



# Will the European Public Prosecutor's Office be a stab to the heart?

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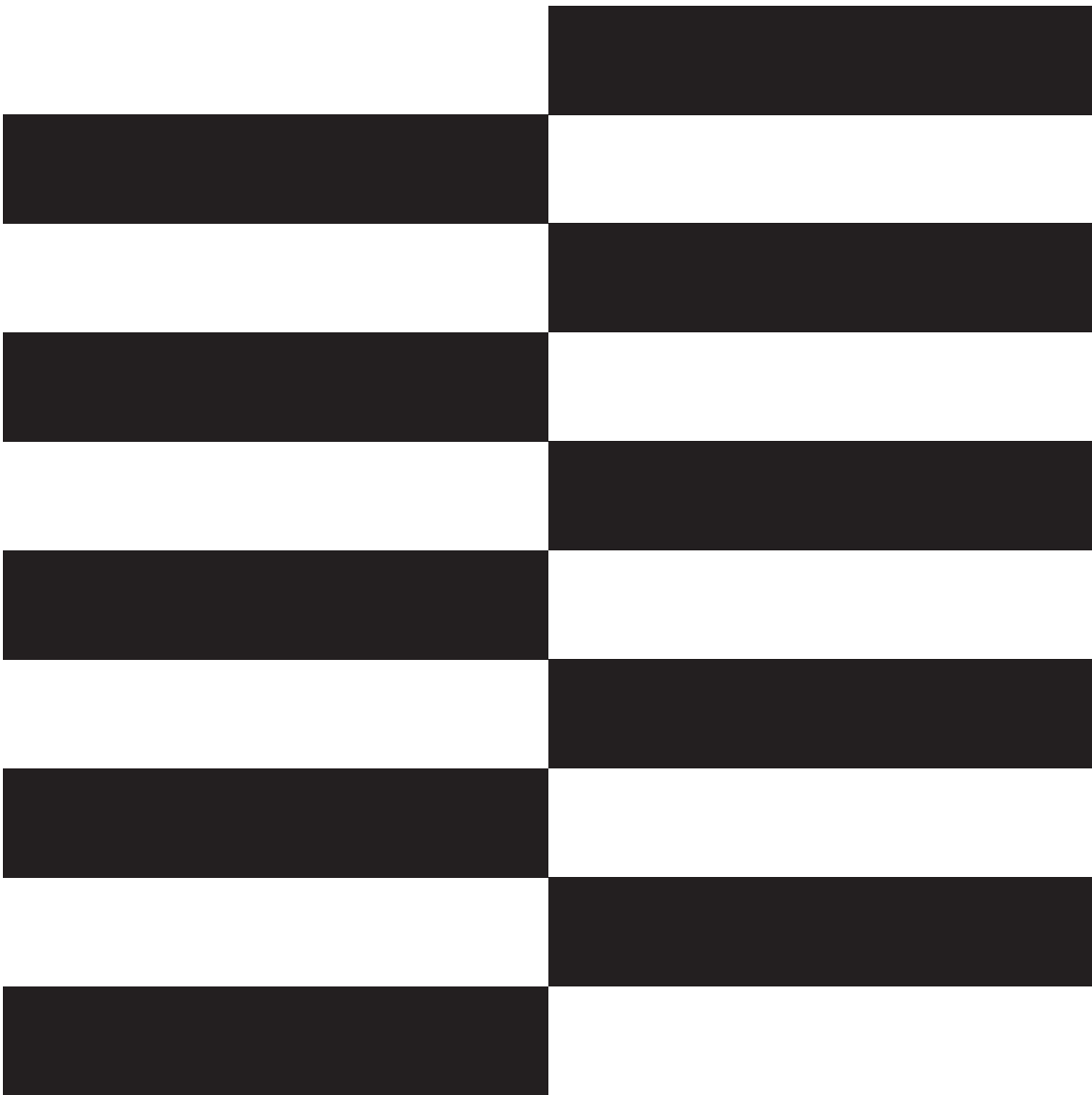


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# Actors





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## Will the European Public Prosecutor's Office be a stab to the heart?

The European Public Prosecutor's Office is expected to be operational in the spring of 2021. This upheaval at the institutional and political level has already been written about many times. Some have denounced a new relinquishment of sovereignty in favor of the European Leviathan; others have criticized the new procedure introduced in the transposition law of December 24, 2020, regarded as creating a risk of a progressive eradication of the French *juge d'instruction*,<sup>1</sup> with an immediate weakening of the rights of defense. An article published a few months ago in the legal journal *Dalloz actualité* summarizes these criticisms quite well. After pointing out that this transposition was a "a new worrying development", the authors concluded with a touch of irritation that the "the specificity of French-style criminal procedure is undermined here".<sup>2</sup> The president of the *Association française des magistrats instructeurs* said nothing else when he asserted with aplomb that the European Delegated Prosecutor is a "false prosecutor",<sup>3</sup> before regretting "that no thought was given to creating a European examining magistrate". One could wonder why no one else has thought about it for twenty years. Could it be because the office of the examining magistrate exists today in only five out of twenty-seven Member States, or more simply because the very principle of a European criminal policy is incompatible with its existence? This is something to be investigated.

In another article, they even go so far as to describe the European Public Prosecutor's Office as a "legal monster" - nothing less - "a little as if an examining magistrate

\* The opinions expressed in this article are solely those of the author and should not be regarded as constituting an official position of the European Public Prosecutor's Office.

1. Editor's note: in the French criminal proceeding, the *juge d'instruction* (examining magistrate) is a judge who carries out criminal investigations in most serious or complex cases prior to the trial.
2. See, C. Mensous and F. Pelloux, "Les forces et les faiblesses de la transposition du parquet européen en droit français", *Dalloz actualité*, December 8, 2020.
3. See, Pascal Gastineau, President of the Association française des magistrats instructeurs, interview by Jean-Baptiste Jacquin, "Futur parquet européen : "le procureur européen délégué est un faux procureur"", *Le Monde*, August 21, 2019.

were put into the clothes of a public prosecutor, but without saying so".<sup>4</sup> Deprived of all humanity, it would thus in truth be nothing more than an appalling chimera, a sort of *Indominus Rex* speaking Volapük, or more exactly English, which in the context of Brexit is obviously amusing.<sup>5</sup> Thus, one sees in these severe comments a distrust with regard to the principle of a European Public Prosecutor's Office, a distrust that is stubbornly opposed to the defense of French law, whose figurehead would magically become again the *juge d'instruction*. The one who was criticized so much yesterday, this judge suspended between the office of a sitting judge and that of the public prosecutor, this judge who was denounced both for its sinful slowness and for its hyper-powers - another mutant! -, is suddenly propelled to the front line, like a last bulwark against this "disturbing" drift, this bad blow to our laws by who knows what conspiracy, whose splendor and fall Balzac could have recounted in a new *Histoire des Treize*.

It is undoubtedly expected that this European Prosecutor's Office would fall back in line. However, that is precisely what it should not do. What is the point of creating a European Public Prosecutor's Office if it should change nothing in the current organizations? What is the point of creating a supranational prosecuting authority if it should submit without any reluctance to national systems? The purpose of European Public Prosecutor's Office is not to be discreet.

### A prosecutor's office that is independent because it is European

If the positive reactions were less numerous, they were - dare we say it - of a better level. First, there was the opinion piece published by the *Procureur Général* at the *Cour de Cassation*, François Molins, and one of his predecessors, Jean-Louis Nadal, who called for better guarantees of the independence of French prosecutors, stressing that "the arrival of a European Public Prosecutor's Office, endowed with an independent status and integrated into our national judicial system, once again raises the question of the necessary statutory independence of the French prosecutors".<sup>6</sup> Independence is indeed one of the essential attributes of this new judicial body. It is guaranteed by the European Regulation (the "Regulation"), which sets out the principle in its Article 6, and also by the status and the method of recruitment of its members, whose appointment must always be validated, at the end of the day, at the European level.<sup>7</sup>

In accordance with this same Regulation, which is indeed all-encompassing, it will systematically be assessed that the candidates have the required professional skills

4. See, J.-B. Jacquin, "Les pouvoirs hors normes du parquet européen", *Le Monde*, August 19, 2019.
5. See, "Malgré le Brexit, le futur parquet européen parlera anglais", *Le Point.fr*, October 26, 2020.
6. See, F. Molins, J.-L. Nadal, "Il est urgent de garantir l'indépendance statutaire des magistrats du parquet", *Le Monde*, September 2, 2020.
7. Regulations of the Council (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') EU OJ 10.31.2017.

and that their independence is established, as the text says, “beyond doubt”. This applies both to the European Prosecutors based in Luxembourg and to the European Delegated Prosecutors based in each Member State. The former are appointed not by their own country, but by the Justice and Home Affairs (JHA) Council, which will decide on the basis of an opinion delivered by a panel of twelve independent experts who will have ranked the candidates in order of merit. As for the latter, their appointment by the national authorities will only become effective once it has been validated by the College of European Prosecutors.

This control at the European level is even more thorough when it comes to the Chief Prosecutor, who, it should be remembered, applies directly with the European Commission without going through the national authorities (which is not the least of the guarantees). The candidate appears before the same panel of twelve European experts, which then proposes a shortlist of a few candidates, and is appointed “by common accord” by the European Parliament and the Council. The search for such a common accord may, in fact, initially come up against a real disagreement between the two institutions, each of which will defend its own champion. Far from being a problem, this initial disagreement will, on the contrary, open a debate on the respective qualities of the last two candidates in the race. The appointment of Laura Kövesi against the will of her own government, which literally obstructed her candidacy throughout the procedure, is the best example of this. It is not only her appointment, but the manner in which it was obtained, that allows her to claim full independence today.

Whether it acts at the central level in Luxembourg or through its 140 Delegated Prosecutors in the 22 countries that today participate in the enhanced cooperation, the freedom of action of the European Public Prosecutor’s Office will certainly be at least equivalent to the freedom of an examining magistrate. It will even be superior to that of an examining magistrate, because unlike the latter, who can only act upon referral by the public prosecutor, the European Public Prosecutor’s Office will itself identify the facts on which to conduct its investigations. This right of evocation, which is the first condition of its effectiveness, is expressly provided for in Article 27 of the Regulation.

“Independent because European” could be the motto of this new judicial body, which will operate at two levels: a central level represented by the head of the European Public Prosecutor’s Office, the “College of European Prosecutors”, the “Permanent Chambers”, and a decentralized level represented by the “European Delegated Prosecutors” who will be its operational contacts in each of the 22 participating countries. The central level will conduct the public action that will be carried out in practice by Permanent Chambers to which cases will be assigned one after another. They will decide on the action to be taken after the investigation has been completed (referral to the court, dismissal or third track); it is also

the Chambers which will decide on the exercise of appeal procedures. The College of the European Public Prosecutor has planned to create fifteen Permanent Chambers within it. They will each be composed of three European Prosecutors, who by definition will have no proximity or personal link with the country in which the investigations will be conducted. An investigation opened in France can thus be handled by a Permanent Chamber composed of a German European Public Prosecutor, an Austrian European Public Prosecutor and an Estonian. Independent by nature, the European Public Prosecutor’s Office will thus be detached in practice from any national contingency. To put it in another way, the decision it will make and the jurisprudence that will subsequently emerge from them, will always be a collective work.

The Permanent Chambers may of course transfer their powers to the European Public Prosecutor in the relevant country, but this option is limited by the Regulation to cases of minor importance. It is excluded to recreate within it purely national chains of command, where each European Public Prosecutor would lead its own team of European Delegated Prosecutors. This raises the question of the “national link”, which was raised like a scarecrow by some during the negotiations, but whose maintenance is in fact essential to its functioning. Let us recall first that it is consubstantial with the very project of a European Public Prosecutor’s Office. In the famous “*Corpus Juris*” published in 1997 under the direction of Mireille Delmas-Marty, it was in fact foreseen that cases would be judged by the courts of the Member States.<sup>8</sup> This was, moreover, one of the strong points of this study, which did not propose to establish a supranational competent court as a counterpoint to the public prosecutor’s office that it wanted to set up. It would have been a real “legal monster” and the best way to nip the project in the bud, because it would have been deprived of all legitimacy: when it does not judge extraordinary crimes, justice will always need a national framework to be accepted.

This national link is all the more necessary since public action is not limited to the final decision on whether or not to prosecute. The European Public Prosecutor’s Office, if it really wants to establish its authority, must be able to exercise its control throughout the investigation. This does not mean that it is necessary to submit the European Delegated Public Prosecutors in the Member States to someone’s control. They must be able to keep a margin of action and even a share of initiative in the conduct of their investigations. In short, there must be control, but control that is sufficiently distant so as not to stifle the actors in the field. The Regulation has qualified it as “supervision”, which reflects the idea fairly well. In application of this national link this supervision will be entrusted to the European Public Prosecutor of the country in which the investigation is conducted.

Why is he or she the one in charge ? Because it is the

8. See, M. Delmas-Marty (ed.), *Corpus Juris introducing penal provisions for the purpose of the financial interest of the European Union*, Economica, Paris, 1997.

only one able to do so. Who else will be sufficiently familiar with the applicable law to assess the decisions to be taken in a case on a case-by-case basis? Who else would be able to assess in concrete terms the legal difficulties that may arise in order to carry out such and such act? Only a magistrate of the said country will be able to make a decision in full “knowledge of the facts.” Any other solution would immediately undermine the authority of the European Public Prosecutor’s Office in the other member States. Let us give just one example, the most modest of all: my own. I was a liaison magistrate in Germany for four years. I was familiar with German criminal procedure well enough to answer without too much difficulty the very detailed questionnaire sent to me by the parliamentary commission of inquiry into the Outreau case,<sup>9</sup> which wanted to have some comparative law elements; I even wrote, before leaving Berlin, an article, which went completely unnoticed at the time, on criminal justice in Germany, which was published in the journal *Questions Internationales* in March 2008 (it is true that the issue was mainly devoted to Japan).<sup>10</sup> Would I be qualified today to oversee investigations conducted by German European Delegated Prosecutors? The answer is no.

The representation of the European Public Prosecutor’s Office in the Member States is ensured by the European Delegated Prosecutors. They constitute what the Regulation calls the “decentralized” level, which is in fact a deconcentrated level. Let us recall first of all that they are full members of the European Public Prosecutor’s Office. It is provided for in the Regulation that a European Delegated Prosecutor may work part-time for the European Public Prosecutor’s Office and spend the rest of his or her time as a national prosecutor, “to the extent that this does not prevent them from fulfilling their obligations under this Regulation”.<sup>11</sup> This provision is the result of a compromise reached with some Member States which, for various reasons, were anxious that the representatives of the European Public Prosecutor’s Office should be able to have double roles; others, on the contrary, feared, quite rightly, that this double hat, a little too large for a single head, would soon enough become a double tutelage, or even a double allegiance. In practice, most of the participating countries have ruled out this possibility.

Thus, whether with respect to the appointment of its members or of its functioning, the European Public Prosecutor’s Office will be independent precisely because it is... European. In a system where decision-making will be by nature free of any national allegiance, the independence of this public prosecutor’s office will be truly established in all its components “beyond doubt”.

9. Editor’s note: The Outreau case is a major criminal case of sexual assault on minors concerning events that took place between 1997 and 2000. It gave rise to a strong public reaction in France, many thinking that it highlighted the dysfunctions of the judicial institution.

10. See, F. Baab, “La justice pénale en Allemagne”, *Questions Internationales*, n°30 March-April 2008, la Documentation française.

11. Art. 13(3) of the Regulation of the Council UE 2017/1939.

### Did you say, “national law”? In Europe, as elsewhere, some countries are more equal than others

The other essential element, with regard to the European Delegated Prosecutors, is that they are, contrary to what has been said, real prosecutors. The Regulation expressly provides that they will “have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment”.<sup>12</sup> This is the very essence of the project since 1997, its heart: without a complete transfer of competence, there can be no European Public Prosecutor’s Office! Once the principle had been confirmed, and the text adopted, it remained to transpose it into national law. Even if the regulation is directly applicable, its implementation required adaptation measures to be adopted in each of the twenty-two participating countries. And in this process, while all countries are in principle bound by the same obligations, it must be recognized that some of them, as in the *Animal Farm* getting back to the state of “Manor Farm”, are more equal than others. In the German system, for example, which abolished the examining magistrate (*Untersuchungsrichter*) in 1974, the public prosecutor is the only judicial authority to conduct investigations. He or she does so, of course, under the supervision of an “examining magistrate” (*Ermittlungsrichter*) who will himself order coercive acts and, more broadly, all measures impacting fundamental rights and freedoms (searches, seizures, pre-trial detention, etc.). This model is the standard on which the European Public Prosecutor’s Office has been designed: the Regulation reflects it very well and in this country there is no need of transposition.

But in a country like France, which still has an examining magistrate, the exercise is much more complex, not to say complicated. The point was delicate to deal with from a legal point of view, but also politically, because keeping the examining magistrate in the area of damages to the financial interests of the Union was, in principle, incompatible with the establishment of a European Public Prosecutor’s Office. What would have been the point of creating a supranational prosecution authority if it had had to relinquish jurisdiction in certain countries in favor of a national judicial authority that would have acted, once seized, at its will? The map of the European Public Prosecutor’s Office would have become an incomprehensible patchwork: depending on whether it investigates in France or in Germany, the European Public Prosecutor’s Office could have retained in one case control over investigations and prosecutions in the other case, whereas it would have lost it entirely in the latter. It was therefore necessary to remove the examining magistrate from its scope, with all the possible implications of such a choice. This is the first point that we had encouraged Christiane Taubira to decide when we started working on this project at the beginning of 2013. If the Minister had refused this option, we would not have gone any further in our reflection.

12. *Ibid*, Article 13(1).

Therefore, France chose to confer the powers of the examining magistrate on the European Delegated Prosecutor; or to put it more precisely, it chose, as the impact study points out, not to create a new investigative framework for the European Delegated Prosecutor, an option that was rejected “not only because of its complexity but also because it is useless”.<sup>13</sup> The issue was settled by a simple reference to the three existing procedural frameworks, namely: the smoking gun misdemeanors investigation, the preliminary investigation and the judicial information. These provisions introduced in the law of December 24, 2020 relating to the European Public Prosecutor’s Office thus bring us into perfect compliance with the regulation, while preserving the French legal order (Articles 696-113 and 696-114 of the French Code on Criminal Procedure).<sup>14</sup> The choice by the European Delegated Prosecutor to use judicial information and the criteria surrounding it are the most important hinge of the text. Contrary to what has been written, this decision will not be made purely on the spur of the moment.

The law lays down the framework for action in Article 696-14 of the said code, the exact wording of which is worth recalling: “(w)here it is necessary either to bring an indictment against a person or to place him or her under the status of an assisted witness, or to resort to investigative acts that can only be ordered in the course of an investigation, because of their duration or nature, the European Delegated Prosecutor shall conduct investigations in accordance with the provisions applicable to the investigation”. Apart from these hypotheses, the European Public Prosecutor’s Office will continue its investigations within the framework of the preliminary investigation.

Here is a prosecutor who will sometimes wear the clothes of an examining magistrate. The substitution is complete, since it is also the prosecutor who will issue a dismissal or referral order the prosecutor, once the investigation done, who will propose the use of a third way (Article 696-132 of the Code of Criminal Procedure). As a full member of the European Public Prosecutor’s Office, he or she will follow the instructions of the Permanent Chamber to which the case has been assigned. This does not pose any problem since the decision is his or her own.

His or her actions will, of course, be subject to the control of the *juge des libertés et de la détention*<sup>15</sup> who will order all coercive measures for which the intervention of a judge is necessary. We find here the same balance as in German law between the public prosecutor’s office as “master of the investigation” and the examining magis-

trate, who acts as a counterpoint.<sup>16</sup> Thus, a dividing line is drawn between the judges and the public prosecutor’s office that neither of the two has the right to cross. For if the judge will always remain the sole guardian of individual rights, he or she cannot decide on the appropriateness of the measure requested by the public prosecutor: the direction of the investigation and the exercise of prosecution are the prerogatives of the public prosecutor, it is an area in which he or she must remain the sole master. However, sometimes the line becomes blurred when the judge, going beyond a simple legality review, extends his or her examination to the “proportionality” of the measure. The terms of the debate are well known.

This does not mean that it should not be debated. The implementation of this new procedural framework will raise questions and concerns, as well as misunderstandings. The respect for the rights of defense and other parties in the trial will be one of the issues to be dealt with as a matter of priority; and this will have to be done with the lawyers and the bars’ representatives without whose collaboration everything will go wrong.

The European Public Prosecutor’s Office will therefore conduct its investigations within the framework of national criminal proceedings. This was not the option initially chosen in the Corpus Juris or in the Green Paper published by the Commission in 2001 on the protection of the financial interests of the Community.<sup>17</sup> Although the Commission has always denied that it was advocating the idea of establishing a “European penal codification”, the idea of a minimal harmonization on the basis of the principle of legality of prosecution was in the background. This idea was expressed more clearly in the studies financed by the Commission in the framework of the anti-fraud program “Hercule II” managed by OLAF. Their conclusions were presented by a professor of law at the University of Luxembourg, Ms Katalin Ligeti, at a conference in Berlin in November 2012. She proposed a complete set of “model rules” to serve as a basis for the investigative framework of the future European Public Prosecutor’s Office. The idea was supported with great enthusiasm by the Director General of OLAF, who was also present at the conference. Without prior harmonization, he said, it will not work! The question of the admissibility of evidence before trial courts was one of the main arguments put forward by them. How to guarantee their probative force at the time of the trial when this evidence will have been collected in another Member State? Hence the need to harmonize the rules as much as possible. Otherwise, as Giovanni Kessler hammered it vigorously from the rostrum, it won’t work!...

Since France and Germany thought exactly the opposite, the Minister of Justice, Christiane Taubira, and her

13. See, Impact study, *Projet de loi relatif au parquet européen et à la justice pénale spécialisée*, p. 72.

14. Loi n°2020-1672 du 24 décembre 2020 relative au parquet européen, à la justice environnementale et à la justice pénale spécialisée – JORF, December 26, 2020.

15. Editor’s note: the *juge des libertés et de la détention* is a judge competent in matters of criminal procedure, to authorize certain investigative measures that are particularly prejudicial to freedom (telephone tapping, night searches, etc.) or certain exceptional extensions of police custody.

16. The mission of the public prosecutor’s office in Germany is summed up in a famous formula: “*Die Staatsanwaltschaft ist Herrin des Ermittlungsverfahrens*” (the public prosecutor’s office is the master of the investigation).

17. See, *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, Brussels, November 12, 2001, p. 52.

German counterpart, Sabine Leutheusser-Schnarrenberger, decided a few days later to create a Franco-German working group on the subject of the European Public Prosecutor's Office. Its missions were carried out with great enthusiasm and resulted in a joint declaration signed by the two ministers on March 20, 2013, the first day of spring. Published in French and German, it very clearly states that "the rapid establishment of the European Public Prosecutor's Office can only be done at this stage within the framework and in application of the national laws of the Member States, supplemented by the block of procedural guarantees that we are currently negotiating." The declaration therefore says two things: 1) if one wants to engage in the negotiation of a specific procedural framework for the European Public Prosecutor's Office, the instrument is condemned in advance, because there will never be an agreement possible on such a sensitive and complex subject; 2) let us therefore be satisfied for now with the few harmonization directives currently being negotiated in the field of procedural guarantees in criminal matters. These are already complicated enough, even though they deal only with the obvious (access to the file, the right to a lawyer, the right to an interpreter, the right to translation of the main procedural documents, legal aid). To put it more bluntly: this project is not only the result of a reflection among academics, but also a political project.

**Where do you come from? The European Public Prosecutor's Office is not an isolated phenomenon, its history is rooted in that of the European judicial area**

Its legal basis is Article 86 of the Treaty on the Functioning of the European Union (TFEU), which provides that, in order to combat offences against the financial interests of the Union, the Council, acting unanimously after obtaining the consent of the European Parliament, may establish a European Public Prosecutor's Office from Eurojust. It should be added that in the absence of unanimity, a group composed of at least nine Member States may adopt the project in the framework of "enhanced cooperation." This seems clear, and yet...

What are we talking about first when we say, "European Public Prosecutor's Office"? Is it a public prosecutor's office, as we commonly understand it, or a prosecutor? The very title of the institution, as it appears in the English version of the Regulation - European Public Prosecutor's Office - suggests that it would rather be a prosecutor. Except that the same title in French refers to a "*parquet européen*".<sup>18</sup> So, who should we believe, the English or the French versions? One might think that this difference between the two versions is purely fortuitous, which is not quite the case. The Treaty itself, by changing language versions, also moves from one notion to another. As a result, depending on whether it is expressed in French or in English, the European legislator does not think the same thing. In this matter, the Commission has always thought

18. Editor's note: a public prosecutor's office.

in English. This notion of "European Public Prosecutor's Office" reflects exactly what it aimed at: a single European Public Prosecutor, surrounded if need be by a collection of deputies representing the legal and cultural diversity of the Union, to which would be directly attached European Delegated Prosecutors in the Member States.

This conception of the European Public Prosecutor's Office is directly inspired by the *Corpus Juris* and the conclusions of the *Green Paper on the protection of financial interests*, which explains that the expressions "European Public Prosecutor" and "European Public Prosecutor's Office" are in fact two sides of the same coin: in one case the head is designated, in the other his or her administration.<sup>19</sup> There are also some naiveties, such as the tirelessly repeated hope that everything will work out the day the principle of mutual recognition of judicial decisions comes into force within the European judicial area.

Twenty years later, let us start by paying tribute to these high-level experts who have worked in the same spirit and in the service of the same ambition. It is they, with the help of a few magistrates, such as Giovanni Falcone or Renaud van Ruymbeke, who are at the origin of our Europe of Justice: without the groundwork that they did at the time, there would have been no European arrest warrant, no Eurojust agency, no European Public Prosecutor's Office. I wanted to pay tribute in my turn to Mireille Delmas-Marty by inviting her to the swearing-in of the twenty-two European public prosecutors and their head before the Court of Justice of the European Union on 28 September 2020. I gave her the text of my oath in French; she gave me a version of the *Corpus Juris* in English, a more recent version, that of "Florence", almost laughing: "that will be more useful to you than to me." The weather was rather nice that day in Luxembourg, the sky was milky, but full of sunshine, a sun still blazing despite its entry into autumn. It was for both of us, I think, a beautiful day.

This initial reflection, these first works carried out almost blindly, we must put them back in their chronology. At the time when the *Corpus Juris* was published in 1997, the European judicial area did not yet exist, nor did Eurojust. The idea is already in everyone's mind, but it will take another two years and the Tampere European Council of 15 and 16 October 1999 for this objective to become a political priority. If the quality of the reflection led by Mireille Delmas-Marty was unanimously recognized at the time, her project of a European Public Prosecutor's Office came too soon. As she herself pointed out during a colloquium at the *Cour de cassation* held on April 13, 2018, the collective resignation in March 1999 of the Commission chaired by Jacques Santer, which was accused of financial irregularities and a lack of budgetary rigor, could have been an opportunity to set up a European Public Prosecutor's Office. It simply led to the creation of the Anti-Fraud Office (OLAF). Since it was a simple directorate of the European Commission, a hierarchical body *par excellence*, it

19. *Ibid*, p. 28.

was decided to add a supervisory committee to guarantee its independence, a committee of which Mireille Delmas-Marty will become “by an irony of history”, she tells us, the first president.<sup>20</sup> However, the idea of a European Public Prosecutor’s Office was not abandoned, and it will be taken up again, twenty years later, in the Treaty of Lisbon.

A bold and simple idea to express - a European Public Prosecutor’s Office - but whose implementation was singularly complex, for two reasons. The first was purely technical. There is nothing more complicated, in fact, than to create a European Public Prosecutor’s Office from scratch. Everything had to be planned if it was to work: the distribution of powers between the central and national levels, the structure and internal functioning of the body, the law applicable to investigations and prosecutions, transnational cooperation, relations with partners, etc. The other difficulty was of a political nature. Beyond the legal and technical aspects, the creation of a European Public Prosecutor’s Office represented a complete transfer of sovereignty to a supranational judicial authority. However, the Member States were not ready to accept such a sacrifice without obtaining some guarantees in return. One need only refer to the study published by the French *Conseil d’Etat* in 2011, which considered that “as regards the mode of organization, a collegial structure comprising one representative per Member State would be more acceptable with regard to considerations relating to national sovereignty”, being said that “the reference to Eurojust, itself a collegial body, appearing in paragraph 1 of Article 86, as the basis or model of the future European Public Prosecutor’s Office, goes in this sense”.<sup>21</sup>

That is precisely what we pleaded for! The project thus gave rise, from the outset, to two very different visions: on the one hand, that of the Commission, which wanted a fully integrated body; on the other, a more realistic approach, supported by France and Germany, which wanted a collegial organization with one European Public Prosecutor per participating country. In their joint founding declaration of March 20, 2013, the French and German ministers said the following: “We believe that the collegial structure is capable of guaranteeing the operational effectiveness and independence of this European Public Prosecutor’s Office, while ensuring that it is firmly anchored and has real legitimacy in the Member States. We must be careful to ensure that it is fully integrated and accepted in the internal judicial orders of the Member States. It is on this condition that it will fulfil the mission assigned to it by the Treaty”. Commissioner Viviane Reding immediately opposed this idea, believing it to be a deception, worse still, an attempt to quietly restore the intergovernmental model of Eurojust. This was not our intention. We did not want to reproduce the college of Eurojust in which each

“national Member” represents his or her country, we wanted a college of a different nature, a college in which the European prosecutors would act in the name and on behalf of an interest superior to the national interests, an interest common to all the Member States, a European interest. This collegiality, as we understood it, was simply intended to make the project politically acceptable. Indeed, we were not certain, at the outset, that we would be able to bring together the minimum required nine Member States to adopt the text in enhanced cooperation. But we wanted an agreement! Collegiality was the price to pay for a minimum of support in the JHA Council.

As the Commission had not yet submitted its proposal for a regulation, France and Germany set up a working group open to all Member States that were ready to discuss this alternative project. And it was immediately a great success! This did not help our relations with the Commission, which even forbade us to meet in the premises of the Justus Lipsius on the grounds that we were not an official working group of the Council. “The revolution is not a gala dinner,” President Mao was reported to have said one day, neither are the negotiations in Brussels! Ignoring our proposals and our studies, the Commission submitted its draft regulation a few months later, on July 17, 2013.

The worst arguments were used during the debates, with each party showing the worst faith. For example, much has been made of this strange formula used in Article 86 TFEU, which provides for the creation of the European Public Prosecutor’s Office “from Eurojust”. How should it be interpreted? Hmm... All that was meaningless in truth, because in spite of all its efforts to make itself as big as an ox - and God knows it did! -, the Eurojust agency did not have the vocation to metamorphose itself into a European Public Prosecutor’s Office, but it didn’t matter. We immediately concluded that the legislator had decided in favor of a structure similar to that of Eurojust, a collegial structure. The Commission immediately responded to this vile attack by asserting (without the slightest semblance of proof) that the formula was elliptical. It was to be understood as a reference, not to Eurojust, but to the experience of Eurojust... This is what the experts were wasting their time on in the working group of the Council charged with negotiating the settlement, the COPEN group, which was making little progress because of these fierce antagonisms. But after many twists and turns and a “yellow card” issued by the national parliaments to the Commission in October 2013 for failure to respect the principle of subsidiarity, the vision of the Member States finally prevailed.

What pushed in our favor was not only the fact that the officials of the Directorate General for Justice were quick to apply the strategy of the weak to the strong, like a band of buccaneers against Spanish frigates;<sup>22</sup> what worked in our favor above all, what gave us a decisive advantage over them, was the experience we had accumulated over

20. See, M. Delmas-Marty, “Lectures du règlement instituant le parquet européen – Propos introductifs, le double contexte du règlement instituant le parquet européen”, *Revue de science criminelle et de droit pénal comparé*, March 2018.

21. See, *Réflexions sur l’institution d’un parquet européen – l’Assemblée générale plénière du Conseil d’Etat*, February 24, 2011, La Documentation française.

22. See, A.O. Exmelin, *Histoire des frères de la côte, Flibustiers et boucaniers des Antilles*, ed. Nouveau Monde, 2017.

more than ten years already in the field of judicial cooperation. All these alleged difficulties related to the admissibility of evidence acquired abroad did not move us, since they never occurred in practice; as for the criticisms addressed to the collegiality, they seemed to us anachronistic and even a little ridiculous, whereas the Eurojust agency was at the same time taking new dimensions in the fight against organized crime; and it is precisely because we already knew all its insufficiencies and limits, that we were sure of ourselves when we considered a collegiality of another nature, a rationalized collegiality within the Permanent Chambers, a combative collegiality able to decide and to act quickly. Opposing heavy weapons to our light canoes and muskets, the experts of the Commission had written their proposal with their noses turned to the past, while we were already anticipating all the possible evolutions within this new judicial area where the European Public Prosecutor's Office would easily find its place between Europol, Eurojust and OLAF.

Once matured, our project, which in the minds of all was actually a counter-project, comprised four main ideas. First idea: since the European Public Prosecutor's Office is a true public prosecutor's office, its creation will entail a complete transfer of all the prerogatives of public action to the central level; second idea: the European Public Prosecutor's Office will have to be independent, not only from the Member States, but also from the Commission and OLAF, which will put itself at its service (and not the other way round); third idea: the European Public Prosecutor's Office will be based on a College of European Prosecutors, one per country, who will defend a collective interest, while maintaining a strong national link with the European Delegated Prosecutors in the Member States; fourth and last idea: the European Public Prosecutor's Office will act within the framework of the legislation of the Member States, conceived not as a hindrance but as the only means of being effective in this labyrinth of national rules and traditions that only an insider can understand. In short, let everyone take care of their own law and everything will be fine!

It is on these bases that the regulation relating to the creation of the European Public Prosecutor's Office was adopted on October 12, 2017.<sup>23</sup> This adoption was not unanimous, but within the framework of an "enhanced cooperation" that already included a number of countries that is much larger than the nine Member States required by the Treaty. This failure of negotiation was in fact a success, because the European Public Prosecutor's Office was going to enjoy *ab initio* a sufficient territorial and political base to impose itself immediately in the European game.

At the same time, the directive (EU) 2017/1371 "on the fight against fraud to the Union's financial interests by means of criminal law" was negotiated, which serves as

a basis for its material competence.<sup>24</sup> It covers all threats to the European budget, namely: expenditure fraud, revenue fraud (including VAT fraud), active and passive corruption of public officials, misappropriation of European funds, money laundering, as well as "inextricably linked" offences in the cases.<sup>25</sup> In addition, there is also participation in a criminal organization whose activities "focus" on committing offences against the Union's financial interests.<sup>26</sup>

### The European Public Prosecutor's Office is financial oriented

As soon as the regulation was adopted in 2017, some people were already thinking about extending the jurisdiction of the European Public Prosecutor's Office to other types of offences. In his speech on Europe delivered at the Sorbonne on September 26, 2017, the French President proposed «to establish a European Public Prosecutor's Office against organized crime and terrorism, beyond the current powers that have just been laid down».<sup>27</sup> The idea was taken up a year later by the President of the European Commission, Jean-Claude Juncker, in his State of the Union address delivered on September 12, 2018. A communication on the subject was published by the Commission on the same day, but this first attempt, hastily prepared, ended in failure.<sup>28</sup> The Netherlands and Germany were opposed, while Italy and Spain were content with a simple agreement in principle. Without being formally abandoned, the proposal had been frozen due to a lack of sufficient support in the Council.

There were many reservations about the proposal at the time, including in France. The Senate had judged it premature in a report rendered in 2019 on the criminal judicial cooperation and the European Public Prosecutor's Office.<sup>29</sup> It recommended waiting until this new judicial body had first demonstrated its effectiveness before considering an extension of its jurisdiction to terrorist offences, considering in conclusion that the response to the terrorist attacks "would remain national for a long time."

It is undoubtedly on this point that opinion has evolved the most in recent months. As the French Secretary of State for European Affairs, Clément Beaune, recalled in an article published in the newspaper *La Croix*, the latest attacks in France and Austria last October and November did not target one country in particular, but the "European way of life as a whole" and the values on which it is based. Hence the need to build a common European

23. Regulation of the Council (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') EU OJ 10.31.2017, EU JO L 283 10.31.2017.

24. Directive UE 2017/1371 of 5 July 2017, EU JO 07.28.2017.

25. Art. 22(3) of the Regulation EU 2017/1939.

26. *Ibid*, Article 22(2).

27. Sorbonne Speech of Emmanuel Macron "Pour une Europe souveraine, unie, démocratique", September 26, 2017.

28. See, "A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes", Communication from the European Commission to the Leader's meeting in Salzburg on 19-20 September 2018.

29. See, *Rapport d'information n°509 (2018-2019) fait au nom de la Commission des affaires européennes du Sénat*, May 16, 2019.

response by extending the jurisdiction of the European Public Prosecutor's Office to terrorist offences. Beyond the added value it could bring at the operational level, the creation of a European anti-terrorist prosecutor's office is first and foremost a political act. The attacks committed in France and Austria a few weeks apart led the Commission to bring forward the publication of its new agenda against terrorism. The creation of a European anti-terrorist prosecutor's office is expressly mentioned.<sup>30</sup>

This extension of jurisdiction could also concern other forms of organized crime, such as cybercrime, or serious environmental offences, which are transnational by nature. Here too, there would be a collective interest to be defended at the European level.

The fact remains that these extensions of jurisdiction are subject to two conditions, one at the French level, the other at the European level. The first limit is linked to the very nature of the European Public Prosecutor's Office, which will be vested with prerogatives previously exercised by national public prosecutors. The French *Conseil Constitutionnel* thus considered in its decision of December 20, 2007 that the implementation of Article 86 TFEU required a revision of the Constitution, "considering the implications of such a provision for the exercise of national sovereignty".<sup>31</sup> This revision, linked to the ratification of the Lisbon Treaty, took place a few months later with Constitutional Law no. 2008-103 of February 4, 2008. In its study on the European Public Prosecutor's Office published in 2011, the *Conseil d'Etat* concluded that the "consequences inherent in the effective institution of the European Public Prosecutor's Office, in terms of excessive infringement of national sovereignty, were necessarily accepted by the constitutional law of February 4, 2008". However, this analysis is only valid "subject to the reservation that Article 86 TFEU, that is to say, the material scope of the European Public Prosecutor's Office, remains unchanged".<sup>32</sup> An extension of its jurisdiction to other offences should therefore give rise to a second revision of the Constitution, in order to authorize this new transfer of sovereignty.

The second limit to this extension of jurisdiction results from the Treaty itself. Article 86 TFEU in fact makes it subject to unanimous agreement of the European Council, after approval by the European Parliament and consultation of the Commission, knowing that it can only concern forms of serious crime with a transnational dimension. This institutional lock posed by the Treaty therefore requires a political consensus to be reached, including with the countries that do not themselves participate in the European Public Prosecutor's Office (Poland, Hungary, Denmark, Ireland, Sweden).

30. See, "A Counter-Terrorism Agenda for the EU : Anticipate, Prevent, Protect, Respond", p. 18.

31. See, Decision n° 2007-560 DC of December 20, 2007, 19.

32. See, *Réflexions sur l'institution d'un parquet européen - Assemblée générale plénière du Conseil d'Etat*, February 24, 2011, La Documentation française.

Favoring a slightly different approach, the *Club des Juristes*<sup>33</sup> recently published a study on "European compliance law" in which it plans to extend the jurisdiction of the European Public Prosecutor's Office to international corruption as a whole.<sup>34</sup> The idea is to cover the entire phenomenon, not only in Europe, but also in the relations of Member States with third countries, by detaching it from the notion of damage to the financial interests of the Union. Here too, therefore, it is a real extension of competence which would be subject, as for terrorism or cybercrime, to the conditions set out in Article 86 TFEU. The strength of this proposal is that it falls within the scope of economic and financial offences. The European Public Prosecutor's Office is not envisaged as a "catch-all" public prosecutor's office, but as a real financial prosecutor's office. It does not change that the agreement of all the participating countries will have to be secured (and this reform would inevitably have an impact on international trade), not to mention the non-participating countries that would see an almighty financial prosecutor's office set up at their doorstep.

In any case, it would be desirable to develop the European legal framework in the fight against corruption, an area in which Europe should assert itself more strongly against the United States, as Bernard Cazeneuve and Pierre Sellal pointed out in an article published in 2018 in *Le Monde*.<sup>35</sup> Raphaël Gauvain, a member of the French Parliament, says the same thing in the report published in 2019 on extraterritorial laws and measures.<sup>36</sup> On the basis of this observation, the *Club des Juristes* thus proposes adopting an "anti-corruption package" composed of three European directives that would in particular integrate the principles and recommendations of the OECD in this area and impose obligations to prevent and detect corruption within companies of significant size.

With regard to the European Public Prosecutor's Office, we are thinking more modestly of initially developing the use of "simplified procedures" such as the *convention judiciaire d'intérêt public* (CJIP),<sup>37</sup> which we consider useful in major cases. This possibility of implementing this type of procedure which aims at "the final settlement of a case according to the modalities agreed upon with the suspect" is expressly provided for in the Regulation, on condition, however, that national law so provides.<sup>38</sup>

This possibility exists in French law. The law of 24 December 2020 authorizes the European Delegated Prosecutor to use two types of simplified procedure: the *compa-*

33. Editor's note: a French legal think tank.

34. See, "Pour un droit européen de la compliance", report of the *Club des Juristes*, working group headed by B. Cazeneuve, reporter A. Gaudemet, November 2020.

35. See, B. Cazeneuve and P. Sellal, "Il faut corriger l'asymétrie entre l'Europe et les États-Unis dans la lutte contre la corruption", *Le Monde*, July 7, 2018.

36. See, "Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriales", June 26, 2019, (report requested by the French Prime Minister from Raphaël Gauvain).

37. Editor's note: the equivalent in France of a deferred prosecution agreement.

38. Regulation EU 2017/1939, Article 40(1).

*ration sur reconnaissance préalable de culpabilité* (CRPC)<sup>39</sup> and the CJIP.<sup>40</sup>

While the scope of application of the CRPC extends, with some exceptions, to all offences, the much more limited scope of the CJIP does not currently cover all the offences falling within the jurisdiction of the European Public Prosecutor's Office. It would therefore be interesting to think now about the creation of a "judicial convention of European public interest", or "CJIPUE",<sup>41</sup> which would make it possible to cover a wider range of offences while integrating this concept of "European public interest" to which the Regulation expressly refers when it requires the Permanent Chambers to ensure that recourse to a simplified procedure is indeed "in accordance with the general objectives and basic principles of the EPPO".<sup>42</sup>

Our initial discussions within the College on this subject revealed very wide variations between national laws: in some Member States, simplified procedures are reserved for minor cases, while in other countries they may be used in larger cases in which the prejudice may be very significant. There is clearly a need for harmonization in this area which should be taken into account at the European level.

### A stab to the heart

Before thinking about these possible developments, the European Public Prosecutor's Office has to be operational and to prove its worth. Like any other financial prosecutor's office, its success will be measured by the importance of the cases it handles and the amount of misappropriated funds it will recover.

This success is all the more expected since the Member States recently adopted a €750 billion recovery plan (out of a global envelope of €1800 billion) to help their economies overcome the consequences of the global pandemic that is currently hitting us. We could not have imagined a better time to start its activity.

Everything suggests today that this entry on the scene will not be discreet. It is a risk for the European Public Prosecutor's Office, but it is also an opportunity. It will have to fully assume its role as a precursor and its judicial mission in support of this still fragile notion of "European sovereignty".<sup>43</sup> Its first steps and missteps will be scrutinized with the greatest attention. Like all beginners, it will have to convince a little and seduce a lot; it will have to accept the debate as well, and the contradiction. It will have to discuss with the magistrates and the public prosecutors, deal with the investigation services, and also discuss relentlessly with the lawyers.

In conclusion, I could have quoted one of the founding fathers of Europe. There are several great Frenchmen among them, and their quotations are numerous. But since it is more appropriate to think of seduction rather than reason at this time of night, I prefer to quote the one who is keeping me company at the very moment I am writing these lines, the guitarist of the Stones, Keith Richards. A song is only successful, he tells us, if the audience receives it each time as "a stab to the heart".<sup>44</sup> In order to succeed and establish itself as a new player, the European Public Prosecutor's Office will have to trigger not only interest, but emotion as well. If it does not wreck after a few months, it could in turn become, better than a rock standard, better than a new model, a true European success and the proof that this monster with 22 heads and 140 arms, not counting its chiefs, can act quickly and strongly to protect an interest common to all the citizens of the Union, an interest that is their own and yet goes also beyond each one of them: a European interest.

39. Editor's note: a French plea bargaining.

40. Loi n°2020-1672 du 24 décembre 2020 relative au parquet européen, à la justice environnementale et à la justice pénale spécialisée, Article 696-132.

41. Editor's note : not translated from the french original version of this article.

42. Regulation EU 2017/1939, Article 40(2).

43. See, V. Malingre, "La souveraineté européenne promue par les dirigeants de l'UE est mal comprise par les Européens", *Le Monde*, March 1, 2021.

44. See, Keith Richards and James Fox, *Life*, ed. Weidenfeld & Nicolson, 2011, p. 311.