GREEN PAPER

on the protection under criminal law
of the Communities' financial interests
and the establishment of a European Public Prosecutor.
(Intervention at the public hearing of September 17, 2002)

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In the limited time allowed to me, I am going to address the following six points:

1.- The most critical one is, in my opinion, the legal basis for the creation of the EPP and the accompanying institutions and legislation. The amendment to the EC Treaties proposed by the Commission[1] to this effect would also leave it for secondary legislation to regulate not only the status and operation of the EPP but also the constituent elements and the penalties of fraud and other offences prejudicial to the EC.
Against this proposed course certain objections have been raised. In the first place it has been remarked that the matters to be regulated here belong to the Third Pillar, i.e. in Title VI[2] of the Treaty of the European Union and should have been dealt there.
But the most important objection is that under the proposed art. 280A, Member States would be bound by acts of the secondary community law as to the constituent elements of criminal offences. From the viewpoint of art. 7 § 1 of the Greek Constitution at least, this seems to be contrary to the principle *nullum crimen sine lege*. That principle requires that the elements of an offence shall be provided by a law. As law is meant here an enactment to be passed in a procedure guaranteeing its democratic legitimation, i.e. either an act of Parliament or a specific delegation of power to another authority

[1] Art. 280A.
[2] Articles 29 ff.

by an act of Parliament[3]. The proposed art. 280A which delegates to the EC Council the power to legislate in general on certain penal matters, does not fulfil the requirements of the above principle. By that provision, EC secondary legislative acts would be binding for the national legislators, whose role would be limited to practically only endorsing a provision, the contents of which would have been already decided in detail by the EC act[4].

Therefore, the opinion mentioned above sees as only acceptable course for the creation of new offences a Third Pillar convention.

I do not share the above opinion, because I think that the democratic legitimation is guaranteed up to a certain degree by the consultation of the European Parliament in the procedure of art. 251 TEC[5].

Anyway, I think that such conventions including the description of the constituent elements of criminal offences are already the PIF Convention of July 26, 1995 and its Protocols.

2.- (Question 1). The next point concerns the status and independence of the Delegated European Public Prosecutors

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[3] Kaiafa – Gbandi, Poiniki Dikaiosyni, 5 (2002), 568-569, see also Manoledakis in Kasimatis-Mavrias, Interpretation of the Constitution , art. 7, 1999, 20; cf. on the need of parlamentary blessing for the introduction of penal provisions in general: Hirsch: Die Zukunft des Europäischen Strafrechts, Diskussionsbeitrag in: Europäische Einigungn und Europäisches Strafrecht, 1993, 121: but see Dagtoglou, The Constitution and the EEC, in: The impact of the Constitution of 1975 on the Private and Public Law, 1976, 77, who supports the view that the entrance of Greece into the EEC created a new, third, level of order in this country, in which the procedure of creating norms and their prevalence over the interior legislation have been established. This fact, however, should not reach the point of creating penal norms without the necessary democratic legitimation.

[4] See also Köhler, Rechtstaatliches Strafrecht und europäische Rechtsangleichung, FS für Mangakis, 761-762.

[5] Kaiafa-Gbandi (supra 1) 567, fn. 43 claims that even the procedure under art. 251 TEC does not solve the problem of democratic legitimation because under it main factor of the legislative power remains the Council, which is indirectly legitimised by the peoples. I consider this argument as not convincing. According to Tiedemann FS für Roxin , 1411 supranational legislation on penal matters (including the definitions of offences) could be passed by guidelines, (and also by Third Pillar framework decisions) which would leave to the national Parliaments certain margins of decision., although he is sceptical as to the effectiveness of such a course.

(DelEPP). These officials should be – alike the EPP - independent both of the European and of the national authorities. With the exception of the instructions of the EPP, the DelEPP should neither accept nor sollicit any instructions from any other authorities. Of the three options mentioned in the Green Paper, I am inclined to prefer the combined function, at least considering also the legal status of the Greek public prosecutors, who under the Greek Constitution[6], are judicial officers enjoying the same guarantees as judges, their main task being to keep the legality[7]. Consequently a possibility of conflict of loyalties is rather improbable, since the DelEPPs would pursue, beside the application of their national law, also the application of the provisions protecting the EC financial interests. During their term, this duty will be their primary one, while their other obligations - including the obligation to follow instructions from their superiors in the national hierarchy - will be pursued on a subsidiary basis. The accumulation of the two capacities, however, will enable them to prosecute and defend the accusation in cases of accumulation of offences or of hybrid offences against both the financial interests of the EC and national interests.

3.- (Question 3). The liability of legal persons or entities is my third point. Although in several Member States the criminal liability of such entities has been already introduced, among scholars there is still strong opposition against applying to them such a form of liability; for, in many European jurisdictions it has been formed traditionally in view of the qualities of natural persons and cannot be transferred to legal fictions such as the legal entities without mental manipulations.
Therefore, it would be preferable to create a different form of liability to be applied to legal entities, entailing different conditions of it and different legal consequences.
In order to avoid misunderstandings, such a different liability should not be called “criminal”, but by a different term, e.g.

[6] Art. 88.
[7] Art. 24 Law 1756/1989 re Organisation of the Courts.

either “administrative” or “quasi criminal” or a situation justifying “criminal measures” similar to the “security measures” of most penal systems. Obviously, the different name would not constitue a labelling swindle, but the creation of a different institution adapted to the character of the legal entities. It should be noted that art. 3 of the Second Protocol of the PIF Convention does not provide “criminal”, but only “liability” of legal persons, which leaves in the discretion of the Member States the formation of the character and such liability. Therefore, I agree with the proposal of the Green Paper (p. 40) to make only a general reference to the law of the Member States.

4.- (Question 9). The fourth point I would like to address is the criteria and the review of committals to trial. Under Greek law[8] the PP in felony cases, and in all cases if he proposes to close the case, has to apply to the indictment chamber with his proposal to commit the case for trial or to close it. In misdemeanour cases he may either apply also to that chamber or decide to commit for trial directly. I think that the final decision of an indictment chamber should be adopted also in the procedure of the EPP or at least that each Member State should be free to provide accordingly.

5.- (Question 10). Since in art. 6 of the First Protocol of the Convention dated 25-7-1995 (PIF) - and also in art. 26 of *Corpus Juris* - more than one criteria for the choice of the trial court are included without any ranking, it will remain in the hands of the EPP to chose the appropriate court and/or apply to the indictment chamber accordingly. In order to avoid phenomena, such as forum fishing or conflicts, it would be preferable either to provide a certain rank -at least as a last resort- among these criteria and/or to establish the jurisdiction of the ECJ to review the relevant decision of the EPP or of the national indictment chamber.

[8] Art. 308-310 GrCPP.

6.- (Question 11) . Evidence lawfully obtained in one Member State, should be admissible in the court of the other Member State in which the trial is going to take place. The main difficulty exists between States in which the *procès verbaux* of the pre-trial phase are considered as admissible evidence at trial, while in other countries, where the orality principle is primordial, such records are not admitted as evidence. The solution of the "European depositions" to be recorded by the EPP, as provided by art. 32 of the CJ, which combine the contradictory procedure and a degree of orality, is a good compromise, provided that the jurisdictions of the above Member States are going to accept them.

Also a European record of questioning would be a useful help to harmonise the pre-trial investigations and form them in a way adequate to be submitted to and considered by a trial court in any country.