

Working Group X

Working document 27

Working group X "Freedom, Security and Justice"

Subject : A European Public Prosecutor

Members of the Group will find enclosed a contribution from Mrs. Michaela Schreyer, member of the European Commission, submitted to the attention of the Group by Messrs. Michel Barnier and António Vitorino.

CONTRIBUTION OF MS SCHREYER TO WORKING GROUP X (“FREEDOM, SECURITY AND JUSTICE”) OF THE CONVENTION ON THE FUTURE OF EUROPE

A EUROPEAN PUBLIC PROSECUTOR

The need to prosecute perpetrators of criminal activities affecting the financial interests of the European Community more effectively has been a major concern for the European Union for many years. It has led the Commission to propose establishing a European Public Prosecutor¹.

In the context of the preparation of the new Treaty, there is an urgent need to consider immediately the establishment of a European Public Prosecutor. In the run-up of the enlargement of the Union, the issue has become a key priority.

Recently, a broad public debate has taken place with regard to the creation and functioning of a European Public Prosecutor, on the basis of a Green Paper². In Laeken, the Heads of States and governments have asked the Council to consider this document.

This contribution will summarise the main features of the Commission’s proposal and further develop the concept on the basis of the public discussion. This contribution also builds upon the discussion already initiated within the Convention and this working group.

1. Need for a prosecutorial function to protect the core interests of the Community

Crime detrimental to Community financial interests is a phenomenon requiring the utmost vigilance, which can affect the image and reputation of the European integration in the eyes of our citizens. The scale of detected fraud, corruption and money-laundering affecting the Community’s financial interests is estimated to account for several hundred million euros each year³, involving organised crime in complex transnational cases. In the interest of Europe’s taxpayers, these illegal activities must be vigorously prosecuted in the courts.

¹ See Additional Commission contribution to the Intergovernmental Conference on institutional reforms - *The criminal protection of the Community’s financial interests: A European Prosecutor*, 29.9.2000, COM(2000) 608.

² See Green Paper of the Commission on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, 11.12.2001, COM(2001)715; Communication from the Commission, *A project for the European Union*, 22.5.2002, COM(2002)247.

³ This amount reflects cases effectively detected and presumed to be criminal offences. According to certain assessments of experts, the real amount of fraud would account for several billion euros.

The Member States and the Commission are currently making great efforts to prevent and detect fraud but this alone is not sufficient. Substantial operational experience accumulated with the European Antifraud Office (OLAF) shows that it remains difficult for administrative investigations to lead to a successful judicial follow-up and criminal court proceedings. In addition, proceedings in cases involving Community bodies (internal cases) still depend on the national enforcement authorities.

The European Public Prosecutor would be a Community authority with his own enforcement powers. He would be responsible for detecting, prosecuting and bringing to judgement the perpetrators of crime prejudicial to the Community's financial interests and their accomplices. He would also be responsible for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences.

The main reason that the Commission has proposed that the European Public Prosecutor's jurisdiction be limited to the protection of the Community's financial interests⁴ is that Community funds have from the start of European integration constituted specific common interests (Articles 274 and 276 EC).

Moreover Article 280 of the EC Treaty requests that protection of the Community's financial interests be effective, dissuasive and equivalent in all the Member States. Building upon the acquis this objective of the Community requires a specific criminal-law solution going beyond traditional judicial cooperation.

The same concerns arise with respect to areas of common interest beyond the financial interests but which are still closely connected with Community instruments or the functioning of the Community, such as the single currency, the European civil service or the Community trademark. Therefore, the European Public Prosecutor's competence could be extended, if Member States agree, to the protection of such areas.

The Commission's approach is without prejudice to the possibility for the Convention to consider further areas of competence of the European Public Prosecutor.

2. Respect for the subsidiarity principle and for fundamental rights

In recognition of the subsidiarity principle, the Commission proposes that the organisation of the European Public Prosecutor be decentralised to guarantee integration into the national legal systems. Accordingly the European Public Prosecutor would rely on Deputy European Public Prosecutors in the Member States, seconded from national prosecution services.

Under the subsidiarity principle, many cases within the competence of the European Public Prosecutor could be referred to national authorities. For instance, such a reference would be appropriate where a case concerns the territory of only one Member State.

To operate properly, the European Public Prosecutor must have a procedural framework that meshes well with the national judicial systems. The Commission considers that this can be largely achieved on the basis of the mutual recognition principle, combined with approximation of national laws where necessary.

⁴ EC Treaty Article 280 provides for the protection of financial interests of the Community, which include resources, expenditures and assets.

The European Public Prosecutor would be required, in the exercise of his functions, to respect fundamental rights, especially those guaranteed by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, all his acts involving an element of compulsion should be subject to review by courts designated by each Member State and should conform to the strictest standards of the Union. This concept would not affect the Court systems in the Member States. Following the current debate, the creation of a preliminary Chamber of the Court of Justice in charge of reviewing certain activities of the Public Prosecutor at European level could also be considered.

Furthermore, the European Public Prosecutor would be subject to disciplinary responsibility before the Court of Justice and to a political control by the European Parliament.

3. The European Public Prosecutor, Eurojust and OLAF

Eurojust as a component of the judicial area is to be recognised as an important step. However a European Public Prosecutor would be a body of a very different nature (See annex 3). The functions of a European Public Prosecutor and Eurojust would be complementary. Their relationship should be clearly defined.

Several options for a common institutional framework might be considered. For example, the European Public Prosecutor could be a Member of a revised Eurojust. The European Public Prosecutor would have his own powers, but would cooperate and consult Eurojust where his cases require the broader jurisdiction of Eurojust. Another possibility would be to place under the authority of the European Public Prosecutor the powers to direct prosecutions in a limited field and the powers to co-ordinate prosecutions in a wider scope of competence.

Concerning the relationship with OLAF also several options might be considered. For example, OLAF might exercise criminal investigative functions under the authority of the European Public Prosecutor, without prejudice to further specifying the role of Europol.

4. Need for a legal basis to prepare the future

The establishment of a European Public Prosecutor requires an adequate legal basis in the future European Constitutional Treaty (see annex 1). This is necessary to ensure the legitimacy of the Prosecutor.

A future constitutional text should include an institutional provision confined to what is necessary to establish the Prosecutor and to define his tasks and main function. It should establish the legal basis for taking legislative action, building on the *acquis* (see annex 2), based on the co-decision procedure for the necessary substantive and procedural law.

- Annexes:
1. Elements to be inserted in the constitutional treaty
 2. Confirmation of the *acquis*
 3. Main features of Eurojust and a European Public Prosecutor

Annex 1:

Elements to be inserted in the constitutional treaty

In the framework of the Convention proposals on the European judicial area, the constitutional elements concerning the creation of a European Public Prosecutor could be inserted in an article 20a⁵ as follows:

- establishment of a European Public Prosecutor ensuring the centralised direction of proceedings aimed at crimes against the financial interests of the Community
- identification of other substantive competencies by the Council acting by unanimity
- specification of independence of the European Public Prosecutor
- creation of a Community legal basis (co-decision) laying down the conditions of operation of the prosecutor's functions including :
 - status
 - substantive law
 - procedural law
 - judicial review.
- specification of the relationship between the European Public Prosecutor and Eurojust.

⁵ Following the structure presented in the document CONV 369/2 of the 28.10.2002 on a draft constitutional treaty.

Annex 2:

Confirmation of the *acquis*

1. The *acquis* should be confirmed in an article 40a of the Constitutional treaty⁶.

The *acquis* of the Community in the field of financial interests includes:

- the principles of shared responsibility for the Community and the Member States, (current Article 280 § 1 and 3 EC)
- the principle of effective, dissuasive and equivalent protection (current Article 280 §2 and §4 EC).

2. The last sentence of paragraph 4 of current article 280 EC (“These measures shall not concern the application of national criminal law or the national administration of justice.”) should be abrogated.

⁶ Following the structure presented in the document CONV 369/2 of the 28.10.2002 on a draft constitutional treaty.

Annex 3:

Main features of Eurojust and a European Public Prosecutor

The functions of a European Public Prosecutor and Eurojust would be complementary, as mentioned above.

	Eurojust	European Public Prosecutor
Role	Coordination of national prosecution authorities	European direction of investigations and prosecution
Scope of offences	Wide range of types of cross-border criminality	Protection of specific Community interests (budget, Euro currency, ...)
Organisation	Collegial	Hierarchical and decentralised (Deputies)
Stage 1 – Information duties	An option for national authorities	An obligation for national authorities
Stage 2 - Investigation	No Communitywide enforcement powers	Communitywide enforcement powers
Stage 3 - Trial	No role	Power to prosecute and to indict
Legislation governing operation	Union Decision and intergovernmental method	Community legislation adopted by codecision