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Dear Readers,

In 1997, a group of researchers called upon by the European Commission presented guidelines for the improvement of the criminal law protection of the financial interests of the European Union. In addition to proposals for substantive-legal models, the draft – which was published in its final version as “Corpus Juris” in 2000 – contained a proposal for the establishment of an independent and decentrally organised European Public Prosecutor.

As a member of the above-mentioned research group, I was glad to witness the shift from initial scepticism and widespread criticism of this bold and progressive idea by representatives of the legal and political communities to acceptance in principle. In 2001, with the assent of the European Parliament, the initiative was adopted in the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor. It was to be promulgated as the new Art. 280a in the EC Treaty; ultimately, it found its way into the Treaty of Lisbon after the Constitution for Europe had failed. Art. 86 TFEU provides for the setting up of a European Public Prosecutor by a unanimous decision of the Council after the assent of the European Parliament. It also, however, allows for the initiative of a group of at least nine Member States to seek a Council decision for their region.

For over a decade, a lively debate has taken place on the possible creation of a European Public Prosecutor. The debate was sparked by two studies of the Max Planck Institute for Foreign and International Law in Freiburg/Germany and a project carried out by the University of Luxembourg, in which a code of model procedural rules for the European Public Prosecutor was developed.

The comprehensive and controversial discussions on this subject document the longstanding opinion that the introduction of new institutions into “dynamic” procedural law, which deals with a multitude of conflicting interests and constitutes a complicated system, would cause greater problems than a harmonisation or statutory redefinition of criminal offences in the somewhat “rigid” substantive law given to selective amendments as we know it.

So far, a basic consensus seems to have been reached on the concepts regarding the protection afforded by the law ("juge des libertés") and the inadmissibility of evidence, and they should be implemented in the Council Regulation on the establishment of a European Public Prosecutor according to Art. 86 (3) TFEU. Aside from the general question of how the European Public Prosecutor should be organised, two issues remain a matter of political controversy: how to regulate the rights of defence, which are not set out in the TFEU, and how to avert the danger of “forum shopping,” i.e., the possibility for the European Public Prosecutor to choose a jurisdiction having the laws most favourable for criminal prosecution. Even in this respect, feasible solutions exist. The best and simplest solution would be to lay down the criteria for the choice of jurisdiction under Community law as well as the coercive procedural measures and their prerequisites in a Council regulation according to the suggestion of the Corpus Juris. The Luxembourg pilot project envisages a supranational regulation of all powers of intervention but prefers to divide the legal protection between the "juge des libertés" and the European Court of Justice.

Ultimately, the ambitious and complex undertaking of establishing a European Public Prosecutor is in line with supranational criminal policy to date. It is anticipated that, in the near future, the Commission will make an expedient recommendation or present a White Paper, possibly already in connection with the recent publication of a draft directive on the criminal law protection of the financial interests of the European Union.

About eucrim

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