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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.3.2003
COM(2003) 128 final

FOLLOW-UP REPORT

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

(presented by the Commission)

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1. INTRODUCTION

The need to prosecute perpetrators of crime affecting the financial interests of the European Communities more effectively has led the Commission to propose establishing a European Public Prosecutor with responsibility in this field (the European prosecutor) to remedy the fragmentary nature of the European criminal-law enforcement area.¹

The aim of the Green Paper

This project requires a revision of the EC Treaty. When the Heads of State or Government met in Nice in December 2000, they failed to follow up this idea owing to a lack of time and detailed study. This is why, in line with its Action Plan for 2001-2003 for the protection of the Community's financial interests,² the Commission organised a wide-ranging debate in Europe on this subject throughout 2002.

In the Commission's view, the *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*,³ which was adopted on 11 December 2001, had two objectives: to clarify ideas and throw up options and preferences regarding ways of implementing the original proposal, and to open the debate to all circles concerned on the eve of enlargement and in view of the forthcoming constitutional review of the Treaties.

The Commission's contribution to the 2000 Intergovernmental Conference already proposed incorporating the essential characteristics of the European Prosecutor (appointment, resignation, independence and mission). It argued that the rules governing his status and operation could be left for secondary legislation, which would define offences at Community level (fraud, corruption, money-laundering, etc.) and the penalties for committing acts that harm the Community's financial interest. It should determine the relationship between the new Community system and national criminal-law systems, cover the question of referral to the European Prosecutor and his powers with regard to investigations and prosecution in relation to national systems and make provision for judicial control of the European Prosecutor's actions.

Method of consultation

Public consultation on the Green Paper, which focused mainly on possible secondary legislation, lived up to expectations. A real broad and open debate was launched in Europe. In terms both of number and quality, the reactions and discussions generated by the Green Paper are evidence of the variety and liveliness of the consultation. All circles affected made contributions. They included national parliaments and governments, Community institutions and bodies, professions involved in criminal proceedings, practitioners and the academic world and non-governmental organisations affected, all of which responded to some or all of the 19 questions that make up the Green Paper.⁴

¹ COM(2000)34; additional Commission contribution to the Intergovernmental Conference on institutional reforms - *The criminal protection of the Community's financial interests: A European Prosecutor*, 29.09.2000, COM(2000)608.

² COM(2000)254.

³ COM (2001) 715; http://www.europa.eu.int/anti_fraud/green_paper/index_en.html.

⁴ In view of the flood of replies received it was decided to extend the deadline for consultation from 1.6.2002 to 1.12.2002. In fact, comments can still be submitted to the following address: olaf-livre-vert@cec.eu.int

Over 12 500 copies of the Green Paper were circulated. More than 70 written replies were received, some from individuals but mostly from groups. To maximise the transparency of the consultation they were made available on the Internet.⁵ Coming from different Member States, candidate countries and professions, these responses made a major contribution to the debate, in terms of both critical analysis and constructive suggestions. Governments,⁶ national parliaments,⁷ and numerous representatives of judicial authorities⁸ stated their positions on the project. Furthermore, a number of lawyers' associations,⁹ national governing bodies of lawyers,¹⁰ groups of European legal experts¹¹ and non-governmental organisations active in the field of financial crime and the protection of people's rights¹² also expressed their views on the creation of a European Prosecutor. The subject has also been studied in depth by universities, most notably at certain renowned Centres for Legal and Judicial Research in Europe.¹³

Since the Green Paper was adopted, the Commission has also taken part in some twenty national seminars or international conferences on the subject of the European Prosecutor in the current and prospective Member States. On 16 and 17 September 2002, it also organised a public hearing with representatives of the circles concerned, which brought together three hundred participants with a representative panel of about a hundred speakers. Their contributions were also published on the abovementioned website in an attempt to reach a wider audience.¹⁴

The follow-up report

This process generated hundreds of written and oral responses to the Green Paper. This report summarises the opinions expressed in them with a view to the constitutional revision of the Treaties. It consists of a general evaluation, followed by an evaluation of the responses received by subject area. The first part deals with views on the need to create a European Prosecutor, reaffirming and detailing the Public Prosecutor's added value (2). The second half focuses on institutional and legal questions that will need to be addressed in greater depth to make it easier to achieve the objective (3).

2. GENERAL EVALUATION

2.1. General overview of public consultation on the Green Paper

Reactions varied greatly. While there was some criticism, much of it constructive, all those taking part in the debate appreciated the quality of the Green Paper and welcomed the attempt to conduct a broad-based consultation.

⁵ http://europa.eu.int/comm/anti_fraud/green_paper/contributions/date.html. The complete list of responses received by 1.12.2002, which were published and evaluated by the Commission, can be found in Annex 1.

⁶ See written replies 15, 17, 20bis, 30, 43, 45, 61 and 65. The numbers refer to the list in Annex 1.

⁷ See written replies 5, 38 and 71.

⁸ See written replies 11, 21, 23, 27, 28, 29, 44, 67, 68, 69 and 72.

⁹ See written replies 55 and 57.

¹⁰ See written replies 19 and 66.

¹¹ See written replies 1bis, 3, 4, 10, 14, 35, 40, 41, 58 and 62.

¹² See written replies 2, 34 and 70.

¹³ See written replies 6, 25, 31, 32 and 33.

¹⁴ http://www.europa.eu.int/comm/anti_fraud/green_paper/public_hearing/index_en.html

Most of the reactions were basically in favour of the establishment of a European Prosecutor, with government bodies more cautious about this question than practitioners and representatives from civil society. A minority remains strongly opposed. Reactions regarding the way the project was to be realised, however, varied quite considerably. A clearer picture can be obtained by looking at the separate sources, namely the contributions at the public hearing, which provides a comprehensive overview of opinion, and the written replies to the Green Paper, which are as a rule far more detailed.¹⁵

2.1.1. General overview of the written replies to the Green Paper

An analysis of the replies to the questionnaire produced the following general findings.

- There is a clear majority in favour of establishing a European Prosecutor.¹⁶ However, this majority made a series of criticisms and suggestions aimed at improving the legal framework proposed by the Commission.
- While not excluding the possibility of establishing a European Prosecutor, a minority remained fairly sceptical about the advisability and feasibility of doing so in the foreseeable future.
- Lastly, a small minority categorically rejected the idea of establishing a European Prosecutor, believing that the instruments for judicial cooperation currently available are capable of offering adequate solutions to the problems of fraud damaging the Communities' financial interests.

While a considerable number of representatives of judicial authorities, associations of legal experts and academic circles insist that there is an urgent need to create a European Prosecutor, several Member States have written that they are not convinced that it would be a good idea to create a Community institution with criminal-law prerogatives and powers solely in the field of the fight against fraud.¹⁷

2.1.2. Overview of the opinions expressed at the public hearing

Organised around a representative panel,¹⁸ the hearing provided a relatively comprehensive view of the range of opinions expressed by the three categories of speakers, i.e. speakers from the institutions, frontline operators and civil society.¹⁹

¹⁵ For the purposes of analysis, the replies received are considered representative of the categories from which they come.

¹⁶ Of the 72 replies analysed, over 50 were in favour and only 15 opposed.

¹⁷ See written replies 15, 30, 43, 45 and 65.

¹⁸ See Annex 2. The 105 speakers were divided into three categories. The first consisted of representatives of the **institutions** that drew up the legal framework: the Council Presidency, the European Parliament, the Court of Justice, the Court of Auditors, the European Anti-Fraud Office (OLAF) Supervisory Committee, Member State ministries, the authors of the *Corpus Juris*, with the Convention on the future of the European Union as an observer. The second category grouped together the **operational bodies** involved in "investigations, prosecution and trials": Europol, OLAF, national police or customs investigation services, Eurojust, the European Judicial Network, national public prosecutors, etc. The third group brought together **representatives of civil society**: defence lawyers, taxpayers' associations, NGOs, criminal-law experts from national associations of legal experts on the protection of the financial interests of the Union (PFI). The candidate countries were also invited to attend as observers.

¹⁹ In certain cases, the report takes account of written contributions received later that demonstrate a certain change in the position adopted by certain Member States in comparison with the opinions they expressed at the hearing in September 2002.

So while the great majority of the speakers representing the European institutions,²⁰ representatives from civil society and a majority of the representatives of frontline operators voiced their support for the Commission's proposal, some of the Member States' ministries returned to the question of whether the specific area of the protection of the Community's financial interests justified a new Community institution such as a European Public Prosecutor.

2.1.2.1. Positions adopted by representatives of the Member States

The representatives of the Member States ministries concerned can be divided into three categories: those who support the principle of establishing a European Prosecutor,²¹ those who are simply sceptical about the usefulness or feasibility of the idea,²² and those who reject the project out of hand.²³

Most of those opposed to the project from the ministries and the frontline operators argued that the Commission had not provided sufficient justification for its proposal or illustrated the real problems faced by those responsible for the fight against Community fraud.²⁴ Many government representatives also believed that it would be a good idea to first examine alternatives to prosecution before creating a Community criminal-law enforcement service.²⁵ Some²⁶ stressed the need to give a chance to the judicial and police cooperation bodies already in place.²⁷

A number of ministries took the view that there were no insurmountable problems of feasibility with regard to establishing a European Prosecutor.²⁸ However, other ministries opposed to the idea of a European Prosecutor considered the principles of subsidiarity and proportionality to be significant obstacles.²⁹

Several government representatives, including some from among the ranks of those in favour of establishing a European Prosecutor, feared that a Prosecutor along the lines proposed by the Commission could find himself in conflict with their national legal principles³⁰ and might weaken safeguards protecting fundamental rights³¹ and legal certainty.³² Consequently many representatives insisted that further work be done on the Commission proposal to ensure that it satisfied the effectiveness criterion and fully respected fundamental rights. It should also be pointed out that several governments, some of which were opposed in principle to the idea of a European Prosecutor, took the view that if a European Prosecutor were established some

²⁰ Opinions expressed at the public hearing by representatives of the European Parliament, the Court of Justice, the Court of Auditors of the European Communities and the OLAF Supervisory Committee.

²¹ The ministerial representatives from Belgium, Greece, Spain, the Netherlands, Portugal and, to a certain extent, Italy.

²² The ministerial representatives from Germany, Luxembourg and Sweden.

²³ The opinions expressed at the public hearing by the ministerial representatives from Denmark, France, Ireland, Austria, Finland and the United Kingdom.

²⁴ Germany, Ireland, Finland and the United Kingdom.

²⁵ Germany, Ireland, Austria, Finland, Sweden and the United Kingdom.

²⁶ Germany, France, Ireland, Luxembourg, Austria and Sweden.

²⁷ Specifically Eurojust, Europol and the 2000 Convention on Mutual Assistance in Criminal Matters between Member States of the European Union, OJ C 197, 12.7.2000, p.1.

²⁸ Belgium, Greece, Spain, the Netherlands and Portugal.

²⁹ France, Ireland, Austria and Sweden.

³⁰ Italy, Ireland, Austria, Finland and the United Kingdom. Ireland also pointed out that a European Prosecutor would be incompatible with its constitution.

³¹ Greece, Luxembourg, the Netherlands, Austria and Finland.

³² Denmark, Finland and Sweden.

time in the future, his powers set out in the Green Paper would need to be extended to cover other areas of Community interest.³³

2.1.2.2. The position of the other players

The public hearing showed that the majority of frontline operators support a qualitative step forward. To a lesser degree they appear to be divided between those who consider the establishment of a European Prosecutor a necessary step towards the construction of an area of freedom, security and justice within the Union and a smaller number who are convinced that the only way forward is through continued horizontal judicial cooperation and believe that the time is not yet right for the creation of a Community institution.

It is even clearer that a very large majority of representatives from civil society view the establishment of a European Prosecutor with responsibility for prosecuting Community fraud as a must for the Union. While some consider the Commission's project too modest to cope with the challenge posed by serious transnational crime, others fear that it is too ambitious to be achievable in the short term. Generally speaking, many supporters of a European Prosecutor also insist on guarantees to safeguard fundamental rights.

2.2. The value added by the European Prosecutor

While the majority attending the public hearing welcomed the idea of a European Prosecutor, there were those who doubted³⁴ or contested³⁵ the value added by the project. While recognising the importance of the statistical analysis requested of the Commission on that occasion, any complementary demonstration of the practical need for a European Prosecutor must employ other criteria.

2.2.1. *Assessment of an effective criminal-law prosecution of Community fraud*

Representatives from some Member States asked for the added value of the European Prosecutor to be demonstrated by means of statistics on his potential activity.³⁶ Others went as far as to argue that there was no added value, pointing out that the fraud committed might be negligible in some Member States and greater in third countries.³⁷

Firstly, **the total volume of fraud** has at times been considered insufficient to justify the cost involved in establishing a new body.³⁸ The Commission cannot share this view. The objective of law enforcement is not primarily pecuniary. Nonetheless, punishing offences that harm the taxpayers' interests is profitable because it makes it possible to recover the funds defrauded and deters people from misappropriating public funds. Moreover, while it is known that the amount of fraud is significant, the exact volume remains unknown. Although it is laid down

³³ Belgium, Denmark, Spain, Luxembourg, Portugal and, to a lesser degree, Germany.

³⁴ See written replies 12, 15, 17, 24, 38, 41, 43, 49, 65, 66 and the verbal opinions of the ministerial representatives from Denmark, Germany, Austria and Finland at the public hearing ("the opinions").

³⁵ See written replies 16, 30, 39, 45 and the opinions of Ireland, Finland and the United Kingdom.

³⁶ See written replies 7, 16, 17, 39 and the opinions of Germany, Austria and the United Kingdom.

³⁷ See written reply 30 and the opinion of the United Kingdom.

³⁸ See written replies 20bis, 41, 43, 64 and the opinion of Spain. The Commission has shown, on the basis of the cases officially detected by the Member States and OLAF, that there were 1487 cases in 1999, involving an estimated €413 million. Cf. Green Paper § 1.2.1.

as an objective in Community legislation adopted for the purpose,³⁹ at present there are difficulties in obtaining data on the extent of fraud and prosecution in the Member States. The data gathered does not provides an overall picture because the powers involved are hopelessly intertwined, spread among over 450 bodies, some of which are administrative, while others are judicial, depending on the Member State, and also owing to the diversity of national data protection rules that currently have to be communicated to administrative bodies at Community level, such as OLAF.

Secondly, according to certain government sources, **the number of fraud cases that are transnational** (affecting several Member States) but limited to the European Union (not involving third countries), which would be the main area of interest to the European Prosecutor, is too small to justify establishing the institution.⁴⁰ In the light of its experience, the Commission cannot subscribe to this point of view. Most cases of which it is informed have a cross-border dimension at first sight. Such divergent assessments are probably due to variations in national statistics, which make it difficult to make comparisons across the Community. The explanation for the unsatisfactory results of judicial cooperation in connection with fraud offences⁴¹ can be found in the continuing difficulties encountered when implementing the provisions on mutual assistance.⁴² Finally, the problems of working with third countries would be less significant for a Union body, which could make use of a network of judicial cooperation agreements.

It must also be pointed out that Member States' notifications **do not provide information on the criminal prosecution of fraud damaging the Community's financial interests**. It is estimated that of every four cases investigated by OLAF that should give rise to prosecution in the Member States, only one comes to trial. Far from playing down the importance of fraud, the figures available reveal a lack of an overall and homogeneous vision and the will to prosecute unlawful acts affecting the Community's financial interests. In the absence of a European Prosecutor fraud as a crime will continue to be underestimated and not always suitably punished. If the problem appears negligible from a national point of view, this means that, on the basis of the principle of subsidiarity, it should be a priority to deal with it at Community level.

It is not enough for the Member States to notify each other, OLAF, Europol and Eurojust on an optional basis, cooperating on certain carefully chosen cases, even if, legally speaking, they are required to report the information.⁴³ This is clearly where the **European Prosecutor** would have an **added value**. Establishing a European Prosecutor as a judicial authority that could centralise information with a view to enforcing the law and prosecuting offences committed in a consistent and constant fashion would considerably reduce the difficulties currently experienced when attempts are made to achieve the objectives laid down in Article 280 of the EC Treaty by simple administrative cooperation or recourse to case-by-case judicial cooperation.

³⁹ Under provisions contained in Regulations (EC) Nos 1831/94 (Cohesion Funds), 1681/94 (Structural Funds), 595/91 (common agriculture policy), 1150/2000 (own resources) the Member States are required to submit quarterly reports on cases of irregularities.

⁴⁰ At the public hearing, the ministerial representative from the United Kingdom pointed out that the cases of agricultural irregularities in the United Kingdom had fallen from 393 in 2000 to 252 in 2001. She added that at European level only 30% of fraud cases involved more than one Member State or third countries; in 70% of the cases, the fraud was being committing in one Member State only. See also written replies 12 and 30.

⁴¹ Cf. the Commission's annual reports on the protection of the Communities financial interests, COM (2002) 348 and COM (2001) 255.

⁴² Cf. *infra* § 2.2.2.

⁴³ See written replies 17, 27 and 41.

2.2.2. Criteria for evaluating the added value of a European Prosecutor

Public consultation has revealed that there is broad recognition of the fact that **the fragmented nature of the European judicial area** hampers the effectiveness of criminal prosecutions, especially in connection with the fight against fraud, although there are a few exceptions.⁴⁴ It is important for the less convinced to remember that there are still obstacles to the effective prosecution of fraud **in the field of substantive criminal law**: limitation periods may differ, for example, and offences in one Member State may not correspond to those in another. On their own, national legal systems have proved ill-equipped to respond to the transnational nature of Community fraud owing to the **principle of territoriality of the law of criminal procedure** and the diversity of rules governing the production of evidence. All too often these factors ensure that prosecutions are not launched or completed, as the problems involved in obtaining evidence deter even the most willing.

Some have expressed support for the idea of maintaining the current system for protecting the Community's financial interests.⁴⁵ Unfortunately, however desirable and successful they may be, by definition the improvements continually being made to the system of European cooperation between judicial authorities⁴⁶ will not remedy damage caused to true Community interests.⁴⁷ The tasks assigned to **those responsible for coordination and exchanging information at Union level** (OLAF, Eurojust, Europol and the European Judicial Network) are essential but serve other purposes. Eurojust, for example, was not designed to gather evidence that would be admissible throughout the Community or equipped with the power to direct prosecutions. In the case of OLAF, the numerous reasons preventing the findings of its investigations from being used in court cases show that the current administrative instruments for combating fraud are not in themselves enough. This is why there is a need to find a specific response,⁴⁸ while continuing to develop bodies within the European judicial area with general powers.

Where the **instruments of international judicial cooperation** continue to expose positive or negative power struggles and the difficulties with the need for the *ne bis in idem* principle or the execution of international letters rogatory, the European Prosecutor could provide the solution. He would be equally capable of doing so at the investigation stage, thanks to his delegates, whose work would be based on a minimum of common rules and whose findings would be mutually admissible, and at the prosecution stage, as cases would be tried in just one Member State.

When attempting to combat crime against Europe, **conflicts of interest or crime policies** between the national and Community levels should be avoided wherever possible. The judicial authorities must continually arbitrate between the numerous and competing national priorities where resources are scarce. In such circumstances, it is difficult for them to take on the protection of Community interests. Their chances of success seem to be diminishing in the face of complex offences, where it is tempting to offload responsibility onto the services of

⁴⁴ See, in particular, the opinion of the United Kingdom.

⁴⁵ See written replies 7, 16, 17, 30, 38, 43 and 65.

⁴⁶ The 1995 Convention on the protection of the European Communities' financial interests, the 1995 Convention on simplified extradition procedure between the Member States of the European Union, the 1996 Convention of extradition between Member States of the European Union, the 1990 Convention implementing the Schengen Agreement, the 2000 Convention on judicial assistance in criminal matters between Member States of the European Union, the Council Decision of 28.2.2002 setting up Eurojust and the Council Framework Decision of 13.6.2002 on the European arrest warrant.

⁴⁷ See written replies 5, 36, 37, 42, 55, 61 and 71.

⁴⁸ Cf. *infra* § 3.1.2 (the relationship of the European Prosecutor with Europol, Eurojust and OLAF).

another Member State.⁴⁹ The European Prosecutor would be able to conduct criminal actions in a continuous and consistent manner anywhere in the enlarged European Union, thanks to his special Community nature and the means allocated for the purpose.

Although some may disagree,⁵⁰ the intrinsically common aspect of the public good of protection - in this case of Community finances - calls for technical specialisation and a principle of prosecution independent of particular national considerations, which once again would be guaranteed by a specialised European Prosecutor.

3. SUBJECT-BASED EVALUATION

The detailed evaluation below focuses on the analysis of written answers to the Green Paper, opinions expressed at the public hearing being mentioned only in the event of significant differences.

3.1. Institutional affairs

3.1.1. *Status and organisation*

The Commission proposed establishing a **European Prosecutor** who would be **independent** both of the Member States and the Community institutions. Many respondents agree that this is an essential characteristic of the European Prosecutor.⁵¹ Others consider that a fully independent prosecution service is alien to their legal traditions, where only the trial courts enjoy full independence. At any rate, the European Prosecutor's independence and impartiality should be guaranteed by transparent procedures, including, for some respondents, provisions to that effect in the future constitutional Treaty.⁵²

Despite the diversity of the proposals put forward, the majority of respondents⁵³ consider that the European Prosecutor should be more clearly answerable.⁵⁴ Several suggestions, to which the Commission is open, were formulated to underline his responsibility: the Prosecutor could be required to report each year on his activity; in the event of a serious misdemeanour actions to have him declared liable could also be brought in the Court of Justice on the initiative of a quorum of national parliaments. Regarding the European system of disciplinary liability, only a few respondents propose that it should be strengthened by extending the conditions for activating it in cases falling short of serious fault.

The **decentralised internal organisation** of the European Prosecutor as proposed in the Green Paper strikes most respondents as the most appropriate:⁵⁵ it would be based on an

⁴⁹ The special national units dealing with economic and financial offences (such as the German Schwerpunktstaatsanwaltschaften, the French Pôles financiers and the British Serious Fraud Office) are but a very limited response to the problem, bearing in mind their legitimately national remit.

⁵⁰ See written replies 43 and 49.

⁵¹ See written answers 10, 11, 14, 22, 23, 28, 33, 41, 44, 45, 47, 53, 55 and 65.

⁵² See written answers 10 and 23.

⁵³ See written answers 6, 16, 17, 20, 20bis, 23, 37, 39, 45 and 65.

⁵⁴ According to the terms proposed by the Commission with regard to the liability of the European Prosecutor, the Council would appoint him by a qualified majority, on a proposal from the Commission and after receiving the assent of Parliament, under conditions similar to those for the appointment of members of the European Court of Justice. The Prosecutor would answer of his measures in the event of serious fault in the performance of his duties before this same Court of Justice the request of Parliament, of the Council or of the Commission. Cf. Green Paper § 4.1.2.

⁵⁵ See written answers 10, 11, 29, 33, 35, 37, 38, 41, 44, 60, 65, 67, 69 and 70.

allocation of functions between a European Prosecutor, centralising the minimum needed at the Community level, and Deputy European Prosecutors in the national legal systems, who would investigate and prosecute cases in practice.

The Commission did not envisage a specific European status for Deputy Prosecutors. They could preserve their national status except as regards hierarchical and disciplinary matters. This solution, with which many respondents agree,⁵⁶ would facilitate the integration of the European Prosecutor in the national legal systems. Others, by contrast, recommend that Deputy European Prosecutors be appointed and, if necessary, dismissed by Community authorities. Some thus wish to see Deputy European Prosecutors enjoy a European status or at least a specific national status to guarantee their independence.⁵⁷

A majority, including a majority in judicial and academic circles, leans in favour of the option of allocating **an exclusively European mandate** to Deputy Prosecutors, as a means of securing perfect independence.⁵⁸ A minority of respondents, however, preferred a combined national and European status to assimilate the powers of Deputy European Prosecutors to those of their national colleagues and allow them to easily share information.⁵⁹ During the consultation process some of the respondents suggested that to maintain such a possibility, it might be useful to lay down rules defining a rigorous hierarchy of priorities.

3.1.2. Relationship with Europol, Eurojust and OLAF

The European Prosecutor's competence being confined to the protection of specific Community interests, the Commission does not believe there should be any difficulties in ensuring the interaction between his functions, both more integrated and more specialised, and those of the authorities handling more general cooperation in criminal matters, in particular Europol and Eurojust. But, "given current developments within the third pillar of the European Union," all the Commission could do on this subject was "to identify possible food for thought," to use the words contained in its Green Paper. The debates on the future of the Union, and in particular the plan to merge the pillars, must now be taken into account and could ease the relationship between the various actors in the European law-enforcement area.

There was a general tendency for respondents to call for **greater precision concerning the European Prosecutor's relations with OLAF, Eurojust and Europol**, in order to avoid a proliferation and duplication of structures.⁶⁰ Some would prefer closer cooperation between Eurojust and Europol or OLAF to the establishment of a European Prosecutor.⁶¹ Others, on the contrary, would prefer to establish a European Prosecutor with control over Europol and OLAF,⁶² and some of these would even like these two bodies to be merged.⁶³ Finally, although the specific question was not asked, the hypothesis that OLAF might be given powers of judicial enquiry under the direction of the European Prosecutor was mentioned by several respondents.⁶⁴

⁵⁶ See written answers 6, 29, 33, 35, 37, 38, 41, 44, 60, 65, 67, 69 and 70.

⁵⁷ See written answers 1, 12, 20bis, 23, 25, 27, 28, 41, 48, 53, 62 and 68.

⁵⁸ See written answers 1, 1bis, 4, 5, 10, 12, 20bis, 23, 25, 27, 28, 41, 44, 53, 58, 60, 61 and 62. At the public hearing, opinions were more divided on this question.

⁵⁹ See written answers 3, 29, 33, 35, 37, 38, 65, 66, 67 and 69.

⁶⁰ See written answers 3, 17, 20bis, 27, 28, 32, 37, 40, 41, 60, 62, 66 and 69.

⁶¹ See written answers 15, 16, 24, 30, 43, 45 and 65.

⁶² See written answers 27, 40 and 69.

⁶³ See written answer 71.

⁶⁴ See written answers 6, 11, 20, 27, 28, 37, 40, 41 and 69.

The Commission believes that Eurojust is an important stage in the establishment of the European law-enforcement area. It will undeniably act as a catalyst for cooperation between Member States as regards cross-border crime and organised crime in general, but it does not constitute a sufficiently dynamic response to crime that specifically targets Europe. The Green Paper sets out a scenario whereby Eurojust and the European prosecutor could be **separate and complementary bodies**. While the former is intended to be given a broad range of judicial cooperation functions, the European Prosecutor is to be a Community authority with his own detection and prosecution powers in the specific field of protection of the Community's financial interests. The establishment of the European Prosecutor would not affect the powers of Eurojust in criminal matters, provided the priority jurisdiction of the European Prosecutor for the protection of the Community's financial interests is provided for. A clear division of powers should also be accompanied by operational cooperation in cases involving both bodies.

Following the public consultation, it is now possible to consider **other scenarios to combine the various existing structures**. First of all, **institutional links** could be established: the European Prosecutor could become a member of a strengthened Eurojust Unit to improve complementarity and cooperation with it.⁶⁵

A second alternative could be to establish the European Prosecutor direct in the constitutional Treaty but incorporate him in Eurojust.⁶⁶ This **total integration** scenario would see Eurojust become a collective prosecution body tasked with conducting and centralising investigations and prosecutions and launching prosecutions in the national courts to protect the Community interests for which it is responsible and with coordinating national operations in relation to transnational crime in general. The European Prosecutor having the power to direct and conduct prosecutions in a more restricted field of jurisdiction would be established within this prosecution service. Whatever solution is selected, the protection of the Community's financial interests should be among the European Prosecutor's prime functions from the outset.

The European Prosecutor also complements **Europol**. He could, if necessary, ensure permanent control of Europol's strictly Community (protection of the euro), like the control that he is to exercise over OLAF.

3.1.3. Relations with non-member countries

The Green Paper suggests that the European Prosecutor should be **the direct contact for the authorities of non-member countries** as regards mutual judicial assistance and that he could issue international letters rogatory in accordance with Conventions binding the Member States but later the Union also. A majority of respondents supported the Commission on this proposal.⁶⁷

3.2. Legal questions

Several replies from government departments and from professional circles encourage the Commission to continue considering ways of ensuring that the legal framework relating to the Prosecutor is established in the fullest respect both for the various legal traditions of the

⁶⁵ See in particular the contribution by Ms Schreyer to Working Group X meeting as part of the Convention, forwarded by Mr Barnier and Mr Vitorino: "A European Prosecutor", WD 27, 25.11.2002.

⁶⁶ The European prosecution service would thus be based on Eurojust.

⁶⁷ See written answers 3, 17, 20bis, 25, 27, 29, 32, 33, 40, 41, 59, 60 and 61.

Member States and for the subsidiarity and proportionality principle. Many, however, supported more thorough approximation of the rules of substantive criminal law and criminal procedure to improve the protection of fundamental rights and the smooth operation of the European Prosecutor.

3.2.1. Substantive criminal law

3.2.1.1. Powers of the European Prosecutor in substantive terms

Since the Convention of 26 July 1995⁶⁸ and its additional protocols can constitute the core of a special criminal law, the Commission proposed⁶⁹ that the European Prosecutor's powers should extend at least to offences against the financial interests of the Communities, on which there is already an agreement between the Member States.⁷⁰ A vast majority of the respondents consider nevertheless that if a European Prosecutor is to be created, his powers should necessarily be broader than proposed by the Commission.

Some consider that an effective fight against fraud involves prosecuting criminal organisations indulging in it and wish the Prosecutor's criminal jurisdiction to extend to offences related to Community fraud, such as money laundering, corruption and conspiracy.⁷¹ Others however, and there are more of them, consider that he should also be responsible for protection of the single currency⁷² and for the integrity of the European Public Service.⁷³ Many recommend going further still and entrusting to a European Prosecutor the prosecution of serious forms of crime⁷⁴ affecting important common interests⁷⁵ such as consumers, the environment or the Community trademark.

But not many people suggest that his powers should extend to the full range of cross-border crimes as delimited, for example, by the list of offences against the Decision on the European arrest warrant or the Europol Convention⁷⁶ ("eurocrimes"). Many ultimately support the idea that there should be an opening clause⁷⁷ allowing the Prosecutor's substantive jurisdiction to extend to other forms of crime. As for the degree of harmonisation to be achieved, the vast majority support the idea of a sufficiently clear and detailed common definition of offences, the aim being to ensure certainty as to the law and prevent any risk of conflicts of jurisdiction between the European Prosecutor and national prosecution authorities⁷⁸ and between the authorities of the Member States themselves.

3.2.1.2. Harmonisation of general rules of criminal law

The Commission's concern to abide by the principles of subsidiarity and proportionality led it to envisage only partial harmonisation, covering the minimum necessary for the smooth

⁶⁸ Convention of 26.7.1995 on the protection of the financial interests of the European Communities (OJ C 316, 27.11.95, p.48) and its additional protocols (OJ C 313, 23.10.1996, p.1; OJ C 221, 19.7.1997, p.11; OJ C 151, 20.5.1997, p.1).

⁶⁹ Cf. Green Paper, § 5.2.1.

⁷⁰ See written answers 1, 3, 12, 17, 20bis, 21 and 38.

⁷¹ See written answers 1, 22, 31, 32, 42, 62, 66 and 69.

⁷² See written answers 1bis, 14, 20, 37 and 70.

⁷³ See written answers 1bis, 27, 31, 33, 37, 42, 55, 62 and 70.

⁷⁴ See written answers 1, 8, 25, 36 and 60.

⁷⁵ See written answers 8, 10, 11, 23, 25, 28, 36, 41, 44 and 71.

⁷⁶ See written answers 11 and 25.

⁷⁷ See written answers 1, 3, 11, 20, 25, 26, 36, 41, 44, 58, 60 and 71.

⁷⁸ See written answers 1bis, 20bis, 31, 42, 44 and 55.

operation of the European Prosecutor.⁷⁹ But a significant number of written responses to the Green Paper consider a minimum degree of approximation of the general national rules of criminal law to be essential to achieve this objective.⁸⁰

Many people consider that harmonisation of both the maximum and the minimum criminal penalties for offences prosecuted at European level and of the limitation rules is essential.⁸¹ Some stress that the Prosecutor's operation will be weakened as long as there has not been a certain approximation of the basic rules,⁸² such as those concerning individual criminal liability (conditions, aggravating and mitigating circumstances, limitation), mistake, attempt etc, in order to avoid useless annulments of proceedings.⁸³ But those who regard the full unification of the general part of the national criminal laws as a condition for establishing a European Prosecutor are few and far between.⁸⁴

3.2.2. *Law of criminal procedure*

Creating a common detection and prosecution area presupposes mutual trust between the Member States in their national criminal systems. This trust is based very much on the convergence of systems for the protection of fundamental rights.

In this respect, the public consultation made it clear to the Commission how seriously the question of the protection of defence rights and consequently the need for closer study of the question of mechanisms to safeguard them must be taken in the context of establishing a Prosecutor. The legal framework proposed by the Commission should in the majority view provide for adequate guarantees both in terms of the proper administration of justice and the fairness of the criminal procedure.

3.2.2.1. Questions concerning the administration of justice

- Information and referral to the European Prosecutor

Many respondents⁸⁵ agree with the Commission that there should be an obligation for both the Community authorities and the relevant national authorities⁸⁶ to refer to the European Prosecutor any fact that might constitute, or generate suspicion of, an offence within his jurisdiction. Several of them also stress the need to recognise, under certain conditions, a right of private individuals to inform the prosecutor directly.⁸⁷ But there is a division of opinions between those who support the possibility of direct referral to the European Prosecutor⁸⁸ and those who consider that there should first be a mandatory referral to the Deputy European Prosecutors.⁸⁹ On the second view, the Deputy Prosecutors could, after appraisal on a case by case basis, decide whether or not to refer the case to the European Prosecutor.⁹⁰ And, as the

⁷⁹ Cf. Green Paper § 5.3. to 5.5. See written answers 3, 17, 20bis, 38, 43, 45 and 66.

⁸⁰ See written answers 5, 6, 12, 14, 19, 20, 22, 27, 28, 36, 37, 41, 44, 59, 60, 62, 65 and 68.

⁸¹ See written answers 12, 21, 28, 33, 44, 59 and 65.

⁸² This opinion recurred among operational actors at the public hearing.

⁸³ See written answers 14, 20, 22, 27, 37, 41, 55, 62 and 68.

⁸⁴ See, for example, written answer 19.

⁸⁵ See written answers 1, 3, 12, 17, 20bis, 25, 27, 28, 29, 32, 33, 36, 37, 41, 44, 55, 58, 59, 60, 61, 62, 65, 66, 70 and 71. *A contrario*, see written answers 6 and 41.

⁸⁶ According to the Green Paper such would be the case in particular of customs, tax, police and judicial officers.

⁸⁷ See written answers 3, 25, 37, 41, 44, 60, 70 and 71.

⁸⁸ See written answers 27, 37 and 66.

⁸⁹ See written answers 12, 14, 17, 20, 61 and 62.

⁹⁰ See written answers 12 and 14.

Commission suggested, some recommend the possibility of the European Prosecutor taking up cases of his own motion.⁹¹

- Principle of mandatory prosecution

The Commission considered that equivalent proceedings in the European law-enforcement area require the implementation of the principle of mandatory prosecution but proposed certain exceptions to moderate it.⁹² Its opinion is shared by the majority, which considers that the European Prosecutor should be compelled to prosecute only in particularly important cases.⁹³ Most respondents support a financial threshold or “criteria of gravity” with respect to the Community interests⁹⁴ below which the European Prosecutor could waive his right to proceed in favour of the national authorities. This would have the advantage of not encumbering his office with minor cases, which could be dealt with more effectively at national level. Some stress in this respect the need to introduce precise categories of cases in which proceedings could definitively be closed or dropped.⁹⁵

As a corollary of implementing the principle of mandatory prosecution, any negative Decision emanating from the European Prosecutor (classification, fence, transaction with the person accused⁹⁶) should to be subject to judicial review.⁹⁷ Certain respondents insist that this review be exercised by **a European pre-trial chamber**,⁹⁸ as the only authority able to ensure uniformity in the implementation and interpretation of Community law.⁹⁹

- Allocation of powers and control of hybrid cases

Supporting the Commission proposal on this point, the majority¹⁰⁰ considers that because of the Community nature of the interests to be protected, the principles of mandatory prosecution and of priority of the European Prosecutor’s jurisdiction¹⁰¹ should apply wherever there are suspicions that a Community offence has been committed. With regard to hybrid cases, the priority rule should in addition make it possible to avoid conflicts of positive jurisdiction between the Prosecutor and the national prosecution services.¹⁰² The European Prosecutor

⁹¹ See written answers 6, 25 and 32.

⁹² Cf. Green Paper § 6.2.2.

⁹³ See written answers 1bis, 3, 4, 5, 6, 11, 12, 17, 20bis, 25, 27, 30, 33, 35, 37, 38, 40, 41, 44, 58, 61, 65, 70 and 71. Some consider nevertheless that the discretionary prosecution principle should be chosen because it would be the only way of guaranteeing the independence of the future European Prosecutor. See written answers 14, 21, 28, 29, 31, 32, 39 and 66.

⁹⁴ See written answers 6, 23, 25, 27, 33, 35, 40, 41, 61 and 71.

⁹⁵ See written answers 14, 20bis, 37, 62 and 65.

⁹⁶ Certain answers explicitly exclude the European Prosecutor’s power to terminate a case by settlement. They concern Member States where the system is neither practised nor even allowed. See written answers 30 and 44.

⁹⁷ See written answers 5, 6, 12, 33, 44, 55 and 71.

⁹⁸ See, in particular, written answers 5, 6, 25, 55 and 71.

⁹⁹ Cf. *infra* § 3.2.2.2.

¹⁰⁰ See written answers 17, 27, 29, 32, 37, 41, 44, 59, 61, 68, 69 and 70.

¹⁰¹ This priority or primacy of the European Prosecutor’s action over national proceedings would open the way, if necessary, to a division of Community cases between the national and European levels, in particular on the basis of the modest character of a fraud or its purely national impact.

¹⁰² Cases where there are both a Community offence and a national offence. At the public hearing, the majority favoured detailed criteria for the allocation of such cases.

could thus decide in full independence to carry out the investigation himself if the offence mainly affected Community interests¹⁰³ or to entrust it to the relevant national authorities.¹⁰⁴

If there was a conflict of jurisdiction all the same, some respondents propose either that the competent authority for each individual case¹⁰⁵ be designated via a consultation procedure between the European Prosecutor and the national authorities or that a European pre-trial chamber decide where to allocate it.¹⁰⁶

3.2.2.2. Guarantees of fairness in criminal procedure and protection of fundamental rights

Many regard the question of strengthening defence rights and procedural guarantees as the essential corollary of establishing a European Prosecutor. The majority consider that specific rules to safeguard fundamental rights and fairness in criminal procedure should be laid down for the investigation and the judgment on the admissibility of evidence.¹⁰⁷

- Measures of investigation by the European Prosecutor

The Commission proposal is that the European Prosecutor should be able to use the full range of investigation measures that generally exist in all Member States to prosecute similar financial offences. There should basically be mutual recognition of the authorisation by a national judge of freedoms of such measures.¹⁰⁸ Several respondents point out that such a legal framework has weaknesses in terms of protection of privacy and of defence rights because of the diversity of the current procedural rules in the Member States.¹⁰⁹ Some also consider that the principle of certainty as to the law would be weakened if the European Prosecutor were able to choose the judge of freedoms to be approached for authorisation of measures of investigation.¹¹⁰ According to this argument, this situation could also generate risks of forum-shopping right from the investigation phase.

The Commission acknowledges that this point needs more detailed study. An alternative proposed by some¹¹¹ would consist of producing a joint list of investigation measures that can be ordered direct by the European Prosecutor and of measures for which he would have to

¹⁰³ Some answers claim, however, that in the presence of clear criteria for allocating cases, the Prosecutor's jurisdiction should be exclusive in relation to that of the national authorities. See written answers 1bis, 4, 10, 12, 20bis, 27 and 60.

¹⁰⁴ See written answers 28, 29, 32 and 70. Some people criticise this solution as allowing the European Prosecutor's jurisdiction to extend to the prosecution of national offences where there is a link with a Community offence. See written answer 62.

¹⁰⁵ In addition, it is proposed to establish criteria for distinguishing the "Community" part of an offence (which could be defined as an offence against the Community's financial interests) and the purely national part, which should remain the exclusive responsibility of the national authorities. See written answers 20bis, 30, 33 and 61.

¹⁰⁶ See written answers 17, 25, 38, 44 and 70.

¹⁰⁷ The Green Paper states the need "to think in greater depth than hitherto about the ... relevant level – national or Community – at which such measures should be managed and controlled."

¹⁰⁸ With regard to national investigation measures to which the European Prosecutor would have recourse, this principle means that in the event of implementation in a Member State of an investigation measure authorised by a court in another Member State, the European Prosecutor would not have to seek a fresh authorisation.

¹⁰⁹ See written answers 6, 17, 28, 40, 60, 70 and 71.

¹¹⁰ See written answers 1, 5, 6, 25, 28, 40 and 60.

¹¹¹ Certain answers also recommend detailed mandatory rules of jurisdiction to avoid forum-shopping at the preparatory stage. See in particular written answer 6.

seek authorisation from the judge of freedoms.¹¹² As long as redress procedures are available if fundamental rights are not respected, it should be possible for European Prosecutor to order non-coercive measures.¹¹³ Coercive investigation measures should be ordered only by a judge of freedoms, and the European Prosecutor should preferably be required to approach the courts in the state where they are to be executed.¹¹⁴ Lastly, some suggest that a European pre-trial chamber should authorise and supervise the implementation of all coercive investigation measures requested by the European Prosecutor.¹¹⁵

- The choice of the state of judgment (choice of forum)

In cases that are often complex and involve several Member States, the Commission proposes, as one of the options, that the European Prosecutor enjoy some room for manoeuvre in choosing the state where the case that he has investigated will be tried as to the merits.¹¹⁶ But as the Commission stresses, such a choice is not neutral, insofar as it determines not only the practical conditions for the trial and the relevant court but also the applicable national law.

The Commission has heard the wide-ranging objections to this solution, based on the view that it gives the European Prosecutor a discretionary power which, in the absence of suitable control, would generate a real risk of forum-shopping. Many respondents proposed that stricter Community choice-of-court rules be laid down¹¹⁷ to make it possible to fulfil the foreseeability and legality requirements while taking into account the specific character of cross-border fraud. For a number of respondents, criteria based on relevant international rules and ranked hierarchically should determine in a sufficiently foreseeable way the state in which the case will be tried.¹¹⁸ For others, these criteria should be alternative and not ranked hierarchically as proposed by the Commission, to leave the European Prosecutor the possibility of referring the case for trial on the merits to the most appropriate national court.¹¹⁹

With regard to the review of this choice, the vast majority consider that judicial review is a substantial guarantee for individual rights. But opinions are divided between those who consider that it must be practised by the national court of freedoms or the trial judge¹²⁰ and those who argue that it should be entrusted to a European pre-trial chamber.¹²¹ Such a chamber would also be responsible for solving negative conflicts of jurisdiction between States, rather like the role that the Commission proposes entrusting to the Court of Justice.¹²²

¹¹² See written answers 1bis, 3, 5, 17, 28, 32, 40, 58, 60 and 62. Others agree with the Commission's idea of creating a European record of questioning or hearing to serve as a model for the European Prosecutor. See written answers 1 and 41.

¹¹³ This action could logically be brought in the national court of freedoms with jurisdiction over similar investigation measures provided for by national legislation. See written answers 1, 6, 32 and 62. See, on the contrary, written answer 29.

¹¹⁴ Which would also facilitate the review of the legality of their implementation. See written answers 6, 30, 31, 32, 33, 40 and 58.

¹¹⁵ See written answers 1, 5, 25, 37 and 71.

¹¹⁶ Cf. Green Paper § 6.3.1. This option would also make it possible to avoid, in the interest of all the parties, positive conflicts of jurisdiction between Member States.

¹¹⁷ See written answers 6, 12, 20, 20bis, 25, 26, 27, 31, 33, 40, 44, 60, 61, 62, 68 and 70.

¹¹⁸ See written answers 12, 20, 44, 58, 61, 62, 66 and 68.

¹¹⁹ See written answers 20bis and 44.

¹²⁰ See written answers 12, 17, 27, 58, 65, 68 and 70.

¹²¹ See written answers 1, 5, 25, 27, 32, 37, 42, 44, 53, 55 and 61.

¹²² See written answers 5, 17, 27, 53 and 69.

- Mutual admissibility of evidence

To remedy the current fragmentation of the European law-enforcement area and facilitate judicial follow-up to Community anti-fraud investigations, the Commission proposes a principle of mutual admissibility of evidence.¹²³ Any national court hearing a criminal case on the merits where interests protected by the Prosecutor are at stake would be obliged to admit evidence legally obtained in accordance with the national law of another Member State. But many respondents consider that such a system raises serious problems both for defence rights and for certainty as to the law.¹²⁴

According to some respondents, the reference to the national law of the Member States would not be an appropriate solution in view of the differences between national criminal systems and alleged inequalities in the protection of fundamental rights.¹²⁵ As some see it, applying a mutual admissibility rule without imposing more detailed common minimum rules than currently exist could have the effect of reducing defence rights at Union level, or even of “levelling down” the procedural guarantees attached to the European Prosecutor’s investigations.¹²⁶

Many of the respondents are of the opinion that the mutual admissibility principle proposed by the Commission should therefore be adopted only if appropriate mechanisms are established to secure legal guarantees and the effective protection of fundamental rights. The Commission is willing to explore possibilities here. In some people’s view, these mechanisms could provide, for example, for the establishment of a joint list of investigation measures recognised by all the Member States or common criteria for determining the validity or legality of such measures.¹²⁷ Some people more generally recommend harmonisation either of the rules of criminal procedure on the collection and transfer of evidence¹²⁸ or of the rules concerning their appraisal.¹²⁹ For others, the adoption of common rules establishing guarantees for the safeguard of fundamental rights throughout the Union would be a necessary preliminary for the acceptance of the mutual admissibility principle.¹³⁰

- Review of the European Prosecutor’s measures and the protection of fundamental rights

The procedural guarantees relating to the European Prosecutor’s investigation and prosecution activities are probably one of the points most frequently raised by respondents to the Green Paper. The establishment of common mechanisms or minimum rules for the protection of fundamental rights appears to many to be an essential counterpart to conferring enforcement powers on a Community body.¹³¹

Several respondents point out that the reference to the Council of Europe’s European Convention on Human Rights and the Charter of Fundamental Rights of the Union would not

¹²³ Cf. Green Paper § 6.3.4.1.

¹²⁴ See written answers 1bis, 5, 6, 17, 20bis, 24, 25, 26, 36, 39, 40, 58, 62 and 65.

¹²⁵ Major problems would arise if an investigation measure was not regulated in the same way in all the Member States. See written answers, 6, 17 and 70.

¹²⁶ See written answers 1bis, 6, 24, 25, 26, 33, 36, 40, 59, 62 and 65.

¹²⁷ See written answers 1, 14, 20bis, 25, 27, 28, 31, 36, 37, 40, 41, 50, 55, 60 and 62.

¹²⁸ See written answers 5, 25, 31, 32, 60 and 70.

¹²⁹ See written answers 1, 4, 6, 14, 20bis, 37, 41 and 70.

¹³⁰ See written answers 1bis, 6, 17, 24, 25, 27, 33 and 58.

¹³¹ See written answers 2, 5, 6, 11, 12, 20bis, 21, 25, 32, 33, 37, 66 and 70.

suffice to establish a procedural guarantee scheme in a common investigation and prosecution area.¹³² Many consider that if investigation measures are to be carried out throughout the Community and the principle of mutual admissibility of evidence is to be accepted, there must be equivalent protection of defence rights throughout the Union. They accordingly recommend that they be codified or harmonised or, at least, that a catalogue of procedural rights that must be protected everywhere in the Union be produced at the Community level.¹³³

Judicial review being an essential guarantee, the majority consider that all investigation measures, negative Decisions (termination, closure) or decisions by the European Prosecutor's to send cases for trial should, in theory, be reviewed by the national court on the basis of the *lex fori*.¹³⁴ Some stress, however, that only a European pre-trial chamber would be able to solve the problems of reviewing the European Prosecutor's measures.¹³⁵ For the moment the Commission is not ruling out any solutions that could be employed to safeguard the equivalent guarantee of fundamental rights at Union level. In this context it stresses the significance of its recent Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union.¹³⁶

4. FOLLOW-UP

If the general evaluation of the outcome of the public hearing points to the need for a Treaty amendment to allow the establishment of a European Prosecutor, more detailed evaluation points to the need for further consideration of certain topics of vital importance for secondary legislation.

4.1. Political follow-up to Green Paper

The subject of the European Prosecutor is now on the Union's political agenda. When the Heads of State or Government met in Laeken they urged the Council "swiftly to examine the Commission Green Paper on a European Prosecutor, taking account of the diversity of legal systems and traditions."

While initially the Green Paper appeared to be given only a cautious welcome by the Council, the question of the establishment of a European Prosecutor was debated at length in the European Parliament¹³⁷ and by the Working Group on Freedom, Security and Justice set up within the European Convention.¹³⁸ The more general reflections on strengthening the Union with regard to justice and home affairs has finally made it possible to find a majority in favour of stepping up the work of establishing a European Public Prosecutor.¹³⁹ There now seems to be a majority in favour of establishing a European Public Prosecutor in the new constitutional

¹³² To be effective, such a reference should at least guarantee that the European Prosecutor is bound by the Strasbourg Court's interpretation of the European Human Rights Convention. See written answers 2, 6, 25 and 58.

¹³³ See written answers 2, 5, 6, 21, 42, 58 and 66. Certain respondents draw up a list of fundamental defence rights, such as the rights to be represented by a lawyer, to be informed of the facts complained of, to a free defence etc.

¹³⁴ See written answers 3, 11, 12, 17, 20bis, 23, 28, 33, 40, 60, 61, 65, 66 and 70.

¹³⁵ See written answers 5, 6, 8, 25, 27, 32, 37, 42, 44 and 61.

¹³⁶ COM(2003)75.

¹³⁷ The public hearing with national parliaments held by the European Parliament on 5 November 2002 evidenced the European Parliament's interest in the subject.

¹³⁸ Final report by the Working Party X, European Convention, CONV 426/02, 2.12.2002.

¹³⁹ In his conclusions regarding the plenary session of 6.12.2002 the President of the Convention emphasised the need to step up work in this field.

Treaty or at least of eventually turning Eurojust into a European Public Prosecutor's Office. The Member States do not have fixed opinions and some are now far more open to the idea than was originally the case.¹⁴⁰ However, a minority are still firmly opposed. Lastly, as the prospective Member States will participate as active observers in the Council's Working Groups after the signing of the accession treaty, which is planned for 16 April 2003, their individual opinions will help to move the debate on.

Even if at present it is impossible to see how the discussions will turn out, it seems clear that the Green Paper has achieved its aim of launching a general debate that has also involved the relevant Union institutions. The proposal to establish a European Public Prosecutor has led to consultations at ministerial and parliamentary level in the Member States. On the eve of an enlargement that will give the Union ten new Member States, the idea was assessed with a view to strengthening European policy in the field of justice and home affairs, focusing on the objective of protecting the Community's financial interests while taking a broader view and looking to create a Community body that would complete the operational powers that could be devolved to Europol at a later date.

The debate has developed a real momentum and there seems to be a growing awareness of the need for a European Prosecutor and the added value such an institution would provide in the fight against crime against Communities' financial interests. Some voices in favour of the project even defend the idea of making the control of the measures taken by a European Prosecutor a matter for the Community, which would help to establish a real common area of freedom, security and justice.

4.2. Institutional reform

The amendment of the Treaties establishing the European Communities remains an indispensable condition: it alone can confer political legitimacy on the proposal. The European Convention provides the appropriate political and institutional framework for discussions. It is working on a root and branch reform of the existing Treaties. If the Convention were to confine itself to give the Council the power to create a European Prosecutor at an unspecified later stage by unanimity, this would be to make an empty promise, as the principle would need to be ratified for a second time at Union level. Instead, it is necessary to develop solutions that are comprehensible to the general public and effective methods of pursuing the Union's objectives, in this case the protection of financial interests while upholding people's fundamental rights.

Regarding the contents of the revision, in the light of the public consultation, the Commission stands by the substance of its Nice proposal.¹⁴¹ It mainly adds two new elements.¹⁴²

On the one hand, the constitutional Treaty, which should directly establish the function of European Prosecutor, should also ensure that its derived legislation specifies the **relationship with Eurojust**. Several scenarios have been outlined above (cooperation between separate and complementary bodies; institutional links; partial integration; total integration).

¹⁴⁰ Germany and France, for example, have suggested creating a European Public Prosecutor that some time in the future would acquire powers to conduct investigations and prosecute cases at Union level. Joint Franco-German proposals for the European Convention in the field of justice and home affairs presented on 27.11.2002, Document 32 of the abovementioned Working Group.

¹⁴¹ Draft article 280a EC.

¹⁴² Ms Schreyer's contribution to the Convention, 25.11.2002.

It should also define the **Prosecutor's material jurisdiction**, in a manner that is precise from the outset but open enough to allow further development. Under the constitutional Treaty, the European Prosecutor would initially be responsible for detecting, prosecuting and remitting for trial to the national courts in the Member States, the authors of offences against the financial interests of the Community. The Council, acting unanimously or by enhanced qualified majority on a proposal from the Commission with the assent of Parliament, could thereafter decide whether to extend the European Prosecutor's jurisdiction to offences against other Union interests.

In response to certain more specific objections, the Commission considers that its proposed **procedure for appointing** the European Prosecutor preserves a balance between the Community institutions and that the fact that his appointment is non-renewable shields him from the risks of negative external influence.¹⁴³ The procedure should accordingly be in the Treaty. Regarding the Commission proposal, it could take the form of a list drawn up on the basis of an open selection, as suggested at the time of the public hearing.

4.3. Detailed examination of questions concerning the implementation of the Prosecutor

The establishment of a legal basis in the Treaty is essential to any preparatory legislative work. Without amendment of the Treaty, the Commission has no power to make specific proposals for secondary legislation going beyond the preferences that it expressed in the Green Paper. But the outcome of the public hearing enables the Commission to identify a series of topics below where it acknowledges that they require further study on account of their sensitivity in the debate. This closer study could take the form of complementary studies or consultation both of the experts and of national political authorities.

Strand 1: Relationship between the European Prosecutor and existing European authorities

Firstly, the question of the role of the **Court of Justice** in settling both vertical and horizontal conflicts of jurisdiction needs specific analysis. Objective criteria must govern the choice of the Member State of trial; their definition should underlie the Commission's next work on preventing conflicts of jurisdiction between Member States.¹⁴⁴

Institutionally speaking, it is particularly important to study the various ways in which the European Prosecutor and **Eurojust** could be combined. Lastly, a fresh look will have to be taken at the future of **OLAF** if the European Prosecutor is established.¹⁴⁵

Strand 2: Defence rights and the administration of evidence in the context of establishing a European Prosecutor

In procedural terms, two essential topics emerge from the hearing. Firstly, equivalent protection of **defence rights** is recognised as one of the main concerns expressed with regard to the establishment of a European Prosecutor. It will therefore be important to incorporate the results of the consultation launched by the Commission this year by means of a Green Paper on the procedural guarantees for persons challenged in criminal proceedings to find out

¹⁴³ The Council, acting by a qualified majority on a proposal from the Commission after receiving the assent of Parliament, would appoint the European Prosecutor for a non-renewable six-year term.

¹⁴⁴ Commission Green Paper currently under preparation.

¹⁴⁵ Commission Report on the Activities of the European Anti-Fraud Office, in the process of adoption.

whether it will be advisable to go beyond the standards already shared by the Member States when establishing a European Prosecutor.¹⁴⁶

Secondly, the value in a Member State of evidence gathered by the European Prosecutor in another Member State supposes an approximation of national legislation, confined to the minimum needed to implement the mutual admissibility principle. The degree of harmonisation of the **law of evidence** felt to be desirable should be studied in more detail in this context, in conjunction with the Commission's work programme for judicial cooperation in criminal matters.

Strand 3: The European Prosecutor's connection with the national criminal systems

Lastly, the Commission plans to show, by means of national variations, the procedures in accordance with which a European Prosecutor with guarantees of independence could integrate into the criminal systems of the Member States without affecting their internal organisation. (E.g. neutrality in relation to the prerogatives of the "examining magistrate" or to the plurality of "law enforcement agencies"). These variations could clarify how, in the specific national context, hybrid cases could be handled (withdrawal of the European Prosecutor or the national law enforcement authorities in favour of the other; joint action by the two, etc.).

By way of conclusion, only the establishment of the function of the European Prosecutor in the constitutional Treaty, accompanied by a legal basis for the development of secondary legislation to ensure his connection with national legal systems, is likely to answer the current difficulties. It is a signal that public opinion expects from the next Treaty if European integration is to be given credibility for the general public and the taxpayer.

¹⁴⁶ Green Paper on the procedural guarantees for suspects and advocates in criminal proceedings in the European Union, 19.2.2003. *Op. cit.*

LIST OF WRITTEN CONTRIBUTIONS ANALYSED¹⁴⁷		
	RESPONSE WRITTEN BY	STATUS
1	OLAF Supervisory Committee	European institution
1bis	Association portugaise de juristes pour la protection des intérêts financiers communautaires (P)	PFI expert/association
2	Fair Trials Aboard (UK)	Expert/NGO
3	György Gátos (H)	Institution/individual
4	Czech Association for the Protection of the financial interest of the EC (PFI) (CZ).	PFI expert/association
5	P. Fauchon, Senator (F)	Member of Parliament
6	Max Planck Institut (D)	Expert/university
7	Prof. Kaiafa-Gbandi (EL)	Expert/university
8	R. Van Camp, Procureur général (B)	Judicial practitioner/ authority
10	Centro di Diritto Penale Europeo (I)	PFI expert/association
11	Association européenne des Magistrats /European Association of Judges	Judicial practitioners/ authorities
12	T. Wolf , judge at the regional court of Marburg (D)	Expert/judicial authority
14	Dutch Association for the PFI (NL)	PFI expert/association
15	Department of Justice (IRL)	Institution/ government body
16	Permanente commissie van deskundigen in internationaal vreemdelingen-, vluchtelingen- en strafrecht (NL)	Institution/ government body
17	Bundesministerium der Justiz und den Justizministerien der Länder der Bundesrepublik Deutschland (D)	Institution/ government body
18	Ms F. Page (UK)	Expert/lawyer
19	Deutscher Anwaltverein (D)	Experts/lawyers
20	P. Amaral (P)	Expert/individual
20bis	Ministerie van Justitie (NL)	Institution/ government body
21	Magistrats européens pour la démocratie et les libertés	Judicial practitioners/ authorities/
22	Prof. L. Picotti (I)	Expert/university
23	Magistratura democratica (I)	Judicial practitioners/ authorities
24	Deutscher Strafrechtslehrer (D)	Experts/universities
25	L. Fayolle, A. Reiter Korkmaz et al., Institut universitaire européen (I)	Experts/universities
26	D.M. Amann, Institut universitaire européen (I)	Expert/university
27	Deutscher Richterbund (D)	Judicial practitioners/ authorities
28	J. de Maillard, Juge au Tribunal de Grande Instance de Blois (F)	Judicial practitioner/ authority
29	B. Bertossa, Procureur général de Genève (CH)	Judicial practitioner/ authority
30	Regeringskansliet Justitiedepartementet (S)	Institution/ government body
31	C. Abt, L. De Muyter et al, Collège d'Europe de Bruges (B)	Experts/universities
32	A. Ardelean, B. Carl et al., Collège d'Europe de Bruges (B)	Experts/universities
33	M. Guglielmetti, L. Mascia et al., Collège d'Europe de Bruges (B)	Experts /universities
34	Transparency International	Expert/NGO
35	Lithuania Association for the PFI (LT)	PFI expert/association

¹⁴⁷ In chronological order of receipt of contribution.

36	C. Ducouloux-Favard (F)	Expert/university
37	Prof. J.A.E. Vervaele (NL)	Expert/university
38	Beschluss des Bundesrates (D)	Institution/parliament
39	C. Fijnaut, M.S. Groenhuijsen (NL)	Expert/university
40	Centro di Diritto Penale Europeo - 2 (I)	PFI expert/association
41	Austrian Association for European Criminal Law (A)	PFI expert/association
42	B. Favreau - Institut des Droits de l'Homme et des Avocats européens	Expert / association
43	Oikeusministeriö (FIN)	Institution/ government body
44	Fiscalía General del Estado (E)	Judicial practitioner/ authority
45	United Kingdom and Scotland (UK)	Institution/ government body
46	Avv. G. A. Conte (I)	Expert/lawyer
47	Avv. Della Valle (I)	Expert/lawyer
48	Dott. Galoppi (I)	Expert/lawyer
49	Dott. B. Giordano (I)	Expert/lawyer
50	Prof. G. Frigo (I)	Expert/lawyer
51	Prof. Lanzi (I)	Expert/lawyer
52	Dott. De Vincenzi (I)	Expert/lawyer
53	A. P. Casati, B. Coluccia et al. (I)	Expert/lawyer
54	D. Alessio, L. Cirillo et al. (I)	Expert/lawyer
55	Institut des Droits de l'Homme et des Avocats européens /Union des Avocats européens	PFI expert/association
56	E. Mezzetti (I)	Expert/university
57	Union des avocats européens /Commissione di diritto penale comunitario	Experts / association
58	Croatian Association for the PFI (HR)	PFI expert/association
59	K. Schöfflerle (D)	Expert/individual
60	Camera Penale di Como e Lecco (I)	Judicial practitioner/ authority
61	Latvian Ministry of Finance (LV)	Institution/ government body
62	Romanian Association of Community Law Research (RO)	PFI expert/association
63	Seminar of Rome (I)	PFI expert/association
64	F.S. Spruijt (NL)	Expert/university
65	Bundesministeriums für Justiz der Republik Österreich (A)	Institution/ government body
66	Criminal Bar Association (UK)	Expert/lawyers
67	Procuratore della Repubblica di Palermo (I)	Judicial practitioner/ authority
68	Procuratore della Repubblica di Roma (I)	Judicial practitioner/ authority
69	J-F. Kriegk, Président du Tribunal de Grande Instance de Nîmes (F)	Judicial practitioner/ authority
70	Taxpayers Association of Europe	Expert/NGO
71	R. André et J.Floch, députés, assemblée nationale française, (F)	Institution/parliament
72	Armando D'Alterio, Sostituto Procuratore della Repubblica Tribunale Napoli (I)	Judicial practitioner/ authority

Annex 2

LIST OF SPEAKERS AT THE PUBLIC HEARING¹⁴⁸		
	NAME OF SPEAKER - COUNTRY	REPRESENTING:
1	Ms Toftergaard Nielsen, Ministry of Justice - DK	Presidency of the European Council
2	M. José Narciso Cunha Rodriguez, judge	Court of Justice of the European Communities
3	M. Juan Manuel Fabra-Valles, President	European Court of Auditors
4	M. Raymond Kendall, Chair	OLAF Supervisory Committee
5	M. Edmondo Bruti-Liberati, Committee Member	OLAF Supervisory Committee
6	Mme Mireille Delmas-Marty, Committee Member	OLAF Supervisory Committee
7	M. Daniel Flore, Conseiller général - B	Ministère de la Justice
8	M. Alfons Van den Abbeele, Auditeur général - B	Ministère des Finances
9	Ms Birgitte Juul, Chief Adviser -DK	Justisministeriet
10	Mr Andreas Birkmann, Justizminister - D	Thüringer Justizministerium
11	Mr Alfred Dittrich, Referatsleiter - D	Bundesministerium der Justiz
12	Mr Nikólaos Lívos, Léktoras Pinikón Dikéon - EL	Ipourgio Dikeossinis
13	Mr Fernando Irurzun Montoro, Consejero de Justicia - E	Consejo General Poder Judicial
14	Mme Isabelle Toulemonde, Secrétaire générale adjointe - F	Comité interministériel pour les questions de coopération économique européenne
15	Mr Anthony McDermottroe, Head of division - IRL	Department of Justice Equality and Law Reform
16	Mr Richard Ryan, Head of division - IRL	Department of Justice Equality and Law Reform
17	Ms Augusta Iannini, Direttore generale - I	Ministero della Giustizia
18	Mr Amedeo Speranza, Avvocato generale - I	Ministero dell'Economia e delle Finanze
19	Mr Roland Genson, Conseiller - L	Ministère de la Justice – Représentation permanente auprès de l'UE
20	Ms Marjorie Bonn, Raadsadviseur - NL	Ministerie van Justitie
21	Mr Paul Van Voorst, senior beleidsadviseur - NL	Ministerie van Justitie
22	Mr Christian Pilnacek, Oberstaatsanwalt - A	Bundesministerium für Justiz
23	Mr Fritz Zeder, stellvertretender Abteilungsleiter - A	Bundesministerium für Justiz
24	Ms Teresa Alves Martins, Directora adjunta - P	Gabinete para as Relações Internacionais, Europeias e de Cooperação – Ministério da Justiça
25	Mr José Antonio Viegas Ribeiro, Subinspector general - P	Inspect. General - Ministério das Finanças
26	Ms Seija Kivinen, neuvotteleva virkamies - FIN	Valtionvarainministeriö
27	Mr Asko Valimaa, Lainsäädäntöneuvos - FIN	Oikeusministeriö / Lainvalmistelunosasto
28	Mr Mikael Tollerz, Director - S	Ministry of Justice
29	Ms Lorna Harris, Head of United Kingdom Central Authority - UK	Home Office, Judicial Cooperation Unit
30	Mr Enrique Bacigalupo	Tribunal Supremo – “Corpus Juris”
31	Mr John Spencer	University of Cambridge – “Corpus Juris”
32	Ms Catherine Guy-Quint, Member	Committee on Budgets – EP
33	Mme Diemut Theato, Chair	Committee on Budgetary Control – EP
34	M Dimitrakopoulos, Vice-President of the EP	Committee on Constitutional Affairs - EP
35	Mr Jürgen Storbeck, Director	Europol
36	Mme Ute Stiegel, Magistrate	DG OLAF - EC
37	M. Johan Denolf, Directeur - B	Police Fédérale – Direction de lutte contre la criminalité économique financière
38	Mr Ralf Moßmann, Regierungsdirektor - D	Bundesministerium des Inneren
39	Mr Javier Albadalejo Campos, Vocal Asesor de la Secreteria General Tecnica - E	Ministerio del Interior – Secreteria General Tecnica
40	M. Didier Duval, Chef de Division - F	Ministère de l'Intérieur – Direction centrale de la Police judiciaire

¹⁴⁸ In the order of speaking at the public hearing held in Brussels on 17 September 2002.

41	Mr James Hamilton - IRL	Office of Director Public Prosecutions
42	Mr Edoardo Esposito, Comandante Centro Investigazioni Economiche Finanziarie - I	Guardia di Finanza
43	Mr Wim Verheggen, Lead management team FIOD - NL	Fiscal Information and Investigative Authorities – Fiscal Inlichtingen en Opsporings Dienst (FIOD)
44	Mr Carlos Farinha, Subdirector nacional adjunto - P	Polícia judiciária
45	Ms Minna Ketola, Rikostarkastaja - FIN	Keskusrikospoliisi
46	Ms Sheila Edwards - UK	Department for Environment, Food and Rural Affairs
47	Mr Michael Kennedy, President	Eurojust
48	Mr Detlev Mehli, Contact point - D	European Judicial Network (EJN)
49	Mr Eugenio Selvaggi, Contact point - I	European Judicial Network (EJN),
50	M. Serge Brammertz, Procureur fédéral - B	Parquet fédéral
51	M. Guy Rapaillé, Avocat général - B	Parquet de la Cour d’Appel de Liège
52	Mr Jesper Hjørttenberg, Deputy Public Prosecutor - DK	Director of Public Prosecutions
53	Ms Sonja Ponikowski, Deputy Public Prosecutor - DK	Public Prosecutor for Serious Economic Crime
54	Mr Thomas Janovsky, Leiter der Wirtschaftsabteilung - D	Staatsanwaltschaft Hof
55	Ms Ursula Reichling, Generalstaatsanwältin - D	Generalstaatsanwaltschaft
56	Mr Sotirios Bagias, Proïstamenos - EL	Issangelia Protodikon Athinon
57	Mr Ilias Zagoreos, Audiissangeleas - EL	Protodikio Athinon
58	Mr Jaime Moreno Berdejo, Fiscal - E	Secretaría Técnica de la Fiscalía General del Estado
59	Mme Dominique Planquelle, Chef de Division économique et financière - F	Parquet du Tribunal de Grande instance de Paris
60	Mme Augustine Pascal, Adjointe au Chef du Bureau - F	Bureau “lutte contre la fraude” – Ministère des finances
61	Mr Finbarr O’Malley, Head of Unit - IRL	Office of the Attorney General
62	Mr Pietro Grasso, Pubblico ministero - I	Procura della Repubblica di Palermo
63	Mr Italo Ormanni, Pubblico ministero - I	Procura della Repubblica di Roma
64	M. Jeannot Nies, Avocat général - L	Parquet général
65	Mr Anne Zwaneveld, Officier van Justitie - NL	Openbaar Ministerie / arrondissementsparket Rotterdam
66	Ms Teresa Almeida, Procuradora da Republica- P	Procuradoria General da Republica
67	Mr João Paulo Rodrigues, Procurador da Republica - P	Procuradoria General da Republica
68	Mr Matti Nissinen, Valtionsyyttäjä - FIN	Valtakunnansyyttäjän virasto
69	Ms Lena Moore, Överåklagare, Chef of Internationella Avdelingen - S	Rikesåklagaren Internationella Avdelingen
70	Mr Aberg Kazimir, Director - S	Swedish National Economic Crimes Bureau
71	Ms Helen Garlick, Senior Legal Adviser - UK	Serious Fraud Office
72	Mr Tony Walker – UK	Customs and Excise
73	Mr Günter Woratsch, Judge	European Association of Judges
74	Mr Vito Monetti, Judge	MEDEL (Magistrats européens pour la démocratie et les libertés)
75	Ms Elisabeth Doleisch von Dolsperg, Vorsitzende Richterin am Oberlandesgericht - D	Oberlandesgericht Köln
76	Mr Andreas Potamianos, Próedros - EL	Próedros Protodikón Athinón
77	Mr Fernando Roman Garcia, Director del Gabinete Técnico - E	Consejo General Poder Judicial
78	M. Luc-Michel Nivose, Conseiller - F	Cour d’Appel de Paris
79	Mr Patrick McCarthy, Barrister - IRL	Law Library
80	Mr Luciano De Riu, Consigliere - I	Corte di Cassazione
81	Mr Henk de Graaf, Rechter - NL	Rechtbank Haarlem
82	Mr Franz Furtner, Richter - A	Landesgericht Korneuburg
83	Ms Alistair Brown - UK	Crown Office Scotland
84	Mr John Fish, President	CCBE (Council of the Bars and Law Societies of the EU)
85	Mr Peter Baauw	Criminal Law Committee - CCBE
86	M. Giovanni Bana, Président	Commission droit pénal communautaire – Union avocats européens (UAE)
87	Mme Francesca Ruggieri, Membre	UAE
88	M. Bertrand Favreau, Président	Institut des droits de l’homme - UAE
89	Mr Michael Jäger, Secretary General	Taxpayers Association of Europe
90	Mr Michael Boeckhaus, Member	Deutschland « NordRhein-Westfalen »

91	Mme Benoîte Taffin, Président	Contribuables Associés
92	Mr Stephen Jakobi, Director	Fair Trials Abroad
93	Mr Rüdiger Bandilla, Legal Adviser of the Board	Transparency International
94	Mr Dionysios Spinellis - EL	University of Athens
95	Mr Paul Carney, Judge - IRL	The High Court Ireland
96	Mr Massimo Capirossi - I	Centro di Diritto Penale -Tributario-Torino
97	Mrs Rosaria Sicurella - I	Centro di Diritto Penale Europeo - Catania
98	Mr Friedrich Hauptmann - A	General Prokuratur beim Obersten Gerichtshof
99	Mr Raimo Lahti - FIN	University of Helsinki
100	Mr Jaroslav Fenyk - CZ	Supreme Public Prosecutor's Office
101	Mr Jaan Ginter - EE	University of Tartu
102	Mr Akos Farkas - HU	University of Miskolc
103	Ms Angela Nicolae - RO	General Prosecutor's Office
104	Ms Anna Ondrejova - SK	General Prosecutor's Office
105	M. Durmus Tezcan - TR	Université Dokuz Eylul d'Izmir