

Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

concerning

a Draft Regulation of the Council on the establishment of the European Public Prosecutor's Office (EPPO)¹

Treaty framework for appraising compliance with subsidiarity

1. In previous Reasoned Opinions, the House of Commons has set out what it considers to be the correct context in which national parliaments should assess a proposal's compliance with subsidiarity. The House of Commons continues to rely on that context without restating it.

Proposed legislation

Purpose

2. The general or main objective of the proposed Regulation, as summarised by the Commission in its impact assessment, is to “contribute to the strengthening of the protection of the Union’s financial interests and further development of an area of justice..”; and the other objectives are to:

- establish a coherent European system for investigation and prosecution of offences affecting EU financial interests (known as PIF offences – taken from the French acronym for “protecting financial interests”²);
- ensure a more efficient and effective investigation and prosecution of those offences;
- deter the commission of such offences;
- increase the number of prosecutions leading to more convictions and recovery of fraudulently obtained Union funds; and
- ensure close cooperation and effective information exchange between the European and national competent authorities.³

¹ COM(13) 534.

² These offences will be defined by reference to the yet to be agreed draft Directive on the fight against fraud to the Union's financial interests by means of criminal law (12683/12) COM (12)(363). This draft Directive is commonly known as the draft PIF Directive.

³ See page 28 of the impact assessment.

3. It aims to achieve these objectives through the main action of establishing a European Public Prosecutor's Office (EPPO) to be structured on a "decentralised" model⁴ comprising a small central team of the European Public Prosecutor (EPP) and four deputies that would then work through a system of European Delegated Prosecutors (EDPs) in each participating Member State.⁵

Operation

4. The draft Regulation is based on Article 86 TFEU which creates a competence for the EU⁶ "in order to combat crimes affecting the financial interests of the Union" to "establish a European Public Prosecutor's Office from Eurojust".

5. In summary, the draft Regulation proposes that the EPPO (through its EDPs) would:

- have exclusive competence to investigate and prosecute PIF offences within the territory of the Member States which will be considered to be a "single legal area" for this purpose;⁷
- be able to direct the competent investigative and prosecution authorities within the participating Member States through the EDP network for PIF offences⁸;
- use, through EDPs and subject to certain conditions⁹, an extensive list of investigative measures¹⁰;
- be able to obtain any relevant information from national authorities (criminal investigation or law enforcement databases¹¹) or from Eurojust and Europol¹²; and
- have the same powers as national public prosecutors in national courts¹³ and be able to choose which participating Member States' national court would take the case¹⁴.

Subsidiarity

6. In its explanatory memorandum, the Commission asserts the proposal's compliance with subsidiarity as follows (a similar approach being taken in Recital 5 of the draft Regulation):

"There is a need for the Union to act because the foreseen action has an intrinsic Union dimension. It implies Union-level steering and coordination of investigations and prosecutions of criminal offences affecting its own financial interests, the protection of which

⁴ Recital 13 and Article 3 of the draft Regulation

⁵ Article 6 (1) and (4) of the draft Regulation

⁶ Article 86(1) TFEU

⁷ Articles 11(4) and 25(1) of the draft Regulation

⁸ Article 6(4) of the draft Regulation

⁹ Such as prior judicial authorisation or the pre-requisite of "reasonable grounds"; see Article 26(3) of the draft Regulation

¹⁰ Article 26 of the draft Regulation

¹¹ Article 20 of the draft Regulation

¹² Article 21 of the draft Regulation

¹³ Article 27(1) of the draft Regulation

¹⁴ Article 27(4) of the draft Regulation

is required both from the Union and the Member States by Articles 310(6) and 325 TFEU. In accordance with the subsidiarity principle, this objective can only be achieved at Union level by reason of its scale and effects. As stated above, the present situation, in which the prosecution of offences against the Union's financial interests is exclusively in the hands of the authorities of the Member States is not satisfactory and does not sufficiently achieve the objective of fighting effectively against offences affecting the Union budget."¹⁵

7. However, in its impact assessment, the Commission advances seven main reasons to justify EU action (which we address in more detail later on):

- additional measures are required to tackle fraud against the EU budget;¹⁶
- the current fragmented, national-level enforcement system is deficient;
- EU fraud is not a priority at national level and is not prosecuted satisfactorily by Member States, including OLAF-referred cases (conviction rates being uneven across Member States and ranging from approximately 20% to 90%);¹⁷
- increased prosecution of EU fraud cannot be achieved by reforming existing EU Agencies nor by strengthening current EU measures and initiatives;¹⁸
- the draft PIF Directive will only partially address EU budget fraud¹⁹;
- a coherent, EU-level prosecution regime will produce an equivalent level of national and cross-border enforcement and deterrence across the EU;²⁰ and
- a high level of protection of suspects' rights will be thus be ensured.

Aspects of the Regulation which do not comply with the principle of subsidiarity

i) Failure to comply with essential procedural requirements

8. By virtue of Article 5 of Protocol (No 2) "any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality". The requirement for the detailed statement to be within the draft legislative act implies that it should be contained in the Commission's explanatory memorandum, which forms part of the draft legislative act and which, importantly, is translated into all official languages of the EU. The fact that it is translated into all official languages of the EU allows the detailed statement to be appraised for compliance with subsidiarity (and

¹⁵ Paragraph 3.2, page 4 of the explanatory memorandum.

¹⁶ See page 7 of the impact assessment. There was an average of €500/£425 million of suspected fraud in each of the last three years and undetected fraud of up to €3/£2.55 billion a year

¹⁷ Conviction rates for Member States in relation to cases referred to them by OLAF, 2006-11 are provided at page 18 of the impact assessment. The Commission concedes that statistics are a crude measure which the Commission concedes. It states that to properly assess the performance of the judicial systems of the Member States would require an in-depth study, including the legal procedural framework applicable in each Member State and of the crime situation on the ground. Nevertheless the Commission still concludes that the operation of the EPPO would "...achieve a higher degree of prosecution in such cases".

¹⁸ Commission's impact assessment, pages 26 and 27.

¹⁹ Commission's impact assessment, page 27

²⁰ Page 26 of the impact assessment

proportionality) in all the national parliaments of Member States of the EU, in conformity with Article 5 of Protocol (No 2). This is to be contrasted with the Commission's impact assessment, which is not contained within a draft legislative act, and which is not translated into all the official languages of the EU.

9. The presumption in the Treaty on European Union²¹ is that decisions should be taken as closely as possible to the EU citizen. A departure from this presumption should not be taken for granted but justified with sufficient detail and clarity that EU citizens and their elected representatives can understand the qualitative and quantitative reasons leading to a conclusion that "a Union objective can be better achieved at union level", as required by Article 5 of Protocol (No 2). The onus rests on the EU institution which proposes the legislation to satisfy these requirements.

10. For the reasons given below, we do not consider that the Commission has provided sufficient qualitative and quantitative substantiation in the explanatory memorandum of the necessity for action at EU level. This omission, the House of Commons submits, is a failure on behalf of the Commission to comply with essential procedural requirements in Article 5 of Protocol (No 2).

11. The first limb of the subsidiarity test provides that the EU may only act "if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level".²² The House considers that the Commission's subsidiarity analysis does not consider whether the stated objectives are necessary, only that they can better be achieved at EU level, which makes them necessary: "[t]here is a need for the Union to act because the foreseen action has an intrinsic Union dimension" (see paragraph 6 above). By conflating the first and second limbs of the subsidiarity test, this statement is entirely self-serving. The analysis is not remedied simply by stating that the prosecution of offences by Member States "is not satisfactory".

ii) Failure to comply with the principle of subsidiarity

12. Turning to the impact assessment, the Commission says that action at national, Member State level is not sufficient because:

- there are deficiencies in the current national-level enforcement system (even though supported by the work, at the cross-border/EU level, of relevant EU Agencies – OLAF, Eurojust and Europol) which is fragmented due to the divergence of Member States' criminal justice systems and priorities;
- despite Member States being under wide legal obligations to tackle fraud against the EU budget under existing EU measures and Article 325 TFEU, they are not able satisfactorily to identify, investigate and prosecute EU fraud and a large number of

²¹Article 5.

²²See Article 5(3) TEU.

cases forwarded by OLAF to national authorities do not result in any kind of enforcement or prosecution action²³; and

- obstacles to successful national level action include divergent legislation, the complexity of cases, lack of sufficient national resources and the frequent need to gather evidence outside of the national territory²⁴.

13. The Commission also says that national-level action would still not be sufficient if it is combined with strengthened existing EU-level measures and mechanisms, because:

- there is limited scope to achieve the objectives of the proposal through reforming those EU Agencies: neither Eurojust²⁵ nor Europol²⁶ can be given the power to conduct investigations, Eurojust cannot be given the power to prosecute cases before the national courts and OLAF does not have any competences with respect to criminal investigations nor can it ensure follow-up to its investigations;²⁷
- whilst the legal fragmentation of national criminal law will be partially addressed through the draft PIF Directive by harmonising criminal offences and sanctions, that proposal cannot address problems with EU-wide investigations and prosecutions²⁸; and
- other existing measures and initiatives taken by the Commission (such as the anti-fraud strategy)²⁹ are not sufficient to deal with the problems identified with investigations and prosecutions³⁰.

14. The House of Commons considers that, in its analysis in the impact assessment, the Commission has not satisfied the first limb of the subsidiary test because:

- it has not adequately considered the option of strengthening existing or alternative mechanisms (including preventive measures at the point of application for EU funds) which could be enforced at national level and EU level but assumes that the establishment of a supranational prosecution and investigative agency is the only way that EU budget fraud can be addressed. Its impact assessment sets out four options for consideration (no action, only non-regulatory action at EU level, strengthening the powers of Eurojust and setting up an EPPO) but only the option forming the current proposal is substantially examined;

²³ See page 27 of the impact assessment.

²⁴ See note above.

²⁵ See limits of Article 85 TFEU

²⁶ See limits of Article 88 TFEU

²⁷ Commission's impact assessment, page 26

²⁸ Commission's impact assessment, page 27

²⁹ Also, the 1995 Convention on the protection of the EU's financial interests, Regulation 1073/1999 on investigations conducted by OLAF, and Regulation 2185/1996 concerning on-the-spot checks and inspection)

³⁰ Commission's impact assessment, page 27

- it has been too precipitate in not waiting to assess the impact of the draft PIF Directive in facilitating national and cross-border investigation and prosecution of EU budget fraud³¹; and
- the Commission uses questionable data and flawed assumptions in its impact assessment (including, but not limited, to the use of unreliable convictions data³², the assumption that the EPPO option is the only way of reducing fraud and not examining preventive measures, the use of the data of non-participating States, use of problematic costing based on EPPO being funded out of existing resources).

15. Furthermore, the Commission's assertion in relation to the first limb of the subsidiarity test, does not consider the sufficiency of action "at regional or local level", particularly important where devolved administrations may have discrete criminal justice systems. The House draws the Commission's attention to Annex 1 to this Reasoned Opinion, the 13th Report of the Justice Committee of the Scottish Parliament. That Committee concluded that it does not consider that the establishment of the EPPO is either necessary in order to achieve the stated objective of tackling EU fraud or that action at EU level would bring greater benefits than Member States could achieve collectively. It is concerned that Commission has not sufficiently explored whether action short of a supranational agency would be capable of delivering effective protection against EU financial fraud. On 5 September the Scottish Parliament agreed, as recommended by the Justice Committee, to the motion that the draft Regulation "does not comply with the principle of subsidiarity, as set out in Article 5 of the Treaty on the European Union".

16. The second limb of the subsidiarity test requires evidence that the objective of the draft Regulation would be better achieved, by reason of its scale or effects, by action at EU level. According to the Commission, the benefits of EU-level action are that:

- a coherent, EU-level prosecution regime will be able to tackle the cross-border elements involved in EU fraud cases, produce a consistent, efficient, equivalent level of enforcement throughout the EU, ensure cooperation and coordination between Member States and ensure that every suspected offence against the EU's financial interest is systematically pursued, thus improving deterrence³³; and
- an EU-level approach will ensure a high level of respect and protection of the rights of individuals and companies during investigations and prosecutions of EU fraud, in accordance with the Rule of Law.

³¹ Ongoing uncertainty about the UK's participation in that measure does not undermine the validity of that argument, given that the Commission is quite prepared to advance the subsidiarity credentials of the current proposal which can only ever have partial Member State participation.

³² See note 17. The Commission concedes that statistics are a crude measure which the Commission concedes. It states that to properly assess the performance of the judicial systems of the Member States would require an in-depth study, including the legal procedural framework applicable in each Member State and of the crime situation on the ground. Nevertheless the Commission still concludes that the operation of the EPPO would "...achieve a higher degree of prosecution in such cases".

³³ Page 26 of the impact assessment

17. The House of Commons is not convinced by the Commission's assertion of these benefits of EU-level action. This is because:

- the qualitative and quantitative indicators used are open to the same criticism referred to in paragraph 14 above; and
- an EU-level prosecution regime, in which there will be only partial participation and no “single legal area” across the EU, will not achieve an equivalent level of enforcement throughout the EU; and
- the claim that a high level of protection of suspects' rights will be achieved is unjustified:
 - it is questionable whether participating Member States, in which investigative and prosecutorial functions have been separated precisely to prevent abuse of power and to enhance protection of suspects' rights, would agree with that claim;
 - pressures on EDPs to prioritise EU fraud cases and secure 100% conviction rates will introduce a mandatory model of prosecution decision-making (alien to the UK and other Member States who employ a discretionary model) which may undermine suspects' rights;
 - rights of EU citizens who are victims of other crimes might be adversely affected by the prioritisation of national resources for EU fraud prosecutions;
 - the lack of detail on arrangements for judicial review undermines the proposal's compliance with the Rule of Law; and
 - “equality before the law”, another Rule of Law concept, will not be achieved in the two-tier criminal justice systems which will inevitably result from the proposal, where suspects of prioritised, target-driven prosecutions of EU offences may run a greater risk of conviction than other suspects.

18. The House of Commons is also concerned about the potential disadvantages of EU-level action. Not only are there potential disadvantages for non-participating States resulting from the reduced competence of Eurojust and OLAF in relation to PIF offences and the lack of focus on preventive measures, but also for participating States in the dilution of national responsibility for prosecuting those offences and a loss of autonomy in prioritising prosecution activity within their own criminal justice systems.

Conclusion

19. For these reasons the House of Commons considers this proposal does not comply with the principle of subsidiarity.

Annex

**13th Report of the Justice Committee of the Scottish Parliament (2013, Session 4)
“Report on the European Commission Proposal for a Council Regulation on the
establishment of the European Public Prosecutor’s Office (COM (2013) 534 final”**



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

13th Report, 2013 (Session 4)

Report on the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)

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The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

Remit and membership

Remit:

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

13th Report, 2013 (Session 3)

Report on the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)

The Committee reports to the Parliament as follows—

BACKGROUND

1. At its meeting on 3 September 2013, the Committee considered whether the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final) complies with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. The Committee's consideration was prompted by concerns highlighted by both the UK and Scottish governments in relation to the proposal's compliance with the subsidiarity principle and included taking evidence from the Cabinet Secretary for Justice.

OVERVIEW OF PROPOSAL

2. The European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO) (COM(2013) 534 final) was published on 17 July 2013, with a view to tackling EU fraud. Under the proposal, the EPPO would be responsible for investigating, prosecuting and bringing to judgment the perpetrators of offences against the Union's financial interests.¹ Article 25(1) of the legislative proposal states that, "for the purposes of investigations and prosecutions conducted by the EPPO, the territory of the Union's Member States shall be considered a single legal area in which the EPPO may exercise its competence".²

3. The Commission has identified that suspected fraud amounted to an average of £425 million in each of the last three years, but suggests that the actual amount

¹ Home Office (7 August 2013). *Explanatory Memorandum on European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)*.

² European Commission (17 July 2013). *Proposal for a Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)*. Available at: http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf

is "likely to be significantly higher"³. The Commission believes that "Member States are not able satisfactorily to identify, investigate and prosecute EU fraud" and that "a new supra-national EU criminal justice body with investigation and prosecution powers would be best placed to protect the EU's financial interests"⁴.

4. The UK Government has confirmed that it does not intend to participate in this proposal.⁵

SUBSIDIARITY

Principle of subsidiarity

5. Article 5 of the Treaty on European Union sets out the principle of subsidiarity as follows—

"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

Commission position

6. The Commission believes that the proposal meets the principle of subsidiarity.

7. It argues that "combatting crimes affecting the financial interests of the Union can be better achieved at Union level by reason of its scale and effects". It goes on to state that "the present situation, in which the prosecution of offences against the Union's financial interests is exclusively in the hands of the authorities of the Member States does not sufficiently achieve that objective". The Commission therefore concludes that "steering and co-ordinating investigations and prosecutions of criminal offences affecting its own financial interests ... can only be achieved at Union level".⁶

UK Government position

8. In its Explanatory Memorandum of 7 August 2013, the UK Government states that it does not believe that the principle of subsidiarity has been met.

9. It argues that "the Commission does not ... provide robust evidence to justify the creation of a new supra-national agency with extensive and harmonised powers, acting through one new single legal territory across the whole Union and all Member States".⁷ It goes on to state that "the Commission does not explore or

³ Home Office (7 August 2013). Explanatory Memorandum.

⁴ Home Office (7 August 2013). Explanatory Memorandum.

⁵ Home Office (7 August 2013). Explanatory Memorandum.

⁶ European Commission (17 July 2013). Proposal for a Regulation on the establishment of the European Public Prosecutor's Office.

⁷ Home Office (7 August 2013). Explanatory Memorandum.

assess alternative approaches to deliver a strengthened system to prevent EU fraud at source at national level".⁸

Scottish Government position

10. In correspondence to the Committee of 26 August, the Cabinet Secretary for Justice confirmed the Scottish Government's view that the proposal may breach the principle of subsidiarity. He argued that "there is little or no evidence that consideration has been given to possibilities short of the creation of a new supra-national agency with extensive and harmonised powers".⁹

11. In further correspondence of 2 September, the Cabinet Secretary explained that the EPPO would have exclusive competence to investigate, prosecute and bring to judgement those connected to offences against the EU's financial interests (so-called PIF offences) and that this could also be extended to include other offences inextricably linked to the PIF offence under investigation.¹⁰ He added that "the new proposals would mean that the EPPO would in relation to certain offences have the power to direct investigative activity at national level and not just in relation to PIF offences but other connected offences. This, he argued, would cut across the role of the Lord Advocate as the head of the system of prosecution in Scotland".

12. During evidence heard by the Committee on 3 September, the Cabinet Secretary stated that there could also be difficulties in relation to the direction and operation of investigations carried out by the police and other law enforcement agencies.¹¹ Furthermore, he confirmed that the EPPO would be able to change or apply different rules of evidence to those which exist in national jurisdictions.

13. The Cabinet Secretary told the Committee that the Scottish Government agreed with the UK Government that the Commission had not made the case for its position that it is necessary to establish the EPPO to achieve better detection and prosecution of EU fraud and that this cannot be achieved by Member States working individually and together.¹² He further argued that the proposal to move directly towards an EPPO was premature and that more efforts should be made to help support national governments improve tackling EU fraud.¹³

CONCLUSION

14. The Committee does not consider that the establishment of the EPPO is necessary in order to achieve the stated objective of tackling EU fraud or

⁸ Home Office (7 August 2013). Explanatory Memorandum.

⁹ Scottish Government (26 August 2013). Correspondence from Cabinet Secretary for Justice to the Committee on proposal to establish a European Public Prosecutor's Office. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130626_CSfJ_EU_proposals.pdf

¹⁰ Scottish Government (2 September 2013). Correspondence from Cabinet Secretary for Justice to the Committee on proposal to establish a European Public Prosecutor's Office. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130902_CSfJ_EU_proposals.pdf

¹¹ Justice Committee. *Official Report*, 3 September 2013.

¹² Justice Committee. *Official Report*, 3 September 2013.

¹³ Justice Committee. *Official Report*, 3 September 2013.

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¹¹ Justice Committee. *Official Report*, 3 September 2013.

¹² Justice Committee. *Official Report*, 3 September 2013.

¹³ Justice Committee. *Official Report*, 3 September 2013.

that action at EU level would bring greater benefits than Member States could achieve collectively. Furthermore, we have concerns that the Commission has not explored sufficiently whether action short of a supra-national agency would be capable of delivering effective protection against EU financial fraud.

15. The Committee therefore agrees that the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final) does not comply with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union.

RECOMMENDATION

16. The Committee recommends that the Parliament agrees that the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final) does not comply with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union.

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