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## The European Public Prosecutor: Waiting for Godot?<sup>1</sup>

**Abstract.** This article offers an excursion into the world of fraud-fight in the European context. The first part introduces a hypothetical case on the *modus operandi* of perpetrators of trans-national fraud cases. On the basis of this case, shortcomings of the current legal mechanisms protecting the financial interests of the European Community will be analyzed. Then the article deals with the establishment of the office of the European Public Prosecutor (EPP) as a proposed legislative response to the challenges posed by EC fraud.

**Keywords:** European Community; European Anti-Fraud Office (OLAF); European Public Prosecutor; EC fraud; European anti-fraud policy; European Judicial Area; Corpus Juris; criminal law protection of the Community's financial interests

### Introduction

EC fraud does not only lead to heated debates in expert circles but also excites media attention. It is, and it must be, of great public concern. Less welcomed is the interest of organized criminal networks in benefiting from the shortcomings of the current legal mechanisms intended to protect the Community institutions and the Community citizens from fraud. These perpetrators do not wait to exploit the possibilities in the internal market until the burdensome European decision-making machinery finds the solution to the challenges posed by trans-national EC fraud cases. While the frontier-free Europe became a reality, the problems due to the fragmentation of the criminal law enforcement area in the EU remained. Seven magistrates launched therefore the

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Geneva Appeal in 1996 drawing attention to the legal deficiencies burdening the fight against international financial crime.<sup>2</sup> One year later was the Commission initiated Corpus Juris study published opening up a public debate on the role and forms of criminal law protection in the European Judicial Space.<sup>3</sup> In light of the Corpus Juris study further assessments of national legislation on the protection of the financial interests of the European Community both in the Member States<sup>4</sup> and in the candidate countries<sup>5</sup> appeared. While most of these proposed rules belong yet to the category of *lex desiderata*, the message is clear: reshaping the fragmented criminal law-enforcement area of the EC.

In this process gained the idea of the establishment of the office for a European Prosecutor its significance. The enforcement of the measures proposed by the Corpus Juris study would be the duty of a common European Prosecutor acting on the single European judicial territory.<sup>6</sup> In practical terms this would enable the European Public Prosecutor to carry out investigations within the European Community and prosecute perpetrators before national courts of law. The media response was not fully welcoming to the EPP.<sup>7</sup> Nor was the Nice IGC that did not finally adopt the proposal of the Commission to establish the office of the EPP. Hence the latter published its Green Paper to encourage further reflection and debate on the idea of a European Public Prosecutor.<sup>8</sup> Meanwhile, following the Presidency Conclusions adopted after

<sup>2</sup> Select Committee on the European Communities. House of Lords. "Prosecuting Fraud on the Communities' Finances-The Corpus Juris. With Evidence." Session 1998/99. Report 9. HL Paper 62. London, HMSO, 1999. 27.

<sup>3</sup> "*Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne.*" sous la direction de M. Delmas-Marty. Economica. Paris, 1997.

<sup>4</sup> "La mise en oeuvre du Corpus juris dans les États membres." Delmas-Marty, M. et Vervaele, J. A. E. Utrecht, 2000.

<sup>5</sup> Study on "Penal and Administrative Sanctions, Settlement, Whistle Blowing and Corpus Juris in the Candidate Countries". The Protection of the Financial Interests of the EU in the Candidate Countries. By Van Den Wyngaert. Final Report. 11 September 2001. published in *ERA-Forum*. 3-2001. 2-59.

<sup>6</sup> "Contribution complémentaire de la Commission à la conférence intergouvernementale sur les réformes institutionnelles — La protection pénale des intérêts financiers communautaires : un procureur européen". 29. 9. 2000, COM (2000), 608.

<sup>7</sup> See for example „Alibi-Staatsanwalt für Europa“. Financial Times Deutschland. 10. 8. 2000. 9. or „Ein EU-Staatsanwalt kommt zu früh.“ von Helmut Bündler. *Frankfurter Allgemeine*. 8. 9. 2000. 13.

<sup>8</sup> Green Paper on Criminal-Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor (hereinafter Green Paper), 11. 12. 2001, COM(2001)715 final

the summit in Tampere<sup>9</sup> pro-Eurojust was set up<sup>10</sup> to coordinate prosecutions. Furthermore, the Commission introduced an ambitious proposal for a directive on the criminal law protection of the Community's financial interests.<sup>11</sup>

The emerged proposals would lead to harmonized criminal substantive and procedural rules and to the institution of a European prosecutor responsible for the enforcement of these rules. The idea is not an absolute innovation but harmonization of criminal law was always a very sensitive political topic in the course of European integration.<sup>12</sup> There is an evident tension between the interests of Member States to preserve traditional prerogatives of state sovereignty<sup>13</sup> and those of the Community to acquire the necessary means to tackle fraud on the European level.

In light of the above said, and in particular concerning the reforms of criminal codes in the candidate countries,<sup>14</sup> it is useful to overview before the next intergovernmental conference following the European Convention what specific changes EC fraud necessitates in the *acquis*. To this aim, a hypothetical case puts into a very practical perspective the *modus operandi* of perpetrators of trans-national EC fraud in the first part of this article. On the basis of this

<sup>9</sup> Conseil Européen de Tampere: Conclusions de la Présidence. Point 46. <http://ue.eu.int/en/Info/eurocouncil/index.htm>

<sup>10</sup> Council Decision of 14 December 2000. Official Journal, L. 324, 21. 12. 2000.

<sup>11</sup> Proposal for a Directive of the European Parliament and of the Council on the criminal law protection of the Community's financial interests. 23. 5. 2001. COM(2001)272 final.

<sup>12</sup> Noteworthy is in this regard a Commission proposal for a draft treaty, submitted to Council in 1976, to amend the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of the named Treaties. (Official Journal, Vol. 19. C222, 22 September 1976. 2–18. ) As early as in 1976 the Commission reasoned the approval of the proposal as follows: '...the criminal law of the Member States cannot usually guarantee the protection of the financial interests of the Community nor ensure effective punishment of infringements of the provisions of the Treaties establishing the European Communities' (*ibid.* 2.). The proposal was later defeated.

<sup>13</sup> "Corpus Juris is neither realistic nor practical and would be incompatible with national legal traditions."—reaction of a high ranked civil servant from the Home Office quoted by Spencer, J. R.: "The Corpus Juris Project-Has it a Future?" *Cambridge Yearbook of European Legal Studies*. 355.

<sup>14</sup> It is worth noticing that in Hungary, for example, the criminal code had been amended since 1990 almost forty times! See Farkas, Á. and Petró, R.: Problematic Issues of Hungarian Criminal Law related to the Protection of the Financial Interests of the European Communities. *Agon*. No. 31. 2001. 2–4.

imaginary case will the second part tackle selected major problems in the fight against EC fraud. The last part of the article deals with a key institution in the recent proposals to counteract the perpetrators of trans-national fraud, the European Public Prosecutor.

## Part I.

### *The phenomenon of EC Fraud: The case of defected wheel bicycle industry corporation*

The European Commission publishes every year its annual report on the Fight against fraud including an analysis of data on fraud cases and of recent trends. As a consequence of Article 280 (5) of the Amsterdam Treaty, which came into force on 1 May 1999, the annual report on 2000 contained for the first time a report on the Member States activities with a view to protecting the Community's financial interests. Moreover, various Community legislative instruments oblige the Member States to report periodically on their investigative activities in certain sectors of Community policies. These reports represent a regular source of information for researchers on EC fraud.

To provide a detailed typology of reported fraud cases goes far beyond the limits of this article. What I have tried below is to give account for one type of fraud schemes, more precisely, of revenue fraud cases. My aim was to shed light on the *modus operandi* of perpetrators in a case where everything is the product of my imagination.<sup>15</sup>

### *The case*

Defected Wheel Bicycle Industry Corporation is a Chinese enterprise specialized in bicycles. One of its target areas is the European market. From 1990 onwards this enterprise, together with other Chinese firms, sold loads of bicycles in Europe at a relatively cheap price. The reaction of the European Community was to protect its market by adopting Council Regulation (EEC) No. 2474/93 of 8 September 1993. The regulation imposes a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China.<sup>16</sup> The consequence of the regulation is that Chinese traders

<sup>15</sup> Hypothetical fraud cases prepared by the Commission can be found in the Green Paper. See Annexes 1–3.

<sup>16</sup> Official Journal, L. 228, 09/09/1993, 1–9.

must pay an additional duty to customs if they want their products penetrate into the European internal market. Article 1 (2) of the regulation fixes the rate of the anti-dumping duty at 30,6%.

Mr. A. M. C. van Dyck, a Dutch trader, who incorporated the Defected Wheel Bicycle Industry Corporation in China in order to spread cheap bikes in the Dutch market, became furious as the regulation entered into force. He sat together with his partners from Germany, the United Kingdom, Portugal and Belgium to discuss how to avoid the payment of the anti-dumping duty and to maximize profit. They decided that they ship their bikes first to Thailand where they set up a new entity, the Flying Golden Wheels Bicycle Manufacturing and Trading Corporation. According to their plan, this latter enterprise should transport the bikes to the EC under its own name. The reason behind this plan was the lack of anti-dumping measure against Thai bikes in the Community at that time. In summary, the traders wanted to disguise the Chinese origin of the bikes because of the anti-dumping duty imposed on Chinese bicycles by Regulation No. 2474/93. Under the name of the Thai company the bikes will be sent in five different consignments to five different European ports (Rotterdam, Porto, Hamburg, Ostende, Hull) in order to make it more difficult for the various customs authorities to connect the crimes and to trace back the true origin of the bicycles. In all ports representatives of five different companies of the partners of Mr van Dyck would wait the merchandise. These five companies are incorporated in five different Member States. The perpetrators were aware of the obstacles to controlling transnational EC fraud in the 90-ies, notably of the problems flowing from divergent procedural rules and substantive norms in each Member State, the division of responsibility for enforcement, insufficient cooperation among Member State and Community authorities and the weaknesses of collecting and providing information among national and Community authorities.<sup>17</sup>

<sup>17</sup> There is an extensive literature on these problems. On behalf of the European institutions the Court of Auditors criticized in a number of its reports throughout the 90-ies the Commission for inadequate control. A comprehensive critical assessment of the workings of UCLAF can be found in Special report No 8/98 on the Commission's services specifically involved in the fight against fraud, notably the "unité de coordination de la lutte anti-fraude" (UCLAF) together with the Commission's replies. O.J. 1998 C230 of 22 July 1988. The reports of the European Parliament, particularly of its Budgetary Control Committee, represent also very critical views on the functioning of the mechanisms against EC fraud. An example is the Bosch Report of the Committee on Budgetary Control of the European Parliament of 22 September 1998, A4-0297/98. Outstanding analysis from academic circles can be found in Vervaele, J. A. E.: *Fraud against the Community: the Need for European Fraud Legislation*. Deventer, 1992., Delmas-Marty, M.: *Pour un droit*

To understand better the complex procedures that the authorities carry out only the route of one consignment will be traced. The first consignment arrives in Rotterdam. The merchandise, from the time of their entry into the customs territory of the Community, is subject to customs supervision. The procedure is governed by Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code,<sup>18</sup> and in addition, by its implementing Regulation (EEC) No. 2454/93 of 2 September 1993.<sup>19</sup> First, goods must be presented to customs either by the person who brought them into the customs territory of the Community or by the person who assumes responsibility for carriage of the goods following such entry. In our case, the manager of Two Wheels Inc., a Dutch company, takes further care of the bicycles.

The Community Customs Code determines what steps the trader have to take before the bicycles obtain the “customs status of Community goods”.<sup>20</sup> The amount for the customs duties depends on the value of goods for customs purposes as set out in Chapter 3 of the Community Customs Code, the tariff position of the goods and in certain cases the origin of the goods. The following rates would apply for example to bicycles, with product code CN871200, originating from China: applicable rate 15% according to Regulation No. 2261/98 of 26 October 1998,<sup>21</sup> tariff preference 10,5% pursuant to Regulation

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*commun.* Seuil, Paris. 1994., Simone White: Protection of the Financial Interests of the European Communities: The Fight against Fraud and Corruption. European Monographs. 1998., Sieber, U.: Euro-fraud: Organised Fraud against the Financial Interests of the European Union. Crime, *Law and Social Change* 30. 1998. 1–42.

<sup>18</sup> Official Journal, L. 302/1 of 1 October 1992.

<sup>19</sup> Official Journal, L. 253/1 of 11 October 1993.

<sup>20</sup> Customs status of Community goods results in the same status as if the goods were provided in a Member State of the Community, that is to say, they can circulate freely within the internal market. Not all the goods arriving into the customs territory of the Community receive this status and then circulate freely in the single market. After some goods no customs are paid. Some of these cases fall under the transit procedure, others under the inward processing procedure again others under customs warehousing. Collectively, these procedures are called suspensive arrangements. The name indicates that the payment of customs is suspended as a consequence of non-marketing within the Community but transiting, processing and the like. Our trader in the imaginary case wants however to gain for the bikes equal status with Community goods in the internal market and thus he places non-Community goods under the release for free circulation procedure and pays customs duties.

<sup>21</sup> Official Journal, L. 181, 16/07/1999, 38.

No. 2820/98 of 21 December 1998<sup>22</sup> and anti-dumping duty 30,6% as set out in Regulation No. 2474/93.<sup>23</sup>

Chapter 3 and its implementing provisions regulate in detail how the value of a certain product is determined for customs purposes. The calculated value most often serves as a basis to count the customs that are computed as a percentage of this value.

The tariff position is a defined place in a list, i.e. tariff, containing the percentage of customs duties to be imposed on products. Products are classified in this list and the customs authorities have to find the appropriate position for each merchandise in question. In practice, the manager of Two Wheels Inc. makes a summary declaration when he presents the bikes to customs. According to his declaration, the customs authority finds the appropriate tariff position.<sup>24</sup>

This is the important stage where detection of falsified stamps could lead to investigation. However the sheer volume of transactions and the high number of legitimate stamps could make even a weak attempt to falsify a stamp a successful one.<sup>25</sup> So the Dutch authorities did not discover fraud this time. Should they have initiated proceedings, a web of multilateral and bilateral conventions with third countries would govern their cooperation with competent authorities abroad. Even to find the competent authorities for requesting cooperation is difficult due to the diversity of the rules from one convention to another, not to mention the problems arising from the application of various procedural and substantive norms. Part II of the article tackles some of these problems with a restriction to the European context.

### *Happy end or rather Pyrrhic Victory?*

National customs officers run the day-to-day administration, they face first fraud *sur le terrain* and control consignments. They are responsible for transmitting cases to specialized investigating organs too. The national authorities

<sup>22</sup> Official Journal, L 61, 10/03/1999, 55.

<sup>23</sup> Official Journal, L 320, 28/11/1998, 60.

<sup>24</sup> The volume and complexity of rules on the value of goods often lead to errors. Only the Common Customs Tariff contains over 4000 product codes for agricultural products alone, a further 932 product codes exist for processed goods, and 1416 standard recipes and 14000 non-standard recipes. (House of Lords 5<sup>th</sup> Report 1989. 12.) Officials at the local customs stations learn for years the rules and still turn repeatedly to central offices specialized in giving advice in certain cases. Sometimes the characteristics of the goods are such that expert aid in a laboratory is needed for determining the nature of the product.

<sup>25</sup> See Sieber: *op. cit.* 10.

are obliged to take all the measures necessary to protect the Community budget equally as they take all necessary measures to counter fraud affecting the national budget. A further obligation is to inform the European Commission of national inspection activities and their results<sup>26</sup>. Moreover, Member States prepare an annual inspection report in the light of Article 17(3) of the above regulation. These reports make it possible at the European level that the authorities can carry out systematic analysis of the data provided.

To finish this hypothetical case with an optimistic note, I refer to a legislative instrument. On the information flowing from national authorities the Commission took appropriate counter measures against companies like Defected Wheel Bicycle Industry Corporation by legislating a new regulation. It proposed shortly after the introduction of anti-dumping duties on Chinese bicycles a new regulation<sup>27</sup> that imposes anti-dumping duties on bicycles originating from Thailand. The regulation came into force on 13 April 1996 and terminated fraudulent businesses like the Defected Wheel Bicycle Industry Corporation was pursuing. The prevention of a certain type of fraudulent activities does not necessarily guarantee that similar pattern do not reoccur in new disguise.

## **Part II.**

### *Challenges posed by the phenomenon of EC Fraud*

EC fraud necessitates legislative reform on substantive and procedural measures on the European level as well as on detection and follow up investigation leading to prosecution and sanctioning of perpetrators of cross-border financial crime. The aim of this part of the article is not to give a full account of problems related to EC fraud-fight, rather to indicate in an easy-to-grasp-framework selected shortcomings that must necessarily be eliminated should the fight against fraud be stepped up in the Community.

The completion of the single market and the removal of frontiers eased in many aspects the functioning of organized criminal networks in Europe. Transnational EC fraud cases such as the case of Defected Wheel Bicycle Industry Corporation reveal this phenomenon and represent a particular challenge to effective anti-fraud action. The Commission proposed in its opinion “Adapting

<sup>26</sup> Article 6(5) of Regulation No. 1150/2000 requests Member States to report fraud cases where the amount involved is higher than 10000 euro.

<sup>27</sup> No. 0648, 12 April 1996 OJ L91.



the institutions to make a success of enlargement”<sup>28</sup> that a legal basis be created for the powers and duties of a European Public Prosecutor responsible for detecting fraud offences throughout the EU.

The first and most obvious effect of trans-national EC fraud is on the number of proceedings. In our hypothetical case the customs authorities may initiate five different procedures, which are competing and partial in comparison with a single procedure run by the European Public Prosecutor in a single European Judicial Area. Equally damaging is if only one or two consignments are caught in the hypothetical case and the others can operate freely and harm the budget of the European Communities. Later stages of the process may bring even more unacceptable results. This is due to the various substantive and procedural norms in the national systems. The worst example is impunity.<sup>29</sup> The divergent national rules on the validity of evidence could for example easily prove in the court phase that long years of investigations were simply wasted.<sup>30</sup> Perpetrators—with the aid of expert lawyers—could draw up plans how to exploit the shortcomings of the system of criminal law protection against EC fraud long before the criminal activity takes place.<sup>31</sup> Various causes result in severe delays in the proceedings. A famous example is the testimony of a prosecutor from a Member State before the European Parliament.<sup>32</sup> He

<sup>28</sup> COM (2000) 34 of 26 January 2000 [http://europa.eu.int/omm/igc2000/offdoc/opin\\_igc\\_en.pdf](http://europa.eu.int/omm/igc2000/offdoc/opin_igc_en.pdf)

<sup>29</sup> See the shortcomings of the traditional methods of judicial cooperation between Member States. Green Paper. p.13.

<sup>30</sup> Professor Spencer explains in his paper delivered in the Conference on the European Public Prosecutor, Trier, 24–25 June 2002, the problems flowing from the diversity of national rules on evidence. Here two illustrations of these issues are provided that could be applicable in the “bike”-case. Scenario No 1. The British customs authority took the case to court after fraud was detected in Hull. The Prosecution wanted to use evidence gathered in France by letters rogatory issued by an examining judge but the Court in the UK considered it as hearsay and hence inadmissible. Spencer, J. R.: Diversity of national rules on evidence—is the mutual admissibility of evidence feasible? 2–3. *Scenario* No 2. The case is brought before a Belgian court. Evidence obtained abroad legally but not in accordance with Belgian laws would lead to exclusion of the evidence. Belgian law has a strict approach to illegally obtained evidence, while in Sweden it would be admissible almost irrespective of how it was obtained. England and Germany represent again another group regarding acceptance of illegally, improperly or irregularly obtained evidence because in certain cases it is admissible and in other cases not. *ibid.* 1–2.

<sup>31</sup> Recognized aim of the Community is that “criminals must find no ways of exploiting differences in the judicial systems of Member States”. Conseil européen de Tampere: Conclusions de la Présidence. Point 5.

<sup>32</sup> Green Paper. 79.

declared that he had to deal with more than 50 successive actions in a single case brought before him to slow down proceedings and benefit from the time needed by the judge to dismiss them. Consequently, by the passage of time the execution of the international letters rogatory would generally be of no real use, not to mention that delays would help the suspects to disappear. Besides efforts to obstruct the process, traditional international cooperation inherently results in delays. Two examples are provided. On the one hand, Article 125 of the Royal Decree of December 28, 1950 states that no documents (or copies thereof) pertaining to criminal investigations or similar matters may be issued or supplied to others without specific authorization of the procurator-general of the Court of Appeal or the auditor-general. Hence Belgian police is not authorized to transmit independently information from criminal records or current investigations to colleagues in other Member States.<sup>33</sup> On the other hand, if a judge handles an inquiry in one Member State but administrative authorities deal with the same offence in another Member State, direct contact would generally be impossible between them.<sup>34</sup> The traditional judicial cooperative mechanisms have a defect concerning efficiency and timely work. Furthermore, specific problems such as the secrecy of tax and business information are so acute that they may lead to the refusal of mutual assistance.<sup>35</sup>

The Van Dyck scheme described in the first part of this article resulted in no judicial action against the perpetrators. Let me change here a bit the hypothetical case and examine in the European context what would have most likely happened if, say the Belgian, authorities discover a valuable source of information indicating fraud. Customs officers in Oostende—after a tip—learn that the bike import is accompanied by falsified documents to avoid customs duty. After examination of the accounts of Three Wheels Minus One Inc., a Belgian company, the authorities suspect a massive and long standing practice of deliberative breach of EC norms. The case is referred to the Belgian *juge d'instruction*. He initiates criminal investigations by police to interrogate

<sup>33</sup> Vermeulen, G.: A Judicial Counterpart for Europol: Should the European Union Establish a Network of Prosecuting and Investigating Officials? 2 *UCLA Journal of International Law and Foreign Affairs*, Fall/Winter 1997–1998. 225.

<sup>34</sup> “Contribution complémentaire de la Commission à la conférence intergouvernementale sur les réformes institutionnelles — La protection pénale des intérêts financiers communautaires : un procureur européen”. 29. 9. 2000, COM (2000), 608. 5.

<sup>35</sup> The Final report on the first exercise devoted to judicial assistance in criminal matters, approved by the Council on 28.5.2001., states: “The evaluations showed that the issue of tax offences remained such a sensitive one that mutual assistance could, on this basis be limited and slowed down or at worst be refused.”. Tax offences (Heading III.e) Official Journal, C216, 1. 8. 2001.

employers of the Three Wheels Minus One Inc. Investigation in Belgium leads to a criminal network, notably with the involvement of a British company, Four Wheels Minus Two Inc. and a Portugal one, Five Wheels Minus Three Inc. A German company whose name is up to your imagination, dear Reader, is also suspected to be part of the criminal network.

As evidence is transferred to the United Kingdom the British authorities note that the written statements of a Belgian citizen will not be admissible before a court of law because evidence was gathered in Belgium under *commission rogatoire* and lacking certain preconditions a court in the UK would consider this as hearsay and hence inadmissible.<sup>36</sup> The manager of the German company disappears together with the funds of the company before the authorities could take action, thus enforcement will be impossible in case of the German company. In Portugal the prosecutor realizes after having received the files that criminal investigation police gathered evidence and not a prosecution service or examining judge. Consequently, the evidence was not collected in response to the international *letters rogatory* in compliance with Portuguese law, and it will not be admissible in Portugal either.

Moreover, supposing that the authorities detect a deliberate attempt to breach Community law in all five Member States, official action would be governed by five different systems of substantive and procedural laws. In fact, as the number of Member States involved in the case increases, the problems of national police and judicial authorities grow.<sup>37</sup> Particularly difficult would be to run the current mechanisms in an enlarged Union. In our imaginary case only five countries are involved. If the connection between the five consignments were at all discovered, cooperation between the authorities of five nations would already be severely hampered by the territoriality principle of national criminal laws. The traditional cooperative methods do not suit anymore in an ever more integrated Europe as the national authorities are empowered to act on their own territory. From the conflicts of jurisdiction and the *forum regit actum* principle to the cumbersome mutual judicial cooperation the fragmented European law enforcement area signifies such residual problems that are

<sup>36</sup> Professor Spencer clarifies that English law was changed in 1988 to enable foreign witnesses to give evidence at fraud trials from abroad by means of a live video link. As the foreign witness abroad can not be forced to cooperate, this solution is based on the good intention of the foreign witness. Spencer, J. R.: Diversity of national rules on evidence—is the mutual admissibility of evidence feasible? Conference on the European Public Prosecutor, Trier, 24–25 June 2002. 2–3.

<sup>37</sup> Currently there are seventeen different legal regimes in the EU due to the distinct legal systems in England and Wales, Scotland and Northern Ireland. Green Paper. Footnote 24. 12.

leftovers while European integration deepened in other areas. Those are the perpetrators who could move without restriction in the Community territory and not those responsible for the suppression of crime.<sup>38</sup>

Even such a brief and selective overview within the limits of this article indicates that the creation of a European Judicial Area is indispensable. To this aim, common European rules are necessary that change both substantively and procedurally the current mechanisms of fraud fight. The enforcement of such rules would be the responsibility of the European Public Prosecutor.

### Part III.

#### *The European public prosecutor: Response to the challenges posed by the phenomenon of EC Fraud*<sup>39</sup>

As indicated above, severe shortcomings restrict the work of law enforcement bodies in Europe in the field of fraud fight. An Italian prosecutor quoting tragic statistical data on international cooperation burst out: “International cooperation in judicial matters does not work”.<sup>40</sup> The necessity of finding a legislative response on the European level motored the European Parliament and the European Commission to sponsor a comprehensive study on the criminal law protection of the financial interests of the Communities. Essential part of this project was to elaborate rules on the elimination of the dispersion of the prosecution function against cross-border organized networks harming the budget of the European Communities.

After a decade-long preparation<sup>41</sup> the Commission submitted its proposal to the Nice IGC with the recommendation on the creation of a European Public Prosecutor.<sup>42</sup> His responsibility would be detecting, prosecuting and bringing to judgment perpetrators of offences detrimental to the financial interests of the

<sup>38</sup> Delmas-Marty, M.: Combating Fraud—Necessity, Legitimacy and Feasibility of the Corpus Juris. *Common Market Law Review* 37: 247–256, 2000. 248.

<sup>39</sup> See for detailed analyses conference papers of the Conference on the European Public Prosecutor, Trier, 24–25 June 2002., Part II of The Implementation of the Corpus Juris in the Member States, eds. Delmas-Marty, M. and Vervaele, J. A. E. Intersentia. Utrecht. 2000. Vol. 1. 305–327. and Proceedings of the conference organized by Robert Schuman University of Strasburg on the European Public Prosecutor. 19–20 October 2000.

<sup>40</sup> “La mise en oeuvre du Corpus juris dans les États membres.” Delmas-Marty et Vervaele: *op. cit.* 305.

<sup>41</sup> See the Corpus Juris study. Footnote 3.

<sup>42</sup> See footnote 34.

Community as well as exercising the prosecution function in the national courts of Member States.

Its organizational status would be set out in a new Treaty article, 280a. The first paragraph of this new article states that the Council appoints the EPP acting by a qualified majority. The Commission with the assent of the Parliament proposes a list of candidates to the Council. Its term of office is six years and its appointment is non-renewable.<sup>43</sup> Concerning the removal mechanism, the European Court of Justice may, on application by the European parliament, the Council or the Commission, remove the EPP. The Treaty provides on the reasons of removal: serious misconduct or not meeting the requirements for the performance of his duties.<sup>44</sup>

His independence must be beyond doubt. Secondary legislation would determine organizational issues such as the structure of the office or its location on the basis of Article 251 of the Treaty.<sup>45</sup> Similar treaty basis is provided for the adoption of (1) rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the financial interests of the Community, (2) rules of procedure applicable to the activities of the EPP and rules governing the admissibility of evidence, and (3) rules applicable to the judicial review of procedural measures taken by the EPP in the exercise of his functions.<sup>46</sup>

The basic duty of the EPP would be to exercise the prosecution function across the Community territory in relation to a precisely circumscribed set of offences. A harmonized body of criminal law on the European level would reduce the problems indicated in the first parts of this article, including the clearing up of conflicts of jurisdiction, conflicts of the application of national substantive laws and the complexities of international judicial cooperation. Furthermore, the European Public Prosecutor would be able to combine information from national sources. Thus a more coordinated and centralized administration of information would offer a broader picture for the EPP than for isolated national prosecution services. On the basis of the so gained information the EPP would be able to direct investigations in the European Judicial Area. European Arrest Warrants recognized throughout the Community territory would aid his work in a single European investigation area concerning fraud fight. It is hoped that the introduction of the institution of the European

<sup>43</sup> Proposed new Article 280a, para.1. Green Paper. 85.

<sup>44</sup> Proposed new Article 280a, para.2. Green Paper. 85.

<sup>45</sup> Co-decision procedure with qualified majority in the Council.

<sup>46</sup> Proposed new Article 280a, para.3. Green Paper. 85-86.

Public Prosecutor will significantly increase the efficiency of law enforcement against perpetrators of EC fraud.

The reference above to the Draft Treaty, submitted to Council in 1976, to amend the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of the named Treaties, signaled the long-standing cumbersome tension on the allocation of criminal powers between the Community and the Member States. The lack of political will would damage any effort to constitutionalize the EPP. The highly problematic ratification process of third pillar conventions in the area of protection of the financial interests of the Community shows already bad signs.

The failure of the Nice IGC did not let the adopted Treaty be nice for the ones that expected a breakthrough in regard to fraud fight. The proposal of the Commission on the establishment of the office of the EPP was turned down. The questions arise naturally how long we can wait for the European Public Prosecutor and how many funds must be defrauded until the fight against fraud is stepped up. Or, keeping in mind the failure of the Draft Treaty of 1976<sup>47</sup>, will the question be after Samuel Beckett: Waiting for the European Public Prosecutor?

## Conclusions

In the course of European integration anti-fraud activities gradually became a primary issue on the political agenda. The Maastricht Treaty incorporated the assimilation principle into the EC Treaty while the Amsterdam Treaty created a first pillar legal base for anti-fraud action and extended the co-decision procedure to the prevention of and fight against fraud.

Pursuant to Article 280 the European Parliament acquired legislative authority in the field of anti-fraud policy on an equal footing with the Council. In the Council the voting procedure changed from unanimity to qualified majority. The Commission gained new capacities and strengthened its autonomy vis-à-vis the member states. The recent shift to a horizontal anti-fraud policy articulated in the adoption of cross-sectoral legislative instruments.

The europeanization of anti-fraud policy is a clear tendency from a historical point of view. The decisive step to transfer penal power to the European level is still not made though. The European Public Prosecutor to enforce the

<sup>47</sup> See footnote 12.

harmonized rules of the *Corpus Juris* became indispensable in an ever more integrated Europe. Without a harmonized legal framework for the Single European Judicial Area the puzzle still misses its basic pieces. At the next crossroads concerning the power balance between the Community institutions and the Member States will be the prospective incorporation of certain parts, particularly the European prosecuting authority, of the *Corpus Juris* into the treaties. The next IGC in deciding what features the European Judicial Area takes will have to concentrate on transparency and legitimacy of, and politico-legal responsibility for anti-fraud measures. Only this way can the values of European integration be protected together with the financial interests of the European Communities.