

PUBLIC HEARING ON THE GREEN PAPER ON THE PROTECTION UNDER CRIMINAL LAW OF THE COMMUNITIES' FINANCIAL INTERESTS AND THE ESTABLISHMENT OF A PUBLIC PROSECUTOR

Government in Ireland operates on the doctrine of the separation of powers which decrees that there are three main classes of governmental functions - the legislative, the executive and the judicial and three main organs of government to operate these functions - the legislature, the executive and the judiciary. The Irish Constitution and legal system is founded on this doctrine. Within the Irish legal system there are three distinct and independent processes in criminal matters whereby (i) the police investigate criminal offences, (ii) the Director of Public Prosecutions decides whether to prosecute or not on foot of files forwarded to the Director by the police and (iii) the courts try the offender for the offence in respect of which that person is accused. The proposal contained in the Green Paper for a European Public Prosecutor would lead to a blurring of the distinction between two of these functions - the investigative and prosecution functions - in relation to matters involving the protection of the Community's financial interests in Ireland. This would require substantial changes to Ireland's investigation, prosecution and constitutional systems and would fundamentally alter the manner in which justice is administered in Ireland.

On a wider European level, this proposal means that the citizens of the European Union are being asked to accept that crimes against the Communities' budget are so pervasive that a novel and untried system of criminal justice be constructed from a green-field site. The proposal for a European Public Prosecutor is built on the unproved premise that international co-operation, as presently structured, does not adequately cope with fraud against the Community. This approach ignores the fact that a number of European Union instruments, the Convention on the Protection of the European Communities' Financial Interests and its Protocols, have been negotiated specifically with a view to tackling this very issue. The Green Paper makes a claim, at Section 2.1.2, that none of these instruments ". . . give an adequate response to the specific question of criminal proceedings for acts to the detriment of the Communities financial interests ". As these instruments are only now coming into effect, it is not clear how this claim can be credibly made. Surely some reasonable time must be given to allow these instruments operate, after which a formal determination can then be made as to their impact and effectiveness in protecting the Communities' financial interests. Other initiatives which have been established recently will be identified by my colleague when he addresses you after this.

The proposal undermines the large body of ongoing work being done within Council in the area of police and judicial co-operation in criminal matters generally. For example, the principal of mutual assistance in criminal matters is built on the premise of giving assistance to overcome potential barriers while respecting the differing traditions in Member States. This is reflected in the ongoing work in the Justice, Home Affairs and Civil Protection area, which allows Member States to take account of their different legal systems in relation to investigation and prosecution but still makes it

possible to build and enhance co-operation towards each other in the manner by which they bring about such measures. An example of such co-operation within different legal systems is the programme of measures to implement mutual recognition in criminal matters agreed following the conclusion should become the cornerstone of judicial co-operation in both civil and criminal matters. However, the establishment of a European Public Prosecutor would be built on a foundation that would seek to use mutual recognition without taking account of the different legal systems. As we are all aware, to use a building metaphor, a faulty foundation is a recipe for future trouble. The approach in the Green Paper would seek to bypass totally the Mutual Assistance Convention in Criminal Matters and its Protocol which were adopted recently within the European Union and which build and enhance the long established and widely accepted procedures of the 1959 Council of Europe Convention.

The proposal also raises serious practical issues which have not been considered in the Green Paper. The Irish Director of Public Prosecutions will be dealing with some of these issues in greater detail when he addresses this gathering later, but I might mention some of the more obvious ones. For example, if, as proposed, the national police are to be subject to the direction of the European Public Prosecutor, which takes priority - urgent domestic cases or European Public Prosecutor cases? How are resources within the Member States to be planned and allocated when competing interests clash? How realistic is it to suggest that such approach could work in a limited and narrow field? How realistic practical is it to expect that separate and distinct rules and procedures should be available to combat these offences which would either not available to, or would differ from, those which are available to local law enforcement agencies? Others in their written comments, have referred to The problems of so-called "hybrid cases", but what can one say about hybrid investigations, prosecutions and judicial investigations? In addition, the Green Paper refers only to instances of cases against the Communities' budget which would involve Member States, but fails to indicate how the European Public Prosecutor would handle a case which would involve a Member State and a non-Member State.

In effect, the proposals contained in the Green Paper raise too many problems of a fundamental character to be workable. The Convention and its Protocols negotiated for the very purpose of tackling crimes against the Communities' budget must be given a realistic chance to operate before any new initiatives are pursued.

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