

## APPENDIX II: GUIDING PRINCIPLES OF *CORPUS JURIS* 2000

(Draft agreed in Florence)<sup>1</sup>

### I – TRADITIONAL PRINCIPLES

*Principle of legality:* ‘Penalties defined in the *Corpus Juris* only apply to the elements of offences expressly defined in Articles 1 to 8 and according to the procedure in Articles 15 to 17.

In case of amendment to the *Corpus Juris*, the more severe criminal law is not applied to acts committed before the *Corpus Juris* was amended.

Articles 1 to 17 of the *Corpus Juris* are interpreted restrictively when they are not favourable to the defence.

Changes of interpretation are only permitted when they are reasonably predictable.

The offences set out in Articles 1 to 8 are not applied to analogous situations which are not expressly covered in the *Corpus Juris*’.

*Principle of individual culpability:* ‘Criminal responsibility is individual. It is determined according to the behaviour of the accused and according to his degree of responsibility as main offender, instigator or accomplice’.

*Principle of proportionality:* ‘Criminal sanctions imposed as the result of offences laid down in Articles 1 to 8 of the *Corpus Juris* must be proportionate to the seriousness of the offence, determined in accordance with the interest to be protected and the damage caused, or with the risk created. They must also be proportionate to the fault of the offender and to his personal circumstances’.

*Principle of judicial guarantee:* ‘Only an independent and impartial tribunal can find the accused guilty and sentence him.

During the investigations relating to offences laid down in Articles 1 to 8 of the *Corpus Juris*, and throughout the preparatory phase of the procedure, any measure which seriously affects a person’s liberties must be authorised by an independent and impartial judge. The role of this judge is to verify that the measure is justified in law and that the facts are sufficiently serious to justify its use’.

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<sup>1</sup> The last meeting of the expert group of the *Corpus Juris* Follow-up study and of the representatives of the European Lawyers Association for the protection of the financial interests of the European Communities was held in May 1999 at the European University Institute (Florence-Fiesole).

## II – ‘NEW’ PRINCIPLES

*Principle of European territoriality:* ‘For the purposes of investigation, prosecution, trial and execution of sentences concerning the offences set out above (Articles 1 to 8), the territory of the Member States of the Union constitutes a single area, called the European judicial area. The *competence rationae loci* of the EPP and of national prosecutors to issue warrants and judgments pursuant to the *Corpus Juris* extends to the entire European judicial area. The EPP brings proceedings and conduct investigations across the territory of the Union (Article 24(1)(a)); warrants issued by the judges of freedom (Article 24(1)(b)) and judgments delivered by courts and tribunals of the Member States of the Union (Article 24(1)(c)) are enforceable throughout the territory of the Union.

The EPP chooses the national jurisdiction of judgment, under the supervision of the European Court of Justice (Article 26).

The necessary corollary of European territoriality is the unconditional recognition of the rule of *ne bis in idem*. In relation to Articles 1 to 8 of the *Corpus Juris*, this rule requires all national authorities responsible for investigations or prosecutions and all criminal jurisdiction of the Union to give *res judicata* status to judgments on the same offences and the same facts from other European criminal jurisdictions (Article 23(1)(b)).’

*Principle of proceedings which are ‘contradictoire’:* ‘The principle of proceedings which are ‘contradictoire’ implies, within respect for equality of arms as defined by the European Court of Human Rights, that the parties can have access to any evidence or observation presented to the judge (even when this is presented by a party to the proceedings, or by an independent prosecutor), with a view to influencing and discussing the judge’s decision.

The accused enjoys the rights of the defence guaranteed by the international instruments, namely the European Convention on Human Rights and the UN International Covenant on Civil and Political Rights’.

## APPENDIX III: *CORPUS JURIS* 2000

(Draft agreed in Florence)<sup>2</sup>

### I – CRIMINAL LAW (SPECIAL PART)

#### OFFENCES COMMITTED BY ANYONE

##### *Article 1 – Fraud affecting the financial interests of the European Communities and assimilated offences*

1. Fraud affecting the budget of the European Communities constitutes a criminal offence, both in the area of expenditure and in the area of receipts, when one of the following acts has been carried out either intentionally (fraud) or by recklessness or by gross negligence (assimilated offence):

- a) in connection with a grant or subsidy or the settlement of a fiscal debt, presenting the competent authority with declarations which in important respects are incomplete, imprecise, or based on false documents, in such a way as to risk harm to the financial interests of the European Communities;
- b) in the same context, omitting to provide information to the competent authorities in breach of a requirement to provide such information;
- c) diverting Community funds (subsidies or grants) obtained legally.

2. Any person who corrects the inaccuracies or omissions in a false declaration, or withdraws an application made on the basis of false documents, or who informs the authorities about facts that he has omitted to reveal before the act has been discovered by these authorities, is not punishable.

##### *Article 2 – Market-rigging*

1. It is a criminal offence for a person, in the context of a adjudication process governed by Community law, to make a tender on the basis of an agreement calculated to restrict competition and intended to cause the relevant authority to accept a particular offer.

2. The grounds for exemption from punishment defined in Article 1(2) also apply in relation to market-rigging.

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<sup>2</sup> The last meeting of the expert group of the *Corpus Juris* Follow-up study and of the representatives of the European Lawyers Association for the protection of the financial interests of the European Communities was held in May 1999 at the European University Institute (Florence-Fiesole).

**Article 3 – Money laundering and receiving** (previously Article 7)

1. It is a criminal offence to launder the fruits or the profits of offences described in the *Corpus Juris* (Articles 1, 2, 4 and 8).

Laundering means:

a) the conversion or transfer of goods resulting from any of the criminal activities mentioned in the previous paragraph or participation in such an activity with the aim of concealing or disguising the illicit origins of the said goods or of helping any person involved in this activity to escape the legal consequences of his acts;  
b) concealing and disguising the nature, origin, site, placing, disposal, movements or real ownership of goods or rights resulting from any criminal activity mentioned in the previous paragraph, or participation in such an activity.

2. It is a criminal offence to receive products or profits from the offences set out. Receiving means acquiring, keeping or using goods deriving from any of the criminal activities mentioned in the previous paragraph, or participation in such an activity.

*Implementing provision*

The criminal offence defined in Article 3 does not apply to the offender, the instigator or the accomplice when the profits or the product of the offence are laundered or received.

**Article 4 – Conspiracy** (previously Article 8)

It is a criminal offence to take part in a conspiracy that is harmful to the financial interests of the European Communities. A conspiracy is when three or more persons work together, setting up a stable and operational organisation, with a view to carrying out several offences defined by Articles 1 to 7.

**OFFENCES COMMITTED BY OFFICIALS**

**Article 5 – Corruption** (previously Article 3)

1. For the purposes of Articles 5 to 8 of the *Corpus Juris*, the term official covers any official whether ‘European’ or ‘national’. A ‘European official’ means:

- a) any person who is an official or an agent employed under contract as understood by the Staff Regulations;
- b) any person placed at the disposal of the European Communities by Member States or by any public or private organisation, who exercises functions equivalent to those exercised by officials or other agents of the European Communities.

The expression ‘national official’ is interpreted by reference to the meaning of ‘official’ or ‘public officer’ under the national law of the Member State where the person in question holds this title for the purposes of application of criminal law.

2. Passive and active corruption are criminal offences if they harm the financial interests of the European Communities.

3. Passive corruption is where an official solicits or accepts, directly or via a third person, any offer, promise or advantage of whatever nature:

- a) in order to carry out an official act relating to his duties, in breach of his official obligations;
- b) in order not to carry out an official act or act relating to his duties, which he is officially required to perform.

4. Active corruption means where any person makes or gives, directly, or via a third person, any offer, promise or any other advantage of whatever nature, to an official, in his own interest or in the interest of a third person:

- a) to induce him to carry out an official act in relation to his duties, in such a way as to contravene his official duties;
- b) to induce him not to carry out an official act or act relating to his duties which his official duties require him to carry out.

**Article 6 – Misappropriation of funds** (previously Article 4)

An official duly authorised to dispose of Community funds commits a criminal offence if he appropriates or misapplies them, either by deciding to award a subsidy, grant or exemption in favour of a person who clearly has no right to such a decision, or by intervening directly or indirectly in the award of grants or exemptions from duty in relation to any business or operation in which he has a personal interest.

**Article 7 – Abuse of office** (previously Article 5)

An official responsible for the management of Community funds commits a criminal offence if he abuses his powers and thereby damages the financial interests of the European Communities.

*Implementing provision*

The offence defined in Article 7 can only be applied when no other provision of the *Corpus Juris* is applicable.

**Article 8 – Disclosure of secrets pertaining to one’s office** (previously Article 6)

1. It is a criminal offence for an official improperly to reveal secrets pertaining to his office, when the secrets concern information acquired in, or by virtue of, his professional activity, when monitoring receipts or awarding grants and subsidies, if this revelation is likely to damage the financial interests of the European Communities.

## II – GENERAL CRIMINAL LAW

### CRIMINAL LIABILITY

#### *Article 9 – Mens rea* (previously Article 10)

All the offences set out above (Articles 1 to 8) require intention, with the exception of offences ‘considered’ as fraud (‘délit assimilé à la fraude’) against the Community budget (Article 1) for which recklessness or gross negligence is sufficient.

#### *Implementing provision*

The offender acts recklessly if he is aware of the risk that the circumstances that amount to the constituent elements of the offence exist and that it is unreasonable, having regard to the circumstances known to him, to take that risk. The offender acts with gross negligence if he is not aware of the risk that the circumstances that amount to the constituent elements of the offence exist but the risk is, having regard to the circumstances known to the offender, obvious.

#### *Article 10 – Error* (previously Article 11)

Mistake as to the constituent elements of the offence excludes intention. Mistake as to the legal prohibition excludes liability if it would have inevitably been committed by a careful, sensible person. If the mistake was avoidable, the penalty may be reduced, and the judge may not impose the maximum penalty (see Article 14).

#### *Article 11 – Individual criminal liability* (previously Article 12)

Any person may be held responsible for the offences defined above (Articles 1 to 8) as a main offender, inciter or accomplice:

- as a main offender if he commits the offence by himself, jointly with another person or organisation (Article 13) or by means of an innocent agent;
- as an inciter if he knowingly provokes a natural person or organisation (Article 13) to commit the illegal act;
- as an accomplice if he knowingly helps a natural person or organisation (Article 13) to commit the illegal act.

The maximum penalty for the accomplice shall not exceed three quarters of the penalties under Article 14.

#### *Article 11bis – Criminal attempts* (new article)

Attempts to commit an offence under Articles 1 to 3 and 5 to 8, and participation in such an attempt (Article 11), are punishable. The maximum penalty is three quarters of the penalty applicable, under Article 14, to the completed offence.

A person is guilty of a criminal attempt if, with intent to commit an offence under Articles 1 to 3 and 5 to 8, he performs an act which constitutes the commencement of the commission of a criminal offence.

A person who has attempted to commit an offence shall not be punished if he voluntarily desists from completion or voluntarily forestalls completion. If the offence is not completed for other reasons, it is sufficient that the person voluntarily and seriously tries to desist from completion or to forestall completion.

#### *Article 12 – Criminal liability of the head of business or persons with powers of decision and control within the business: public officers* (previously Article 13)

1. If one of the offences under Articles 1 to 8 is committed for the benefit of a business by someone acting under the authority of another person who is the head of the business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he knowingly allowed the offence to be committed.

2. The same applies to any public officer who knowingly allows an offence under Articles 1 to 8 to be committed by a person under him.

3. If one of the offences under Articles 1 to 8 is committed by someone acting under the authority of another person who is the head of a business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he failed to exercise necessary supervision, and his failure facilitated the commission of the offence.

4. In determining whether a person is liable under (1) and (3) above, the fact that he delegated his powers shall only be a defence where the delegation was partial, precise, specific, and necessary for the running of the business, and the delegates were really in a position to fulfil the functions allotted to them. Notwithstanding such a delegation, a person may incur liability under this article on the basis that he took insufficient care in the selection, supervision or control of his staff, or in the general organisation of the business, or in any other matter with which the head of business is properly concerned.

5. Where liability is incurred under this article, the maximum penalty shall be half the penalty prescribed under Article 14.

#### *Article 13 – Criminal liability of organisations* (previously Article 14)

1. The offences defined above in Articles 1 to 8 may be committed by corporations, and also by other organisations which are recognised by law as competent to hold property in their own name, provided that the offence is committed for the benefit of the organisation by some organ or representative of the organisation, or by any person acting in its name and having power, whether by law or merely in fact, to make decisions.

2. Where it arises, the criminal liability of an organisation does not exclude that of any natural person as main offender, inciter or accomplice to the same offence.

## SANCTIONS

### *Article 14 – Penalties and measures* (previously Article 9)

1. The principal penalties, common to all offences set out in Articles 2 to 8, and also applicable to Article 1 where offences under it are committed intentionally, are as follows:

a) for natural persons, a custodial sentence for a maximum of five years and/or a fine. Fines shall be determined according to the day fine system. A day fine corresponds to the daily income of the accused. This may be estimated freely by the court, but shall not exceed 3,000 Euros per day. The total fine shall not exceed three hundred and sixty five day fines. The court may suspend the sentence, put the offender on probation, convert a custodial sentence into a fine, or impose any other kind of reduced or mitigated penalty to the extent that this is permitted under national law (cf. Article 35).  
b) for organisations, a fine of up to ten million Euros.

2. The following additional penalties may also be imposed where the public interest so requires:

a) publication of the conviction. Publication shall be in the Official Journal of the European Communities and in the daily press, if the public interest requires it, especially if the offence has created a large publicity;  
b) for an offence under Article 1, exclusion of the convicted natural person or organisation from future subsidies granted under European Community law, for a period of up to five years;  
c) an offence under Articles 1 or 2, exclusion of the convicted natural person or organisation from future contracts with public authorities using European Community funds, for a period of up to five years;  
d) for offences under Articles 3 to 6, a ban from Community and national public office for up to five years. Such a ban shall apply across the entire territory of the Member States of the European Union.

3. Where an offence under Article 1 is committed recklessly or by gross negligence, the maximum penalties shall be two thirds of those laid down in (1) and (2)(b) and (d) above. The same shall apply to offences provided by Article 8.

4. The instruments, fruits and profits of the offence may be confiscated to the benefit of the European Communities. This may be ordered not only where the accused is convicted, but also where he is proved to have committed the actus reus of the offence, but is not convicted because of lack of mens rea or insanity.

### *Implementing provision*

'Confiscations' means a measure, ordered by a court, following proceedings in relation to one of the criminal offences set out in Articles 1 to 8, resulting in the permanent deprivation of property rights on such instruments, fruits and profits to the benefit of the European Communities.

### *Article 15 – Extent of penalties*

1. The penalties applicable to the offences under Articles 1 to 8 shall not exceed the range justified by the fault of the offender as to the seriousness of the offence and the extent of his participation in it.

2. Subject to paragraph 1 the court in determining sentence shall be guided: in the case of organisations, by the need for general and specific deterrence, and in the case of natural persons, by the need for general and specific deterrence, tempered where appropriate by the need to secure the rehabilitation of the offender.

3. In applying 2, the national court may take account of the previous conduct of the accused, including any previous convictions and administrative sanctions, his general character (good or bad), his motives, his economic and social situation and any efforts he has made to make amends for the harm that he has done. Other factors treated as relevant to sentence under national law may be taken into account in so far as Article 35(2) allows.

### *Implementing provision*

The sentence must indicate reasons for the penalty, in accordance with Article 26.

### *Article 16 – Aggravating and mitigating circumstances*

1. Where aggravating circumstances exist, the maximum period of custodial sentences provided for by Article 14(1) shall be seven years instead of five years; the maximum fine for natural persons shall be 540 day fines instead of 360; and the maximum fine for organisations shall be 15 million Euros instead of 10 million Euros.

2. 'Aggravating circumstances' mean either of the following:

- that the amount of the fraud or profit sought through the offence exceeds 100,000 Euros;
- as regards Articles 1 to 3 and 5 to 8, that the offence was committed in the context of a conspiracy;

3. By application of the principle of complementarity stated in Article 35(2) below, the scope and effect of mitigating circumstances shall be determined by national law.

### **Article 17 – Penalties incurred in the case of concurrent offences**

1. Where by a single act or omission a person commits one or more offences against Articles 1 to 8 above, a single penalty shall be applied, determined on the basis of the maximum penalty applicable to the most serious offence, increased by one half.
2. Where a person commits one or more offences against Articles 1 to 8 by a series of separate acts or omissions, a single penalty shall be applied, determined on the basis of a maximum penalty which is twice the maximum penalty for the most serious offence. In the cases provided by (1) and (2) the penalty determined thereunder shall not exceed the sum of the penalties which could have been inflicted separately for each offence.
3. Where at trial a defendant is convicted of both a criminal offence against Articles 1 to 8 above and some offence against national law, and both offences arose out of the same facts, a single penalty is applied, determined on the basis of the maximum penalty that is the higher.
4. Where a non penal, administrative sanction under Community or national law has already been imposed for the same act, this must be taken into account in determining the penalty for any offence under Articles 1 to 8.

## **III – CRIMINAL PROCEDURE**

### **THE EUROPEAN PUBLIC PROSECUTOR**

#### **Article 18 – Status and structure of the European Public Prosecutor (EPP)**

1. For the purposes of investigation, prosecution, trial and execution of sentences concerning the offences set out above (Articles 1 to 8), the territory of the Member States of the Union constitutes a single legal area.
2. The EPP is an authority of the European Community, responsible for investigation, prosecution, committal to trial, presenting the prosecution case at trial and the execution of sentences concerning the offences defined above (Articles 1 to 8). It is independent as regards both national authorities and Community institutions.
3. The EPP consists of a European Director of Public Prosecution (EDPP) whose offices are based in Brussels and European Delegated Public Prosecutors (EDelPPs) whose offices are based in the capital of each Member State, or any other town where the competent court sits in accordance with Article 26.

4. The EPP is indivisible and inter-dependent:

- a) indivisibility implies that any act undertaken by one of its members is deemed to have been undertaken by the EPP; that all acts which fall within the competence of the EPP (particularly powers of investigation as set out under Article 20) may be undertaken by any one of its members; and that, with the agreement of the EDPP, or with his retrospective approval in emergencies, any of the EDelPPs may fulfil their duties on the territory of any of the Member States, in collaboration with the assistance of the EDelPP in that Member State;
- b) inter-dependence requires, on the part of the different EDelPPs, an obligation to assist each other.

5. National Public Prosecutors (NPPs) are also under a duty to assist the EPP.

#### *Implementing provision*

##### *Conditions for nominating members of the EPP*

Members of the EPP are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointments to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence, as laid down in Article 223(1) of the EC Treaty (previously Article 167) for the Judges and Advocates General of the Court of Justice.

The EDPP is nominated for a period of six years, renewable once only. EDelPPs are also nominated for six years, with a reconfirmation every three years. Both are nominated by the European Parliament, on a proposal by the Commission for the EDPP and on a proposal by the Member States for the EDelPPs.

Members of the EPP are completely independent in the performance of their duties. They neither seek nor take instructions from any government or from any body, be it national or European. The members of the EPP are not permitted, during their term of office, to engage in any other occupation, whether gainful or not.

Members of the EPP may be dismissed following a request by the European Parliament when they are no longer able to fulfil their functions or when they have been found guilty of serious misconduct, the latter being defined in relation to the functions of the EPP.

The EDPP must submit an annual report to the European Parliament, giving an account of what he has achieved.

##### *Competence of the ECJ in disciplinary matters and in appeals:*

The ECJ has competence to rule on appeals and in disciplinary matters involving members of the EDPP and to order adequate sanctions (including dismissal in cases of gross misconduct).

##### *EPP's duties are exclusive:*

The function of members of the EPP excludes the possibility of simultaneous national or European functions.

##### *Duty of the EDelPP to take instructions from the EDPP:*

The EDelPP is bound by instructions from the EDPP.

##### *NPP's duty of cooperation:*

NPPs cooperate with the EPP in matters relating to the investigation and the prosecution of eurofrauds. They respond without delay to any request for assistance or warrants from the judge of freedoms, concerning in particular identifying and locating persons, collecting and protecting evidence, forwarding documents, arresting or detaining persons, and transferring and bringing prisoners before the competent jurisdiction.

*Application of the principle of ne bis in idem in prosecutions:*

- The EPP has priority over NPPs;
- the prosecution at the national level of persons who have already been judged at the European level on the same facts is not permitted;
- there is a duty on the criminal court applying the provisions of the *Corpus* to take into account any sentence passed by a national court on the same facts and already served by the person concerned.

**Article 19 – Seisin of the EPP and opening of proceedings**

1. The EPP must be informed of all acts which could constitute one of the offences defined above (Articles 1 to 8), by the national authorities (police, public prosecutors, juges d'instruction, agents of national administrations such as tax or Customs authorities) or the competent Community body, the European Office for the Fight against Fraud (OLAF). It may also be informed by denunciation from any citizen or by a complaint from the Commission. National authorities must seise the European Prosecution Service at the latest when the suspect is formally 'under investigation', under Article 29(1), or when coercive measures are employed, particularly arrest, searches and seizures or when a person's telephone is to be tapped.

2. If an investigation conducted by a national authority reveals that one of the offences above has been committed (Articles 1 to 8), the file must be immediately submitted to the EPP.

3. However the EPP learns about the facts, it may become officially seised either by the national authorities or by acting on its own initiative.

4. The decision to prosecute, which means opening an investigation, may be taken by the EPP whatever the sum of the fraud involved. The EPP, bound by the legality principle, must bring a prosecution if it appears that one of the offences (Articles 1 to 8) has been committed. It may however, by a decision with special grounds communicated immediately to the person who has informed it, or denounced it to its officials or laid a complaint:

- a) refer offences which are not serious or which affect principally national interests to the national authorities;
- b) drop the case, if the accused, having admitted guilt, has made amends for the damage caused and, as the case may be, returned funds received illegally;
- c) or grant an authorisation for settlement to a national authority which has applied for it, according to the conditions set out below (Article 22(2b)).

**Article 20 – Powers of investigation of the EPP**

1. In order to discover the truth and to bring the case to a point where it may be tried, the EPP conducts investigations into the offences defined above (Articles 1 to 8) looking for evidence of innocence as well as evidence of guilt (*à charge*

*et à décharge*). Its powers are divided between the European Director of Public Prosecutions (EDPP), the European Delegated Public Prosecutors (EDePPs) and, as may be, national authorities appointed for this purpose, according to the following rules.

2. The EDPP's own powers include:

- a) overseeing investigations and their delegation to one or more EDePPs, in accordance with the conditions and restrictions set out below (Article 20(3)).
- b) the coordination of investigations undertaken by the EDePPs as well as by national police forces and competent national administrations and, as may be, OLAF; this coordination may take the form of oral or written recommendations to the relevant authorities;
- c) the right to call in cases where the investigation reveals that they concern in whole or in part offences defined above (Articles 1 to 8).

3. All the following powers may either be exercised by the EDPP or delegated to the EDePP, where there is an investigation into offences set out in Articles 1 to 8:

- a) questioning of the accused, under conditions which respect his rights as set out below (Article 29);
- b) collection of documents and/or computer-held information necessary for the investigation and, if need be, visits to the scene of the offence;
- c) request addressed to the judge to order an expert enquiry under the conditions set out below (Article 29);
- d) searches, seizures and telephone tapping ordered in accordance with the rule below (Article 25bis) on authorisation from a judge or with his subsequent permission, and undertaken with respect for the rights of the accused (Article 32);
- e) hearings of witnesses who agree to cooperate with the law and, as may be, witnesses obliged to appear in accordance with the conditions below (Article 32);
- f) notification of charges to the accused, with respect for the rights set out below (Article 29);
- g) to make requests for a person's remand in custody or judicial control.

4. The powers delegated to the DdePP can in turn be partially subdelegated, for a limited period and in respect of a particular matter, to a national authority (prosecuting authority, police or other competent authority, such as the tax authorities or Customs). The national authority is obliged to follow the rules contained in the European *Corpus Juris*.

*Implementing provision*

20§3(a) An accused person (within the sense of Article 29) summoned by the EPP is bound to present himself in person, although not bound to reply to the questions put to him by the EPP. The summoning of a person in custody by the EPP, or of a person against whom a prosecution has been initiated, needs to be authorised by the judge of freedoms.

20§3(b) Upon an authorisation by the judge of freedoms, the EPP may demand that documentation and computer data be produced by a person holding them. National law determines questions of privilege, either personal or linked to professional secrecy.

20§3(d) In principle, all detailed arrangements concerning search and seizure are regulated by national law, so far as the *Corpus Juris* does not lay down specific provisions. However, the authority competent to give permission shall always be the judge of freedoms.

20§3(e) The EPP may summon a person to appear when he has reasons to believe that he possesses information which might be useful to his investigations. Such a summons is compulsory. National law determines questions of privilege, either personal or linked to professional secrecy. A person must be heard as an accused person, and not as a witness whenever there exists clear and consistent evidence of guilt against him (cf. Article 29).

20§3(g) Requests for an arrest warrant or for judicial control must be in written form and duly motivated. It must be addressed to the competent judge of freedoms, in accordance with the rules below (Articles 25ter and 25quater). The execution of such measures is arranged in the country where the arrest has taken place.

#### *Explanatory text*

According to the *Corpus Juris*, a person becomes an accused person 'from the point when any step is taken establishing denouncing or revealing the existence of clear and consistent evidence of guilt and, at the latest, from the first questioning by an authority aware of the existence of such evidence'. A consequence of this is that a someone can acquire the status of a person formally accused even before he has been officially notified by the EPP of the charges – something which is done with the sole aim of protecting his interests. The coercive measures laid down in Article 25quater can only take place once the notification of charges has been made.

#### **Article 21 – Role of the EPP in terminating the investigation**

1. When he considers investigations to be completed, the EDelPP decides, under the authority of the EDPP, whether to make a decision not to prosecute, or to bring the case to court.

2. The decision not to prosecute is notified to the European Commission, to the accused and to any body or person who informed the EPP, denounced the offence to its officials or laid a complaint, within the meaning defined above (Article 19(1)).

3. The decision to bring the case to court is notified under the same conditions as non-prosecution (Article 21(2)). Such notification includes details such as the name and address of the accused, a description of the acts and the offence so committed, and also states where the case is to be tried. It is verified by the judge of freedoms in accordance with the rules set out below (Article 25bis) who seises the court with jurisdiction and sends a summons to the accused stating the date and the time he is to appear.

#### *Implementing provision*

Article 21§1 – In order to close the preparatory stage, the EPP must base himself on evidence collected in accordance with the provisions of the *Corpus*, under the control of the judge of freedoms and under the conditions laid down in Article 25(bis). In order to bring a case to court, the EPP must support each of the charges with sufficient evidence to show

that there are serious reasons to believe that the suspect has committed the offence which he is alleged to have committed. If evidence is not sufficient, the EPP must drop the case. Article 21§3 – The decision to commit to trial excludes the possibility of negotiating the penalty.

#### **Article 22 – Bringing and terminating a prosecution**

1. For the offences set out above (Articles 1 to 8), the EPP prosecutes at the court of trial (selected as indicated hereafter, Article 26), according to the laws in the relevant state. The national prosecutor may if appropriate join the proceedings, if national interests are also under threat. In such a case, notices and summons are also addressed to the national prosecutor and the file is sent out to him in good time.

2. For the same offences, the prosecution is extinguished on the death of the defendant (or if it concerns a group, the dissolution of the group), or by expiry of the limitation period or by settlement:

a) there is a limitation period of five years, calculated from the day when the offence was committed if within this time there has been no investigation or prosecution; if investigation or prosecution have taken place, the offence is only time-barred from five years after the last act of investigation or prosecution. In all cases, notification of the charges to the suspect interrupts the limitation period;

b) settlement is ruled out in the case of repeated offences, where arms or forgery were used, or if the sum involved is 50,000 Euros or more. In other cases, it may be proposed by the national authorities to the EPP, both for cases under national jurisdiction (cf. Article 19(4a)), and cases under European jurisdiction, according to the following conditions: the defendant freely admits his guilt, the authorities have sufficient evidence of guilt to justify committal to trial, the decision to come to a settlement is made publicly, and the agreement concluded respects the principle of proportionality. In the case of refusal, the EPP must, if there are grounds, call in the case. The settlement agreement is subject to the control of the judge of freedoms.

#### *Implementing provision*

Article 22§1 – The relationship between the EPP and the NPPs is governed by the rules contained in Articles 18 and 19, establishing that the NPPs 'cooperate with the EPP in the investigation and in the prosecution of eurofrauds' and also that 'the EPP has priority over the NPPs'.

Article 22§2 – In any case, suspensions and interruptions should not prolong the limitation period beyond 10 years.

#### *Explanatory text*

In settlements, the role of the judge consists in checking that the conditions laid down in Article 22 of the *Corpus* have been respected. His agreement is given only when these conditions are respected.



### **Article 23 – Role of the EPP in the execution of sentences**

1. When a conviction becomes definitive, it is immediately communicated by the EPP to the authorities of the Member State appointed as the place of execution of the decision; certain penalties such as confiscation, removal of rights or publication of the conviction may be carried out in one or more places other than the place of imprisonment. The EPP is responsible, alongside the competent national authority, for ordering and overseeing the implementation of the sentence if this is not automatic. In principle, execution of the penalties is governed by the laws in force in the Member State appointed as place of execution of the sentence. However, the EPP oversees the application of the following common rules across the whole territory of the States of the European Union:

- a) any period spent in custody by the accused on account of the same acts, in any State and at any point of the procedure, is deducted from the custodial sentence pronounced by the court of judgment;
- b) no person may be prosecuted or criminally convicted in a Member State by reason of one of the offences defined above (Articles 1 to 8) for which he has already been either acquitted, or convicted by a final judgment, in any of the Member States of the European Union.

2. The EPP may, if there are grounds, authorise a transfer if a convicted person with a custodial sentence asks to be imprisoned in a Member State other than the one named by the conviction.

#### *Explanatory text*

By reason of its particularly innovative character, Article 23§1 (first part) renders amendments to national law necessary in order to ensure respect for the principle of European territoriality, within the meaning given to it by the *Corpus*. In particular, it requires that the rule prohibiting the extradition of nationals be interpreted in a manner compatible with the principle of European territoriality. This has the effect, at the level of the European Union, of suppressing the concept of extradition for offences defined in the *Corpus*.

The second part of Article 23§1 is equally innovative and takes into account current legal thinking. According to Recommendation no. 4 of the IADP, the principle of *ne bis in idem* 'should be regarded as a human right that is also applicable on the international or transnational level'.

#### *Implementing provision*

**Article 23§1** – The place of execution of the sentence is chosen by reference to the criteria laid down in the Convention of the Council of Europe on the transfer of criminal proceedings (Article 8) and in the European Convention on the recognition of criminal judgments (Article 6).

**Article 23§2** – In order to authorise the transfer of the sentenced person, the EPP takes into account the criteria laid down in the Council of Europe Convention on the transfer of sentenced persons (Article 3).

### **Article 24 – Competence *ratione loci* of the EPP, territorial effects of judgments and cooperation with third countries**

1. In the single legal area as defined in Article 18(1), competence *ratione loci* is exercised in application of the principle of European territoriality according to the following rules:

- a) members of the EPP appointed by the EDPP to bring prosecutions and conduct investigations into cases in accordance with the conditions set out above (Article 18 et seq.) have competence across the entire territory of the European Union (cf. Article 18(4a));
- b) warrants for arrest and decisions relating to the offences defined above made by the courts of any of the Member States are valid across the whole territory of the Union, as are judgments.

2. If investigations require legal cooperation of any kind from a third state, the EPP requests the national authorities of the principal country where investigations are taking place to apply to the third state concerned, following the procedure laid down by the national and international legal instruments in force.

#### *Explanatory text*

By reason of its particularly innovative character, Article 24§1 renders amendments to national law necessary in order to ensure respect for the principle of European territoriality, within the meaning given to it by the *Corpus*. In particular, it requires that the rule prohibiting the extradition of nationals be interpreted in a manner compatible with the principle of European territoriality, which has the effect, at the level of the European Union, of suppressing the concept of extradition for offences defined in the *Corpus*.

### **PREPARATORY STAGE (previously Article 25)**

#### **Article 25 – Definition and duration of the preparatory stage**

1. The preparatory stage of proceedings, opened with regard to the offences defined above (Articles 1 to 8), lasts from the initial investigations conducted by the EPP until the closure of such investigations and the decision to commit the case to trial (Article 21(3) above).

2. The preparatory stage has a legal duration of no more than six months. The judge of freedoms may, acting on a request from the EPP, decide on an extension for another period of six months. After hearing representations from the parties to the proceedings, the judge determines the length of the extension, taking into account the steps already taken by the EPP and the needs of the investigation. A further extension may be requested and granted according to the same procedure.

### *Article 25bis – The judge of freedoms*

1. Throughout the preparatory stage, an independent and impartial ‘judge of freedoms’, designated by each Member State within the jurisdiction sitting where the EDPP is established, exercises judicial control. This judge is also competent to order an expert opinion. He may also order measures to conserve the subject-matter of the prosecution, in cases where the duty to repay appears to be beyond dispute and such measures are necessary for the preservation of civil interests and are proportionate. The judge of freedoms applies national law as well as the *Corpus Juris*.

2. Throughout the investigation of offences defined above (Articles 1 to 8), the prior approval of the judge of freedoms is needed for any measure (including coercive measures which are permitted under the conditions listed in Article 25quater) which has the effect of restricting or depriving a person of the rights and fundamental freedoms laid down in the European Convention on Human Rights. The judge of freedoms controls the legality and the regularity of the measures and ensures that the principles of necessity and proportionality have been respected. An *a posteriori* check within 24 hours is, however, permitted in urgent cases, particularly when evidence is likely to disappear, when an offence is being committed or when the suspect is likely to evade justice.

3. At the end of the preparatory stage, if the EDPP decides to bring the case to court (cf. Article 21§1 and §3), he notifies his decision to the judge of freedoms, who seises the trial court in accordance with the rules below (Article 26).

#### *Implementing provision*

*Article 25bis(1)* – Member States designate the judge of freedoms, in accordance with the criteria listed below, so as to avoid overlap between the role of the judge of freedoms and that of the trial judge, in accordance with the case-law of the European Court of Human Rights.

The judge of freedoms must be chosen in a manner guaranteeing his competence, as well as his independence and his impartiality within the meaning given to these terms by the European Convention on Human Rights.

*Article 25bis(2)* – The judge of freedoms<sup>3</sup> holds a hearing in order to confirm the charges which the EPP intends to use in its request for a committal to trial. The hearing takes place with the EPP, the accused person and his counsel present. At the close of the hearing, the judge of freedoms assesses whether the case is ready for trial and decides whether there is sufficient evidence giving serious grounds to believe that the accused person has committed each of the offences he is alleged to have committed. This decision can be appealed against, in accordance with the appeal procedures laid down in national law, under conditions stipulated in Article 35.

*Article 25bis(3)* – Decisions of the judge of freedoms can be appealed against by the accused person and by the EPP. The Member States specify the arrangements for such appeals.

### *Article 25ter – The European arrest warrant*

1. The judge of freedoms, having examined the request of the EPP and all evidence and information provided by the prosecutor, issues a European arrest warrant when he considers this step to be justified. The warrant bears the name of the person to whom it is addressed and all other information necessary to identify him, as well as a precise reference to the offence relating to the *Corpus Juris* which is the ground for the arrest and a brief account of the facts alleged to constitute the offence in question.

2. An arrested person is brought without delay to the judge of freedoms of the state where he is being held. The judge of freedoms checks that the warrant concerns the arrested person, that the arrested person has been arrested according to a regular procedure and that his rights have been respected, in accordance with the procedure laid down in the *Corpus Juris* and in national law in accordance with the principle of complementarity found in Article 35 of the *Corpus*. The arrested person has the right to ask the judge of freedoms of the place where he is being held to be bailed until transferred.

3. The judge of freedoms makes his decision in accordance with national law and the European Convention on Human Rights. His decision is appealable in national law, in application of the provisions laid down in Article 35.

4. The European arrest warrant is granted by the judge of freedoms upon application made by the EPP (cf. Article 20, para. 3g and Article 25ter). It is valid on the whole territory of the European Union. The arrested person can be transferred onto the territory of the state where his presence is needed (this applying to the preparatory stage as well as the judgment stage).

5. In relation to legal cooperation that may be required from a third state, national authorities have the power to transmit requests for cooperation on behalf for the EPP. The practical details of cooperation will be governed by the international conventions that apply between the third state and the state whose help the EPP invokes.

#### *Explanatory text*

By reason of its particularly innovative character, Article 25ter (like Article 24§1) requires adjustments to national law, in order to ensure that the principle of European territoriality, within the meaning given to it in the *Corpus*, is respected. In particular, it requires that the rule prohibiting the extradition of own nationals be interpreted in a manner compatible with the principle of European territoriality. This principle must be considered to suppress, at the level of the Member States of the European Union, the concept of extradition for the offences defined in the *Corpus*.

#### *Implementing provision*

The EPP can request the arrest of the person in question by using a European arrest warrant.

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<sup>3</sup> This system would only apply in the absence of a Pre-trial Chamber (see chapter 2, section 2).

### **Article 25quater – Coercive measures: judicial control and pre-trial custody**

1. A person arrested or prosecuted in connection with the offences defined above (Articles 1 to 8) can be subjected to coercive measures such as remand in custody or placement under judicial control.

2. These measures are ordered by the judge of freedoms, after the EPP has informed him of the charges (cf. Article 20(3f)). The judge of freedoms orders the measures when he has good reasons to suspect that the accused person has committed one of the offences defined above (Articles 1 to 8) and when he is convinced that such a measure is necessary in order: to stop the accused person from evading justice; or to stop a continuation or repetition of offences; or to preserve evidence or prevent witnesses from being pressurised.

3. The accused person shall be held in pre-trial custody only when all other means of control appear insufficient, and only for a period strictly justified by the grounds mentioned in (2). The maximum duration for pre-trial detention is six months, renewable for three months.

4. National authorities are bound to help with the execution of the measures of judicial control ordered in other Member States and to arrest and transfer accused persons not remanded in custody but who when summoned had failed to appear.

5. Decisions of the judge of freedoms concerning coercive measures are appealable in so far as national law allows, in accordance with the provisions contained in Article 35.

#### *Implementing provision*

The procedure for judicial control is determined by national law, in accordance with the provisions contained in Article 35.

## **THE JUDGMENT STAGE**

### **Article 26 – Trial**

1. The offences set out above (Articles 1 to 8), are tried by national, independent and impartial courts, appointed by each Member State according to the rules on competence of the national law. The courts must as far as possible consist of professional judges, specialising wherever possible in economic and financial matters.

2. Each case is judged in the Member State which seems appropriate in the interests of efficient administration of justice, any conflict of jurisdiction being settled according to the rules set out hereafter (Article 28). The principal criteria for the choice of jurisdiction are as follows:

- a) the State where the greater part of the evidence is found;
- b) the State of residence or of nationality of the accused (or the principal persons accused);
- c) the State where the economic impact of the offence is the greatest.

3. In application of the general rule on the complementarity of national law (Article 35), national courts must refer to the rules in the European *Corpus* and, whenever needed, those of national law. They are bound in all cases to give grounds for the penalty by reference to circumstances pertaining to the particular case, applying the rules set out above (Articles 14 to 17).

#### *Implementing provision*

Article 26§2 – The choice of the Member State where the case is to be tried is made by the EPP, who first consults with the EDelPP or the NPP who carried out the investigation.<sup>4</sup> When investigations and prosecutions are carried out in several Member States, the case is tried by the competent authority of a single state, according to the criteria provided in subparagraph 2.

### **Article 27 – Appeal to national courts**

1. Any conviction pronounced against a person declared guilty of one of the offences set out above (Articles 1 to 8) must be subject to appeal by the convicted person, leading to the case being retried, in law and in fact, by a higher court of the State where the conviction was pronounced at first instance; the higher court must apply, as the court of first instance, the rules set out in the European *Corpus* and, in the case of a lacuna, must apply national law.

2. In the case of total or partial acquittal, appeal is also open to the EPP as a prosecutor.

3. In the case of appeal by the convicted person alone, the court seized may not pronounce a stiffer penalty.

### **Article 28 – Appeal to the European Court of Justice (ECJ)**

1. The Court of Justice has jurisdiction to rule on offences as defined above (Articles 1 to 8) in four cases:

- a) preliminary questions on the interpretation of the *Corpus Juris* and of implementing measures;
- b) on the request of a Member State or the Commission on any dispute concerning the application of the *Corpus Juris*;
- c) on the request of the EPP or a national legal authority on conflicts of jurisdiction regarding application of the rules on the principle of European

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<sup>4</sup> This system would only apply failing the adoption of a Pre-trial Chamber (see chapter 2, section 2).

territoriality, in relation to both national and European prosecutors (Articles 18 to 24); on the request of the EPP on the exercise of judicial control by national courts (Articles 25 to 27);

d) on the request of the accused on the choice of jurisdiction of judgment, within the meaning of Article 26(2).

2. When a question of interpretation is raised or a conflict of jurisdiction brought before a court of one of the Member States, this court may, if it considers that a decision on this point is necessary in order to give its judgment, call on the Court of Justice to rule on the issue.

3. When an issue or conflict such as this is raised in a case pending before a national court whose decisions are not subject to appeal in national law, this court is bound to seise the Court of Justice.

#### COMMON PROVISIONS

##### *Article 29 – Rights of the accused*

1. A person may not be heard as a witness but must be treated as accused from the point when any step is taken establishing, denouncing or revealing the existence of clear and consistent evidence of guilt and, at the latest, from the first questioning by an authority aware of the existence of such evidence.

2. In any proceedings brought for an offence as set out above (Articles 1 to 8), the accused enjoys the rights of the defence guaranteed by Article 6 of the European Convention on Human Rights and Article 10 of the UN International Covenant on Civil and Political Rights. Before any questioning takes place the accused must be informed of his right to silence.

3. From the time of his first questioning, the accused has the right to know the content of the charges against him.

##### *Article 30 – Rights of the Commission as partie civile*

This article has been deleted.

##### *Article 31 – Burden of proof*

1. Any person accused of one of the offences set out above (Articles 1 to 8) is presumed innocent until his guilt has been established legally by a final judgment which has acquired the authority of *res judicata*.

2. Subject to the obligation to produce certain documents which may be required under national or Community law, no person is obliged to contribute, directly or indirectly, in establishing his own guilt.

##### *Article 32 – Admissible evidence*

1. In Member States of the European Union, the following evidence is admitted:

a) testimony, either direct, or presented at the trial via an audio-visual link, or recorded by the EPP in the form of a 'European deposition'. For the latter the witness must be examined before a judge, the defence lawyer must be present and allowed to ask questions, and the operation must be recorded on video;

b) questioning of the accused is either direct or recorded by the EPP in the form of 'European interrogation report'. For the latter the questioning must take place before a judge, the accused must be assisted by a defence lawyer of his choice (who has received the file in good time and at the latest 48 hours before the questioning) and, if necessary, by an interpreter; in addition, the operation must be recorded on video;

c) statements made by the accused, outside the interrogations previously mentioned, provided that they have been made before the competent authority (EPP or judge), that the accused has first been informed of his right to silence and of his right to be assisted by a defence lawyer of his choice, and that the statements have been recorded in accordance with the law;

d) documents presented by an expert, appointed by the competent court from individuals or corporations appearing on a European list approved by the Member States on the proposal of the EPP, either during the preparatory stage or at the beginning of the trial;

e) pre-existing documents that the accused has been required to produce in a preliminary administrative investigation, as well as documents produced by third parties.

2. These provisions do not exclude the validity of other forms of evidence considered as admissible under the national law in force in the State of the court of judgment.

##### *Article 33 – Exclusion of evidence illegally obtained*

1. In proceedings for one of the offences set out above (Articles 1 to 8) evidence must be excluded if it was obtained by Community or national agents either in violation of the fundamental rights enshrined in the ECHR, or in violation of the European rules set out above (Articles 31 and 32), or in violation of applicable national law without being justified by the European rules previously set out; but such evidence is only excluded where its admission would undermine the fairness of the proceedings to admit it.

2. The national law applicable to determine whether the evidence has been obtained legally or illegally must be the law of the country where the evidence was obtained. When evidence has been obtained legally in this sense, it should not be possible to oppose the use of this evidence because it was obtained in a way that would have been illegal in the country of use. But it should always be possible to object to the use of such evidence, even where it was obtained in

accordance with the law of the country where it was obtained, if it has nevertheless violated rights enshrined in the ECHR or the European rules (Articles 31 and 32).

*Implementing provision*

With respect to evidence, the procedures found in national law (cf. Article 35) apply, to the extent that the *Corpus Juris* does not provide for a specific procedure (see also implementing provision for Article 20§3d).

Evidence can only be excluded when its admission would contravene due process. Therefore the judge must check that no irregularity has taken place which could damage the legally protected interests of the accused person (*Schutznorm*). If the evidence only concerns third party interests, there is no obligation to exclude it.

**Article 34 – Publicity and secrecy**

1. Investigations carried out under the authority the EPP are secret and authorities participating in these investigations are bound to respect the rule of professional secrecy.

2. Hearings before the judge of freedoms may be published if all parties consent to it, unless publicity would be likely either to harm the smooth running of the investigation, or to damage the interests of a third party, or to endanger public order or morals.

3. The trial hearing must be held in public, but access to the court may be denied to the press and the public, during all or part of the proceedings, under the conditions stipulated in Article 6(1) ECHR. Publicity may include recording and broadcasting the proceedings audiovisually if the national law of the State concerned allows it, and under the conditions it imposes. The judgment must in any case be given publicly.

*Implementing provision*

The concept of professional secrecy in §1 must be understood in accordance with the applicable national law (cf. Article 35).

**IV – COMPLEMENTARITY OF NATIONAL LAW**

**Article 35 – Complementarity of national law with regard to the *Corpus Juris***

1. In order to apply Articles 1 to 8, the rules defined in Articles 9 to 34 are supplemented by national law, whenever necessary. The national law applicable is that relating to investigations, to prosecution, to judgment or to the execution of sentences, depending on the stage the proceedings have reached.

2. As a complement to Articles 9 to 16, only the provisions of national law more favourable to the accused person apply.