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# A Public Prosecutor for Europe?



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## Introduction

The post of European Public Prosecutor – primarily intended to deal with fraud committed against EU funds – was first proposed by the Commission at the time of the Intergovernmental Conference for the subsequent Nice Treaty but was not agreed. It was later included in the Constitutional Treaty in 2004 but following the decision to drop that treaty the proposal was included in the Treaty of Lisbon as Article 69E. The Treaty requires unanimity in the Council and the consent of the European Parliament before the post can be created.

This briefing note explains the history of the proposal, the intent behind it, and developments since the Treaty of Lisbon came into force at the beginning of 2010.

## Background

The idea of creating a European Public Prosecutor (EPP) to handle major cases of fraud involving EU funds, and possibly other cross-border crime, was first proposed by the Commission in 2000 but it had been widely discussed before then. The Commission's idea was to include the post in the Nice Treaty but Member States failed to agree. The Commission produced a detailed Green Paper the following year outlining the purpose and scope of the role.<sup>1</sup> During the Convention that produced the draft Constitutional Treaty in 2003-04, the proposal was revived and included in the draft Treaty.

The EPP proposal was controversial from the beginning – as the Commission acknowledged in its 2001 Green Paper – because several Member States felt that such a post would undermine national sovereignty in justice matters. In particular, they felt that there were problems of accountability, of ensuring a fair trial for the accused and they doubted the utility of the post.

The Commission's arguments in favour of a European Public Prosecutor were that:

- fraud against EU funds is a substantial problem;
- such frauds are complex, major cases that cross borders;
- this was "a specific form of crime which requires a specific response";
- there had been calls for many years from judges and prosecutors for more effective ways of dealing with cross-border crime in the EU;
- there was concern about the fraud problem in many Member States, including the United Kingdom;

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<sup>1</sup> European Commission, *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, COM (2001) 715 final, 11 December 2001

- Member States have different rules of criminal justice procedure which make for a fragmented approach to fraud cases involving EU funds.

The Commission went on to point out that potential fraud cases had been abandoned because of the difficulties posed by different jurisdictions.

### **The Role & Powers of the European Public Prosecutor**

Article 69E of the Treaty of Lisbon sets out the role and scope of the office of European Public Prosecutor and how it can be established.

Sub-section (1) gives the reason for the office:

In order to combat financial crimes affecting the interests of the Union [...]

Sub-section (2) gives more detail:

The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators in, and accomplices in, offences against the Union's financial interests [...]

The details of the working of the office would be laid down in the regulations establishing the post. These regulations would cover general rules applying to the office, rules of procedure applying to its activities, rules governing the admissibility of evidence and rules governing judicial review of the actions of the prosecutor's office. These regulations would be adopted when the office was established.

As no definite proposal to create the office has yet been tabled, the details of the working of the office have not been set out. However, the 2001 Commission Green Paper provided a great deal of detail on its proposals as to how the office of European Public Prosecutor could work in practice.

The Prosecutor would be a law officer, independent of Member State governments and the EU's institutions, with authority to act on his own initiative, and not subject to the direction of any other person or body. The procedure for appointment, it was suggested, would be nomination by the Commission and a decision by the Council under qualified majority voting. The office holder would have a non-renewable term of six years – *i.e.* longer than the term of an individual Commission or of the European Parliament.

The Commission proposed that the Prosecutor would be responsible for the investigation and assembly of a case but the trial stage would be in national hands. The Prosecutor would have a directing and co-ordinating role; actual investigations, for example, would be carried out by Member States' police forces. In each case, a judge in a Member State would take on the role of reviewing the investigation of the Prosecutor and the judge's decisions on the admissibility of evidence or other procedural matters would apply across all Member States.

While the direction of cases where he had jurisdiction would be in the hands of the Prosecutor, most of the detailed work on individual cases, including the actual prosecution, would be carried out, the Green Paper proposed, by a network of Deputy Prosecutors in Member States. These would be appointed on the nomination of the relevant Member State and would be drawn from those with experience of carrying out prosecutions in that state.

Part of the difficulty with establishing the office of European Public Prosecutor lies in determining how far national criminal laws should be harmonised – if at all. The Commission argued in its 2001 Green Paper that any “such harmonisation must be proportionate to the specific objective of the criminal protection of the Community’s financial interests”. It suggested that the minimum necessary harmonisation to enable the Prosecutor to work effectively should be adopted initially; it would then be possible to see whether further change was necessary. It did suggest, however, that a high level of harmonisation was needed for the definition of the specific offences to be covered by the Prosecutor:

If there is to be a prosecution service with jurisdiction throughout the Community, a common definition of offences is therefore clearly an essential condition for its operation.

In fact, as the Commission points out, Member States had adopted an EU law on common offences concerning fraud or misuse of EU funds in 1995, as a consequence of the Convention establishing the EU police agency, Europol.

The Green Paper of 2001 suggested expanding on the existing common offences by including other crimes, such as conspiracy and the financial abuse of office by civil servants concerned in the management of the EU’s financial interests.

The procedure for establishing the office under the Treaty of Lisbon is set out in Article 69E. The Treaty provides for the office to be established by unanimous agreement in the Council after consulting the Commission and obtaining the consent of the European Parliament.

Where there is no unanimity, the Treaty provides for the matter to be referred to the European Council – provided at least nine Member States agree – for it to try and establish a consensus. If it manages to do so, then the draft legislation would be referred back to the Council for adoption. If not, and at least nine Member States wished to adopt the regulation, then they could do so using the enhanced co-operation provisions of the Treaty. This means that the European Public Prosecutor’s office would be established but it would only have jurisdiction in those Member States that had chosen to participate in the enhanced co-operation in this area. However, it is possible that a citizen of a non-participating Member State could be arrested and extradited using a European Extradition Warrant in order to be tried in a case prosecuted by the EPP.

### **Developments since January 2010**

The Lisbon Treaty came into force at the beginning of 2010 and soon after the Spanish Presidency called for the post of European Public Prosecutor to be established quickly. Its motivation for doing so was concern about fraud and speculation against the euro. The

Spanish Public Prosecutor also suggested that the EPP could also have responsibility for certain other cross-border crimes, such as people-trafficking, drugs offences and terrorism.

In April 2010, the presidency tabled a paper suggesting that the time was now right to discuss bringing the EPP post into being and to consider whether the post holder should be granted wider investigative powers than those in the Treaty. The Lisbon Treaty does make provision for the European Council, by unanimity, to extend the powers of the EPP to include "serious crime having a cross-border dimension", either when it agrees to establish the EPP or later.

The Spanish proposal was not in fact discussed by the Justice & Home Affairs Council during its presidency and although its approach was endorsed by the subsequent Belgian Presidency, it is unlikely that agreement will be reached on setting up the EPP in the near future as a significant number of Member States believe that such a post is unnecessary and would undermine their crime and justice systems. The coalition Government in the UK, which is one of those that still opposes an EPP, has said that any agreement would need to be ratified in a referendum.

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## Senior European Experts

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