel would also reduce legal certainty, as warrants would still be required for offences which do not affect the EC's financial interests.

What this would mean is that, while a national public prosecutor would need a warrant for the same investigations (in this case, searching a company's premises), the European Public Prosecutor would not. Apart from the fact that having such confusing search warrants would confuse the citizens (and the courts), and would reduce legal certainty merely by not being transparent, this would have grotesque effects in the worst national criminal cases. If the financial interests of the EC were involved, searches could be carried out without a court order, but not in any other case, even in the case of such serious crimes as murder or trafficking in human life.

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53 Green Paper, 6.2.3.1(a)
54 Kühne, [Criminal procedural law], note 556
55 Green Paper, 6.2.3.1(a)
c) Mutual recognition of investigations

Under the Commission proposal, instigating and consenting to investigations would be mutually recognised. In other words, any investigations approved or ordered by the courts in one Member State would be enforceable in any other Member State. As the principle of mutual recognition of investigations will also apply to the evidence so obtained, it cannot be completely separated from the question of assessing evidence (see q. 11 below).

Although the simplicity of this question may seem persuasive at first sight, it raises considerable problems in terms of the rights of the accused and legal certainty.

In the first place, while different Member States use the same or similar terms to define investigations, they do not necessarily involve the same powers: telephone tapping in England and Wales is subject to other conditions, and has other effects, than in Germany, for example. This means that it is not automatically possible to ensure, as the Commission's Green Paper proposes, that there is a minimum degree of harmony between national provisions relating to investigation measures, which in itself assumes that there is at least one relevant statutory provision in all Union states. In theory, therefore, one Member State might authorise a given investigation measure for financial crimes, while another might authorise it for all offences. Even so, under the Commission proposal on secondary legislation, there is no reason why this measure could not be carried out on the European Public Prosecutor's authority, so that, in a Member State which in principle only allowed investigations in connection with financial crimes, it could also be applied to offences against the financial interests of the European Communities. Mutual recognition, as proposed in the Commission's Green Paper could therefore extend the European Public Prosecutor's powers of investigation considerably, albeit insidiously and covertly. This would amount to a massive encroachment on national criminal law which, ultimately, would be a greater encroachment on national sovereignty than specifying a separate investigation procedure in its own right, with rules of evidence and procedural rules, might indicate. The extension of powers of investigation not provided for in national legislation via the principle of mutual recognition would therefore be tantamount to introducing European procedural rules without calling them by that name, which would be neither transparent in law nor subject to parliamentary control.

Ordering investigation proceedings in one Member State and enforcing them in another would considerably reduce the ability of the citizens concerned to protect themselves in law. Firstly, the principle of mutual recognition of investigations does not say which courts those involved can appeal to, which means there is a risk that no court will admit responsibility. Secondly, protection in law is also made more difficult by the fact that the system of law under which investigations are ordered and the system under which they are enforced are different. In the final analysis, as a general rule at least, the national courts 'only' recognise their own national law, and so have problems when it comes to applying foreign law. It is also hard to imagine how the lawfulness of enforcing investigations can be assessed, if the principle of mutual recognition means it has to be taken virtually as God-given. Separating the remedies available in law by instigation and enforcement cannot resolve the problem: because it would be simply unreasonable to expect those affected by investigations to take action against them in different courts in different countries (attorneys from each system of

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56 Cf Kühne, [Criminal procedural law], note 1203
57 Green Paper, 6.2.3.1(b)
law, language problems, time consumed, procedural costs etc.). The argument that the accused are responsible for the investigations being carried out against them in the first place is not convincing, firstly because it is easier for someone to defend themselves under their own legal system\(^{58}\) and, secondly, because it must always be borne in mind that the accused may be innocent.

The principal of mutual recognition of investigations of all other Member States also involves a risk that the European Public Prosecutor might engage in 'forum shopping'. Different European legal systems may in effect make identical investigations subject to different requirements. As the European Public Prosecutor's office can choose in which of the fifteen Member States to bring or order investigative procedures, there is a risk that it will opt for the legal system with the minimum requirements (cf. question 14 below). The only way of avoiding this risk is to have detailed, obligatory rules of competence.

\(d)\) Supervising the European Public Prosecutor's office

As well as the problems above involving the principle of mutually recognising evidence involves, there are also other concerns in principle against accepting or ordering actions in law in a Member State other than that in which they are enforced.

In principle, when an application is made for an order for investigations, such as a house search, the Member States' systems of law require precise details of what house or flat is to be searched\(^{59}\). This derives, first, from the protection provided by the requirement to obtain such a warrant, which would not be achieved without calling it as such and, second, from the principle of legal certainty. If an application is made for such a search warrant, the European Public Prosecutor's office must therefore know precisely where the search concerned is to be made. If this information has to be available first, there may be no apparent reason why the warrant should be granted by the competent examining judges in the Member State in which the search is to be made, and which may also have to decide whether enforcing it is even lawful. Against this practical background, it becomes clear that the principle of mutual recognition of investigations for which authorisation is required does not make things (much) easier, but may reduce the opportunities for defence considerably. In view of this fact, it becomes clear that the risk of forum shopping cannot be over-estimated.

Lastly, it is questionable in principle whether the national courts can actually exercise effective control of the European Public Prosecutor's office engaging in investigations, which is of course the whole point of making it have to apply for authorisation to conduct them in the first place\(^{60}\). In a Member State, the courts are of course concerned in the first instance with their own national law: it is impossible for them to have an overview of all European bodies of law. In the final analysis, under the Commission proposal, the courts could authorise and order investigations by the European Public Prosecutor's office even though they do not know enough to assess their significance, which would render weighing up the interests impossible. It is therefore impossible for the national courts to exercise effective control over the investigations of the European Public Prosecutor's office.

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\(^{58}\) Cf. Jakobi, Protecting Citizens from Injustice – an Agenda for Europe, p.277-289, see also question 11, 2 a) bb) below

\(^{59}\) Kleinknecht/Meyer-Gössner, [criminal procedural regulations], Commentary, § 105 note 5

\(^{60}\) Kühne, [Criminal procedural law], note 409, Voss in Gless/Grote/Heine, [Judicial control and integration of Europol], p.112
As individual national procedures vary, it cannot be assumed that the principle of mutual recognition of investigations is sufficient to overcome the fragmentation in European criminal law.

IV. Free movement of evidence (question 11)

1. Admissibility of evidence

   a) Commission proposal

   To enable evidence gathered for (criminal) proceedings in one Member State to be used in court in other Member States without any problem, the Commission proposes that

   The courts of Member States involved in criminal proceedings which involve an (alleged) infringement of the EU’s financial interests should be bound to admit any evidence which may be advanced in law under the national law of another Member State\(^61\).

   The Commission justifies this proposal amongst other things by referring to the conclusions of the EU's Tampere summit, which lays down that 'evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States\(^62\).

   b) Question

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

2. Excluding evidence unlawfully obtained

   a) Proposal

   As a solution to the problem of evidence unlawfully obtained (in the state where it is gathered), the Commission proposes that:

   The prohibition on admitting evidence unlawfully obtained should be based on the rules of evidence of the Member State. The (national) courts would then use the rules of evidence of the other states involved\(^63\).

   The Commission justifies its proposals by saying that there is a comparable solution in private international law\(^64\).

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\(^{61}\) Green Paper, 6.3.4.1
\(^{62}\) Conclusions of the Chairman of the European Council of Tampere, no. 36
\(^{63}\) Green Paper, 6.3.4.2
\(^{64}\) Green Paper, 6.3.4.2
b) Question

Do you think that the principle that evidence unlawfully obtained in one Member State should be admissible in the courts of all other Member States is such as to enable the European Public Prosecutor to overcome the barrier raised by the diversity of rules of evidence?

3. Analysis and critique

Before analysing the viability of the Commission proposal, we need to establish what those proposals actually mean.

a) Admission of evidence – what the model proposed actually means

   aa) Abolition of conventional judicial assistance – loss of filter function

Traditionally, evidence is sent by one state to another, i.e. from one system of law to another, by way of international judicial assistance in criminal cases. The first step here is for the requesting state to apply to the requested state via the agreed channels. If the requested state agrees to grant assistance, it normally provides the judicial assistance required in accordance with its own procedural rules ('locus regit actum'). The competent authorities send the findings to the competent authorities of the requesting state, subject if necessary to reservations as to their use. The question of the admissibility of evidence is judged by the law of the court hearing the case which wishes to admit the evidence.\(^{65}\)

The first point to note is that the conventional route of gathering evidence across borders is felt to be time-consuming and laborious, not only by the bodies of the EU, but by the Member States themselves. Second, respecting reservations as to use and applying the procedural laws of the requested state may cause problems when putting evidence forward before the (foreign) court.\(^{66}\) It was for this reason that Member States amongst other things established the EU Convention on judicial assistance in criminal matters between the Member States of the European Union (referred to below as the EU judicial assistance convention)\(^{67}\). As well as making a number of judicial assistance procedures simpler (between EU Member States, but not in the case of EU bodies), this convention also aims to resolve the problem of evidence by making more use of the law of the requesting state. In future, in contrast to the Commission proposal, evidence will be put forward in accordance with the procedures of the court admitting it ('forum regit actum').

At the Tampere summit, however, the EU Member States also held out the prospect of 'free movement of evidence', although without actually laying down a strategy as to how this is to be achieved.\(^{68}\)

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\(^{65}\) On this conventional understanding for England and Wales, see McClean, International Judicial Assistance, p.131; for Germany, see Federal Supreme Court judgment in *Neue Zeitschrift für Strafrecht* [New criminal law review] 2000, p.547 with notes and Nagel, [Obtaining evidence abroad], p. 289ff and 315ff; for France, *Lombois*, Commission Rogatoire [requests for judicial assistance], in Encyclopédie Dalloz International, nos. 2 and 31, *Merle/Vitu*, [General criminal law], note 331

\(^{66}\) See case studies in IV. 3 c)

\(^{67}\) OJ C 197 of 12.7.2000, 1

\(^{68}\) Conclusions of the Chair of the European Council of Tampere, No 36
bb) The concept of 'free movement of evidence'

The proposals put forward in the Commission's Green Paper could be seen as embodying this strategy, which was initially developed with a view to combating fraud. Contrary to the EU convention on judicial assistance, this is not (only) intended to simplify judicial assistance procedures, but to replace them with 'free movement of evidence'.

This concept is clearly derived from the 'principle of free movement' which was developed in Community law to establish the single European market. The Community law concept works on the assumption that (a) 'production' procedures in one state are equivalent to the 'production' procedures in another, and that (b) this is sufficient for the products to be used under other legal systems. The product (for which freedom of movement is asserted) is therefore treated as if it had been made in the [observer's] own state, under its own legal system. In accordance with this principle, evidence obtained lawfully in one Member State should be admissible in the courts of all other Member States.

cc) Interim conclusions

What the Commission proposal actually mean, therefore, is that evidence obtained lawfully in one Member State of the EU would be admissible in the courts of all other Member States without any further examination, based on the fiction that such evidence was (lawfully) obtained under the procedural rules of the court admitting it.

Putting it another way: a witness statement taken in the course of investigations in country A, under the rules in force there, would be treated as a lawfully recorded witness statement in any other country, regardless of the conditions under which it was obtained in A. Documents seized under the procedural rules of one EU Member state would be deemed to have been lawfully seized in any other Member State, no matter if the requirements applicable there were different. For more details see the case studies in IV.3 c).

b) Excluding unlawful evidence – what the proposed model actually means

As far as excluding evidence obtained unlawfully is concerned, the Commission proposal seem to be consistent, in terms of the concept of 'free movement of evidence'. What remains to be considered is whether they are also suited to proceedings being conducted by the (national) courts using transferred evidence. There are two problems the Commission proposal would cause in practice:

aa) National courts applying other systems of law

First, when deciding whether to admit evidence, the (national) courts would find themselves obliged to apply alien law regularly in evaluating evidence to establish whether that evidence was admissible.

bb) Ignoring the rules of evidence of one's own legal system

Second, the Commission's concept does not allow the court any option to review evidence in the light of its own specific system of law and rule it inadmissible if necessary.
c) Critical assumptions

It is questionable whether the concepts which the European Commission has put forward are viable in practice, given the (structural differences) between criminal procedural procedures in the Member States.

If the rules of evidence in national procedural regulations vary, it is basically because the approaches differ. The spectrum ranges from the adversarial procedures of common law through to the examining procedures conventionally used in mainland Europe, with a number of hybrid forms in between.

The purpose of evidential procedures in criminal law is to create a reliable decision-making basis in a fair hearing on which the criminal courts can base their judgements.

The question is whether this aim can be achieved on the basis of the Commission proposal.

d) Case studies

To illustrate the effects and problems of the idea of 'free movement of evidence' and/or the proposals as presented in excluding unlawful evidence, a number of case studies should serve as examples to show the practical consequences (based on the legal systems of Germany, France and England and Wales).

The emphasis here is on comparing the two basic models of criminal proceedings; the party proceedings of common law on the one hand and the official proceedings of continental law on the other. In the first case, it is the parties who determine the substance of the proceedings, which they intend to substantiate by advancing evidence. In the latter case, the principle of official investigation requires that the facts be examined in depth by the courts as neutral parties.

The differences in structure may cause problems, amongst other things as follows:
- Evidence gathered and/or presented may become disconnected by being transferred to another kind of proceedings. (Not even the Commission proposal on excluding evidence obtained unlawfully can correct this, as the evidence was [originally] gathered lawfully; the doubts as to admissibility derive from the situation in which it is used.) (Case 1)
- Evidence gathered in accordance with the rules of one system of law may not be capable of providing a sound basis for judgement in another system of law, for example if the instruments which are intended to ensure the quality of the evidence when gathering it are not viable. The idea of the 'free movement of evidence' fails here, because there is no 'functional equivalent' of certain forms of evidence (Case 2)
- Admitting evidence gathered in accordance with the rules of one system of law may appear unfair under the rules of another system of law as the national legislators reached different conclusions in weighing the interests of prosecuting crime against other legitimate interests. Once again, the Commission proposal on excluding evidence obtained unlawfully do not provide a solution, as the evidence was (originally) obtained

69 These three systems of law represent – in terms of basic models – the differences between two mainland European systems of law with their examining proceedings (each with its own model of a public prosecutor's office and examining judges) and Anglo-Saxon adversarial proceedings
lawfully. The doubts as to its admissibility arise out of the situation in which it is admitted (Cases 3 and 4).

With regard to the proposal to exclude evidence gained lawfully under the law of the state in which it was gathered, there are other concerns in terms of practical feasibility, since this concept normally involves applying another body of law.

The case studies are based on the following situation:

D runs a company based in Düsseldorf. F is the managing director of its subsidiary in Toulouse. E runs an agency in London, which provides D and F with business contacts. The agency employs X and S, D's son.

In the course of privatising publicly owned companies in Germany and France, D comes under scrutiny from the German criminal investigation authorities. He is suspected of obtaining considerable sums in EC subsidies fraudulently, or of using them improperly.

The Düsseldorf public prosecutor's office reports its suspicions to the criminal investigation authorities in Manchester and Paris and the European office for combating fraud (OLAF) in Brussels.

**aa) Case 1**

On receiving the information from Germany, the police in London start investigating E. Not long afterwards, they present E and his defence council with a 'bargaining' proposal. E's solicitor advises accepting the offer, as the terms offered are good and nothing can happen to E if this deal falls through: because any admission of guilt made in the course of bargaining cannot then be used as a confession in any subsequent prosecution. E then says he is prepared to admit misusing EC subsidies. The proceedings are closed before the 'deal' is made.

OLAF believes it was wrong to close the case. It sends a copy of the documents in the case to the German prosecuting authorities, asking them to open proceedings against E on the basis of the evidence gathered in England.

E disputes the charges against the German prosecuting authorities in full: so the German authorities want to enter the admission of guilt from the English bargaining proceedings in the case.

Applying the principle of freedom of movement which the Commission proposes to this case, the admission of guilt from the English bargaining proceedings could be admitted in Germany without any further examination: because the Commission's idea of 'free movement of evidence' provides precisely that, contrary to generally accepted legal doctrine following the rules of the state where evidence is gathered makes the evidence admissible in the requesting state per se.

Even today, in line with the German understanding of the courts' duty to investigate, a confession may be admitted as evidence in criminal proceedings in principle, unless, exceptionally, there is a prohibition on introducing it.

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70 See Roxin, [Criminal procedural law], § 15 note 3
71 On the other hand, considering the evidence may result in the confession not being included in the criminal judgment
German criminal procedural regulations do not impose any express prohibition on admitting a confession which was made in the course of plea bargaining (which ultimately failed to materialise). Such 'bargaining' is alien to German criminal proceedings. Criminal proceedings in England, on the other hand, often end in bargaining. The fact that this way of ending proceedings is widely accepted is due amongst other things to the fact that criminal proceedings are adversarial, and are not about finding out what actually happened and reaching judgement on that basis, but about obtaining satisfaction in law through a process in which both parties have a fair opportunity of presenting their case.

German law requires there to be particular circumstances surrounding the confession which make it appear reasonable to restrict the freedom of will of the person making a confession before such evidence is ruled inadmissible. Such circumstances are listed in § 136 a of the criminal procedural regulations: (a) freedom of decision-making and acting are impeded by deceit; (b) they are threatened with an action which is inadmissible in procedural law and (c) they are promised an advantage which the law does not allow. None of these circumstances applied at the time E admitted his guilt. Nor could the prosecuting authorities foresee that E could expect his admission to have implications beyond the boundaries of his own legal system.

There are therefore no grounds in German law for excluding the admission, as it is treated as an admission (of guilt), in accordance with the fiction of equivalence of the concept of free movement of evidence which was obtained under German law. This could cause problems, especially as far as the person involved is concerned.

One argument against admitting the English confession in German proceedings, on the other hand is that the admission of guilt would have been inadmissible in English proceedings in view of the circumstances. While there is no express prohibition on admitting evidence in English law, admissions of guilt obtained by bargaining, if a deal then fails, are normally regarded as questionable evidence which would be excluded under the conditions of section 76 of the PACE. This is because an admission of guilt in bargaining is regarded as part of the accused's negotiating strategy (aimed at ending proceedings) and not as evidence.

If the admission were admitted in Germany, it would be ignored.

Assuming that the admission of guilt could stand up under the 'free movement of evidence' rule, the Commission proposal do nothing to help exclude evidence obtained unlawfully in one Member State which should be excluded under the rules of evidence of that state - because the confession was of course originally obtained lawfully, but not as evidence in any (disputed) trial. Only admitting it in proceedings in the trial would be unlawful. Under the Commission proposal, this conclusion could only be corrected at the stage of assessing

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72 Cf. Federal Supreme Court judgment in criminal matters, Vol. 21, p.287
73 Cf. Andrews & Hirst, Criminal Evidence, 6-029
74 Cf. Federal Supreme Court judgment in criminal matters, Vol. 21, p.287
75 Contrary to US law, for example, there are many areas of English law which do not include any provision on deals. This also explains why, under common law rules, an admission of guilt made as the basis of bargaining might still in some cases be introduced in the criminal proceedings. For more details see Wolchover/Heaton-Armstrong, Confession Evidence 1-070 and notes
76 Cf. Wolchover/Heaton-Armstrong, Confession Evidence 1-070 and notes. On the question of instructing the jury on the force of such admissions as evidence, see *op. cit.* 1-070 and notes
evidence. The formal rules for admission of evidence and admission rules of the courts considering whether to admit the evidence would therefore apply.

**bb) Case 2**

In German criminal proceedings against D, the public prosecutor's office applies to interview X. In response to a request for judicial assistance for that purpose, X admits to the London police that he has used EC money. This witness statement is to be read out in the German trial (under § 251 No. 2 StPO).

Defending counsel for D opposes entering the witness statement, on the grounds that the interview was not conducted in accordance with the requirements of German law (§ 251 No. 2 StPO). Firstly, the witness statement was not taken by the courts, but by the police. Secondly, neither he nor D was able to be present when X was interviewed as a witness, as English law does not make any provision for the accused and his defence counsel to be present in the course of investigation measures.

Is X's statement admissible in the German proceedings?

Under the Commission proposal on 'free movement of evidence', the witness statement could be used without further ado.

This appears problematic in terms of criminal evidence procedures, i.e. establishing a reliable basis for judgement.

Under German criminal law, the reliability of establishing the facts should be guaranteed by the principle of immediacy. In other words, the court hearing the case must obtain its own impression, as directly and immediately as possible, of the facts to be judged. It follows (in conjunction with the duty to investigate) that the courts called on to judge a case must gather evidence themselves, normally using the best possible evidence as close to the facts as possible. The court hearing a case must obtain the information from a witness statement by examining the witness directly, not by reading out the record of a witness interviewed by others. There is no system of law in which the principle of immediacy justifies a universal prohibition on gathering more remote evidence or gathering evidence at a 'lower level of evidence'. There are exceptions, even in Germany, under strict conditions, if it is impossible to gather evidence in any other way, such as if the witness who has already given evidence before an examining judge or the police cannot now be reached (cf. § 251 para. 1 and para. 2 StPO). The lower value of that evidence should then be allowed for in assessing the evidence. Under the provisions of § 251 para. 1 StPO, records of previous court examinations of witnesses, experts and accessories may be read out at the trial, even against the wishes of the defence.

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77 Federal Supreme court judgment in criminal matters Vol. 2, p.304
78 In Germany, cf. § 250 StPO and Eisenberg, [Law of evidence], note 65; in a limited sense also in France, cf. Art. 427 CPP and Rassat [Treatise on criminal procedures], p.396ff
79 Eisenberg, [Law of evidence], note 65
80 Eisenberg, [Law of evidence], note 13
81 Federal constitutional court judgment Vo. 57, p.277; Federal supreme court in *Neue Zeitschrift für Strafrecht* 1986, 520: Meyer-Gossner, SyPO § 244 note 12
82 Eisenberg, [Law of evidence], note 13 and notes
83 For groups of cases in which records of non-judicial examinations may be read out in court see § ?? para. 2 StPO
However, pursuant to § 251 para. 1 StPO, the record of those statements must be a 'judicial protocol'. X was interviewed by the police, without observing the formalities a (German) examination in court would require.\textsuperscript{84}

The question is whether the statement can still count under 'free movement of witness evidence', that is, whether it amounts to a 'functional equivalent' of a statement from a judicial examination under German procedural law. According to case law and the prevailing doctrine, a record produced in another country may be read out under § 251 para. 1 StPO even if it was not carried out by the courts; but the record must have been produced in accordance with the jurisdictional and procedural rules of the place where the interview was held, and so perform a comparable evidential function and the interview meets the basic requirements of the rule of law\textsuperscript{85}. Under English (criminal) procedural law, the police are responsible for conducting interviews in criminal investigation proceedings, and for taking statements in judicial assistance proceedings. But a police interview under English law does not have any evidential function comparable to German proceedings, namely ensuring a high quality of evidence through examination by a neutral court. In fact, police interviews are often intended to clarify the evidence for prosecution purposes. In conducting an interview, the police are therefore partial. The reasons for this lie in the structure of the party proceedings, which assumes that, subject to some restrictions, the parties need to conduct secret and unilateral investigations so they can achieve success by surprise when the evidence is presented. The aim is rather that the quality of the evidence should be examined by cross-examination\textsuperscript{86}.

In this particular case, the fiction of the concept of 'free movement of evidence' does nothing to solve the problem of gathering evidence internationally: because the 'preliminary gathering of evidence by the courts' in German process law lacks any functional equivalent in English criminal proceedings.

\textit{cc) Case 3}

In the course of the French investigation proceedings against F (on suspicion of fraud), the examining judge orders that F's home telephone line be tapped. The content of the recorded calls confirms the suspicions.

OLAF would like the Düsseldorf public prosecutor's office to enter the findings obtained from the telephone tap in the criminal proceedings against D. Defending counsel for D objects to this on the grounds that, while ordering a telephone tap may be legal in France, it would not be in Germany, in the absence of a 'catalogue deed' under § 100a StPO.

\textit{dd) Case 4}

The English authorities interview S as a witness. At first, S refuses to make a statement, as he would be bound to incriminate his father, D. Only when his solicitor explains to him that

\textsuperscript{84} Information to the defence under § 168 c para. 5 clause 1 StPO/defending counsel's right to be present, § 168 c para. 1 StPO
\textsuperscript{85} Federal Supreme court in \textit{Neue Zeitschrift für Strafrecht} 1994, 595 and notes. On this point however, repeated case law indicates that it is the duty of the court applying for judicial assistance to ensure that procedures can be followed which come as close to its own (stricter) procedural regulations as possible
\textsuperscript{86} On the prohibition on hearsay, see \textit{Andrews & Hirst}, On Criminal Evidence, 17-001ff
English law does not allow him to refuse to testify in his father's favour does he make a statement.

OLAF would now like to send the interview statement to the German public prosecutor's office in Düsseldorf so they can use it in the proceedings against D. Defending counsel for D objects to the statement being entered, saying that S was reluctant to make a statement to avoid incriminating his father, and that he would have such a right of refusal in Germany (§ 52 StPO). As S is not appearing at the trial in Germany, as he is afraid he will be prosecuted, he cannot invoke the right to refuse to testify in the proceedings either.

Under the Commission's concept of 'free movement of evidence', both the record of the telephone tap and witness statement would be admissible in Germany.

The objection that gathering this evidence would not have been authorised in Germany does not stand. The different value judgements by national legislators as to when, when weighing the interests of prosecution against other legitimate interests (such as family and privacy), the former should prevail, and the different requirements for intervention this gives rise to (such as supervising telecommunications traffic, or the scope of the right to refuse to testify) are irrelevant. If evidence is transferred, the persons who are the subject of the investigations now lack the protection of their own system of law justified by them democratically or by their place of residence.

Cases 3 and 4 show that the 'free movement of evidence' may put the chance of a fair hearing at risk (from the viewpoint of the system of law in which the evidence is admitted): because the value judgements of the legislators in the country admitting the evidence as to cases in which protection of the family and privacy should be restricted in the interests of criminal investigations, do not apply if evidence can move freely.

Once again, the Commission proposal on excluding evidence do not stand up, whereby evidence obtained unlawfully in one Member State should be ruled out as evidence by the state in which it was gathered. Because the statement was originally obtained lawfully; the doubts arise at the admission stage.

e) Interim conclusions

These case studies show that the problems presented by transferring evidence between differently structured systems of law (and rules of evidence) are not resolved (or resolved comprehensively) by the Commission's concept of free movement of evidence. It merely corrects the symptoms of these problems, but not the causes, which lie in the differing structures of national criminal procedures.

Once gathered, criminal evidence is not a finished product which can simply be let loose in the 'free movement (of products'). Whether it is admissible still depends on how it was gathered. This is true not only in that, if evidence was gathered unlawfully, it may not be admitted. At the admission stage, it is also important to ensure that the evidence can guarantee that a fair, reliable basis for the criminal judgement is obtained under the conditions of the system of law under which it is to be admitted.
4. Conclusions

A principle that evidence obtained lawfully in one Member State should automatically be admitted before the courts of the other Member States is not likely to overcome the problems involved in transferring evidence.

These problems arise not only out of different (detailed) rules on gathering and admitting evidence: their origin lies rather in the different structures of the Member States' procedural rules.

On the other hand, as there do not appear to be any prospects of harmonising national criminal procedures in the near future, and it is argued that there is a major need to transfer criminal evidence in practice, we should examine whether admitting or assessing evidence obtained in another Member State should take precedence over a (Europe-wide) admission procedure.

Laying down a principle that evidence obtained unlawfully in one Member State should be excluded by other Member States under the rules of evidence of the law of the Member State it was obtained in can only solve the problems arising out of the 'free movement of evidence' in part. This principles does not apply in the cases in which evidence is excluded not because of how it was obtained, but how it should be admitted.

Such a rule also creates practical problems, as the courts would normally have to apply foreign law.

V. Supervising the European Public Prosecutor's office (question 12)

1. Question

a) Commission proposal

The concept as proposed, of a 'European Public Prosecutor's office', consisting of the 'European Public Prosecutor' and Deputy Public Prosecutors appointed by the Member States has already been discussed, in the answer to question 1 above.

The job of the Deputy European Public Prosecutors will be to conduct investigations in the Member States on the European Public Prosecutor's instructions.

The Commission proposes that, in these preliminary proceedings, the 'judge of freedoms' should review whether what the European Public Prosecutor's office does for legality and proportionality. This should be done partly by reserving consent and partly by ordering measures themselves on application by the 'European Public Prosecutor'. Such supervised investigations should be automatically accepted and enforced in all Member States. What the Commission actually proposes is as follows:

- The Member States should appoint the 'judge of freedom' from the national courts where the (Deputy) European Public Prosecutors are based.
- Investigations should be supervised by the national courts, whose decisions are accepted by other Member States, or by the 'judge of freedoms' in the state in which they are enforced, insofar as this is already known.  

The Commission justifies its proposals on the grounds that the only possible alternative would be to vest judicial control in a European court. But this solution assumes that all investigation measures are subject to common rules; but Member States are not (at present) in favour of harmonising criminal procedural law in this way. The proposals as presented also ensure (it argues) that mutual recognition will enable the courts to work efficiently, thanks to a common basis of principles of law in the Member States and a uniform standard of fundamental rights.

In looking at the Commission's chosen solution and/or possible alternatives, there is one question which has to be considered, however.

b) Question

To whom should the function of reviewing acts of investigation executed under the authority of the European Public Prosecutor be entrusted?

2. Analysis

Under the Commission proposal, investigations by public prosecutors' offices are supervised mainly by the 'judge of freedoms' (a); but this does not mean there is no need to consider the possibility of institutional control by way of incorporating this in a judicial system, with rights of instruction and disciplinary rights in some cases (b), provided that control via personal responsibility on the part of the public prosecutor (c) is not overlooked.

a) Judicial control

aa) Vesting control in the national courts

The Commission proposal are to be welcomed in the first instance as they mark a major step forward on the road to judicial control of European criminal prosecution. There is one basic problem with the Commission proposal, however: with cross-border investigations, a complete overview of the proceedings may be a decisive factor in effective control. Whether any given measure is reasonable may depend on whether the investigation results could be obtained by less intrusive means, possibly in another country. A national court called on to supervise a European criminal prosecution body lacks this overview of cross-border investigations, in contrast to a court at European level. It can only judge the importance of investigations applied for or to be consented to a limited extent. In conducting its examination, it is forced to rely on the documents presented to it by the respective Deputy European Public Prosecutor without itself being able to consider the European dimension of the case. More consideration should be given to the option of control at European level for this reason. A European judicial body does not necessary need consistent European procedures. There is no reason why a criminal division of the ECJ could not, if established, apply the national law of the Member State in which the investigations are to be conducted. This would also meet the Commission's justified concerns as to whether Member States would be prepared to harmonise their criminal procedural law to any great extent.

87 Cf Green Paper point 6.4
The Commission's counter arguments here do not stand up: if the Commission assumes, as it apparently does, that it will not always be known which Member State is responsible for enforcing investigations, it can be countered that Member State rules require in any case that, when applying for a search, for example, it must be stated precisely what that search is to cover, so no 'blank cheques' are issued[^8].

**bb) Mutual recognition of investigation measures**

The principle of mutual recognition of investigation measures marks a departure from traditional judicial assistance rules. Under the conventional principle, investigations ordered in a state which are to be conducted in another are followed by a formal request for judicial assistance, which cannot be granted until the conditions for acceding to it in that country have been examined. Now, however, orders made by the national courts are to be automatically enforceable by the investigative bodies in all other Member States, without any further examination being required.

There are two main problems here: the requirements which different national systems of law impose on the admissibility of investigations are still different, which raises the risk of 'forum shopping'.

**- Different national procedural standards**

What the Commission's mutual recognition proposal overlooks is that Member States still differ in terms of their requirements for certain investigation measures to be admissible. The argument the Commission puts forward in favour of mutual recognition, that under the European Convention on Human Rights, all Member States use uniform standards, is not true precisely in these generalities. The main function of the ECHR is to guarantee a fair hearing; this is supervised by the European Court of Human Rights, on the basis of the proceedings as a whole. The rights enumerated in the Convention are essentially derived from this general principle. On the other hand, the ECHR does not lay down any specific procedural requirements for individual investigation measures. If the process is fair as a whole, it does not look at whether individual procedural steps are unlawful. What the Commission proposal also overlook is that the ECHR represents the 'lowest common denominator' in terms of European protection of fundamental rights, so that its standard of protection often lags behind that of criminal procedural rules in the Member States. If the state in which evidence is obtained and that in which it is used are different, this will often reduce the standard of protection in the latter (cf. question 14 below) – a conclusion which runs counter to the aim of providing as wide a protection of fundamental rights as possible, not least at EU level.

**- Risk of forum shopping**

As long as the European Public Prosecutor is not bound to apply to the courts in the state in which investigations are to be conducted, the principle of mutual recognition raises the risk of forum-shopping. What this means is that the European Public Prosecutor will seek out the course of law which offers him the most favourable prospects and enables the interests of the prosecution to be pursued to best advantage. A (central) European Public Prosecutor's office might be tempted to delegate the investigations to the Deputy European Public Prosecutor in

[^8]: Cf. for example the requirements which have been assembled in case law as to the admissibility of a search under §§ 102 ff of the German procedural regulations, BVerfGE 20, 162 (227)
the Member States which imposed the least requirements on the investigations concerned, and so obviate the system of checks and balances within the legal system of the state in which investigations were ultimately conducted (cf. answer to question 7). The only way of excluding such a risk is if requirements were already harmonised at European level, but at present this only applies to European arrest warrants. The right to apply to the same national courts, irrespective of what state the investigations will ultimately be conducted in, should therefore be restricted to those investigation measures where a European standard applies. Otherwise, the law of the state in which they are to be conducted must apply.

**cc) Control by referral to national courts**

Both decisions by individual state courts in investigation procedures and the type of coercive measures and how they are applied should be open to referral to the respective national courts.

Express rights of referral are to be welcomed.

The way in which protection in law is actually formulated under the Commission proposal involves serious detriment to the accused, if measures which the courts might approve or order in investigation measures in one Member State are then conducted in another Member State according to the principle of mutual recognition. The accused would be forced to seek protection in law in another Member States, if his home were searched, for example, if he wished to oppose the order itself.

The arguments which the Commission puts forward on the similar question of the proper jurisdiction for the trial, namely that the accused must accept that the geographical distances involved are the result of his acting internationally, and that he has the right to an interpreter under the ECHR in any case, do not go far enough: they underestimate the practical importance of familiarity with one's own national system and physical proximity if the accused and the public prosecutor are to be equally well armed.

The strict separation of ordering and enforcing investigations, with legal protection separated accordingly, is not always feasible in practice in any case, as it is precisely here that ordering investigations extends to dictating the precise modalities of how they are to be conducted. In this case, the accused will often be confused as to whether their legal protection is actually directed at the 'whether' or 'how' of the measures, and which courts in which Member State they should apply to.

Finally, different forms of recourse to law can be expected to lead to problems if an accused facing investigations appeals against the order and enforcement in two Member States simultaneously. If the courts in the state in which the investigations are ordered come to the conclusion that the measures are unlawful under their system of law, but the courts in the state in which they are enforced have to assume that they are lawful, under the principle of mutual recognition, and therefore hold their enforcement reasonable, this could lead to contradictory judgements.

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89 This was one of the reasons why Germany has systematised the safeguards in law against ordering and implementing investigations in terms of the jurisdiction of the courts, cf. BVerfG, NJW 1997, 2165; BGH, NJW 2000, 84

90 Cf. for example § 100 b para. 2 of the German criminal procedural regulations on certain forms of use of covert recording devices
b) Institutional integration

In many Member States of the European Community, the public prosecutor's office is not independent in the sense that it is bound by instructions, but is in fact under institutional control.

In Spain, for example, the public prosecutor's office is under the instructions of the attorney general, who in turn is subject to the instructions of the government, and supervision by Parliament, which has the right to question the executive about its acts and to order the public prosecutor to appear before it. On the other hand, virtually all measures which constitute restrictions of fundamental rights are ordered by the examining judges, not by the public prosecutor's office.

In Germany, the public prosecutor's office is subject to instructions in principle, which under the hierarchical structure extends from the appropriate Federal and state ministers via the attorney general to the public prosecutor to the regional court. The Minister of Justice is responsible in turn to parliament; but the principle of legality is not only binding on the public prosecutor in exercising his office, but also on the Ministers and Parliament in influencing the public prosecutor.

The Green Paper does not provide for the European Public Prosecutor to be incorporated in any hierarchy, such as reporting to the Commissioner responsible for budgetary matters, and is right not to do so. The conceivable effects which Member States, and EU executive bodies, might have on cross-border investigations, would be too wide. They run the risk of activities which should be purely legal being influenced by political considerations.

Integration with and responsibility to democratically legitimised bodies cannot therefore be achieved merely by laying down requirements for the appointment mechanism for the European Public Prosecutor himself, whose appointment should be subject to the approval of the European Parliament, and Deputy European Public Prosecutors, e.g. through being made to report to their respective national Parliaments. There should also be a feedback process going beyond appointment alone, to the European Parliament, by requiring the European Public Prosecutor to present annual reports, for example. Such reporting obligations exist in states in which the public prosecutor's office is not conventionally subject to any general institutional control91.

c) Personal responsibility

As well as the supervision of the courts over certain investigative acts which the Green Paper proposes, and control in the form of the rights of the accused, there is another element of control in the legal systems of all Member States: the liability of executive bodies in law. This includes both criminal liability for abuse of office, and the possibility of being sued in civil law for personal negligence.

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91 This is true of some common law countries, such as the USA, where Congress can demand regular reports, but also in civil law countries such as Spain (see above) or Hungary and Russia, cf. Ambos, 'The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports', European Journal of Crime, Criminal Law and Criminal Justice 2000, 89 (95ff)
In the case of the Deputy national public prosecutors, resort may therefore be had to the law of the Member State concerned\textsuperscript{92}. As far as the European Public Prosecutor himself is concerned, the Green Paper limits itself to removal procedures in the event of serious misconduct, under the jurisdiction of the European Court of Justice, on application by Parliament, the Commission or Council\textsuperscript{93}. Below this – evidently high – level, there must also be facilities for holding the European Public Prosecutor personally responsible if things go wrong. The statutes of the International Criminal Court provide for disciplinary measures, for example (Art. 47).

The problem with any European provisions is that the Green Paper leaves it open as to whether the European Public Prosecutor should, as an EU official, enjoy immunity under the Protocol on the privileges and immunities of the European Communities of 8 April 1965\textsuperscript{94}. The protocol provides for immunity from legal proceedings in respect of any acts performed in an official capacity (Art. 12), although there are disputes as to whether acts relevant for the purposes of criminal law would be those committed in an official capacity\textsuperscript{95}. The relevant institution can only waive the immunity if this is not, in its opinion, contrary to the interests of the Communities (Art. 18). If the European Public Prosecutor acts outside the conventional EU bodies in complete independence, this in itself raises the question as to what body should have jurisdiction over immunity. Dismissal or disbarring from office, at least, would be a matter for the ECJ (cf. Art. 30 of the Merger Treaty); but this makes prosecution difficult for the individuals involved, and is not objectively justifiable. To protect the European Public Prosecutor who faces 15 Member States at present, it would be sufficient to designate a national system of law under which breaches of duty could be prosecuted under criminal and civil law exclusively. This could be the law of the state in which the European Public Prosecutor is based, or the home state.

**VI. Fundamental and procedural rights of the parties involved (question 14)**

1. Question

a) Commission proposal

Investigations by the European Public Prosecutor should ensure that the fundamental and procedural rights of the persons concerned are safeguarded.

With this in mind, the Commission proposes that

*The European Public Prosecutor must act with full respect for fundamental rights as secured by Art. 6 of the Union Treaty, the Charter of Fundamental Rights and the ECHR.*

A European Public Prosecutor's office would (so the Commission maintains) put the accused in a better position, as procedures would be speeded up, and improving prosecution would mean that measures restrictive of freedom would not need to be used so often.

\textsuperscript{92} Cf. Green Paper, point 4.2.1.1 and analysis of the structure of the proposed European Public Prosecutor's office (question 1)

\textsuperscript{93} Cf. Green Paper, point 4.1.2.2

\textsuperscript{94} Green Paper, point 4.1.2.1

\textsuperscript{95} Cf. Henrichs, EuR 1987, 75 (81)
On the principle of double jeopardy in particular, the Commission proposes that:

*the European Public Prosecutor may order a preliminary enquiry to ensure that the 'ne bis in idem' principle is applied; that principle being applicable to all final decisions.*

The Commission justifies its proposals by arguing that the European Public Prosecutor himself must decide whether two proceedings involve the same person and deeds. The double jeopardy principle should also be followed in cases where national criminal prosecuting authorities continue to pursue cases in which the European Public Prosecutor has closed proceedings.

**b) Question**

**Do you feel that fundamental individual rights are adequately protected throughout the proposed procedure for the European Public Prosecutor? In particular, is the double jeopardy principle properly secured (see point 6.2.1)?**

2. Analysis

**a) Reference to Art. 6 of the Union Treaty, Charter of Fundamental Rights and ECHR**

It is clear from the Green Paper[^96] that the Commission makes provision for protecting fundamental rights by referring to the rights enshrined in Art. 6 of the Union Treaty, the European Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).

But, without actually listing the rights guaranteed, merely making such reference raises problems, and does not establish a sufficient standard of fundamental rights.

Article 6 of the Treaty does not enumerate the rights protected, but merely refers to the common constitutional heritage of the Member States and the European Convention on Human Rights, and only confers protection in connection with the case law of the European Court of Justice. This means individuals involved (and their defending counsel) cannot foresee what basic and procedural rights they would enjoy in any individual case.

The European Charter of Fundamental Rights also restricts itself to guaranteeing rights of defence (Art. 48(2)), without specifying them in more detail. Nor does it have any binding effect, so that individuals cannot invoke it in claiming procedural rights.

While Art. 6(3) ECHR lists a number of minimum rights to be guaranteed (not least in investigation proceedings), the main significance of the criminal procedural guarantees in Art. 6 lies in guaranteeing a 'fair hearing' in the investigations and proceedings in chief as a whole. The role of the European Court of Human Rights, once proceedings have been completed, is therefore mainly to look back and assess whether they provided a fair hearing, having regard to the circumstances as a whole; only if they do not is there a breach of Art. 6 ECHR. What this means is that in some cases the unlawfulness of individual proceedings may be completely irrelevant[^97].

[^96]: Cf. Green Paper, point 6.2.1
[^97]: Cf. Green Paper point 6.2.1
For the ECHR and its system of legal safeguards to provide this function of safeguarding fundamental rights, a non-exhaustive list of rights is sufficient.

If, however, as is the case with the European Public Prosecutor's office, it is a matter of limiting the investigators' powers from the outset by establishing the rights of the accused and providing the accused with some guidelines as to their rights which enables them to object to the investigations being ordered, or how they are conducted, while the proceedings are still in progress, this calls for a comprehensive, formulated, detailed enumeration of the obligations by which the European Public Prosecutor is bound in terms of the accused and their rights.

We will now look at a number of points which should be considered in the rules to be laid down here. They are important precisely because the scope of protection under the ECHR can often only be established in the light of the case law built up in respect of its provisions.

- The position of the accused

In the first instance, this concerns the personal scope of the procedural rights.

In terms of certain rights, at least, the Green Paper appears to assume that they should apply as soon as the European Public Prosecutor discovers elements which argue against the persons concerned 98.

The wording of Article 6 of the European Convention on Human Rights (the wording of Article 48 of the Charter of Fundamental Rights is identical here), which covers most fundamental procedural rights, refers to the rights of the person 'charged with a criminal offence'; but the case law of the European Court of Human Rights indicates that some of these rights at least apply during the investigation measures 99, although the actual scope of the rights in question only arises out of their significance for the subsequent court proceedings.

For the purposes of the Convention, a person is 'charged' if he has been officially informed that he is suspected of having committed an offence, or if anything else is done which implies such suspicions and substantially affects their position in the same way 100.

But, as this scope only arises out of European Court of Human Rights case law, it would be appropriate to include a corresponding, more detailed, provision as to exactly when a person becomes the accused in procedural regulations. This could conceivably be a provision along the lines of that in Corpus Juris 2000 (Art. 29 para. 1): 'A person may not be heard as a witness, but must be treated as accused from the point when any step is taken establishing, denouncing or revealing the existence of clear and consistent evidence of guilt and, at the latest, from the first questioning by an authority aware of the existence of such evidence.'

Such a provision would also appear appropriate, given that the Member States' systems of law diverge so widely on this point 101.

98 Cf. Frowein/Peukert, Art. 6, note 71 ff
99 ECHR – Imbroscia/Switzerland, 1993, A 275
100 ECHR – Corigliano/Italy, 1982, A-57
101 In France, for example, the rights of defence are linked to the formal status of the accused ('mis en examen'), whereas Denmark, for example, has a rule in the event of doubt in favour of the position of the accused in examinations which have resulted in suspicions
- Particularly important rights not mentioned in the Commission proposal

On the subject of the rights of the accused in investigation measures which the EPP can instigate himself at his own discretion, without referring matters to the courts, the Commission proposal refers to the statutes of the International Criminal Courts, which may be cited as a source of experience. In fact, Article 55 of the statutes of the International Criminal Court, which opens on July 1st, 2002, includes a detailed list of the rights of the accused which the public prosecutor must observe in the course of his investigations.

As well as those stated in the Green Paper, the rights which are particularly important and should be emphasised as such and enshrined in procedural regulations are as follows:

- As soon as a person is accused, he must be informed of the charges against him and the rights available to him.

- As well as the right to make a statement, the accused must also be allowed the right to remain silent, without any negative conclusions being drawn from this. Not all Member States recognise this in their investigation proceedings; but the importance which can be attached to an initial interview in terms of subsequent further investigations and bringing charges, and its role in narrowing the circle of possible suspects, means that the public prosecutor's office should be required to recognise it. Such a provision is also made in the statutes of the International Criminal Court in Art. 55 no. 2, for example.

- The accused must have the right to defence council, at public expense if necessary. The statutes of the International Criminal Court also include a provision to this effect. A provision should be sought here as to which state bears the costs of the European Public Prosecutor's investigations.

- Emergency powers

The Commission proposal says nothing as to what the public prosecutor's office's emergency powers should be. This is understood to mean powers to undertake investigations for which the consent of the courts is required, but which in exceptional cases at least could be made on the public prosecutor's decision alone, if there would be a risk in delaying. If such urgent searches had to be carried out in a number of Member States simultaneously, for example, the question arises as to what law should govern the requirements for emergency jurisdiction. In other words, does the law of the state whose examining judges would normally give consent apply (given also that most systems of law allow application to be made to the courts retrospectively in cases of urgency), or should this be based on the enforcement itself, so that the law of the state in which enforcement is made applies? This is therefore particularly

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102 Cf. the position in English law, for example, under the Criminal Justice and Public Order Act 1994, cf. national report England and Wales in Gless/Grote/Heine, 'Judicial integration and control of Europol', Freiburg i. Br. 2001, p.199
103 Cf. Art. 17 para. 3 of the statutes of the Rwanda Tribunal and Art. 18 para. 3 of the statutes of the Yugoslavia Tribunal, for example
104 Cf. for example the urgency powers of the German public prosecutor's office and its assisting civil servants in conducting searches if time is of the essence, § 105 para. 1 StPO
important, as the criteria for admissibility of emergency powers vary considerably between Member States in some cases\(^\text{105}\).

Unless the rules are clarified, this will undermine the protection in law offered to the accused. The question of governing law also affects admissibility of evidence if emergency powers are used improperly, either because the criteria for them were not met or because such powers are unknown in the state in question. Under the Commission proposal, evidence only becomes inadmissible if it was obtained unlawfully under the law of the state in which it was obtained. If the state in which the enforcement measures are ordered, and those in which they are enforced, are not the same, the latter is the state in which the evidence is obtained. This would run contrary to the principle of applying to the courts retrospectively in the country in which the order was obtained.

- *Interpreting the ECHR correctly*

The problems described above in relation to when a person first becomes the accused show how important the case law of the European Court of Human Rights is for an understanding of the rights guaranteed in the ECHR. If the provisions of the procedural rights in connection with the European Public Prosecutor's investigations are confined to a referral to the European Charter of Fundamental Rights and the ECHR, care must at least be taken to ensure that the interpretation of the case law of the European Court of Human Rights is correct and binding on national courts as far as the rights guaranteed under the ECHR are concerned. So far, for example, the views of the European Court of Human Rights and the ECJ, which has to construe the ECHR indirectly via Art. 6 of the EU Treaty, are not always identical\(^\text{106}\).

- *A reduction in the standard of protection through 'mutual recognition'*

Lastly, we have to consider the particular problems of protecting procedural rights in the light of the proposed 'mutual recognition' of investigation measures as proposed (see q. 12 above).

These provide that any measures lawfully ordered in any one Member State should be enforceable in any other Member State without any further examination being required. On closer inspection, it becomes clear that, while the Commission claims this would improve the position of the accused, it would often worsen it, as soon as national systems of law contain procedural standards which go beyond those of the ECHR. It should always be remembered here that the ECHR represents a minimum standard, in the sense of a lowest common denominator, while the legal systems in many Member States often provide more protection for the accused and impose more restrictions on what the State can do.

In terms of interviewing methods, for example, the European Court of Human Rights merely verifies in principle whether the prohibition on torture in Art. 3 ECHR has been breached; but

\(^{105}\) Cf. the national reports on Denmark (p.35), Germany (p.109 ff), England and Wales (p.189), France (p.275), Italy (p.348 ff), the Netherlands (p.417) and Austria (p.473) in Gless/Grote/Heine, 'Judicial integration and control of Europol', Freiburg im Breisgau 2001

\(^{106}\) For example, case law varies on the question as to whether business premises are 'dwellings' for the purpose of Art. 8 ECHR: the ECJ says they are not, whereas the ECHR says they are, or on the question as to whether indirect self-incrimination by producing incriminating material is a breach of Art. 6, para. 1 ECHR, cf. 'Divergences on fundamental rights between ECJ and ECHR', ZEuS 2000, 97
the criminal procedural regulations of some Member States go further than this\textsuperscript{107}. If an interview were held in a Member State whose procedural regulations required no more than the standards of the ECHR, the accused would be worse off than they would be in a country with more stringent requirements, if his country would rule that evidence as inadmissible. So his position would be worse.

\textit{b) Safeguarding the double jeopardy principle}

Any provision which stipulates that the double jeopardy rule applies may raise a number of problems, and hence must be formulated with particular care.

- \textit{When should it apply?}

The first point which may raise problems - as the Commission acknowledges - is the point at which the principle should apply.

Since investigations are involved, the double jeopardy rule must apply not only to being punished twice for the same offence (which is how most international conventions are worded), but also to being prosecuted twice. This is in line with Art. 50 of the European Charter of Fundamental Rights. Any consideration as to whether the double jeopardy rule should also rule out further investigations must be made at the time when a person becomes charged with a criminal offence, as from then on action will be taken against them specifically and, if pursued, might have serious effects on their position. Once again, this shows how important it is to establish precisely when the rule applies.

Looking at the question of when the rule should apply from the other direction, the UN Tribunal on Yugoslavia gave an opinion in a decision\textsuperscript{108}, in which the defendant had objected to being charged before the Yugoslavia Tribunal, invoking the double jeopardy rule, as proceedings were pending before the German courts. The tribunal held that the rule had not been breached, as no judgement existed for the purposes of the statutes ('Since the accused has not yet been the subject of a judgement on the merits … he has not yet been tried for those charges.') This rule in itself would prevent the German courts from continuing their national proceedings once the Tribunal had given its judgement. The Rules on Procedure also allow the President of the Tribunal to make application for national proceedings which were pending before the Tribunal took over, or which were instigated after the charges were brought before the Tribunal to be terminated (cf. rules 9 and 14 of the Rules on Procedure and Evidence of the Yugoslavia Tribunal, for example). A comparable provision could also conceivably be made for the European Public Prosecutor's office.

Only such an understanding of when the double jeopardy rule first applies would make possible a clear definition of competences between national investigating authorities and the European Public Prosecutor's office. If every time national authorities started investigations the European Public Prosecutor would be prevented from doing likewise, this would put too many restrictions on the options open to the national authorities, as they would have to refrain from any investigations themselves so as not to obstruct the European Public

\textsuperscript{107} Cf. on this point, for example, § 136 a of the German criminal procedural regulations, which largely prohibits restrictions on the freedom of decision and action by way of abuse, fatigue, physical intervention, administering medication, torture, intoxication or hypnosis

\textsuperscript{108} ICTY – Tadic, Decision on the Defence Motion on the Principle of Non-Bis-in-Idem of 14.11.1995, IT-94-1-T
Prosecutor. Ultimately, this would then mean that only the European Public Prosecutor would have such powers, rather than merely taking precedence. So the double jeopardy principle would rule out parallel investigations.

- Acts terminating the proceedings

Court practice on parallel standards, mainly Art. 54 of the Schengen Convention, has shown that even the substantive scope of the double jeopardy rule can cause problems if not based on very careful wordings in all binding languages.

Art. 54 of the Schengen convention is worded more narrowly than the Commission proposal. It is based on a binding assessment in law only, which in practice leads to problems in connection with certain national procedures for terminating proceedings.

Given the objective of establishing rules for a European Public Prosecutor's office, the aim in principle, as with the Schengen Convention, is to find an interpretation in which the definition of the binding effects in law is based solely on the law of the state in which the initial judgement is made. The definition would be based on criteria such as the extent of the court's duties of investigation and judgement as laid down in law, and the methods to be used in establishing the facts of the case (a trial or merely a decision on the basis of the documents?).

With certain institutions, this could lead to considerable problems of interpretation in practice, if the courts in one Member State had to examine whether the procedures of another Member State were binding in law.

Belgian, French and Dutch law, for example, refer to what is known as a 'transaction', in which the public prosecutor's office, or the administrative authorities, can offer the accused the chance to close the proceedings in return for payment of a sum of money. Until now, such 'transactions' have only come under the double jeopardy rule in Dutch law, which goes further than any other Member State. The United Nations' model convention on extradition and the European Convention on extradition also only provide optional obstacles to closing proceedings outside the main trial. And the double jeopardy rules in Art. 4 of protocol number 7 to the ECHR and Art. 50 of the Charter of Fundamental Rights only apply to convictions or not guilty verdicts which are binding in law.

Any provisions in respect of the European Public Prosecutor which did not refer expressly to judgements, but to decisions by criminal prosecution or administrative authorities outside the main trial would therefore go well beyond international practice and the rules of most Member states.

One requirement which argues against such wide-ranging provisions is the need for clarity in cross-border legal transactions. Under Belgian law, for example, a 'transaction' could also extend to third parties who make no consideration by way of fines, and who might in some cases only be included by way of interpretation. In making their payment, the accused not only averts criminal prosecution, but also any proceedings against others involved in the same offences.

109 Cf. the Federal Supreme court's ruling that a 'transaction' can only fall within the scope of Art. 54 SDU under certain conditions, NSFZ 1999, 250
Other problems might also arise if national law only made limited provision for bringing criminal charges, such as § 153 of the German criminal procedural regulations, on closing provisions on condition, or in the case of the extended resumption options in criminal prosecutions under § 373 a of the criminal procedural regulations, each in terms of criteria for committing an offence. The latter case in particular proves to be problematic, for as far as the double jeopardy rule on arrest warrants is concerned, but this can be reversed partly by the greater options for reopening proceedings. The latter would fail at European level, however, so that, in the final instance, the double jeopardy rule would have a wider effect in the work of the European Public Prosecutor than was intended in national law.

It would therefore be sensible to have a provision whereby the double jeopardy rule would apply even if the criteria for re-opening proceedings were met under the law of the state in which first judgement was given.

Making the scope of the double jeopardy rule too wide might also act as an incentive to forum shopping in a Member State with greater provision for ending proceedings outside a trial if enforcing such a settlement meant that a European double jeopardy rule could be achieved.

- **Recording offences**

In connection with the double jeopardy rule, it would also seem important to clarify precisely what the substantive scope of the rule is. So far, international legal acts have referred it to 'the same acts', some to 'the same offences', or 'the same facts'. In German, these are translated sometimes as the 'same offence' or 'acts'. Nor do national systems of law agree on when the double jeopardy rule applies: while German law is guided more by when the act itself is committed, in other countries the offence itself applies. The European Court of Human Rights uses the term 'same conduct'\(^\text{110}\). National concepts such as connecting circumstances, repeated offences or a rule such as in the Netherlands whereby, under certain conditions, information included in the charges can sometimes be included in the proceedings and taken into account when sentencing create further difficulties.

But, if there is no adequate definition of what the double jeopardy rule applies to in the case of acts committed in more than one state, there is a risk that the national courts will interpret the situation differently in line with the conventions of their respective countries, so that its application will vary. In the final analysis, such a solution can only be found by being guided by the facts alone on which the original judgement was based.

- **Exceptions**

Finally, the Commission proposal only allows the European Public Prosecutor to re-open proceedings which the national authorities have closed if new findings come to light.

The statutes of the International criminal courts for Rwanda and Yugoslavia, but also Art. 4 para. 2 of protocol no. 7 to the ECHR go further. They include another exception to the double jeopardy rule, namely an abusively lenient judgement in the state in which judgement was first given. The statutes of Rome for the Standing International Criminal Court go even further and include protective procedures which are in fact intended to evade the jurisdiction

\(^{110}\) ECHR, Gradinger, judgment of 23.10.1995, A 328 – C, p.66
of the Court, and other non-impartial and independent rule of law requirements as exceptions
to the double jeopardy principle (Art. 20 no. 3).

In principle, all the Member States of the EU have faith in the others' legal systems, so that
there would not normally be any reason for such a clause. On the other hand, there could
conceivably be cases, precisely in combating fraud to the detriment of the EU budget where
Member States might be negligent in conducting proceedings and over-lenient in their
judgements and so fail to meet their obligations to protect the budget effectively under Art.
10 EC, in which case the European Public Prosecutor should be able to open new
proceedings. The use of such an abuse rule should be open to appeal, however (possibly to
the ECJ, see below).

- Application to investigations by national investigation authorities

In terms of the double jeopardy rule, the Commission proposal also looks at the question of
when national public prosecuting offices can re-open a case if the European Public
Prosecutor has closed it\(^{111}\). In the interests of consistent practice, the interpretation of the rule
above should also apply instead of the corresponding national rules.

- Preliminary enquires

The preliminary enquiries which the Commission proposal provides on the question of
whether the double jeopardy rule prevents charges being brought must, as stated above, be
made at the time a person becomes the accused.

The problems in connection with the double jeopardy rule as stated above lead to problems of
interpretation in practice and divergent decisions under the systems of law of different
Member States or by the Deputy European Public Prosecutors under differing national
conventions. A uniform interpretation could therefore be achieved by conferring jurisdiction
on the ECJ. Given how long cases take to be heard before the ECJ, which means that
criminal prosecutions must be efficient and fast, a special division would have to be set up
which could deal with questions of interpretation as soon as they were received. Such
referrals could then be made both by the European Public Prosecutor and the national
investigative authorities, or by the national courts involved.

VII. The European Public Prosecutor's office and OLAF (question 16)

1. Question

a) Commission proposal

The Commission proposes that, if a European Public Prosecutor's office is established,
OLAF's duties and organisational structure should be reconsidered\(^ {112}\). The aspects which the
Commission believes should be taken into account include:

\(^{111}\) Green Paper, point 6.2.2.1
\(^{112}\) Green Paper, 7.3
- Should OLAF's role be limited to carrying out administrative checks, even after a European Public Prosecutor's office is established?

- What should the relationship be between a European Public Prosecutor's office and OLAF?

**b) Question**

In the run-up to the Commission's evaluation of the rules governing OLAF, what factors related to the relationship between the Office and the European Public Prosecutor seem most meaningful to you?\(^{113}\)

2. Analysis

OLAF was set up as an independent office for combating fraud within the European Communities in 1999. This new office, able to undertake investigations of its own accord, met a condition which the European Parliament had imposed on the Commission in the course of the budget discharge procedures in 1998, and which was also included in the report of the wise men's report on irregularities in the use of EG funds. The Commission's attempts to combat fraud via UCLAF\(^{114}\) were considered to have failed at that time\(^{115}\). This background explains why OLAF has a dual function.

OLAF's job is to examine fraud against the EU's finances inside and outside the institutions of the EC in administrative law procedures and to inform the appropriate (criminal) prosecution authorities if necessary. The legal basis for the external controls is Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (Reg. (EC) 2185/96)\(^{116}\). Internal controls were subject to Reg. 1073/99\(^{117}\) in conjunction with the respective inter-institutional decisions on recognising OLAF's authority.

**a) Extending OLAF's powers – carrying out criminal investigations**

Restricting OLAF to administrative checks was mainly because the Member States have not (so far) recognised that the EC has any (investigative) jurisdiction in criminal matters\(^{118}\).

\(^{113}\) Green Paper, 7.3.2


\(^{115}\) Cf. in particular the 'Bösch report' (report of the Committee on Budgetary Control of the European Parliament A-4-0297/98, PE225.069/end.) and the auditor's report of the Court of Accounts PE 315.762/rev. on the work of UCLAF, its fraud combat unit (special report no. 8/98 of the Court of Accounts on the Commission's departments involved in combating fraud, OJ C 230 of 22.7.1998, 1)

\(^{116}\) OJ L 292 15.11.1998, 2

\(^{117}\) OJ L 136 31.05.1999, 1

This attitude to jurisdiction will have to change before a European Public Prosecutor's office can be established. This does not affect OLAF's powers, however.

One point which should be mentioned, however, is whether OLAF should be authorised to assist the European Public Prosecutor's office in conducting investigations on site by giving it powers to conduct criminal investigations. A European Public Prosecutor's office could not always conduct such investigations of its own accord; in which case it could either ask the competent Member State authorities to conduct investigations themselves or involve OLAF, if its powers were widened accordingly. OLAF would then take the place which the police of the Member States (under mainland European systems of law) have, in that, while it is primarily a judicial body delegated to conduct criminal investigations, it can delegate that power to the police.

A separate question is whether and, if so, to what extent OLAF should continue to be involved in external controls under administrative procedural law of its own accord. This question arises in connection with the present enquiry, given that the purpose of OLAF's controls is to prepare for criminal prosecution by the Member States. This task would then (to a large extent) be taken over by the European Public Prosecutor's office.

b) Relations between the European Public Prosecutor's office and OLAF

The question is whether a division of responsibilities (as described in the previous section) should also govern the relationship between the European Public Prosecutor's office and OLAF, in the sense that OLAF would play a 'support function', as an auxiliary authority to the European Public Prosecutor's office.

aa) Control over OLAF – de lege lata

Until now, OLAF's activities have been supervised mainly by a supervisory committee established specially for the purpose. This committee is composed 'of five independent outside persons who possess the qualifications required for appointment in their respective countries to senior posts relating to the Office's areas of activity'. They are appointed by the European Parliament, the Council and the Commission by common accord. The supervisory committee can issue opinions of its own accord; but it cannot intervene in the course of investigations, and so its influence over OLAF's work is very limited.

The institutional control mechanisms of Community law have been largely abandoned in favour of as much independence as possible.

As stated above, the Commission cannot exercise the control over OLAF which it once had over UCLAF, as it has no powers of instruction. This also means that there is in fact no institutional control in the sense of any integration in the administration or judiciary whatsoever.

In theory, the Council can still bring complaints against OLAF before the ECJ under the general rules of Art. 173 ECT or Art. 175 ECT for breaches of the EC treaty or the legal

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119 Art. 11(1), Reg. 1073/99, OJ L 136 of 31.05.1999, 1
120 The Court of Accounts has already expressed itself critically over such a concept (Opinion 2/99, OJ C 154 of 1.6.1999, 1 no. 10)
121 The Director is now only responsible to the Commission in terms of disciplinary law, for more details see Art. 12(4), Reg. 1073/99, OJ L 136 31.5.1999, 1
standards it is required to use in its activities\textsuperscript{122} (which include failing to exercise or abusing its discretion)\textsuperscript{123}; but given that the regulations on combating fraud are interpreted at the Director's discretion, it is doubtful whether this could ever provide an effective means of control.

\textit{bb) Control of OLAF – de lege ferenda}

The main argument which could be advanced in favour of the European Public Prosecutor's office playing a supervisory role in relation to OLAF is that this form of control is one of the conventions of Member States with mainland European legal systems.

In conventional mainland European legal systems (Austria, Germany, France and the Netherlands), criminal investigations are the responsibility of a judicial authority or body, supported by the police. This is also true of Italy, although its criminal procedures resemble those of the Anglo-Saxon tradition in other respects. While, in Austria, the examining judge is (still\textsuperscript{124}) the central figure in preliminary investigations\textsuperscript{125}, in Italy, Germany and the Netherlands, the respective public prosecutor's offices are the statutory\textsuperscript{126} masters of investigations, while in Italy the public prosecutor's office enjoys an independence comparable with the judiciary\textsuperscript{127}. In France, it is the examining judges who carry out preliminary judicial investigations, while the public prosecutor's office supervises the police investigations\textsuperscript{128}. The differences in how judicial bodies are used are largely the result of structural differences in criminal procedures: having a judiciary body carry out preliminary judicial investigations may be sensible where the public prosecutor's office is viewed with scepticism as a party to the proceedings\textsuperscript{129}, or where qualified gathering of evidence is to be included at the preliminary investigation stage, so that certain areas of evidence are already prejudiced\textsuperscript{130}.

The judicial body can issue instructions to the investigating police at any time during the investigations\textsuperscript{131}. This authority derives from the police's power to conduct criminal

\textsuperscript{122} This also includes Art. 280 ECT and the accounting principles in combating fraud
\textsuperscript{123} Such complaints would have to be made against the Commission 'within [the] administrative structure' in which OLAF was established (recital 4, Reg. 1073/99)
\textsuperscript{124} On the proposed reforms in Austria, which will give the public prosecutor's office wider powers, see \textit{Zerbes}, LB Austria, in Gless/Grote/Heine (eds.), [Judicial integration and control of Europol], Vol. 1, Freiburg 2001, I.B. 3.a
\textsuperscript{125} \textit{Zerbes}, op. cit. I.B.3.a
\textsuperscript{126} In the Netherlands, since the reforms of 1.2.2000, the examining judge may also instigate preliminary judicial enquiries of his own accord. \textit{Faure/van Riel/Ubachs}, national report on the Netherlands, op. cit., I.B.2.a.e
\textsuperscript{128} \textit{Leblois-Happe/Barth}, national report on France, op. cit., I.B.2.a.a
\textsuperscript{129} Such as in France, for example (cf. \textit{Leblois-Happe/Barth}, national report on France, I.B.2.b) Austria (\textit{Zerbes}, national report on Austria, op. cit. I.B.3.a) or the Netherlands ((\textit{Faure/van Riel/Ubachs}, national report on the Netherlands, op. cit. I.B.2.b.a.)
\textsuperscript{130} In France, for example, cf. \textit{Leblois-Happe/Barth}, national report on France, op. cit. I.B.2.a.a)
investigations from the judicial criminal investigation authorities\textsuperscript{132}. In normative terms, this authority is safeguarded by the fact that the police are bound to inform the judicial body with the authority to conduct the case if they suspect an offence has been committed\textsuperscript{133}.

In most Member States, however, the practice is usually that the police conduct their own investigations in most cases in the first instance, before passing the matter to the prosecuting authority\textsuperscript{134}, so that this power of instruction is largely confined to specific areas in practice, or is not even used, especially in the case of everyday crime. This trend has been reinforced in recent times by the powers of the police being expanded in the field of 'preventive crime fighting' (especially in fighting organised crime)\textsuperscript{135}.

Denmark has transferred powers to conduct criminal investigations for wide ranges of offences to the police\textsuperscript{136}. Like the criminal prosecution bodies of other mainland European systems, the police have an obligation to investigate not only facts which incriminate the offender but also those which absolve them. Public prosecutors still have rights of instruction which are designed to ensure control of investigations, but rarely use them in practice\textsuperscript{137}. It is also the public prosecutor's office which is responsible for handling complaints and criminal proceedings against police officers (jointly with other bodies)\textsuperscript{138}.

In Italy, the public prosecutor's office, protected by its position of independence comparable with that of the judiciary conducts (preliminary) criminal investigations\textsuperscript{139} as the judicial authority. The criminal police are under its instructions, and must inform the public prosecutor's office of any offences which come to their attention of their own accord (within 48 hours at the latest). In practice, however, the Italian police also have 'some autonomy' in conducting criminal investigations\textsuperscript{140}.

3. Conclusions

In view of the Commission's assessment of OLAF's position to be undertaken in terms of the relationship between the European Public Prosecutor's office and the European office for combating fraud (OLAF), the points to note are as follows:

- OLAF could retain its powers of criminal investigation (only) as a support function to a European Public Prosecutor's office
- If OLAF is granted such powers, consideration should also be given as to what extent this support function should be exercised. One approach which could be considered here is

\textsuperscript{132} Cf. Zerbes, national report on Austria, op. cit., I.B.3.a, b. and c.; Voss, national report on Germany, op. cit., I.B.3.b.bb

\textsuperscript{133} Cf. for example Caianiello/Orlandi, national report on Italy, op. cit., IB.2.a.aa and IB.2.b.aa

\textsuperscript{134} Cf. for example Zerbes, national report on Austria, op. cit., IB.B.3.b; Voss, national report on Germany, IB.3.b.bb; Leblois-Happe/Barth, national report on France, op. cit., IB.2.a.aaa and IB.2.b; Caianiello/Orlandi, national report on Italy, op. cit., IB.1; Faure/van Riel/Ubachs, national report on the Netherlands, op. cit., IB.2.a.aa and IB.2.b.aa

\textsuperscript{135} Voss, national report on Germany, ebenda, IB.3.b.bb; Leblois-Happe/Barth, national report on France, op. cit., IB.2.a.aaa and IB.2.b; Caianiello/Orlandi, national report on Italy, op. cit., IB.1

\textsuperscript{136} Cornils/Verch, national report on Denmark, op. cit., IB.1

\textsuperscript{137} Cornils/Verch, national report on Denmark, op. cit., IB.3.a

\textsuperscript{138} Cornils/Verch, national report on Denmark, op. cit., IB.3.b

\textsuperscript{139} Caianiello/Orlandi, national report on Italy, op. cit., IB.2.a.bb

\textsuperscript{140} Caianiello/Orlandi, national report on Italy, op. cit., IB.2.b.bb
giving it powers of instruction equivalent to those of the public prosecutor's office and police under mainland European legal systems.
Criminal-law protection of the financial interests ...
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Conclusions of the Chair of the European Council of Tampere
Abbreviations

aaO   = op. cit.
Abl. (EG) = Official Journal of the European Community
Abs.   = paragraph
Bd.    = vol.
BGH    = German Federal Supreme court
BVerfG = German Federal constitutional court
BVerfGE = Decisions of the German Federal constitutional court
CPP    = French criminal procedural code
ebda.  = Ebenda
e tc.   = et cetera
f., ff. = following
EC     = European Community
EMRK   = European Convention on the protection of Human Rights and Fundamental Freedoms of 4 November 1950
EstA   = European Public Prosecutor's office [EPP]
EU     = European Union
EuGH   = European Court of Justice [ECJ]
EuGHMR = European Court of Human Rights
gem.   = as per
ggfs.  = as the case may be
i.S.   = in the sense of
m.w.N. = and references
no.    = Number
Nr.    = Number
Rn.    = Margin number [note, section]
s.     = see
S.     = page
SDÜ   = Schengen Convention
Slg.   = Collection
StPO   = (German) criminal procedural regulations
s.u.   = see below
u.U.   = in certain circumstances
vgl.   = cf.
z.B.   = e.g.