



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.09.2000
COM(2000) 608 final

COMMUNICATION FROM THE COMMISSION

**Additional Commission contribution to the
Intergovernmental Conference on institutional reforms**

**The criminal protection of the Community's financial interests:
a European Prosecutor**

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INTRODUCTION

In its opinion of 26 January 2000 "Adapting the institutions to make a success of enlargement",¹ the Commission suggests in connection with the protection of the Community's financial interests that a legal basis be created in the Treaty for setting up a system of rules relating to offences and the penalties that they incur, to the requisite procedural provisions for the prosecution of these offences and to the powers and tasks of a European Public Prosecutor responsible for detecting fraud offences throughout European territory and for prosecutions in the national courts. In the framework of its new anti-fraud strategy, the Commission has confirmed its wish to strengthen the protection of the Community's financial interests in this respect.

In 1998 fraud and other irregularities affecting to the Community's financial interests accounted for a total estimated by the Member States and by the Commission at over a billion euros.² The involvement of organised crime in fraud to the detriment of the Community's financial interests and the transnational character of such crime presuppose cooperation with fifteen legal orders applying different rules of both substance and procedure. The current methods of cooperation often prove insufficient to overcome the difficulties faced by the judicial and police authorities in their fight against such fraud.

These difficulties will increase as the number of Member States and the number of operators and administrations involved in the management of Community funds rise.

The powers which this Communication proposes should be vested in a European Public Prosecutor would be limited strictly to the protection of the Community's financial interests as already defined and circumscribed in Article 280(1) of the EC Treaty.

Only the essential characteristics of the office would be laid down in the Treaty (appointment, removal, duties, and independence), leaving the rules and mechanisms governing its operation to be regulated by secondary legislation.

¹ COM(2000) 34; http://europa.eu.int/comm/igc2000/offdoc/opin_igc_en.pdf

² *Protecting the Communities' Financial Interests and the Fight against Fraud: annual report 1998*, COM(99) 590 final, section 1.3.

1. THE COMPLEXITIES TO BE OVERCOME IN VIEW OF THE COMMUNITY'S SPECIFIC RESPONSIBILITIES FOR THE PROTECTION OF THE COMMUNITY'S FINANCIAL INTERESTS

The shortcomings of the current mechanism are due mainly to the fragmentation of the European criminal law-enforcement area, which results from the fact that the national police and judicial authorities are empowered to act only on their own territory. The traditional methods of mutual judicial assistance and cooperation between police forces remain cumbersome and are often unsuited to an effective fight against transnational fraud. And experience has shown the difficulties of making a success of administrative inquiries in terms of prosecutions.

But the Community's financial interests ought to be protected especially rigorously and in equivalent fashion in all the Member States, since the money involved represents pooled resources. Responsibility for ensuring that the Community's financial interests are protected rests on the Member States and the Community both. The European Union must be able to guarantee the Member States and their citizens that offences of fraud and corruption are genuinely prosecuted in the courts.

1.1. The fragmentation of the European law-enforcement area

Article 280 EC states that measures adopted by the co-decision procedure to counter fraud and any other illegal activities affecting the financial interests of the Community "shall not concern the application of national criminal law or the national administration of justice". The EC Treaty as it stands, therefore, confers no powers to set up a European criminal law-enforcement area comprising a common judicial body such as a prosecutor.

The signing of the Convention on the protection of the financial interests of the European Communities of 26 July 1995 and of its additional protocols constitutes a first step towards the criminal protection of the Community's financial interests. These documents, which are the fruit of cooperation between governments under the "third pillar", are an important asset since they define fraud, misapplication of funds and corruption as offences incurring criminal penalties in all Member States.

But the Convention and its protocols have not yet entered into force as they have not been ratified by all the contracting parties. When they are in force, there will still be a degree of uncertainty as to the way in which they will be transposed into national criminal law by all the parties. What is more, these provisions alone will not suffice to eliminate the fragmentation of the European law-enforcement area as prosecutions will still be brought at national level.

Thus, given that there are fifteen different systems of criminal law, the Community has only very limited means to ensure effective and equivalent protection of the Community's financial interests in the Member States, as required by the Treaty. In the current situation, however effective the administrative coordination that the European Anti-fraud Office can generate, criminal proceedings remain uncertain. The Community does not have the instruments to supplement preventive action and administrative inquiries with a prosecution function.

Example:

The effect of the fragmentation of judicial authorities between the Member States is that there can be competing, partial or non-existent proceedings.

The ban on beef and veal exports from certain areas of the Community owing to BSE infection was circumvented by operators in three Member States when exporting to a non-member country. Commission action and the exposure of this scheme to defraud the agricultural subsidy system led thereafter to the opening of competing prosecutions in several Member States against the same offenders for the same offences. Yet although the proceedings began in mid-1997, the case has come to judgment in only one Member State.

This situation is unacceptable, in particular in areas of Community activity where subsidies are the rule, such as the common agricultural policy.

1.2. The traditional methods of judicial cooperation between the Member States are cumbersome and inappropriate

National mechanisms are the basis for criminal protection against transnational crime and remain essential. There are also international forms of cooperation in criminal matters, now boosted by the strengthened provisions for judicial cooperation under the third pillar.

But the development of organised crime to the detriment of the Community's financial interests makes the traditional instruments of mutual judicial assistance inadequate, and the progress achieved in judicial cooperation is also insufficient. There is no possibility of providing an interface between the Community level and the national judicial authorities in the Treaty as it stands.

Example:

The inadequacy of cooperation between Member States in criminal matters generates delays, dilatory actions and unpunished offences. In transnational financial fraud cases it all too often allows evidence to be destroyed and suspects to disappear. This is particularly prejudicial when it comes to reconstructing downstream financial channels used in cases of fraud against the Community's financial interests.

To take but one example, on the occasion of a public hearing before the European Parliament, a prosecutor from a Member State stated that he had had to deal with as many as 60 successive actions in the requested State in a single case likely to affect the Community's financial interests. The actions were brought one after the other to benefit in each instance from the time needed by the judge to dismiss them. It follows that, when the international letters rogatory are executed, they will generally be of no real use.

1.3. Difficulties in making administrative inquiries culminate in successful prosecutions

Numerous cases based on the Community experience in recent years thus testify to persistent obstacles in a field where precisely the specific responsibilities of the Community and the Member States create the need for a clear perception of the interests to be protected and for greater efficiency in proceedings in terms of the Community territory.

Example:

The transmission of information between Member States and between them and the European Anti-fraud Office (OLAF) is hampered by differences in the rules governing prosecutions in each Member State. If, for the same offence, the inquiry is handled in some Member States by a judge but in others by an administrative authority, direct contact between the two is generally impossible in both fact and law. Moreover, not all the relevant national authorities even have access to information under the various national rules, in particular those concerning the secrecy of tax and business information or the confidentiality of criminal investigations.

Example:

An attempt to prosecute the organisers of a major transnational fraud detrimental to the Community's own resources in two Member States, A and B, is an exemplary real case in this respect. A judge in a third Member State (C), where the accused actually resided, to whom the case was referred by the national customs authorities declared their action inadmissible on the specific ground that the certificate provided by the authorities of Member State A was insufficient for the purpose of proceedings in Member State C. This certificate confirmed, however, that the offence was punishable under the law of Member State A and referred to the penalties incurred by offenders in that State. Under the rules of Member State C, however, the judge was unable to admit the certificate issued by the customs authorities of Member State A as valid evidence.

2. THE PROPOSED MECHANISM

In the absence of a specific Community institutional structure the existing mechanisms, however legitimate and irreplaceable they may be, amount to obstacles to prosecution by the police and the courts and advantages for the criminal. Given the design of the Treaty, therefore, the Commission recommends that in order to respond to the current situation the primary legislation should be amplified to allow the creation of an office of European Public Prosecutor, its organisation and operation being governed by secondary legislation. This amendment would be confined to protection of the Community's financial interests.

2.1. Mature and detailed preparatory study

The Commission proposal to the Intergovernmental Conference is based on detailed preparatory work. For nearly ten years now, at the request of the European

Parliament and the Commission, a group of experts in criminal law from all the Member States has been working on the criminal protection of the Community's financial interests. Their work produced the proposal for a set of rules for the criminal protection of the Community's financial interests, the well-known *Corpus Juris*.³ It recommends the creation of a unified Community law-enforcement area as regards the preparatory stages of court proceedings precisely by the harmonious insertion in the national systems of a European Public Prosecutor, excluding any communitarisation of the administration of criminal justice.⁴

The authors of the *Corpus Juris* specified the possible architecture of an independent European Public Prosecutor, responsible in matters of the protection of the Community's financial interests for directing investigations and prosecuting cases in the relevant national courts and for coordination with national procedures.

The organisation would be highly decentralised. The European Public Prosecutor would be supported by Deputy European Prosecutors in the Member States so as to secure the link between the Community mechanism and the national legal systems.

2.2. The object of the reform

In this spirit, the Commission recommends the institution of an independent European Public Prosecutor to protect the Communities' financial interests.

This would supplement the reform of the Community courts as proposed by the Commission in its additional contribution to the Intergovernmental Conference of 1 March 2000⁵ by adding a judicial body with the function of bringing prosecutions in the courts of the Member States and of exercising ongoing control of criminal investigations across the Community territory in order to enforce the law and protect the Community's finances. The point is not to communitarise the administration of criminal justice, which would remain within national powers.

2.3. The methods of the reform

In the Commission's view, the Treaty will need amending only as regards the European Public Prosecutor's appointment and removal from office and the definition of his main tasks and the principal characteristics of his function, to be set out in a new Article 280a. The Treaty would provide for secondary legislation to lay down the regulations applicable to him and govern his operation.

³ *Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union*, under the direction of Mireille Delmas-Marty, Economica, Paris, 1997. The text of the *Corpus Juris* is also available on the Internet (<http://www.law.uu.nl/wiarda/corpus/index1.htm>).

⁴ In response to these recommendations, the experts more recently completed a comparative study into the need, legitimacy and feasibility of the *Corpus Juris*, analysing the potential impact of a European Public Prosecutor on national prosecution systems: *The implementation of the Corpus Juris in the Member States*, Mireille Delmas-Marty and J.A.E. Vervaele (eds.), Intersentia, Utrecht, 2000.

⁵ *Additional contribution of the Commission to the Intergovernmental Conference on institutional reform: the reform of the Community courts*, COM/2000/109 final.

2.3.1. *The appointment of the European Public Prosecutor (paragraphs 1 and 2 of the new Article 280a)*

The Commission proposes that the European Public Prosecutor be appointed by the Council, acting by a qualified majority on a proposal from the Commission with the assent of the European Parliament. The proposal, which should be made by the Commission in view of its specific responsibility for protecting the Community's financial interests, would be submitted, for example, in the form of a list of candidates from which the Council could select the European Public Prosecutor. The Commission further considers that conditions governing the removal from office of the European Public Prosecutor should be laid down (*paragraph 2 of new Article 280a*). Regarding the term of the office, the Commission proposes a non-renewable term of six years (*paragraph 1 of new Article 280a*). An essential characteristic of the European Public Prosecutor must in particular be stressed: his independence as a judicial officer (*paragraph 2 of new Article 280a*). Apart from these essential elements, the revised Treaty would leave the regulations governing the Prosecutor in respect of such things as structure, location of offices, etc. to be determined by Community secondary legislation in accordance with the procedure laid down in Article 251 of the Treaty, which calls for a qualified majority in the Council and co-decision with Parliament.

2.3.2. *Conditions for the exercise of the European Public Prosecutor's functions (paragraph 3 of the new Article 280a)*

With regard to the conditions for the exercise of the European Public Prosecutor's functions, a specific mechanism confined to activities detrimental to the Community's financial interests is necessary to ensure smooth operation in terms of both substantive criminal law and criminal procedure. These rules should be adopted by the Council by the co-decision procedure.

To clarify the Prosecutor's powers, offences relating to activities prejudicial to the Community's financial interests (fraud, corruption, money laundering etc.) and the relevant penalties should be defined more explicitly at Community level. It is difficult to reconcile the rigour of the criminal law with the existence of differences throughout the Community if the point is to ensure the effective and equivalent protection of the Community's financial interests. The definitions of these common offences should therefore be uniformly applicable in the national legal systems by the national criminal courts, as the ordinary courts of Community law, and this implies the adoption of specific rules. The provisions drawn up under the Convention of 26 July 1995 referred to above and its additional protocols already provide a solid basis that has the agreement of the Member States.

Moreover, the performance of the Prosecutor's duties will have to be made subject to rules of procedure (on such points as the mechanisms for referring cases to the Prosecutor, the Prosecutor's powers of investigation, or the initiation and termination of enquiries) and rules of judicial review (on such points as the review of acts done by the Prosecutor, whether or not under a warrant granted by a national judge). The *Corpus Juris* describes some possible options for rules of procedure and coordination with the national authorities. Rules of this kind will in any event have to be spelt out in proposals for secondary legislation, which will have to respect the national legal systems and traditions. Provision must therefore be made for the enactment of the following, by the procedure laid down in Article 251 of the Treaty:

- rules concerning offences (subparagraph 3(a) of the new Article 280a)
- rules of procedure applicable to the activities of the Prosecutor and rules governing the admissibility of evidence (*subparagraph 3(b) of the new Article 280a*)
- rules for the judicial review of the Prosecutor's actions, such rules being essential for the performance of his duties (*subparagraph 3(c) of the new Article 280a*).

These provisions of secondary legislation should also determine how this Community mechanism meshes with the national legal systems.

In conclusion, the Commission proposes that the Conference supplement the current provisions concerning the protection of the Community's financial interests with a legal basis allowing:

- the appointment of an independent European Public Prosecutor exercising the prosecution function in the courts of the Member States in the field of the protection of the Community's financial interests and within the framework of specific rules adopted for this purpose; and
- the subsequent adoption through secondary legislation of:
 - the regulations applicable to his office,
 - rules of substantive law concerning the protection of financial interests by the European Public Prosecutor (offences and penalties),
 - rules governing criminal procedure and the admissibility of evidence,
 - rules concerning judicial review of actions taken by the Public Prosecutor in the performance of his duties.

Current text of EC Treaty

Article 280

1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.
2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.
3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.
4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.
5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.

Proposed text

Article 280

1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.
2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.
3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.
4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. **Without prejudice to Article 280a**, these measures shall not concern the application of national criminal law or the national administration of justice.
5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.

Article 280a

1. To contribute to the attainment of the objectives of Article 280(1), the Council, acting on a proposal from the Commission by a qualified majority with the assent of the European Parliament, shall appoint a European Public Prosecutor for a non-renewable term of six years. The European Public Prosecutor shall be responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community's financial interests and their accomplices and for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences in accordance with the rules provided for by paragraph 3.

2. The European Public Prosecutor shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries. In the performance of his duties, he shall neither seek nor take any instructions. The Court of Justice may, on application by the European Parliament, the Council or the Commission, remove him from office if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the regulations applicable to the European Public Prosecutor.

3. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular:

- (a) rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community's financial interests and the penalties incurred for each of them;**
- (b) rules of procedure applicable to the activities of the European**

	<p>Public Prosecutor and rules governing the admissibility of evidence;</p>
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(c) rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.