

HOUSE OF LORDS

European Union Committee

3rd Report of Session 2013–14

**Subsidiarity
Assessment: The
European Public
Prosecutor's Office**

Ordered to be printed 22 October 2013 and published 24 October 2013

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

The European Union Committee

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Sub-Committee Staff

The current staff of the Sub-Committee are: Mike Thomas (Legal Adviser), Arnold Ridout (Deputy Legal Adviser), Tim Mitchell (Assistant Legal Adviser), Elisa Rubio (Clerk) and Amanda McGrath (Committee Assistant).

Contacts for the European Union Committee

Contact details for individual Sub-Committees are given on the website. General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW. General enquiries 020 7219 5791. The Committee's email address is euclords@parliament.uk

Subsidiarity Assessment: The European Public Prosecutor's Office

12558/13: Proposal for a Regulation on the establishment of the European Public Prosecutor's Office

Recommendation

1. We recommend that the House of Lords should issue the reasoned opinion set out below that the proposed Regulation on the establishment of the European Public Prosecutor's Office (EPPO) does not comply with the principle of subsidiarity; and should send it to the Presidents of the European Parliament, the Council and the Commission, in accordance with the provisions of the EU Treaties.

Scrutiny reserve

2. This report does not complete scrutiny of this proposal, which will be subject to further detailed examination.

Our report

3. This report was prepared by the Justice, Institutions and Consumer Protection Sub-Committee of the EU Select Committee. Its members are listed in the Appendix.

The Commission's Proposal

4. The Commission's proposal would establish the EPPO with a separate legal identity as a body of the Union with its own supporting staff. It would have exclusive power to investigate and prosecute criminal offences affecting the financial interests of the Union and closely related offences.
5. The body's office holders would comprise the European Public Prosecutor (EPP), four deputies and at least one European Delegated Prosecutor (EDP) operating in each participating Member State. An EDP could also exercise the functions of a national prosecutor, though the function of an independent EDP would have priority.
6. The EPPO would be independent. It would be accountable through an obligation to provide an annual report of its general activities to the European Parliament, the Council and the Commission. There would be an obligation for the EPPO to act impartially and proportionately, to investigate "without undue delay", and to prosecute "speedily".
7. In order to carry out its investigative function the proposal would give the EPPO the power to access national databases and information held by Europol (the EU's law enforcement agency) and Eurojust (the EU's judicial co-operation unit). It would have a wide range of investigative powers in respect of potential offences, subject to obtaining a warrant from a national

judge in respect of intrusive procedures or when national law so requires. There would be a duty upon Member States' authorities to provide any necessary assistance and information at the request of the European Public Prosecutor.

8. The proposal would confer upon the EPPO the powers of a national prosecutor. It would have power to decide the jurisdiction in which an EU fraud offence should be prosecuted and whether or not to prosecute, including whether to accept compensation and a lump sum fine in place of prosecution.
9. The proposal would prescribe the rules for the admissibility of evidence in cases prosecuted by the EPPO, and give suspects under investigation the minimum rights established by EU Directives and the relevant national law. It would also confer the following additional rights which have not so far been addressed by EU Directives, to be exercised in accordance with national law:
 - A right to silence.
 - A presumption of innocence.
 - A right to legal aid.
 - A right to provide evidence and to request the EPPO to pursue a specific line of inquiry.
10. The EPPO would be given powers to co-operate with EU, international and third country bodies. In addition the proposal requires that the EPPO fosters a particularly close relationship with Eurojust. It would be subject to judicial review before national courts as if it were a national authority. Finally, the proposal sets out the mode of appointment of the EPPO office holders, the data protection regime to which the EPPO is subject, and financial and staff provisions.

Reasoned Opinion

11. As the Committee highlighted in its report *The Fight Against Fraud on the EU's Finances*¹ it is difficult to estimate the extent of fraud committed against the EU budget. That report suggested that the figure could be €5 billion per year or more. For the purposes of its Impact Assessment the Commission has conservatively assumed that about €3 billion per year could be at risk through fraud.² These are significant amounts, and both Member States and the EU as a whole have a strong interest in reducing the level EU fraud. This reasoned opinion does not question this objective, but, rather, the Commission's choice as to how it is to be achieved.
12. In broad terms, the Commission's proposed response to this level of fraud is to establish the European Public Prosecutor's Office (EPPO) as an EU body with exclusive power to investigate and prosecute a broad range of criminal

¹ 12th Report, Session 2012–13, HL Paper 158.

² SWD(2013) 275, section 1.

offences affecting the financial interests of the Union³ and inextricably linked offences,⁴ able to call upon the resources of national authorities.

13. This would create a very significant and disruptive incursion into the sensitive criminal law systems of the Member States. The House of Lords considers that such action at EU level would breach the principle of subsidiarity in that it is unnecessary, excessive and insufficiently justified by the Commission.⁵ It considers that the objective of countering fraud affecting the financial interests of the Union can best be achieved by action by the Member States within the existing framework for co-ordination and co-operation. This framework is capable, if necessary, of being strengthened to meet this objective effectively.
14. In reaching this conclusion the House of Lords takes into account the following considerations:
 - The proposal would create two separate systems for combating fraud, with the EPPO having exclusive power to investigate and prosecute EU fraud. This would create duplication and a “fault line” between this and the national systems for investigating and prosecuting other frauds. It would also risk discouraging Member States from fighting EU fraud when Article 325 TFEU clearly places responsibility for this on both the Union and the Member States.
 - The most effective means to counter fraud is to prevent it happening in the first place. The Commission does not adequately explore or assess alternatives to criminal law enforcement, such as simplification of the rules that govern the different sectors of the EU budget in order to make fraud more difficult, improving its own oversight of the EU budget, and facilitating or (if necessary) requiring Member States to improve their management or control systems.
 - The Commission has not sufficiently taken into account the option of maximising the benefits of the existing framework for investigating and prosecuting EU fraud, particularly as there has not been time to put in place and evaluate measures to improve that framework. In 2008 Eurojust was strengthened by a Decision which included a requirement for an independent evaluation of its effectiveness and efficiency to be commissioned by June 2014.⁶ On 11 September this year a regulation was adopted which is intended to increase the efficiency of investigations by the European Anti-Fraud Office (OLAF) and reinforce its cooperation with Member States.⁷ There is at present under negotiation a proposal for a Directive on the fight against fraud on the EU’s financial interests by

³ These offences would be defined by reference to a Directive, currently under negotiation, on the fight against fraud on the EU’s financial interests by means of criminal law. They would include aiding, abetting, incitement and attempt to commit EU fraud. There would be corporate liability for prosecution.

⁴ The EPPO would have competence if the EU fraud offences were preponderant and the linked offences were founded on the same facts.

⁵ The Scottish Parliament has notified the House of Lords that it too considers that the proposal breaches the principle of subsidiarity.

⁶ Council Decision 2009/406 on the strengthening of Eurojust and amending Decision 2002/187 setting up Eurojust with a view to reinforcing the fight against serious crime.

⁷ Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 and (EURATOM) No 1074/1999.

means of criminal law, which would set out a framework for Member States' criminal law in respect of EU fraud.⁸

- The current proposal concerning Eurojust also includes provisions which are intended to strengthen its operational functions.⁹ The opportunity should be given for these measures to take effect, particularly given that a trend may be emerging of reduction in EU fraud.¹⁰
- The Commission's rationale for the proposal does not take sufficiently into account the fact that at least two Member States will not be participating in the EPPO. Denmark is automatically excluded by virtue of Protocol 22, whilst the UK Government have made it clear that they will not be opting in to the proposal under the terms of Protocol 21. It is clear, therefore, the creation of the EPPO as proposed could not fully address the problem, acknowledged by the Commission, of the fragmentation of national law enforcement efforts.
- The EPPO proposal would adversely impact upon the work of OLAF and Eurojust without there being any guarantee that the untried additional entity would provide adequate replacement. The Commission's Impact Assessment envisages that a substantial part of OLAF's staff and resources would need to be transferred to the EPPO. It also acknowledges that Eurojust's role would no longer include the co-ordination of cross-border investigations in the area of EU fraud,¹¹ thus generating the complication of additional co-ordination between the EPPO and Eurojust. However, both Eurojust and OLAF are capable of operating effectively under the present framework. The House of Lords has recently concluded that the steadily increasing use made of Eurojust by UK law enforcement authorities was a measure of its value.¹² OLAF's effectiveness was found to be constrained,¹³ but by matters which can be corrected without recourse to the EPPO. A reduced function for OLAF and Eurojust would have a particularly adverse effect on those Member States which will not be participating in the EPPO proposal.
- The Commission, in its Impact Assessment, exaggerates the potential impact of their proposal by using in their analysis figures from OLAF, which include information from Denmark and the UK, when both countries are definite non-participants in the EPPO. To the same effect, the Commission treats VAT fraud as a fraud affecting the financial interests of the Union (and thus within the exclusive competence of the

⁸ COM (2012) 363.

⁹ COM(2013) 535. This proposal has been presented as part of the package introducing the EPPO.

¹⁰ COM(2012) 548, Annual Report from the Commission *Protection of the European Union's financial interests—Fight against Fraud* Chart 1 indicates that the number of irregularities reported by Member States as fraudulent and the sums involved were lower in 2011 and 2012 than they were at their high point in 2010.

¹¹ SWD(2013) 274, section 7.

¹² European Union Committee, *EU police and criminal justice measures: The UK's 2014 opt-out decision* (13th Report, Session 2012–13, HL Paper 159), paragraph 245.

¹³ European Union Committee, *The Fight Against Fraud on the EU's Finances* (12th Report, Session 2012–13, HL Paper 158), chapter 5. The constraints are: budgetary considerations; a breakdown in relations with its Supervisory Committee; lack of Member State follow-up to information it provides; and a lack of co-ordination with Europol and Eurojust. A requirement for Member States to report to OLAF the action they had taken in response to cases referred to them was envisaged as a solution to the lack of Member State follow-up.

EPPO) when the UK, along with other Member States, do not consider that it is.¹⁴

- The Commission's estimates of the costs and benefits of its proposal in its Impact Assessment lack credibility.¹⁵ The Commission assumes that there will be no significant change in the human resources available to tackle crimes affecting the EU's financial interests, when its own assessment that current arrangements are ineffective indicates that this is not likely to be the case. It estimates start up costs chargeable against the EU budget at €2.5 million and annual running costs at €27.9 million reduced to €6.1 million after taking account of savings in respect of OLAF and Eurojust. This appears too low for an organisation which is expected to be responsible for a caseload of 2500 complex fraud cases per year and 1667 prosecutions. As far as the call on national budgets is concerned, the Commission questionably assumes that the number of national staff working on EU fraud offences is currently up to the level needed to handle the anticipated caseload of the EPPO. The benefits are also based on questionable assumptions, including an increase rate of convictions of almost 25%, and a rate of recovery of the sums defrauded of 15%, which is the highest of the current national estimates. Both these assumptions appear too high given that the EPPO's powers to investigate and prosecute largely replicate those already available to national authorities and the prosecutions by the EPPO will still take place before national courts and be conducted largely by EDP's who are drawn from national prosecutors.
 - By giving the EPPO power to direct national investigation and prosecution authorities, it would be able to override the priorities set by Member States concerning the finite national resources allocated to criminal law enforcement, including in respect of fraud.
 - The proposal would introduce autonomous rules in respect of the admissibility of evidence for EU fraud offences. This would introduce unnecessary additional complication and expense in the operation of national criminal law systems.
15. The Commission's subsidiarity justification, as found in Section 3.2 of its Explanatory Memorandum, is that the proposal has an "intrinsic Union dimension"; that "it implies Union-level steering and co-ordination of investigations and prosecutions of criminal offences affecting its own financial interests, the protection of which is required from both the Union and the Member States"; and 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 is not satisfactory."¹⁶ Recital (5) of the proposal asserts that the objectives of the proposal cannot be achieved due to the fragmentation of national prosecutions in the area of EU fraud. In its Impact Assessment the Commission elaborates that action by national judicial authorities is often ineffective, prosecution rates are low

¹⁴ The Council has adopted a general approach to the Commission's proposal for a Directive on the fight against fraud on the EU's financial interests by means of criminal law in which the definition of the EU's financial interests, which is used to define the scope of the EPPO's powers, specifically excludes VAT revenue.

¹⁵ These are set out in Section 7 and Annex 4 of the Commission's Impact assessment, SWD(2013) 274.

¹⁶ COM(2013) 534.

and the results obtained in the different Member States are unequal.¹⁷ Furthermore, the Commission argues, the existing powers of OLAF and Eurojust are unsatisfactory and the restrictions found in the TFEU prevent these organisations being given the necessary powers.¹⁸

16. The House of Lords does not accept that any “intrinsic Union dimension” obviates the need for the proposal to be properly justified in terms of subsidiarity, nor that there must be Union level steering and co-ordination of investigation and prosecution of criminal offences simply because they affect the financial interests of the Union. Article 325 TFEU makes it clear that combating such fraud is the responsibility of both the Union and Member States and requires Member States to take the same measures to counter it as they take to counter fraud affecting their own financial interests.
17. As indicated above, the House of Lords does not accept the Commission’s optimistic assessment of the improved rates of prosecution and recovery to be gained by the establishment of the EPPO and considers that EU fraud could be effectively countered though the existing framework based on the criminal law systems of the Member States and co-ordination between them and the EU institutions, strengthened if necessary.
18. Strengthening the existing framework for addressing EU fraud would address any ineffectiveness on the part of Eurojust and OLAF. It would also address the issue of the fragmentation of national prosecutions without creating extra fragmentation of a different sort—between separate frameworks for investigating and prosecuting EU fraud in each Member State, and between the different systems operated by Member States that participate in the proposal and those which do not.

¹⁷ SWD(2013) 275, section 4.2.

¹⁸ OLAF is restricted to administrative (not criminal) investigations and Eurojust cannot conduct investigations or prosecute offences.

APPENDIX: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

The Members of the Sub-Committee that conducted this inquiry were:

Lord Anderson of Swansea
Lord Blair of Boughton
Baroness Corston (Chairman)
Lord Dykes
Baroness Eccles of Moulton
Viscount Eccles
Lord Elystan-Morgan
Lord Hodgson of Astley Abbotts
Baroness Liddell of Coatdyke
Baroness O'Loan
Lord Rowlands
Lord Stoneham of Droxford

Declarations of Interest

Lord Hodgson of Astley Abbotts
Trustee of Fair Trials International

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Lord Boswell (Chairman)
Lord Bowness
Lord Carter of Coles
Baroness Corston
Lord Dear
Baroness Eccles of Moulton
Lord Foulkes of Cumnock
Lord Hannay of Chiswick
Lord Harrison
Lord Maclennan of Rogart
Lord Marlesford
Baroness O'Cathain
Baroness Parminter
The Earl of Sandwich
Baroness Scott of Needham Market
Lord Tomlinson
Lord Tugendhat

During consideration of the report the following interests were declared:

Lord Bowness
Notary Public (non-practising)
Solicitor (non-practising)

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>