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REPORT

on the Commission Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM(2001) 715 – C5-0157/2002 – 2002/2065(COS))

Committee on Budgetary Control

Rapporteur: Diemut R. Theato

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PROCEDURAL PAGE

By letter of 13 December 2001 the Commission forwarded to Parliament its Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM(2001) 715 – 2002/2065(COS)).

At the sitting of 11 April 2002 the President of Parliament announced that he had referred this Green Paper to the Committee on Budgetary Control as the committee responsible and to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, the Committee on Legal Affairs and the Internal Market, the Committee on Constitutional Affairs, the Committee on Petitions and all other interested committees for their opinions (C5-0157/2002).

The Committee on Budgetary Control had appointed Diemut R. Theato rapporteur at its meeting of 23 January 2002.

It considered the Commission Green Paper and the draft report at its meetings of 13 May 2002, 30 September 2002 and 18 February 2003.

At the last meeting it adopted the motion for a resolution by 11 votes to 6 with 0 abstentions.

The following were present for the vote: Diemut R. Theato, chairman and rapporteur; Herbert Bösch, Paulo Casaca and Freddy Blak, vice-chairmen; Generoso Andria, María Antonia Avilés Perea, Juan José Bayona de Perogordo, Mogens N.J. Camre, Rijk van Dam, Gianfranco Dell'Alba, Christopher Heaton-Harris, Michiel van Hulten, Helmut Kuhne, Ole Sørensen, Bart Staes, Gabriele Stauner and Jeffrey William Titford.

The opinions of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, the Committee on Legal Affairs and the Internal Market, the Committee on Constitutional Affairs and the Committee on Petitions are attached.

The report was tabled on 24 February 2003.

MOTION FOR A RESOLUTION

European Parliament resolution on the Commission Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM(2001) 715 – C5-0157/2002 – 2002/2065(COS))

The European Parliament,

- having regard to the Commission Green Paper (COM(2001) 715 – C5-0157/2002),
 - having regard to Article 280(1) and (4) of the EC Treaty,
 - having regard to its resolutions of 13 April 2000 containing its proposals for the Intergovernmental Conference¹ of 16 May 2000 on the 1998 annual report by the Commission on protecting the Communities' financial interests and the fight against fraud², of 13 December 2000 on the Commission communication on protection of the Communities' financial interests³ and of 29 November 2001 on the constitutional process and the future of the Union⁴,
 - having regard to Commission communication (COM(2002) 247 entitled 'A project for the European Union',
 - having regard to Rule 163(1) of its Rules of Procedure,
 - having regard to the report of the Committee on Budgetary Control and the opinions of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, the Committee on Legal Affairs and the Internal Market, the Committee on Constitutional Affairs and the Committee on Petitions (A5-0048/2003),
- A. whereas fraud prejudicial to Community financial interests (which amounts each year to approximately EUR one billion and is constantly increasing) is a scourge which is recognised and condemned by all the EU Member States, and whereas the Community has an obligation to fight this fraud,
- B. whereas the ultimate victim of this type of fraud is the European taxpayer,
- C. whereas the existing legal instruments do not enable effective action to be taken against such fraud, owing to the fact that the 1995 conventions and protocols have only very recently been ratified by all the Member States, the provision of mutual assistance in criminal matters is cumbersome and there are limits stemming from the administrative nature of OLAF investigations,
- D. whereas fewer than 5% of the cases dealt with OLAF are passed on to the national authorities (either in the form of information or a file), thus demonstrating the need for a

¹ OJ C 40, 7.2.2001, p. 409

² OJ C 59, 3.2.2001, p. 61

³ OJ C 232, 17.8.2001, p. 191

⁴ OJ C 153E, 27.6.2002, p. 310

European agency,

- E. whereas Eurojust exists but whereas it has an intergovernmental basis, the purpose of which is to facilitate judicial cooperation in respect of organised crime but with no scope for bringing cases to court and no power of jurisdiction, and whereas it cannot be regarded in its present form as a permanent obstacle to the establishment of a European Prosecutor,
- F. whereas the above observations led the Commission to submit a contribution at the December 2000 Nice Intergovernmental Conference which contained a proposal calling for the amendments to the Treaties to include the incorporation of an Article 280a which would enable the office of European Prosecutor to be established with the basic task of directing and coordinating cross-border investigations and proceedings in respect of offences relating to EU finances, and whereas this was in response to Parliament resolutions,
- G. whereas the Nice Conference did not take up the Commission proposal but it noted the Commission's contribution and the Member States have agreed that the proposal will be considered with a possible view to being incorporated into the Treaty at the appropriate time,
- H. whereas, pursuant to Annex 23 of the Nice Declaration on the future of the Union, a Convention has been set up in order to prepare the work of the next Intergovernmental Conference, which is due to take place by the next European Parliamentary elections,
- I. whereas Parliament, in its resolution of 29 November 2001 on the future of the Union, took the view that 'the agenda for the reform of the Treaties should include issues which were not tackled or not resolved under the Treaty of Nice and which are essential if the Union institutions are to operate more democratically and more effectively, such as (...) the establishment of an independent European Public Prosecutor's office empowered to bring cases before the competent Member State jurisdictions in the context of the protection of the Community's financial interests',
- J. whereas, it could be necessary to make OLAF an independent and separately resourced body, with an officer in each Member State's anti-fraud office;
- K. whereas 80% of EU finances are spent within the Member States;
- L. whereas the establishment of a European Union body of substantive and procedural criminal law should be thoroughly assessed by the Convention on the Future of Europe and the Member States, and should be considered in unitary terms, avoiding proposals for partial solutions which might cause intolerable harm to the personal freedom of citizens,
- M. whereas the establishment of a European Prosecutor by the 2004 Intergovernmental Conference will create a major new source of Union power vis-à-vis which legal safeguards must be provided for European citizens,
- 1. Calls for the protection of the financial interests of the European Union as a priority objective for the development of common provisions in the field of criminal law and criminal procedural law in the European Union. There can be no question of returning

Community powers to national level.

2. Welcomes the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor;
3. Supports the idea of establishing a European Public Prosecutor and notes the importance of protecting the Community's financial interests by a variety of means; calls at the present time on the Convention and in due course on the 2004 Intergovernmental Conference, i.e. on the governments of the Member States to ensure that the forthcoming institutional reform actually includes the establishment of a European Public Prosecutor's office through incorporation of the Article 280a which has been proposed by the Commission and which covers the essential points pertaining to the office of European Prosecutor (appointment, dismissal, duties and independence) and which refers to the rules (to be laid down under secondary legislation) which are needed in order to enable the Prosecutor to perform his/her tasks;
4. Insists that in addition to the European area of freedom, a European judicial area be set up;
5. Calls upon the governments of all Member States and candidate countries to hold a substantive debate within their national political and legal establishments on the importance of combating cross-border crime;
6. Recognises the importance of not delaying this amendment to the Treaties beyond the next IGC, for the Treaties may not be modified again in the near future, and the protection of the Community's financial interests in an enlarged Union must be secured; stresses, however, that this must not become an obstacle to successful enlargement in 2004;
7. Asks the Commission to support Parliament's call for the transfer of the third-pillar competences and to consider its proposal for the European Prosecutor's Office to be established in the context of a unified treaty;
8. Notes that the establishment of a European Prosecutor on a first pillar basis is a further step away from the demarcation of EU powers into three areas with their separate rules and instruments in the three-pillar architecture and finds it clear that criminal law can no longer be envisaged as an area for Union regulation only in the third pillar of the EU Treaty;
9. Stresses the need for democratic control via the European Parliament over the exercise of power by the Prosecutor, who has a direct influence on the rights and freedoms of European citizens;
10. Is of the opinion that the European Prosecutor should be appointed by the European Parliament, with the assent of the Council, following a nomination by the Commission of at least two candidates; this will provide the European Prosecutor with the necessary democratic endorsement;
11. Supports the procedure proposed by the Commission under Article 251 of the EC Treaty as regards the terms and conditions under which the European Prosecutor will perform his/her duties; this will give Parliament a role as co-legislator in this matter;

12. Takes the view that, in order to be effective and transparent, the European Prosecutor must inform the European Parliament of the progress of his/her work, the trend in crime and the progress in co-operation with the national Public Prosecutors. He/she will do this by submitting reports annually to the European Parliament, in which he/she also will propose a budget;
13. Insists that the system as proposed by the Commission in its Green Paper be refined so that it meets efficiency criteria;
14. Stresses that it is absolutely essential to improve and supplement the system proposed by the Commission in the Green Paper in order to ensure that fundamental rights are fully upheld and protected in the course of the new authority's work, particularly the rights of those citizens against whom the Prosecutor initiates proceedings. The Prosecutor's Office must be bound by Article 6(2) of the Treaty on European Union, which is destined to become a legally binding part of the future Constitutional Agreement and should form an integral part of the new provisions;
15. Takes the view that, at all events, the envisaged system of criminal law and criminal proceedings must guarantee the protection of the basic rights of those concerned on the basis of the Charter of Fundamental Rights and subject to the control of European courts;
16. Notes that the Commission proposal does not contain any list of the procedural rights of those charged/accused and therefore calls upon the Commission to add a detailed catalogue to its proposal; a list of uniform coercive measures corresponding to a list of criminal acts could also be added;
17. Considers that it is absolutely vital to the rule of law that the offences which constitute damage to the financial interests of the European Union should be specified in precise detail;
18. Considers that a uniform set of penalties is needed; notes that the Council has still not submitted a common position on the 20 May 2001 proposal for a directive on the criminal-law protection of Community financial interests which Parliament wishes to convert into a regulation; calls once again upon the Member States' representatives to ensure that political declarations condemning fraud prejudicial to the Community budget are followed up by legislative measures;
19. Notes that the European Convention on the protection of the Communities' financial interests finally entered into force following ratification by all Member States; calls upon the Member States to abide by their commitments under the PIF Convention and ratify the additional protocols;
20. Supports the principle behind the establishment of an European Prosecutor and greater cooperation between national judicial authorities in an European area of security and justice but insists that there are a number of substantive issues that have to be regulated in part under secondary legislation such as differing legal systems and practices, language and administrative practice, the consequences for national criminal law, risk of double jeopardy and overlapping competences between national and European Prosecutors, admissibility of evidence, mutual recognition etc;

21. Makes the following remarks:

- regarding the independence both of the European Prosecutor and of his/her deputy: insists that such independence be unconditionally guaranteed, with due regard for the separation of powers, and that it be accompanied by the principle of mandatory prosecution; as regards the various possible statutes for deputy prosecutors, permitting such individuals to hold one office only would certainly exclude any possible conflict of interest or hierarchical dependence, even though there would be practical advantages in allowing them to wear 'two hats' in the event of cases falling under more than one jurisdiction, a category into which most cases are likely to fall; wonders, therefore, how the principle of subordination to the European Prosecutor would actually be applied and protected, inter alia as regards the disciplinary procedures applying to the Prosecutor's deputy; calls, likewise, on the Commission to clarify the funding of the major portion of the deputy prosecutors' human resources and operating costs;
- takes the view that the European Public Prosecutor and his deputies must work in conjunction with the national public prosecutors in the Member States, with a view to enhancing the effectiveness of their inquiries and of working out all sorts of practical problems related to the judicial systems of the Member States.
- as regards reviewing the Prosecutor's activities, either in the case of investigations carried out under the Prosecutor's authority (judge of freedoms) or with regard to committals for trial (national judge), any practical advantages to be derived from recourse to the national system (swifter procedure) must be set against the need for a uniform approach in the application and interpretation of Community law, for fairness in determining which court has jurisdiction and for fundamental rights (which could be guaranteed by means of a Preliminary Chamber within the Court of Justice) to be upheld; believes that it is necessary for the future European Prosecutor to be placed under a judicial control which would make it possible to lodge subsequent appeals against his decisions and better monitor his work; considers that it must be clearly established that any acts of the European Prosecutor which relate to people's fundamental rights must be subject to judicial review;
- believes that the Prosecutor should not have a discretionary right to close cases, but that this decision should be subject to judicial control; also takes the view that detailed criteria should be established governing the choice of the Member State where the trial is to be held, in order to avoid the risks of 'forum shopping';
- also calls upon the Commission to consider the case of illegal investigations by the Prosecutor and possible means of redress through the courts;
- as regards evidence: if the principle of mutual recognition is fundamental it must be underpinned by common standards relating to prosecution and punishment; on account of the differences in the Member States' systems for gathering evidence, wonders whether consideration should not be given to a harmonised EU procedure for the admission of evidence and also to a body of common EU rules on evidence; considers that the Commission proposal to devise an EU police or witness statement should be taken up;

- as regards area of competence: considers that the existing system should initially prove itself in the field of financial interests before being extended - if appropriate - to other crimes; envisages that an evolutionary approach could be considered whereby the European Prosecutor becomes competent to deal with offences which are already the subject of an agreement between the Member States and a further series of offences could be added, as set out in the Corpus Juris; takes the view that this will largely depend upon the proposals from the Convention and the decisions in the IGC as concerns communitarisation of the instruments under the third pillar;

22. Calls on the Commission to make its proposal clearer on the subject of relations between the Prosecutor and existing structures:

- as regards relations with Eurojust, asks the Convention on the future of Europe to define in a clear manner the relationship between the European Public Prosecutor and Eurojust, through the clarification of their powers and responsibilities respectively; takes the view that, in future, in the interests of effective criminal law enforcement, the development of overlapping structures should be avoided. A parallel structure with Eurojust on the one hand and a European Public Prosecutor on the other, with a partial overlap of responsibilities and powers, is not rational.
- the tasks of the European Public Prosecutor could be taken over by a strengthened Eurojust provided that Eurojust is transferred to the first pillar;
- as regards relations with OLAF:

regrets the fact that the Commission has not yet submitted an assessment of the current OLAF system to complement the proposal under consideration; considers that OLAF currently lies at the heart of the system to combat Community fraud but that it must be improved in such a way as to embody the legal guarantees which it requires if it is to acquire the legitimacy which it lacks; considers that OLAF should assist the Prosecutor both in the forwarding of information and in the carrying out of investigations; considers, therefore, that it is quite in order to enlarge OLAF's remit to include powers of criminal investigation (accompanied by the necessary provisions relating to protection of the individual) and to make OLAF an entirely independent body; awaits the Commission's proposals on this point;

- calls on the Commission to specify the nature of relations between the European Prosecutor and OLAF, in the context of the reform of the latter's status and objectives, and with Eurojust;

23. Asks the Commission to consult it on the revised draft of the Green Paper which will be forwarded to the Convention; stresses that the system should be efficient, transparent and credible, and believes that resistance to it rests on a political rather than a legal basis; demands once again that the Convention seize this historical opportunity;

24. Instructs its President to forward this resolution to the Council, the Commission and the European Convention.

EXPLANATORY STATEMENT

INTRODUCTION

It has long been acknowledged that the Communities' financial interests require special protection under criminal law. As long ago as 1991 (in a resolution of 24 October 1991, published in OJ C 305 of 25 November 1991), Parliament highlighted the inadequacy of the protection afforded to the Community's financial interests, both administratively and under criminal law, and it called for the Community to be given, under the new Treaty on European Union, the power to introduce administrative and criminal-law provisions on the basis of a procedure involving Parliament. It also called on the Commission to submit proposals designed to harmonise the Member States' criminal-law provisions relating to the protection of financial interests.

The work which has been carried out at Parliament's and the Commission's request by a group of experts from the Member States and which has resulted in a proposal for a set of rules (well-known under the name of Corpus Juris) on the criminal-law protection of the Communities' financial interests has provided the basic reference for the protection scheme which is envisaged and which has now been put forward in the Commission Green Paper, on which Parliament believes it should express its views.

By means of this report, Parliament wishes first and foremost to call upon the Convention with a view to ensuring that the amendment to Article 280 which will enable the office of European Prosecutor to be established appears on the agenda for the next IGC. It also wishes to draw the Member States' and the Commission's attention to certain aspects of the Green Paper which merit a different approach or more detailed consideration, yet it is quite clear that the Commission's efforts should be supported in the interests of protecting European taxpayers' money and demonstrating the Union's ability actually to provide such protection, since those efforts constitute a response to the many calls issued by Parliament – a long-standing advocate of a European Prosecutor with responsibility for the EU's financial interests.

I. PARLIAMENT'S CALL TO THE CONVENTION

On 28 June 2000 the Commission presented an 'overall strategic approach' in respect of the protection of the Communities' financial interests, which it followed up on 29 September with 'an additional contribution to the Intergovernmental Conference on institutional reform'. In response to the problems of the fragmentation of the European criminal law-enforcement area, the cumbersome and inappropriate nature of judicial cooperation between the Member States and the difficulty of ensuring that administrative investigations are followed up by legal proceedings, the Commission proposed to the IGC that Article 280 be amended so as to enable a European Prosecutor to be appointed. (The Prosecutor's activities would be governed by secondary legislation.) The IGC did not take up the Commission's proposal, which had received full backing from Parliament. It nonetheless made the following statement: 'The Conference has noted the contribution addressed to it by the Commission concerning the criminal-law protection of the Communities' financial interests and proposing to supplement the existing EC Treaty provisions in order to enable a European Prosecutor to be appointed and the rules required for him to carry out his duties in this area to be adopted. It welcomes

the Commission's intention to give further and more detailed consideration to the practicalities of implementing such a proposal. In view of the importance which they attach to effective protection of the Community's financial interests, the Member States agree that the proposal will be reconsidered on this basis with a possible view to being incorporated into the Treaty at the appropriate time'.

It is clear, therefore, that:

- firm statements were made at the Nice Conference regarding the importance attached to protecting the Union's financial interests;
- the opportune moment would be the next institutional reform (2004 IGC); as Parliament has repeatedly emphasised in a number of resolutions, the office of European Prosecutor must be established when accession takes place. To delay the matter beyond the date of EU enlargement would be irresponsible and would be tantamount to deliberately multiplying the risk of loss or damage in the absence of any means of protection other than those which currently exist, whose limitations (as mentioned earlier) are well known and which benefit organised crime. Since crime now exists on a Community-wide basis, so too must the means of combating it;
- a legal instrument exists, namely Article 280a (see Annex) as proposed by the Commission;
- the vehicle for the task is the Convention, which is required to draw up the agenda for the next IGC. Hence Parliament appeals in this connection to the members of the Convention, to MEPs, to MPs from the existing Member States and from the applicant countries, and to the other representatives, in particular the members of a Presidium. A working party within the Convention on Security and Justice should give detailed consideration to this issue and act as an intermediary for Parliament's proposals.

Parliament therefore supports the Commission Communication (COM(2002) 247 final - A Project for the European Union). Under section 1.2 of that document (entitled The Union must build up an EU-wide area of freedom, security and justice) it is stated that 'the Union also needs to take steps to build up a genuine European area of justice, based on civil and criminal judicial cooperation which would in the future be within a single institutional and legal framework. We also clearly need to supplement the current Treaty provisions on the protection of the Community's financial interests by a legal basis providing for a European Prosecutor and facilitating the adoption of rules of criminal proceedings in cases of cross-border fraud'.

The EU Member States which are hesitant about the project might in particular be usefully reminded of the fact that they have all ratified the agreement on the International Criminal Court. There is surely some risk of contradiction here.

Furthermore, in accordance with the desire to simplify the Treaties (see Annex 23 to the Nice Treaty) and as Parliament called for in its report on the division of competences between the European Union and the Member States (A5-0133/2002), Parliament's request for the second and third pillars to be brought within the Community sphere must also be taken into account

in order to increase democratic legitimacy and allow for parliamentary and judicial review. The powers and responsibilities relating to judicial cooperation in criminal matters within the European Union and the establishment of a European Public Prosecutor's office should therefore be considered within the framework of a unified Treaty.

Lastly, it is clear that the system envisaged is based on the subsidiarity and proportionality principles. Hence in this area the Union will have a power of allocation justified by the fact that synergy (in terms of efficiency) will be one of the criteria which Community action will be required to meet in order to compensate for the handicaps resulting from the current fragmentation of law-enforcement areas.

II. STRUCTURE AND FUNCTIONING OF THE EUROPEAN PROSECUTOR'S OFFICE

As the Commission states, it is proposing to incorporate into the Treaty (by means of an Article 280a) only the essential aspects pertaining to the office of European Prosecutor (appointment, dismissal, duties and independence); the rules and other practical arrangements relating to the performance of his duties will be determined under secondary legislation.

The Green Paper dwells on what might be done under that secondary legislation: establishment at Community level of the charges and the penalties relating to activities prejudicial to the Communities' financial interests, coordination of Community procedures with the criminal-law systems of the individual Member States, and establishment of the practical arrangements for referring cases to the European Prosecutor, for defining his powers to open, conduct and conclude investigations, and for subjecting his activities to judicial review.

Parliament's concern is to devise a transparent system in which there is a balance between optimum effectiveness in the procedure for investigating cases of cross-border crime and respect for fundamental and human rights, and within which there is in particular a degree of coordination with existing structures (OLAF, Eurojust and Europol).

Parliament attaches particular importance to the following considerations:

1. The **independence** of the European Prosecutor vis-à-vis both the parties to any trial and the European Union's Member States, bodies and institutions. Such independence is essential and it must be guaranteed, as currently codified in the Commission's proposed Article 280a. Such independence must be apparent as regards:

- the appointment of the Prosecutor: the latter's importance is such as to require direct, democratic endorsement;
- statute: Article 280a(2) as proposed by the Commission provides for a codecision procedure for the purpose of establishing the Prosecutor's statute. The current statute for the Ombudsman could serve as a reference, and the idea of submitting an annual report to Parliament could also be taken up;

- deputy European prosecutors (one in each Member State, the task of whom will be to carry out investigations in his Member State, acting on instructions from the chief European Prosecutor): the system envisaged by the Commission is based on a decentralised structure which will enable the system to be incorporated into the Member States' legal systems. Whether deputy prosecutors should be restricted to holding only one office, whether they should be allowed to 'wear two hats' or whether they should have a choice in the matter is an issue to be considered from the point of view of efficiency and effectiveness but also (and in particular) from that of the guarantees concerning the genuine independence of prosecutors who hold two offices. A Community approach would undoubtedly give preference to the holding of a single office (as emphasised by the OLAF Supervisory Committee in its opinion 2/2002), in order to prevent any conflict of interest.
- the deputy European prosecutors should also have a statute.

2. **Monitoring the European Prosecutor**

It is obvious that, since the Prosecutor's acts will have an impact on people's basic rights, they must be subject to judicial review:

- review of the acts of investigation carried out under the Prosecutor's authority;
- review of committals for trial.

In the first case the Commission proposes a review by a national 'judge of freedoms' and, in the second case, a review by a national judge. Procedural speed and efficiency are factors which could be cited in support of such a proposal. However, it may appear shocking (again from a Community viewpoint) to allow a national judge to review the Prosecutor's committals for trial. The risk of 'forum shopping' has been emphasised (see Max-Planck-Institut – Analysis of the Green Paper – French Senate's 5 April 2002 motion for a resolution on the Green Paper). In certain quarters the idea of entrusting 'judges of freedoms' with the task of reviewing or authorising coercive acts decreed by the European Prosecutor is controversial, since such a task would probably be very difficult to perform in cross-border cases.

Towards a 'Preliminary Chamber'

The proposed European Preliminary Chamber within the European Court of Justice would enable the necessary judicial safeguards to be provided, since it would be able to review the preliminary stage, ensure unity in the application and interpretation of Community law and fairness in the selection of the court in which the trial is to be held, and, naturally, uphold human rights in the course of the entire procedure. Such a Chamber (similar to the one which exists within the International Criminal Court) would also have the power to review the factors upon which a decision to close a case or to send it for trial is based.

The same Chamber should also be responsible for supervising investigations – in other words, it should have the job of monitoring the preparatory stage and reviewing the decision to commit to trial. Such a system would also have the advantage of being more intelligible to the general public whilst providing guarantees regarding the terms and conditions pertaining to a fair trial.

The time remaining until the IGC could be usefully employed in following up the Commission's contribution to the Nice IGC, since it seems to be the case that a Preliminary Chamber will soon have to be established (as emphasised, incidentally, by the OLAF Supervisory Committee and the European University Institute in Florence) if the system is to function with due respect for fundamental rights.

Calls are already being heard from some quarters for a proper 'European Criminal Court' - a possible offshoot of the European Court of Justice. This would constitute the European court body which would be essential to the running and the supervision of the European Prosecutor's Office (see French Senate's 5 April 2002 motion for a resolution on the Green Paper).

3. Relations with existing structures

- OLAF

The heart of the proposed system must be the relationship between the Prosecutor and OLAF (an assessment of which unfortunately demonstrates that it has not achieved its political objective and *must* be improved).

A question which needs to be answered is whether or not OLAF will continue to restrict itself to carrying out administrative checks. One might envisage OLAF being given powers of criminal investigation, in which case it could assist the European Prosecutor in investigations in the same way as the Member States' competent authorities. Hence it goes without saying that a judicial guarantee in respect of such activities would be impossible to obtain unless those activities were subject to the authority of the European Prosecutor, himself under a guarantee provided by a special chamber within the European Court of Justice (as proposed).

It must be ensured that information can pass between OLAF and the Prosecutor, and vice-versa.

- The same complementarity could apply to Europol.
- Relations between the European Prosecutor and Eurojust

Eurojust currently comes under the third pillar and its remit is much wider than the mere protection of financial interests. However, it is still no more than a unit responsible for improving judicial cooperation between the relevant authorities within the Member States and it is not subject to any kind of court supervision. (It may be noted that, in the 2001 report by the members of the Pro.Eurojust Provisional Unit, it is stated that 'the Member States have created a mosaic of powers and responsibilities' within the Unit, whilst over 20 obstacles to mutual assistance in judicial matters have been brought to light.). Although Eurojust cannot constitute a real obstacle to the establishment of a European Prosecutor (as some would wish), complementarity should be developed within a flexible framework in order to avoid the complications which would result in 'cross-pillar' cases.

4. Evidence

This is probably the most delicate issue. The Commission is intending to transpose the principle adopted in Tampere of the mutual recognition of the admissibility of evidence gathered under national law and forwarded via the traditional channel of judicial cooperation. The Commission is in fact proposing the concept of the 'free movement of evidence' (which would consequently exclude evidence gathered illegally).

As pointed out by certain jurists (study carried out by the Max Plank Institute), this would mean in practice that the terms and conditions governing the admissibility of evidence which are laid down in the laws of the Member State in which judgement is to be passed will not be taken into account. The principle of the free movement of evidence cannot be applied if evidence is excluded not on the basis of the way in which it is gathered but on the basis of the way in which it is assessed. Furthermore, the fact that judges would have to invoke foreign law would cause language problems.

Consideration should therefore be given as to whether or not the following should be envisaged:

- a procedure for the acceptance of evidence (harmonised at European level), rather than the acceptance or assessment of evidence gathered in another Member State;
- a set of common European rules relating to evidence (here too, the proposed solutions should incorporate respect for fundamental rights).
- lastly, the Commission's suggestion of creating a European model for police or witness statements should be taken up.

5. The European Prosecutor's powers

The current proposal restricts the European Prosecutor's remit to the protection of the Union's financial interests, and it is indeed on this aspect (which falls within its sphere of competence) that the Committee on Budgetary Control is expressing its views. However, it is quite justifiable to view the debate in terms which could eventually include the list of 32 offences covered by the European arrest warrant. In such a case, the design of the system would be based on the European Ministry for Public Affairs within which Eurojust and specialist investigative bodies (OLAF and Europol) would merge, with everything under the judicial supervision of a European Preliminary Chamber which would safeguard individual freedoms and the rights of the defence and the functioning of which would be facilitated by the greatest possible standardisation of criminal-law rules and procedures: common rules on evidence, a European model for police or witness statements, a common definition of offences, etc.

CONCLUSION

The above considerations are Parliament's contribution to the discussion which has arisen between the Commission and the various parties concerned. Although the Commission has made a remarkable effort in submitting its Green Paper, it would appear that a number of weaknesses may make the project unworkable. We believe that more of a Community basis should be incorporated into the system, together with further guarantees concerning respect for individual freedoms.

It is essential for Parliament (as the latter has often emphasised) that the first stage of the operation (which involves incorporating Article 280a into the Treaty) take place as soon as

possible, since the entire second stage (secondary legislation) will take time and full operation of the system will not be possible until well after 2004.

ANNEX

Article 280a

1. To contribute to the attainment of the objectives of Article 280(1), the Council, acting on a proposal from the Commission by a qualified majority with the assent of the European Parliament, shall appoint a European Public Prosecutor for a non-renewable term of six years. The European Public Prosecutor shall be responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community's financial interests and their accomplices and for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences in accordance with the rules provided for by paragraph 3.

2. The European Public Prosecutor shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries. In the performance of his duties, he shall neither seek nor take any instructions. The Court of Justice may, on application by the European Parliament, the Council or the Commission, remove him from office if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the regulations applicable to the European Public Prosecutor.

3. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular:

- (a) rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community's financial interests and the penalties incurred for each of them;
- (b) rules of procedure applicable to the activities of the European Public Prosecutor and rules governing the admissibility of evidence;
- (c) rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.

20 June 2002

OPINION OF THE COMMITTEE ON CITIZENS' FREEDOMS AND RIGHTS, JUSTICE AND HOME AFFAIRS

for the Committee on Budgetary Control

on the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor
(COM(2001) 715 – C5-0157/2002 – 2002/2065 (COS))

Draftsman: Elena Ornella Paciotti

PROCEDURE

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Elena Ornella Paciotti draftsman at its meeting of 20 February 2002.

It considered the draft opinion at its meetings of 23 May 2002 and 18 June 2002.

At the latter meeting it adopted the following conclusions by 24 votes to 8.

The following were present for the vote: Ana Palacio Vallelersundi (chairman), Giacomo Santini (vice-chairman), Elena Ornella Paciotti (draftsman), Marco Cappato (for Mario Borghezio), Charlotte Cederschiöld, Carmen Cerdeira Morterero, Ozan Ceyhun, Carlos Coelho, Giuseppe Di Lello Finuoli, Evelyne Gebhardt (for Adeline Hazan), Margot Keßler, Eva Klamt, Baroness Sarah Ludford, Manuel Medina Ortega (for Sérgio Sousa Pinto), Bill Newton Dunn, Arie M. Oostlander (for Mary Elizabeth Banotti), Paolo Pastorelli (for Giuseppe Brienza), Bernd Posselt, Martine Roure, Heide Rühle, The Earl of Stockton (for Thierry Cornillet), Joke Swiebel, Anna Terrón i Cusí, Christian Ulrik von Boetticher and Olga Zrihen Zaari (for Walter Veltroni).

SHORT JUSTIFICATION

Background

Action to combat fraud against Community finances is an essential political priority. Each year the EU budget suffers losses of several hundreds of millions of euros. The work of the European Anti-Fraud Office (OLAF) has made it possible to obtain good results in seeking to prevent and identify fraud. Criminal-law protection, however, is hampered by the diversity of national criminal-law systems, as well as the fact that the fraud against the Community's financial interests is disregarded and not sufficiently prosecuted by the Member states, not all of which have ratified the European Convention on the protection of those interests and the protocols thereto. This is why Parliament has, for many years now, repeatedly called for the establishment of specific criminal-law protection in this field and the establishment of a European Prosecutor.

The Commission Green Paper

In the Green Paper the Commission sets out in greater detail the contribution it submitted to the Nice Intergovernmental Conference, which proposed amending the wording of Article 280 of the EC Treaty in order to provide for the establishment of a European Public Prosecutor's Office responsible for the criminal-law protection of the Community's financial interests. Academics have been seriously debating this subject for years, in particular following the publication of two successive editions of the *corpus juris*, a study dealing with this topic and financed by the Commission.

The Commission proposal's originality lies in the fact that it is founded on the principles of subsidiarity and proportionality. The relevant provisions of the EC Treaty should be limited to the appointment of the European Public Prosecutor and essential aspects of this new office. All other details, such as the statute and operating procedures of the European Public Prosecutor's Office, would be governed by secondary law provisions. The European Public Prosecutor's Office would constitute an independent judicial authority, organised on a decentralised basis, with a deputy European Public Prosecutor in each Member State, and would be responsible for instituting proceedings solely in cases relating to offences directly affecting the Community's financial interests. The actual trial would remain within the competence of the national courts.

Eurojust and the European Public Prosecutor's Office for the protection of the Community's financial interests would be complementary to each other: the Prosecutor's Office would operate within a specific and clearly defined Community context and Eurojust would operate on the basis of the conventional cooperation procedures in the wider field of serious crime.

The opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

It is essential, at this time when the Convention on the Future of Europe is meeting, that Parliament support the Commission proposal for a revision of Article 280 of the Treaty (and insertion of a new Article 280a) as a matter of urgency in order to provide the necessary legal basis for the establishment of the European Public Prosecutor to combat Community fraud.

The statute and operation of the Prosecutor's Office can be looked at more closely at a subsequent stage and regulated by secondary legislation.

It is also worth reiterating Parliament's position on the need to communitise the third pillar and, hence, to incorporate this proposal into a unified treaty.

CONCLUSIONS

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs calls on the Committee on Budgetary Control, as the committee responsible, to incorporate the following points in its motion for a resolution:

- to welcome the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor;
- to draw attention to the European Parliament's call for competences relating to judicial cooperation in criminal law matters within the Union to be transferred to the Treaty establishing the European Community;
- to ask the Commission to support Parliament's call for the transfer of the third-pillar competences and to consider its proposal for the European Prosecutor's Office to be established in the context of a unified treaty;
- to call on those Member States which have not yet done so to ratify the Convention of 26 July 1995 on the protection of the European Communities' financial interests and the protocols thereto.

28 January 2003

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Budgetary Control

on the Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor

(COM(2001) 715 – C5-0157/2002 – 2002/2065 (COS))

Draftsman: Béatrice Patrie

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Béatrice Patrie draftsman at its meeting of 19 February 2002.

It considered the draft opinion at its meetings of 7 October 2002, 5 November 2002 and 28 January 2003.

At the last meeting it adopted the following conclusions by 13 votes to 8, with 2 abstentions.

The following were present for the vote: Giuseppe Gargani (chairman), Willi Rothley, Ioannis Koukiadis and Bill Miller (vice-chairmen), Paolo Bartolozzi, Maria Berger, Bert Doorn, Enrico Ferri (for Anne-Marie Schaffner), Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghilardotti, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Heidi Anneli Hautala, Piia-Noora Kauppi (for Marianne L.P. Thyssen), Kurt Lechner, Klaus-Heiner Lehne, Neil McCormick, Toine Manders, Arlene McCarthy, Manuel Medina Ortega, Marcelino Oreja Arburúa (for Rainer Wieland), Diemut R. Theato, Joachim Wuermeling and Stefano Zappalà.

CONCLUSIONS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Budgetary Control, as the committee responsible, to incorporate the following points in its motion for a resolution:

1. The protection of the financial interests of the European Union must be a priority objective for the development of common provisions in the field of criminal law and criminal procedural law in the European Union. There can be no question of returning Community powers to national level.
2. In the interests of effective criminal law enforcement, the development of overlapping structures should be avoided. A parallel structure with Eurojust on the one hand and a European Public Prosecutor on the other, with a partial overlap of responsibilities and powers, is not rational.
3. The tasks of the European Public Prosecutor could be taken over by a strengthened Eurojust provided that Eurojust is transferred to the first pillar.
4. At all events the envisaged system of criminal law and criminal proceedings must guarantee the protection of the basic rights of those concerned on the basis of the Charter of Fundamental Rights and subject to the control of European courts.
5. The substantial shortcomings in terms of OLAF's legal status must be remedied. This applies both to its legal basis and to judicial control of OLAF's activities.
6. Calls on the Commission to specify the nature of relations between the European Prosecutor and OLAF, in the context of the reform of the latter's status and objectives, and with Eurojust.

23 January 2003

OPINION OF THE COMMITTEE ON CONSTITUTIONAL AFFAIRS

for the Committee on Budgetary Control

on the Commission Green paper on criminal law protection of the financial interests and the establishment of a European Prosecutor

(COM(2001)715-C5-0157/2002-2002(2065)COS))

Draftsman: Giorgos Dimitrakopoulos

PROCEDURE

The Committee on Constitutional Affairs appointed Giorgos Dimitrakopoulos draftsman at its meeting of 26 March 2002.

It considered the draft opinion at its meeting of 5 November 2002, 11 November 2002 and 23 January 2003.

At the latter meeting it adopted the following conclusions by 15 votes to 1, with 0 abstentions.

The following were present for the vote: Giorgio Napolitano, chairman; Jo Leinen, vice-chairman; Ursula Schleicher, vice-chairman; Giorgos Dimitrakopoulos, draftsman; Teresa Almeida Garrett, Juan José Bayona de Perogordo (for José María Gil-Robles Gil-Delgado, pursuant to Rule 153(2)), Georges Berthu, Jens-Peter Bonde, Carlos Carnero González, Richard Corbett, Armando Cossutta, Andrew Nicholas Duff, Michel Hansenne (for Jean-Louis Bourlanges), Neil MacCormick (for Monica Frassoni), Hans-Peter Martin, Iñigo Méndez de Vigo, Gérard Onesta and Johannes Voggenhuber.

CONCLUSIONS

The Committee on Constitutional Affairs calls on the Committee on Budgetary Control, as the committee responsible, to incorporate the following amendments in its motion for a resolution:

Recital Ha (new)

- Ha. whereas the establishment of a European Prosecutor by the 2004 Intergovernmental Conference will create a major new source of Union power vis-à-vis which legal safeguards must be provided for European citizens,

Paragraph 1

1. Supports the idea of establishing a European Public Prosecutor and notes the importance of protecting the Community's financial interests by a variety of means; Calls at the present time on the Convention and in due course on the 2004 Intergovernmental Conference, i.e. on the governments of the Member States to ensure that the forthcoming institutional reform actually includes the establishment of a European Public Prosecutor's office through incorporation of the Article 280a which has been proposed by the Commission and which covers the essential points pertaining to the office of European Prosecutor (appointment, dismissal, duties and independence) and which refers to the rules (to be laid down under secondary legislation) which are needed in order to enable the Prosecutor to perform his/her tasks;

Paragraph 2a (new):

- 2a. Is convinced that an effective enforcement strategy must consist of a balanced mix of preventive measures, action under criminal law and administrative sanctions. The establishment of a European Prosecutor on a first pillar basis creates a legal framework for combating financial fraud and thus contributes towards achieving a balance at a European level between the administrative and the judicial approach.

Paragraph 2b (new):

- 2b. Notes that the establishment of a European Prosecutor on a first pillar basis is a further step away from the demarcation of EU powers into three areas with their separate rules and instruments in the three-pillar architecture and finds it clear that criminal law can no longer be envisaged as an area for Union regulation only in the third pillar of the EU Treaty.

Paragraph 2c (new):

- 2c. Stresses the need for democratic control via the European Parliament over the exercise of power by the Prosecutor, who has a direct influence on the rights and freedoms of European citizens,

Paragraph 3:

3. Is of the opinion that the European Prosecutor should be appointed by the European Parliament, with the assent of the Council, following a nomination by the Commission of at least two candidates; this will provide the Prosecutor with the necessary democratic endorsement;

Paragraph 4:

4. Supports the procedure proposed by the Commission under Article 251 of the EC Treaty as regards the terms and conditions under which the European Prosecutor will perform his/her duties; this will give Parliament a role as co-legislator in this matter;

Paragraph 4a (new):

- 4a. Suggest that, in order to be effective and transparent, the European Prosecutor must inform the European Parliament of the progress of his/her work, the trend in crime and the progress in co-operation with the national Public Prosecutors. He/she will do this by submitting reports annually to the European Parliament, in which he/she also will propose a budget;

Paragraph 5:

5. Insists that the system as proposed by the Commission in its Green Paper be refined so that it meets efficiency criteria ;

Paragraph 5a (new):

- 5a. Stresses that it is absolutely essential to improve and supplement the system proposed by the Commission in the Green Paper in order to ensure that fundamental rights are fully upheld and protected in the course of the new authority's work, particularly the rights of those citizens against whom the Prosecutor initiates proceedings. The Prosecutor's Office must be bound by Article 6(2) of the Treaty on European Union, which is destined to become a legally binding part of the future Constitutional Agreement and should form an integral part of the new provisions;

Paragraph 5b (new):

- 5b. Is of the opinion that the establishment of a European Public Prosecutor should go hand in hand with the development of European criminal law and criminal proceedings, in order to guarantee to a maximum the rights of defence;

Paragraph 7:

7. Considers that it is absolutely vital to the rule of law that the offences which constitute damage to the financial interests of the European Union should be specified in precise detail;

Paragraph 7a (new):

- 7a. Considers that a uniform set of penalties is needed; notes that the Council has still not submitted a common position on the 20 May 2001 proposal for a directive on the criminal-law protection of Community financial interests which Parliament wishes to convert into a regulation; calls once again upon the Member States' representatives to ensure that political declarations condemning fraud prejudicial to the Community budget are followed up by legislative measures;

Paragraph 8, indent 1a (new):

- Suggests that the European Public Prosecutor and his deputies must work in conjunction with the national public prosecutors in the Member States, with a view to enhancing the effectiveness of their inquiries and of working out all sorts of practical problems related to the judicial systems of the Member States.

Paragraph 8, indent 6

- as regards area of competence:
the European Prosecutor is competent to deal with offences which are already the subject of an agreement between the Member States (fraud, corruption, money-laundering); the proposal also envisages a further series of offences, which could be added to; an evolutionary approach (counterfeiting of the euro, for example) should remain in place;

Paragraph 8, indent 6a (new):

- Regrets however, that the scope is limited to crimes of economic nature and therefore envisages in time a broader scope, covering other sorts of international organised crime such as, for example, terrorism and trafficking in persons, offences against children and crimes against the environment.

Paragraph 9

- as regards the relations with Eurojust, asks the Convention on the future of Europe to define in a clear manner the relationship between the European Public Prosecutor and Eurojust, through the clarification of their powers and responsibilities respectively;

28 October 2002

OPINION OF THE COMMITTEE ON PETITIONS

for the Committee on Budgetary Control

on the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor
(COM(2001) 715 – C5-0157/2002 – 2002/2065 (COS))

Draftsman: Christian Ulrik von Boetticher

PROCEDURE

The Committee on Petitions appointed Christian Ulrik von Boetticher draftsman at its meeting of 24 January 2002.

It considered the draft opinion at its meetings of 7-8 October and 21 October 2002.

At the latter meeting it adopted the following conclusions unanimously.

The following were present for the vote: Vitaliano Gemelli, chairman, Astrid Thors, vice-chairman, Herbert Bösch, Felipe Camisón Asensio, Marie-Hélène Descamps, Jan Dhaene (for Jean Lambert), Glyn Ford, Janelly Fourtou, Christopher Heaton-Harris (for The Earl of Stockton pursuant to Rule 153(2)), Margot Keßler, Luciana Sbarbati.

SHORT JUSTIFICATION

The proposal submitted by the Commission in the two versions of the Corpus Juris and the version now presented in its Green Paper concerns the establishment of a European Prosecutor's Office, whose main role will be to coordinate transnational investigations into crimes which harm the financial interests of the European Union. Fraud (own resources and expenditure), corruption (active and passive) and money laundering (proceeds from fraud and corruption) are the main offences which a European Prosecutor will be responsible for prosecuting.

This proposal follows on from the Convention of 26 July 1995 on the protection of the financial interests of the European Communities. This is not the only instrument reflecting the European Union's concern to combat financial crime. Mention should be made of the recent initiative of the Kingdom of Denmark aimed, in the field of money laundering and in accordance with point 55 of the conclusions of the Tampere European Council of 15 and 16 October 1999, at the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders¹.

The establishment of a European Prosecutor responsible for the criminal-law protection of Community financial interests will have as its legal basis a new wording of Article 280 of the Treaty (Article 280a). This structure, prefiguring the rules governing the judicial organisation of a future European constitution, will make it possible to improve criminal investigations and proceedings, which at present are hampered by disparities in the national criminal law systems.

The duties of the European Prosecutor will be coordinated with those of OLAF, Europol and Eurojust.

In accordance with the Green Paper, the European Prosecutor will be an independent personality, who will neither seek nor take any instructions, who will act on behalf of society alone, whose term of office will not be renewable and over whose acts the Court of Justice will exercise judicial control.

The Green Paper refers to the general principles underpinning a body whose powers have a bearing on the principle of legality and human rights; this is why, in the opinion of the Committee on Petitions, European citizens must be given all the necessary guarantees that their fundamental rights will be respected.

The Committee on Petitions has received a number of petitions in recent years concerning infringements falling within the sphere of competence of a future European Public Prosecutor. If such an office is set up, the Committee on Petitions will, on account of its special responsibility for dealing with citizens' complaints, be of valuable assistance in its work.

¹ OJ C 184, 2.8.2002, p. 8.

CONCLUSIONS

The Committee on Petitions calls on the Committee on Budgetary Control, as the committee responsible, to incorporate the following into its motion for a resolution:

1. Welcomes the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor;
2. Considers that it must be clearly established that any acts of the European Prosecutor which relate to people's fundamental rights must be subject to judicial review;
3. Welcomes the initiative of the Kingdom of Denmark aimed at the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders;
4. Welcomes the entry into force of the Convention of 26 July 1995 on the protection of the financial interests of the European Communities and the additional protocols thereto on 17 October 2002.