

The European Public Prosecutor : a challenge for the European Union

It is today obvious that the more that borders of the single market are opened up, the more the persistence of legal frontiers proves disastrous. The Spanish general public prosecutor called for a European public prosecutor in March 2010, stressing that "*one of the main problems that arises when combating money laundering is that "borders have disappeared for criminals while our legal systems still operate at a strictly national level"*".

The Commission also has to respond to the high cost of fraud. VAT value losses amounted to €17 billion in Germany and €18 billion in United Kingdom. [The Court of Audits of the EU](#) lacks the means to conduct a related global estimate, but says the volume of VAT fraud could exceed the volume of the EU total annual budget (€140 billions). The fraud related [with carbon gas emission permits](#) alone is estimated to cost €5 billion in the EU^[1].

Moreover, European system of law enforcement is unbalanced, and it may affect fundamental rights : key administrative, police and data collecting structures lack their judicial equivalent; they lack judicial control.

Initiatives to improve European space of liberty, security and justice

Judges and prosecutors were the first to warn the public about European cooperation's deficiencies. In 1996, seven judges and prosecutors released the Geneva appeal, to denounce the obstacles in international judicial mutual assistance. MEDEL joined the initiative by organizing a conference in Brussels in 1997 titled [The Hindered Justice](#).

Amongst many difficulties, there are disparities between systems : for instance, the statutes of prosecutors vary to a great extent from country to country ; prosecution services have very different degrees of independence. Even the concept of judicial authority may be understood differently from a country to another. And it is difficult for [highly diversified systems](#) to work together, particularly in the area of procedures and evidence; the European arrest warrant and the European evidence warrant are only steps towards a harmonized system.

There was also a concern about the qualitative progression of cross-border crime and to the spreading of mafia or other forms of organized crime. 27 member states with different systems are not able to tackle such an evolution.

The *Corpus juris* may be viewed as a response to that appeal. 1997 saw the publishing of this project headed by Mireille Delmas Marty and John Vervaele, involving many European universities. A second, more detailed version was publicized in 2000[2]. The *Corpus juris* is a set of penal law governing principles. It includes the creation of a European Public Prosecutor and a uniform definition of certain infractions and certain evidence rules. It only deals with the protection of Europe's financial interests.

The project received the backing of the European Commission. First, in the form of a simple statement issued in 2000[3] and then by a Green Paper in 2001 and a follow-up paper in 2003[4]. The Green Papers was generally well received by competent committees of the [European Parliament in 2003\[5\]](#).

But after all this, there were seven years of black out.

The institutional system of remains incompletes

[OLAF \(the European Anti-Fraud Office\)](#) has worked on the prevention of fraud affecting the Community's interests since 1999. It employs 470 people. Its budget was in 2009 €57 millions. In 2010, the Office reported that its activities have led to the recovery of €250 million. However, OLAF has a major defect: it is a service of the European Commission, even though it has been vested with a certain degree of autonomy, guaranteed by a Supervisory Committee and a special status. Consequently, working with penal jurisdictions of EU member states is rather difficult. OLAF cannot bring cases to court in the member states. When an investigation requires prosecution, the Office transmits the file to the relevant national authority. Since 2006, the Commission is considering the necessity to reform OLAF again. [A reflexion paper was issued in July 2010.](#)

[EUROPOL](#) is in charge of fighting certain forms of transnational crime. It employs 660 people, including 120 liaison officers. The EUROPOL budget for 2009 was €68 millions. EUROPOL sets up joint investigation teams in EU member states.

The Europol Convention has been replaced by a [Council decision](#) in 2009. EUROPOL became an EU Agency. It will reduce the power of national parliaments to control the development of Europol, and furthermore will accelerate the pace of the development of Europol's powers and competence.

However, its competences are not that of an operational police force. Investigation powers remain under exclusive competence of members states. It is still considered as a white elephant by national police forces.

And [EUROJUST](#) is a unit comprising prosecutors and police officers, whose mission is to "contribute to a good coordination between national authorities in charge of prosecution and

to take part in investigations targeting organized crime, mostly on the basis of investigation conducted by Europol". However, EUROJUST has no jurisdictional powers whatsoever, even though this organization is sometimes considered as Europol's judicial branch.

The system is therefore a complex one. In certain situations, both OLAF and EUROPOL may be in charge of the same form of crime. Sometimes, there is a kind of competition" between them. Coordination between member states systems is delicate.

Setting up a European Prosecution Office would give more strength to the judiciary to control police and administration repression devices (in particular databases) which are already developed and supported by a [Security-industrial complex](#).

The European Prosecutor's Office : a system swinging between efficiency requirements and the guarantee of rights

According to the *Corpus juris*, the European prosecutor should intervene only during the initial stage of the criminal investigation : it is the period with the more important obstacles imposed by difference between judicial systems.

It's a light structure, with a European prosecuting service in Brussels and European deputy prosecutors in the capital cities of each EU member state.

Trials and appeals remain before national courts. The European Union Court of Justice intervenes only in case of conflict of competences regarding the choice of the jurisdiction of the judgment. This is not a federal project. It does not promulgate a European judicial system next to the ones of member states, as is the case in the United States. But it reflects a willingness to establish an "organized pluralism^[6]". This is a new model that may serve as example in a world where law may no longer be perceived in terms of hierarchy of norms or pyramids.

The idea was to build up a system swinging between efficiency requirements and the guarantee of rights. The balance between efficiency and guarantees of rights would be the result of the adoption of the following rules:

- Legality of pursuits: The prosecution must always launch an investigation as soon as it becomes aware of facts that may constitute an infraction;

- Independence: members of the prosecution are appointed by the European parliament for an undetermined period of time. The Commission nominates the general prosecution office members and the states nominate deputy prosecutors. They are liable only to the European Union Court of Justice in disciplinary rulings;
- Control by a "judge of freedoms" who may grant, where necessary, restrictive measures or privation of rights (temporary detention, telephone eavesdropping);
- European territoriality principle : it allows considering a unique European judicial space where issued warrants and passed verdicts are enforceable.

In 2010, after seven years of the black out, the European public prosecutor was again promoted.

The Lisbon Treaty considers the creation of a prosecutor with two areas of competence ([Art 86 on the on the functioning of the EU](#)): first, for the prevention of infractions to EU' financial interests; after, for struggling against criminal activities with transnational dimension. The European prosecutor should be established from EUROJUST.

The unanimity of all 27 states is required each time, but enhanced cooperation is nevertheless possible (it is an important advantage with respect to what was envisaged by the "constitutional treaty").

On March 3, 2010, [the Spanish presidency presented a project aimed at creating a European prosecutor](#). It would initially be in charge of conducting investigations and instituting criminal procedures relative to cross-border crimes, such as human and drugs trafficking or terrorism. During her speech at ERA on March 12, the European Commissioner in charge of justice declared that she had a firm intention of setting up a European public prosecutor before the expiry of her mandate. On [April 15, 2010, the EU Council issued a note](#) advising that the focus should be on finding the most appropriate procedure to implement the project. This means that the enhanced cooperation procedure should be applied as soon as nine member states join Spain, without even seeking the consent of all the 27 members. The [Belgian presidency is also supporting the EU prosecutor](#) initiative.

Conclusion

It is important to bear in mind the importance of maintaining the balance of the initial project defined in *Corpus juris*. The European public prosecution service is not a goal in itself. It positions itself in a more global project that defines the balance between the efficiency requirement and the respect of fundamental rights.

Political difficulties would have to be overcome. But if judicial sovereignty remains, when economic and monetary sovereignty are already delegated, it creates a distortion that favours cross-border crime. States would have to understand that wanting too much to preserve the appearance of their judicial sovereignty leads up to turning sovereignty into an appearance.

They might have to face the following choice: either delegate a part judicial power to an independent European institution or relinquish it to those who know how to circumvent borders.

Such a model may succeed if all judges and prosecutors share the same values, if there is a mutual trust. An another condition is the respect, by the executive branches of each countries of the separation of powers.

We have to invent new scales of justice. For the beginning, a French or German judge or prosecutor asking his Serbian, Romanian or Bulgarian counterpart for some investigations should be sure that the work is done fairly, with efficiency and in good time.

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[1] Source : EUROPOL, communique from December 5, 2009

[2] M. Delmas-Marty et J.A.E Vervaele (éds), *The Implementation of the Corpus Juris in the Member States*, Intersentia (Anvers), 2000

[3] COM(2000) 608

[4] COM(2001) 715; COM (2003)128

[5] February, 24th 2003, A5-0048/2003

[6] Mireille Delmas Marty, *Le pluralisme ordonné. Les forces imaginantes du droit* Ed. du Seuil,