

## 8 Subsidiarity yellow card: the European Public Prosecutor's Office

(35613) 17176/13 COM(13) 851	Commission Communication on the review of the Draft Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity in accordance with Protocol No. 2
---------------------------------------	---

<i>Legal base</i>	—
<i>Document originated</i>	27 November 2013
<i>Deposited in Parliament</i>	4 December 2013
<i>Department</i>	Home Office
<i>Basis of consideration</i>	EM of 16 December 2013
<i>Previous Committee Report</i>	None; but see (35216) 12566/13: HC 83-xviii (2013-14) chapter 6 (23 October 2013) and HC 83-xv chapter 1(11 September 2013)
<i>Discussion in Council</i>	See paragraph 8.29
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Not cleared; further information requested; relevant to the debate on relations between the Commission and national Parliaments in European Committee B on 30 January

### Background and previous scrutiny

8.1 In July 2013, the Commission published its proposal for a Regulation to establish a European Public Prosecutor's Office to combat fraud on the EU budget.<sup>[37]</sup> The EPPO would comprise of a core team of the European Public Prosecutor (EPP) and four deputies working through a system of European Delegated Prosecutors (EDPs) in each participating Member State. An account of the scope and provisions of that proposal and the Government's view are set out in our previous Reports on the proposal.<sup>[38]</sup>

8.2 The draft Regulation requires the unanimous agreement of Member States (with the consent of the European Parliament)<sup>[39]</sup> but in the absence of unanimity the proposal can proceed according to an accelerated version of the enhanced co-operation procedure, if nine Member States or more request that the draft regulation be referred to the European Council.

8.3 Although the draft Regulation engages the UK's JHA Title V opt-in rights under Protocol 21 to the Treaties, the Government's intention not to opt into this measure was set out in the Coalition Agreement. As part of our scrutiny of the opt-in aspects of the proposal a Lidington debate was held jointly on that proposal and the parallel

proposal on Eurojust on 29 October 2013.

8.4 In any event, any participation in a proposal to establish an EPPO is governed, either pre- or post-adoption, by the "double lock" requirements set out in section 6 of the European Union Act 2011 — approval by Act of Parliament and a referendum.

8.5 On 22 October 2013 the House of Commons debated and agreed a motion adopting a Reasoned Opinion, which we recommended in our Fifteenth Report on the draft Regulation.<sup>[40]</sup> The Reasoned Opinion, which was sent to the Presidents of the European institutions, sets out the reasons why the House of Commons believes the proposal does not comply with the principle of subsidiarity in Article 5 TEU. This principle requires that, in matters of shared competence, the EU shall only act if the objectives of the proposal cannot be sufficiently achieved by Member States (either at central or at regional and local level) but can be better achieved at EU level.

8.6 Article 7(2) of Protocol (No. 2) to the EU Treaties on the application of the principles of subsidiarity and proportionality provides that where Reasoned Opinions in respect of a JHA proposal (submitted within the eight week period allowed under the Protocol) represent at least a quarter of all votes allocated to the national parliaments (currently 14 votes), the proposal must be reviewed by the Commission.<sup>[41]</sup> This is known as reaching the "yellow card" threshold. The Commission may decide to "maintain, amend or withdraw" the proposal. Reasons must be given for the decision.

8.7 On 12 November, the Speaker was notified by the Commission that the "yellow card" threshold had been reached on the proposal. By the subsidiarity Protocol deadline (28 October 2013) the Commission had received 14 Reasoned Opinions from national parliaments and chambers of 11 Member States, representing 18 of the 56 votes allocated to national parliaments. Those submitting Reasoned Opinions were the UK Parliament (both Houses), the French Senate, Dutch Parliament (both Chambers), Swedish Parliament, Irish Parliament (both Chambers), Hungarian Parliament, Czech Senate, Slovenian Chamber, Cypriot Parliament, Romanian Chamber and the Maltese Parliament.

8.8 Prior to this, national parliaments have only issued a "yellow card" once, on the Monti II proposal (on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services).<sup>[42]</sup> The Commission decided to withdraw that proposal, but in its collective response to all national parliaments explained that this was because it anticipated the proposal would not have the requisite political support in the Council. It did not concede that the subsidiarity principle had been breached, nor did it explore properly the national Parliaments' arguments to the contrary.

### **The current document**

8.9 In this Communication, dated 27 November 2013, the Commission informs Member States that it has decided to maintain the EPPO proposal because it believes it complies with subsidiarity. Despite this, it says that it has "carefully

analysed" the Reasoned Opinions of the national parliaments from the perspective of subsidiarity and commits to continuing to take them into consideration in the ongoing legislative process.

## SUBSIDIARITY TEST

8.10 In applying the subsidiarity test (Article 5(3) TEU) to the EPPO proposal, the Commission accepts that both insufficiency of Member States' action and added value of Union action must be demonstrated. The Commission says that the Court of Justice has implicitly recognised that the EU institutions have some margin of discretion in their assessment of compliance with the principle, referring to cases such as C-58/08 *Vodafone* and Case C-377/98 *Netherlands v Parliament and Council*.

## PRELIMINARY POINTS

8.11 As preliminary points in its subsidiarity review of the EPPO proposal, the Commission:

- repeats that the protection of the EU budget against fraud can be better achieved at Union level, by reason of its scale and effects;
- argues that the proposal cannot be considered *per se* to be in breach of subsidiarity as the Treaties have explicitly called for the establishment of the EPPO in Article 86 TFEU; and
- notes that some of the Reasoned Opinions expressed support for the establishment of an EPPO, even though they questioned specific elements of the proposal.

## ARGUMENTS RAISED IN THE REASONED OPINIONS

8.12 The Commission then distinguishes between arguments in the Reasoned Opinions that it considers to be within the scope of the subsidiarity control mechanism in Protocol (No.2) and those outside that scope because they are unconnected with subsidiarity (proportionality, policy choices unrelated to subsidiarity or other policy or legal issues). Arguments which fall into the latter category, will be "be duly taken into account in the process of negotiating the proposal", addressed in political dialogue and in the Commission's individual replies to be sent to the relevant national Parliaments.

### *Scope of the subsidiarity control mechanism*

8.13 Within the scope of the control mechanism and therefore addressed by the Commission in the Communication (see further below) are arguments relating to:

- reasoning concerning subsidiarity;
- the alleged sufficient character of existing mechanisms (to fight fraud on the EU budget);

- the added-value of the proposal;
- issues relating to the structure of the EPPO; and
- issues relating to the nature and scope of its competences.

8.14 The Commission says that the following arguments are outside the scope of the subsidiarity control mechanism:

- the Regulation is too far-reaching;
- powers should be reserved to national authorities;
- the Regulation goes beyond what is necessary to achieve the objective;
- the Regulation may violate the protection of fundamental rights guaranteed by the Charter of Fundamental Rights; and
- the Regulation would create disadvantages for Member States in that they lose the capacity to prioritise prosecution activities within their own criminal justice systems.

*Arguments within scope — sufficiency of Member State action and existing mechanisms*

8.15 The Commission rejects the following arguments of national Parliaments:

- that it did not sufficiently explain the reasons why the proposal is compatible with the principle of subsidiarity (Cyprus' *Vouli ton Antiprosopon*, the UK's *House of Commons*, and Hungary's *Országgyűlés*). The Commission believes that the EPPO proposal complies with the legal requirement of Article 296 TFEU to provide a statement of reasons underpinning the proposal and the Court of Justice's corresponding case law. Its impact assessment adds to the detail already provided in the explanatory memorandum and in the legislative financial statement and together this substantiates its position with regard to the principle of subsidiarity and explains why the action of the Member States is insufficient;
- that it conflated the first and second steps of the analysis (insufficiency of Member State action and added-value of Union action) as argued by the UK *House of Commons*. The Commission says it has explained adequately why the proposal meets both steps in detail, in accordance with the *Vodafone* case and with reference to the impact assessment as evidence;
- that the existing mechanisms or currently proposed legislation were not explored sufficiently (Cyprus' *Vouli ton Antiprosopon*, the Czech Republic's *Senát*, Ireland's *Houses of the Oireachtas*, the Netherlands' *Eerste Kamer* and *Tweede Kamer*, Romania's *Camera Deputailor*, Slovenia's *Državni Zbor*, Sweden's *Riksdag*, and the UK *House of Commons*). The Commission believes that it has provided objective and clear statistical information which shows that the efficiency of action at Union level will give a more effective deterrent and equivalent level of protection than

existing mechanisms or proposed legislation;

- that regional and local level actions should also have been examined where devolved administrations may "have discrete criminal justice systems (UK *House of Commons*). It dismisses regional division of powers as "a purely internal matter" and says its statement of insufficiency of Member State action "necessarily encompasses" all levels of Member State action; and

- that action should be focussed on improving existing mechanisms to address fraud on the EU budget (UK *House of Commons*) because this would, at best, have a marginal effect and that because not all fraud is preventable, the deterrent of enforcement is also required. The Commission argues that OLAF's powers are limited to administrative investigations and quotes the statistics in the explanatory memorandum and impact assessment. The Commission repeats that Europol and Eurojust have no powers to conduct or direct investigations or prosecutions themselves, nor can they be given such powers under the Treaties. Harmonisation of offences and sanctions will not as such produce satisfactory results without being accompanied by effective investigation and prosecution measures, whereas the EPPO can.

#### *Arguments within scope — added value*

8.16 The Commission disagrees that the proposal will not provide added value (Czech Republic's *Senát*, Hungary's *Országgyűlés*, Romania's *Camera Deputatilor*, and the Netherlands' *Eerste Kamer* and *Tweede Kamer*). Instead, the Commission says that the proposal will address the wide divergences between Member States, provide deterrence and prevent forum-shopping. Expertise and know-how in investigating and prosecuting EU-fraud can be pooled. It will allow the discovery of cross-border links and the effective direction and coordination of investigations. Also, time-consuming mutual legal assistance procedures for obtaining information or evidence will disappear. Exchange of information and evidence data will be facilitated. Added value will be achieved by removing different rules on collection or presentation of evidence at national level to aid the exchange and admissibility of evidence as between Member States and the proposal would not undermine judicial authorisation of investigative powers and procedural safeguards.

#### *Argument within scope — structure of EPPO*

8.17 The Commission rejects the argument of France's *Sénat*, Romania's *Camera Deputatilor*, and Malta's *Kamra tad-Deputati* that a "college" structure (involving representatives from all participating Member States in the central tier of the EPPO) would adhere more closely to the principle of subsidiarity. Questions of a vertical or horizontal model are related to the principle of proportionality and not subsidiarity. In any case a college model is not less centralised than the EPPO model proposed but just another way of organising the EPPO. The comparison is therefore between two possible modes of action at EU level. A collegial structure could hamper the EPPO's efficiency and compromise the clear chain of command needed for the EPPO's effective decision-making and operation.

## *Argument within scope — nature and competences of the EPPO*

8.18 The Netherlands' *Eerste Kamer* and *Tweede Kamer*, Hungary's *Országgyűlés*, Romania's *Camera Deputaţilor*, Slovenia's *Državni Zbor*, the UK's *House of Lords*, Cyprus' *Vouli ton Antiprosopon*, and the Czech Republic's *Senát*, all questioned the nature and competences of the EPPO. The Commission sees no distinction between national and cross-border cases within Article 86 TFEU and proposes to maintain the EPPO's exclusive competence over all EU fraud cases. The fundamental EU dimension of these crimes, the need to avoid parallel actions but also to identify connections across the EU requires exclusive competence. Ancillary competence is not a concern because it will be subject to strict criteria and can help avoid parallel investigations and the problem of double jeopardy.

### **The Government's view**

#### *The rejection of the yellow card*

8.19 The Minister for Security at the Home Office (James Brokenshire) says that overall the Government is disappointed with the Commission's response to the "yellow card" and is:

"concerned about the apparent haste with which the Commission has conducted its review. National Parliaments have a right to expect that the Commission will conduct a thorough review and duly acknowledge and consider Reasoned Opinions. Despite the numerous concerns raised, and especially on aspects that directly underpin the principle of subsidiarity, the Commission remains firm in their view that subsidiarity has been met."

8.20 He notes the Commission's undertaking to respond to each Reasoned Opinion in turn but should that prove dissatisfactory, says the Government "would support further calls from national Parliaments for the Commission to take on board the serious issues they have raised". He continues:

"In line with the principle of subsidiarity, it is essential that decisions are made at the appropriate level and as close to citizens as possible. This principle is enshrined in the Treaties by the subsidiarity principle and the Government regards it as a key principle for the democratic legitimacy of the EU. It is therefore important that the Commission responds appropriately to the views of national Parliaments."

8.21 In particular, in rejecting the "yellow card", the Minister says that the Commission:

- does not provide any new evidence to support its case;
- jumps from the options of taking no action or taking no new regulatory actions to variations on the creation of the EPPO, a new supra-national agency with extensive and harmonised powers, acting through one new single legal territory across the whole EU and all Member States;

- continues to base this proposal on the premise that Member States do not have the will or the capacity to act to protect the Union's budget, and that a 100% prosecution rate is the most effective deterrent where the EPPO's decision to prosecute takes priority over national cases whereas the Government still considers prevention at source within Member States is as valid a deterrent within the enforcement cycle;
- does not explore or assess alternative approaches to deliver a strengthened system to prevent EU fraud at source at national level (including further simplification of sectoral rules governing the EU budget, Member States taking more responsibility for the funds they administer and effective enforcement by the Commission to make Member States improve management and control systems); and
- is wrong to consider that just because there is a specific legal base for the EPPO proposal that it follows that the proposal complies with subsidiarity, particularly since Article 86 only says that the EPPO "may" be created, not that it should or will be created.

## SCOPE OF THE SUBSIDIARITY CONTROL MECHANISM

8.22 The Minister then addresses the Commission's approach to the scope of the subsidiarity control mechanism and its interpretation of the subsidiarity principle. He says that the Government does not agree with the distinction the Commission draws between arguments raised in Reasoned Opinions which are within and outside the scope of the mechanism and thinks "that the Commission has accorded the principle of subsidiarity an unacceptably narrow interpretation". He continues:

"The Government believes that some of the substantive issues that the Commission argues are not subsidiarity concerns are, in fact, subsidiarity issues. For example, it is the Government's view that the following two issues are squarely within the scope of the principle of subsidiarity: 'The Regulation is too far-reaching'; and 'The EPPO's powers are too far-reaching and should be reserved to national authorities'.

"Moreover, whether any proposed action cannot sufficiently be achieved by Member States and would be better achieved by action at Union level *must* be informed, in part, by an assessment of the merits of the proposed action. That assessment of the merits will inevitably need to take into account policy choices and legal issues. Subsidiarity cannot be fully assessed without consideration of these wider issues. This is particularly relevant where, as with the EPPO measure, there is a spectrum of possible options for EU-level action, but not all EU-level action will comply with the principle of subsidiarity. The role of national Parliaments under Protocol 2 would be academic and void of any practical meaning if they were constrained to assess issues of subsidiarity with no corresponding assessment of the parameters of the Union's proposed action in the relevant area.

"The inclusion of the principle of subsidiarity within the Treaties and the role of national Parliaments to assess this issue are specifically designed to act as a counter balance to excessive moves towards EU-level action, as it should remind legislators that they must first consider all other options available at the national level to achieve the objective and add value."

## COMMISSION'S ANALYSIS OF REASONED OPINION ARGUMENTS

8.23 The Minister says that the Government agrees with the following arguments raised by national Parliaments in their Reasoned Opinions:

- that the Commission had not adequately considered the option of strengthening existing bodies (e.g. Eurojust, OLAF) or alternative new mechanisms;
- that the Commission failed to substantiate the need and the added value of the EPPO (Netherlands' Senate, Sweden's Parliament, the UK's House of Commons, Cyprus' Parliament, Slovenia's Parliament and Czech Republic's Senate);
- that the protection of the EU financial interests can be better obtained by strengthening existing mechanisms of cross-border cooperation between criminal justice authorities;
- that criminal law is primarily a national competence and that the Commission has not considered other alternatives to prosecution action through exclusive competence (Irish Parliament, House of Commons and House of Lords), as the Government believes that "prevention at the national level, within national competence, is an essential element of the fight against any form of fraud and existing payment systems must be strengthened";
- that the Commission's interpretation of national conviction rates as demonstrating that Member States are unwilling to act. The Minister adds:

"whether a case is or is not prosecuted depends on the evidence available and public interest considerations. If the evidence is not strong enough, then there cannot be a prosecution. We believe that the new Regulation governing the work of OLAF, which entered into force on 1 October, will help improve the quality of evidence provided by OLAF to national courts, which will in turn support increased convictions. This can help address many of the conviction issues the Commission raises in its assessment of the EU fraud problem. So we continue to advocate that recent changes need time to be implemented fully before any further action is contemplated."; and

- that the powers given to the EPPO are too far reaching (the Netherland's Senate, France's Senate and Hungary's Parliament) and the EPPO should be based on a more "collegial" model. The Minister says that there "is no evidence that the Commission has actively appreciated these different points of view or considered anything other than the creation of an EPPO as a hierarchical EU-body".

## LACK OF FINANCIAL AND EMPIRICAL EVIDENCE FOR PROPOSAL

8.24 The Minister says that the Commission has "side-stepped" concerns about the evidence underlying the proposal, does not provide further information or new data to strengthen its impact assessment or cost benefit analysis and simply refers to "a solid basis of statistical evidence" supporting the proposal. He says that this "seems rather at odds with their own impact assessment, which says that the cost benefit



analysis is "pushing the limits of what is possible". He adds that the Government therefore still considers that the "Commission's assessment, calculations of risk and therefore its projection of the scale of the problem remain flawed and weak" and its justification for the proposal "fundamentally flawed".

## FINANCIAL IMPLICATIONS

8.25 The Commission maintains the position that the EPPO will not generate substantial new costs and that "the overall costs of law enforcement will be more balanced as a result of efficiency gains". The Government does not consider that the impact assessment and the cost benefit analysis are correct or has been accurately assessed, particularly given the inability to include figures for OLAF in the Estimated Financial Impact sections.

## DEVOLVED ADMINISTRATIONS

8.26 The Minister refers to the motion of the Scottish Parliament dated 5 September 2013 that the proposal breaches the subsidiarity principle. He notes that the Scottish Parliament maintain its concerns about the proposal and not least about the position of the Lord Advocate as head of both the prosecutorial and investigative systems. He also notes the concerns of the Northern Irish Assembly about how the proposal would affect its prosecutorial and investigative functions which are separate and the fact that prosecutors in Northern Ireland do not have powers of search, seizure, interception, surveillance, monitoring financial transactions or covert video surveillance.

## FUTURE NEGOTIATION OF THE PROPOSAL

8.27 The Minister says that in the absence of consideration of alternative options to the EPPO proposal "it is difficult for us to see how the Commission can fulfil its promise to represent the views of national Parliaments expressed in their Reasoned Opinions during the Commission's interventions as part of future negotiations".

8.28 He adds that there continues to be no information on how the EPPO will interact with non-participating Member States, an issue on which the UK will seek clarity in negotiations in order to protect its position under Protocol 21 where the UK does not opt to participate in a JHA measure.

## TIMING

8.29 The Minister says that the EPPO was discussed at the December JHA Council and negotiations are expected to continue from January 2014. The Government says that the Commission can only progress to enhanced cooperation once the Member States make it clear that there is no unanimity on the current proposal.

## **Our Assessment**

8.30 The precipitate nature of the Commission's response (published just one month after the deadline for Reasoned Opinions), the absence of any new evidence in the response, its complete rejection of every single argument raised by 14 different

chambers of national Parliaments and its collective approach are all suggestive of the Commission treating the exercise as a formality rather than a conscientious review. The expediency of maintaining the proposal appears to have driven this review and there is little evidence to suggest that the Commission fully considered the other options of amending or withdrawing the proposal. This approach lacks credibility and we therefore disagree that the Commission has, as it claims at page 4 of the Communication "carefully analysed the Reasoned Opinions submitted by national Parliaments" or "has adopted an open attitude toward the Reasoned Opinions, interpreting their arguments, in so far as possible in the light of the principle of subsidiarity".

8.31 We note that the Commission uses Court of Justice case law to justify its approach to the subsidiarity review and in particular the "margin of discretion" afforded to the EU institutions. But to avail itself of a "margin of discretion", the Commission must properly exercise discretion in the first place. This means reconsidering the subsidiarity compliance of the proposal with an open mind in the light of the national Parliaments' Reasoned Opinions and ensuring that, within the spirit and not just the letter of the subsidiarity Protocol, the proposal represents a "decision taken as closely as possible to the citizens of the Union" and proceeds with a sufficient level of democratic legitimacy.

8.32 We disagree with the Commission's interpretation of the scope of the subsidiarity control mechanism. We agree with the Government that arguments which the Commission considers outside scope are intrinsic to national Parliaments' review of the merits of EU action and whether the EU can better achieve the legislative objective of the Regulation. The House of Commons has issued 12 Reasoned Opinions since the adoption of the subsidiarity Protocol which have relied upon arguments which are similar or analogous to those the Commission now rejects. We have received responses from the Commission to eight of them. We have also corresponded with the Commission on the quality and usefulness of the responses received to our Reasoned Opinions (our letter of 26 June 2013;[\[43\]](#) the Commission's reply of 24 July 2013).[\[44\]](#) At no time before has the Commission made known its view that these arguments were unconnected to subsidiarity. It is unfortunate that only it chooses to do so now when faced with significant opposition to a proposal and at a point in the process where national parliaments are no longer empowered under the Protocol to challenge a draft legislative act. We therefore look forward to receiving a detailed explanation from the Commission as to why these arguments are considered to fall outside the scope of the Commission's subsidiarity review when it writes further to us.

8.33 We also reject the Commission's assertion that it does not have to consider specifically the sufficiency of Member State action "at regional or local level" and that "the division of powers between a Member State, its regions and its municipalities is a purely internal matter" (see page 7 of the Communication). This assertion is concerning particularly where, as in the case of EPPO, the proposal affects criminal justice which necessarily involves diverse systems and processes at the regional level of Member States (as in the cases of Scotland and Northern Ireland) and warrants a subsidiarity analysis which takes into account this diversity.

8.34 We also challenge the Commission's assertion that the existence of a legal base

in the Treaties for the establishment of an EPPO means that it cannot *per se* breach the subsidiarity principle. Article 5(1) TEU states that it is "the use of Union competences" that is governed by the principle of subsidiarity, not their mere existence, and we consider this can only be determined by carrying out a two-stage subsidiarity assessment of the specific content and scope of a proposal. In addition, Article 86(1) TFEU states that the Council may establish an EPPO, not "shall". There can be no assumptions that a proposal intrinsically does or does not comply with subsidiarity; there can be no pre-emption of the process in which national parliaments have been accorded the central role under Protocol (No. 2).

## **Conclusion**

**8.35 We will send a copy of this Report to the Commission, with a covering letter, drawing its attention to our concerns. We will also request that when the Commission provides an individual response to the House of Commons this will address all the arguments raised in the House's Reasoned Opinion.**

**8.36 We recommend that this Chapter of our Report is included in the document pack for the debate on relations between the Commission and national parliaments in European Committee B on 30 January.**

**8.37 We ask the Government to keep us informed:**

**i) of whether the Commission honours its undertaking to take the concerns of the national Parliaments into consideration (which is already required by Article 7(1) of Protocol (No. 2)) in the course of negotiations; and**

**ii) of any developments which indicate that the proposal will have to move to the "enhanced co-operation" procedure.**

**8.38 We continue to retain the Communication under scrutiny.**

---

37 COM(13) 534. [Back](#)

38 See headnote. [Back](#)

39 Article 86(1) TFEU. [Back](#)

40 See headnote: (35216) 12566/13: HC 83-xviii chapter 6 (23 October 2013). [Back](#)

41 For non-JHA proposals the yellow-card threshold is one-third. [Back](#)

42 COM(2012) 130. [Back](#)

43 Letter of 26 June 2013 from William Cash MP, the Chairman of the European Scrutiny Committee to Maroš Šefčovič, Vice-President of the European

Commission <http://www.parliament.uk/documents/commons-committees/european-scrutiny/Composite%20letter%20on%20ROs.pdf>. [Back](#)

44 Letter of 24 July 2013 to Maroš Šefèoviè, Vice-President of the European Commission <http://www.parliament.uk/documents/commons-committees/european-scrutiny/VP%20reply%20to%20Cash%20HoC%20UK%20NPs.pdf>. [Back](#)

[Previous](#)

[Contents](#)

[Next](#)