Speech given by Barry Donoghue, Deputy Director of Public Prosecutions, at the Law Society Annual Conference, Budapest – 28 March 2008

EUROPEAN PUBLIC PROSECUTOR: WILL IT HAPPEN?

Article 69E of the Lisbon Treaty makes specific reference to a European Public Prosecutor. As there is no European criminal code and no European criminal court before which such a prosecutor could lay a charge, the question arises as to what such a prosecutor would be expected to do and why it was felt necessary to signal in the Treaty the possibility of establishing such an Office. The purpose of this paper is to examine the somewhat tortuous path that led to the reference to the European Public Prosecutor in the Treaty, to set out the arguments for and against the establishment of such an Office, to analyse the role of the Office in the criminal justice field and to offer some estimate as to whether it is likely it will be established in the short to medium term.

CONTEXT

The context in which this question arises is the evolving role of criminal justice in the European Communities/European Union. As is well known, justice and home affairs issues had initially little or no relevance to the workings of the European Economic Communities. The process whereby this changed is a complex one outside the scope of this paper. However, it is clear that the process involved a tension between competing views of the future of the Union. One author aptly described it as "both born of fear and imprisoned by fear". He explained that:

> "it was born as a result of insecurity on the part of member states. They were threatened by forces over which they had little or no control – terrorism and illegal immigration – and which they thought might be more effectively tackled through collective action…Free movement of persons [under the Single European Act] threatened to worsen existing insecurities and again only collective action was deemed capable of meeting that challenge. Fear, however, also undermined those collective efforts. Member states, differentiated by administrative interests, by historical experience, by legal tradition and by political psychology, sought to maintain national control over an area of public policy which in

> part defined them as independent states. This dynamic – or dialectic – guaranteed immobility and stagnation."[1]

Since the Maastricht and Amsterdam Treaties there has been less immobility and less stagnation but the anxiety to maintain national control over the area of criminal justice meant that most policies in this area were "quarantined" under Title VI of the Treaty on European Union (TEU) (commonly known as the Third Pillar). Title VI was structured so that member states retained greater control over proposals in this area and, indeed, in many areas retained the right of veto. Apart from the obvious limitations on action that this arrangement entailed, the structure is one of great complexity. However, it cannot any longer be said that "Europe" has no relevance to the area of criminal law and criminal procedure. Many of our statutes dealing with money laundering, fraud and corruption have been introduced as a direct result of measures introduced under the Treaties. In relation to criminal procedure there have been Framework Decisions in on victims' rights and, most notably, in the area of extradition with the introduction of the European Arrest Warrant.

In connection with the former Framework Decision,[2] the decision of the European Court of Justice in the case of Pupino [3] is of some interest. The Court decided that Italian law did not comply with the requirements of the Framework Decision that the most vulnerable witnesses be able to testify in a manner that protected them from the effects of giving evidence in open court and that the Framework Decision (a Third Pillar instrument) had "indirect effect" equivalent to that of a Directive (a First Pillar instrument).

CORPUS JURIS

The first proposal to establish a European Public Prosecutor was contained in a document called the Corpus Juris. This document did not emanate from any of the institutions of the European Communities but rather was the product of research and analysis carried out by a group of academics and practitioners. They were asked by the European Commission in 1995 to look at the question of whether the then current arrangements for the investigation and prosecution of cases of fraud on

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[1] Ben Tonra, "The Politics of Justice" in Gavin Barrett (Ed), Justice Cooperation in the European Union, Institute of European Affairs, 1997, at page 57
[2] [2001] OJ L 82/1
[3] Case C-105/2005[2005] ECR 5285

the European budget were adequate. Fraud on the European budget is of course a matter of concern to all but particularly to the Commission. Estimates of the extent of fraud vary from time to time as does the definition of what constitutes fraud. The European Court of Justice decided in the famous Greek maize case[4] (the Greeks point out the maize the subject of the fraud originated in the former Yugoslavia) that a member state was obliged to apply its criminal law to protect the EC budget in the same way that it would apply its criminal law to national criminal offences and that any sanctions applicable to fraud on the budget had to be 'effective, proportionate and dissuasive'. This requirement was incorporated subsequently into Article 209A of the TEU.

Fraud on the European budget was chosen for the Corpus Juris study therefore because of the importance of protecting the budget but also because the trans-national nature of much of the fraud in this area was felt to create particular challenges to the criminal justice systems of the member states, operating as they must within their own territories. If the fraud involved goods being transported over the territories of two or more member states, the differing legal systems of those states could cause difficulty in identifying in which state the offence happened and in coordinating investigations between the states. There was also a belief that fraud on the European budget did not always receive the necessary level of protection in all member states and that a community wide initiative was required.

The group reported in 1997 in their document Corpus Juris, the title alluding to the great work of codification of roman law carried out in the reign of the Emperor Justinian. The Corpus Juris was revised to take account of observations on and criticisms of the original draft and an amended version issued in 2001. As part of that review the Group also carried out a very useful comparative study of the criminal justice systems of the member states.

What did the Corpus Juris say? As its title suggests, it put forward a comprehensive criminal code, identifying a number of criminal offences in relation to fraud on the European budget which would apply across the community. Eight offences were chosen and defined: fraud, market rigging, corruption, abuse of office, misappropriation of funds, disclosure of secrets, money laundering and conspiracy. It also dealt with questions of criminal liability (such as mens rea) and penalty. Finally, it set out a comprehensive procedure for the investigation and prosecution of such

[4] [1989] ECR 723

offences. It was in the context of this procedural framework that the idea of a European public prosecutor was mooted.

Before turning to the role of the prosecutor I will highlight one of the offences suggested in the code. The principal offence was of course that of fraud on the European budget. In article 1 of the code the offence of fraud covers both the expenditure (grants, subsidies etc) and receipts (VAT fraud etc) side of the budget. What is fraud? It is defined in very wide terms. In relation to a grant or subsidy for example it includes the submission of a declaration that is "in important respects...incomplete, imprecise or based on false documents, in such a way as to risk harm to the Community budget." It can also include a situation where the person receiving the grant or subsidy fails to supply information to the authorities. This very wide definition of fraud reflected the view of the Commission that "fraud" on the budget encompassed not only fraud as would be understood in most criminal codes but also any case where funds had been misapplied or diverted. Furthermore, the offence could be carried out "intentionally or by recklessness or by gross negligence". This contrasts with the requirement that the other seven offences set out in the code could be committed only where the suspect acted "intentionally" (article 10).

Turning then to the procedural aspects of the code, article 18 states that for the purposes of the investigation, prosecution, trial and penalty of the eight offences of the code "the territory of the Member States of the Union constitutes a single legal area". This was certainly a novel proposal. Rather than creating federal offences under a federal system of justice as in the United States of America, the code would operate in a separate legal space. Apart from the European public prosecutor and a supervising judge, the code would depend on the criminal justice systems of the member states; the offences would be processed through the national courts. What then would be the benefit of the code? First, the eight offences would be common to all member states. Secondly, the investigation and prosecution of such offences would be entrusted to a supranational prosecutor, to whom all possible breaches of the code would have to be reported by national authorities. The prosecutor would have "competence across the entire territory of the European Union" in relation to the code offences (article 24). Thirdly, there would be common penalties applying to those offences.

The code envisaged that the European prosecution service would be headed by an independent European Director of Public Prosecutions based in Brussels with delegated Public Prosecutors under the aegis of the

Director based in each member state (article 18). The service was described as "indivisible and interdependent".

The primary function of this service would of course be to investigate breaches of the code. The code reflects the civil law model where the prosecutor or investigating magistrate is in charge of the investigation rather than the common law model where the police are in charge of the investigation stage. Under the code the prosecutor is given very wide powers. However, the more intrusive powers such as the searching of property must be subject to authorisation from the supervising judge, to be known as the judge of freedoms. This judge would be appointed by individual member states and supervise the delegated prosecutor for that state. In addition to supervising the actions of the prosecutor, the judge could also at the request of the prosecutor remand an accused in custody at investigative stage.

My final comment in relation to the Corpus Juris relates to the trial of offences under the code. As the code contemplates that there would be no federal court, the courts of the member states would try the cases. But in trying offences under the code the courts would have extra-territorial jurisdiction. Thus, the Irish courts would be able to try a French national for a code offence committed in Germany. However, in one of its most controversial clauses the code excluded trial by jury. Under article 26 the courts trying offences under the code " must consist of professional judges, specialising wherever possible in economic and financial matters, and not simply jurors or lay magistrates." In a sweeping criticism of the very concept of trial by jury the authors of the Corpus state, referring to the recommendations of the Roskill Committee on fraud trials in England and Wales, that they "are convinced by this analysis for there is a double risk inherent in granting competence to an inexperienced court: not only of acquitting guilty people, but also of convicting innocent people" (page 116).

The Corpus Juris was the subject of extensive debate both after its initial publication in 1997 and when the revised version was published in 2001. It is fair to say that the reaction of criminal law practitioners in common law jurisdictions in particular was lukewarm if not hostile. However, there were also positive responses. Mr Justice Carney broadly defended the Corpus Juris in an article in 2000. He said that in the "attempt to detect, investigate, prosecute and try those responsible for fraud which affects the financial interests of the Community, it is essential that a broader perspective than the traditional territorial application of criminal law is adopted." While he was critical of some aspects of the code, such

as secrecy surrounding proceedings before the judge of freedoms, he stated that its procedures "combine elements of the common law approach to criminal justice, and aspects of the civil law system. Some of these approaches will require adaptation and compromise."[5]

COMMISSION'S GREEN PAPER

What happened to the Corpus Juris? Some of the offences set out in the code are now part of the domestic laws of member states. The offence of corruption of EU officials set out in article 3 of the code for example is now part of the Criminal Justice (Theft and Fraud Offences) Act 2001. And the idea of a European Public Prosecutor (EPP), which was central to the Corpus Juris, was the subject of a proposal by the European Commission to the Nice Intergovernmental Conference in 2000.

In a very short paper (annexed to its subsequent Green Paper) the Commission recommended a treaty amendment to permit the appointment of an EPP. As with the Corpus Juris, the role of the prosecutor would be confined to cases of fraud on the EU budget. The paper noted that fraud on the budget had been estimated in 1998 as amounting to in excess of €1 billion. Reference was also made to the involvement of organised crime in this area of fraud. The Commission stated that the current arrangements for tackling fraud on the budget were not working and that this was due "mainly to the fragmentation of the European criminal law-enforcement area, which results from the fact that the national police and judicial authorities are empowered to act only on their own territory." The Commission recommended that the treaty provision address the role of the EPP in general terms, with the detail to be worked out in secondary legislation. In any event the proposal was not taken up by the Conference, partly on the basis it seems that there was not sufficient time to consider the proposal. Notwithstanding this setback, the Commission decided to present a Green Paper on the EPP. The Green Paper is a detailed and sophisticated proposal running to almost 100 pages.[6] It was published in 2001.

Broadly speaking the Green Paper followed the recommendations of the Corpus Juris in relation to the structure and functions of the EPP. The EPP as the head of the European Prosecution Service was to be a

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[5] Paul Carney, "The Case for a Corpus Juris", in Eugene O'Regan (Ed) The Third Pillar: Cooperation Against Crime in the European Union, Institute of European Affairs, 2000, at page 122

[6] COM (2001) 715, 1 Dec 2001.

supported by a de-centralised Deputy EPP in each member state. However, while the EPP would be appointed by the EU Council the Deputy EPPs, under a complex arrangement, would remain part of the national prosecution services of their member state, while being under the general control of the EPP.

The primary function of the EPP would be to direct and coordinate investigations and proceedings with a view to protecting the Community's financial interests. In any case where the investigation involved a coercive measure such as a search of a premises, the authority of the judge of freedoms would be required. The paper invited comment on the relationship between the Deputy EPP and national investigative bodies such as the police. There was also a discussion about what would happen where the conduct under investigation amounted to fraud on the community budget and also some domestic criminal offence. Which offence would have primacy and who would decide? Also, what would happen where the conduct amounted to offences in a number of member states? In relation to the latter issue, the paper recommended that it be a matter of choice for the EPP as to where the prosecution should take place. As to the trial itself, this of course would proceed in the national courts and would be conducted by the Deputy EPP.

One of the more controversial recommendations of the paper was that evidence lawfully collected in one member state would be automatically admissible in another member state (state of trial). The precise mechanism as to how this would work in practice was not clear and observations were invited on this issue. The actions of the EPP would be subject to judicial review with a possible ultimate referral to the ECJ. Finally, the paper recommended that secondary legislation would define the common offences of fraud on the budget both in terms of the constituent elements of the offences and the applicable penalties. Of course, being a Green Paper its principal purpose was to invite discussion on the entire concept of the EPP and specific issues were raised at the end of each chapter.

Although the Green Paper invited comments in relation to the detailed analysis of how the EPP would work in practice, a number of the responses challenged the very concept of the EPP. Again, the common law countries were less enthusiastic about the idea than some of the civil law countries. Public hearings on the Green Paper took place in September 2002. The Commission subsequently published a Follow-Up Report in 2003 summarising the response to the Green Paper. It is clear from this report that opposition to the concept of the EPP was not

confined to common law countries. The officials of the following countries rejected out of hand the idea of an EPP at the public hearings: Denmark, France, Ireland, Austria, Finland and the United Kingdom.

What were the objections to the proposals put forward in the Green Paper? First, it was stated that, as the idea of an EPP was such a radical step and contrary to the normal manner of dealing with Justice and Home Affairs issues, there was an onus on the Commission to establish that the EPP was the only solution to the suggested problems in investigating and prosecuting fraud on the EU budget and that the Commission had not made a convincing case that that was so. There was criticism that the supposed inadequacies of the present arrangements in tackling fraud on the budget were not empirically established. Secondly, it was stated that the problem of hybrid offences was not properly addressed in the Green Paper. It was suggested that many cases of fraud on the European budget would also involve ordinary offences of fraud and that this would lead to conflict and duplication of effort. Which case would take precedence? Who would decide? What if a co-accused is charged with ordinary fraud? Thirdly, the question was raised as to whether the remit of the EPP should be confined to fraud on the EU budget. Was this type of crime more serious than terrorism or child trafficking? Fourthly, there was criticism of the idea that evidence obtained lawfully under the rules of evidence of one member state should automatically be admissible in the member state where the trial is to take place. How is the national court of the latter state to determine whether the evidence was lawfully obtained? Fifthly, there was criticism that the proposal was premature as some measures to assist cross-border investigations had not been given sufficient time to bed down. One such measure was the establishment of Eurojust.

EUROJUST

What is Eurojust? It is a body established in 2002 by a Council Decision[7] for the purposes of coordinating national investigations and prosecutions, improving cooperation between national authorities, in particular by facilitating extradition and mutual assistance requests and supporting in other ways the effectiveness of national investigations and prosecutions. It was set up on a provisional basis in 2000 following the European Council meeting in Tampere, Finland.[8]

[7] [2002] OJ L63/1
[8] [2000] OJ L 324/2

It is based in The Hague and is made up of representatives from all member states. Under the Decision of 2002 the national members could be police officers, judges or prosecutors. In fact, they have almost invariably been prosecutors and I understand at present that only one member state has a non-prosecutor (judge) as its representative. Although its role is only an enabling one, it has proved to be very useful to date. Ireland has had two representatives in Eurojust Micheál Mooney and Jarlath Spellman, prosecutors from our Office. The personal relationships that they have built up with their colleagues over time has facilitated the smoother operation of mutual assistance. Apart from its role in relation to mutual assistance, Eurojust has also facilitated the coordination of on-going complex cross border investigations in relation to serious crime, where the early involvement of prosecutors to assist the police can be of great benefit.

Many see Eurojust as an embryonic European prosecutor's office. Certainly, it has been a useful experience in having prosecutors (or magistrates) from all member states working together in the one organisation. Nonetheless, the tasks given to Eurojust in the Council Decision emphasise its role as facilitator: to ask national authorities (a) to undertake an investigation or prosecution of specific acts, (b) to coordinate between themselves when dealing with cross border cases, (c) to recognise that another State is in a better position to investigate or prosecute, in case of conflicts of jurisdiction, and (d) to set up joint investigation teams.

In contrast with the EPP proposed by the Commission, Eurojust is not confined to offences involving a fraud on the EU budget. In addition to the offences which come within the remit of Europol, it can deal with computer crime, fraud on the EU budget, money laundering, environmental crime and organised crime. The offences which Europol can deal with are many but include drug trafficking and people trafficking. In addition, Eurojust can deal with any offence where its assistance is sought by a national authority of a member state.

LISBON TREATY

Article 69D of the Lisbon Treaty will alter the role of Eurojust from one of facilitation to a more pro-active one. First, its mission will now be to support and strengthen coordination and cooperation between national authorities. Furthermore, the mission is not confined to cases involving two or more member states but will include serious crime "requiring a prosecution on a common basis". It remains to be seen what this entails

but it could, for example, give Eurojust a role in relation to EU fraud, even if committed in only one member state.

Secondly, Eurojust will be entitled to initiate criminal investigations, particularly those relating to fraud on the EU budget. At present it can only ask national authorities to do so. It remains to be seen how this new power will operate in practice. Depending on the nationality of the Eurojust member they may or may not have power to carry out an investigation in their own country. Prosecutors from civil law countries will probably be able to carry out (or direct the police to carry out under their supervision) criminal investigations but prosecutors from common law countries would not. Is it intended that the powers of individual prosecutors from common law countries would be altered to take account of this difference? However, the fact that investigations of fraud on the EU budget are expressly referred to is of some interest.

Thirdly, the authority of Eurojust in relation to cases where there is a conflict of jurisdiction has been altered. In cases of cross border crime such conflicts would not be unusual. In a drug trafficking case offences may have occurred in several states. Where should the prosecution take place? Article 69D refers in sub-clause c to "the resolution of conflicts of jurisdiction". I assume this means that Eurojust will decide where the prosecution should take place. This would have consequences not only for the competing prosecution services but of course for the accused as well.

Fourthly, the tasks to be given to Eurojust under secondary legislation need not be confined to those enumerated in Article 69D. In referring to the process whereby the tasks are assigned to the body under legislation it is stated that "these tasks may include" certain express functions. This leaves open the possibility of other tasks being granted to Eurojust.

I mention these important changes to Eurojust's role and function not only because they are part of a typically incremental process but also because the next clause in the Treaty dealing with the EPP has to be understood in the light of these changes.

LISBON AND THE EPP

Article 69E empowers the Council, in order to combat crimes affecting the financial interests of the Union, to establish a European Public Prosecutor's Office "from Eurojust". I expect that if there is a proposal to establish such a body these last two words will be the subject of some

debate. In deciding to establish the EPP the Council must act unanimously and with the consent of the Parliament. However, in the absence of unanimity, a group of at least 9 member states may establish the EPP on the basis of what is called “enhanced cooperation”. However, if that were to happen no doubt Eurojust would continue to operate. In that circumstance how could the new body be said to have been established “from" Eurojust, where the latter organisation is an existing and functional one?

If the EPP is established what will its functions be? They are described in the Article in only the most general terms. The EPP will be “responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union’s financial interests” (Article 69E (2)). In carrying out this role it shall exercise the functions of prosecutor in the courts of the member states.

Much will be left to secondary legislation, which will cover such issues as “the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures” (Article 69E (3)).

Finally, it should be noted that the Council can amend Article 69E so as to extend the remit of the EPP to offences other than EU budgetary fraud offences but can only do so on the basis of unanimity (Article 69E (4)).

CONCLUSION

The idea of establishing the Office of EPP has been the subject of detailed discussion for over 10 years now. It remains a controversial proposal. Much has happened since the Corpus Juris was published in 1997 in the field of harmonisation of criminal law and enhanced cooperation between investigators and prosecutors, all of which should assist the fight against fraud on the EU budget. On a prevention level, work has been undertaken to reform various schemes operated by the Union to make them less prone to fraud.

Many practitioners are not convinced that the EPP proposal put forward by the Commission in its Green Paper would really enhance the fight against budgetary fraud and might become a costly distraction. With the possibility of further powers being given to Eurojust, an argument can be made that Eurojust needs time to demonstrate its capability before

considering the establishment of the Office of EPP. Having regard to the reaction of a number of member states to the Green Paper, one wonders whether there would be unanimity at European Council level about establishing such a body in the short to medium term. In the absence of such unanimity of course a group of at least 9 members could establish the EPP on the basis of enhanced cooperation between them. However, this EPP could only operate in the territories of those states and would have to work alongside Eurojust which would continue to operate on a Union-wide basis. Would such an arrangement enhance the fight against EU fraud?

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