

Public hearing on the Green Paper on the protection under criminal law of the Communities'
financial interests and the establishment of a European Public Prosecutor.

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Speech by

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1. General outline

In a democratic State based on respect for fundamental rights and the rule of law it is unthinkable that a national public prosecutor could operate in a political and judicial vacuum.

That is why national public prosecutors operate within an institutional structure of separation of powers, checks and balances, hierarchical structures, political responsibilities, democratic control and judicial control.

In the Green Paper these essential elements are missing regarding the proposed European Public Prosecutor (EPP). No discussions about the lack of political responsibilities and of democratic parliamentary control: a political vacuum. And no discussions about the lack of legal structure: the European Union is not a federal State with a federal criminal legislation, a federal criminal justice system, federal criminal courts etc.. The EPP obviously also operates in a judicial vacuum (in this respect the position of the national deputy EPP remains unclear).

Prosecution includes substantial interference with fundamental rights of the citizen as a suspect or a defendant. It is the task of the defence lawyers to contribute to the control of these interferences. It is obvious that it takes more than a dream team of lawyers in order to control a legal opponent who operates in a political and judicial vacuum.

2. Substantive criminal law

In the Green Paper the scope of action of the proposed EPP is confined to offences against the Communities' financial interests. This aspect is only one potential element of big fraud cases. Other potential elements are f.i. involvement of organised crime, cross border aspects, damage to other financial interests like national or non-EU international interests. Most of the big fraud cases are complex mixed cases in which various national offences are involved. In general this is no jurisdiction obstacle for a national public prosecutor. But for the proposed EPP these mixed cases cause substantial problems with f.i.

- jurisdiction
- application of a mandatory or discretionary prosecution principle
- choice of the Member State of trial
- distribution of hybrid cases between the EPP and national public prosecutors
- application of review procedures
- the double jeopardy principle.

It also doubles the problems of the defence: two (a national and an European) opponents with two different legal regimes.

3. Criminal Procedure Law

a. Investigation measures

The proposed list of investigation measures consists of a mix of elements derived from

- national law, applicable in mixed cases
- first pillar Community law regarding the acts and decisions of the EPP and the so called Judge of Freedoms
- third pillar constructions like the mutual recognition of coercive measures (in a not harmonised national criminal procedure!) based on another national law.

The defence lawyer will be confronted with a mix of applicable law: what powers, what defence rights, what review procedures are applicable?

b. Evidence

The proposed admissibility in all Member States of evidence lawfully obtained raises various problems:

- different regimes of review and of admissibility in mixed cases
- unharmonised different national rules, jurisprudence and practices regarding inadmissible evidence
- smuggling c.q. laundering of unlawfully obtained evidence.

c. Rights of defence

The Green Paper gives rules about transnational powers of the EPP, but no rules about the rights of the defence (like de Corpus Juris did). This is a striking lack of appreciation regarding the equality of arms principle (a principle recognised by the European Court on Human Rights as essential for a fair trial).

Specifically in transnational cases (with a foreign prosecutor involved) it is essential for proper legal assistance that the defence lawyers in each Member State (in cross-border cases at least two) have f.i.

- information about the investigations and prosecution in every Member State involved in the case of his client
- access to his client (who is properly cautioned about his right to remain silent and who has not been forced to incriminate himself)
- access to court (pre-trial and trial judges)
- possibilities to ask for investigation measures
- proper fees in legal aid cases in each Member State involved
- free assistance of translators and interpreters
- review procedures against acts and decisions of the EPP in cases of alleged ‘forum shopping’ (regarding the choice of Member State for investigation measures, obtaining evidence, committal for trial, choice of Member State of trial, etc.).

Without these rights the defendant is placed at a substantial disadvantage vis-à-vis his opponent.

A mere verbal reference in the Green Paper to ‘respect for human rights’ and a mere Consultation Paper on ‘Procedural safeguards for suspects and defendants in criminal proceedings’ are not enough.

Human rights –in the wording of the European Court on Human Rights- must be ‘practical and effective’.

4. Evaluation

One can understand the interests of the European Commission regarding the protection of the financial interests of the Community.

One lesson can be drawn from the proposals in the Green Paper on the EPP:

“never leave the allocation of the rights of the defendant to the representative of the victim”.