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Ministry of Justice

Directorate General of Law and Order

Enforcement Division

Postal address PO Box 20301, 2500 EH The Hague
Permanent Representative to the European Union in Brussels
Dr. B.R. Bot
Herrmann Debrouxlaan 46
1160 BRUSSELS
BELGIUM

Address
Schedeldoekshaven 100
2511 EX The Hague
Tel. (070) 3 70 79 11
Fax (070) 3 70 7789
Telex 34554 mvj nl

Directorate-General of Law and Order Office
Contact Dr P.J.J. van Voorst
Direct dial (070) 370 7514
Date 24 May 2002
Our ref. 5167258/502/PV
Your ref. COM (2001) 715 final;
Enc(s) 1

Please quote date and. reference in all correspondence

Subject: The Government's comments on the European Public Prosecutor Green Paper

Your Excellency,

Please find attached the Government's comments on the Green Paper on the criminal-law protection of the financial interests of the Community and the creation of a European Public Prosecutor (doc. (COM) 2001 715 final).

The European Commission has invited comments on the Green Paper no later than 1 June 2002 to be sent to:

The European Commission
European Anti-Fraud Office (Section A.2)
"Comments on the Green Paper on a European Public Prosecutor"
Rue Joseph II, 30
B-1049, Brussels.

Please forward the attached comments by the Government to the European Commission before 1 June at the address given above.

The Minister of Justice,

cc.: the Minister of Foreign Affairs, the Minister of Finance, the Minister of LNV, the Minister of SZW

Response by the Dutch Government to the Green Paper on the criminal-law protection of the financial interests of the Community and the creation of a European Public Prosecutor

Introductory comments/general assessment

The Dutch Government's assessment of the initiative to create a European Public Prosecutor to combat Community Fraud is a positive one, though it notes at the same time that the proposals merit more detailed examination on a variety of points, and careful consideration of their interaction. Success in tackling Community fraud requires not only the creation of new officials, it is also essential that they should be able to operate effectively, which is to say they must possess an adequate legal armoury and have sufficient capacity for investigation, prosecution and trials in Member States. As far as the requisite legal armoury is concerned, the European Public Prosecutor should in theory be able to operate on the basis of national law in Member States. Having regard to the proposals in the Green Paper, it can also be expected that there will be considerable pressure to harmonize (elements of) legislation in the sphere of criminal procedure. In view of the far-reaching consequences this will have for national legislation and the application of criminal law, the Dutch Government would like the continuing discussion to question whether substantial interference of this kind is warranted, all the more since EC fraud accounts for a relatively small proportion of total cross-border crime. As far as the requisite capacity is concerned, the European Public Prosecutor must be able to possess a real capacity for investigation which is present or must be created in Member States. There must also be a guarantee that in those cases where the European Public Prosecutor initiates investigation, a trial will follow within a reasonable period of time. As the Commission points out, it is a known fact that in all Member States the lack of enforcement is made considerably worse by the lack of capacity necessary and often also the lack of adequate specific financial expertise during investigation and prosecution, and the time-consuming nature of trials. The proposal that the European Prosecutor can make a more or less arbitrary appeal for the capacity available in Member States will lead to competition with national priorities, without any guarantee that the desired results will be obtained. The Green Paper erroneously pays no attention to the problem of capacity, or to the way in which the extra capacity for investigation, prosecution and trials which is required in Member States should be funded. The Dutch Government believes that the Commission should examine this point in greater detail for inclusion in further discussion. At the same time the Dutch Government assumes that national capacity will have to be funded at a national level.

The Dutch Government notes that the Commission's proposals contain no provision for a transfer of liability for the European Public Prosecutor's own actions unless it is submitted directly to a national court in the context of a prosecution. The Dutch Government regards a suitable provision as essential.

The Dutch Government believes that if the European Public Prosecutor is to be effective, he must submit reports annually on the way in which he plans to make use of his powers and spend the budget which he requires for the purpose. The annual plan would also include agreements made with Member States. At the end of the year, the European Public Prosecutor will submit a report on the way in which the plan was implemented to the Commission, the Council and the European Parliament. This goes some of the way towards meeting the need for democratic control (in the shape of the right to approve the budget) via the European Parliament over the

exercise of power by the European Public Prosecutor, who has a direct influence on the rights and freedoms of European citizens.

The Dutch Government believes that the road to the creation of a European Public Prosecutor can be followed via Article 280 of the EC Treaty, though in future it is conceivable that he will have the status of a full Community institution, albeit with limited terms of reference. The advantage of this would be that the relationship between the European Public Prosecutor and other institutions can be regulated clearly and comprehensively, which would also benefit democratic control of that office.

The Dutch Government supports the allocation of powers to the European Public Prosecutor in the field of Community fraud, agreement on which has already been reached by Member States in the relevant Agreements, Treaties and Protocols. It is desirable that prosecutions should concentrate on this, and that no problems should arise of "hybrid cases" which converge with other "non-Community offences". "Non-Community offences" of this kind must be prosecuted at a national level. The Dutch Government believes that for a distribution of powers, reference should be made to the EU treaties on the common-law protection of financial interests which are already in existence. To implement these Treaties, Member States must attach a penalty to the definitions of fraud, corruption and money-laundering which they have agreed with each other, if commission of those offences damages or may damage the Community's financial interests. The condition that there should be an adverse impact on EG budgets can serve as a clear demarcation of the powers of the European Public Prosecutor. This should mean that the sphere of operations of the European Public Prosecutor is limited to the criminal offences which activate the aforementioned Treaties (which will then involve the offences of forgery, bribery and money-laundering in the Criminal Code), if these offences harm the financial interests of the Community. But this should not mean that the European Public Prosecutor has his own exclusive sphere of operations, and the national prosecution authorities must retain their powers, unless this does not arise if the case is being handled by the European Public Prosecutor. A close examination of the *ne bis in idem* rule is required in this context.

The Dutch Government believes that the status of the judge with regard to civil liberties requires more detailed clarification and consideration. In particular, this involves the nature of the examination which he must carry out (national law and/or new European law), the prevention of forum shopping (favouring courts in countries where the fewest requirements apply) and the relationship with the concept of mutual recognition of court verdicts in Member States. The relationship with the judicial organisation in Member States also requires closer examination.

It is still important that the financial interests of the Community are protected by a variety of means: an effective enforcement strategy must consist of a balanced mix of preventive measures, measures in the sphere of supervision, control and prohibition. The second report by the Committee of Independent Experts on the reform of the Commission, of 10 September 1999, also advocates a similar approach. The Dutch Government endorses this approach wholeheartedly.

Anti-fraud legislation and the exercise of adequate and effective supervision, of compliance with and enforcement of Community legislation by Member States are of major importance. The Dutch Government endorses the proposals which the Commission has already made in this area in its statement on a general strategic approach to the fight against fraud and the action plan on the prevention of fraud

2001-2003[1]. It is important moreover that administrative sanctions can be effective in a large number of cases: action under criminal law must be seen as an ultimate remedy. It is above all important that the administrative path and the legal path should be effectively harmonized, amongst other things to prevent any obstruction to reclamation under administrative law. The Green Paper relates exclusively to the final link in the chain of enforcement, the application of criminal law. The Dutch Government stresses the relatively limited role which criminal law can play as the ultimate remedy in the fight against EU fraud. In this context the Dutch Government is not convinced that the creation of a European Public Prosecutor will quickly lead to a substantial reduction in Community fraud, an intensification of the fight against cross-border organized crime in general and an end to the frictions which characterise any co-operation in international criminal-law, just like that.

The Dutch Government endorses the idea behind the proposals – more effective investigation, prosecution and trials of perpetrators of fraud and other offences against the Community's financial interests. Powerful and effective action against crime to the detriment of EU budgets takes priority for the Netherlands. There is still a need for improvement on this point in Member States. The image in the minds of EU citizens in all of this is also important: the necessary measures must be implemented at a European level if fraud is to be tackled effectively with European funds. The European Public Prosecutor can make an effective contribution to this, but for that purpose he must be properly equipped, and supplied with clear and specific terms of reference, and provide an account of their implementation. In view of all this, the Dutch Government believes that the proposals in the Green Paper take the formulation of ideas on the reinforcement of criminal-law protection of the financial interests of the Community a step further. The Dutch Government wants to make a constructive contribution to the discussion, and the proposals will be commented on below on the basis of this position using the eighteen questions which the Commission has framed. On some points more detailed suggestions will be made or alternatives proposed. Here it is important that the various topics which come up for discussion in the Government's response can only be considered together in this context. Changes in one sub-section will have a bearing on the viewpoint in others.

Question 1 What are your views on the proposed structure and internal organisation of the European Public Prosecutor? Should the European function conferred on the Deputy European Public Prosecutor be an exclusive function or could it be combined with a national function?

As far as the form of organisation is concerned, the Dutch Government believes that the proposed decentralised model with Deputy European Public Prosecutors in Member States is a logical choice. One point of particular interest is that the relationship with national prosecution authorities must be clearly defined. The Commission assumes that the Deputy European Public Prosecutors are not subordinate to national prosecution authorities, but come directly under the European Public Prosecutor. But in order to operate in a national setting, Deputy Public Prosecutors must be able to direct investigations and bring cases before national courts. The Green Paper also seems to assume that Deputy European Public Prosecutors are part of national prosecution authorities. At least it states that they will be able to retain their national legal position as regards training, recruitment,

[1] Communication from the Commission of 28 June 2000 – Protection of the Communities' financial interests – The fight against fraud – For an overall strategic approach (COM (2000) 358 and Communication from the Commission of 15 May 2001 – Protecting the Communities' financial interests – Fight against Fraud : Action Plan for 2001-2003 (COM (2000) 254).

appointment and day-to-day management. One potential solution to the tension between these two assumptions (part of national prosecution authorities, but without any hierarchical relationship) is that Deputy European Public Prosecutors will not be located within national prosecution authorities, but enjoy a special status with the powers which are necessary to execute their tasks. To this end a specific legal provision must be created in the national legislation of Member States. As far as the mandate is concerned, attention is drawn to the following. To guarantee that Deputy European Public Prosecutors in Member States can concentrate on their own tasks without distraction, i.e. the prosecution of offences against the financial interests of the Community, an "exclusive mandate" is to be preferred. Combination with other, national tasks would have an adverse effect on this. The assignation of an exclusive mandate requires that a clear distinction can be drawn between "Community matters" as specified in the relevant Treaties (see Question 2) and "non-Community matters". Since prosecution is usually on the basis of national definitions of penalties which have a wider application than Community fraud alone (e.g. "forgery" in the Netherlands), it is difficult to draw any such distinction at a statutory level. The solution must therefore be found in the creation of practical workable criteria and unambiguous agreements between the European Public Prosecutor and national prosecution authorities. This question must be considered in conjunction with Questions 2 (definition of offences), 4 (referral of cases) and 6 (hybrid cases). The following points require closer examination:

- which criteria can be used to determine whether the European Public Prosecutor or
- national prosecution authorities have jurisdiction (Question 2)?
- who will be responsible for making referrals (Question 4) and
- what procedures must be adopted in the event of doubt, such as hybrid cases, for example (Question 6)?

Question 2 For what offences should the European Public Prosecutor have jurisdiction? Should the definitions of offences already provided for in the European Union be amplified?

For the time being, the jurisdiction of the European Public Prosecutor will have to be confined exclusively to such activity as is recorded in the Fraud Agreement of 1995 and its protocols, and in the Corruption Treaty, provided the financial interests of the Community are at issue. After all the creation of a European Public Prosecutor as proposed is intended to strengthen the criminal-law–protection of the financial interests of the Community, and such activity is at its heart. At present the Dutch Government does not support the addition of any other criminal offences.

It is an important point to consider that a clear distinction must be drawn between the jurisdiction of the European Public Prosecutor and national prosecution authorities to prevent any risk of conflicting jurisdiction. After all, offences against the financial interests of the European Community as referred to above are usually covered by the national legislation of Member States. This means that at present national prosecution authorities have the power to institute criminal proceedings for such offences. It is a thus a matter of (a) clearly delineating the jurisdiction of the European Public Prosecutor and (b) preventing any conflict between the jurisdiction of the European Public Prosecutor and national prosecution authorities in advance. One way of establishing the jurisdiction referred to in (a) is to apply the following criteria:

- "if as the result of an offence which is defined in Articles (…) of the national Criminal Code, damage is done to the financial interests of the European Community, or funds are extracted from the budget, or

- "if an offence which is defined in Articles (…) of the national Criminal Code is followed, accompanied or preceded by dispensation or enforcement by or on behalf of the European Communities and performed to prepare for or facilitate that dispensation or enforcement, or to secure possession of anything received unlawfully".

As far as the division of jurisdiction is concerned, it is still possible to conceive the operation of a threshold, expressed in terms of financial disadvantage, or the size of the estimated amount of damage. The Green Paper discusses this option under the heading of "Distribution of cases between the European Public Prosecutor and the national prosecution authorities", but it seems more appropriate to the definition of the jurisdiction.

As far as the demarcation of jurisdiction with regard to the national prosecution authority is concerned, as cited at (b) above, it seems prudent for the legislation to indicate that if the criteria under (a) are satisfied, the European Public Prosecutor has jurisdiction, with the associated rule of precedence. This rule of precedence offers the advantage that the national prosecution authority also has jurisdiction, but will not take any action if the European Public Prosecutor is dealing with a case. A more detailed exposition of the 'ne bis in idem' principle is called for (see Question 14). An exclusive jurisdiction for the European Public Prosecutor may seem more attractive, but entails the risk of a negative conflict of jurisdiction.

Question 3 Should the establishment of the European Public Prosecutor be accompanied by certain further common rules relating to penalties, liability, limitation or other matters? If so, to what extent?

The Dutch government does not consider any more far-reaching Community rules in the sphere of penalties to be necessary. A harmonisation of penalties of this kind passes over the fact that the offences involved here already attract a penalty in a more general sense in the legislation of the different Member States, and they are thus already provided with a sanction. National definitions of offences, such as forgery in the Netherlands, for example, encompass not only Community fraud, but also other (national) forms of fraud. An independent harmonisation of the penalty for behaviour which may be regarded as an offence against the financial interests of the European Community, would contravene the basic assumption which is included in Article 280 of the EC Treaty that Member States must take the same action against fraud which damages the financial interests of the European Community as against "national" fraud. While the rule has been conceived with an eye to action against Community fraud, the idea of parity is also at an inverse premium.
Needless to say, it is also noted that in the judgement of the Dutch Government that there is no scope for introducing minimum penalties, even in the event of further harmonization. Trials always take place in a national context, via national courts.

For the time being, the Dutch Government has no objections to the idea of an option to consider additional penalties, although this idea needs more detailed explanation.

The following is also offered as a suggestion. If the national legal systems of the Member States allow the Public Prosecutor to specify the penalty which in his own judgement would be appropriate, it may be useful, with a view to more equality of action on the part of the Deputy European Public Prosecutor, to issue Directives at an EC level on criminal proceedings, on the prosecution of offences against the financial interests of the Community. This would boost the transparency of policy on

criminal proceedings and thereby of the actions of the officials of the European Public Prosecutor's Office.

As far as the liabilities of legal persons is concerned, the Fraud Agreement of 1995 and its protocols all assume that Member States will take responsibility for an appropriate regulation in their national legislations. The Green Paper's reticence on this point is thus striking. Now, some seven years after the creation of the Fraud Agreement, the Dutch Government supports the idea of taking another step forwards, and making the criminal-law liability of legal persons an objective.

The Dutch Government regards a closer inspection of the periods of limitation for different offences against the financial interests of the Community as a good thing. Generally speaking, the periods of limitation which are effective in Member States are not the same, after all. But the idea which the Green Paper puts forward that there should be an identical period of limitation for all offences is not easy to follow. It makes more sense to apply a longer period of limitation if a more serious offence is involved (which will usually be apparent from the penalty). The plea to apply a lengthy period of limitation automatically in cases of Community fraud, with reference to the complexity of the cases, is not illogical, but requires further detailed consideration. Whether it is also necessary to harmonize the bases for interruption of the period will depend on the period of limitation which is ultimately fixed. After all, the longer the periods of limitation, the less relevant the bases for interruption.

Finally another two observations in this context.

Depending on the principle of criminal prosecution which is chosen (discretionary or mandatory, see Question 5), we shall have to examine whether, and if so which legal remedies must be available to resist the decisions of the European Public Prosecutor to suspend a prosecution. It may be sufficient in this connection to refer to the national law of the Member States.

We shall also have to examine in due course how the Deputy European Public Prosecutors in the Member States will be able to request assistance, extradition or legal assistance from third nations. One possibility would be that Member States should appoint the Deputy European Public Prosecutor who is established on their own territory as a judicial authority, within the meaning of the relevant bilateral or multilateral treaties in the sphere of criminal-law co-operation to which they are party.

Question 4 When and by whom should cases have to be referred to the European Public Prosecutor?

Under Dutch law (Article 162 of the Code of Criminal Procedure), public bodies and officials are obliged to report any criminal offences which they may encounter in their official capacity. This relates to crimes committed while in office, corruption and the misuse of regulations whose implementation they are charged with or must monitor. The offences, which are within the jurisdiction of the European Public Prosecutor (see Question 2), are types of general crimes which are included in Dutch legislation: a duty to report these crimes will therefore exist from the outset. The Dutch Government may therefore find itself under the obligation which is advocated in the Green Paper to notify national (and Community) authorities.

The subsequent question is who must be notified in the first instance. The Dutch Government does not advocate that the European Public Prosecutor should be notified direct, without going through the national prosecution authorities. To begin

with, it will not always be clear whether the offence concerned is within the jurisdiction of the European Public Prosecutor. This will have to be determined by the national prosecution authorities first. It is also important that national prosecution authorities are aware of the nature and scale of offences which are identified in their national territory, even if they will be ultimately prosecuted by the European Public Prosecutor. For this reason the Dutch Government advocates that suspected offences against the financial interests of the European Community are in the first instance reported to the national prosecution authorities. If the national prosecution authorities establish that an offence is involved which falls within the jurisdiction of the European Public Prosecutor, they will refer the case to him. The problem here is that in practice it is not always possible to draw a watertight distinction between "Community fraud" and "non-Community fraud". Often "hybrid cases" (see also Question 6) will be involved. In such cases a consultative structure must be set up between the Deputy European Public Prosecutor in the Member State and a permanent representative of the national prosecution authorities. Their consultations must determine how the case will be prosecuted. Finally, it should be observed that the European Public Prosecutor will also have the power to initiate the prosecution of "Community crimes" independently, without their being the subject of a notification (except in the case of offences which can only be prosecuted in the event of a complaint).

Question 5 Should the European Public Prosecutor be guided by the mandatory prosecution principle, as proposed by the Commission, or by the discretionary prosecution principle? What exceptions should be provided for in each of these cases?

In the Netherlands the national prosecution authorities apply the principle of discretionary prosecution. This principle of discretionary prosecution is organized in such a way that the discretionary powers of the Public Prosecutor's Office can be tested in a variety of ways. The Public Prosecutor's Office in the Netherlands has the option of deciding within certain margins whether to prosecute, or whether the case will be dealt with in some other way, for example by the payment of a fixed penalty. Criminal prosecution can also be waived in some circumstances (dismissal). The prosecution of some types of offences is subject to directives which are issued by the Public Prosecutor's Office with the consent of the Minister of Justice. The directives are in the public domain, and give both the courts and the public an idea of the criteria which the Public Prosecutor's Office applies to its decisions on prosecution. An interested party can lodge an objection to a decision by the Public Prosecutor's Office not to prosecute through the courts, which in such cases can then still issue an order to initiate criminal prosecution. The Minister of Justice is politically accountable for the actions of the Public Prosecutor's Office, and can be called to account for them by Parliament. Finally, the Minister of Justice has what is known as a "power of direction", which means that he can give the Public Prosecutor's Office (general or special) instructions. These powers extend to individual cases too. To guarantee democratic control, the Minister of Justice is obliged to notify Parliament of every instruction which he issues in an individual case. In practice these powers are very rarely used. This shows that the principle of discretionary prosecution which is applied in the Netherlands is formulated in such a way that there is an intricate and balanced system of checks and balances. At a national level the Dutch Government strictly adheres to the application of the principle of mandatory prosecution.

The Dutch Government realizes that a principle of discretionary prosecution of the kind described above, with a similar level of democratic and judicial control and the associated checks and balances, is easier to implement at the level of the individual

Member State than at the level of the EU. For this reason the Dutch Government can endorse the choice of the principle of mandatory prosecution for the limited and discrete area in which the European Public Prosecutor has jurisdiction. The attendant obligation to initiate criminal prosecution in every case strengthens judicial control of the European Public Prosecutor, as the courts will always (except in the case of dismissal) be in a position to assess the actions of the European Public Prosecutor.

It is important to consider the possible exceptions to the principle of mandatory prosecution. The Green Paper significantly proposes a very wide range of potential exceptions to the principle. This version of the principle of mandatory prosecution seems to differ very little from a system of discretionary prosecution. If a system of mandatory prosecution is chosen, it will have to be accompanied by a limited and restrictive list of exceptions. The following grounds for exemption from prosecution present themselves:

- It (subsequently) becomes apparent that the party concerned has wrongfully been regarded as a suspect. This may be a matter for discussion if a legal person or a natural person is being prosecuted for an offence. If a decision is taken to prosecute either of these, then the other cannot be regarded as a suspect;
- If there is a suggestion that evidence is inadequate or has been obtained unlawfully, and it is obvious in advance that to continue with a criminal prosecution will not result in a successful conviction;
- If it is apparent in advance that there are formal reasons why there is no prospect of initiating criminal prosecution. This may be the case, for example, if there is a possibility of it being precluded through lapse of time, if the suspect dies, or if the reasonable period specified in Article 6 of EVRM is exceeded;
- The offence is not punishable: this situation may occur if before a case has been brought, a court establishes that the law does not provide a punishment for the offence;
- It is obvious that the culprit cannot be punished, because there is suggestion of mental disturbance, or that he or she suffers from a serious mental disorder.

The Dutch Government advocates distinct and clearly defined categories of cases in which prosecution may be waived. In the opinion of the Dutch Government, the possible application of a financial threshold, expressed in terms of financial disadvantage or the scale of damage estimated, is properly a question of jurisdiction (see Question 2), and not of exception to the principle of mandatory prosecution.

Question 6 Given the ideas put forward in this Green Paper, how should functions be distributed between the European Public Prosecutor and the national enforcement authorities, notably in order to see that hybrid cases are properly treated?

As has already been observed in the response to Question 2, the Dutch Government advocates that for the time being the European Public Prosecutor should have exclusive powers to prosecute offences which are directed against the financial interests of the European Community as there described. National prosecution authorities will accordingly be empowered to prosecute all other offences. As far as the question of hybrid cases is concerned, it must be stated at the outset that excessive attention to this problem serves to obscure the clear position of the Deputy European Prosecutor relative to the staff of the national public prosecutor's office. The distinction between the two must first be established clearly, before any attempt is made to tackle the question of hybrid cases. The analysis in the Green Paper is also incomplete. For instance, no attention is paid to the situation in which a criminal

organization not only commits fraud with Community funds, but is also active in the drugs trade: what is known as a “hybrid case”. The examples given in the Green Paper (a and b on p.57) entail a completely different problem, notably the lack of any clear guidance as to precisely which offences fall within the jurisdiction of the European Public Prosecutor and which do not. The solution to this must be sought in a sharper delineation of that distinction (see also the response to Question 4). If a clear distinction is drawn between the jurisdiction of national prosecution authorities on one hand and that of the European Public Prosecutor on the other, the way in which hybrid cases are dealt with need not be a problem. A clearer ruling on jurisdiction can serve as basis for examining on a case-by-case basis whether the European Public Prosecutor or the national prosecution authorities have jurisdiction. If it is established that a case has both the features of Community fraud and “national” features”, the case must be shared. The European Public Prosecutor is empowered to prosecute the aspects relating to Community fraud, while the national prosecution authorities are empowered to prosecute the other criminal offences. This obviously calls for effective co-ordination and co-operation between the European Public Prosecutor and national prosecution authorities, in the form of a system of regular consultation between the two sides.

In practice it is also often the case that Community fraud involves not only Community funds but also national funds. Thus VAT fraud is always primarily a national fraud, which also has consequences for the size of the funds which are transferred to the Community on the basis of VAT. In the margins of spending, reference is made to the Structural Funds, which almost always involve national co-finance (usually 50%). The Green Paper does not consider this problem. Here the solution lies in drawing a clear distinction between that part of a complex crime which can be defined as an offence against the financial interests of the Community and that part which can only be defined as “national” fraud. On the basis of the ruling on jurisdiction advocated above it will then be possible to specify the offences which will be submitted to the European Public Prosecutor and those which will be submitted to the national prosecution authorities.

Question 7 Does the proposed list of investigation measures for the European Public Prosecutor seem to you to be adequate, particularly as a means of overcoming the fragmentation of the European criminal-law area? What framework (applicable law, review – see para. 6.4) should be envisaged for investigation measures?

Here the hybrid nature of the proposals in the Green Paper exacts its vengeance, especially since a number of issues are confused. Proposals to reinforce the criminal-law approach to offences against the financial interests of the Community are associated with ideas which are aimed at counteracting the assumed fragmentation of the European criminal-law arena. The proposals sometimes overlap, but sometimes they seem to contradict each other, as in the case of the simultaneous introduction of a judge of freedoms *and* mutual recognition of evidence. This involves a number of fundamental problems, which definitely require a more careful and more detailed treatment than is found in the Green Paper.

If mutual recognition of evidence is opted for, this implies that a decision by a national judicial authority in one Member State (based on the national law of that Member State) will be implemented in other Member States without any more detailed examination of the national law of the Member States where the action will be carried out. This thus involves a form of co-operation whereby existing differences between the provisions of the law of criminal procedure (which relate to evidence,

methods of coercion etc.) in Member States are “disregarded” as it were. Effective assessment of the implications of the application of mutual recognition, as defined here, warrants the recommendation that the Commission should identify existing differences in national legislation in the sphere of the law of criminal procedure.

But the judge of freedoms, as advocated in the Green Paper, would have to operate on the basis of harmonized rules of criminal procedure. It is not obvious what need would still exist for mutual recognition. The judge of freedoms as described is by and large a singular construct. He operates at a national level on behalf of the Deputy Public Prosecutor, but is he part of national judicial power? And if so, what is his status, in the Netherlands for example, as regards the examining magistrate? Will he also apply rules which differ from the rules of criminal procedure applying in purely national criminal cases? Ultimately his actions will also be subject to review by the national session judge, although it is not apparent from the proposals which law the session judge will have to apply during his review.

Nor is it obvious why the judge of freedoms in the Member State where an investigation starts should make decisions which will also have to be implemented in other Member States. It would be more obvious if the European Prosecutor were to approach the judge of freedoms in the Member State where the investigation measures will have to be carried out. The judge of the freedoms will apply the same harmonized rules of criminal procedure, but will probably be in a better position to balance the interests of the citizens of that Member State (among others) which are at issue with investigatory interests than a “foreign” judge in another Member State. In the United States this approach also applies in the case of federal criminal investigations.

The Dutch Government regards the proposals in the Green Paper as distinctly unbalanced and confusing. It would be much better to work out which solution is advocated for which problem, together with the inevitable consequences. At the same time it should be noted that if the principle of mutual recognition of evidence is opted for (it must be possible to introduce evidence which has been lawfully obtained in one Member State into legal proceedings in another Member State), it is in any case important that exceptions are possible if acceptance of the evidence constitutes a fundamental violation of the national rule of law in the Member State where the criminal case comes up. In any case there must also be a guarantee in these criminal cases that, as with purely national criminal cases, a complete judicial review is possible of the course of the criminal investigation and collection of evidence. One solution which is proposed in the context of the *Corpus juris* would be a preliminary court at the European Court of Justice. But this proposal has the serious disadvantage that, depending on the stage which the criminal-law investigation is at, the assessment of progress and its implementation by the courts would take place variably at national or European level, and also on the basis of disparate rules of law. If a fundamental choice, of the kind which is made in the Green Paper and also endorsed on our part, is made that a trial should be held before a national court, a European judicial review would simply not be appropriate. On the other hand the aim must be a system which empowers the national session judge to carry out a complete review. Here we are thinking of direct contact between national courts, which permits the advice of foreign colleagues on the lawfulness of evidence acquired in the interests of an actual criminal case in their country to be sought in a straightforward manner.

Question 8 What solutions should be envisaged to ensure the execution of investigation measures undertaken by the European Public Prosecutor?

There is no doubt that the effectiveness of the actions of the European Public Prosecutor will be determined largely by the extent to which the necessary expertise and capacity are available in the national criminal investigation agencies of the Member States. This will be all the more apparent if the principle of mandatory prosecution is assumed (see Question 5), whereby in principle prosecution must be initiated in all cases (apart from a limited number of exceptions) which come to the attention of the European Public Prosecutor .

The structure and operating methods of national criminal investigation agencies and their relationship to national prosecution authorities differ from one Member State to the next. This may be the reason why the Green Paper proposes to leave the extent to which investigation measures are carried out in Member States to the Member States themselves. But this option, which may seem attractive at first sight, might in practice lead to considerable problems. After all, in the absence of clear and specific agreements with Member States on the availability of investigative capacity, there is a considerable risk that where cases are reported to the European Public Prosecutor it will not be practicable to out carry investigative inquiries.

The Dutch Government advocates maximum clarity about and understanding of the actions of the European Public Prosecutor. It therefore urges that the European Public Prosecutor should draw up an annual action plan and/or annual plan, as a basis for the conclusion of agreements with the Governments of Member States on the provision of the necessary capacity for investigation, prosecution and trials. The hierarchical and disciplinary structures of the criminal investigation agencies as they currently exist in Member States should not, or only minimally be affected by this. The implementation of the annual plan and the spending of his budget will be reported annually by the European Public Prosecutor to the Council, the Commission and the European Parliament. The necessary funds will only be made available if the institutions involved in drawing up the budget agree with it
.
As far as the control of national criminal investigation agencies by Deputy European Public Prosecutors is concerned, attention is drawn to the observations which were made in the response to Question 1.

Finally, the Dutch Government draws attention to the fact that the European Public Prosecutor as proposed will not be able to operate unless the extra capacity which is required for investigation, prosecution and trials becomes available in the Member States. The Green Paper erroneously pays no attention to this point. The Dutch Government believes that this point must be examined by the Commission first, and must then be included in further discussion. Here the Dutch Government assumes that national capacity will have to be funded nationally.

Question 9 On what terms should the European Public Prosecutor be able to take a decision to close a case or commit it for trial?

On the basis of the principle of mandatory prosecution, the assumption is that prosecution will be initiated in every case, apart from a strictly specified number of exceptions (see response to Question 5). If there are no grounds for dismissal, it logically follows that the European Public Prosecutor will bring the case before the competent national court. The Dutch Government observes that the Commission’s proposals do not include a provision for the European Public Prosecutor to unburden himself of responsibility for his actions if it is not immediately brought before a national court in the context of a prosecution. In particular it is conceivable that there

will be a lack of adequate activity or a display of excessive or unreasonable activity (compare the actions of independent prosecutors in the USA). The Green Paper only makes provision for action in extreme situations, i.e. the dysfunction of the European Public Prosecutor, which justifies dismissal. Apart from the marginal notes which can be placed alongside the procedures, this limitation passes over the fact that there must also be a mechanism which enables institutions and European citizens to measure the results of the policy on prosecution which the European Public Prosecutor implements and, where necessary, put marginal notes against the efforts required of Member States to make resources and manpower available. The Dutch Government draws attention to the proposal which is expounded in the response to Question 5 on the need to make known the intentions of the policy and its implementation by the European Public Prosecutor. As far as the institution of legal remedies against a decision by the European Public Prosecutor to waive prosecution is concerned, attention is drawn to the observations made in the response to Question 3.

Question 10 By what criteria should the Member State or States of trial be chosen? Should the European Public Prosecutor's choice be subject to review? If so, by whom?

On the basis of the principle of mandatory prosecution, with strict exceptions, it remains a matter of importance that the criminal cases referred to here should be brought in Member States which qualify from the point of view of effective administration of justice. There will be quite a few cases of Community fraud which lack a transnational character of any kind, in other words which are committed entirely within a single Member State. It will then be obvious that the trial should also be held in that Member State, unless a transfer of criminal prosecution seems more appropriate. Where cases involve a number of Member States, it may be possible for the trial to be held in more than one Member State. The circumstances of the actual case will also be critical to the question of whether it is possible and desirable to concentrate a trial or compel a division of the trial between different Member States. From the above it is apparent that in transnational cases in particular the Public Prosecutor is to a certain extent free to determine the place of trial. In that context it is essential that the place and manner of trial are governed solely by the desire for effective administration of justice. Forum shopping, which is based on the idea of bringing a case before the court which applies the most flexible procedural criteria or is otherwise less critical, is unacceptable. The phrase “effective administrative of justice” requires more detailed explanation. The source of inspiration for this can be found in the summary of criteria in Article 8 of the European Treaty on the transfer of criminal prosecution which came into being in Strasbourg on 15 May 1972.

These criteria can be applied both by the European Public Prosecutor when specifying the place of trial and by the national session judge when evaluating a defence by the defendant that the Deputy European Prosecutor's prosecution is not sustainable on account of forum shopping. The involvement of a preliminary court at the European Court of Justice to determine whether or not a case has been erroneously brought in one Member State or another seems – in addition to the fundamental objections to a court of this kind which have already been expressed under Question 7 above - to be a most laborious and needlessly complicated method.

As well as clear criteria, it is obvious that the European Public Prosecutor stimulates consultation on questions of this sort between the Deputy European Public Prosecutors concerned and with himself, so that with effective harmonisation Public

Prosecutors can finally decide on the Member State in which a case will be brought. Eurojust may also be able to play a part in this: after all, that body is charged with co-ordinating investigation and prosecution if cross-border forms of crime are involved, including offences against the financial interests of the European Community (see also Question 15).

As we have stated, the final decision will rest with the national session judge. The question is whether the courts, when confronted with evident forum shopping should have the option, as an alternative to a declaration of the non-acceptability of the Public Prosecutor, to refer the case to a colleague in another Member State who in its opinion has jurisdiction.

Question 11 Do you think that the principle that evidence lawfully obtained in a Member State should be admissible in the courts of all other Member States is such as to enable the European Public Prosecutor to overcome the barrier raised by the diversity of rules of evidence?

To begin with, attention is drawn to what has already been observed above in the response to Question 7. The extent to which the problems described will come up for discussion or be solved depends to a considerable extent on whether or not the competent court (in the person of a judge of freedoms or otherwise) reviews the exercise of powers for compatibility with harmonized rules of criminal procedure.

In the event of non-harmonized rules, one solution might be for the national law of each Member State to include a rule to the effect that evidence which is obtained in one Member State – other than in cases which would involve a fundamental violation of the national rule of law – cannot be regarded as unlawfully obtained on the basis of national law.

It would be only a step further for the national law of the Member States to include a rule which Dutch national law recognizes in the context of a criminal prosecution which has been taken over from another country, and which would read: “The documents relating to official actions in connection with investigation or prosecution which are submitted in response to its request by the authorities in the country in which the request for criminal prosecution originates have the same force in evidence as documents relating to similar actions carried out by Dutch officials, provided that their force as evidence does not exceed that which they enjoy in the foreign country” (Article 552 gg of the Code of Civil Procedure).

As was also stated in the response to Question 7, this does not affect the fact that it is ultimately the national court which must express an opinion on recognition of the evidence.

Question 12 To whom should the function of reviewing acts of investigation executed under the authority of the European Public Prosecutor be entrusted?

Acts of investigation executed under the authority of the European Public Prosecutor must be reviewed by the national court, if possible in the person of a judge of freedoms. A complete review by the national session judge trying the criminal case must also be possible. If the defendant contests (the lawful nature of) the evidence, a mechanism must be devised by means of which the national court can acquaint itself with the rules of evidence in the Member State in which the evidence was obtained,

and the way in which it was obtained. If a judge of freedoms is appointed in each Member State, he could act as a point of contact for the session judge.

Question 13 To whom should the committal review function be entrusted?

The Green Paper offers two options. Firstly, the creation of a European preliminary court, and secondly the authorization of a national court designated by the Member States. The Dutch Government prefers the second of the two options: the national court in the Member State before which the case is brought by the European Public Prosecutor.

If strict application of the principle of mandatory prosecution is assumed (see Question 5), there need be no discussion on completion of the investigation of whether or not the European Public Prosecutor was correct in starting prosecution. A defendant who believes that there is insufficient evidence of guilt or that prosecution has been initiated imprudently, must raise the matter during examination in court. Preliminary defences other than invalidity of summons or the court's lack of competence may be reviewed in chambers on equal terms with the procedure for giving notice of objection to the summons.

Question 14 Do you feel that fundamental individual rights are adequately protected throughout the proposed procedure by the European Public Prosecutor? In particular, is the double jeopardy principle properly secured (see paragraph 6.2.1)?

The Dutch Government believes that the proposals in the Green Paper do not make adequate allowance for the rights of the individual. The Green paper assumes that the situation may arise in which a person is prosecuted in a Member State for an offence over which the Public Prosecutor also has jurisdiction. But in the Dutch view this situation should be impossible, on the assumption that (a) the offences over which the European Public Prosecutor has jurisdiction are clearly defined, and (b) a rule of precedence applies. Attention is drawn to the response to Question 2.

If national prosecution authorities duplicate the previous actions of the Deputy European Public Prosecutor in the same Member State, existing national rules on double jeopardy should provide adequate protection against a second prosecution.

As regards the potential for duplication of action on the part of a number of Deputy European Public Prosecutors in different Member States at the same time, the existing provisions of Articles 54 – 58 inclusive of the Implementing Agreement for the Schengen Agreement should provide adequate protection. One point in the Green Paper on which attention is correctly fixed is the case which is due to be heard before the Court, case C-187/01 (criminal case against Hüseyin Gözütok). The outcome of this will be relevant to the consideration as to whether the existing Schengen rules need to be augmented.

The Green Paper also states that the fact that an individual must stand trial in another Member State is not a disadvantage, because he will in any case be given an interpreter. This passes all too easily over the fact that it probably makes a considerable difference to a defendant that he should stand trial in his own language and in his own country, apart from the basic emotional feelings of citizens who stand trial on foreign soil.

Attention is also drawn to the fact that if acts of investigation are carried out in different Member States primarily on the basis of mutual recognition, it probably makes a considerable difference if the defendant makes his objections to such conduct known in his own country or in a foreign country.

Question 15 How would the relationship between the European Public Prosecutor and those involved in cooperation in criminal matters in the European Union be best organised?

The basic assumption must in any case be that there should be no duplication and that the different players, each on the basis of his own tasks and responsibilities, makes two-way use of each other's services. The most important partners for a European Public Prosecutor will be: Eurojust, Europol and the European Judicial Network.

The Dutch Government advocates a strong co-ordinating role for Eurojust when it comes to the improvement of co-operation within the European Union on the investigation and prosecution of the criminal offences specified in Article 5 of the Decision on the creation of Eurojust. These include "fraud, corruption and any other criminal offence which harms the financial interests of the European Community". A clear and effective division of responsibilities and effective working agreements between the European Public Prosecutor and Eurojust are therefore of considerable importance. The actual potential for co-operation must be examined in greater detail. But it is worth recommending in any case that Eurojust makes a contribution to strengthening co-ordination and co-operation on efforts to tackle cross-border forms of crime against the financial interests of the European Community.

Europol, which since 1 January 2002 has also included the fight against cross-border organized fraud amongst its tasks, could undoubtedly offer the European Public Prosecutor interesting information in the sphere of intelligence and analysis. The conditions for co-operation between these two must be investigated. In this connection it is significant that the mandate of the European Public Prosecutor is more restricted than that of Europol.

The European Judicial Network (EJN) already involves a variety of partners in its activities, including Europol and OLAF. The products of the EJN can also be made available to other partners, such as a European Public Prosecutor, even though he is not technically part of the EJN. The EJN is at the service of all of the judicial authorities in the European Union, and thus also of the European Public Prosecutor.

Question 16 In the run-up to the Commission's evaluation of the rules governing OLAF, what factors related to the relationship between the Office and the European Public Prosecutor seem most meaningful to you?

OLAF is a body with administrative investigation powers with regard to behaviour which damages the financial interests of the European Community. The creation of a European Public Prosecutor does not give cause to introduce any changes to it. As soon as there is any suggestion of a breach of criminal law, OLAF must pass the case over to the competent judicial authorities. In this respect officials of OLAF enjoy the same status as officials in the Member States. Regardless of the way in which the requirements of mandatory notification are satisfied (see response to Question 4), and regardless of the nature of the criminal offence, officials of OLAF must notify

the national prosecution authorities in a Member State or the European Public Prosecutor.

The Dutch Government stresses that OLAF (and by analogy the European Public Prosecutor) must not address themselves only to administrative investigations in Member States, but also to investigations within the institutions, bodies and services of the Community itself. If any potentially criminal acts are identified there, they will also normally come under the jurisdiction of the European Public Prosecutor.

Question 17 What type of relations should the European Public Prosecutor maintain with third countries, and in particular applicant countries, in order to improve efforts to combat activities which damage the Community's financial interests?

Because a new institution is involved which has yet to prove its worth, the Dutch Government deems it important that the European Public Prosecutor should address his attentions during the first few years at least to tackling crime against the financial interests of the Community to within the Member States of the European Union and – just as important – within the institutions and bodies of the Community, before directing his efforts at third countries. Otherwise there is a risk that the attentions of the European Public Prosecutor will have been subjected to excessive fragmentation in the initial phase.

It is obviously important that applicant countries are thoroughly prepared for their prospective membership of the Community, such that they can satisfy the 'acquis communautaire' on all points as regards the management, control and combat of fraud. But contact with applicant countries should not be limited to the criminal-law protection of the financial interests of the European Community. Preparations for accession must have broader purpose: an effective system of management and control is after all more than just the fight against fraud alone. Here there is a role for the European Commission rather than the European Public Prosecutor. The latter must restrict himself to his primary task, which is the criminal-law prosecution of criminal offences, directed against the financial interests of the European Community.

Question 18 What procedures should be available for judicial review of acts done by the European Public Prosecutor or under his authority in the exercise of his functions?

The national court is empowered to review the acts of investigation of the European Public Prosecutor in the preliminary review. If the creation of a "judge of freedoms" is chosen, he should also be able to fulfil that role. At this stage it does not seem necessary to create legal remedies to it in the shape of a higher authority. If a defendant does not agree with a judgement of the first (national) instance, the legal remedies which apply under national law are available.